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The Political Theory of the Class Action

Owen M. Fiss*

Courts are not self-starting. Their proceedings must be initiated by some outside agency, and it is that agency, not the courts, who will conduct the factual investigation, devise the discovery program, select and examine witnesses, write the legal briefs, and monitor the implementation of the remedy. Who might play that role?

When the remedy for violation of a legal norm consists of jail or some other form of punishment and the judicial proceeding is considered a criminal one, the power of initiation is exclusively in the hands of an officer of the state, for example, the attorney general or district attorney. Victims of crimes cannot commence criminal proceedings, and over the years the Supreme Court has been reluctant to grant individual citizens any power to review or otherwise superintend the government's decision to commence a criminal prosecution.¹

The situation is entirely different in the civil context. There the purpose is not to punish for a past violation, but to compensate for past injuries or to stop future violations, and the remedy sought is damages or an injunction rather than a fine or imprisonment. For such proceedings, the power of initiation has been allocated to two different agencies: public officers and private citizens. In my judgment, the class action can be understood best as a fusion of both of these agencies.

Civil suits initiated by private citizens may serve their private purposes. Imagine a price-fixing agreement among stockbrokers and a suit by one of the investors for an injunction to prevent price-fixing in the future or to recover damages for the harm inflicted. The suit may vindicate or protect the individual rights of the investor. However, a public purpose also may be served by this very same suit in the sense that, if successful, it will bring

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1. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

the brokers' behavior into accord with antitrust law. An injunction against price-fixing in the future clearly would have that effect, but so would an award of damages to the investor. The damage award would force the stockbrokers to internalize the costs of their wrongdoing and, through the operation of ordinary principles of deterrence, discourage future violations by the defendants and other brokers.²

In many instances, there is no need to disentangle the private and public purposes of a citizen-initiated lawsuit. The citizen furthers the public interest by pursuing private ends. However, there is a category of cases — of increasing importance in the modern times — when the two purposes become distinct. This occurs when the harm to an individual citizen is not sufficient to give that citizen a good reason to bring a lawsuit, yet the aggregate harm to society is quite considerable. Once again consider a price-fixing agreement. This time the agreement involves stockbrokers who handle small transactions. The damage inflicted on an individual investor may be seventy dollars, but the aggregate damage inflicted on all the investors — numbering in the millions — is sixty million dollars. In such an instance, the legal system could be relatively indifferent as to whether the seventy dollars is ever collected, but not at all indifferent to the public ramifications of the defendants' action because of the enormous social loss incurred.

To some extent, such situations can be handled by suits brought by public officers. If the public interest is great and the private interest relatively trivial, then the attorney general should be able to sue the stockbrokers. While we have a strong tradition, dating from the late nineteenth century, that authorizes government-initiated civil suits as an alternative to criminal prosecution,³ we have been reluctant to make it the only available alternative for dealing with such cases. This reluctance may reflect the characteristic American distrust of government power and the desire to preserve a place for the ingenious and imaginative citizen. More concretely, the unwillingness to make the government-initiated lawsuit the only civil option in these situations may be rooted in misgivings with the official system of governance and how public officials discharge their duties. The issue is one of accountability. The power vested in the attorney general is discretionary, and there are fears that discretion might be abused because of corruption or that the needs of certain sections of society — for example, the

2. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 73-74 (1970).

3. See Sherman Act, 15 U.S.C. §§ 1-7 (1994); *Mugler v. Kansas*, 123 U.S. 623, 672-73 (1887) (affirming that proceedings in equity brought by attorney general are appropriate alternative to criminal proceedings to curb nuisances).

politically powerless — might be systematically slighted. As a result, the idea of the private attorney general has emerged. The power of initiation is vested in the individual citizen, but the function of the suit is the same as one brought by the attorney general, namely, to vindicate the public interest.

How is such a citizen-initiated lawsuit to be financed? The suit might be brought in the name of some individual citizen, but the work is going to be done by lawyers. While the term "private attorney general" is usually applied to the plaintiffs, it is the lawyers who, in reality, fulfill that role, and they must be compensated for their time and effort. Indeed, going even further, the level of compensation must be high enough to make it worthwhile for the best and the brightest to undertake such ventures. Because we in the United States operate under a rule that does not award attorney's fees to the victor, there is no separate award for fees, and that means that the lawyer for the plaintiff must be paid out of the damages collected by the plaintiff from the defendant if the suit is successful. When the damage award is sixty million dollars, there is more than enough to go around; there would be an army of lawyers prepared to handle that case on a contingent fee basis, but not when the award is seventy dollars.

Our response to this dilemma, like all things American, has been both varied and pragmatic. One approach has been to relax the American rule on attorney's fees when the named plaintiff is acting as a private attorney general. In such a case there can be a separate award of attorney's fees to compensate the lawyers who served in that role for their time and effort. In some jurisdictions, this change was wrought by the courts alone; at the federal level, it took the enactment of a statute.⁴ Most of the federal fee-shifting statutes are asymmetrical; defendants receive attorney's fees only upon a special showing, for example, that the litigation was brought in bad faith, while plaintiffs receive the fees for their attorneys simply on condition that they prevail.⁵

A second approach has been to create a separate corps of lawyers that might act as private attorneys general and then to pay them out of funds that

4. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975) (holding that respondents could not recover attorney's fees based on "private attorney general" approach because only Congress can authorize such exception to the American rule). This result was changed by the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970)). On the state level, see *Serrano v. Unruh*, 652 P.2d 985, 997 (Cal. 1982) (holding that attorney's fees can be awarded under "private attorney general" theory).

5. Judith Resnik, Dennis E. Curtis, & Deborah Hensler, *Individuals Within the Aggregate: Representation and Fees*, 71 N.Y.U. L. REV. (forthcoming April/May 1996) (manuscript at 60 n.132, on file with author).

come from the public itself, sometimes in the form of tax revenue, but most often out of private donations. This has led to the emergence of an entire panoply of organizations — the NAACP, ACLU, Natural Resources Defense Council, Legal Services Corporation, Center for Law & Social Policy, Equal Rights Associates — that provide lawyers to serve as private attorneys general.⁶

The third, and perhaps most imaginative, solution to the problem of funding the private attorney general is the class action. In essence, the class action allows the named plaintiff to collect not just the seventy dollars — the amount the plaintiff was injured — but rather the sixty million dollars — the damages due to all investors. Most of that award would be paid to the investors, but a hefty chunk — perhaps as much as six million dollars (10 percent) or even twenty million dollars (33 1/3 percent) — would go to the lawyers for the plaintiff. The lawyers would be paid from the common fund they created.

In short, the class action could be viewed as a device to fund the private attorney general and is able to play that role because of the aggregation of the claims of a large number of persons who have similar or identical claims, none of which — standing alone — would justify the suit. The person who brings the suit is referred to as "the named plaintiff," and the others are referred to as "the unnamed members of the class." The named plaintiff acts on behalf of the unnamed members of the class, and to more fully understand the dilemmas created by the class action we must consider the impact the action of the named plaintiff will have upon the rights of the class.

A victory by the named plaintiff will preclude any further action on their claims by the unnamed members of the class. This seems relatively straightforward. The unnamed members of the class will have no reason whatsoever to pursue their claims because, by hypothesis, their claims have been paid or honored and, in any event, the most elementary fairness would require that result. The defendants should not have to pay twice.

But what should happen if, as indeed is possible, the named plaintiff loses the suit? The general rule is to bar the unnamed members of the class from any further action, but the reasons for that rule are far from clear. One notion, perhaps more appropriate to gambling than to litigation,⁷ assumes that the risks of the defendant should be symmetrical. If the defendant loses,

6. See generally JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990).

7. Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 713 (1941).

the loss is big; so if the defendant wins, the win also should be big. Alternatively, the rule might be based on a fear of wearing down the defendant — after winning one case, the defendant might have to mount a second defense, then a third, and so forth. Admittedly, the size of the claim is too small to assume that one named plaintiff after another will bring suit on an individual basis, but there are no obvious reasons why the first person to bring a class action should be the only one able to do so.

Whatever its rationale, the rule foreclosing the claims of the unnamed members of the class on the contingency of a loss by the named plaintiff has become well entrenched and gives rise to the central normative tension in the class action: a conflict with the principle that promises to each person a day in court before his or her claim is foreclosed. At a superficial level, this tension has been resolved by conceiving the class action as a form of representative action because, to be precise, the legal system does not guarantee that every person will have a day in court, but only that the interest of each person will be represented in court.⁸ It is fairly well established that if I appoint an agent to represent my interest and that agent brings a lawsuit on my behalf and then loses, I will not be able to sue again.

The class action is in fact a representative lawsuit — as noted, the named plaintiff is bringing a suit on behalf of all the unnamed members of the class — but it employs a peculiar concept of representation: self-appointment. Contrary to the situation where I appoint someone as my agent, in the class action the named plaintiff appoints himself or herself as the representative of the class. Self-appointment is not unheard of in the world of politics and other social domains. Indeed, it is quite commonplace in political situations where there is a radical shift in regimes. The persons who gathered in Philadelphia in the summer of 1787 to draft the United States Constitution appointed themselves to represent the people.⁹ Those who sat around the round table in Budapest in the summer of 1989 assumed their mandate in a similar fashion.¹⁰ Yet there is no denying that self-appointment is an anomalous form of representation, only justified, if at all, by the most exceptional circumstances. The use of it in the class action reveals the truly exceptional — perhaps even revolutionary — character of that procedural device.

At this juncture in the history of the class action, little attention is paid to the concept of self-appointment itself, however odd it initially may seem

8. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

9. BRUCE ACKERMAN, *WE THE PEOPLE I: FOUNDATIONS* 167-75 (1991).

10. See László Bruszt & David Stark, *Remaking the Political Field in Hungary: From the Politics of Confrontation to the Politics of Competition*, 45 J. INT'L AFF. 201, 234-37 (1991).

as a form of representation. Yet the normative tension generated by it has not disappeared; the battles are simply being fought on other fronts, above all, around the requirements of notice. All agree that some notice must be provided to the unnamed members of the class concerning the pendency of the lawsuit and the decision of the plaintiff to appoint himself or herself as the representative of the class. But there is a sharp dispute — fueled by differing attitudes toward the social utility of the class action and the very notion of a private attorney general — concerning the form of notice and also who must bear the cost of notice.

One school insists upon what may be referred to as individualized notice: Each individual within the class must be informed of the plaintiff's decision to appoint himself or herself as the representative of the class. The individual who receives this notice then has the option of disavowing the purported representation, either by opting out of the class or by intervening and contesting the adequacy of the representation to be afforded by the plaintiff. Silence will be taken as acquiescence. Those who subscribe to this view nominally accept the concept of self-representation, but in fact seek to recreate the agency form of representation and the consensual tie it presupposes between the representative and those being represented. The only concession to the social purposes served by the class action are, first, a temporal reordering — consent can come after the appointment — and, second, a willingness to treat silence or inaction as a form of consent.

Those who want to broaden the scope of the class action and, thus, are more accepting of the notion of self-appointment acknowledge the importance of notice, but insist that it take a collective form: Only some, but not all, members of the class need be informed of the pendency of the suit. For the members of this school, the purpose of the notice is not to construct a consensual link between the representative and the members of the class, but rather to make certain that the powers of self-appointment are not abused. The notice informs a good portion of the class of what is about to transpire in their name and gives them the opportunity to complain to the court about the adequacy of the self-appointed representative. Notice is not a proxy for consent, but only an instrument for making certain that the named plaintiff will be a strong and effective advocate for the class.

This theoretical dispute over the two types of notice — individual versus collective — has important pragmatic implications simply because individual notice tends to be more expensive. In the landmark case of *Eisen v. Carlisle & Jacquelin*,¹¹ decided in the mid-1970s, individual notice was estimated to

11. 417 U.S. 156 (1974).

cost about \$225,000.¹² That case involved a price-fixing scheme among stockbrokers who handled what is referred to in the industry as odd-lots — sales of stock in units less than one hundred. The costs of notice consisted of a first-class mailing to some 2,250,000 persons who purchased less than ten shares from the brokers over a certain period of time — the small fries.¹³ In contrast, the cost of collective notice was estimated only to be slightly above \$20,000. It consisted of advertisements in major newspapers, first-class mailing to those who were regular or large investors in the market, and then a first-class mailing to 5,000 of the small investors, who were to be chosen at random from the group of 2,250,000.¹⁴

The battles in *Eisen* were fought primarily over the type of notice — specifically whether random notice was acceptable — but a question was also raised as to who should pay for it. The costs of notice must be paid at the front end of the lawsuit, before any recovery. From the perspective of the plaintiff's lawyer, such expenditures could be viewed as an investment. The expected returns — the amount of the aggregate claim times the probability of winning — may be so large as to justify the expenditure. If not, however, the lawyer will not bring the lawsuit. To avoid this contingency, some have argued that the costs of notice could be reallocated and placed on the defendant.

In the *Eisen* case, the trial court in fact reallocated notice costs to the defendant, but the Supreme Court balked, insisting that the plaintiff must pay for the costs of *his* lawsuit.¹⁵ In justifying its ruling in these terms, the Court overlooked the public dimensions of the lawsuit — that the plaintiff was bringing the suit for the public, not just himself. Even so, there may be other reasons to be wary of reallocating the costs of notice to the defendant. For one thing, such a reallocation may work to the detriment of the unnamed members of the class. In the typical class action, the unnamed members of the class actually may be protected by the actions of the defendant; the defendant aims to unseat the plaintiff or add to the plaintiff's financial burden and, thus, has reason to insist upon a robust notice to the unnamed members of the class. Placing the costs of notice on the defendant, however, may make the defendant think twice about demanding such notice.

12. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 167 (1974).

13. *Id.* at 166-67.

14. *Id.* at 167.

15. *Id.* at 178-79 (noting that "[w]here, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit").

Second, such a reallocation will add to the burdens the defendant must shoulder in defending the action. The pressure to capitulate would be intensified, and the defendant's right to a day in court may be compromised. The trial judge in *Eisen* was aware of this danger and, as a result, conditioned the reallocation of the costs of notice to the defendant on a finding that the probability was quite high that the defendant would lose.¹⁶ But such a finding can be made only after some judicial inquiry into the merits of the underlying claim. That itself would burden the defendant and put the court in the position of acting on the basis of an incomplete hearing — at best a summary of the evidence or a presentation of the highlights — because that inquiry must precede the certification of the class and thus antedates the full trial on the merits.

Aside from leaving the costs on the plaintiff or reallocating them to the defendant, another alternative might be to have the government pay the costs of notice. The costs of notice then would be treated as one of the many expenses incurred by the state in maintaining a court system, comparable, for example, to the costs of the courthouse or the judge's salary. Such a financing scheme, however, would produce an odd result. It would give private citizens a power over the public fisc, much like the real attorney general, but without being accountable to the public for their expenditures.

To some extent, therefore, one can understand the difficulty of always reallocating the cost of notice from the named plaintiff to the defendant or government. Admittedly, leaving it on the shoulders of the named plaintiff has its problems because it makes the pursuit of the claim less attractive to the enterprising lawyer — he or she must put up the money at the front end of the lawsuit, and, in many cases, this may be a decisive impediment to bringing the suit at all. Yet the alternatives also have their drawbacks. On balance, it seems that the most sensible way out of this predicament would be to opt in favor of collective notice because it allows us to be somewhat indifferent to the method of allocation because the sums are small enough. Even if left on the shoulders of the plaintiff, the burden is not likely to be decisive. From this perspective, the *Eisen* decision seems especially unfortunate. The Supreme Court not only rejected the effort of the trial judge to reallocate the costs of notice, but also rejected the notion of random notice and insisted upon the particularly costly form of individualized notice — first class mailings to each and every member of the class whose name and address were known — all 2,250,000.¹⁷

16. *Id.* at 168.

17. *Id.* at 175, 177.

The Supreme Court rationalized this result in terms of the special wording of one of the federal procedural rules.¹⁸ In my view, the Court was not bound by this rule or, for that matter, any other of the class action rules because the process by which the federal rules were promulgated was unable to generate rules that might be able to *bind* the Court in any meaningful sense of that word.¹⁹ The rules do not satisfy the case-or-controversy requirement of Article III or any of the other requirements that surround judicial decisions and, thus, cannot even be afforded the weight customarily accorded precedents. Nor might the rules be considered to have the binding effect of a statute. Under Section 2072 of the Judicial Code, enacted in the 1930s, the class action rules took effect because Congress did not reject them within a specified period, but this reliance on inaction seems to abridge the most elementary requirement for the enactment of a statute — a vote by both houses of Congress and presentation to the President for his signature.²⁰

Moreover, it is not clear that the particular rule the Court invoked in *Eisen* was the relevant one. The rule in question turned on classifying or characterizing the class action in a certain way, and the Court never adequately explained why the class action should be classified in the way it chose. The Court insisted that the suit be treated as a Rule 23(b)(3) class action, thereby triggering the individualized notice requirements of Rule 23(c)(2).²¹ But no satisfactory explanation was given for the court's unwillingness to treat the suit as a Rule 23(b)(2) or Rule 23(b)(1) class action. The Rule 23(b)(2) class action seems to be geared to injunctive proceedings as opposed to ones seeking money damages, but in *Eisen* the plaintiff sought an injunction as well as damages. The injunctive component could have been

18. *Id.* at 173 (quoting Federal Rule of Civil Procedure 23(c)(2) for proposition that court is required to direct to class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort").

19. See Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 521 n.1 (1980) (Powell, J., dissenting). In registering a caveat about the process in which the rules are promulgated, Justice Powell, who only a few years earlier wrote *Eisen*, noted that the

Court's role in the rulemaking process is largely formalistic. Standing and advisory committees of the Judicial Conference make the initial studies, invite comments on their drafts, and prepare the Rules. . . . Congress should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves.

Id.

20. See *INS v. Chadha*, 462 U.S. 919, 958 (1983).

21. *Eisen*, 417 U.S. at 173.

viewed as a Rule 23(b)(2) action. The Court also refused to treat the suit as a Rule 23(b)(1) action on the theory that the chance of inconsistent adjudications — a requirement of that type of class action — was virtually nil because each individual investor had so little stake in the outcome (seventy dollars). This may be true, as a purely practical matter, but from that perspective hard to understand why the Court was so insistent on individual notice to each and every investor, considering the small stake at issue.

This odd oscillation of the Court between a formal and a pragmatic perspective — one, when it decided upon the need for individual notice, the other, when it came to classify the class action — suggests that perhaps larger considerations, largely of a political character, were at play and that these considerations, not the specific wording of Rule 23 itself, accounted for the Court's decision. Certainly, political factors, in the broadest sense, must account for the failure of Congress, the Judicial Conference of the United States, or, for that matter, the Court itself to revise the allegedly restrictive language of the rule invoked. More than twenty years have passed since the Court handed down its ruling in *Eisen*.

The momentum behind the concept of the private attorney general and thus of the class action was at its strongest during the 1960s and the Warren Court era. In the 1970s and 1980s, American politics and American law moved to the Right, and, in that climate, the class action became a frequent target of conservative forces. Indeed, the *Eisen* decision may be seen as one of the many victories of those forces: Individualized notice escalates the costs of notice and thus makes the class action less attractive as a purely financial matter. It dampens the enthusiasm of the private attorney general, who after all must shoulder those costs, at least at the front end, and thereby protects the status quo. Such an interpretation of the Court's decision is made all the more plausible once it is seen as part of a larger program to curtail the private attorney general, a program that gathered force during the 1970s and 1980s and included the refusal of the Supreme Court to modify the traditional American attorney's fees rule for public interest suits²² and also the repeated assaults by Republicans, in the White House and in Congress, to the governmentally funded legal service organizations.²³

22. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975).

23. See EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 3-102, 279 (2d ed. 1978) (recounting establishment of Legal Services Corporation and early opposition to it by Nixon Administration); *Make Legal Services Legal*, N.Y. TIMES, June 1, 1983, at A22 (discussing Reagan Administration's opposition to Legal Services); see also Naftali Bendavid, *As GOP Soars, Will LSC Sink?*, LEGAL TIMES, Dec. 5, 1994, at 1, 16-17 (outlining Republican opposition to Legal Services

Couched in purely political terms, this explanation for the turn in American law may be sufficient, yet, in the end, it seems to me to be too facile. It does not wholly explain *Eisen* and ignores the deep theoretical — maybe even constitutional — question raised by the class action. Individualized notice is indeed very costly and a burden in the class action, but it also can be seen as an attempt to respond to the anomalous character of self-appointment as a mode of representation. The truly disquieting fact about the class action is that it creates a situation in which I may be represented in proceedings I know nothing about and by someone I do not know and had no role whatsoever in choosing. The social purposes served by the class action may well justify this odd form of representation, but it would be a mistake to ignore or deny its very oddity and the fact that it runs counter to the individualistic values that so permeate our legal system. Admittedly, these values were given dramatic expression in America during the 1970s and 1980s, when we experienced a revival of orthodox capitalism and classical liberalism — the most individualistic of all ideologies — but this development might only be a matter of emphasis. The individualistic values that the class action calls into question are all pervasive features of our law, perhaps of all law, and, for good or bad, will always exert a restraining influence on the great temptation of social reformers to create collective instruments that might better serve their ends.

Corporation); William Mellor, *Want Welfare Reform? First Fight Legal Services Corporation*, WALL ST. J., Feb. 1, 1995, at A13 (claiming that Legal Services Corporation stands in way of welfare reform).

