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THE INSTITUTION OF THE PRIVATE ATTORNEY GENERAL: PERSPECTIVES FROM AN EMPIRICAL STUDY OF CLASS ACTION LITIGATION

BY
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INTRODUCTION

In the past forty years, the “private attorney general” has become an accepted character in legal debates and reform discussions. Conceptually, the idea enjoys bipartisan support, but for widely different reasons. Liberals promote the private attorney general, in part, as an antidote to what they view as a conservative administration’s reluctance to aggressively enforce various regulatory laws. Conservatives find virtue in the private attorney general concept because of its function in “privatizing” law enforcement pursuant to the ideals of economic efficiency. Whether the private attorney general is heralded as the “Lone Ranger”

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or a "bounty hunter," both roles equally comport with cherished images of Americana. While the term "private" suggests the market untainted by government interference, the idea of "attorney general" implies an extension of governmental law enforcement. While profound disagreements exist concerning the role of the state and of governmental regulation, the convergence of support seen for this legal institution appears to insulate it from attack.

On one level, the concept of the private attorney general stands out as a successful legal reform—a progressive reform that has stood the test of time. Yet that success has also been accompanied by a recurring sense of crisis—a sense especially renewed in recent years.¹ It is therefore appropriate to re-examine and evaluate the role of the private attorney general. Evaluation, however, poses difficulties, and we are not content with the kinds of evaluation generally employed in assessing legal institutions. One theoretical approach to evaluation takes its lead from ideology by looking at the debates surrounding an institution and finding contradictions, overly simplistic assumptions, or a failure to use the "correct" model. Another typical approach proceeds empirically, shedding light on what happens in practice, but examining the institution according to whether it does "what it is supposed to do" according to some normative paradigm. Unfortunately, neither approach works very well. The ideological image may have little to do with the practical situation, and the practical situation cannot be understood by cavalierly assuming there is a consensus about what any institution is really supposed to do. Our approach seeks to combine a focus on ideological assumptions and dilemmas with some empirical grounding, drawing on data to explore and highlight those ideological assumptions and concerns.²

This Article begins with the ideology of the private attorney general as developed largely through both the debates in United States Supreme Court cases and the published legal scholarship. Close attention to the terms of the debates shows that meanings have shifted in subtle ways not obvious to participants. Enlightened legal debate today looks rather different than it did thirty or even fifteen years ago. Common sense has not stayed the same over time, burdens of proof have shifted, and some justifications for the institution have become more acceptable than others. While it is true that there remains a solid consensus that an institution

1. See, e.g., Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

2. See, e.g., C. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23 (1985).

like the private attorney general is important and should be maintained, our study will demonstrate that the underlying rationale for that consensus has in fact changed. These changes raise the question of whether it even makes sense today to speak of a single, "lasting" reform, institutionalized as the private attorney general.

Our examination of the ideology and the practice of the private attorney general focuses on the particular way in which that role is executed in the course of class action litigation. The class action suit is the principal procedural mechanism characteristic of the private attorney general.³ Our empirical examination draws on data that were collected as part of a larger study of class action litigation.⁴ For that study, we selected a purposive sample of all certified federal class actions that were closed between 1979 and 1984 in the Northern District of California. Personal interviews with the plaintiffs' lawyers in these cases provided much of our basic data. The interview data were supplemented by archival record data culled from the docket sheets and the case files.

We completed interviews with forty-five plaintiffs' lawyers. These forty-five interviews in turn derive from thirty-seven case "clusters" out of the total of forty-six such clusters of class actions terminated during the period encompassed by the study.⁵ In addition to the lawyer interviews for the thirty-seven clusters, we collected archival data for the nine certified class action clusters for which interviews were precluded by refusals or scheduling conflicts. Additionally, for seventy-three cases filed as class actions, *not* certified by the court and terminated during the

3. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986). Stephen Wasby quotes the Legal Defense Fund lawyers as saying, "You don't win one-on-one cases and don't accomplish anything with them," so the class action device was 'absolutely crucial.'" Wasby, *The Multi-Faceted Elephant: Litigator Perspectives on Planned Litigation for Social Change*, 15 CAP. U.L. REV. 143, 178 (1986).

4. The primary focus of the empirical study was the process of decisionmaking in class action suits. In particular, the study addressed the role of the lawyer and the named plaintiff(s) in the decision to file, the breadth of the definition of the class, the selection of the named plaintiff(s), decisions to settle, the scope of the legal issue, and the nature of the remedy sought.

5. We took the term "clusters"—meaning cases combined in one form or another for the purposes of pretrial proceedings and trial—from Banoff & Duval, *The Class Action as a Mechanism for Enforcing the Federal Securities Laws: An Empirical Study of the Burdens Imposed*, 31 WAYNE L. REV. 1, 39 (1984). The clusters comprised the following categories:

employment discrimination—21	retirement benefits—1
securities regulation—5	mental health—1
social security—5	auto towing—1
antitrust—4	other civil rights—1
housing eviction and relocation—2	public employment—1
jails and detention—2	Indian rights—1
unemployment compensation—1	

same period,⁶ comparable archival data were collected as a basis for drawing limited comparative conclusions. The empirically-derived picture that emerges of class action litigation provides a rich insight into the operation of the private attorney general concept in one of the most active centers of such litigation. While we do not claim that our research necessarily can be applied to other situations absent a random sample and further empirical study, the preliminary data certainly sharpen the evaluative focus.

It is not only the ideological model of the private attorney general that has changed notably in recent years. Our empirical research indicates that the private attorneys general today look *and act* quite differently from their counterparts of a decade ago. While our research can be interpreted to favor one or another particular model of the private attorney general, looking deeper and more critically we find the need to go beyond the confining image of any one particular model. None of the models commonly used to describe private attorneys general is particularly helpful in revealing the actual social behavior of those fulfilling the role.

A first step toward understanding the private attorney general is to think of the concept as referring to two separable phenomena: the "mercenary law enforcer," whose chase for attorney fees depends in substantial measure on the regulatory bureaucracy, which is typically federal, and the "social advocate," for whom litigation is a form of pressure group activity. While the dichotomy helps our understanding, and explains much of our data, it sobers our expectations. First, some characteristics of the mercenary limit the effectiveness of this model of a private attorney general. Furthermore, the mercenary who brings class actions for a profit often depends on the government for initial guidance and information. Finally, the mercenary's activities, whatever the hopes of some reformers, cannot make up for a diminished state commitment to regulatory enforcement.

The social advocates, in contrast, might be expected to transcend some of the limitations of mercenary law enforcers. But social advocates,

6. The breakdown for uncertified cases was:

employment discrimination—24	securities regulation—4
antitrust—12	housing eviction—2
other civil rights—10	products liability—1
jail and detention—5	retirement—1
social security—5	unemployment compensation—1
labor concerns—4	other—3

it turns out, also cannot be isolated from the public commitment to regulatory law enforcement, found both in the prevailing ideology and in the supporting activities of the state.

In the end, therefore, we cannot point to one model of the private attorney general that can be perfected as an effective private alternative to governmental enforcement activity. The private attorney general depends in crucial respects on a combination of private initiative *and* governmental commitment to regulation and enforcement. Such a finding should not be a surprise. However, this does not mean the institution lacks importance or that reform or improvement is impossible. It does mean that all the attention paid to the institution of the private attorney general requires some explanation. The institution no doubt exists in part because of its perceived functional utility, but it also exists because of its symbolic importance, a point which merits more extended exploration in the conclusion of this Article.

I. VARIETIES OF THE PRIVATE ATTORNEY GENERAL

The concept of the private attorney general has found a comfortable home in at least three variants of the liberal legal tradition. The first ideological setting is simply the tradition of "social advocacy" in the courts. Here, political claims of certain groups are translated into the language of rights, and efforts are made to persuade courts to promote a political end. The second setting tries to remove the politics from the first. It purports to develop the private attorney general as a neutral solution to the problem of unequal political advocacy by competing interest groups in the United States. The third setting retreats to another level: inadequate "law enforcement" is seen as raising a different neutral problem—that of creating the correct incentives for private *individuals* to act to enforce particular legislation. Each of these redefinitions, explored more fully below, represents to a great extent a flight from political controversy in order to safeguard the legal institution.

A. SOCIAL ADVOCACY AND THE PRIVATE ATTORNEY GENERAL

The term "private attorney general" came from Jerome Frank's opinion in the famous case of *Associated Industries v. Ickes*.⁷ The case itself was about the standing of a membership corporation interested in keeping down the price of coal, but the often-quoted term was used there

7. 134 F.2d 694, 704 (2d Cir. 1943).

to refer to any private person who would "vindicate the public interest."⁸ The opinion emphasized the activities of Associated Industries "on behalf of consumers"⁹ and the need to construe the statute "in such a way as not to blot out all protection to consumers."¹⁰ The case accordingly supported a broad definition of standing, allowing organized consumer advocacy in a setting where consumer interests might have been neglected.

The theme of organized group advocacy has been present throughout the history of the private attorney general. A *Yale Law Journal* Note, written in 1949 and cited with approval in a number of Supreme Court opinions, emphasized "group action in the fight for civil liberties,"¹¹ and concentrated on the activities of the NAACP and the American Civil Liberties Union. Reflecting the same approach, the Supreme Court's majority opinion in *NAACP v. Button*¹² in 1963 stated, "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."¹³ They help make "possible the distinctive contribution of a minority group to the ideas and beliefs of our society,"¹⁴ and provide an "avenue open to a minority to petition for redress of grievances."¹⁵ Litigation, the opinion adds, is "a form of political expression";¹⁶ it promotes the spread of ideas that may not have been successful in the legislatures.

The themes of this vision of "social advocacy"¹⁷ emphasized both the standing of organizations to advocate certain positions in the courts and the award of attorney fees largely to reward winning—succeeding in selling good ideas to the courts. This vision, however, rested on a presumed consensus as to what constituted the kind of good ideas that ought to succeed. Minority rights, civil liberties, consumer interests, and perhaps the environment seemed sufficiently attractive to merit special consideration. As long as societal consensus along these lines persisted,

8. *Id.* at 695.

9. *Id.* at 706.

10. *Id.* at 705.

11. Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 *YALE L.J.* 574, 574 (1949).

12. 371 U.S. 415 (1963).

13. *Id.* at 429-31.

14. *Id.* at 431.

15. *Id.* at 430.

16. *Id.* at 429.

17. We have borrowed the term "social advocate" from Philip Selznick. Selznick, *Social Advocacy and the Legal Profession in the United States*, in *LAWYERS IN THEIR SOCIAL SETTING* (D.N. MacCormick ed. 1976).

there was no perceived need to argue about whether courts should be promoting social advocacy. It contributed to a shared vision of progress.

But when the consensus began to show signs of collapse, the contours of the debate and the presumed role of the private attorney general began to shift. It is largely through this historical lens that one can understand a proposal that now seems quite out of place: granting special standing to the Sierra Club in order to protect trees.¹⁸ This was an idea which was plausibly sound so long as it was agreed that the Sierra Club represented a desirably progressive point of view.

B. BALANCING THE SCALES OF JUSTICE

From good ideas and the assumed movement toward progress came the shift to the image of the private attorney general as the antidote to inequity and the new source of balance.¹⁹ Groups previously accorded favor because of their progressive goals became groups worthy of support because they were “underrepresented” in the institutions of a representative democracy. The private attorney general thus became dependent on the “neutral” justification of balanced advocacy. Balance in this context meant that decisionmakers would best be able to judge arguments objectively and correctly since they would be presented with all sides of a particular public policy issue. In theory, public policy would not be skewed by the failure of certain interests to have effective advocates. The private attorney general could guarantee equal access to justice.

This image is not explicit in many Supreme Court opinions.²⁰ Nevertheless, it is a familiar image because it underlay the initiatives, supported by money from government and large foundations, that led to the “public interest law” movement characteristic of the late 1960s and early 1970s. Many of the lawyers who took advantage of liberal standing

18. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

19. See generally COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976) [hereinafter *BALANCING THE SCALES OF JUSTICE*] (outlining history and functions of the public interest law organization and proposing recommendations to ensure continued growth of public interest law); B. WEISBROD, J. HANDLER, & N. KOMESAR, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978) (discussion of economic and social consequences of the public interest law organization). See also Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (analysis of the traditional role and alternative models of the administrative agency).

20. One exception was Justice Douglas' concurring opinion in *Flast v. Cohen*, 392 U.S. 83, 111 (1968), where Douglas promoted the private attorney general to remedy the individual's need for a “well-organized active political group” and a “powerful sponsor” as an antidote to the power of the church.

requirements were subsidized by the government or private foundations.²¹ Thus, the idea of remedying the imbalance in access to justice gained sufficient currency to embolden some sympathetic critics of public interest lawyers to ask what again seems wholly out of place today: why did the public interest lawyers fail to become powerful interest groups, strong enough to assert their positions with the clout of major actors in the economy and polity?²²

By 1980, the neutral justification had lost its consensus. Today, there is much disagreement about what an appropriate balance would be and whether the public interest is furthered by subsidizing certain groups of legal advocates. The extent of the change is illustrated by a recent *New York Times* review of a book condemning government-funded advocacy²³ in which the reviewer's main criticism was that the authors did not "shed more light on the porous Government procedures that allow tax money to be used for partisan politics."²⁴ What was once non-partisan balancing has now become another form of partisan advocacy.

C. MARKETING THE PUBLIC INTEREST IN LAW ENFORCEMENT

In the latest conceptualization of the private attorney general, there are no heroes and villains, and there is no imbalance of advocacy. Rather, there is an emphasis on economic incentives to allow individuals to vindicate legal rights that for economic reasons might be unenforced privately and for a variety of reasons are not enforced publicly. The market is said to *dictate* that the cost of vindication be relatively low, even if

21. A thoughtful discussion of the development of public interest law is found in Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976). See also Wasby, *supra* note 3 (discussion based on interviews conducted with special interest lawyers about interest group litigation).

22. See, e.g., Trubek, Book Review, 1977 WIS. L. REV. 303 (1977) (reviewing COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA*).

23. Van den Haag, *Tax-Exempt Troublemakers: Review of Destroying Democracy*, N.Y. Times Review of Books, Dec. 22, 1985, § 7 at 23, col. 1 (reviewing J. BENNETT & T. DI LORENZO, *DESTROYING DEMOCRACY: HOW GOVERNMENT FUNDS PARTISAN POLITICS* (1985)).

24. *Id.* at 23; see also R. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME* 7 (1984) ("While it may not be true that every new legal protection of individuals involves costs in institutional efficiency or degradation of our social environment, most can only be purchased by payment in this coin."); O'Connor & Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 HARV. J.L. & PUB. POL'Y 483 (1984) (discussing funding and support of liberal and conservative public interest law firms); Rabkin, *Public Interest Law: Is it Law in the "Public Interest"?*, 8 HARV. J.L. & PUB. POL'Y 341 (1985) (suggesting public interest cases do not really represent "public interest" but present views not otherwise represented in political process).

It should be noted, however, that some liberal theorists continue to insist on a balancing ideal. See, e.g., B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 33 (1984).

some lawyers may abuse the relative ease of access to courts. Class actions and private attorneys general have thus been redefined as simply "an evolutionary response to the existence of injuries unremedied by the regulatory action of the government."²⁵

Examples of this image abound. Chief Justice Burger, writing in 1980, described class action litigation by stating:

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation. . . . For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights. . . .²⁶

Given this image, it is not surprising that the focal point in the continuing discussion of the private attorney general has become the issue of attorney fees for litigants' counsel.²⁷ This could have been an issue with either of the other models of the private attorney general just described. Fees could reward good social advocacy or add to the inevitably limited resources available to the public interest movement. In view of recent political developments and the corresponding emphasis on law and economic theory, however, the trend in the law and the literature is to further "privatize" the private attorney general and to defend the attorney general's virtues in terms of the market.²⁸

Beginning with *Newman v. Piggie Park*,²⁹ the most often cited of the private attorney general opinions, the Supreme Court has increasingly used the market image to promote awards of attorney fees to successful

25. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

26. *Id.* at 338 (footnote omitted).

27. This sense of the meaning of the term "private attorney general," for example, is found in R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION* 695 (1985).

28. One can easily see the change by contrasting *NAACP v. Button*, 371 U.S. 415 (1963), with *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 (1977). The first speaks in terms of a right to organize, while the second emphasizes advertising and price competition to enable "the middle 70% of our population" to be served by the legal profession. *Bates*, 433 U.S. at 376 (quoting *AMERICAN BAR ASSOC., REVISED HANDBOOK ON PREPAID LEGAL SERVICES* 2 (1972)). The group emphasis has vanished, and only individual legal rights—taken as given—are considered important.

29. 390 U.S. 400, 402 (1968).

plaintiffs. After the setback in *Alyeska Pipeline*,³⁰ which denied attorney fees, the Civil Rights Attorney's Fees Awards Act of 1976³¹ strongly bolstered this view. The Report of the House Committee on the Judiciary in support of this Act stated simply:

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality.³²

. . .

The application of these standards [described in the report] will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys.³³

As the quotation suggests, the focus of the discussion has shifted; that shift is reflected in the more recent opinions of the Supreme Court and even in Congressional debates about the role of the private attorney general.³⁴ As a consequence of this shift, the question now is whether the incentives are adequate to motivate an attorney to take the case but not such as to constitute "windfall" fees. It is assumed that law enforcement will take place if the incentives to litigate a particular case are established at the proper level.

The Supreme Court's majority and concurring opinions in *Hensley v. Eckerhart*, the leading case on the setting of attorney fees for prevailing plaintiffs, were divided on the question of what would provide a reasonable incentive to encourage attorneys without providing a windfall.³⁵ The majority held that a plaintiff's "limited success" on the merits should reduce an award of attorney fees. The concurring opinion emphasized that "market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons

30. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) (holding that the prevailing party could not recover attorney fees based on the private attorney general approach since only Congress can authorize such an exception).

31. 42 U.S.C. § 1988 (1981).

32. H.R. REP. NO. 1558, 94th Cong., 2d Sess. at 1 (1976).

33. *Id.* at 9.

34. See *The Legal Fee Equity Act, 1984: Hearings on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

35. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

with bona fide civil rights claims.”³⁶ The concurring opinion simply disagreed with the majority as to what the market required.³⁷

More recently, a majority of the Supreme Court rejected Judge Posner’s economic assessment of the impact of extending the “offer of settlement” provisions of Federal Rule of Civil Procedure 68 to the award of attorney fees to prevailing parties. Judge Posner, speaking for the United States Court of Appeals for the Seventh Circuit, had found such an extension inconsistent with the goal of encouraging civil rights litigation.³⁸ Chief Justice Burger disagreed: “Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit.”³⁹ Judge Posner had one view of the impact of Rule 68 on economic incentives, the Chief Justice another; they shared, however, the same understanding of the issue in terms of a model of the private attorney general.

In a number of these sharply contested issues, the outcomes of the economic debates have considerable significance. It does matter whether the Supreme Court errs too much on the side of preventing windfalls or on the side of encouraging lawsuits to proceed. What is remarkable, however, is how dramatic the shift in the focus of the concept of the private attorney general has been. Gone is the quest for evaluating the impact or propriety of the Lone Ranger or the bounty hunter. The debate is now narrowly couched; the pivotal question at issue today is the impact on the economic incentives to sue.

The current model of the private attorney general tends to be hostile to advocacy before administrative agencies. The Supreme Court, in *Webb v. Board of Education of Dyer County*,⁴⁰ held that unless a “discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement,” fees would not be awarded.⁴¹ Congress, the Court found, sought

36. *Id.* at 447 (Brennan, J., concurring in part and dissenting in part).

37. *Id.*; see also *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (holding that attorney fees should not be proportioned according to damages awarded and that attorney fees should be reasonable and in line with market rates).

38. *Chesney v. Marek*, 720 F.2d 474 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985).

39. *Marek v. Chesney*, 473 U.S. 1, 10 (1985).

40. 471 U.S. 234 (1985).

41. *Id.* at 243. At least this enforcement can be encouraged also, even if it requires administrative action. *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S. Ct. 3088 (1986).

only to encourage meritorious *lawsuits*.⁴²

A variant on the theme, without challenging fundamental premises, surfaced in *Ruckelshaus v. Sierra Club*.⁴³ The Supreme Court confronted statutory language authorizing attorney fees whenever "such an award is appropriate."⁴⁴ The court of appeals had found that the Sierra Club was entitled to fees even though it did not prevail in the suit, reasoning that "[i]t was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests."⁴⁵ A majority of the Supreme Court simply refused to believe that "appropriate" could be read to mean anything but "prevailing" or at least "partially prevailing," and reversed. The dissenters did not promote a different model; they simply did not want the incentive mechanism to turn solely on the vagaries of win-lose. They proposed to extend the entitlement to encompass situations where the contribution to the process of judicial review had been "substantial" and where the arguments made had not been "relatively weak" as a matter of law.⁴⁶ The majority opinion, relying on its "intuitive notions of fairness" and "the most reasonable interpretation of Congressional intent,"⁴⁷ seems to be more consistent with current notions of the private attorney general. "Common sense" today seems inconsistent with the idea of using attorney fees to subsidize advocacy of views that a court feels "ought" to be considered in reaching a decision.

The current preoccupation with economic logic can be seen most recently in *Evans v. Jeff D.*⁴⁸ The Ninth Circuit allowed the district court to reject an agreement by the class counsel to exchange the claim for attorney fees for a commitment to injunctive relief for the class. According to that perspective, awards of attorney fees to prevailing plaintiffs have become so important that class counsel may not even voluntarily give them up in exchange for a benefit for the class. Advocates of this perspective argue that attorneys would be less likely to take these cases if they knew that they might be asked in the course of the settlement negotiations to exchange attorney fees in order to promote the interests of the class. The Supreme Court divided closely on the issue,

42. See *Dyer*, 471 U.S. at 241.

43. 463 U.S. 680 (1983).

44. *Id.* at 682-83; 42 U.S.C. § 7607(f)(1982).

45. *Sierra Club v. Gorsuch*, 672 F.2d 33, 41 (D.C. Cir. 1982), *rev'd*, *Ruckelshaus*, 463 U.S. 680.

46. *Ruckelshaus*, 463 U.S. at 710-11.

47. *Id.* at 685-86.

48. *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984), *rev'd*, 475 U.S. 717 (1986).

with the majority favoring bargained agreements instead of rigid incentives.

The current version contrasts dramatically with the earlier ones. No longer is it clearly assumed that particular organizations deserve standing or compensation because their views are uniformly seen as good and deserving of more influence in American life. The ACLU, NAACP, Sierra Club, and others are now held to the same neutral criteria in qualifying for the benefits that might accrue as are individuals acting as private attorneys general. Beyond that, the general treatment of these organizations makes it inappropriate to subsidize organized *advocacy*, whether in administrative proceedings, as in *Webb*,⁴⁹ or in the courts, as in *Ruckelshaus v. Sierra Club*.⁵⁰ Certainly it would require a bold act of imagination today to expect a court to suggest that we should subsidize advocacy by groups such as the Sierra Club—much less that of a simple practitioner bringing a civil rights claim—just because the particular interest being advocated merits encouragement in order to balance the scales of justice. Whether the reason is that there is no longer consensus on what is right and good or because the “grace period” for these groups is over, it seems clear that presently the only criteria for decisions concerned with compensating private attorneys general tend to be whether the appropriate economic incentive has been found for any given lawyer with a given potential lawsuit. In the words of Justice Brennan, the problem to be corrected is only the failure of “the private market for legal services . . . to provide many victims of civil rights violations with effective access to the judicial process.”⁵¹

The picture of today’s private attorney general rests on a number of simple yet questionable assumptions. The private attorney general gets together with the lawsuit, which is assumed simply to exist, ready for litigation. The attorney is presumed to decide whether the lawsuit is potentially meritorious either in whole or in part. Then, when the meritorious parts of the lawsuit are filed and litigated or settled, it is assumed that the private attorney general is rewarded economically for the effort and thereby stimulated to take other similar suits in the future. Finally, it is assumed that the market in legal services, thus reformed, will overcome any remaining obstacles that inhibit the enforcement of important laws such as those involving antitrust and civil rights. Thus, despite the

49. *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234 (1985). See *supra* notes 40-42 and accompanying text for a discussion of this case.

50. 463 U.S. 680. See *supra* text accompanying notes 43-47 for a discussion of this case.

51. *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2695 (1986).

shift in conceptual focus on the role of the private attorney general, the image today, like its historical counterparts, rests on a set of overly simple assumptions.

Those assumptions are as untested and unquestioned as were the earlier formulations of the private attorney general as well as the assumptions of the unquestioned truth and goodness of the values promoted by groups such as the NAACP or the ACLU. When the assumption of goodness became difficult to keep free of debate, the private attorney general emerged as an institution to balance organizational advocacy in our society. Later, however, when serious questioning began of the notion of redistributing advocacy resources and promoting "special interest groups" (who by definition tended to promote their own agendas rather than the goal of economic efficiency), the contours of the debate shifted even further. We are left with the market and economic efficiency to provide the "neutral" framework for discussion of private attorneys general.⁵² This market model has its own questionable assumptions and implicit biases.

In sum, while the private attorney general is very much alive today, the contours of the debate about the institution have changed considerably. Liberals remain enthusiastic about the potential for private law enforcement of certain regulatory policies; likewise, conservatives hold to the belief that the private attorney general market can obviate the need for government underwriting of legal advocates. But both liberals and conservatives now define and promote their views almost exclusively in terms of whether there is enough or too much of a market incentive for individual attorneys to take particular lawsuits. As we shall see, the transformation of the image, reflected in class action litigation, affects significantly both the practice and potential of private attorneys general.

52. This contest over what can be termed "neutral" obviously implicates much more than the institution of the private attorney general. A useful exchange that helps clarify what is at stake took place recently between Frank Easterbrook and Lawrence Tribe. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592 (1985).

As a matter of intellectual history, it is interesting to compare the recent approach of M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982) with M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). The earlier book was in many respects the Bible of those who argued for balancing the scales, since Olson demonstrated powerfully that consumers and other such groups are structurally unable to organize collectively. Today, Olson starts from the same premise, but now rejects any public policy in favor of organizing or subsidizing those unlikely to organize on their own. His argument now favors the *discouragement* of organization because, he argues, it leads to economic inefficiency.

II. THE PRIVATE ATTORNEY GENERAL AND CLASS ACTION LITIGATION

A. EMPIRICAL EXPLORATION OF IDEOLOGICAL IMAGES

For purposes of translating these images of the private attorney general into the class action context, we propose three hypothetical propositions about the private attorney general's role in class action litigation:⁵³

1. The private attorney general uses the class action device to facilitate interest group advocacy by groups who seek to circumvent or short-circuit the legislative process to advocate social reform.
2. The private attorney general uses the class action to balance the scales of justice by facilitating organizational advocacy when it otherwise would not take place, thereby increasing equality in access to justice.
3. The private attorney general uses class action suits when the economic incentives of attorney fees are sufficient to encourage such private litigation.

While we cannot purport to have tested empirically these hypothetical propositions, they illustrate how the specification of such propositions can sharpen debate and focus empirical exploration.

Before discussing the propositions, a few preliminary qualifications are necessary. First, the study of class actions is, of course, not the same as the study of the private attorney general. Individual lawsuits that are not in the class action form can promote significant advocacy or law

53. These propositions find support in the cases cited earlier and in a variety of empirical research. *See, e.g.*, J. CASPER, *LAWYERS BEFORE THE WARREN COURT* (1972) (discussion of goals and interests of private practitioners who have argued civil liberties and civil rights cases before the U.S. Supreme Court); *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* (R. Mnookin ed. 1985) (collected essays on issue of whether test-case litigation is a sensible means of making policy and achieving policy reform on behalf of children); S. OLSON, *CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS* (1984) (description of a new model of social reform litigation featuring increased client participation and increased reliance on the lawyer as politician and less on the lawyer as expert); M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* (1982) (description and analysis of the judiciary's role in public policy making in the educational context); M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50* (1987) (discussion of the NAACP's litigation strategy in school desegregation cases); B. WEISBROD, *supra* note 19; Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 *LAW & POL'Y* 105 (1986) (discussion of various direct and indirect political strategies for achieving political change through litigation); Paul-Shaheen & Perlstadt, *Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases*, 57 *IND. L.J.* 385 (1982) (discussion of sociological underpinnings of class action suits, using the concept of class action as a means of "short-circuiting" the political process); *cf.* Garth, *Introduction: Toward a Sociology of the Class Action*, 57 *IND. L.J.* 371 (1982) (examination of the accountability, effectiveness, and legitimacy problems generated by and about class action litigation).

enforcement goals. Equally, interest group advocacy, or its subsidization, can proceed outside the class action form.⁵⁴ Nevertheless, class actions are closely identified with the role of the private attorney general, especially when the emphasis is on financial feasibility and financial incentives. While the sample of cases we studied may underrepresent litigation by organized interest groups, it does capture fairly well the cases that fit the modern view.⁵⁵ In the words of Chief Justice Burger, "the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights."⁵⁶

The hypothetical propositions are, in any event, merely ideal descriptions. While these propositions are in one sense controversial, they are neutral in another. They are controversial because to some extent they represent normative prescriptions of what the role of private litigation should be when confronted with matters of public concern. If we were to find a way to evaluate the relative accomplishments of private attorneys general acting in one or the other image, then we might choose which was more successful by the agreed upon criteria. However, that kind of evaluation, as we shall see, fails to overcome the problems caused by the fundamental lack of agreement as to the normative question of the proper role of private attorneys general. The success of private attorneys general is a matter of personal opinion; success for some would be failure for others. Evaluation on the basis of accepted definition, moreover, does not delve deeply enough into the assumptions and dilemmas of the institution of the private attorney general. Therefore, our understanding will be enhanced if we enlarge the context and reach questions that tend to be ignored or masked in the ideological pronouncements.

54. This is particularly evident from comparative research done in foreign countries. See, e.g., Cappelletti & Garth, *Finding an Appropriate Compromise: A Comparative Study of Individualistic Models and Group Rights in Civil Procedure*, 2 CIV. JUST. Q. 111 (1983); Koch, *Class and Public Interest Actions in German Law*, 5 CIV. JUST. Q. 66 (1986). For examples from the United States, see J. CASPER, *supra* note 53, at 124-64.

55. Our study examined all the actions in which the complaint was designated as a class action. We therefore did not capture organizational actions not in the form of a class action. We also would have missed mercenary law enforcers who did not file class actions, but we are convinced that the class action device, as noted by Coffee, *supra* note 3, is the norm for this group of lawyers.

56. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). The connection between the class action and persons acting as private attorneys general has also been emphasized by several commentators. See, e.g., Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparative Contribution*, 25 BUFFALO L. REV. 643 (1976); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

These ideological pronouncements, translated into the somewhat simplistic propositions, serve to begin the process of assessment. Their simplicity helps to alert us to changes in practice, questions to ask, and dilemmas to confront. Two versions of the private attorney general provide an especially helpful contrast when pursued in the class action litigation context: Are private attorneys general still primarily "balancing the scales" of organized advocacy as they were thought to be doing in the 1960s and 70s, or are they correcting imperfections in the private market for law enforcement? Furthermore, what difference does it make if lawyers are acting more or less according to one or the other image?

B. BALANCING THE SCALES?

Regardless of whether subsidizing the underrepresented is a good or bad idea, the impact of that perspective can certainly be traced by examining the class action litigation that we have studied. The federally-funded legal services program, established in 1965 as part of the "War on Poverty,"⁵⁷ accounts for a significant percentage of the class action litigation that has occurred in the 1980s. In our study, we found that fifteen of the forty-six certified class action "clusters" were initiated by lawyers acting under the auspices of the Legal Services Corporation, and three more were initiated by other publicly-funded law firms. The legal services lawyers were paid a salary by the federal government to provide full-time legal services to the poor. One justification for this funding was that the poor need advocates for their interests just as the rich have theirs.⁵⁸ The availability of legal services lawyers was designed to allay concerns that access to justice was limited to the upper classes who could purchase advocates; free services for the poor were thought to lessen the inequality

57. There is extensive literature on the question of whether legal services lawyers should concentrate on class actions and other "impact" litigation. For arguments that this should be the focus of the lawyers, see, e.g., E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* (1978). It is not clear, however, that legal services lawyers ever really spend a large percentage of their time doing anything but servicing individual clients. See, e.g., J. HANDLER, H. ERLANGER & E. HOLLINGSWORTH, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978); Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474, 570-79 (1985). In any event, there has been substantial pressure in recent years not only to cut the funding of the Legal Services Corporation but also to curtail class actions and comparable work. See Failing & May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 *OHIO ST. L.J.* 1, 17 (1984) ("Group representation devices such as the class action are often the most effective way of representing an individual poor person.").

58. See, e.g., Dooley & Houseman, *Legal Services in the 80's and Challenges Facing the Poor*, 15 *CLEARINGHOUSE REV.* 704 (1982); Rabkin, *supra* note 24, at 344-45, (deprecates the idea that "dissident groups . . . [be] provided with equal funds").

to some extent.⁵⁹ In addition to the eighteen case clusters noted above, in five additional case clusters, the class action suit was handled by lawyers working in non-profit law firms initially funded by private foundations. The role of the lawyer in the non-profit firm is also consistent with the idea of the private attorney general balancing the scales.

If the above actions are totalled, a substantial percentage (fifty per cent) of the certified class action suits that closed between 1979 and 1984 in the Northern District of California were the product of law firms created directly by broad funding agencies trying to generate legal power for the unrepresented and underrepresented. The image of the private attorney general, fostered in the sixties and seventies, seems well-reflected in the picture of class action litigation in the district we observed. While this comes as no surprise, there are implications which need to be explored.

First, with the retreat of private foundations and the shrinking of federal funding for the Legal Services Corporation, we should expect a decrease in the volume of class action litigation. Both the absolute numbers reported nationally⁶⁰ and the trends observed in our study confirm that fewer class actions are being filed by legal services lawyers today. It does not necessarily follow, of course, that changes in the funding of private attorneys general must result in a decline in representational activity. Private lawyers could, theoretically, be just as active as the publicly

59. BALANCING THE SCALES OF JUSTICE, *supra* note 19, thus devotes some attention especially to "back-up" or "support centers" specializing in activities comparable to foundation funded public interest law firms.

60. The chart below shows the annual number of class actions filed in the United States from 1973 to 1984:

<u>Year</u>	<u>Number of Class Action Filed</u>
1973	2654
1974	2717
1975	3061
1976	3584
1977	3153
1978	2586
1979	2084
1980	1568
1981	1672
1982	1238
1983	1023
1984	988

In Camera, 8 CLASS ACTION REP. 161 (1985). The decline among legal services offices is demonstrated in E. SPANGLER, LAWYERS FOR HIRE 154-70 (1986). The number of class actions filed in 1986 was only 736. *In Camera*, 10 CLASS ACTION REP. 93 (1987).

funded lawyers would have been with more resources. The current economic image of the private attorney general would support this shift to private activity.

However, a review of our data reveals that contrary to idealized expectations, in the context we studied, the economic incentives provided by attorney fees do not serve as a substitute motive to bring the class actions previously brought by government subsidized lawyers. Regardless of whether this reflects a change in the values of lawyers as to the kinds of cases they prefer, a judgment of comparative risk of success, or an economic decision about cases that pay, private lawyers have not been taking advantage of enhanced opportunities to win attorney fees for undertaking class action litigation in traditional reform arenas. Although many legal services offices and public interest law firms that once relied on the government or foundations are now depending increasingly on fees won in particular litigation, the situation is not as it was before. Moreover, the decline of subsidization has not been limited to "privatizing" the activity; it has also had a significant impact on the amount and kind of class action litigation.

C. THE MARKET MODEL IN ACTION

The question about whether lawyers make too little or too much money from a particular class action settlement is difficult and of little interest to us. Attorney fees in our sample were awarded in thirty of the forty-four class action clusters for which we were able to obtain data on this issue. The fees ranged dramatically in amount: under \$25,000 in six cases, \$25,000 to \$100,000 in nine cases, \$100,000 to \$250,000 in seven cases, and over \$250,000 in seven cases.⁶¹ The figures do not tell us what awards were appropriate, because they are not correlated with hours of effort, complexity of the suit, etc. While we asked questions about fees of the plaintiffs' attorneys interviewed, the interview data are not well-suited to answer questions about whether a fee award is too much or too little.

Not surprisingly, no one we interviewed claimed a windfall from a class action victory, although some did confess that the "one big case" was the incentive for representing the plaintiff class. At the same time, only a few attorneys complained that a particular award of fees was inadequate. We must recognize, however, that the admission that the judge awarded less than the lawyer thought reasonable might suggest that the

61. The following chart provides the figures on attorney fees for our certified class actions:

lawyer's handling of the case was not evaluated very highly by the judge. Despite the absence of many responses in the extremes, several attorneys did note a general difficulty in obtaining adequate compensation, although they often added that they personally had done better than their colleagues in persuading judges of their worth.⁶²

Private, For Profit Law Firms (16)

<u>Amount Awarded (in dollars)</u>	<u>Injunctive Relief</u>	<u>Attorney Fees (in dollars)</u>	<u>Type of Case</u>
none	yes	335,000	antitrust
none	yes	349,000	other civil rights
8,000	yes	84,000	jail and detention
27,000	yes	22,000	other civil rights
55,000	yes	85,000	employment discrim.
59,000	yes	51,000	employment discrim.
70,000	yes	40,000	employment discrim.
83,000	no	51,000	securities
100,000	yes	57,000	antitrust
100,000	yes	113,000	employment discrim.
300,000	no	160,000	employment discrim.
400,000	no	145,000	antitrust
565,000	no	188,000	securities
600,000	yes	40,000	employment discrim.
700,000	no	300,000	securities
3,000,000	no	400,000	securities

Public or Nonprofit Law Firms (18)

<u>Amount Awarded (in dollars)</u>	<u>Injunctive Relief</u>	<u>Attorney Fees (in dollars)</u>	<u>Type of Case</u>
none	yes	none	social security
none	yes	none	social security
none	yes	none	social security
none	yes	11,000	employment discrim.
none	yes	23,000	jail and detention
none	yes	24,000	unemployment/retirement
none	yes	28,000	social security
none	yes	37,000	Indian rights
none	yes	165,000	employment discrim.
none	yes	558,000	employment discrim.
none	yes	570,000	other civil rights
4,000	yes	9,000	illegal towing
6,000	yes	37,000	employment discrim.
20,000	yes	none	unemployment/retirement
21,000	yes	180,000	employment discrim.
46,000	no	none	housing eviction
205,000	yes	45,000	employment discrim.
1,060,000	yes	252,000	employment discrim.

62. Quotations from interviews with class action attorneys are reported according to the case number in our sample and the page on our interview transcript. If there was more than one interview, one is designated "a" and the other "b." Thus, "Int. 37a" means one of the attorney interviews in case number 37. "Int. 11a at 1" means page one of the attorney interview on case 11. All interviews cited are on file with the authors.

Among the few who did complain about the fees they obtained, several did not handle any subsequent class action litigation.⁶³ Again, however, we cannot generalize. Some of these lawyers may have suffered from what one lawyer termed “the legal aid syndrome.”⁶⁴ They failed to request sufficient fees because they believed that they were supposed to be doing “good” for its own reward. However, they subsequently found that they could not afford to handle more class actions because it was not economically profitable for their own law practice.

We learned more about the role of fees in promoting class actions by asking the lawyers why they brought the lawsuit as a class action. While most of the lawyers emphasized the “effectiveness” of a class action as a procedural tool,⁶⁵ especially in instances where the claim might not succeed in obtaining the plaintiffs’ goals as an individual action, the economic advantages were particularly emphasized by the antitrust and securities lawyers. One lawyer referred to antitrust law as “a business,”⁶⁶ the implication being that the representation of the entire class makes the business of representation profitable. Another suggested that in selecting the appropriate antitrust remedy, consideration of the fee was the prime concern: “[F]or me to get paid I had to claim money damages.”⁶⁷ At least four or five others quite clearly opted to use the class action as a way to make a small claim profitable for the attorney.⁶⁸ On the basis of this interview data, one might conclude that the bounty hunter image is not far from the self-image of these lawyers. One attorney dryly noted that some lawyers tend to focus on the money aspect of class actions.⁶⁹

Of particular interest was a model of the private attorney general exemplified by one impressive attorney who seemed to straddle both the social advocate role and the bounty hunter role in a modern day accommodation. Self employed, he focused his practice on employment discrimination cases, stressing the need to “do well” in addition to “doing

63. Int. 11a at 12 (“you don’t get paid”).

64. Int. 27.

65. One lawyer characterized the attitude as “[l]et’s enforce the law and extend its application in the Bay Area.” Int. 42 at 11. *See also* Int. 43 at 9 (class actions can also expand public’s awareness of an issue, making it a valuable tool even if the suit fails).

66. Int. 11a at 14.

67. Int. 23 at 13.

68. *See* Int. 3 at 3; Int. 5 at 4 (“going to be economic”); Int. 14; Int. 34; Int. 37a at 5; Int. 37b at 3.

69. Int. 23 at 8, 13.

good.”⁷⁰ It may well be that this economically sophisticated social advocate is the forerunner of the next generation of private attorneys general. If so, the emergence and spread of this new model will be a fruitful subject for future research. It remains to be seen whether this approach can overcome some of the dilemmas highlighted in this Article.

D. PRACTICAL IMPLICATIONS

Some of the implications of the ascendancy of the market model of the private attorney general can be determined from a comparison of two contrasting ideal types of class action litigation⁷¹—the “social advocate” and the “legal mercenary.”⁷² Despite imperfection, these terms have the advantage of highlighting what determines the basic decisions of the attorney in a given case, whatever the attorney’s ideological or practical motivations may be in general. In Donald Schon’s description of professional decisionmaking, these motivations represent frames of reference for decisionmakers which “determine their strategies of attention and thereby set the directions in which [practitioners] will try to change the situation, the values which will shape their practice.”⁷³ An ideal social advocate would be a lawyer funded to identify social causes and to litigate cases solely for their value in promoting a particular political end or the interests of a particular group. The ideal mercenary would be a lawyer who selects cases solely on the basis of whether the expected profit from an investment in that particular case would be greater than the profit earned from the same investment in another activity. Looking carefully at critical decisions made in class action litigation, the potential

70. Int. 36 at 15. Professor Coffee has in fact predicted that with an increased reliance on attorney fees for civil rights and comparable litigation, we can expect a convergence between the lawyers we have termed mercenaries and the social advocates. Both will become increasingly attuned to the business requirements of the litigation. See Coffee, *supra* note 1, at 236. On the role of resource restraints and possibilities involved in the selection of cases, see Wasby, *supra* note 3, at 180-82.

71. Comparable models based on the motives of the lawyers can be found in J. CASPER, *supra* note 53; Coffee, *supra* note 1. Again, however, it is important to note that this contrast between a market driven scheme and one focusing on other values is not unique to the law. It is central to the current debate about “privatizing” services and institutions. See generally N. GILBERT, CAPITALISM AND THE WELFARE STATE: DILEMMAS OF SOCIAL BENEVOLENCE (1983) (fundamental tensions between the concepts of capitalism and welfare, or of doing good); C. OFFE, CONTRADICTIONS OF THE WELFARE STATE (1984) (modern welfare state filled with conflict because entitlements provide disincentive to work and invest which conflicts with essence of capitalism).

72. The social advocate could be subsidized by the government or a foundation, or it could simply rely on its own resources. Of course, strategies are in part determined by sources of funding. See Wasby, *supra* note 3.

73. D. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 309 (1983).

explanatory power of these two types of private attorneys general is revealed.

Our explanation focuses on four dimensions of private attorney general activity: (1) creativity in initiating litigation; (2) success in obtaining class action certification; (3) likelihood of mobilizing a class toward other collective activity; and (4) strategies for settlements. The findings, discussed below, are summarized roughly in the following chart:

IDEAL TYPE OF LAWYER	ACTIVITIES			
	Settlement Approach	Creativity in Initiation	Success in Certification	Likelihood of Class Mobilization
Legal Mercenary	Focuses on fee, which may require trades else- where by enforcer	Tends to file cases requir- ing little active investi- gation or research	Less successful	Quite unlikely
Social Advocate	Focuses on advocacy, impact of set- tlement, and on defendant behavior, which may even require trading away fees	More likely to attack a situa- tion requiring creativity and investigative resources	More successful	Also unlikely, but less so

1. *Creativity in the Initiation of Litigation*

Salaried lawyers, not dependent on fees from clients or successful litigation, are to some extent free to do research on what kind of cases *ought* to be brought to further the social goals they deem desirable. They can assess a particular situation and ask whether legal action could help to improve it, and they can make strategic decisions about how best to make long-term changes for their constituencies. A review of our data reveals that this kind of creativity is largely confined to cases brought by public interest or federally-funded legal services lawyers. The organization of legal services lawyers especially promoted that kind of research.

For example, a number of the offices specialized in "impact" litigation; beyond the impact centers there were "backup centers" further specializing in research.⁷⁴ Salaried lawyers may elect to spend more time in research than in fee-generating activities since they are not dependent on fees.

To illustrate, lawyers from legal services offices reported that social security cases they brought typically were generated by the staff or in response to a plight evidently suffered by a number of individuals.⁷⁵ It is important to note that these cases were initiated neither by express client complaints nor necessarily by any overt dispute. Rather, the idea of the class action suit as a tool to manage a social problem was often conceived and carried forward by an activist attorney. In other cases, the lawyers saw a problem area and decided to "see if there was anything they could do about it."⁷⁶ It was not unusual for consultation to occur among legal services programs about particular legal theories and long-term strategies.⁷⁷ While not all or perhaps even a large percentage of legal services lawyers participated in these activities,⁷⁸ it is fair to say that such efforts characterized the legal services class action bar.

In contrast, the private attorneys tended to "piggyback" their cases on governmental investigations, even to the extent of copying the government's complaint.⁷⁹ The antitrust and securities cases we reviewed depended largely on the investigative activities of governmental agencies. In one securities case, for example, the decision to file the case came only after an SEC investigation; the SEC even referred one of the class representatives to the plaintiffs' lawyers.⁸⁰ A second example recounted to us was the proverbial race to the courthouse after lawyers had learned

74. See, e.g., *BALANCING THE SCALES OF JUSTICE*, *supra* note 19, at 100-06.

75. E.g., Int. 39 at 2.

76. Int. 30 at 8; see Int. 6 at 3 ("We had been receiving over . . . the preceding years a number of complaints . . . we had kind of monitored what . . . was going on for a while [and] . . . our office filed."); Int. 6 at 4 ("The problem seemed there [was] no one else to do it. I think that was probably the initial basis on which we got involved.")

77. Int. 4 at 9 ("welfare office alerted to send us clients"); Int. 43 at 4 ("[W]e started looking around for . . . clients from other offices and basically sent out questionnaires to legal aid offices . . . and that network works pretty quickly.")

78. See Abel, *supra* note 57.

79. Coffee, *supra* note 1, at 222 criticizes this trend. The Reagan administration's "new antitrust" enforcement policies have served to drastically limit an attorney's ability to bring "piggyback" cases to governmental litigation. Middleton, *New Antitrust Era Takes Shape*, Nat'l L.J., Jan. 13, 1986, at 9, col. 1. For further evidence on the role of government, see Coffee, *supra* note 3, at 681-82; Kauper & Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163 (1986).

80. Int. 34 at 10, 11.

through a newspaper article of indictments for antitrust violations.⁸¹ A third suit originated with a telephone call from a state deputy attorney general conducting an investigation which even included the names of prospective clients.⁸² In other cases, the private complaints mirrored precisely the wording of the governmental complaints.⁸³ Such complaints and investigatory materials, secured in one of the cases through a separate action under the Freedom of Information Act, appear to be the standard procedure rather than the exception in the pure "mercenary" class action suits.⁸⁴ According to one experienced lawyer, the operating assumption is, "if . . . there [was] no prior government action . . . you're not going to win [your case]."⁸⁵

A lawyer dependent on fees from a successful lawsuit naturally looks for the easy victories; creativity and innovation in the generation of the lawsuit are unlikely.⁸⁶ Indeed, it looks as if the mercenary lawyers limit themselves largely to "no research" lawsuits because of the efficiency of such a strategy. No research does not eliminate risk, but the lawyer can assess the efficiency of bringing the lawsuit and be confident of bringing to fruition only those cases which would require a minimum of investment. The mercenary tends to treat the lawsuit as a set piece to which he or she merely reacts; the social advocate is more likely to take a particular situation and actively build it into a legal package or commodity.

Our data suggest that yet another distinction flows from this difference in purpose between the mercenary and social advocate. The mercenary lawyer takes fewer risks in defining the scope of the class. Accordingly, the attorney's goal is to reduce the reach of the suit and the breadth of the defendants' exposure so as to both maximize class certification and the probability of an expeditious and favorable settlement.

81. Int. 11a at 2.

82. Int. 37b at 5.

83. *E.g.*, Int. 11a at 3 ("[W]e retyped the complaint the government filed.").

84. Int. 34 at 5. *But see* Coffee, *supra* note 3, at 681-82 n.36 ("Although the conventional wisdom has long been that class actions tend to 'tag along' on the heels of governmentally initiated suits, a recent study of antitrust litigation . . . has placed this figure at '[l]ess than 20% of private attorney suits filed between 1976 and 1983.'").

85. Int. 37b at 22. *See* Kauper & Snyder, *supra* note 79, at 1189 ("Overall, follow-on cases are dismissed with less frequency, settled more often, and more often litigated than independently initiated cases.").

86. *See* Coffee, *supra* note 3, at 677-98. Coffee provides a persuasive analysis of the "principal-agent problem," which reflects the different interests and incentives held by plaintiffs' lawyers and their clients. As Coffee suggests, we are more likely to see profit-maximizing attorneys filing many actions and investing only minimal amounts in each action unless a "smoking gun" is found. *Id.* at 711-12.

Social advocates, in contrast, find incentives to expand a class, as evidenced in several quotes: “[G]o for a nationwide class”;⁸⁷ “Define the class . . . as broadly as [possible]”;⁸⁸ or aim for “the largest possible class suit.”⁸⁹ Several of the mercenary-type lawyers, in contrast, stressed to us the importance of narrowing the suit to keep it manageable and to avoid unnecessary complication.⁹⁰

2. *Certifying a Class*

In federal class action litigation, the court’s crucial decision is whether or not to certify a class under Federal Rule of Civil Procedure 23.⁹¹ After certification, the settlement value of a plaintiff’s class action shifts dramatically in the plaintiff’s favor. Our research shows,⁹² for example, that out of seventy-three *uncertified* class actions, there were thirty-two dismissals and nineteen summary judgments for the defendants, but only eleven settlements and a mere four summary judgments for the plaintiffs (with one unascertainable).⁹³ None of the seventy-three were litigated. By comparison, of the forty-six *certified* class action clusters, thirty-six were settled and ten litigated.⁹⁴

For reasons that are not immediately obvious, the legal services lawyers seem to enjoy an advantage in getting classes certified by the court. Only six of the seventy-three *uncertified* class actions were brought by legal services attorneys (plus three more by lawyers for non-profit organizations). However, one-third of the *certified* class actions were brought by legal services attorneys.⁹⁵ Even when the substantive “type” of case is controlled, the probability of certification seems to increase substantially when the lawyers representing the class are associated with the Legal

87. Int. 30 at 4.

88. Int. 43 at 4; *see* Int. 31 at 3 (“Our notion was to go as broadly as possible.”).

89. Int. 17 at 5.

90. *See* Int. 37a at 4; Int. 23 at 8-10.

91. *See* 2 H. NEWBERG, CLASS ACTIONS 2-12 (1985); MANUAL FOR COMPLEX LITIGATION 2d § 30.1 at 206 (2d ed. 1985).

92. We collected archival data on all the *uncertified* class action suits concluded during the same period as the *certified* ones discussed earlier.

93. The motion to certify was made in 22 cases and ruled on in 14.

94. Of the litigated cases, the plaintiffs won seven and the defendants won three. Five of the litigated actions involved governmental defendants. Only two of the *certified* employment discrimination actions were litigated, resulting in one victory for the plaintiff and one for the defendant. One securities class action was litigated successfully for the defendant. No antitrust cases were tried. On appeal, the plaintiffs lost two victories. In the five other appealed cases, the trial court decisions were affirmed.

95. The same finding is reported by M. REBELL & A. BLOCK, *supra* note 53, at 204 (“Public interest attorneys requested and obtained class action certification . . . substantially more often than did private attorneys.”).

Services Corporation.⁹⁶ One can speculate that the reason for this result could be better selection of class actions to litigate, or perhaps the greater expertise, resources, and experience of legal services lawyers in conducting this kind of complex litigation.

It appears, however, that there may be structural reasons to expect class certification more often in the cases brought by legal services attorneys or comparable lawyers. Most battles about certification concern the “adequacy” or “typicality” of the named plaintiff or plaintiffs.⁹⁷ Original named plaintiffs often prove “defective” under the scrutiny of the defendants and the court. Public law offices, with access to broad networks of potential named plaintiffs, can more easily search for the best class representatives to begin with, or more readily shift from defective to more adequate named plaintiffs. In fact, this practice seems quite common among those we interviewed. The organization of the legal services offices facilitates this kind of search for the “typical” plaintiff. Numerous clients with the kinds of problems that interest legal services lawyers find their way into local offices, and local offices can share information and clientele. One legal aid lawyer, for example, reported “looking for a working poor person;”⁹⁸ another reported a “questionnaire” circulated to other legal aid offices to find class representatives;⁹⁹ another tells of alerting the welfare office to refer clients after a problem had been identified,¹⁰⁰ and still others explained how ties to community organizations provided access to potential class representatives.¹⁰¹

It is of course true that such networks are not the exclusive province of the legal aid lawyers. Organizational ties help to explain the success of other groups of public interest lawyers as well. We were told of antitrust and securities class actions where the quest for “good” named plaintiffs led lawyers to call, for example, their “mother’s friends” to find potential consumer plaintiffs,¹⁰² or to inform a previous client, “Hey, Joe, there’s another lawsuit [—do] you want to get involved?”¹⁰³ A lawyer who runs in the same social circles as the potential named plaintiffs, which may

96. For example, only one of the twenty-four uncertified employment discrimination class actions was brought by a public interest or legal aid firm. However, eight of the twenty-one uncertified class actions were brought by public or legal aid firms.

97. See generally 1 H. NEWBERG, *supra* note 91, at 163-260 (discussing typical class action claims, typicality of claims, and the timeliness of motions).

98. Int. 33 at 14.

99. Int. 43 at 4.

100. Int. 4 at 2.

101. Int. 2 at 3-4; see also Int. 44 at 4 (“help from mental health activists”).

102. Int. 11a at 4.

103. Int. 37b at 9.

often be the case in antitrust and securities litigation, will have reasonably easy access to class representatives. Affiliation with an organization composed of potential named plaintiffs serves the same purpose. However, in the class actions where the lawyer and client come from different worlds, as is usually the case in litigation on behalf of poor or working class people, the special access of the legal services network provides a decided advantage in generating potential class representatives who can survive attacks on their typicality and adequacy.

The advantage of social affiliation with potential named plaintiffs is reinforced by the rules for client solicitation. While there is ambiguity in the standard for deciding what is permissible and what is not, it is the case that the pure social advocate described above is generally presumed to have a first amendment right to solicit, while the legal mercenary is not so favored.¹⁰⁴ Although securities and antitrust lawyers tend to have a network, it appears that they often just represent former clients or other individuals who had previously come to the attorney with similar claims. The social advocate tied to an organization or part of the legal aid group can more easily expand the search for the "typical" and "adequate" plaintiff.

3. *Mobilizing a Class*

A number of commentators have argued that the class action should serve as a vehicle for organizing class members to promote the class' interests.¹⁰⁵ There are substantial differences of opinion about the desirability or feasibility of this strategy.¹⁰⁶ Our research reveals little concrete activity by lawyers directed to organizing class members. Most class action lawyers we interviewed expressed doubt about whether mobilizing the class would contribute to victory in their lawsuit, although several recognized that this approach could contribute to success in certain class actions.¹⁰⁷ With one notable exception,¹⁰⁸ there was very little if any

104. The basic, even if perhaps unworkable, distinction is between solicitation in the public interest and solicitation for profit. *Compare* *In re Primus*, 436 U.S. 412, 431-32 (1978) (solicitation by a nonprofit organization that engages in litigation as a form of political expression constitutes conduct entitled to first amendment protection) *with* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (state bar may "constitutionally . . . discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent").

105. *See, e.g.*, Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976).

106. *See, e.g.*, Simon, *Visions of Practice in Legal Thought*, 36 *STAN. L. REV.* 469 (1984).

107. *See* *Int. 2* at 6; *Int. 42* at 37; *Int. 46* at 3.

108. *See* *Int. 29* at 9 (a successful organizing effort).

active attempt by lawyers to organize class members to participate in the suit or to engage in other activities complementary to the suit.

One might expect that this organizational activity will more likely be found in cases in which the lawyers are not dependent on fees awarded at the conclusion of the case. If this is true, then the social advocate may find it strategic to incorporate such activity into his or her relationships with class representatives and members. The mercenary lawyer, however, would have less incentive to do the same. Our data suggest that neither spends much time in organizing class members.

4. *Trading for Class Relief*

It is difficult to reconstruct class action negotiations reliably and even more difficult to evaluate them.¹⁰⁹ Nevertheless, we can point to several examples where specific trade-offs were made in order to obtain a particular result. For example, several legal aid lawyers reported trading damage awards for injunctive relief.¹¹⁰ At least one even traded attorney fees for class relief.¹¹¹ On the other hand, there are a number of examples of lawyers, dependent on fees, trading injunctive relief for a monetary award for both the class and the attorneys.¹¹² One antitrust lawyer said simply that while his clients were interested mainly in injunctive relief, "For me to get paid I had to claim money damages."¹¹³ He characterized the terms of the settlement as a cosmetic concession with no real teeth to it: "[C]hange some of these prices and pay my fees."¹¹⁴ These examples should not be surprising. If lawyers believe that their fees depend largely on the monetary award, they will tend to focus more of their energy on obtaining the award. Again, the social advocate may be less concerned with winning attorney fees if the fees are somehow subsidized.

Issues involved in these kinds of trade-offs can be very complex. Trade-offs may involve more than just the interests of the lawyer versus the interests of particular members of the class. Difficult problems also

109. Problems of evaluation are discussed in Garth, Nagel & Plager, *Empirical Research and the Shareholder Derivative Suit: Toward a Better-Informed Debate*, 48 LAW & CONTEMP. PROBS. 137, 149-57 (1985).

110. Int. 29 at 3, 10; Int. 6 at 15.

111. Int. 38 at 21; Int. 8 at 10 (attorneys proposed giving up some of their fees to induce class to settle); Int. 13 at 16-17 (defense attorneys often will not talk settlement unless attorney fees are not included in agreement); see also Int. 29 at 6 (provision for attorney fees dropped from settlement agreement as it was perceived to be a "sticking point" in settlement process).

112. Int. 19a at 12; Int. 19b at 7; Int. 37a at 14; Int. 37b at 19.

113. Int. 23 at 13.

114. *Id.* at 15.

arise with respect to remedies sought by the named plaintiffs and those sought on behalf of the class. Lawyers seeking the broadest remedy or the maximum impact may neglect to push for relief to particular individuals who may have been the ones who started the lawsuit in the first place. For present purposes, however, the discussion is limited to the issues involved in pursuing large-scale relief that enforces the law on behalf of the class.¹¹⁵

5. *Implications for Reform*

The distinction between social advocates and legal mercenaries illuminates many of the patterns revealed in our study. We can point to differences in how each model leads to the initiation of a lawsuit, how the models affect the likelihood of certification, whether there is any activity aimed towards mobilizing the class, and what kinds of exchange in remedies will be found acceptable. Armed with these insights, reformers might emphasize these differences in the behavior of social advocates and legal mercenaries and recommend their preferred version of the private attorney general.

Nostalgia for more publicly funded legal services and an expanded public interest bar might be one response. If effectiveness means succeeding in a class action and winning a serious remedy for as broad a group as possible, legal policy might encourage social advocates more than legal mercenaries. In several respects, one might claim that social advocates are the best private attorneys general.

That claim and its reform implications, however, depends heavily upon at least one debatable assumption: it makes sense to term publicly funded legal services as part of the private sphere. The private attorneys general in our sample were salaried by the government in eighteen out of forty-six certified class action clusters. Publicly funded legal services programs, in some respects, exemplify the use of *governmental* resources to pay for the research, innovation, and other activity of those called private attorneys general. With direct public funding, it is difficult to claim that such private attorneys general should be considered qualitatively different from public law enforcers—that is, public attorneys general. A certain degree of independence from the government is not quite the same as being non-governmental. Nevertheless, the Legal Services Corporation, for example, is not simply part of the federal bureaucracy. Legal service lawyers retain some autonomy from the policies of the

115. The authors of this Article explore the role of class representatives in a forthcoming piece tentatively entitled *Class Action Representatives: Odd People Out in Class Action Litigation*.

administration in power. That autonomy is not uncontested, but it may provide a sufficient basis for the reformer to persist in the argument.

Even assuming legal services for the poor were private, we generally find a very complex mix of public and private involvement. First, governmental agencies may and often do participate in the litigation of social advocates as *amicus curiae* or even as one of the complaining parties. In our sample of cases, we found several examples where the Equal Employment Opportunity Commission (EEOC) participated directly in the litigation. One lawyer in such a case thus commented, "the defense would have absolutely rolled over me if I didn't have the EEOC in there."¹¹⁶ Furthermore, several cases ended with a remedy that depended on governmental action to oversee it.¹¹⁷ In addition, as noted earlier, there are quite a few cases dependent on governmentally acquired information. Governmental investigations could be found behind the antitrust and securities litigation, and in one case, the private complaint turned into an SEC investigation before returning to the lawyers for the filing of a class action.¹¹⁸

Probing deeper reveals still more linkages between the private and public spheres. The employment discrimination class actions tended to turn on statistical data, the collection and analysis of which is difficult and heavily dependent on the selection of particular job classifications.¹¹⁹ The lawyers who handled these cases admitted to building their settlement values on a combination of statistics and anecdotes.¹²⁰ Sometimes the statistical data were available through some kind of investigation prior to filing; more often, though, the data surfaced after the case was filed. Importantly, the statistics almost invariably came from the federal government. Nearly every lawyer—especially legal services attorneys or others handling EEOC cases—acknowledged that EEOC statistics and affirmative action plans ultimately defined the class and affected the plaintiffs' bargaining power.¹²¹

116. Int. 32 at 15. The importance of the EEOC is corroborated by the aggregate data on appellate cases reported in Burstein & Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 LAW & SOC'Y REV. 355, 375 (1986) ("Having a federal agency as party to the case is associated with an 18 percent higher chance of victory . . .").

117. Int. 19a at 13.

118. Int. 34 at 2.

119. Int. 17 at 11; Int. 19a at 4; Int. 31b at 31-32.

120. Int. 31a at 18; Int. 3 at 7.

121. See, e.g., *infra* notes 125-26 and accompanying text.

Beyond the employment discrimination context, governmental information has provided crucial material for several class action lawsuits, including the size and identity of the class. In one rather notable antitrust case, a governmental agency provided the plaintiffs with gummed labels containing the names and addresses of all class members.¹²² In another case, a governmental study of conditions in a mental hospital provided the crucial leverage for the plaintiffs.¹²³

This blurring of public and private distinctions is in some respects rather unremarkable. For example, the causes of action are created by public law as are the rules for attorney fees. This argument, however, proves too much. The question to be explored is what role non-lawyers and lawyers outside the federal bureaucracy can play in the enforcement of fairly complicated regulatory laws. That is the theme which has sustained the idea of the private attorney general; and, as Professor Coffee has suggested, a dependence on the government jeopardizes that ideal.¹²⁴

6. *Some Tentative Conclusions*

We can now suggest some preliminary conclusions. The class actions just highlighted were outgrowths of regulation by the government—usually the federal government. In order to file and successfully prosecute class action litigation, the private attorney general depends in substantial measure on activities of the regulatory state. We noted earlier that we might expect fewer class actions due to less direct subsidy of legal aid and public interest law, but that turns out to be only a small portion of the story. To the extent that governmental machinery undertakes serious investigations and promotes creative new theories to obtain legal relief, we can expect that class actions will surround that governmental activity.

In recent years, however, deregulation rather than federal investment in enforcement has been the norm. Diminished resources have been allocated to governmental enforcement of the laws that typically

122. Int. 23 at 7.

123. Int. 44 at 2.

124. See Coffee, *supra* note 1. An example of the emphasis on private litigation "filling the void" left by public litigation is found in Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978). See also American Bar Association, Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 198 (1986) ("Although recognizing the role assigned to public enforcement actions, the constraints and limitations necessarily placed upon such actions persuades the Committee that private injunctive and damage actions, properly contained and efficiently administered, are often essential if widespread violations of those [important public] policies are to be deterred.")

have spurred class action litigation—most notably antitrust, civil rights, and securities. If the federal government were actively pursuing “comparable worth” in employment discrimination litigation, for example, we would expect more class actions to be filed. Certainly, the reasons for the decline in the number of class actions are complex, but the most obvious explanation has largely been neglected: the dependence of the class action and private attorney general on the regulatory state.¹²⁵ We believe the reason for this stems from the general perception or misperception that the private attorney general can be kept distinct from the regulatory activities of public agencies.

The link between public and private enforcement machinery does not render the ideal of a private attorney general meaningless. The policy adopted for the private aspect, whether somehow subsidizing social advocacy or promoting legal mercenaries, helps determine when law enforcement actions will be brought and how they will be resolved. Certainly, for example, increased funds for public advocacy and more generous awards of attorney fees are significant kinds of reforms. Yet, as discussed in the next section, we must reconsider to what extent the private attorney general can serve either as a substitute for the federal bureaucracy, as “privatizers” argue, or as an antidote for a lessened federal enforcement commitment, as critics of the current approach might wish.

III. EXCEPTIONAL CASES: SUCCESSFUL PRIVATE ATTORNEYS GENERAL INDEPENDENT FROM PUBLIC REGULATORY MACHINERY

There are cases in our sample that fit the *private* ideal of law enforcement as being separate from the activities of governmental machinery. The criteria for such cases are that the lawyer and client undertake the initial investigation, provide the resources for litigation, and obtain a reasonable result for their efforts. These cases are worthy of careful consideration because they provide examples that seem to replicate the best successes of social advocacy and mercenary enforcement without depending on governmental resources and initiatives.

125. For information on this decline, see *supra* note 60. Chayes, for example, attributes the decline in class actions to “the less hospitable climate for these actions generated by the Court’s rulings.” Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 34 (1982). For useful discussions of the relationship of private antitrust litigation to governmental activity, see Kauper & Snyder, *supra* note 79, at 1178; Salop & White, *Economic Analysis of Antitrust Litigation*, 74 GEO. L.J. 1001, 1043 (1986).

We exclude from our study the cases brought by legal services lawyers because they raise special considerations discussed earlier. However, six cases in our sample of forty-six clusters might fit the criteria. One involved a challenge to the length of pretrial detention after an arrest but prior to the filing of charges; the second alleged a breach of a fiduciary obligation by a pension plan; the third claimed fraud under the securities laws for the acquisition of a small company by a much larger one; the fourth represented an attack by professionals on insurance provisions that limited their pricing freedom; the fifth sought to change a policy, the effect of which was to restrict access to hotel premises on the basis of race; the sixth challenged how medication was being given to mental patients. With the possible exception of the sixth case, which was brought by a non-profit public interest law firm, the other five actions share characteristics worth examining.

The most important characteristic appears to be that there were one or more aggrieved plaintiffs who sought legal representation and who were armed at the outset with the facts necessary to prove a violation of the law affecting a large but easily identifiable group of persons. These facts were simple and largely undisputed in the crucial respects; the lawyers could proceed much as they would in a relatively simple private lawsuit. There were no problems of defining relevant markets and products, tracing complex arrays of disclosure statements and securities transactions, or determining appropriate job classifications for comparison to community statistics. If there were novelties in the legal theories advanced, which there were in several of the cases, they emerged in the way the law was applied to a given set of facts rather than in the discovery of relevant new facts and evidence.

The private attorney general independent from governmental machinery exists, but the limiting conditions are severe indeed. The independent private attorney general requires a client to come to the lawyer's office and relate the relevant facts of the potential legal violation and the situation of the other affected persons. The lawyer must then be able to characterize those facts such that they can be taken seriously by the defendant. This kind of activity matches well with the conception of the lawsuit traditionally advanced in case law. A cause of action is assumed to exist, ready for litigation; it is then brought to a lawyer who simply files and pursues the most meritorious claims possible. This traditional conception, however, generates very few class actions today.

It would be possible to limit the conceptualization of the role of the private attorney general to fact patterns such as those described above.

However, when the facts are not this simple or the client cannot present the package to the lawyer, we may need an intermediary to put the package together. In many circumstances, the government is the natural intermediary. This would also be the case where it was important to have novel legal approaches that require substantial time and investigative research. In these kinds of cases, the "public" addition to the private attorney general may be indispensable.¹²⁶

126. It is interesting to compare these findings with two notable examples of the successes of private attorneys general. The campaign of the NAACP against segregated schools certainly is one of the most famous examples of the use of the courts to obtain and vindicate public rights. As Mark Tushnet describes the litigation campaign, it is notable how much the strategy of test cases was determined to a significant degree by the need to minimize the necessity of factual investigation. M. TUSHNET, *supra* note 53, at 109-10. The NAACP simply lacked the resources to undertake complicated factual investigations and bring them to bear in court.

The tremendous recent increase in "citizen suits" to enforce environmental regulations also seems to fit well the ideal of the private attorney general. According to Boyer and Meidinger,

In the private enforcement suit, by contrast, some of the private litigants hope to step into the shoes of government in a rather literal sense. As they see it, government agencies are often unable or unwilling to enforce regulatory laws as they should be enforced. Private parties, armed with citizen suit authority, are fully capable of taking over routine enforcement cases. They are also free of some of the bureaucratic and political constraints that hobble government enforcers. Thus, the citizen suit is not a mere occasional prod used to goad reluctant agencies into action, nor is it an extraordinary remedy for unusual administrative failures. Rather, it is the means of seeking a major—perhaps permanent—realignment of roles and powers in important areas of regulation: the creation of "private attorneys general" with responsibilities comparable to those of the public attorney general.

Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 836-37 (1986). While the ideology suggests an antidote for government, the authors found a very close dependency relationship:

Litigation is fundamentally a process of gathering, presenting and evaluating information. Easy access to accurate information is a prerequisite to bringing successful citizen suits. One of the primary reasons that most of the private enforcement activity has centered on the Clean Water Act is the system of monitoring, self-reporting and data processing developed under that statute.

The statute creates a self-monitoring system by requiring each discharger to obtain a permit and by providing sanctions for failure to submit periodic compliance reports. While monitoring for toxic pollutants may be difficult, the "conventional pollutant" parameters, such as biological oxygen demand or pH, can be monitored routinely and inexpensively. This allows the permitting agency to reasonably require dischargers to report monthly or weekly average discharges of these pollutants, in addition to reporting maximum daily discharges. The agency's computerized permit compliance system collects information from the permittees' periodic discharge monitoring reports (DMRs) and compares it to their permit limits. This makes it possible to generate the quarterly noncompliance reports (QNCRs) identifying significant violators. As previously noted, these QNCRs are wisely used both for internal program evaluation by the EPA and for case selection by many of the citizen suit plaintiffs.

For most of the plaintiff organizations, scanning the QNCRs to identify persistent permit violators is only the first step in case screening. To develop a full understanding of the violations, and to document them for possible courtroom use, it is necessary to get into the detailed paper records. This usually means spending an extended period of time in the state agency or the EPA regional office tracking down and working with the appropriate files.

Id. at 917-18 (footnote omitted). A related study points to the same conclusion:

[D]etailed monitoring and reporting obligations can make it easier for citizens to prove violations. Discharges of pollutants without a permit or in violation of a permit's effluent

If the public dimension to the private attorney general is as pervasive as it appears, the private attorney general concept does not look like a very important social institution by itself. Alone, it carries very little weight; for the most part, the private attorney general only complements governmental regulatory activity. While the impact of complementary enforcement activity is important, it might be possible to abolish it with relatively little impact on society. We must first ask, however, if our description of the institution is an argument for further institutional reform. Can the private attorney general be strengthened in some manner? Can the private side be made more significant—more independent from government—without sacrificing efficiency? We now understand why the institution has been perceived to be in crisis, but we also need to know if the crisis is merely its natural state or a problem that can somehow be solved.

IV. CURRENT APPROACHES TOWARD REVITALIZING THE INSTITUTION OF THE PRIVATE ATTORNEY GENERAL

One approach to revitalization is the strengthening of the role of private attorneys general as social advocates through such measures as increased funding for the Legal Services Corporation. However, it is difficult to decide how that fits the purpose of the private attorney general. If law enforcement is the general goal, a strong role for such subsidized social advocates is acceptable. But this approach too obviously begs the larger issue concerning the role of the government in reaching out to enforce public rights. The concern is whether or not that political question can be put aside and the private attorney general still revitalized. What can be done within the prevailing ideology of the private attorney general? If the answer is very little, we will have to consider whether the prevailing ideology can be used to provide the relevant boundaries for debate and reform.

For purposes of this discussion, we have selected three rather different responses given by others to the perceived limitations of the private attorney general in the context of class action litigation. All three are

limitations are violations, and permittees must file periodic reports on their compliance with such effluent limitations. The reports are public information, and are organized in a generally useful manner. . . . It illustrates one reason why the Clean Air Act has been less vigorously enforced by citizens than the Clean Water Act, despite the Clean Air Acts [sic] greater vintage: the relative difficulty in proving violations.

sympathetic to some vision of the private attorney general. The titles of these three positions are oversimplified, but they nevertheless convey the appropriate sense of the reformers' perspectives.

A. LIBERAL REFORM IN THE 1980S

Professor Abram Chayes' recent analyses of "public law" litigation—which set the tone for so much procedural scholarship of late—suggest that the Supreme Court has impeded the legitimate growth of such litigation.¹²⁷ Decisions on standing, class actions, and remedies, according to Chayes, misconstrue the nature of modern federal litigation. By asking the wrong questions, the Court misses the opportunity to focus on pivotal legal issues such as "adequate representation of the interests affected by the litigation."¹²⁸ In Chayes' view, the Court represents an institution "exercising an oversight function on behalf of the interests and groups as well as the individuals affected by the challenged bureaucratic actions."¹²⁹ The Court's role is to police the bureaucracy, and it should recognize and strengthen that role. Private attorneys general can then do their work.

Unfortunately, we cannot expect much improvement in that "oversight" role, even from a Supreme Court more favorably disposed to the kinds of cases brought by private attorneys general. Changing the doctrine of standing, class actions, and remedies omits two basic obstacles to the kind of oversight function that Chayes would prefer to see strengthened. First, it neglects the crucial problem of funding such litigation, whether by direct subsidies or through attorney fee incentives. Moreover, Chayes does not connect the kind of advocacy he prefers to the constraints of the private attorney general as currently conceived. We have already seen that profit-maximizing mercenary lawyers typically do little research prior to initiating a lawsuit, spend little time mobilizing the class to pursue its interests, and seek relatively narrow remedies through litigation.¹³⁰ The incentive structure does not promote the independent aggressiveness Chayes would like nor the initiative to follow the direction he prefers.

Second, Chayes underestimates the importance of a public commitment to the functioning of private attorneys general. If governmental institutions are not involved in the oversight function to the extent that

127. Chayes, *supra* note 56; Chayes, *supra* note 125.

128. Chayes, *supra* note 125, at 60.

129. *Id.*

130. See *supra* notes 79-85 and accompanying text.

they radiate potential complementary litigation, there will be relatively little activity by private attorneys general no matter what the state of Supreme Court doctrine.¹³¹ The Chayes ideal may be desirable on its own terms, but the Supreme Court doctrine he discusses will have only a marginal impact on its practical realization. Chayes does not discuss the prior question of supporting the social advocates. Without this kind of support, these attorneys will not bring to the courts the issues Chayes wishes to encourage.

B. RADICAL REFORM IN THE 1980S

Professor William Simon, in the course of a provocative article on "visions of practice," makes proposals to strengthen the institution of the private attorney general as practiced in class action litigation.¹³² Contrasting a critical view with the liberal focus on "representation," Simon favors efforts to mobilize the class: "[A] community of interest is something to be created in the course of representation, rather than a premise of representation."¹³³ He thus emphasizes "the importance of communication among clients and direct participation."¹³⁴ In Simon's view, lawyers should "extend legal strategies in ways that have the potential to complement or even generate initiatives of popular mobilization, electoral politics, or workplace politics."¹³⁵

With respect to the liberal vision, however, this current perspective on the private attorney general reveals no means to subsidize the kind of advocacy Simon prefers. Simon cites examples from the legal services and public interest law movements, but he does not make the argument for the subsidization of such advocacy. Perhaps more importantly, given recent trends, he does not confront the impact the new market system will have.¹³⁶ Lawyers, dependent upon fees, are unlikely to spend their time as "unprofitably" as under Simon's proposals. Relatively few private attorneys general in the past have undertaken the activities Simon prefers, and it is difficult to imagine any significant increase of this activity under the current regime of private attorneys general.¹³⁷ Again, that

131. See *supra* note 124 and accompanying text.

132. Simon, *supra* note 106.

133. *Id.* at 487.

134. *Id.*

135. *Id.* at 500-01.

136. *Id.* at 483, 487, 501.

137. Simon states, for example, that his vision of practice promotes the following approach: "[O]ne . . . starts with a conventional notion of law practice and develops it in ways that cut across the conventional distinctions between legal and political, enforcement and reform, and reform and revolution." *Id.* at 500-01. While in many ways appealing, note how the rules for the payment of

does not mean that such advocacy is undesirable, but it cannot be obtained on a large scale without some fundamental changes. These changes lie outside the scope of Simon's specific proposals.

C. A SYMPATHETIC LAW AND ECONOMICS PERSPECTIVE

Professor John Coffee, in a series of important articles, confronts the institution of the private attorney general in precisely the language of the most recent debates—economic incentives and their effect either to promote or inhibit the activities of private attorneys general.¹³⁸ This approach takes him beyond the approaches of Chayes and Simon. Coffee responds directly to the challenge of substituting private attorneys general for governmental bureaucracy. Coffee contends that “rescuing” the private attorney general requires finding a method to encourage private attorneys to investigate and prosecute violations of federal statutes. The importance of the *private* attorney general, according to Coffee, is that it is more efficient than governmental machinery.¹³⁹ It is more fair because of the government's advantages in litigation,¹⁴⁰ and it protects against changes in the level of enforcement caused by changes in the “attitudes of public enforcers or the vagaries of the budgetary process.”¹⁴¹ With a proper incentive structure, according to Coffee, “one might logically expect private enforcement efforts to dwarf those of public agencies.”¹⁴²

Coffee's proposals address two problems in particular. First is the problem of collusive settlements. Coffee argues that lawyers often settle cases that either should be dismissed or pursued more vigorously. This problem cannot be dismissed by the findings of our study since we can point to cases where mercenary attorneys certainly made trades during settlement discussions in order to ensure that they would be paid their fees. Coffee proposes that the prime determinant for fees should be the amount of the recovery, with fees limited to a fixed percentage of the recovery. He does not favor the award of fees calculated solely on the basis of time spent, since that makes it too easy for lawyers to have a

attorney fees promote successful litigation and none of the other activities that Simon supports. The incentives ensure that the kind of activity Simon favors—at times pursued only by subsidized legal services attorneys—will occur very rarely indeed.

Without developing the argument here, increasing market pressures on a deregulated legal profession might prevent lawyers from expanding their practices in the manner that Simon envisions.

138. Coffee, *supra* note 1; Coffee, *supra* note 3; Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985).

139. Coffee, *supra* note 1, at 226.

140. *Id.* at 226-27.

141. *Id.* at 227.

142. *Id.* at 228.

conflict of interest with those they represent. Accordingly, Coffee favors an award based on a percentage of the value of the award, whether in the form of monetary or injunctive relief.¹⁴³

A second major concern of Coffee is the dependence of private attorneys general on public investigations. He explores a variety of possible solutions to that problem, including greater incentives to sue.¹⁴⁴ However, he essentially returns to the same proposal made to avoid collusion: "[T]he most feasible answer to the attorney's inadequate incentive to fund litigation probably involves some combination of multiple damages, an increasing percentage of the recovery formula, and higher fee awards."¹⁴⁵

Coffee's proposals may be helpful in several respects. First, they provide a solid theoretical justification for increasing the fees paid to private attorneys general in cases where settlements or orders have substantial economic value. Second, they stay within the market model, proposing deregulation of attorney fees rather than the regulatory scheme in current use. Finally, they confront the specific problems we have identified—an inability of mercenary lawyers to invest in research and innovation and a tendency to reduce the scope and ambition of class actions in order to ensure the award of a fee.

Ultimately, however, Coffee's effort to stay within the current model leads to another version of the dilemmas seen before. Suppose for present purposes that a percentage fee award leads lawyers to invest more heavily in winning more valuable forms of relief, both monetary and injunctive. Lawyers may be more willing to run the risk of no recovery if the potential rewards for success are greater.¹⁴⁶

Greater potential awards logically lead to the likelihood of an increase in research and innovation. The question is whether such awards would in fact be sufficient to encourage the kind of research

143. See Coffee, *supra* note 3, at 717-18.

144. Coffee, *supra* note 1, at 274-84 (for example, creating a property right in the lawsuit); Coffee, *supra* note 3, at 684-98 (increasing the percentage of the recovery awarded, or basing fees on a graduated, increasing percentage of the recovery formula which would award a plaintiffs' attorney a marginally greater percentage of each increment in damages).

145. Coffee, *supra* note 3, at 698.

146. Of course, we cannot know without more empirical study what factors specifically lead to keeping the actions relatively unambitious. It could be, for example, that mercenary lawyers believe that their chances of getting a class certified are too small if they shoot for a large class action. Yet, greater economic incentives at least make it more feasible to invest time: the reward could be greater.

needed, research that we found to be rather unlikely among the mercenary lawyers. Our data are not encouraging, but at least there is some possibility.¹⁴⁷ If greater awards are packaged as a means to encourage research, the idea might be plausible, and it would be consistent with the current model of the private attorney general. However, the current model appears, in crucial respects, inconsistent with Coffee's reforms. The change from the percentage-of-recovery system of compensating lawyers to the current one appears to have reflected a shift to a model designed *not* to promote innovative research.

Coffee suggests a private model that could include positive incentives to undertake original research, bring innovative litigation, and pursue alternatives to litigation able to accomplish the same ends. Unfortunately, these kinds of incentives, as we have seen, are outside the scope of the private attorney general as currently conceived.¹⁴⁸ The model today, in the cases and commentary, assumes that a lawsuit is a package delivered to a lawyer who should litigate it precisely and efficiently. The debates in the cases are about the incentives to litigate once the lawsuit has been brought to the lawyer's office. Incentives designed to promote activities beyond just litigation of claims brought to lawyers would result in some windfalls but would encourage private attorneys general.

The question again, however, is whether this reform is any more realistic than using governmental funds to subsidize favored groups whose activities are supported by a general consensus or who get special support in order to balance the scales of justice. Coffee's reforms are captured in the language of the market model but they require a social commitment that the model does not currently contemplate. We can

147. It may also be, however, that only full-time salaried lawyers in the government, legal service, or foundation funded law firms will have the motivation and resources to do sufficient research. As a matter of theory, one can at least posit that lawyers will invest in research if the expected payoff is equal to what they would have received by investing in another activity. That suggests that market forces could promote research if there are not a sufficient number of easy cases or cases in which per-hour billing would earn more than is expected from research. Economic incentives can also be structured to promote alternative forms of advocacy.

Boyer and Meidinger's study suggests the difficulty of this kind of commitment without governmental resources:

If the defendants succeed in opening up the validity of the DMRs [discharge monitoring reports] to trial on the merits, this will most likely mean protracted hearings with extensive testimony from statisticians, engineers and other expensive experts. Even with the prospect of fee and cost recovery if plaintiffs ultimately prevail, it seems clear that the greater the time and "front money" investment, the longer the delay before recovering, and the increased risk will deter some plaintiffs and plaintiffs' lawyers from bringing the actions.

Boyer & Meidinger, *supra* note 126, at 922 (footnote omitted).

148. See *supra* notes 23-51 and accompanying text.

imagine a shift to a new form of private attorney general under the incentive system he describes, but finally we face the question of whether his proposal is for a 1960s and 70s agenda in the language of the 1980s. Reform energy devoted to such a goal might better be turned to the general social commitment and to public institutions at the center of activity instead of just the private attorneys on the regulatory periphery.

D. PESSIMISM AND NOSTALGIA

The tone of this Article might be considered pessimistic about the present, and romantic about the past era of the private attorney general. The analysis and data suggest that the private attorney general works well when there is either subsidized social advocacy¹⁴⁹ or a genuine governmental commitment to promote strong efforts by mercenary law enforcers. Efforts to reform the private attorney general and to create an antidote or substitute for governmental machinery—an effective enforcement institution independent of the vagaries of government—will fail unless they confront this basic proposition. If one wishes to promote this ideal of the private attorney general, then our conclusions may appear to be pessimistic. None of the reformers we discussed resolved these central dilemmas.

A first qualification for this pessimism, however, is that liberal rules of standing and fee shifting statutes, as currently interpreted, can help sustain social advocacy groups. If that is the desired goal, advocacy groups, such as those protecting the environment, will remain active. We did not see such groups in our sample of class actions, but other evidence suggests that they continue to be important.¹⁵⁰ These interest groups, however, are able to accomplish only as much as their political power permits. Despite the important work of these groups, they cannot fulfill the broad role for private attorneys general that legal ideology has contemplated over the past few decades.¹⁵¹

Although pessimism may be appropriate to some extent, it should not lead to nostalgia for a golden age of the private attorney general characterized by subsidized social advocacy and a greater commitment to governmental regulation. We might want more regulatory enforcement for a variety of political reasons. If this is the case, we must confront

149. For an interesting discussion of the funding problems of left/liberal public interest law and the riches of public interest advocacy on the right, see O'Connor & Epstein, *supra* note 24.

150. See S. OLSON, *supra* note 53.

151. The limitations of private groups largely explained the effort to subsidize social advocacy in the first place. See *supra* notes 19-22 and accompanying text.

those issues squarely. Tinkering with the institution of the private attorney general implicates the broader issues but cannot transcend them. The private attorney general's seeming insulation from politics makes the role appear to be a means to promote law enforcement independently without confronting political issues. It is still possible to call for reform to make the private attorney general more effective, but it is not possible to make that kind of reform a substitute for a more general debate about regulatory enforcement.

V. APPEALING IMAGES AS MISLEADING MODELS

The private attorney general is an appealing image. A large body of legal literature has been generated concerning this role. Reform efforts continue from a variety of perspectives continually attempting to mold the institution into some ideal of private law enforcement. As we have argued above, these efforts can produce worthwhile results; but they cannot fully realize the ideals implicit in the model of a private, institutional antidote to, or substitute for governmental machinery. Dependence on government—an inevitable result of the present structure of the institution—limits and shapes the possibilities for the activities that have been characterized as those of private attorneys general.

Part of the appeal of the image, therefore, must be in the symbols that it invokes. The use of this image can mask a tremendous increase in regulation by suggesting that enforcement is separate from other activities of governmental bureaucracies. It can likewise camouflage a dramatic decrease in such regulation by suggesting that private enforcement will somehow fill the gap. Both illusions obscure our understanding and, not surprisingly, the image has failed to generate an institution that corresponds in practice to the ideal of the image.

At the risk of oversimplifying and overstating, our empirically-based class action study points to the following preliminary conclusions:

There continues to exist a number of groups that use the courts strategically to pursue their political ends. Our study was not designed to find those groups, except to the extent that they filed class actions. These politically motivated groups represent the core of what we have called social advocacy.

Consensus within legal debates has shifted away from the notion that some of those groups are special and deserve a protected status, either because their work was considered progressive or because subsidies were considered necessary to balance out the advocacy of certain public policies.

The current image of the private attorney general promotes fee shifting as a private market model for encouraging certain types of meritorious litigation. The main concerns in the debates appear to be whether attorneys get too much or too little in profit incentives.

The use of the market model leads to a distinct approach by the lawyer playing the role of private attorney general. This kind of attorney—the legal mercenary—is less likely to put together an innovative legal package, less likely to get a class certified, less likely to actively attempt to mobilize the class, and less likely to pursue injunctive relief, than a public interest or legal service lawyer focused on social advocacy.

The private attorney general cannot realistically be expected to go beyond existing organizations and their invariably limited power (for otherwise they would have little need to go to court) either according to the balance model or the recent market model. The private attorney general is in large part bound to be dependent on governmental machinery. Class actions can rarely be initiated and brought to successful fruition without the aid of the tools that government uses to promote the litigant's position.

Because of the system of economic incentives and the dependence on the government, plausible "reforms" are not likely to make the private attorney general a real antidote to, or substitute for, a lack of governmental commitment to regulatory enforcement. The private attorney general in the vision favored by many legal policymakers is probably unrealizable.

We come finally to the question of why this institution retains such symbolic power. Obviously the "answer" cannot be derived directly from any data. Yet, some attention to this question helps us to connect the legal ideas and assumptions to the larger social framework. We can begin by recognizing that in the United States there is an ideological tradition that we are a nation of individuals who do not need to share important public values.¹⁵² The tradition, nevertheless, celebrates the bounty hunter or Lone Ranger who cleans up a town and enforces a morality that we all do share. In the words of the authors of *Habits of the Heart*, a book which examined precisely this American ambivalence about public values, "[t]o serve society, one must be able to stand alone, not needing others, not depending on their judgment, and not submitting to their wishes."¹⁵³ The private attorney general confirms public values

152. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

153. *Id.* at 146.

while apparently standing outside of public institutions. The idea of the private attorney general helps us to recognize public values implicitly while retaining an emphasis on individualism and private activity. By camouflaging major social debates in terms of the operation and reform of private attorneys general, we are able to pretend that we are a society that still reveres the purely individualistic and private tradition.

The idea of the private attorney general also matches well some of the ideological concerns that historically have been found in the legal profession.¹⁵⁴ It celebrates the power of attorneys to do good, to overcome structural obstacles to the vindication of legal rights, and therefore to bring justice to those who may be priced out of the market. At the same time, it allows leaders of the legal profession to support such activities without crossing the traditionally forbidden line between sound legal policy and politics. Lawyers maintain their innocence of large social debates by staying behind plausibly neutral institutions.

Both ideals—the Lone Ranger and the political neutrality of “efficient” law enforcement—help to sustain us all. Yet, the symbolic importance does not mean descriptive accuracy. The general idea of the Lone Ranger or bounty hunter is largely myth. In law and elsewhere, we might do better to recognize that no individual or set of individuals can clean up a town without a widely shared view—a truly public commitment—of what the town should be like. While we tinker with a belief in the perfectibility of private enforcement machinery, it is too easy to neglect the question of exactly how much enforcement of public laws—how much regulation—we really wish in our society. We avoid serious public questions by insisting on the perfectibility of private law enforcement. Indeed, the larger questions are often so well hidden that we frequently overlook the obvious and treat law enforcement as independent from governmental machinery. To the contrary, private attorneys general who piggyback their efforts on the government do not represent a flaw in the system; in crucial respects, they represent the system at its best.

The legal professional myth may have other serious problems. Concerned with staying on the right side of the line between political and legal policy, the leaders of the profession have been unable to maintain a clear vision of the private attorney general and what it is supposed to accomplish. The image has shifted dramatically in the past fifteen years,

154. For an exemplary study of legal practice and professional ideology, see Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS* 51 (G. Gawalt ed. 1984).

corresponding to some extent with a shift in the perceptions of law and politics. A retreating profession has contributed very little to the questions implicated by these changes and has finally been left with little terrain to defend "non-politically": the market—or legal mercenary—model of law enforcement. Questions relating to that model, as well as earlier versions of the ideal of the private attorney general, have important repercussions for the legal system and society. Answers to these serious questions lie not in debates over mythology, but in an understanding rooted in the practical operation of legal institutions.