

Spring 1982

# Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases

P.A. Paul-Shaheen

*Michigan Department of Public Health*

Harry Perlstadt

*Michigan State University*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Litigation Commons](#), and the [Sociology Commons](#)

## Recommended Citation

Paul-Shaheen, P.A. and Perlstadt, Harry (1982) "Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases," *Indiana Law Journal*: Vol. 57 : Iss. 3 , Article 2.

Available at: <http://www.repository.law.indiana.edu/ilj/vol57/iss3/2>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# Class Action Suits and Social Change: The Organization and Impact of the Hill-Burton Cases†

P.A. PAUL-SHAHEEN\*

HARRY PERLSTADT\*\*

Class action suits permit an individual or group to bring to court issues on behalf of themselves and others similarly situated but otherwise not specifically named. In many respects the existence of a class action suit does not change the basic tasks of the attorney—to discover precedent and to organize the best possible case for his or her clients. Class action suits can, however, add a dimension to the legal process that is best illuminated from a sociological perspective. This dimension encompasses the nature and the social organization of the class, the involvement of major social institutions as parties to the suit, the existence of social networks among attorneys, and the ability of class action suits to change attitudes, behavior, and general social patterns.

An earlier version of this paper<sup>1</sup> traced the precedent-setting judicial decisions arising from a series of class action suits claiming that hospitals receiving construction funds under the Hill-Burton Act<sup>2</sup> had incurred an obligation to provide free care and community service to the medically indigent and poor. This article's shift in focus to the sociological perspective has required construction of a sociology of class action suits from a wide range of theories and research. The article, therefore, opens with some sociological perspectives on the relationship between the legal system and social change with respect to class actions. A discussion of the legislative history and intent of the Hill-Burton Act along with brief summaries of the key class action suits follows. The article then addresses several questions of concern to the legal community with respect to class action suits: Is a class action suit a substitute for social organization? How can courts implement decisions when social institutions must change to

---

† An earlier version of this article was presented at the American Sociological Association Meetings in Toronto, Ontario, Canada, Aug. 24, 1981.

\* B.S. 1968, M.P.H. 1978, University of Michigan. Division Chief, Office of Local Health Services, Michigan Department of Public Health.

\*\* B.A. 1963, M.P.H. 1979, University of Michigan; M.A. 1966, Ph.D. 1973, University of Chicago. Associate Professor, Department of Sociology, Michigan State University.

<sup>1</sup> P. Paul-Shaheen & H. Perlstadt, *Judicial Influence on the Development of Health Policy: The Case of Hill-Burton Litigation* (1980) (article to be published in the *International Journal of Medicine and Law* (1982)) (article on file with *Indiana Law Journal*).

<sup>2</sup> Hospital Survey and Construction Act, Pub. L. No. 79-725, ch. 958, 60 Stat. 1041 (1945) (codified in scattered sections of 24, 31, 33, 42, 46, 48, 49 U.S.C.), as amended by the Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443, § 3(a), 78 Stat. 447 (codified at 42 U.S.C. §§ 291-291o (1976)).

carry them out? What limits the ability of class action suits to bring about changes in society?

### THE LEGAL SYSTEM AND SOCIAL CHANGE

Many legal scholars and sociologists have examined the question of whether the law is an instrument or consequence of social change. Some sociologists have claimed that the law is a product of previous social activity,<sup>3</sup> that it is intended to govern the relations among individuals and groups in society,<sup>4</sup> and that it generally reflects sentiments and interests of social and class solidarities.<sup>5</sup> From this perspective the law appears to lag behind social change and in fact acknowledges and legitimates such changes.<sup>6</sup> Others have argued that the law can be used as a force to promote change,<sup>7</sup> to resolve social problems,<sup>8</sup> to reform individuals, or to alter the organizational structure of society. From this perspective the law is an instrument of social change and it is society or segments of it that lag behind the law.<sup>9</sup> Regardless of the temporal relationship between the law and social change, both perspectives tend to focus on the ability of pressure groups, factions, and parties to influence the legislative process that creates the laws and the normative system.

The law, however, is not only legislatively enacted, it is administratively enforced and judicially upheld. Law is guaranteed by a bureaucratic staff ready to apply legitimate means to secure compliance. The capacity and willingness of administrative agencies to enforce the law varies, thereby raising conflicts over consistency and fairness of enforcement. From this perspective the law can be modified at the discretion of organizational and individual enforcers.<sup>10</sup> Finally, the law may be challenged on substantive or procedural grounds. The court settles disputes by deciding which side is right based on a normative standard such as a constitution or

---

<sup>3</sup> See generally H. BECKER, *OUTSIDERS* (1963); E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1933) [hereinafter cited as E. DURKHEIM, *DIVISION*]; E. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1938) [hereinafter cited as E. DURKHEIM, *RULES*]; K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY PARTS I & III* (R. Pascal trans. 1947); W. OGBURN, *SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE* (1922).

<sup>4</sup> See generally *id.*

<sup>5</sup> See generally Ross & Staines, *The Politics of Analyzing Social Problems*, 20 *SOC. PROB.* 18, 18-26, 32, 36 (1972).

<sup>6</sup> See generally H. BECKER, *supra* note 3; E. DURKHEIM, *DIVISION*, *supra* note 3; E. DURKHEIM, *RULES*, *supra* note 3; K. MARX & F. ENGELS, *supra* note 3; W. OGBURN, *supra* note 3.

<sup>7</sup> Dror, *Law and Social Change*, 33 *TUL. L. REV.* 787, 796-801 (1959).

<sup>8</sup> See Blumer, *Social Problems as Collective Behavior*, 18 *SOC. PROB.* 298, 304-05 (1971); Contra A. Rose, *Law and the Causation of Social Problems*, 16 *SOC. PROB.* 33 (1968) (law contributes to cause of social problems).

<sup>9</sup> See generally M. BERGER, *EQUALITY BY STATUTE* (1952); W. SUMNER, *FOLKWAYS* (1906).

<sup>10</sup> See generally K. ERICKSON, *WAYWARD PURITANS* (1966); P. MANNING, *THE NARCS' GAME* (1980); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966); M. WEBER, *ECONOMY AND SOCIETY* (G. Roth & C. Wittich eds. 1978); J. WILSON, *THE INVESTIGATORS* (1978); Parsons, *The Law and Social Control*, in *LAW AND SOCIOLOGY* 56, 61 (W. Evan ed. 1962).

accepted precedent.<sup>11</sup> The judgment may vary from a narrow expounding of the law to a broad interpretation and redefinition of the law. From this perspective the meaning and intent of the law is judicially malleable.<sup>12</sup>

These premises can be examined within the context of what have been termed norm-oriented movements.<sup>13</sup> Many social actions commonly designated as social movements or reform movements seek to establish or repeal laws, rules, regulations, or standards, and successful norm-oriented movements leave behind a legacy of formal proposals, new norms, or normative organizations. The civil rights, women's rights, and welfare rights movements occurring during the 1960's and 1970's have all used law in one form or another as a fulcrum to bring about social change.

One particular strategy used successfully in the civil rights struggle by the National Association for the Advancement of Colored People (NAACP) was the class action suit.<sup>14</sup> Here the NAACP asked the judiciary to establish new norms or authoritative standards for race relations based upon existing constitutionally defined values of equality and opportunity. Used in this manner, a class action suit can be considered a norm-oriented movement, one which seeks to change behaviors and social patterns in order to realize existing social values. In contrast, value-oriented movements seek to redefine what is good and transform society by establishing a new order based on the new values. A distinction exists between a "reform movement," which generally seeks to change the norms of society, and a "value-oriented movement," which generally seeks to change the values as well as the norms of society.

Once organized, reform or norm-oriented groups seek to change the rules through either legislative action or judicial decree. While political action represents a direct attempt to influence legislative bodies to change the laws, class action suits represent an indirect attempt. When using the court system to achieve reform, the discontented must find an attorney willing to take the case, a judge willing to hear the arguments, and a defendant willing to follow court orders. The leadership of social movements must formulate the belief in the cause and mobilize the discontented to action.<sup>15</sup> The recent prevalence and support for norm-

---

<sup>11</sup> Eckhoff, *The Mediator, the Judge and the Administrator in Conflict-resolution*, 10 ACTA SOCIOLOGICA 148, 158, 161-62 (1967).

<sup>12</sup> See generally G. SCHUBERT, JUDICIAL BEHAVIOR (1964); Bredemeier, *Law as an Integrative Mechanism*, in LAW AND SOCIOLOGY 73, *supra* note 10, at 73-90; Foster, *Public Law and Social Change*, in SOCIETY AND THE LAW 149-95 (F. Davis, H. Foster, C. Jeffery, & E. Davis eds. 1952).

<sup>13</sup> See generally N. SMELSER, THEORY OF COLLECTIVE BEHAVIOR (1963).

<sup>14</sup> See, e.g., NAACP v. City of Corinth, 83 F.R.D. 46 (N.D. Miss. 1979); NAACP v. Lansing Bd. of Educ., 429 F. Supp. 583 (W.D. Mich. 1976), *aff'd*, 559 F.2d 1042 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd & remanded*, 493 F.2d 614 (5th Cir. 1974); Beckett v. School Bd. of Norfolk, Va., 269 F. Supp. 118, 123-24 (E.D. Va. 1967); Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963), *aff'd per curiam*, 375 U.S. 395 (1964).

<sup>15</sup> See generally N. SMELSER, *supra* note 13; A. MAUSS, SOCIAL PROBLEMS AS SOCIAL MOVEMENTS (1975).

oriented, nonmilitant reform movements on the part of public interest attorneys has led several authors to suggest the existence of a new social institution, the public law industry.<sup>16</sup> The public law industry includes the legal services sections of government-sponsored programs as well as a number of private partnerships and firms which may be retained by voluntary social reform groups and welfare organizations.<sup>17</sup> The major objective of such legal activity is to better the conditions of members or constituents through administrative orders or judicial decrees. The major strategy used to accomplish this end is the class action suit.

From a sociological perspective, public interest attorneys have enabled organizations involved in class action suits to resolve what has been termed the "free rider" problem.<sup>18</sup> A review of the background literature on social movements indicates that most reform movements, including those using class action suits, are highly vulnerable to this problem.<sup>19</sup> Such a problem exists when a group achieves a benefit but cannot limit the enjoyment of that benefit to themselves alone. It has been suggested that the large dispersed membership often associated with social reform movements means that economic and social benefits accruing to any individual or group would not provide sufficient incentives to organize and to pursue and obtain the objectives.<sup>20</sup> Only a separate and selective incentive will stimulate a rational individual or group to act in a group-oriented way, and such an incentive must reward only those who are active and work for the collective good.

One set of individuals who can be stimulated to initiate action is the leadership of a mass movement or social reform organization. This leadership group can enjoy social power and prestige above and beyond the actual collective good which must be shared, and may evolve into a full-time professional staff which leads the organization with the less active members playing no serious role in the determination of policy. This is possible when the staff receives outside funding and does not depend on the feeble financial incentives provided by the membership.<sup>21</sup> Reform movements of a nonmilitant and more problem-oriented kind are often led by middle and upper middle class college-educated professionals.<sup>22</sup>

---

<sup>16</sup> See generally Handler, Ginsberg & Snow, *The Public Interest Law Industry*, in PUBLIC INTEREST LAW 42-79 (B. Weisbrod, J. Handler & N. Komesar eds. 1978); J. MCCARTHY & M. ZALD, RESOURCE MOBILIZATION AND SOCIAL MOVEMENTS (1977) [hereinafter cited as J. MCCARTHY & M. ZALD, MOBILIZATION]; J. MCCARTHY & M. ZALD, THE TREND OF SOCIAL MOVEMENTS IN AMERICA: PROFESSIONALIZATION AND RESOURCE MOBILIZATION (1973) [hereinafter cited as J. MCCARTHY & M. ZALD, TREND].

<sup>17</sup> See generally Handler, Ginsberg & Snow, *supra* note 16.

<sup>18</sup> See generally J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978); M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

<sup>19</sup> See generally M. OLSEN, *supra* note 18.

<sup>20</sup> See generally *id.*

<sup>21</sup> See generally W. GAMSON, THE STRATEGY OF SOCIAL PROTEST (1975); J. HANDLER, *supra* note 18; J. MCCARTHY & M. ZALD, MOBILIZATION, *supra* note 16.

<sup>22</sup> See generally A. MAUSS, *supra* note 15; A. OBERSCHALL, SOCIAL CONFLICT AND SOCIAL MOVEMENTS (1973).

Therefore, it is reasonable to assume that the theorists and advisors of a social reform organization engaged in litigation and class action suits would be disproportionately drawn from the legal profession and organized into public interest law firms serving various social reform groups.

The public interest lawyer can play a central role as intermediary between the social reform organization and the legal system which creates, interprets, and enforces the rules and norms of society. This suggests that the free rider problem could be overcome if public interest lawyers had sufficient incentives to organize or support social reform movements as well as construct and prosecute their class action suits. If this were the case, then it would be difficult to distinguish between public interest lawyers and political agitators. As an intermediary, however, the public interest lawyer is faced with costs as well as benefits, both for himself and for the reform movement he represents. His own costs extend beyond the ability of the social reform movement to pay for his services to legal ethics which frown upon organizing a case for his own personal benefit and serving as counsel for his own class action.<sup>23</sup>

The conditions for a class action suit also involve the relationship between the benefits and costs of the social reform movement itself.<sup>24</sup> Ongoing social programs are assumed to serve a concentrated core of needy beneficiaries with costs dispersed among millions of taxpayers or voluntary contributors. But quite often an attempt is made to expand the number of beneficiaries or the scope of services provided to the point where costs are no longer minimal for any individual or group. This means that not only do the activists have to face a free rider problem, but the potential concentration of costs will create a class of potential liabilitors<sup>25</sup> who will oppose the movement.

When potential benefits are dispersed but the potential costs are concentrated, social reform movements will have difficulty organizing and will face a protracted dual struggle: first to have their claims for broadening the number of beneficiaries or services recognized, and second to impose the increased costs of such a program upon a few identifiable individuals, firms, or government agencies. The class action suit, almost by definition, arises when potential benefits can be dispersed and potential costs are concentrated. The class action suit also faces a double battle: first to obtain standing in court so that substantive issues can be explored, and second to win a declaratory decree or injunction ordering the expansion of benefits and imposing costs upon the providers of those benefits.

---

<sup>23</sup> See Willis, *Prerequisites for a Class Action*, in *THE NEW FEDERAL CLASS ACTION RULE* 7, 10-11 (R. Clare ed. 1968).

<sup>24</sup> See generally J. HANDLER, *supra* note 18; J. WILSON, *POLITICAL ORGANIZATIONS* (1973). Cf. generally Wilson, *The Politics of Regulation*, in *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* 135 (J. McKie ed. 1974).

<sup>25</sup> Those who voluntarily provide benefits are "benefactors," but no term exists for those compelled to absorb costs without enjoying the benefits or receiving social rewards and status from the deed. The authors suggest "liabilitors" for those who unwillingly foot the bill.

The attempt to increase benefits does not always necessitate the concentration of costs upon a few identifiable providers or resources. In fact, the expected chain of events is that a group seeking to obtain benefits will press for new legislation through the political process. One scholar has argued that when a generalized belief exists that the regulation and social control over agents responsible for the current state of affairs is clearly inadequate to meet needs, two courses of action are possible.<sup>26</sup> The most likely is a normative reorganization—"there ought to be a law"—and subsequent legislative remedies in the form of new statutes. But a second or short-circuit course of action exists. It is possible to identify a specific flaw in the normative regulations and to correct that flaw through favorable administrative or judicial decisions.

This second course of action involves the class action suit, and occurs when benefits already exist, but are not adequately supplied or appropriately dispersed. The nature of the class action suit requires that the providers of the benefits be identified as defendants and the potential costs concentrated upon them. In this way, class action suits appear to short circuit the expected chain of events and could be considered a substitute for social organization and social reform movements.

#### THE HILL-BURTON OBLIGATIONS

This section presents a brief history of the Hill-Burton Act in order to understand the origins of the legal controversies that followed. The Act resulted from efforts by the American Hospital Association and other hospital groups to consolidate wartime subsidies and continue federal funding for hospital construction after the end of World War II.<sup>27</sup> The bill was not proposed by either the Roosevelt or Truman administrations nor by the leadership of Congress or the subcommittee on wartime health. Rather, it was introduced in early 1945 by two junior Senators, Lister Hill (D-Ala.) and Harold Burton (R-Ohio).<sup>28</sup> An examination of the express language of the original draft reveals that the bill was primarily addressing the construction of facilities where needed rather than the provision of health services to the needy.<sup>29</sup>

---

<sup>26</sup> See generally N. SMELSER, *supra* note 13.

<sup>27</sup> See the Lanham Act, Pub. L. No. 77-137, ch. 260, 55 Stat. 361 (1941) (omitted from 42 U.S.C. §§ 1521, 1532, 1541 [executed]; 1523, 1531, 1533-34 [obsolete]; 1551 [repealed by the Housing Act of 1954, Pub. L. No. 83-560, ch. 649, § 802(b), 68 Stat. 590, 642] (1976)), which provided for the construction of schools and hospitals, including private nonprofit hospitals. This act prohibited the federal government from exercising any supervision or control over the administration, personnel, or operations of nonfederally owned or operated facilities. *Id.*

<sup>28</sup> *Hospital Construction Act: Hearings on S. 191 before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 1, 6 (1945) [hereinafter cited as *Hospital Construction Act Hearings*].

<sup>29</sup> *Id.* at 1-6.

The bill was referred to the Senate Committee on Education and Labor, where attempts were made to add coverage for health services to the construction funds to create a comprehensive health package.<sup>30</sup> The advocates for a national health insurance (Senators James Murray (D-Mont.) and Claude Pepper (D-Fla.)) pointed out the incongruity of providing funds to construct hospitals in communities that did not have adequate funds to operate and maintain them.<sup>31</sup> Murray concluded that such hospitals would be forced to charge high fees for service and thereby deny access to individuals unable to pay but in need of hospitalization.<sup>32</sup>

In subcommittee meetings, a compromise between these two positions was reached. Language was inserted requiring that state plans assure that hospitals constructed with Hill-Burton funds be open to all persons in the community. (This requirement is hereafter referred to as the community service obligation.) Further federal regulations governing implementation could require that an applicant hospital give assurance that it would furnish a reasonable volume of services to persons unable to pay. (This requirement is hereafter referred to as the uncompensated care obligation.) These two requirements would become the focal points of the class action suits.<sup>33</sup> The bill became law without further provision for meeting maintenance or operating costs or for a national health insurance program to assist people in paying their hospital bills.<sup>34</sup> The Surgeon-General, and later the Secretary of Health, Education and Welfare (currently Health and Human Services), was authorized to make regulations and perform such other functions as necessary to carry out the provisions of the Act with the approval of a Federal Hospital Council.<sup>35</sup> States wishing to participate in the program had to designate a single state agency for the development, administration, and supervision of state plans for carrying out the provisions of the Act in accordance with the standards and regulations as prescribed by the Surgeon-General or the Secretary.<sup>36</sup>

The entire program was voluntary for both states and individual facilities and depended heavily on economic incentives and the ability to raise matching funds.<sup>37</sup> States received money if they developed plans in accordance with federal guidelines and facilities received money if they built according to the plans' determination of need.<sup>38</sup> While federal regula-

---

<sup>30</sup> S. REP. NO. 674, 79th Cong., 1st Sess. (1945).

<sup>31</sup> *Hospital Construction Act Hearings*, *supra* note 28, at 26, 177.

<sup>32</sup> *Id.* at 177.

<sup>33</sup> See Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 NW. U.L. REV. 168 (1975) [hereinafter cited as Rose, *Pitfalls*].

<sup>34</sup> See Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978).

<sup>35</sup> Hospital Survey and Construction Act, Pub. L. No. 79-725, ch. 958, § 2, 60 Stat. 1041, 1042-44, 1048-49 (1945).

<sup>36</sup> *Id.* at 1041-42, 1043-46.

<sup>37</sup> K. WING, *THE LAW AND THE PUBLIC'S HEALTH* 133 (1976).

<sup>38</sup> *Id.*



tions and state plans developed criteria for setting priorities among requests for funds and for allocating monies, no criteria dealt with efficiency of operations or with monitoring the assurances for meeting the twin obligations of community service and uncompensated care.<sup>39</sup> From 1947 through 1968, Congress appropriated \$3.2 billion for 424,000 in-patient beds,<sup>40</sup> while the uncompensated care and community service provisions of the program remained in abeyance.

### THE ORIGIN OF THE MOVEMENT

For almost twenty years the only set of class action suits that in any way touched on the Hill-Burton Act centered on racial discrimination.<sup>41</sup> The courts held that a private hospital receiving Hill-Burton funds was engaged in state action and was therefore directly subject to the provisions of the fourteenth amendment.<sup>42</sup> These hospitals could not refuse emergency care or hospital admission nor deny appointment to the medical staff on the basis of race, color, creed, or national origin.<sup>43</sup>

The enforcement of these judicial decisions and compliance with the 1964 Civil Rights Act with respect to health care rested in the Office of the General Counsel of the Department of Health, Education and Welfare (HEW).<sup>44</sup> The Acting Chief of the Health Civil Rights Branch from 1966 to 1968 was Marilyn G. Rose, a cum laude graduate of Harvard Law School with previous experience in the field of national labor relations.<sup>45</sup> In the course of her work, she discovered the community service and uncompensated care obligations under the Hill-Burton Act and wrote an internal memorandum outlining the potential use of these obligations in the area of access to health care for minorities and the poor.<sup>46</sup> The war on poverty was in full swing at the time, with the problems relating to health care and poverty assumed to have been solved by the passage

---

<sup>39</sup> W. SHONICK, ELEMENTS OF PLANNING FOR AREA-WIDE PERSONAL HEALTH SERVICE 39 (1976).

<sup>40</sup> Rose, *Hospital Admission of the Poor and the Hill-Burton Act*, 3 CLEARINGHOUSE REV. 185, 191 (1969) [hereinafter cited as Rose, *Hospital Admission*]. Of the 424,000 in-patient beds, an estimated 312,000 were in general hospitals. *Id.*

<sup>41</sup> See *Flagler Hosp., Inc. v. Hayling*, 344 F.2d 950, 950 (5th Cir. 1965) (per curiam); *Eaton v. Grubbs*, 329 F.2d 710, 715 (4th Cir. 1964).

<sup>42</sup> *E.g.*, *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 967-68 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

<sup>43</sup> *E.g.*, *Flagler Hosp., Inc. v. Hayling*, 344 F.2d at 950; *Eaton v. Grubbs*, 329 F.2d at 715.

<sup>44</sup> Telephone interviews with Marilyn G. Rose, Attorney for plaintiffs in the following cases: *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603 (E.D. La. 1970), 61 F.R.D. 354 (E.D. La. 1972); *Lugo v. Simon*, 426 F. Supp. 28 (N.D. Ohio 1976); *Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973); *Eastern Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974); and *Euresti v. Stenner*, 458 F.2d 1115 (10th Cir. 1977) (April 15, 17, 21, 1981).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

of Medicare and Medicaid.<sup>47</sup> Thus, Rose received no response to her memorandum and HEW failed to follow up on it.<sup>48</sup>

In 1968 Rose transferred to the Department of Labor, but remained in the Washington, D.C., area, where she became involved in the Washington tenant rent strike.<sup>49</sup> She met a number of legal service lawyers including the newly appointed director of the National Legal Program on Health Problems of the Poor (currently the National Health Law Program (Nhelp) of the Legal Services Corporation), who asked her to join the program in Los Angeles and pursue her interests in access to health care for the medically indigent and poor.<sup>50</sup>

Nhelp was originally part of the Office of Economic Opportunity (OEO) with a research and training center in Philadelphia and a backup-support center in Los Angeles.<sup>51</sup> The backup-support center served as an informational clearing house for legal developments and cases in the area of health and poverty and provided legal assistance and counsel to OEO Neighborhood Legal Services programs around the country.<sup>52</sup> In addition, the backup-support center engaged in research, drafting model legislation, monitoring administrative agency rulemaking, and participating in court litigation and test cases, mostly on the appellate level.<sup>53</sup>

Rose joined Nhelp in October 1969<sup>54</sup> and within five months published two articles in which she set forth the premise and supporting arguments that a hospital constructed, modernized, or expanded under the Hill-Burton program had statutory, contractual, and constitutional obligations not to deny services to persons otherwise self-supporting who cannot afford to pay for such services.<sup>55</sup> Such hospitals should not be permitted to fulfill their uncompensated care obligations by rendering services to Medicare or Medicaid patients because the provisions of the Act were specifically aimed at covering medically indigent persons unable to pay.<sup>56</sup> Denial of service to this class was an actionable wrong.<sup>57</sup>

In her articles, Rose argued that such cases could be brought as class actions in the federal courts. On the question of standing, the procedural

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See generally Handler, Ginsberg & Snow, *supra* note 16.

<sup>52</sup> See generally *id.*

<sup>53</sup> See generally *id.*

<sup>54</sup> Telephone interviews with Marilyn G. Rose, *supra* note 44.

<sup>55</sup> *Id.*

<sup>56</sup> Rose defined "medically indigent persons" as those "who are not covered by health insurance or are ineligible for coverage by the existing welfare or medicaid plan and cannot meet the required deposit or pay the hospital bills out of their income." Rose, *Hospital Admission*, *supra* note 40, at 185.

<sup>57</sup> See *id.*; Rose, *The Duty of Publicly-Funded Hospitals to Provide Services to the Medically Indigent*, 3 CLEARINGHOUSE REV. 254 (1970) [hereinafter cited as Rose, *Medically Indigent*].

issue of who can sue, Rose<sup>58</sup> suggested that the Secretary of the Department of Health, Education and Welfare has the inherent power to seek judicial enforcement of the terms and conditions of the Hill-Burton grants and loans. Such legal action is unlikely because HEW, in observance of the federal system, is reluctant to interfere in the operations of a state agency under a federal-state grant-in-aid program. Furthermore, HEW apparently acquiesced to the claims of the hospitals that their obligation could be met through the provision of services to Medicare and Medicaid patients because these payments did not meet the full cost of providing care.<sup>59</sup>

Rose contended that when the separation and delegation of powers between the federal and state agencies fails to insure provision of services to a class of beneficiaries, in this case the poor and medically indigent, people within the class the legislation is designed to protect or benefit can sue for the enforcement of the obligations even though the statute does not confer such standing explicitly. She argued that, intended or not, the Act clearly contained a contractually binding requirement for receipt of grant funds, and that the free care provision had been added by the very Senators who realized the bill lacked funds to support and maintain hospitals in needy communities.<sup>60</sup>

Rose ended her 1969 article with the following statement: "The National Legal Program on Health Care for the Poor is interested in assisting Legal Services projects representing their clients who have been denied admission to hospitals because of inability to pay."<sup>61</sup> She then undertook a survey to discover the nature and extent of the problem and visited various areas of the country to see where the issue was ripe for litigation.<sup>62</sup> Out of this activity and contacts from other attorneys with potential test cases, Marilyn G. Rose was to become an attorney of record in *Cook v. Ochsner Foundation Hospital*,<sup>63</sup> *Lugo v. Simon*,<sup>64</sup> *Eastern Kentucky Welfare Rights Organization v. Simon*,<sup>65</sup> and *Euresti v. Stenner*.<sup>66</sup> In these and other suits the courts began a process to define and allocate potential benefits to the poor and medically indigent under the Hill-Burton Act.

The following sections of the article examine several Hill-Burton class action suits. The sections present the background facts, discuss the nature

---

<sup>58</sup> See generally Rose, *Medically Indigent*, *supra* note 57.

<sup>59</sup> See generally *id.*

<sup>60</sup> See generally *id.*

<sup>61</sup> Rose, *Hospital Admission*, *supra* note 40, at 193.

<sup>62</sup> Telephone interviews with Marilyn G. Rose, *supra* note 44.

<sup>63</sup> 319 F. Supp. 603 (E.D. La. 1970) (defendant's pretrial motion to dismiss denied) (Cook I), 61 F.R.D. 354 (E.D. La. 1972) (plaintiff's motion for summary judgment granted) (Cook II), *aff'd*, 559 F.2d 968 (5th Cir. 1977) (Cook III).

<sup>64</sup> 426 F. Supp. 28 (N.D. Ohio 1976) (Lugo I).

<sup>65</sup> Eastern Ky. Welfare Rights Org. v. Shultz, 370 F. Supp. 325 (D.D.C. 1973) (Eastern Kentucky I), *rev'd*, Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974) (Eastern Kentucky II), *vacated & remanded*, 426 U.S. 26 (1976) (Eastern Kentucky III).

<sup>66</sup> 458 F.2d 1115 (10th Cir. 1977).

of the class, analyze the major legal points, and explain the social impact of the cases.

### THE HILL-BURTON LAWSUITS

#### *The Leading Case: Cook v. Ochsner Foundation Hospital*

The first and leading class action suit addressing enforcement of obligations under the Hill-Burton Act is *Cook v. Ochsner Foundation Hospital*.<sup>67</sup> Eight individual plaintiffs brought suit in the United States District Court for the Eastern District of Louisiana claiming that ten New Orleans hospitals "were ignoring their commitments . . . to the Louisiana Hill-Burton Agency with respect to assurances made in their grant applications" for the provision of "a reasonable volume" of services to the poor, either through providing free care or care at below-cost charges.<sup>68</sup>

The ten hospitals claimed the plaintiffs lacked standing under the Act, arguing that the claims and demands for uncompensated care should not be recognized or even considered by the court because the plaintiffs did not constitute a class able to enforce the provisions of the Act through adjudication.<sup>69</sup> The court agreed that the Act did not give the plaintiffs express authority to bring the private action. In order for the plaintiffs to institute a private action, the court said, they would have to be regarded as third party beneficiaries of a contract under the Act.<sup>70</sup> The court then went on to define the only real beneficiaries of a hospital program such as Hill-Burton as those people who need or may need medical treatment. The court agreed to hear a class action suit even though no section of the law expressly authorized it.<sup>71</sup> By obtaining standing in court, legal services attorneys achieved the first step facing a law reform movement under conditions of potentially distributed benefits but potentially concentrated costs. But recognition of the legitimacy of the complaint only permitted the possibility of a short-circuit outcome of correcting a flaw in normative regulations governing hospitals. It took another two years for a decision on the merits of the case.

Of all the classes in suits discussed in this article, the plaintiffs in *Cook* more truly constituted a social as well as a legal class. Most of the women who brought the suit knew each other through neighborhood groups and a tenants' association.<sup>72</sup> The New Orleans Volunteers in Service to America

---

<sup>67</sup> 319 F. Supp. 603 (E.D. La. 1970), 61 F.R.D. 354 (E.D. La. 1972), *aff'd*, 559 F.2d 968 (5th Cir. 1977) (Cook I, Cook II, and Cook III, respectively).

<sup>68</sup> Rose, *Pitfalls*, *supra* note 33, at 172. *See also* *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 356 n.1 (Cook II).

<sup>69</sup> *See* *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603 (E.D. La. 1970) (Cook I).

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> Telephone interview with Jeffrey B. Schwartz, Attorney for plaintiffs in *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. 354 (E.D. La. 1972) (Cook II) (April 30, 1981).

(VISTA) and OEO neighborhood programs had been working with these women for some time and were in the process of bringing lawsuits concerning housing when Jeffery B. Schwartz, an attorney with the New Orleans Legal Services Program, noticed that two women consistently missed appointments and meetings.<sup>73</sup> He soon discovered that the women were late or absent because, when they took their children for medical attention, they ended up spending most of a day going from one hospital emergency or out-patient clinic to another in search of care.<sup>74</sup> Over time, access to health care slowly became a recognizable problem in an agency primarily concerned with better housing and tenants' rights.<sup>75</sup>

Schwartz, however, had no experience litigating health issues, and this, coupled with the emerging problem, motivated him to attend a conference in Chicago sponsored by the National Health Law Program in the spring of 1970.<sup>76</sup> There he met Marilyn G. Rose, who was leading a series of training sessions to help public interest lawyers recognize a range of health-related issues and identify legal solutions to specific problems.<sup>77</sup> Schwartz returned to New Orleans with a new set of ideas and began thinking about some legal strategies in the area of access to health care.<sup>78</sup> Rose returned to Los Angeles aware of a potential test case ripe for litigation.<sup>79</sup> Thus, the loosely linked social network of public interest lawyers and health advocates centered around the National Health Law Program would follow and support the case.<sup>80</sup>

Shortly after Schwartz' return, the State of Louisiana initiated budget cuts that affected service at the New Orleans Charity Hospital, a major institution serving the black community and the inner city poor.<sup>81</sup> The curtailment of services at Charity Hospital created demands for service at other New Orleans hospitals, including several that were traditionally closed to blacks.<sup>82</sup> Since these hospitals had received Hill-Burton funds,<sup>83</sup> it was reasonably easy to identify individuals who had been denied services based on their inability to pay and to initiate a class action suit to force fulfillment of the community service and uncompensated care obligations.

The lawyers' immediate objective was to get the ten hospitals to pro-

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Telephone interview with Armin Freifeld, Staff attorney for the National Health Law Program (Nhelp) (March 31, 1981); telephone interview with Ruth Galanter, Editor of the Nhelp Newsletter (April 24, 1981).

<sup>81</sup> Telephone interview with Jeffrey B. Schwartz, *supra* note 72.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 362 (Cook II).

vide free services to the medically indigent and poor.<sup>84</sup> In order to accomplish this, the attorneys had to address the problem created by the negligence of the Department of Health, Education and Welfare and the Louisiana Hill-Burton Agency.<sup>85</sup> These agencies had not carried out their duty to ensure that hospitals met their obligations under the program.<sup>86</sup> They had failed to issue any rules, regulations, or standards or to take other specific action with respect to the claims presented by the plaintiffs.<sup>87</sup> In 1972 Judge Comiskey held in *Cook* that the Secretary of HEW had violated his legal obligations to enforce the Hill-Burton Act, its regulations, and the assurances given by hospitals receiving Hill-Burton funds.<sup>88</sup>

One course of action in such a situation is for the court to issue a writ of mandamus ordering the Secretary to write the regulations, promulgate them, and enforce them. But courts seem to prefer alternatives other than ordering a member of the executive branch to take a positive action. Instead of directly confronting HEW or the State of Louisiana, Judge Comiskey ordered the hospitals to develop their own set of rules covering the free care and community service obligations, subject to review by the court and all litigating parties.<sup>89</sup>

Under the negotiated agreements, the hospitals were to provide free and below-cost services to persons unable to pay, make prior determination of eligibility for services to persons unable to pay, and increase their participation in the Medicaid program.<sup>90</sup> The hospitals could count any losses in accepting Medicaid beneficiaries toward the dollar amount of care prescribed in the agreement, although the plaintiffs reserved the right to challenge the losses and to contend that properly administered Medicaid programs should incur no losses.<sup>91</sup> Judge Comiskey gave the agreement the status of a court order to be fulfilled within one year, but said it could be superseded and supplanted by final regulations issued by HEW.<sup>92</sup> Ten days before the interim court settlement was published and approximately ninety days before the final court order was to take effect, HEW issued a temporary regulation in the *Federal Register*.<sup>93</sup>

By creating a new normative system applicable only to ten hospitals in New Orleans, Judge Comiskey was able to short circuit the outcome,

---

<sup>84</sup> Telephone interview with Jeffrey B. Schwartz, *supra* note 72.

<sup>85</sup> *Id.*; see generally *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 361-66 (Cook II).

<sup>86</sup> *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 361-66 (Cook II); see also telephone interview with Jeffrey B. Schwartz, *supra* note 72.

<sup>87</sup> Telephone interview with Jeffrey B. Schwartz, *supra* note 72; see also *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 364 (Cook II).

<sup>88</sup> *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. at 361 (Cook II).

<sup>89</sup> *Id.* at 356-57 n.1.

<sup>90</sup> *Id.* at 356 n.1.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 356-57 n.1.

<sup>93</sup> 37 Fed. Reg. 14,719 (1972) (codified in 42 C.F.R. § 53.111 (1972)), as amended by 38 Fed. Reg. 16,353-54 (1973) (codified in 42 C.F.R. § 53.111 (1973)).

move a lethargic bureaucracy into action, and indirectly force the Secretary to promulgate a national set of normative rules governing the twin Hill-Burton obligations. In retrospect, *Cook* resulted in the issuance of long-overdue regulations without the overt conflict and collective behavior that sociological theory might suggest.<sup>94</sup> The subsequent class action suits caused significant change, including some congressional action, which is the essence of a successful short circuit.

Corum v. Beth Israel Medical Center<sup>95</sup>

The interim regulations, issued on July 22, 1972, and finalized on March 13, 1973,<sup>96</sup> permitted hospitals a choice in meeting their free care obligations under the Hill-Burton Act. A facility was allowed to certify it would turn away no one who sought free care (commonly called the "open door policy") or was assumed to be in presumptive compliance if it provided uncompensated care in the amount not less than three percent of its operating costs (less costs attributable to Medicaid and Medicare) or ten percent of all federal assistance received by the hospital, whichever was the lesser.<sup>97</sup> The maximum time for a hospital to provide uncompensated care under a Hill-Burton contract was twenty years from the opening of the facility or portion thereof receiving the grant.<sup>98</sup> The regulations also contained standards regarding income eligibility criteria and billing procedures for persons unable to pay.<sup>99</sup>

The new regulations proved to be a legal lightning rod for some long standing grievances. In 1961 Beth Israel Medical Center, a large facility (373 beds) located on the lower east side of Manhattan, agreed to operate a neighborhood health clinic out of the old Gouverneur Hospital while a new hospital was constructed.<sup>100</sup> During the early stages of construction the city altered its plans and decided to build a chronic care facility instead.<sup>101</sup> This particular part of the city was predominantly Puerto Rican and black with some Chinese and an elderly Russian Jewish and Polish Catholic population.<sup>102</sup> It was probably one of the most organized communities in the country with a maze of ethnic clubs, political organizations, and special interest groups.<sup>103</sup> Those who opposed the change in plans organized the Lower East Side Neighborhood Association, which

---

<sup>94</sup> See generally A. MAUSS, *supra* note 15; N. SMELSER, *supra* note 13.

<sup>95</sup> 373 F. Supp. 550 (S.D.N.Y. 1974) (Corum II).

<sup>96</sup> See note 93 *supra*.

<sup>97</sup> 42 C.F.R. §§ 53.111(b)(4), (d) (1973).

<sup>98</sup> See note 93 *supra*.

<sup>99</sup> *Id.*

<sup>100</sup> B. EHRENREICH & J. EHRENREICH, *THE AMERICAN HEALTH EMPIRE* 270 (1970).

<sup>101</sup> *Id.* at 270-72.

<sup>102</sup> *Id.* at 269-70.

<sup>103</sup> See generally *id.* at 268-79.

collected 10,000 signatures on a petition demanding that the original neighborhood health-general care facility be built.<sup>104</sup> In 1967 the city agreed to construct a facility with 120 general care and 85 chronic care beds but no maternity or surgical services.<sup>105</sup>

The Lower East Side Neighborhood Association monitored the developments at Beth Israel, and when the hospital applied for OEO funds for the neighborhood clinic, the Association's Health Council became the clinic's community advisory board.<sup>106</sup> Unfortunately, the Health Council's advice and suggestions were generally ignored by the hospital's administration.<sup>107</sup> This frustrating situation led the Health Council to team up in 1969 with a few dissidents from the Beth Israel local of the Drug and Hospital Worker's Union to form a more activist coalition of neighborhood people and employees.<sup>108</sup> The collaborative effort produced a series of confrontations and demonstrations at the hospital.<sup>109</sup> Several people were arrested, the dissident workers fired, and the Association's Health Council informed that it would no longer be recognized as the health clinic's community advisory board.<sup>110</sup>

Until July 1, 1971, Beth Israel accepted all patients who applied for treatment at the clinic and charged for its services according to a citywide sliding fee schedule.<sup>111</sup> The sliding fee schedule was possible because other federal subsidies were available to defray expenses.<sup>112</sup> However, these funds dwindled during the early years of the Nixon administration<sup>113</sup> and Beth Israel responded by increasing charges. After July 1, Beth Israel accepted only those who could pay forty-five dollars per visit or were eligible for Medicaid or Medicare.<sup>114</sup> Faced with higher prices, patients began complaining to various neighborhood associations and social welfare organizations.<sup>115</sup>

In search of assistance, Judy Wessler, a health advocate, approached the legal services section of Mobilization for Youth, where she met Louise Lander, a recent law school graduate who had been at the National Health Law Program training center at the University of Pennsylvania in Philadelphia.<sup>116</sup> Although Lander's main interest was poverty law, she was

---

<sup>104</sup> *Id.* at 271-72.

<sup>105</sup> *Id.* at 271.

<sup>106</sup> *Id.* at 272.

<sup>107</sup> *Id.* at 272-73.

<sup>108</sup> *Id.* at 275-76.

<sup>109</sup> *Id.* at 276-77.

<sup>110</sup> *Id.* at 277-79.

<sup>111</sup> *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909, 913 (S.D.N.Y. 1973) (Corum I).

<sup>112</sup> Telephone interview with Judith Wessler, Advocate for plaintiffs in the following cases: *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973) (Corum I); *Corum v. Beth Israel Medical Center*, 373 F. Supp. 550 (S.D.N.Y. 1974) (Corum II) (May 17, 1981).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; Telephone interview with Louise Lander, Attorney for plaintiffs in the following



willing to help and was able to devise a legal theory attacking the Hill-Burton regulations.<sup>117</sup> Meanwhile Wessler searched the neighborhoods for individuals who had been denied clinic services solely because of their inability to pay and who were willing to bring suit. Through her contacts with the community organizations she found Jeanette Corum and one other person.<sup>118</sup> Lander convinced the Lower East Side Neighborhood Association, which had been struggling against Beth Israel for almost ten years, and the Lower East Side Coalition for Humane Housing to lend their names and become corporate plaintiffs along with the two individual plaintiffs.<sup>119</sup> In contrast to *Cook* in which the plaintiffs were all individuals who knew each other and who had been working with the lawyers on other poverty-related problems,<sup>120</sup> the "class" in *Corum* consisted of two individuals who were sought out by a health advocate and a lawyer, and two neighborhood associations which claimed to represent the "class," but apparently did not have members who actually had legal "status" within that "class."<sup>121</sup>

While the immediate objective in *Corum* was to get Beth Israel to lower its costs and to provide free care, the main legal struggle focused on the new regulations and whether Beth Israel's actions were illegal under them. The regulations allowed a hospital to postpone the determination of an individual's eligibility for free care until after the services had been rendered, and in fact, until after the bill had been sent. This permitted hospitals to continue what was apparently an established practice of classifying uncollectable debts as charity, and then claiming this amount towards their Hill-Burton obligations. As a corollary, it permitted medically indigent and poor people to obtain services at the cost of being dunned for a period of time until the books were cleared and the debt reclassified as charity. This charade was somewhat beneficial to both the hospitals and the patients, but made it difficult to find individuals who had been truly denied service.

In *Corum* Judge Lasker sympathized with the hospital's wish to count uncollectable debts towards its Hill-Burton obligations, but said that a difference existed between persons unable to pay and persons unwilling to pay.<sup>122</sup> The former have a genuine inability to pay and are the true beneficiaries of charity obligations, while the latter merely refuse to pay

---

cases: *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973) (*Corum I*); *Corum v. Beth Israel Medical Center*, 373 F. Supp. 550 (S.D.N.Y. 1974) (*Corum II*) (April 17, 1981).

<sup>117</sup> Telephone interview with Judith Wessler, *supra* note 112.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; Telephone interview with Louise Lander, *supra* note 116.

<sup>120</sup> Telephone interview with Jeffrey B. Schwartz, *supra* note 72 & accompanying text.

<sup>121</sup> Telephone interview with Judith Wessler, *supra* note 112; telephone interview with Louise Lander, *supra* note 116.

<sup>122</sup> *Corum v. Beth Israel Medical Center*, 373 F. Supp. at 557 (*Corum II*).

for a variety of reasons. Judge Lasker decided that the best way to separate the two groups was to determine eligibility prior to rendering services.<sup>123</sup>

As a class action suit, *Corum* did not win more benefits for the people of the Lower East Side. It did, however, alter the practices Beth Israel used to determine eligibility, and possibly defused a situation that could have led to a resumption of the demonstrations and marches that had occurred a few years earlier. The impact of the case was most evident at the national level. Soon after Judge Lasker's ruling on prior determination of eligibility, the Department of Health, Education and Welfare incorporated the decision into the new Hill-Burton regulations.<sup>124</sup> An administrative agency adopted a judicial decision believing that such rules were not likely to be challenged successfully in the courts which drafted them.

Judge Lasker, however, dismissed plaintiff's claims that the HEW formula used to calculate the hospital's uncompensated care obligation was arbitrary and unfair. He noted that Beth Israel had a very small grant compared with the total volume of charity care it provided.<sup>125</sup> He also upheld the twenty-year limit on providing uncompensated care although the Act did not specify the duration of obligations to provide uncompensated care and community service. The only limitation in the Act involved a twenty-year period for loan repayment and a twenty-year recovery period for the government should the hospital close or otherwise default.<sup>126</sup> Judge Lasker wrote that in the absence of a congressional determination of the duration of obligations, the presumptive compliance guidelines combined with the twenty-year term of uncompensated care produced a reasonable result given the size of the grant.<sup>127</sup>

Congress disagreed with the thrust of Judge Lasker's interpretation of the twenty-year limit. In the National Health Planning and Resources Development Act of 1974,<sup>128</sup> Congress decided that any new uncompensated care and community service obligations would be indefinite. Congress, of course, could not make the law retroactive. Subsequent court decisions<sup>129</sup> have upheld the original twenty-year limit for uncompensated care but have extended indefinitely the community service obligations. The former had a potential economic impact on hospitals, while the latter

---

<sup>123</sup> *Id.* at 557-58.

<sup>124</sup> See note 130 *infra*.

<sup>125</sup> *Corum v. Beth Israel Medical Center*, 373 F. Supp. at 556 (*Corum II*).

<sup>126</sup> *Id.* at 556-57.

<sup>127</sup> *Id.* at 556.

<sup>128</sup> 42 U.S.C. §§ 300o-300t-14 (1976 & Supp. IV 1980), as amended by the Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, §§ 127(e), 201-204, 301, 93 Stat. 592, 629-40 (1979), as amended by The Department of Education Organization Act, Pub. L. No. 96-88, § 509(b), 93 Stat. 668, 695 (1979).

<sup>129</sup> *Cook v. Ochsner Found. Hosp.*, 559 F.2d 968, 974 (5th Cir. 1977) (*Cook III*); *Lugo v. Simon*, 426 F. Supp. 28, 35 (N.D. Ohio 1976) (*Lugo I*).

had almost none. Currently, facilities funded before 1975 have a twenty-year limit on free care and an indefinite obligation under community service, while those funded under the 1974 amendments have indefinite obligations under both.<sup>130</sup>

The *Corum* decision influenced the development of normative rules in both the legislative and executive branches of the federal government. Testifying before congressional committees and administrative hearings, witnesses criticized HEW and the state agencies' failure to enforce regulations since 1972.<sup>131</sup> The short-circuiting process, however, removed the plaintiffs and the social movement from much of the action and placed the mantle of leadership on the shoulders of lawyers, judges, and legal experts, who can legitimately change the norms, rules, and laws.<sup>132</sup> While this may remove the strains giving rise to ambiguity in social systems and short circuit more active forms of collective behavior, the personal satisfactions and benefits to the individuals who initially brought the suit must be somewhat diminished.

Lugo v. Simon *and* Eastern Kentucky Welfare  
Rights Organization v. Simon

Just as Congress was putting the finishing touches on the 1974 amendments, a class action suit, *Lugo v. Simon*,<sup>133</sup> was filed in northern Ohio on behalf of several migrant laborers with a variety of complaints against area hospitals. Some of the migrants had been denied hospital services because they were unable to pay a forty-five dollar deposit, while others received services but were later billed although the hospitals knew they were unable to pay.<sup>134</sup> Over a brief period of time each of the plaintiffs approached an attorney about their problem, and soon the lunchtime conversations among lawyers in and around Bowling Green, Ohio, began centering on the sudden boom in migrant-versus-hospital cases. One local attorney, Marvin Feingold of the Ohio Migrant Legal Action Program, contacted John P. Worcester, his backup resource person in Toledo, and they decided to consolidate the complaints into one class action suit.<sup>135</sup> The plaintiffs in *Lugo* shared a common market experience with the hospitals and were part of an economic class but not a social class.<sup>136</sup> In

<sup>130</sup> 44 Fed. Reg. 29,372, 29,375-82 (1979) (codified in 42 C.F.R. §§ 124.501-607 (1979)).

<sup>131</sup> Note, *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor*, 39 MD. L. REV. 316, 345 (1979).

<sup>132</sup> See generally N. SMELSER, *supra* note 13, at 307-08.

<sup>133</sup> 426 F. Supp. 28 (N.D. Ohio 1976) (*Lugo I*).

<sup>134</sup> *Id.*

<sup>135</sup> Telephone interview with John Worcester, Attorney for plaintiffs in the following cases: *Lugo v. Simon*, 426 F. Supp. 28 (N.D. Ohio 1976) (*Lugo I*); *Lugo v. Simon*, 453 F. Supp. 677 (N.D. Ohio 1978) (*Lugo II*) (April 14, 1981).

<sup>136</sup> For discussions of distributions of economic power within a class situation determined by market structure, and of economic classes, see M. WEBER, *supra* note 10, at 926-28.

fact, the individual plaintiffs did not know each other beforehand and met for the first and only time at the initial court hearing.<sup>137</sup>

Worcester's brief presented a two-pronged attack. The first challenged the federal tax-exempt status of the hospitals following *Eastern Kentucky Welfare Rights Organization v. Simon*.<sup>138</sup> This particular strategy named the Secretary of the Treasury as the first defendant in a case that would eventually focus on the actions of the Secretary of Health, Education and Welfare.<sup>139</sup> Eastern Kentucky Welfare Rights Organization (EKWRO) was a grass roots group chartered in November 1969 at Teaberry in Floyd County, Kentucky, with the help of some VISTA volunteers.<sup>140</sup> One of its purposes was to improve the health of the region.<sup>141</sup> Such an organized effort was needed because the local physicians and hospitals were hostile and exploitive towards the poor.<sup>142</sup> Maxine Kenny, an organizer with previous experience at Health-PAC in New York, and other VISTA volunteers soon discovered the local custom of going "to law" someone, that is, to file a lawsuit over the slightest provocation.<sup>143</sup> This strategy was used initially by the organizers to build EKWRO and their first success was to get the local OEO health program defunded.<sup>144</sup> When one woman suffered severe complications in childbirth after she was denied admission to a local hospital, the membership of EKWRO wanted "to law" the hospital.<sup>145</sup> The organizers and VISTA lawyers counseled against such a suit, but the membership prevailed.<sup>146</sup>

The plaintiffs sought free care by challenging a 1969 Internal Revenue Service rule eliminating a provision requiring a hospital to provide service to those unable to pay in order to qualify as a tax-exempt charitable institution. The district court granted standing and disagreed with the IRS action.<sup>147</sup> If upheld, this would have concentrated the burden of providing charitable care on those hospitals wishing to retain their federal tax exempt status while forcing the IRS to collect taxes from those hospitals not providing free care to persons unable to pay. The IRS ap-

---

<sup>137</sup> Telephone interview with John Worcester, *supra* note 135.

<sup>138</sup> *Eastern Ky. Welfare Right Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (*Eastern Kentucky I*), *rev'd*, *Eastern Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974) (*Eastern Kentucky II*), *vacated & remanded*, 426 U.S. 26 (1976) (*Eastern Kentucky III*).

<sup>139</sup> *See Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (*Eastern Kentucky I*).

<sup>140</sup> Telephone interview with Maxine Kenny, Organizer for plaintiffs in *Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (*Eastern Kentucky I*) (April 30, 1981).

<sup>141</sup> Articles of Incorporation of Eastern Kentucky Welfare Rights Organization, Inc., art. II, Floyd County, Kentucky, Identification no. 15,201 (filed and recorded Nov. 12, 1969) (copy on file with the *Indiana Law Journal*).

<sup>142</sup> Telephone interview with Maxine Kenny, *supra* note 140.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> 370 F. Supp. 325 (*Eastern Kentucky I*).

pealed and at this point the case came to the attention of Marilyn G. Rose, then with the National Health Law Program in Los Angeles.<sup>148</sup> The court of appeals, however, reversed the lower court decision, finding the IRS rule consistent with the intent of Congress and a permissible definition of charitable.<sup>149</sup> Two years later the Supreme Court decided that EKWRO could not establish standing simply because its purposes included the improvement of health care when it could not demonstrate any injury to the organization itself nor had the individuals named as plaintiffs been denied service.<sup>150</sup> Therefore EKWRO had no claim against the hospitals or the IRS. Without standing, the case died.<sup>151</sup>

In this instance, the class action suit might be considered to be the expected form of collective behavior given the practices of the people of eastern Kentucky and the strategies of the organizers. The case appears to have developed from the outside inward, overcoming the objections of the organizers and attracting the attention of the sociometric star of the health litigation network, Marilyn G. Rose. But the case was ultimately unsuccessful, perhaps because the sense of direct collective behavior and accompanying enthusiasm overrode the more measured and less emotional approaches found in the other health-oriented class action suits.<sup>152</sup>

After the court of appeals' decision in *Eastern Kentucky*, Rose was asked to handle the tax and standing aspects of *Lugo v. Simon*.<sup>153</sup> Eventually the tax aspect was dropped because EKWRO was unsuccessful and the amended complaint focused on the respective roles of the Ohio Department of Health and the federal Department of Health, Education and Welfare. This prong of the case followed the lines of argument in the *Cook* and *Corum* cases. Judge Young was able to uphold recently published decisions in *Corum* on the same issues. The remaining problem focused on the failure of the Ohio Department of Health and the Secretary of HEW to enforce the Hill-Burton obligations through promulgated regulations.

Following the 1972 *Cook* decision, HEW produced various sets of regulations.<sup>154</sup> Concerns had surfaced regarding their enforcement and in 1974 the Senate noted the sorry performance of prior enforcement ef-

---

<sup>148</sup> Telephone interview with Marilyn G. Rose, *supra* note 44.

<sup>149</sup> *Eastern Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974) (*Eastern Kentucky II*).

<sup>150</sup> *Eastern Ky. Welfare Rights Org. v. Simon*, 426 U.S. 26 (1976) (*Eastern Kentucky III*).

<sup>151</sup> *Id.*

<sup>152</sup> *See, e.g.*, *Lugo v. Simon*, 426 F. Supp. 28 (N.D. Ohio 1976) (*Lugo I*); *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603 (E.D. La. 1970) (*Cook I*), 61 F.R.D. 354 (E.D. La. 1972) (*Cook II*), *aff'd*, 559 F.2d 968 (5th Cir. 1977) (*Cook III*).

<sup>153</sup> 426 F. Supp. 28 (N.D. Ohio 1976) (*Lugo I*); *Lugo v. Simon*, 453 F. Supp. 677 (N.D. Ohio 1978) (*Lugo II*).

<sup>154</sup> 39 Fed. Reg. 31,766-68 (1974) (codified in 42 C.F.R. §§ 53.1, 53.112-.113 (1974)); *see also* note 93 *supra*.

forts by the Secretary and HEW.<sup>155</sup> In response, Congress wanted to establish a permanent office to review complaints against individual hospitals and state Hill-Burton agencies, but this language was dropped from the bill.<sup>156</sup> The issues at law in *Lugo*, then, were whether the enforcement of a shared federal-state program should be centralized in the federal agency, whether that agency would actually enforce the provision of the Act, and what role the court should play in upholding its provisions.<sup>157</sup>

Judge Young agreed with the plaintiffs that the Ohio Department of Health could not determine its own compliance with the Hill-Burton provisions<sup>158</sup> but later found that the plaintiffs had not exhausted all their administrative remedies.<sup>159</sup> He therefore directed them to submit their complaints to the Secretary of HEW.<sup>160</sup> The claim that the Secretary failed to fulfill his mandatory duty to issue regulations, however, could be tried because Congress had strongly suggested that a complaint procedure alone is insufficient to secure compliance.<sup>161</sup> The immediate effect of this decision was to turn the state and federal agencies against each other. Both filed accusatory cross-claims, the state asserting it no longer had the authority to enforce Hill-Burton provisions in the absence of HEW regulations and instructions, and HEW arguing that the Ohio Department of Health had submitted a compliance plan for hospitals that was vague and confusing and therefore unenforceable.<sup>162</sup> The court supported HEW's argument and ordered Ohio to modify its plan and implement and enforce both the plan and the federal regulations.<sup>163</sup>

Plaintiff's case against the Secretary and HEW for failure to issue regulations withstood the defendant's motions to dismiss.<sup>164</sup> In a consent decree, HEW then agreed to hold public hearings on proposed regulations, to mail copies of such proposed regulations to the public interest health community (including a list of some 900 names supplied by Marilyn G. Rose), to promulgate the final regulations by a given date, and to undertake compliance surveys on both Hill-Burton and civil rights aspects of the case.<sup>165</sup> *Lugo* brought the Hill-Burton rulemaking process into com-

---

<sup>155</sup> S. REP. NO. 1285, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7842, 7842.

<sup>156</sup> H. CONF. REP. NO. 1640, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7971, 7997. See also *Lugo v. Simon*, 453 F. Supp. at 685 (*Lugo II*).

<sup>157</sup> 426 F. Supp. at 31-32 (*Lugo I*).

<sup>158</sup> *Id.* at 32.

<sup>159</sup> 453 F. Supp. at 684 (*Lugo II*).

<sup>160</sup> *Id.* at 685.

<sup>161</sup> *Id.* at 685-86.

<sup>162</sup> *Id.* at 682.

<sup>163</sup> *Id.* at 691-92.

<sup>164</sup> *Id.* at 691.

<sup>165</sup> Telephone interviews with Marilyn G. Rose, *supra* note 44; *Lugo v. Simon*, No. 74-345 (N.D. Ohio Sept. 1, 1978) (*Lugo III*).

pliance with the already existing Administrative Procedure Act (APA),<sup>166</sup> which, somehow, it had previously circumvented. In addition, it led to the issuance of revised Hill-Burton regulations in 1979.<sup>167</sup>

The plaintiffs' primary objective throughout the case was a legal-judicial settlement of claims against them. But the potential benefits were essentially lost in the maze of bureaucratic procedures and rules which were the direct outcome of the case. The decision short circuited several possible conflicts between the judiciary and the executive branch and between the state and federal agencies. In fact, it is difficult to conceive of a set of actions that would force the Ohio Department of Health to follow federal guidelines or would force HEW to adhere to the Administrative Procedure Act or to issue mandated regulations without a judicial decree. In this respect, *Lugo* is similar to *Cook*, where a court consent agreement avoided a long and expensive trial. Hence, a short circuit occurred within the judicial system as well as among different branches of government.

#### Newsom v. Vanderbilt University Hospital

The last case to be discussed, *Newsom v. Vanderbilt University Hospital*,<sup>168</sup> was filed shortly after the National Health Planning Act<sup>169</sup> became law. Callie Mae Newsom had been hospitalized in 1971 at Vanderbilt University Hospital with a complicated pregnancy and overstayed her Medicaid coverage.<sup>170</sup> The hospital never told her about her potential Hill-Burton eligibility.<sup>171</sup> When she defaulted on the note, the hospital sued.<sup>172</sup> Upon returning to work she was dunned by a collection agency until she signed an agreement garnishing a portion of her wages to pay the hospital debts.<sup>173</sup> She approached Gordon Bonnyman of Legal Services of Nashville after being served with a trial date.<sup>174</sup>

Bonnyman first attempted to negotiate with hospital attorneys for an out-of-court settlement but received no response to his inquiries.<sup>175</sup> He then decided to file a class action suit, thereby allowing the courts to

---

<sup>166</sup> 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976 & Supp. IV 1980). In 1971 HEW voluntarily began promulgating all Department regulations under APA procedures and publishing them in proposed and final form in the *Federal Register*. See 36 Fed. Reg. 2532 (1971).

<sup>167</sup> See note 130 *supra*.

<sup>168</sup> 453 F. Supp. 401 (M.D. Tenn. 1978) (*Newsom I*), No. 75-126, slip op. (M.D. Tenn. Sept. 20, 1979) (*Newsom II*), *aff'd in part, rev'd in part, modified in part*, 653 F.2d 1100 (6th Cir. 1981) (*Newsom III*).

<sup>169</sup> See note 128 *supra*.

<sup>170</sup> Telephone interview with Gordon Bonnyman, Attorney for plaintiffs, *Newsom v. Vanderbilt Univ. Hosp.*, 453 F. Supp. 401 (M.D. Tenn. 1978) (*Newsom I*) (April 10, 1981).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

consider the future need of Newsom and other class members to uncompensated care beyond the eventual resolution of Newsom's past hospital bills.<sup>176</sup> In addition, Newsom, as one member of the class, could exhaust administrative remedies on behalf of the whole class and bring the case to trial on its merits.<sup>177</sup> This reasoning and set of procedures permits an attorney to transform an individual plaintiff's private trouble into a class action suit addressing major social problems and legal issues. It also tends to distribute potential benefits among members of the class and to concentrate costs on those who willingly or unwillingly must provide the benefits.

Bonnyman began by tapping into the health law network. He contacted John Worcester and received an early draft of the *Lugo* brief which he then incorporated into his own brief.<sup>178</sup> When Worcester later was searching for more information and ideas, he received Bonnyman's brief through the health law network.<sup>179</sup> Marilyn G. Rose was busy at the time with the tax exemption aspects of both *Eastern Kentucky* and *Lugo*, but her presence was felt. Judge Morton would cite an article that summarized and commented on the *Cook*, *Corum*, and *Eastern Kentucky* cases<sup>180</sup> and an article on the Hill-Burton obligations of nonprofit hospitals written by Rose with Jeffrey Schwartz, who worked on the *Cook* case.<sup>181</sup>

Many of the issues in *Newsom* were similar to those in previous cases. In *Corum* Judge Lasker had recommended that hospitals make a written determination of eligibility to pay before rendering service, and this had been incorporated into the HEW regulations.<sup>182</sup> Some hospitals, however, viewed this solely as an internal bookkeeping procedure. Although prospective patients were routinely interviewed concerning their ability to pay, Vanderbilt University Hospital did not inform them of their potential eligibility or of the criteria and standards used by the hospital to categorize admissions under the Hill-Burton provisions.<sup>183</sup> According to Bonnyman, the court received as evidence internal hospital memorandums indicating that only acute terminal cases would be admitted as uncompensated care patients and that the hospital had instituted a monitoring mechanism for this policy because some of the house staff were trying to admit people in spite of the hospital directives.<sup>184</sup>

In his decision, Judge Morton determined that the provision of a

---

<sup>176</sup> *Id.*

<sup>177</sup> 653 F.2d at 1106 (Newsom III).

<sup>178</sup> Telephone interview with Gordon Bonnyman, *supra* note 170.

<sup>179</sup> Telephone interview with John Worcester, *supra* note 135.

<sup>180</sup> 453 F. Supp. at 404 n.1, 409 (Newsom I) (citing Rose, *Pitfalls*, *supra* note 33).

<sup>181</sup> 453 F. Supp. at 410 (Newsom I) (citing Schwartz & Rose, *Opening the Doors of the Non-Profit Hospital to the Poor*, 7 CLEARINGHOUSE REV. 655 (1974)).

<sup>182</sup> 40 Fed. Reg. 46,202-03 (1975) (codified in 42 C.F.R. § 53.111 (1976)).

<sup>183</sup> 453 F. Supp. at 416 (Newsom I).

<sup>184</sup> Telephone interview with Gordon Bonnyman, *supra* note 170.



reasonable volume of free care to the indigent was required by the Hill-Burton Act and constituted state action—that is, action that is under color of state law and is not voluntary on the part of the participating hospitals.<sup>185</sup> Therefore, the court held the fifth amendment due process clause could be applied through the fourteenth amendment. The court ruled that hospitals may deny medical care to indigent people only if they give meaningful notice of eligibility criteria, written reasons for a denial of services, and an opportunity to appeal to an administrator who did not participate in the initial denial and who must render a written decision with reasons.<sup>186</sup>

The plaintiffs also asked the court to issue a writ of mandamus to remedy the failure of the state and federal agencies to properly regulate, monitor, and enforce the free care provisions and eligibility procedures of the Act.<sup>187</sup> Judge Morton noted the court would have issued such a mandate “[h]ad the Secretary taken no steps toward complying with the mandate” of the statute, but pursuant to court orders, an affidavit had been filed on behalf of the Secretary stating that the proposed regulations would be promulgated shortly.<sup>188</sup>

This threat of mandamus, coupled with the *Lugo* consent agreement two months earlier, spurred HEW to issue new and updated regulations within a year.<sup>189</sup> The incorporation of judicial recommendations and opinions in the Hill-Burton regulations paralleled HEW actions following the *Cook* and *Corum* decisions. But the Court of Appeals for the Sixth Circuit reversed that portion of the lower court’s opinion and judgment requiring the adoption of due process procedures. The appeals court found that the “District Court’s determination of a due process right cannot rest upon something promulgated after the court made its decision,” even if the new regulations were more equitable and beneficial.<sup>190</sup> The Secretary of HEW was free, of course, to amend the regulations, but was not required to do so.<sup>191</sup>

The court of appeals reasoned that other suits<sup>192</sup> involved the government’s taking away of a benefit which had previously been enjoyed, but in the present case the regulations affected future benefits to the class.<sup>193</sup> It wrote: “[N]o member of the class, merely by being a member of the class, has any right to free services. Which class members will be benefited was left solely to the discretion of the hospital as long as a certain amount

---

<sup>185</sup> 453 F. Supp. at 422 (Newsom I).

<sup>186</sup> *Id.* at 424.

<sup>187</sup> *Id.* at 429.

<sup>188</sup> *Id.*

<sup>189</sup> 44 Fed. Reg. 29,372, 29,375-82 (1979) (codified in 42 C.F.R. §§ 124.501-607 (1979)).

<sup>190</sup> 653 F.2d at 1122 (Newsom III).

<sup>191</sup> *Id.*

<sup>192</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>193</sup> 653 F.2d at 1123 (Newsom III).

was provided."<sup>194</sup> This essentially resolved the social problem for the class as an aggregate, but created private troubles for those members of the class who would be denied services because the resources and obligations of any particular hospital are limited.

Another crucial question decided by the district court and upheld with some modifications by the appeals court was how to assess or measure a hospital's compliance with the Hill-Burton regulations. HEW had issued "presumptive compliance guidelines"<sup>195</sup> which essentially meant that an institution did not have to demonstrate its compliance until challenged in court. Intentional compliance, on the other hand, implies carrying out a set of actions with a commitment to meeting the end to be attained.<sup>196</sup> Judge Morton wrote that under presumptive compliance standards, "it is hard to imagine how Vanderbilt could have failed to comply,"<sup>197</sup> then commented in a footnote that "[i]f intentional compliance had been required, however, Vanderbilt might well have provided no Hill-Burton free care at all until recently."<sup>198</sup>

While not striking down the presumptive compliance guidelines or requiring intentional compliance in the future, the court held "the obligation to provide the care is necessarily coupled with a requirement that the hospital record and report the amount of such care [and] [i]f it failed to keep the proper records then it must bear the consequences."<sup>199</sup> The court ordered Vanderbilt to comply with existing reporting requirements, to document properly its claims of service under the Hill-Burton provisions, to desist certain collection practices against any patients for service who would have qualified for uncompensated care but for Vanderbilt's improper acts, and to provide notice of Hill-Burton eligibility with its billings.<sup>200</sup> The order was issued June 1, 1978, but by September 20, 1979, the court was forced to issue a civil contempt order against Vanderbilt for noncompliance.<sup>201</sup> The court specifically ordered Vanderbilt to produce records and documents to the Hill-Burton agency and the court similar to information required of hospitals in *Cook*.<sup>202</sup>

The *Newsom* case by itself cannot be considered a social movement or an example of collective behavior if one considers such a movement or such behavior to involve a fairly large group of people coming together to support and participate in some action. Perhaps *Newsom* represents the ultimate short circuit, in which one individual's private troubles are

---

<sup>194</sup> *Id.* at 1121.

<sup>195</sup> 453 F. Supp. at 411 n.10 (*Newsom I*).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 411.

<sup>198</sup> *Id.* at 411 n.11.

<sup>199</sup> *Id.* at 418.

<sup>200</sup> *Id.* at 419, 429-30.

<sup>201</sup> No. 75-126, slip op. (M.D. Tenn. Sept. 20, 1979) (*Newsom II*).

<sup>202</sup> See *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. 354, 356 n.1 (E.D. La. 1972) (*Cook II*).

transformed through a class action suit into a social problem, but then resolved on the societal level by normative changes that create new private troubles for some individuals in the future. The short circuiting, however, is not possible in isolation. The existence of the previous cases contributed to the readiness of attorneys to see the *Newsom* case as ripe for litigation as a class action suit and to the willingness of the courts to grant standing and to hear the case on its merits. The *Newsom* case is one short circuit in the health law movement that is part of a set of larger social forces in the health and social welfare arena.

### SOME SOCIOLOGICAL IMPLICATIONS OF THE CASES

The major premise of this paper is that class action suits provide one mechanism through which the judicial process can effect social change. The review of five class action suits related to the Hill-Burton Act supports this hypothesis. The ultimate outcome of four of the five cases was the promulgation of new government regulations in accordance with judicial opinions and interpretations of the law. In addition, at least one of the cases, *Corum*, influenced Congress in its deliberations over the National Health Planning and Resources Development Act of 1974.<sup>203</sup> Both the promulgation of revised sets of regulations and the passage of the 1974 act changed the behavior of state health departments which administered the Hill-Burton program and of the hospitals which had accepted Hill-Burton funds.

#### *The Class Action as a Substitute for Social Organization*

The beginning of this paper presented three questions<sup>204</sup> of concern to the legal community with respect to the sociology of class action suits. The article now examines them in light of the cases. The first question was: Is a class action suit a substitute for social organization?

---

<sup>203</sup> See note 128 *supra*.

<sup>204</sup> Another question is whether the social networks and communications among attorneys constitute a breach of professional ethics. A review of the Hill-Burton class action suits reveals a number of actions consistently taken by lawyers in developing and prosecuting their cases. These include discussing potential clients with other attorneys; referring clients to a single legal service firm; consolidating individual cases into a single class action suit (Lugo I and II); identifying, while working with a group of clients, a previously overlooked problem which is actionable (Cook I and II); actively searching for an individual with standing to serve as a plaintiff (Corum I and II); responding to client and activist pressures to pursue litigation regardless of the likelihood for success (Eastern Kentucky I and II); advising a client that the best course of action to avoid garnishment of wages for the removal of debt is to file a class action suit (Newsom I and II); educating and training attorneys in the latest legal developments; encouraging them to subscribe to newsletters; and offering attorneys assistance if they need consultation (Nhelp).

The issue is whether or not a difference exists between seeking out those with claims or grounds for action and seeking those with standing who can act as representatives of

Social organization is both a form and a process. Class action suits as a form of social organization involve the plaintiffs as a legal class which can vary in size and social solidarity.<sup>205</sup> As was the case in *Newsom*,<sup>206</sup> it is possible for a single individual to become the sole representative of a legal class. In *Eastern Kentucky* an organization became the plaintiff without specifying a particular individual representative.<sup>207</sup> In between these two extremes are *Lugo*, with several identifiable individuals;<sup>208</sup> *Cook*, with eight named plaintiffs;<sup>209</sup> and *Corum*, with a combination of two named individuals and two organizations.<sup>210</sup>

The social solidarity of the legal class can vary in several ways. The legal class can be individuals who occupy a common status and lifestyle and who are acquainted with each other. In *Cook* the legal class consisted of neighbors who were linked through a tenants' organization and who were, in sociological terms, a social group with face-to-face interactions. The legal class can also be an economic class, sharing the same occupation and mode of employment. In *Lugo* the plaintiffs were all migrant farmers who apparently did not know each other and who met for the first and only time in court. Finally, a legal class can consist of an organization interested in the acquisition of social power, that is, an action group or party.<sup>211</sup> In *Eastern Kentucky* the organization pushed ahead without even specifying a named individual plaintiff, and in *Corum*, the organization, in response to membership pressures and complaints, sought out plaintiffs who were not members in order to file the suit.

---

the class. This latter activity appears to be protected by the first amendment because the lawyers sought to litigate in the public interest and were not paid by their clients. See *In re Primus*, 436 U.S. 412 (1978). The authors do not attempt a legal analysis of whether the conduct of lawyers in class action suits complies with the Model Code of Professional Responsibility in terms of decisions to file class actions and the duties to represent a client competently and zealously. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(5); Canons 6-7 (1981). Carlin, who has done the major work on legal ethics in sociology, found that "[l]ower-status clients are most likely to provide lawyers with opportunities for exploitation and to end up with lawyers who are least capable of resisting temptation." J. CARLIN, *LAWYERS' ETHICS* 177-78 (1966) [hereinafter cited as J. CARLIN, *ETHICS*]. He noted that client solicitation was not a matter of great importance to most lawyers and was not a frequently given reason for discipline by the bar association. *Id.* at 180. This, plus research on the nature and conduct of class action suits reported in this article, suggests that the attorneys involved in the Hill-Burton suits behaved in an expected and typical manner. From a sociological perspective, class action suits have their own "rules of the game" and the lawyers appear to have observed these widely understood, if unwritten, rules.

<sup>205</sup> See generally E. DURKHEIM, *RULES*, *supra* note 3.

<sup>206</sup> See notes 168-202 & accompanying text *supra*.

<sup>207</sup> See *Eastern Ky. Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (*Eastern Kentucky I*).

<sup>208</sup> See *Lugo v. Simon*, 426 F. Supp. 28 (N.D. Ohio 1976) (*Lugo I*); *Lugo v. Simon*, 453 F. Supp. 677 (N.D. Ohio 1978) (*Lugo II*).

<sup>209</sup> See *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603 (E.D. La. 1970) (*Cook I*); *Cook v. Ochsner Found. Hosp.*, 61 F.R.D. 354 (E.D. La. 1972) (*Cook II*).

<sup>210</sup> See *Corum v. Beth Israel Medical Center*, 359 F. Supp. 909 (S.D.N.Y. 1973) (*Corum I*); *Corum v. Beth Israel Medical Center*, 373 F. Supp. 550 (S.D.N.Y. 1974) (*Corum II*).

<sup>211</sup> See generally M. WEBER, *supra* note 10.

Class action suits as a process of social organization involve the transformation of private troubles into social problems. If social organization can be considered a series of concentric circles with the leadership in the center and the general public on the outside, then the evolution of social movements can be categorized into an inside-outward or outside-inward pattern. The inside-outward pattern begins with a social entrepreneur possessing a vision or sense of mission.<sup>212</sup> The social entrepreneur may or may not have a private trouble, but perceives that many others do and attempts to unite them into a social movement that attacks the cause of their troubles.

Perhaps the most consistent findings concerning the evolution of class action suits is the crucial role played by attorneys as social entrepreneurs. One sociologist remarked as an example that an aggrieved party's demands for a court injunction must be carried out by attorneys,<sup>213</sup> and the history of the Hill-Burton class action suits strongly suggests that lawyers act as gatekeepers and mediators in the process. Among the poor and lower classes are many people who are unaware of their need for the right to legal services. The emergence of the Office of Economic Opportunity (OEO) legal services and the health law industry was a deliberate attempt to expand this knowledge and increase access to the judicial system for the poor. Even the Supreme Court has noted that "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . ."<sup>214</sup> A distinction, however, should be made between the role of attorneys in the evolution of the health law movement, which set the stage for the Hill-Burton class action suits, and the development or ripening of each case for litigation. The health law movement had its origins in the convergence of the civil rights movement and the war on poverty. The civil rights movement had often turned to class action<sup>215</sup> and efforts to desegregate hospitals followed this same strategy.<sup>216</sup> What was new was the adoption of a litigation strategy for the war on poverty with the creation of the Office of Economic Opportunity's Legal Services, and the subsequent establishment of back-up centers including one devoted to health law.<sup>217</sup> This inner core of health lawyers was able to determine policy and initiate actions independently of the social forces that organized or continued to fund them.<sup>218</sup>

---

<sup>212</sup> See generally H. BECKER, *supra* note 3.

<sup>213</sup> N. SMELSER, *supra* note 13, at 307.

<sup>214</sup> Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 7 (1964).

<sup>215</sup> See, e.g., note 14 *supra*; see also J. HANDLER, *supra* note 18, at 26-27.

<sup>216</sup> See *Flagler Hosp., Inc. v. Hayling*, 344 F.2d 950 (5th Cir. 1965) (*per curiam*); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963).

<sup>217</sup> Handler, Ginsberg & Snow, *supra* note 16, at 45-47.

<sup>218</sup> See generally W. GAMSON, *supra* note 21; J. HANDLER, *supra* note 18; J. MCCARTHY & M. ZALD, TREND, *supra* note 16.

This organizational matrix facilitated the development of a series of class action suits concerning obligations of hospitals under the Hill-Burton Act.<sup>219</sup> Of the handful of people at the Health Law Backup Center in Los Angeles, Marilyn G. Rose was the most active. She had conceived the Hill-Burton class action strategy before the establishment of the Backup Center and then became one of its first full-time attorneys.<sup>220</sup> Her publications and training sessions generated awareness of the issues and encouraged legal service attorneys across the country to identify situations that were ripe for litigation and appeal. In addition, the small staff at Nhelp maintained a newsletter distributed to legal services workers and clients and provided advice and consultation.<sup>221</sup> At the other end of the country, the Health Law Training Program in Philadelphia produced, among others, Louise Lander, who developed and argued the *Corum* case.<sup>222</sup>

These activities reflect an inside-outward pattern of developing a social movement, where lawyers in the health law network reached out to create the legal class of plaintiffs and to support a series of class action suits. In *Cook* a group of people with similar problems were working with attorneys on another matter and jointly discovered the possibility of a class action suit. In their search for assistance they were met halfway by Nhelp and Marilyn G. Rose. In *Lugo* the complaints of several potential plaintiffs against different hospitals were consolidated by lawyers into a single class action suit. In *Newsom* the individual plaintiff came directly to the attorney. In each of these cases, the individual's private troubles were transformed by the attorney into a class action suit addressing public issues and social problems.<sup>223</sup> The plaintiffs' primary goal was to obtain access to free or low-cost care, while the lawyers, who were linked into the health law network, saw these situations as ripe for litigation and convinced the clients to allow them to organize the case as a class action suit in an effort to promote social change.

The *Corum* and *Eastern Kentucky* cases, however, appear to reflect the alternative, or outside-inward pattern of developing a social movement. This pattern begins when a few individuals discover that others like them are in the same predicament.<sup>224</sup> They organize or band together and seek remedies to social issues from the larger society.<sup>225</sup> Applied to the evolution of class action suits, this outside-inward pattern flows from the

---

<sup>219</sup> See notes 67-202 & accompanying text *supra*.

<sup>220</sup> Telephone interview with Marilyn G. Rose, *supra* note 44.

<sup>221</sup> Telephone interview with Ruth Galanter, *supra* note 80.

<sup>222</sup> Telephone interview with Louise Lander, *supra* note 116.

<sup>223</sup> See generally A. MAUSS, *supra* note 15; C. MILLS, *THE SOCIOLOGICAL IMAGINATION* (1959).

<sup>224</sup> See generally Blumer, *Social Movements*, in H. BLUMER, A. HOLLINGSHEAD, E. HUGHES, N. HUMPHREY, A. LEE & E. REUTER, *PRINCIPLES OF SOCIOLOGY* 199-212 (1951); A. MAUSS, *supra* note 15.

<sup>225</sup> See generally Blumer, *supra* note 224.

discontented in the general public to organized groups to attorneys who then select plaintiffs likely to gain standing. The case that most resembles this model is *Corum*, in which dissatisfied patients at Beth Israel contacted neighborhood organizations, which then sought out attorneys and the possibility of bringing suit. In the end the attorney and the health advocate had to search for a person who would have standing and who was willing to become a plaintiff.

The *Eastern Kentucky* case also emerged from a generalized displeasure with the local health care delivery system. EKWRO, however, had been organized with the assistance of VISTA volunteers and other activists who saw litigation as one strategy for organization building and social action. The failure of the *Eastern Kentucky* class action suit was perhaps that once the organization became the plaintiff, no effort was made to reach out and find an individual with a specific grievance upon which the case could be built.

The Hill-Burton class action suits created a framework for social change by channeling activities into the judicial system. The litigation deflected the aim of the social movement from reorganizing norms to identifying specific flaws in the normative regulations and correcting them through the judicial process.<sup>226</sup> But this channeling short circuits two different chains of events. The first involves collective behavior in the larger society, when, for example, public protests are settled in the courtroom rather than the streets. In *Corum* Judge Lasker reached a decision that apparently clarified and defused tense situations at Beth Israel that had previously led to demonstrations. Since the ultimate outcome of *Corum* was the promulgation of new regulations by HEW and the statutory revisions of the Hill-Burton obligations by Congress, it might be argued that the specific grievances between the plaintiffs and the Beth Israel Medical Center were not fully resolved. Nevertheless, the executive and legislative branches addressed the larger societal issues of health care for the poor and the medically indigent by initiating substantive changes. The *Eastern Kentucky* class action suit, which appears to be a local form of general collective behavior, may have short circuited more hostile encounters.

The second short-circuited chain of events was the potential showdown between the judiciary and the two other branches of government.<sup>227</sup> Here a substantive threat either to extend the scope of the litigation or to go directly to trial stimulated the executive or legislative branch to act. In *Cook* the negotiation of a set of regulations between the plaintiffs and the defendant hospitals, independent of HEW, brought about the swift promulgation of interim rules. Such independent agreements could have set a precedent and resulted in many areas of the country having their own rules, which would either cause a bureaucratic-administrative

---

<sup>226</sup> See generally N. SMELSER, *supra* note 13.

<sup>227</sup> See generally G. WILLS, *EXPLAINING AMERICA* 128, 131, 135 (1981).

nightmare for HEW or encourage a move towards uniform standards through additional legislation.

In both *Lugo* and *Newsom*, the courts found that the Secretary of HEW had neglected his duties under the 1974 amendments to the Hill-Burton Act<sup>228</sup> to promulgate and enforce the regulations. In *Lugo* the judge sustained the plaintiffs' case against the Secretary and overruled the defendant's motion to dismiss,<sup>229</sup> while in *Newsom* the judge was willing to issue a writ of mandamus.<sup>230</sup> Both would have resulted in lengthy court proceedings that were avoided by affidavits from the Secretary promising to promulgate rules within a year. Thus, these short circuits within the judicial system avoided trials and jurisdictional conflicts between the judicial and executive branches.

In response to the first question, then, class action suits can substitute for both the form and the process of social organization. A legal class consisting of members of a social group or an organization interested in the acquisition of social power adds a process (litigation) to an existing structure. A legal class consisting of members of an economic class or a group organized by a social entrepreneur creates a new structure which substitutes for possible collective behavior. In general, it appears that when a legal class is an already existing social group or organization the class action suit is most likely to develop from the outside inward. Yet, when the lawsuit itself requires constructing a legal class, this is most likely to occur from the inside outward. Existing social groups with an outside-inward development will most likely lead to short circuiting expected collective behavior in the larger society, such as public protests and demonstrations, while created legal classes developed by the inside-outward leadership of attorneys and social entrepreneurs will alter the possible interactions with the legal system between the judiciary and the legislative or administrative branches of government. These points are summarized and presented in Figure 1. (See page 416).

### *The Implementation of Judicial Decisions*

The second question was: How can courts implement decisions when social institutions must change to carry them out?

From a sociological perspective, the function of the court is to apply the existing norms of society to the case at hand.<sup>231</sup> This insures the existence of a consensual understanding between the parties involved that

---

<sup>228</sup> See *Newsom v. Vanderbilt Univ. Hosp.*, 453 F. Supp. 401, 409 (M.D. Tenn. 1978) (*Newsom I*); *Lugo v. Simon*, 453 F. Supp. 677, 686 (N.D. Ohio 1978) (*Lugo II*).

<sup>229</sup> *Lugo v. Simon*, 453 F. Supp. at 691-92 (*Lugo II*).

<sup>230</sup> See *Newsom v. Vanderbilt Univ. Hosp.*, No. 75-126, slip op. (M.D. Tenn. Sept. 20, 1979) (*Newsom II*).

<sup>231</sup> See M. WEBER, *supra* note 10, at 759.



FIGURE 1  
CASE CHARACTERISTICS AND VARIABLES OF SOCIAL ORGANIZATION

Cases	Type of Class	Evolutionary Pattern	Short-Circuited Conflict Arena	Judicial Action	Outcome
<i>Cook</i>	social group	inside-outward	judiciary-executive	plaintiff-defendant plan approved	interim regulations, 1972
<i>Corum</i>	action group	outside-inward	public protests	judicial opinion	new regulations, 1974 P.L. 93-641
<i>Eastern Ky.</i>	action group	outside-inward	public protests	no standing	S.Ct. decision
<i>Lugo</i>	economic class	inside-outward	judiciary-executive	threat of trial on issue of neglect of duty	new regulations, 1979
<i>Newsom</i>	single individual	inside-outward	judiciary-executive	threat of writ of mandamus	new regulations, 1979

the decision carries with it a guarantee of coercive enforcement by the agents of the state and that the parties concerned will act as if it were obligatory. In other words, most lawyers and judges assume that there will be compliance with court orders to change behavior.<sup>232</sup>

The courts can increase the probability that a consensual understanding exists by relying heavily upon judicial precedent, textual interpretation of the law, or logical syllogisms. Beyond that, the courts themselves actually operate without a guarantee that every decree will receive the legal coercive power of the state to back it up and enforce it. Andrew Jackson reportedly said, "[John] Marshall has made his decision; now let him enforce it"<sup>233</sup> in reference to Supreme Court decisions in favor of the Cherokee Nation and against the State of Georgia.<sup>234</sup> Other judicial decrees have been ignored by the parties named,<sup>235</sup> not enforced by the executive,<sup>236</sup> or eventually retracted by the courts.<sup>237</sup>

In essence, courts depend upon the willingness of the parties involved to enforce their orders. The court itself performs a function for the state by legitimizing enforcement activities as it did in various school integration cases. The executive cannot enforce some laws, such as wiretaps or other search procedures, without judicial approval. What the courts do is to determine if the action will be in the national or public interest.<sup>238</sup> Generally the courts shy away from a showdown with the executive.<sup>239</sup> In *Marbury v. Madison*,<sup>240</sup> Chief Justice Marshall had the choice of ordering Madison, then Secretary of State, to deliver a commission to Marbury or to declare the act of Congress that permitted the appointment to be unconstitutional. In this dilemma it was safer to declare the act of a past Congress unconstitutional than to order Madison and Jefferson to deliver the commission. In the real world of American politics, not only must truth and justice be served, but the normative wishes of the people must be identified and powerful opponents mollified.<sup>241</sup>

In addition, the courts generally avoid regulatory or structural injunctions that seek to control or direct behavior over long periods of time

<sup>232</sup> See generally J. HANDLER, *supra* note 18; D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

<sup>233</sup> 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 551 (1919) (citing as earliest authority 1 H. GREELEY, *THE AMERICAN CONFLICT* 106 (1864)).

<sup>234</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>235</sup> See P. STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* 134 (1974) (discussing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 483 (1866)) (Attorney General Stanbery's discussion of President Jefferson's refusal to respond to the Court's subpoena in *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692(d))).

<sup>236</sup> See *id.* at 132-34 (discussing *Ex Parte Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)).

<sup>237</sup> See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>238</sup> See generally G. WILLS, *supra* note 227, at 127-61 (discussing legislative supremacy and judicial review).

<sup>239</sup> See generally *id.*

<sup>240</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>241</sup> See generally G. WILLS, *supra* note 227, at 127-61.

or alter relationships among people, groups, or institutions. They are also reluctant to establish elaborate machinery or to appoint an agent to monitor or enforce their orders, relying instead on dissatisfied plaintiffs to return to court. It is only in an unusual or extraordinary situation that the courts will formulate and implement plans or manage and direct programs or organizations.<sup>242</sup>

If a party complains that another is not following a court order, the courts have more success if the order was a negative one—one saying “thou shalt not”—the violation of which is clearly visible.<sup>243</sup> Positive orders often require a large decentralized bureaucracy with many employees exercising a great deal of discretion to respond to a problem they have successfully previously ignored.<sup>244</sup> The power of lower level participants to thwart or accept organizational changes is well documented and in most organizations a process of bargaining enables superiors to get lower level participants to perform certain tasks in exchange for favors.<sup>245</sup>

The courts, however, are in a very poor position to become bargainers with other social organizations or institutions. The most effective role for the court is to mediate or arbitrate the disputes of others. In the Hill-Burton suits, the most successful implementation was achieved by Judge Comiskey in the *Cook* case. He encouraged the hospitals to draw up a set of rules governing the community service and free care obligations independently of and in the absence of HEW regulations.<sup>246</sup> The judge did not attempt to order HEW to act; he merely allowed the freedom and slack of the federal system to take its course. The ability of plaintiffs representing the poor and medically indigent and several New Orleans Hill-Burton-funded hospitals to agree upon a mutual set of rules did not go unnoticed or unchallenged by the sluggish HEW bureaucracy. At that time, had the courts chosen another course, such as imposing an injunction ordering the Secretary to write the regulations, holding a trial on neglect of duty, or issuing a writ of mandamus, these actions might have led to resistance by the bureaucracy instead of the promulgation of interim regulations.

Five years, several decisions, and one congressional act later, the consensual understanding of what HEW was supposed to do was much stronger. The situation was ripe for a trial on the merits of neglect of duty and for a threat to issue a writ of mandamus. When these options emerged from the *Lugo* and *Newsom* cases, the Secretary filed an affidavit promising new rules within a reasonable time and the bureaucracy cranked

---

<sup>242</sup> See generally J. HANDLER, *supra* note 18; Comment, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

<sup>243</sup> J. HANDLER, *supra* note 18, at 18.

<sup>244</sup> *Id.* at 18-20.

<sup>245</sup> See generally M. CROZIER, *THE BUREAUCRATIC PHENOMENON* (1964); R. HALL, *ORGANIZATIONS* (1972); R. LIKERT, *THE HUMAN ORGANIZATION* (1967).

<sup>246</sup> See note 89 *supra*.

them out even though the appeals court in *Newsom* would later state that HEW could not really be ordered to do so.<sup>247</sup>

Courts most effectively implement decisions when they can impose a solution through a preventive injunction on a few people whose acts are easily monitored.<sup>248</sup> If these conditions are absent, as they all were in the attempt to get HEW to issue regulations and then enforce the provisions of the Hill-Burton Act, other strategies must be employed. The most successful strategy was to beat the federal bureaucracy at its own game by having the local parties draw up their own agreement in lieu of federal regulations. It was only after a series of inadequate and half-hearted responses on the part of HEW<sup>249</sup> that the available arsenal of judicial citations, writs, and trials became at all effective. Plaintiffs in complex class actions should not expect victory or successful implementation of a decision or decree in a single test case. The groundwork must be laid and the situation allowed to ripen. Nevertheless, visible agreements between the parties can provide immediate relief which can establish a precedent for other disputes.

#### *The Ability of Class Actions to Change Society*

The third question was: What limits the ability of class action suits to bring about changes in society?

The Hill-Burton class action suits appear to have been fairly successful as a catalyst for broad legal change. Rules and regulations were clarified and revised, the HEW bureaucracy was goaded into action, and Congress considered several of these adjudicated issues when amending the Hill-Burton Act in 1974. But the transformation of an individual's private troubles into a social problem through class action suits may benefit the class rather than the individual plaintiff directly. To maintain a class action the Federal Rules of Civil Procedure suggest the court must find that questions common to the class must predominate over the questions affecting individual members of the class.<sup>250</sup> In conformity, the appellate court in *Newsom* noted that although the class may have a right to have the hospital give benefits to some of the class members, thus providing standing under the statute, no individual, "merely by being a member of the class, . . . has a legitimate claim to free services . . ." <sup>251</sup> This is a strong disincentive for individuals or attorneys to create a class action suit for their own benefit. Ironically, Mrs. Newsom was the only plaintiff in all the cases discussed in this article who received any personal tangi-

---

<sup>247</sup> See 653 F.2d 1100, 1122 (6th Cir. 1981) (*Newsom III*).

<sup>248</sup> See generally J. HANDLER, *supra* note 18.

<sup>249</sup> See notes 154-55 & accompanying text *supra*.

<sup>250</sup> FED. R. CIV. P. 23(b)(3).

<sup>251</sup> *Newsom v. Vanderbilt Univ. Hosp.*, 653 F.2d 1100, 1121 (6th Cir. 1981) (*Newsom III*).

ble relief and benefits. But future services were not guaranteed to her as an individual nor to any specific individual in the class. The suits were not very successful, then, in distributing benefits to the plaintiffs. They also had difficulty assessing costs on hospitals and agencies. In *Eastern Kentucky* the plaintiffs were found to lack standing, and their attempt to assess costs by challenging the tax-exempt status of hospitals was never considered.<sup>252</sup> The *Lugo* plaintiffs were forced to abandon a similar cost assessment strategy.<sup>253</sup> The four main cases—*Cook*, *Corum*, *Lugo*, and *Newsom*—failed to change the formula for measuring a hospital's reasonable volume of free care and failed to extend the twenty-year limit on its provisions. Only *Newsom* managed to demonstrate that Vanderbilt University Hospital had not provided a reasonable volume of uncompensated care and forced Vanderbilt to provide such services to make up its deficit.<sup>254</sup>

Several reasons may explain this situation. First, when class action suits peaked around 1975, the twenty-year limit on the free care obligation was expiring or had expired for many hospitals across the country. In these cases the courts were unwilling to assess costs retrospectively or to change the time limit.

Second, the courts were reluctant to tamper with the established formula for estimating the amount of free care provided. Almost any change would have created a financial cost unrelated to the amount of the Hill-Burton grant and the largest burdens would undoubtedly have fallen upon those few Hill-Burton hospitals that regularly provided the bulk of care to the poor and medically indigent.

Third, it was difficult, if not impossible, for the courts to ascertain whether a Hill-Burton hospital was providing its fair share of uncompensated care in the community. The appeals court in *Newsom* noted that "[i]n the present case, the parties stipulated that the need for free services in the territorial area served by Vanderbilt Hospital was greater than the hospital's Hill-Burton obligation."<sup>255</sup> Similar sentiments were expressed by Judge Lasker in *Corum*.<sup>256</sup> These situations called for assessing the costs of providing free care against all the hospitals in a community that received Hill-Burton funds by arguing that under the state plans a joint responsibility existed. Only the *Cook* case named more than one hospital as a defendant and none of the cases attempted to force the creation of a defendant class of all Hill-Burton hospitals in the community.

The failure to effect change by having only a single hospital as defen-

---

<sup>252</sup> See *Eastern Ky. Welfare Right Org. v. Simon*, 426 U.S. 26 (1976) (Eastern Kentucky III).

<sup>253</sup> *Lugo v. Simon*, 453 F. Supp. 677, 686-89 (N.D. Ohio 1978) (Lugo II).

<sup>254</sup> *Newsom v. Vanderbilt Univ. Hosp.*, 453 F. Supp. 401, 418-19 (M.D. Tenn. 1978) (Newsom I).

<sup>255</sup> 653 F.2d at 1121 n.6 (Newsom III).

<sup>256</sup> *Corum v. Beth Israel Medical Center*, 373 F. Supp. 550, 559 (S.D.N.Y. 1974) (Corum II).

dant rather than all the Hill-Burton hospitals in a community is further evidenced in *Perry v. Greater Southeast Community Hospital Foundation*.<sup>257</sup> In *Perry* the plaintiffs alleged that Cafritz Hospital in southeast Washington, D.C., disproportionately served suburban patients and effectively excluded many black and Medicaid-eligible city residents.<sup>258</sup> The plaintiffs sought an order under the community service obligation requiring the hospital to distribute its patient services in ratios roughly proportional to the geographic—and therefore economic and racial—composition of the surrounding community.<sup>259</sup>

The Hill-Burton statute states: “[A]ssurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant . . . .”<sup>260</sup> Judge Gesell found the then current regulations merely parroted the language of the statute and, as such, did not provide a sufficiently clear standard for the court to determine the territorial area of the hospital. Without such a standard “there is no way that the Court can function except by considering itself some kind of an administrative agency in a rule-making and administrative process, which is not the role of the Court.”<sup>261</sup> Judge Gesell thought such territorial decisions should not be made on a hospital-by-hospital basis, but rather on a citywide or regional basis.

Had some of the other metropolitan Washington, D.C., hospitals funded under the Hill-Burton Act been included in the *Perry* suit, perhaps Judge Gesell would have been forced to face the issue more squarely. This possibility never arose because the defendant class was never created. Under Rule 23 of the Federal Rules of Civil Procedure, the requirements for creating a defendant class are rather limiting. Removing all such limits creates the possibility of arbitrarily creating a defendant class of such wide scope that it constitutes harassment and a legal nuisance. One of the constraints on the ability of the Hill-Burton class action suits to change society rests on their inability to create a reasonable and limited defendant class.<sup>262</sup>

---

<sup>257</sup> No. 725-71 (D.D.C. June 28, 1972), reprinted in 2 HEALTH LAW PROJECT OF THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, MATERIALS ON HEALTH LAW: THE HOSPITAL 81-82 (rev. ed. 1972) [hereinafter cited as THE HOSPITAL] (cited and discussed in Rosenblatt, *supra* note 34, at 271 n.109).

<sup>258</sup> *Id.* (cited and discussed in Rosenblatt, *supra* note 34, at 274).

<sup>259</sup> *Perry v. Greater S.E. Community Hosp. Found.*, No. 725-71 (D.D.C. June 28, 1972) (cited and discussed in Note, *supra* note 131, at 329-30).

<sup>260</sup> 42 U.S.C. § 291c(e) (1976).

<sup>261</sup> *Perry v. Greater S.E. Community Hosp. Found.*, No. 725-71 (D.D.C. June 28, 1972), reprinted in 2 THE HOSPITAL, *supra* note 257, at 81-82 (cited and discussed in Rosenblatt, *supra* note 34, at 275).

<sup>262</sup> Since the number of hospitals in most American communities is less than 40 and each hospital would contend that it wanted to protect its own interests, some difficulties hinder the creation of a defendant class of Hill-Burton hospitals which have community service obligations. The plaintiffs would need to show that the community service obligation is

From a legal perspective, one plaintiff alone can litigate the validity of federal regulations, an agency's failure to comply with statutory duties, or a hospital's billing and collection practices. No class action is necessary. But a sociological analysis suggests that a one-on-one approach of individual plaintiff versus individual agency or facility is unlikely to be successful when potential benefits are dispersed and the potential burden of costs is concentrated.

From a sociological perspective, not only can a class of potential beneficiaries be formed, but such plaintiffs could force the creation of a limited class of defendants who will bear the burden of providing the benefits. The existence of two rather well defined but limited classes facilitates and sharpens the conflict.<sup>263</sup> This configuration also encourages a neutral third party to act as mediator and permits settlement of the dispute at the community level.<sup>264</sup> The alternatives are to claim the problem is beyond the control and responsibility of any single individual defendant, who should not be required to assume the full burden of providing benefits, or to claim that one must wait until a sufficient number of similar cases suggest a general solution to the problem.

### CONCLUSION

This review and analysis of the Hill-Burton class action suits considered them as that part of a social reform movement which provided both organized structure and process for channeling discontent and disputes into the judicial system for resolution. The impact of these cases can be examined on both the macro and micro levels.

Most of the change occurred on the macro level and what really changed were the laws and regulations.<sup>265</sup> The twenty-year limit on community service was voided and the community service regulations are now the law and part of the health care reform component of Hill-Burton. The *Cook* decision required all Hill-Burton facilities to participate in Medicaid and this put the first teeth into the community service requirement. The United States Court of Appeals for the Sixth Circuit upheld the concept of deficit makeup for Vanderbilt University Hospital if it could not demonstrate compliance for specified years. The *Cook*, *Euresti*, and *Perry*

---

shared by all funded hospitals in the community or service district according to the state Hill-Burton plan, and that creating a defendant class of such hospitals would achieve economies of time, effort, and expense and promote uniformity of decision as to those hospitals and their obligations.

<sup>263</sup> See generally T. CAPLOW, *TWO AGAINST ONE* (1968); G. SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 145-69 (K. Wolff trans. 1950).

<sup>264</sup> See generally T. CAPLOW, *supra* note 263; G. SIMMEL, *supra* note 263, at 145-69.

<sup>265</sup> Letter from Armin Freifeld, Staff attorney for the National Health Law Program (Nhelp), to Harry Perlstadt (March 11, 1982) (Freifeld contends that the health reform achievements of the cases under discussion were significant in establishing new legal rights to remedy widespread wrongs).

cases were all instrumental in convincing Congress to adopt a statutory right to sue Hill-Burton facilities, thereby permitting and encouraging litigation.

On the micro level, however, very little was changed for the individual plaintiffs or for any particular individual in the plaintiff class. One reason might be the key role played by attorneys as active participants in the health law movement. They provided access to the courts and guided the movement through the judicial process. But in most instances, rightly or wrongly, this leadership did not reach down into the plaintiff class and provide it with any skills or permanent organization through which the plaintiffs might have pursued the benefits they won as a class. The efforts of the attorneys were paramount, but confined to the adjudication process or to influencing the formation of legislation and regulations.

Class action suits are not a perfect substitute for a nonmilitant social movement that cultivates a broad range of grass roots support and provides leadership training for local activists. Under certain conditions, however, class action suits can be part of an effective strategy of a reform movement to bring about social change.



