FUNCTIONAL INTEREST ADVOCACY IN MODERN COMPLEX LITIGATION

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I. INTRODUCTION

Before a court enters an order affecting an individual, it should hear the arguments of that individual or his representative. Such a proposition is hardly novel; it is a simple statement of due process requirements.[1] In modern complex litigation, however, courts frequently enter orders affecting individuals who have not had their views heard, even through a representative.

In a typical school desegregation case, for example, the remedy requires massive changes in the lives of students, parents, teachers, administrators, and school board members. It is unlikely, however, that the judge heard the views of more than a handful of these individuals before he entered his final order. The judge heard, instead, from two lawyers. One lawyer purportedly represented the view of the school board, although in reality he probably advocated a combination of his own views and the views of the people in the school system with whom he had the most contact, the top administrators or the majority of the school board.[2] The other lawyer purportedly represented the view of the class of black parents and children, although in reality he probably advocated a combination of his own views, those of the organization that sponsored the litigation, and those of the class representatives.[3] It is unlikely that all of the other affected individuals had views identical to those held by the people actually represented in the litigation. To the extent their interests differed, a judicial order affecting them was entered without their arguments being heard.

Ensuring that all affected individuals have their views heard is an extremely important aspect of our legal process. In addition to instinctive notions of fairness, there are at least two practical reasons why the

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1. U.S. CONST. amend XIV. *See generally* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

2. *See* text accompanying notes 70-72 & 89-93 *infra*.

3. *See* text accompanying notes 80-88 *infra*.

judge should maximize involvement of affected individuals. First, the judge's decision is more likely to be correct if he is aware of all the information and arguments from all the points of view.[4] Second, the people who must comply with the order will be more likely to do so if they know their views have been heard.[5]

For these reasons, the adversary system of litigation is designed to include representation of all affected individuals. In theory, the affected individuals are all formal parties, and each party is represented by a lawyer whose duty is to advocate vigorously for that party's position.[6] The lawyer is charged to consider no other interests, be they his own, other people's or the public's. His loyalty must be unswerving.[7] He must present the facts and argue the law in a way most favorable to his client.[8] In this way the judge is presented with all the information and arguments from all the affected individuals. This theory of the adversary system is based on simple private lawsuits, however, and fails to ensure adequate representation when formalistically applied to modern complex public litigation. Such a formalistic application leads instead to four erroneous assumptions that result in the exclusion of arguments by affected individuals in litigation.

First, some judges assume that the effects of the case extend only to the parties before them. Thus they do not concern themselves with views other than those presented by the lawyers for those parties. This assumed limitation on the effect of the litigation may be true in some few simplistic lawsuits, but increasingly it is a false assumption. With the expansion of equitable remedies and the increasing use of the class action, modern litigation frequently has direct legal effects well beyond the actual formal parties.[9]

Second, the courts assume that if any people other than the parties will be affected by the case, they will come forward on their own and become parties to the litigation. Thus judges do not attempt to seek out the views of absentees but wait passively for them to appear. This occasionally may be correct. If, however, the affected absentees do not

4. *See* text accompanying notes 19-23 *infra*.

5. *See* text accompanying notes 24-25, 75-76 & 94 *infra*.

6. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1979) [hereinafter cited as ABA CODE].

7. *Id.* EC 5-1.

8. *Id.* EC 7-1, 7-4; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469 (1966).

9. *See* text accompanying notes 28-53 *infra*.

know about the litigation and their right to be heard, or cannot obtain counsel to express their views, their existence may never be known.[10]

Third, to the extent judges do take absentees' views into account, they usually assume they know implicitly what those views are. Thus they perceive no need to ask the absentees about their interests. Occasionally, the court may guess correctly. Usually, however, the judge must base his guess on very little actual experience with the absentee group.[11]

Finally, the courts usually assume that the parties each have a unitary interest in the litigation. Thus they assume that they need not look for divergent views within the party and that they can rely on the party's lawyer to present its interest. This may be true when the party is an individual. When the party is a complex legal entity such as a class, government agency, or corporation, however, the assumption frequently is incorrect, particularly in modern public litigation.[12] A complex legal entity is composed of several individuals, each occupying different roles in the entity. Quite likely there are numerous conflicting interests within that entity.[13] Furthermore, in modern public litigation, the lawyers and sponsoring organizations frequently advocate their own interests.[14]

This Article proposes a functional analysis of the interests affected by the lawsuit and suggests techniques for the individuals with those interests to become involved in the litigation and to advocate those interests to the judge before the decision is made. In every case, the court should consider whether and in what way individuals other than the parties may be affected. In cases in which absentees may be affected or in which the parties are complex legal entities composed of a number of individuals, the court should organize the interests into outcome positions for advocacy rather than assume that each party contains a unitary interest.[15] The court should ensure that there is an advocate for each outcome position[16] and that the individuals who support each position know who their advocate is and have a means for communicat-

10. *See* text accompanying notes 96-103 *infra*.
11. *See* text accompanying notes 104-06 *infra*.
12. *See* text accompanying notes 61-94 *infra*.
13. *See* text accompanying notes 58-60, 69-78, & 89-93 *infra*.
14. *See* text accompanying notes 80-88 *infra*.
15. *See* text accompanying notes 108-19 *infra*.
16. *See* text accompanying notes 115-19 *infra*.

ing with that advocate.[17] In other words, the lawyers should represent positions rather than parties. In this way the litigation will involve all the affected individuals, and all will have their interests represented. The judge will have the information and arguments from all the points of view and thus will be better able to make a well-informed decision. Finally, the people who must carry out the remedial order will be more cooperative, because they will think the decision was reached fairly.

In simple private litigation, the adversary process does this interest organization and involvement automatically. In modern complex public litigation, however, the adversary system does not work automatically. The judge must guide its workings to implement its policies. This Article first will explore in greater depth the nature and source of the problem, so as to alert judges to the situations in which they must modify the adversary system in order to obtain adequate representation of all affected interests. This Article then proposes a method of interest analysis, involvement, and advocacy, with several examples of how the method would work in the types of problems of interest representation most common in modern litigation.

II. THE PROBLEM: FORMALISTIC APPLICATION OF THE ADVERSARY PROCESS TO MODERN COMPLEX LITIGATION

The adversary process for dispute resolution is an ingenious one. Self interest of the parties and the lawyers fuels the system,[18] which is organized according to the psychological principle of separating the investigative function from the judging function so as not to influence the investigation with predictions about the outcome.[19]

If the individual charged with investigating and developing the facts, law, and policy involved in a case forms a tentative hypothesis concerning some element of the case, further investigation naturally will tend to proceed along lines that will confirm or support that hypothesis. The investigator will not seek information that tends to disprove the tentative hypothesis, and if he does uncover contrary information, he will likely ignore, forget, or misconstrue it.[20] The danger of combining the

17. *See* text accompanying notes 120-23 *infra*.

18. *See* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 1-2 (3d ed. 1980).

19. *See* ABA CODE, *supra* note 6, EC 7-19; Damaska, *Presentation of Evidence and Factfinding Precision,* 123 U. PA. L. REV. 1083, 1091-92 (1975).

20. *See* E. LOFTUS, EYEWITNESS TESTIMONY (1979). *See also* Thibaut & Walker, *A Theory of Procedure,* 66 CALIF. L. REV. 541, 549-50 (1978).

roles of decision maker and investigator, therefore, is that the individual will make a decision based on inadequate information and then selectively develop the information to support the premature decision.[21] To avoid this danger, the adversary system isolates the decision maker from the case until the advocates complete their investigation. The system further assigns each advocate a tentative hypothesis—his client's best position—so that his investigation may proceed in the direction that supports that position. Since their tentative hypotheses are diametrically opposed, the facts that one side develops will be those psychologically suppressed by the other side, and vice versa.

Self interest, on the part of both the client and the lawyer, motivates them to investigate thoroughly and to advocate their position vigorously. Both client and lawyer want to win the case, and both know that only they will present the evidence and arguments for their side. The judge will not do so, for he must remain impartial and passive.[22] Similarly, their opponent will not, because his interest in winning requires that he present only the evidence and arguments that support his own position. With both sides thoroughly investigating and vigorously advocating, however, the judge ultimately hears all the facts and all the arguments. His resulting decision, therefore, is fully informed and more probably correct.[23]

In addition to presenting all the information to the judge, the adversary system is designed to involve the people who will be affected by the decision. The courts are effective only because people voluntarily comply with their orders. Although the courts can handle occasional noncompliance (through the cooperation of others, such as the police), they cannot function with large-scale resistance. People tend to comply with judicial orders when they think they have been afforded the opportunity to participate in the process and make their points to the judge.[24] The adversary process, therefore, gives the parties control not only of the investigation, but also of the presentation of evidence and

21. *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("[t]he Court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant").

22. *See* ABA CODE OF JUDICIAL CONDUCT, Canons 2, 3 (1979); ABA CODE, *supra* note 6, EC 7-19.

23. *See* ABA CODE, *supra* note 6, EC 7-19, 7-20. *See generally* Damaska, *supra* note 19.

24. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1299 (1976). *See generally* Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case,* 25 U.C.L.A. L. REV. 244 (1977).

arguments. As a result, whether the outcome is favorable or not, the parties will believe it was reached fairly and should be obeyed.[25] Such is the ideology of the adversary system.

As applied to simple private litigation, the adversary system is designed to effectuate automatically the two criteria for judicial legitimacy: a fully informed decision maker and the opportunity for all affected individuals to participate. In the paradigm of private litigation, the parties are the few individuals who will be concerned directly in the remedy. They usually are divided into two camps, plaintiff and defendant, and represent diametrically opposed views on the desired result of the litigation.[26] Because there are only two sides to the controversy, and because each presents its version of the facts and arguments of policy and law, the system ensures consideration of all the relevant points of view and participation of all affected interests in the decision making process.

An increasing amount of litigation does not resemble the simple two-sided lawsuit paradigm, however. These new cases[27] have been called "public interest" litigation,[28] "public law" litigation,[29] "institutional reform" litigation,[30] and "law reform test case" litigation,[31] and they usually are characterized by two distinguishing features: complex parties and complex remedies.

The relief sought in this type of litigation generally is injunctive, although these cases may vary in scope and complexity, ranging from simple actions for declaratory or injunctive relief seeking a rule change[32] to litigation seeking to reorder in detail a segment of society—

25. *See* Engstrom & Giles, *Expectations and Images: A Note on Diffuse Support for Legal Institutions,* 6 L. & SOC'Y REV. 631 (1972). *See generally* Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice,* 65 VA. L. REV. 1401 (1979).

26. *See* Chayes, *supra* note 24, at 1282-83.

27. Although complex public litigation has generally been thought of as a new procedural development, *see* Chayes, *supra* note 24, a persuasive case can be made that it is not particularly novel in form, but only in the scope of the substantive rights it enforces. *See* Eisenberg & Yeazell, *The Ordinary and The Extraordinary in Institutional Litigation,* 93 HARV. L. REV. 465 (1980).

28. *See, e.g.,* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849 (1975).

29. *See, e.g.,* Chayes, *supra* note 24.

30. *See, e.g.,* Comment, *The Remedial Process in Institutional Reform Litigation,* 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation,* 91 HARV. L. REV. 428 (1977).

31. *See, e.g.,* M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 77-124 (1974).

32. "Rule change" cases are those challenging a statute or regulation or other rule governing

usually a governmental bureaucracy or corporation—according to principles embodied in statutes and regulations or in the Constitution. Typical examples of this form of lawsuit are prisoners' rights,[33] employment discrimination,[34] welfare reform,[35] and school desegregation[36] cases, but many other types of cases involve complex parties or broad relief as well. The litigation ordinarily proceeds as a plaintiff class action,[37] with the single plaintiff representing the interests of a large number of similarly situated individuals.[38] The goal of the suit is to have the court review the structure, policies, and practices of the defendant and their impact on individuals, particularly members of the plaintiff class, and then to have the court order restructuring of the defendant according to a plan that satisfies the norms of the Constitution and statutes. The resulting "structural" injunction[39] begins with the defendant's initial interpretation of what constitutes compliance with the law and develops into an agreement that the plaintiff helps to

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a defendant's conduct. *See* Comment, *The New Public Interest Lawyers,* 79 YALE L.J. 1069, 1076-77 (1970).

33. *E.g.,* Meachum v. Fano, 427 U.S. 215 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974).

34. *E.g.,* United States Steelworkers v. Weber, 443 U.S. 193 (1979); Department of Water & Power v. Manhart, 435 U.S. 702 (1978).

35. *E.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

36. *E.g.,* Milliken v. Bradley, 418 U.S. 717 (1974); Brown v. Board of Educ., 347 U.S. 483 (1954).

37. FED. R. CIV. P. 23 and state counterparts. *See* Comment, supra note 30, at 875-76.

38. Although many public interest cases are class actions, many others are not. Shareholder derivative suits, and suits for declaratory relief or simple injunctive relief against a government agency, for example, may have broad "public interest" effect. *See* Homburger, *Private Suits in the Public Interest in the United States of America,* 23 BUFFALO L. REV. 343 (1974). Many civil rights cases could be brought without the class action rule. *See* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 672 (1979) [hereinafter cited as Miller, *Frankenstein Monsters*]. Whenever the issue is one of interpretation of a law that concededly applies to a group, an individual action will have a classwide effect. *See* Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation,* 27 U.C.L.A. L. REV. 514, 518-19 (1980) [hereinafter cited as Yeazell, *Part I*]. In a Fed. R. Civ. P. 23(b)(2) class action, because the injury is classwide, the relief is appropriately classwide, even if the suit had been brought individually. *See* Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class and Representation,* 27 U.C.L.A. L. REV. 1067, 1110, 1118 (1980) [hereinafter cited as Yeazell, *Part II*]. *See also* Potts v. Flax, 313 F.2d 284 (5th Cir. 1963). This is particularly common in employment discrimination cases. *See* Miller, *An Overview of Federal Class Actions: Past, Present and Future,* 4 JUST. SYS. J. 197, 209 (1978) [hereinafter cited as Miller, *Overview*]; Comment, *To What Extent Can a Court Remedy Classwide Discrimination in an Individual Suit Under Title VII?,* 20 ST. LOUIS U.L.J. 388 (1976). Although the class action is a common characteristic of modern complex litigation, it is not a necessary or definitional one. The definitional characteristics of this type of litigation are complex parties and broad remedial impact.

39. *See* O. FISS, INJUNCTIONS 415-17 (1972).

shape.[40]

These broad remedy cases have become frequent.[41] At one time judges were reluctant to issue injunctions that would require continuing judicial supervision. Today they take control of prison systems, school systems, and other large societal organizations, if not eagerly, at least without significant hesitation.[42] At one time, judges deferred to the expertise of prison wardens, psychiatrists, and other managers of society. Today they are increasingly willing to hold these experts' actions to a vague due process of law standard.[43] Whether the credit or blame goes to activist judges,[44] free legal aid,[45] the explosion of rights and of proceedings to enforce them,[46] or to the liberalization in 1966 of the federal class action rule,[47] the clear fact is that social reform litigation seeking broad injunctive relief is now common,[48] and it probably

40. This remedy is frequently a product of negotiation between the parties. Even if it is judicially created, the plaintiffs' suggestions are usually considered. Chayes, *supra* note 24, at 1298-1301; Comment, *supra* note 30, at 809-12. *See, e.g.,* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978); Interview with M. Davidson in M. MELTSNER & P. SCHRAG, *supra* note 31, at 261. *But see* Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979), and the discussion of the remedy building process in that case at text accompanying notes 140-41 *infra*.

41. *See* Cahn & Cahn, *Power to the People or the Profession? The Public Interest in Public Interest Law,* 79 YALE L.J. 1005, 1008-11 (1970); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?,* 70 F.R.D. 199, 204-05 (1976); Miller, *Frankenstein Monsters, supra* note 38, at 668, 670-72, 674-76.

42. *See* Chayes, *supra* note 24, at 1292-96; *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1012-13, 1061-63 (1965).

43. *Compare* Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) ("[c]ourts have uniformly held that supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions") *with* Smith v. Sullivan, 553 F.2d 373, 381 (5th Cir. 1977) ("[i]n considering the District Court's order and the remedies required for violations of inmates' rights, we note . . . 'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies' ").

44. *See* Satter, *Changing Role of Courts and Legislatures,* 11 CONN. L. REV. 230 (1979).

45. *See* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE 6-10 (1976); Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice,* 58 B.U.L. REV. 337 (1978).

46. *See* Cahn & Cahn, *supra* note 41.

47. *See* Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint),* 55 F.R.D. 365 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1972). *But see* Miller, *Frankenstein Monsters, supra* note 38.

48. Professor Yeazell has thoroughly and persuasively documented the proposition that the phenomenon of social reform litigation has existed as long as litigation has and is nothing new. *See* Eisenberg & Yeazell, *supra* note 27; Yeazell, *Part I*, supra note 38; Yeazell, *Part II,* supra note 38; Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action,* 77

will not become less common in the future.

The scope of the remedy in public interest litigation, as compared to private litigation, has two effects that result in the breakdown of the adversary process in public interest cases. First, persons not even technically involved in the lawsuit as parties are bound by its results.[49] Of course, people who are not parties to a traditional private lawsuit nevertheless are subject to its stare decisis effect, but this effect is limited.[50] In subsequent litigation, absentees are free to argue either that there are significant distinctions between their case and the earlier one that should change the outcome, or that the earlier result was unwise and should be modified or overruled. The court is free to reach a different result in the subsequent case without disturbing the finality of the earlier one.[51] Thus the interests directly involved in the private lawsuit are exclusively those of the litigants. The public interest lawsuit, on the other hand, may result in a reordering of relations among a large number of individuals and entities. Absentees may be legally bound to the outcome,[52] but in any event they pragmatically are foreclosed from relitigating the principle as it affects them. The court cannot reach a different result in a subsequent case without disturbing the finality of the earlier one.[53] Thus the interests involved in this form of litigation are often broader than the parties to it. An example of this effect on

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COLUM. L. REV. 866 (1977). Its frequency of use and the extent of its effect on society in recent years, however, is extraordinary.

49. *See* Comment, *supra* note 30, at 906-07.

50. *Cf.* Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) (stare decisis effect on an absentee gave rise to a right of intervention because the usual limitations on stare decisis, the freedom to argue factual distinctions or incorrectness of the earlier decision, were pragmatically inapplicable). In many public interest suits, because the crucial issue is one of law, stare decisis may bind absentees just as tightly as res judicata would. *See* Yeazell, *Part I, supra* note 38, at 518-19.

51. The earlier case need not be reopened and modified to be consistent with the later change in law, because repose or finality of the judgment is an important value of the legal process. For this reason, Fed. R. Civ. P. 60(b) does not contemplate relief from a judgment on the grounds that the law has changed. Lubben v. Selective Serv. Sys., 453 F.2d 645 (1st Cir. 1972).

52. Members of a class adequately represented, holders of joint interests, and individuals who have some close relationship with a party may be bound through res judicata even though not parties to the lawsuit themselves. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

53. This is true because both orders would operate inconsistently on the same bureaucracy. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., No. 74-P-339-S (N.D. Ala. April 12, 1974) (consent decree):

> This Decree resolves all issues relating to acts and practices of discrimination by the defendants to which this Decree is directed, as well as any future effects of such acts and practices . . . . If a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with . . . this Decree, the

absentees is the impact of a school desegregation case on white students and parents. Although they usually are not even technically part of the party structure, their lives nevertheless are affected, and they are pragmatically bound.

Second, the complex remedy-building process in public interest cases results in divisions of interests that do not always coincide with the theoretical plaintiff-defendant division or even with the party structure.[54] Although private lawsuits operate according to an established system of mechanically inferring the single appropriate remedy solely from the nature of the claim,[55] the creation of a remedy in public interest litigation involves inventing a complex scheme of societal interactions to replace the existing unconstitutional or illegal scheme.[56] Courts must choose a remedy from the almost infinite variety of schemes that could be designed to square with the constitutional or statutory norm. Frequently each of the several different options will have supporters among the affected individuals.[57] Unlike the liability stage, in which the bipolar choice is whether or not to find liability, the remedy stage of public interest litigation may have a many faceted interest array. Moreover, because the remedy-building process can be lengthy, with early choices foreclosing some future options and opening up others, the interest array can be expected to shift with each new choice.

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plaintiffs will undertake to advise the Court . . . that such relief in that action or proceeding is unwarranted.

Discussing this provision, the district court noted "that resolution in the forum of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of private parties in other litigation." United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1, 6 (N.D. Ala. 1974). The court of appeals agreed, stating, "[t]he government concedes, of course, and no one seriously argues contrariwise, that no forum court will be legally obliged to follow any government recommendation of dismissal, stay or transfer as to any separate suit filed in such court." United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 837 (5th Cir. 1975). *But see* Martini v. Republic Steel Corp., 532 F.2d 1079 (6th Cir. 1976), upholding dismissal of a subsequent related action, seeking separate relief from a defendant covered by this consent decree, on principles of comity. *See also* Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), reversing dismissal of a private employment discrimination lawsuit seeking relief arguably inconsistent with the continuing injunction earlier obtained by the government in United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *modified,* 446 F.2d 652 (2d Cir. 1971).

54. *See* Comment, *supra* note 30, at 902-06.

55. Chayes, *supra* note 24, at 1282-83.

56. *Id.* at 1296.

57. *See* Yeazell, *Part II, supra* note 38, at 1112-13.

Airlines[58] provides an example of this shifting interest array. The union of airline stewardesses and several individuals brought a class action suit, challenging the airlines' policy of firing pregnant stewardesses. The class consisted of both present and former stewardesses who were united in interest against the policy. Beyond the issue of liability, however, the interests separated over questions such as back pay and accrual of seniority. The former stewardesses wanted seniority from the time of the illegal discharge until reinstatement. This goal was adverse to the interests of the junior currently employed stewardesses, however, because seniority determines trip assignments.[59]

On the back pay question, the interests again were aligned differently. Current stewardesses had little interest in the question one way or the other. Within the group of former stewardesses, however, many were unlikely to recover any back pay if their individual cases were litigated, although some might have recovered substantial amounts. Because the airlines were unwilling to compromise on the issue, litigation estimated to last five years would be necessary to recover the back pay for the few. The union counsel compromised the back pay interest to obtain a settlement containing a reinstatement provision so that former stewardesses could return to work immediately rather than in five years.[60]

These remedies not only affect those absent from the lawsuit, but also act upon a complex interest structure that does not coincide with the party structure. The potential for the broad impact of the remedy often generates an attempt to include, at least technically, everyone to be affected by naming complex legal entities as parties. Thus a class, perhaps with subclasses, may sue a governmental bureaucracy, such as a school board. If the class is defined broadly enough, it can encompass all those persons potentially affected on one side. On the other side, the school board includes the administration, teachers, perhaps the students and parents, and perhaps even the general public, because school board members are elected representatives. Similarly, a union, perhaps coupled with a class, may sue a corporation. The union repre-

58. Airline Stewards & Stewardesses Ass'n Local 550 v. American Airlines, Inc., 490 F.2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

59. Because the lawyer represented the union, and only currently employed stewardesses were union members, it is not surprising that the negotiated settlement provided for minimal accrued seniority for the former stewardesses.

60. Again, this could be predicted, because the many returning to work will be members of the union, while the few collecting back pay may not be.

sents the employees, while the corporation stands for the corporate board, the officers, the shareholders, and even those employees not represented by the union. This formal involvement of absentee interests, however, is a legal fiction that satisfies due process requirements only in the most technical sense. It does not meaningfully involve the affected interests in a way that fully informs the judge or that causes the people who must obey the decree to believe it was reached fairly. When a single counsel represents a complex party, the self-interest that drives the adversary system now works to mask the true diversity of interests within the party and the litigation.

The failure of the adversary process in public interest litigation is attributable primarily to the fiction that a legal party is monolithic in interest. An individual human being has a single preferred outcome position on an issue, but a group of people probably has both a majority and minority view. Although the individual may have mixed feelings about the issue, it is appropriate for him to suppress his less strongly felt view and advocate only the dominant one. Such behavior is illegitimate, however, when the legal party is a group of individuals.[61] Yet the adversary process expects, and perhaps even requires, counsel to suppress the minority view.

In the traditional simplistic private lawsuit, the task of representing

61. In some types of litigation involving complex parties, the existence of minority dissenting interests within the party is doubtful, and their suppression may be appropriate. Thus, when one corporation sues another for money damages for breach of contract, we could predict that the individuals who compose each corporation would prefer their corporation to win. Their interest is purely financial self-interest, and we can reasonably assume that people prefer more rather than less money. *See* Yeazell, *Part II, supra* note 38, at 1083-84, 1111. Even if dissenting interests were present in this hypothetical private contract action with complex parties, their suppression is of less concern for three reasons. First, there is probably no particularly public policy involved, unlike the typical public interest lawsuit, so that the effects of the litigation are more limited (though the extent to which this is true depends in some measure on whether the suit will resolve issues of fact, which are more limited and private, or issues of law, which may bind thousands of corporations and millions of people through stare decisis and may effectively reorder commercial society). Second, by becoming directors, officers, shareholders, and even employees of the corporation, the individuals voluntarily submitted themselves to an internal dispute resolution mechanism, including, for example, the corporate bylaws and the union contract, and may have no legitimate claim to a right to register dissent outside that mechanism. *See* note 79 *infra*. Finally, the remedy in the hypothetical case, payment of money, does not depend for effectiveness on the voluntary compliance of the large group of individuals who compose the entity, but only on one or two readily identifiable individuals whose cooperation can be coerced through contempt if necessary. Thus voluntary compliance, which comes from satisfaction with the process as a result of participation and adequate representation, is unnecessary. For these reasons this Article focuses on the typical public interest case, though the analysis is applicable to some private cases as well.

the client's interest is, in theory, not a difficult one. The attorney is required to describe fully and fairly the client's options, including all their implications and ramifications. After he is fully informed, the client makes the choice of goals, and the attorney is bound to respect that choice and urge its adoption by the court.[62] Although this paradigmatic vision may overestimate ability to present or hear a "full and fair" description of options,[63] it is nevertheless the stated ideology of the legal profession.

In a public interest lawsuit, however, the model of the attorney as conduit for the client's interests is inappropriate.[64] The attorney cannot meet with a class that is too numerous for joinder in a lawsuit, explain fully all the options in an intricate suit seeking an injunction to reorder a bureaucracy, and obtain a unanimous decision. The attorney cannot consult the governmental or corporate entity, but must speak to the individuals with the greatest authority, who have only certain interests at heart. He also may consult a representative sample of the individuals who compose the party. In the end, however, it is the lawyer's determination of the party's self-interest and the goal it would choose that controls.[65] Moreover, because the choice of goals in public interest litigation is inchoate and complex, the attorney may have difficulty fully and fairly explaining the choices without characterizing and subjectively weighting them to conform to his own values and views of the client's best interest. Because a variety of differing interests necessarily exist within a complex party, the lawyer has the job of sorting through the interests, weighing them, reconciling them when possible, and suppressing the less powerful interests when necessary.

The suppression of minority dissenting views is pragmatically unavoidable and may be ethically mandated. To inform the court of a minority disagreement with the majority position on an issue would severely undermine the force of an attorney's advocacy for his chosen position. In light of the attorney's natural desire to prevail, he can only be expected to suppress dissenting viewpoints within the complex party. Indeed, the ethical requirement of representing the client zeal-

62. ABA CODE, *supra* note 6, EC 7-7, 7-8. *See also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1592 (1976).

63. *See* Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

64. *See generally Developments in the Law—Class Actions, supra* note 62, at 1592-97.

65. *See* Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1175-80 (5th Cir. 1978); Comment, *supra* note 30, at 784-86. *See also* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976).

ously might be violated by such equivocal advocacy.[66]

The image asserted by counsel of a party united in interest contrasts sharply with the reality of an entity held together merely by a legal fiction and possessing as many points of view as there are potential outcomes on any particular issue. The presence of differing viewpoints among class members is well established and is recognized by the requirement that judicial scrutiny test both the adequacy of representation and the typicality of claims or defenses among the various class members.[67] Upon examination, it is apparent that other complex parties are also diverse in interest structure, in contrast to their fictional unity.[68]

Frequently, government agencies are parties to public interest lawsuits. The individuals named as parties, however, are normally only the top rank of officials, and the individuals who have direct service contact with the public are not formally involved in the litigation. Thus, for example, a civil rights action challenging the constitutionality of an aspect of a state prison may name the governor, the director of the state's prison system, and the superintendent or warden of the particular prison as defendants. The direct actors in the system, such as guards and social workers, are not formally included in the party structure. A single lawyer from the state attorney general's office ordinarily represents the variety of official defendants in the litigation. The attorney general's office, however, frequently acts as an independent evaluator and protector of the public interest rather than as a conduit for the interests of its particular governmental clients.[69] Conflicts of interest

66. *See* ABA CODE, *supra* note 6, Canon 7. *But see Developments in the Law—Class Actions, supra* note 62, at 1595-96, suggesting that the lawyer has a duty to report conflicts of interest among class members to the judge. Such a rule is both unrealistic and counterproductive. The self-interest that fuels the adversary process, *see* text accompanying notes 22-23 *supra*, makes it unlikely that the lawyer would report dissenting views, and the fact that the lawyer is psychologically programmed to ignore information contrary to his assumptions, *see* text accompanying notes 20-21 *supra*, makes it unlikely he will notice antagonistic views. Even if the rule were workable, however, it would discourage lawyers from soliciting views from other than their named representative client, lest antagonism to their chosen position surface. Moreover, disclosure of this information is arguably itself unethical, revealing a "secret" of the client. ABA CODE, *supra* note 6, Canon 4.

67. FED. R. CIV. P. 23(a)(3), (4).

68. *See* Comment, *supra* note 30, at 902-06.

69. *See, e.g.,* Secretary of Admin. and Fin. v. Attorney Gen., 367 Mass. 154, 326 N.E.2d 334 (1975). The Massachusetts Attorney General may refuse to prosecute an appeal for the head of a state agency he represents in litigation, despite the client's desire to appeal, when, in the Attorney General's judgment, the appeal would not be in the public interest. *Id.*

among these named defendants, that is, differences about what result should be advocated on various issues in the litigation, may be expected. By contrast, the defense counsel usually presents to the judge an apparently unified position of defendants on any particular issue. This unified position is generated by the same process as is performed by a lawyer representing a party in a class action: selection, characterization, and suppression of interests within the complex client entity. Unfortunately, the points of view most likely to be suppressed in this process may be those most germane to the issue—those of the prison administration, the guards, and the social workers, who, although intimately involved in the process under consideration by the court, are uninvolved in the process by which it is considered.

Another common type of party in public interest cases is the governmental policy making board, which has a bureaucracy implementing and executing its policies. Typically, the board will not be unified on an issue, but will contain both a majority and a minority, each with different interests, and both differing from the third interest of the bureaucratic entity. In school desegregation cases, for example, the defendant may be the school committee, composed of a majority resisting systemwide restructuring and the minority welcoming it, and the school department that oversees such concerns as safety, efficiency, and educational quality. The single lawyer for this composite defendant, unable to represent all three interests[70] simultaneously, will probably advocate either the position of the committee majority, which is the legally controlling interest group in this complex party, or the position of the school superintendent if he is the official with the most frequent contact with the lawyer.[71] Again, the views and desires of those most directly involved with the plaintiffs and affected by the litigation—the teachers,[72] school administrators, parents, and children not members of the

70. The scope of interests contained in the school board defendant may be even broader than its institutional structure. Because it is intended to be representative of the population it serves, the board may be considered to include the interests of the parents and the citizenry in general. *See, e.g.,* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

71. *See* Wilton, *Legitimacy in Social Reform Litigation: An Empirical Study,* 15 U. MICH. J.L. REF. 189 (1982).

72. Teachers' unions on occasion intervene in a school desegregation case to represent the interest of the teachers. As with any other complex party, however, the union cannot truly reconcile all of the interests of its varied members, black and white, kindergarten and high school, English and physical education. The union leaders, who may not be active teachers, will hire, pay, and instruct the lawyers. Teachers union intervention may broaden the representation of interests in the lawsuit, but is unlikely to complete it.

plaintiff class—are not represented in the decisionmaking process.

This suppression of interests creates two unfortunate effects on the judicial process in complex public litigation: it screens useful information from the judge, and it discourages necessary voluntary compliance with the remedial plan. It is apparent that those persons most affected but least involved in the adjudicatory process, the line workers, have a great deal of valuable information that the court should know about when making remedial choices. The contact point between plaintiffs and the defendant bureaucracy should be the focus of a public interest lawsuit. The workers who form that contact point should be helpful participants in the creation of a remedial plan. The present method of interest analysis in public interest litigation, however, dominated as it is by outmoded party theory, tends to suppress this helpful information rather than expose it. It is clearly in the interest of a more competent and just adjudicatory system to encourage the participation of these currently excluded interests in public interest litigation.

Moreover, these unrepresented persons in the lower levels of the bureaucracy are the ones who must carry the remedial plan into operation.[73] Their exclusion from the litigation process can result in their resistance to the judicial order. In very practical terms, if the people who are affected by the decree have had an opportunity to present their point of view to the judge for consideration, they are more likely to respect and obey the ultimate order of the court, even if it is adverse to them. If they are disenfranchised, ignored, and uninvolved in the process, they are more likely to respond by ignoring the orders of the court, which they will perceive as unfairly generated and hence illegitimate.[74] Because the typical public interest case yields a complex injunctive remedy, noncompliance is often difficult to determine and eliminate. It is unlikely the court would even hear of a teacher's behavior in class toward black students, for example, let alone invoke contempt powers to correct it.[75] The court must rely on voluntary compliance in these

73. *See* Note, *supra* note 30, at 440.

74. *See* Wilton, *supra* note 71.

75. Judges are extremely reluctant to use contempt power in these types of cases. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1299 (W.D.N.C. 1969), *vacated,* 431 F.2d 138 (4th Cir. 1970), *rev'd,* 402 U.S. 1 (1971) (district court order reinstated) a school discrimination case. Despite orders on April 23, 1969, 300 F. Supp. 1358; June 20, 1969, 300 F. Supp. 1381; and August 15, 1969, 306 F. Supp. 1291, the defendant school board failed to submit and implement a satisfactory school desegregation plan. When, on November 17, 1969, the board failed to comply with still another deadline, the plaintiffs moved for contempt citations against

cases, which is unlikely to occur unless the affected interests are brought into the remedy-building process.[76] Handling a public interest case in the same manner as a private lawsuit, however, minimizes the involvement of these affected interests.

Similarly, treatment of the business corporation defendant as a unitary interest ignores the reality of its complex interest structure. Different corporate officers may prefer different results in litigation in which the corporation is a party. The board of directors, like the school board, probably contains a majority and minority view, and the preferences of the individual stockholders can be expected to vary. Additionally, although they are not part of the corporate ownership and governance structure, the employees of a business pragmatically must be considered a component part of the defendant entity,[77] with an important and often differing[78] interest in litigation that seeks to rearrange the corporate bureaucracy. The analysis of pragmatic interests of a complex corporate defendant frequently merges into the analysis of interests of the complex plaintiff, because stockholders or employees are those who most often bring public interest litigation against business corporations. The examination of outcome-oriented interests in public interest litigation, therefore, must be direct and pragmatic rather than a blind reference to the party structure.

There normally are some formal hierarchical rules within the corporate structure that resolve this conflict, rules that the system may be justified in honoring.[79] State laws governing corporations or the corpo-

members of the school board. Though it admitted that the "evidence might very well support such citations," 306 F. Supp. at 1314, the court deferred action, stating that contempt citations would be avoided if possible. *See also* Interview with M. Davidson in M. MELTSNER & P. SCHRAG, *supra* note 31, at 258; Note, *supra* note 30, at 448-49.

76. *See* Chayes, *supra* note 24, at 1299; Yeazell, *supra* note 24, at 258-60; Note, *supra* note 30, at 439.

77. Fed. R. Civ. P. 65(d) provides that an injunction issued against a party shall bind its employees.

78. *See, e.g., In re* Lennon, 166 U.S. 548 (1897). One railroad, employing nonunion workers, obtained an injunction against another railroad, whose unionized workers had refused to handle the nonunion railroad's cars. It is unlikely that the defendant railroad hotly contested the suit or presented the union's or employees' positions to the court. The employees were bound by the injunction, however, and engineer Lennon was held in contempt for his failure to comply.

79. The sole fact that an entity is the legal subject of the litigation should not foreclose individual members of the entity from expressing dissenting views, for an entity is functionally no more than the sum of its membership. An entity may, however, demand obedience to majority rule and suppression of dissent as a price for membership; such a demand may be met voluntarily in return for inclusion in the entity. Corporate officers and directors may fit this description. On

rate bylaws usually include provisions allocating authority to control certain decisions and ensuring some protection for minority interests. Employment contracts and laws governing employee relations may provide some protection for employee interests. These protections are pragmatically too cumbersome and inflexible, however, to be useful in the litigation context, particularly for representing employee and shareholder interests. Those most intimately affected by the litigation are again those least involved by the formal party-interest analysis.

The model of attorney as conduit for the client's interest fails in public interest litigation not only because of the inherent inability of one advocate to present the varied interests within a complex party, but also frequently because of a conflict of interest between the client's desires and the attorney's own view of the public interest. Issue-oriented organizations commonly are involved with, or even control, the interests asserted in court by plaintiffs in public interest litigation.[80] Often the organizations are themselves plaintiffs suing either to assert their own organizational interests directly or those of their members derivatively.[81] Most commonly, the organization supplies counsel, either a member of its own staff or a lawyer affiliated with the organization, or it funds litigation expenses, which often include counsel fees.[82] Whatever form the organizational involvement takes, it generally controls the litigation. Lawyers employed by issue-oriented organizations tend naturally to agree with and support the organization's policies. Counsel who merely are affiliated with the organization and those

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the other hand, membership in a racial group is not the sort of choice from which a voluntary waiver of individual views for the benefit of the group may be inferred. Membership in a governmental unit, although more or less voluntary, has not been thought generally to carry the requirement of forgoing expressions of dissent.

No individual is ever required to express a view in litigation that differs from that of the entity. The court may give some deference to the entity's position as against differing views of its constituents by respecting to a degree its presumptively valid internal system for resolving differences. Unless the constituents voluntarily waive their right to express dissent, however, the court should not adhere to an entity's fictional unity of interest.

80. *See* Miller, *Frankenstein Monsters, supra* note 38, at 685-86; Miller, *Overview, supra* note 38, at 213; Yeazell, *Part II, supra* note 38, at 1115; Comment, *supra* note 30, at 874-75, 883-87. *See generally* Bell, *supra* note 65; Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy,* 59 GEO. L.J. 1095 (1971); Hegland, *Beyond Enthusiasm and Commitment,* 13 ARIZ. L. REV. 805 (1971). *See also* Gulf Oil Co. v. Bernard, 101 S. Ct. 2193, 2199 n.11 (1981).

81. *See, e.g.,* Sierra Club v. Morton, 405 U.S. 727 (1972).

82. This is the normal practice, for example, of the NAACP and the American Civil Liberties Union.

whose fees in the particular litigation are being paid by the organization may have less commitment to its policies, but they nevertheless are subject to pressure to advance the organization's goals rather than those of the client. Affiliation reflects at least general agreement with the organization's goals, and, though it is improper, lawyers naturally will tend to serve the source of their income in a particular case at the expense of their client.[83] Finally, because most organizations that fund complex, protracted, and hence expensive litigation have well-known policies they seek to advance through litigation,[84] the lawyer and client seeking such funding will often modify their litigation goals to fit into the organization's guidelines.

Although the conflict or disparity between the individual interest and organizational policy is more often potential than actual, courts must be sensitive to the problem in order to recognize true conflict. Rather than reflecting in accurate proportion the views of all individuals whose factual situations are similar, these litigation-sponsoring organizations frequently espouse a particular solution or predisposition to the group problem.[85] Although the organization proclaims itself representative of a particular group of people, such as blacks or women, in reality it reflects the policy goals of only a segment of that group, such as those blacks who prefer busing to neighborhood schools and those women who seek the elimination rather than the protection of female labor laws. In school desegregation litigation, for example,[86] a small number of individuals serve as named representatives and purportedly represent all black (and/or other minority) school children and their parents. The lawyers, however, usually are supplied and effectively controlled by the NAACP, an organization with a strong policy commitment to the particular remedy of busing. The named plaintiff is not free to alter or modify the policy, and that remedy will be advocated to the court as the desire and interest of the plaintiff class. This will be true despite disagreements among members of the class as to the desirability of this remedy. Blacks who disagree, of course, should be entitled to intervene at the point when their outcome-oriented interest is no longer ade-

83. *See* Berlin, Roisman & Kessler, *Public Interest Law,* 38 GEO. WASH. L. REV. 675, 681-82 (1970); ABA CODE, *supra* note 6, EC 5-22, DR 5-107.

84. *See* Bell, *supra* note 65.

85. *See* Berlin, Roisman & Kessler, *supra* note 83, at 684-85; Comment, *supra* note 30, at 884-85. *See generally* Bell, *supra* note 65.

86. This scenario is drawn from Bell, *supra* note 65.

quately represented by the advocates in the litigation.[87] This path, however, is often not available. If no dissent presents itself to the court, the court may assume that the organization's policy reflects the unified position of the plaintiff class.

This organizational control of interest advocacy in public interest litigation seems to be directly contrary to the norms of professional ethics, which proscribe conflicts between the client's interest and the interest of the attorney's organizational employer.[88] Because the definition of the class interest by the lawyers is inherently a discretionary task, however, and because the lawyers honestly may believe that the consensus of the class agrees with the organizational policy, the actions of the organization's lawyers realistically comport with the ethical standards. The lawyers are not misrepresenting the client's interest, but, rather, they are simplifying it. The result is that in describing their client's desires to the court, they are telling the truth, but not the whole truth.

The suspicions of conflicts of interest within a complex party, the pattern of selecting those views to advocate and those to suppress, and the resulting resistance to the remedy by the disenfranchised lower levels of the bureaucracy are all confirmed by an empirical study of Ann Arbor's "Black English" case.[89] In that case, a group of parents of low income black children sued the school system because they were dissatisfied with the response of the upper middle class white school to their educationally disadvantaged children.

Although the case contained complex parties and conflicts of interest on both sides, an analysis of the defendant will suffice to illustrate the nature of the problem. The Ann Arbor School Board was the named defendant. During the course of the litigation, new board members were elected who changed the majority of the nine person board on several issues in the case. The schools were run on a daily basis by a large, politically powerful central administration, and the superintendent of schools and several of his top aides were actively involved in the case. The focus of the case was the King School, which employed a

87. FED. R. CIV. P. 24(a). Apparently this theoretical right to intervene frequently is denied. *See* Bell, *supra* note 65, at 506.

88. *See* ABA CODE, *supra* note 6, EC 5-23, 5-24.

89. Martin Luther King Jr. Elementary School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979). For a complete report of this study, the results, conclusions, and suggestions for change in the judicial process, see Wilton, *supra* note 71.

principal and 34 teachers and professional staff. One lawyer represented this complex party.

When faced with decisions in this case, the lawyer followed a pattern common in representation of complex parties.[90] First, he assessed the alternatives and decided for himself the choice that would best serve the client's interest. Next, he discussed the choice with the individual who was monitoring the litigation for the complex client, in this case the superintendent. In presenting the choice, though, the lawyer probably painted his own preference in a more favorable light than the alternatives. The superintendent made the final decision on many issues, but occasionally the full board was consulted. In those instances, the board was presented with a choice and with the recommendation of its lawyer and superintendent. The lawyer and superintendent also supplied nearly all the information helpful in evaluating that recommendation. As a result, although the vote of the school board majority ultimately controlled the litigation, the lawyer and superintendent often pragmatically controlled the vote.[91] The individual teachers, with little influence on the school board or central administration and less influence on the lawyer, had almost no voice in the litigation.

The lawyer presented a single view of the defendant entity in court. The results of a survey of the individuals who made up this entity,[92] however, show a division of interest on almost every issue, a division that crossed party lines and even crossed groupings within the party. For example, when the individuals who were part of the defendant group were asked whether they wanted the court to find for plaintiffs or for defendant, one third of the respondents favored plaintiffs. Every component group in the defendant entity—school board, central administration, and teachers—demonstrated this support for plaintiffs.

90. The description of how the school board's counsel made advocacy decisions is based on an interview with the attorney.

91. The lawyer's pragmatic control of the decision by this pattern of communication is illustrated by the one exception to the pattern. When deciding whether to appeal the finding of liability, the board initially considered the question in executive session, and by a 5-4 vote decided, based on the recommendation of the superintendent and their counsel, in favor of appealing. Then the board decided it had to vote on the question at a public meeting, at which other interested people, including plaintiffs' counsel, could address the board. After hearing other information and perspectives on the question, a single vote changed sides, and the board voted not to appeal.

92. The survey questions were mailed to 56 members of the school board, the school system administration, and the staff and teachers of the King School. Six questionnaires were unable to be delivered by the post office, and 25 were completed and returned, for a 50% response rate.

The survey revealed similar divisions of interest within the defendant entity on such questions as whether to appeal, whether to defend or settle, and how to structure the remedial plan. The dissent was widespread and often amounted to a majority of the individual members of the entity actually opposing the entity's position.[93] Nonetheless, the lawyer presented an image of the defendant as unified and never made the judge aware of the dissent.

Squelching the dissent in the litigation process probably created problems in implementing the remedy. The individuals in the defendant entity, particularly the teachers, registered strong dissatisfaction with the result in the case, dissatisfaction that they said would have been lessened or eliminated if their views had been represented.[94] The judicial system, however, ordered these strongly dissatisfied teachers to change their attitude toward the plaintiffs, to be more accepting and positive toward them in class. It would not be surprising if some of the feelings of hostility and resentment created by the judicial process made it difficult for the teachers to carry out this remedial order.

The systemic response to the failure of the adversary process to involve dissenting interests is either that the interests should involve themselves through intervention or that the judge should take on the job of representing all absentees. Neither of these methods, however, is likely to be effective.

Intervention[95] does not adequately ensure participation by those individuals in a complex party whose interests have been suppressed, be-

93. Of the eight features of the plan, the total defendant group preferred defendant's version on three, plaintiffs' version on two, and split on three. The teacher subgroup preferred defendant's version on three, plaintiffs' version on three, and split on two.

94. Respondents indicated the degree of their agreement or disagreement with various statements about the case. The relevant results are indicated in the tables below.

	strongly agree	agree	disagree	strongly disagree
I was satisfied with the result in the case.				
TOTAL DEFENDANT GROUP	0	7	3	14
TEACHERS ONLY	0	1	1	10
* * *				
I would have been more satisfied if my views were presented, even if the result were the same.				
TOTAL DEFENDANT GROUP	4	11	2	0
TEACHERS ONLY	2	7	1	0

95. FED. R. CIV. P. 24. It can be argued that intervention may technically be unavailable in certain circumstances even to individuals whose lives will be affected by a remedy and whose preferences differ from those advocated by the lawyers in court. *See* Yeazell, *supra* note 24. But,

cause the potential dissenters cannot always be expected to present themselves to the court.[96] Often they are not aware of the pendency of the lawsuit let alone the remedial choices and issues under active consideration.[97] Notice in public interest class actions is frequently ineffective because it is not required to be individual[98] or continuing in nature.[99] Even those who receive notice of the initiation of an action and who agree on liability issues may be unaware that the case, months or years later, has proceeded to the remedy phase. They may be unaware that their representative advocates a remedial position that may differ from their individual preference and interest.[100] Alternatively, dissenters aware of the difference between their position and that of the class representative may be unable to procure counsel to assist their intervention. Since much public interest litigation is brought on behalf of disadvantaged minorities[101] who cannot personally afford counsel, dissenters are forced to rely upon public service organizations to supply counsel for them. Typically, however, these organizations, because they are few in number and limited in their issue orientation, are already involved in the litigation and are unable to represent the conflicting position of dissenters.[102] Finally, class dissenters may be

as Professor Yeazell notes, the courts should, and often do, let such individuals intervene for democratic purposes.

96. *See* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) (quoting Frankel, *Amended Rule 23 from a Judge's Point of View,* 32 ANTITRUST L.J. 295, 298 (1966): "However, the procedures available for handling proliferated litigation, including intervention, presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually . . . .' ").

97. *See, e.g.,* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 875-79 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). *See also* Kirkham, *supra* note 41, at 206; Simon, *supra* note 47, at 377; Comment, *supra* note 30, at 878.

98. FED. R. CIV. P. 23(d)(2). *But cf.* FED. R. CIV. P. 23(c)(2) (requiring, for Rule 23(b)(3) classes, individual notice to all members who can be identified through reasonable effort; individual notice is not discretionary, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974)). Although individual responsive notice might be ideal to insure involvement, it would cripple public interest litigation in which the plaintiffs often would be unable to afford the cost of such personalized notice. Nor is it necessary when a representative sampling of affected individuals is notified so as to insure presentation of all of the points of view likely to be found among this group of similarly situated individuals. Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306 (1950).

99. Notice pursuant to Fed. R. Civ. P. 23(d)(2) can be continuing, but it is not required to be, and, in practice, notice is usually not reissued.

100. *See* Comment, *supra* note 30, at 878-79.

101. *See* Higgenbotham, *The Priority of Human Rights in Court Reform,* 70 F.R.D. 134 (1976); Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105, 1127-28 (1977); Satter, *supra* note 44, at 240-46.

102. *See* Bell, *supra* note 65, at 476 n.21.

pessimistic about their potential for impact on the legal system and may simply choose not to undergo the effort and expense of litigation.

Procedures applying equally on their face to powerful and powerless members of society adopt the power imbalance and perpetuate its effects.[103] Self-stimulated participation in public interest litigation will not ensure adequate representation of the array of affected interests when some of those interests are uninformed as to the litigation's progress, unsophisticated as to their rights, incapable of procuring counsel, and fatalistic about their inability to move the system to respond to their needs. If the civil adjudication system is concerned with involving those people who will be affected by a decision and informing itself of their viewpoints, it must recognize that passively awaiting representative volunteers will not be effective.

The single major modification of the adversary system model, intended to ameliorate the legitimacy concerns raised by public interest litigation, has instead exacerbated them. The response to the dim perception that some people absent from the litigation had interests that might be affected was to appoint the judge as attorney for the absent interests.[104] The judge, however, cannot legitimately decide a case in which he appears as an advocate.

Few judges have the time to engage in the sophisticated investigation and discovery necessary to surface the factual information and dissenting viewpoints the parties have suppressed.[105] As a result, they most often give conclusive presumption status to their own untested assumptions about the desires of a group with whom they have little contact.[106] Yet the probability that the judge will guess correctly about the wishes

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103. *See* Galanter, *Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change,* 9 L. & SOC'Y REV. 95 (1974).

104. *See, e.g.,* West Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970) ("[t]he court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action"). *See also* MANUAL FOR COMPLEX LITIGATION, pt. I, § 1.40, n.22, at 47 (1977); Note, *Collateral Attack on the Binding Effect of Class Action Judgements,* 87 HARV. L. REV. 589 (1974).

105. *See* Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?,* 62 A.B.A.J. 587 (1976).

106. *See* Yeazell, *Part II, supra* note 38, at 1083-84, 1098. *See, e.g.,* Ward v. Luttrell, 292 F. Supp. 165 (E.D. La. 1968) (the judge assumed that the majority of working women in Louisiana wanted the protection afforded by the state's female labor laws and therefore denied class certification to representatives challenging the constitutionality of those laws). *See also* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated,* 409 U.S. 815 (1972); Gray v. International Bhd. of Electrical Workers, 73 F.R.D. 638 (D.D.C. 1977).

of the unrepresented interests is not the most significant problem this dual role raises. Those persons not represented by the judge may perceive the system as giving the judge's "clients" an unfair advantage.

The power and influence of the judge as advocate is great. The judge usually will agree with his own arguments, thereby undermining the adversary system. The more important point, however, is the appearance of partiality the judge's representation of absentees gives the public generally and the affected interests in particular. The legitimacy of the courts rests largely on the consensus that they are fair and impartial and thus deserve voluntary respect and obedience, and they must be careful not to undermine this trust.[107] Although the judge must be active in seeking out and involving absent interests, he must not represent any interest himself.

Complex parties in complex litigation contain a complex interest structure, rarely if ever coinciding with the party structure. This interest array shifts and reforms differently with each new issue to be decided. Counsel, unable to represent all interests, picks one and suppresses others. The interests thus suppressed may be unable to present themselves to the court, leaving the process incomplete in two of the requisites of judicial legitimacy: full participation of affected individuals and presentation of all relevant information. The judge pragmatically cannot unearth the missing information and represent the absent interests himself. To the extent the judge attempts this task, he destroys his appearance of impartiality. For these reasons, the traditional adversary system has serious shortcomings when imposed on public interest litigation.

III. THE SOLUTION: FUNCTIONAL INTEREST ANALYSIS AND REPRESENTATION

Though the adversary process does not work when imposed formalistically on modern public litigation, it contains, nevertheless, all the elements needed to resolve the problem. Its central feature is advocacy of opposed positions by different lawyers to a neutral judge. Traditionally, the lawyers and parties choose these positions, thereby illuminating points of agreement and disagreement between them. The judge then resolves the disagreements between the parties' positions. In complex litigation, however, others who will possibly be affected, whether

107. *See* text accompanying notes 24-25 *supra*.

absentees or part of a complex party, may have positions on issues that differ from those positions presented by the lawyers for the parties. These views should be represented as well.

Due process of law requires such representation. A person may not be bound by litigation unless his interest has been represented.[108] For this reason, persons with an interest that may be pragmatically impaired and that is not being adequately represented may intervene as of right.[109] Even if such persons do not intervene, they may be joined as necessary parties.[110] The cases have made it clear that adequate representation of an interest means advocacy for the outcome preference of the individual.

In *Hansberry v. Lee*,[111] in which the binding effect of an earlier class action was in question, the Supreme Court focused on the advocacy goal of the purported representative. It looked to whether the class representative had sought the same result as would the individual who was supposedly bound. The earlier class representative had wanted the Court to hold the restrictive covenant in question valid; the individual in the current case wanted it found invalid. Because the outcome desires or positions of the two were not the same, even though the parties factually were similarly situated as landowners, the individual was not bound.[112] His interest or outcome position was not adequately represented.

It is clear that the touchstone for due process cannot be factual similarity between the representative and the individual. Rather, it is the representative's advocacy for the position or outcome desired by the individual. Therefore, in all litigation, and particularly in litigation seeking an injunction or involving complex parties, the court must ensure that the outcome positions of everyone affected, be they absentees or individuals technically subsumed within a formal party, are adequately represented.

This requirement of advocacy will not necessarily complicate the liti-

108. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

109. FED. R. CIV. P. 24(a).

110. FED. R. CIV. P. 19(a).

111. 311 U.S. 32 (1940).

112. Perhaps the earliest proponent of this principle was Frederick Calvert, who asserted that one of the conditions for representative litigation was that the representative party "shall have an interest not merely in the property in question, but in the object of the suit." F. CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY *32, *quoted in* Yeazell, *Part II, supra* note 38, at 1083.

gation for two reasons: only significantly affected interests need be represented, and the number of outcomes may be no greater, or may even be fewer, than the number of parties.

Interests touched only incidentally have never had the right of representation in a lawsuit. The 1966 amendment to the federal intervention rule eliminated the need for the intervenor to show that the suit will have a legally binding effect on his interest. It substituted instead a provision requiring the intervenor to show the practical impairment of his interest.[113] Cases since have interpreted that standard liberally.[114] Nonetheless, a significant rather than minor effect is still necessary. Whenever a governmental agency is sued, all taxpayers are affected, at least to the extent that they pay a small portion of the litigation expense and possibly the cost of bureaucratic reorganization. Further, the expenses of corporate reorganization are passed into the economy and affect a wide range of individuals. This sort of indirect or attenuated impact does not require consideration in the litigation, however. For an interest to be involved in the litigation, the potential impact on the interest should be direct, substantial, and special rather than tangential, minor, or general in scope.

Individuals significantly affected by the litigation are not entitled necessarily to individual participation through counsel. Due process requires only that their position be adequately represented. Each individual who may be affected by the decision must have a representative presenting evidence and arguments seeking to persuade the judge to decide the issue in the way desired by that individual.[115] The number of representative advocates required on any particular issue is limited, however, by the number of outcome possibilities supported by any of the affected individuals. Thus, if a particular question has four possible resolutions, and of the 100 affected individuals, 60 prefer one outcome, 30 the second, 10 the third, and none prefer the fourth, then three advocates are required. One will advocate the first outcome, representing 60 individuals; another will advocate the second outcome, representing 30; and the third will advocate the third result, representing 10. No advo-

113. *See* Advisory Comm. Notes, 39 F.R.D. 69, 109 (1966).

114. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).

115. The representation of an interest essentially consists of presenting the facts and arguments that interest would wish presented to support its desired result. *See* Ford Motor Co. v. Bisanz Bros., 249 F.2d 22 (8th Cir. 1957).

cate is necessary for the fourth result because no individuals prefer it. Thus, the 100 affected individuals would all be adequately represented by the three outcome-oriented advocates.[116] That a complex party may have a division of interest within it and that an individual's outcome interest may be advocated by the lawyer for another party are unimportant, as long as each outcome interest is advocated.

Dierks v. Thompson[117] is an excellent example of functional interest analysis that simplified the litigation rather than complicating it. That case involved a dispute between employees and a corporation as to the interpretation of a pension plan. The lawyer for the class of plaintiff employees represented one outcome interest, and the corporation defendant advocated the other. The corporation opposed class certification, however, arguing that the plaintiff class contained a conflict of views and that the lawyer for the class could not adequately represent the divided group. Among the employees, a substantial group favored each interpretation of the plan. One remedy for this problem would have been to create a subclass and have two class lawyers, one for each outcome oriented subclass—making a total of three lawyers arguing two positions. This was entirely unnecessary, however. The employees' two conflicting interests were both adequately represented in the litigation, because the outcomes they desired were both being advocated by the two parties' counsel. The plaintiff group presented all the facts and arguments favoring its interpretation of the plan after consulting the collective knowledge and imagination of its constituency, those workers who favored its interpretation. Under the adversary theory, the corporate defendant presented all facts and arguments favoring its interpretation, drawing on its constituents, including the officers, directors, stockholders, and employees who were on its side. Due process of law was satisfied, and a functional analysis of the interests allowed the court to proceed with two lawyers rather than three.[118]

116. The court should not, of course, bow to the wishes of the majority simply because most of the affected interests prefer that position. The nature of public interest litigation is often nondemocratic, *see* note 101 *supra*; its function is to protect minority rights from the majority, even the majority of the minority. If the court decides that the position of the 10% group best protects the rights involved, it should so find. *See* United States v. Michigan, 460 F. Supp. 637, 639 (W.D. Mich. 1978).

117. 414 F.2d 453 (1st Cir. 1969).

118. *See also* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1854); and the discussion of these cases in Yeazell, *Part II, supra* note 38, at 1104-05.

The first rule of functional interest analysis, then, is that the outcome position, not the formal party, requires representation.[119] This leads to a second rule: the interest array, and hence the advocacy, changes with each new decision to be made. Traditionally, when a lawyer represents a party in litigation, the same lawyers represent the same parties throughout the litigation, because the party structure is relatively static. In complex litigation, however, particularly during the remedy building process, the variety of choices and the large numbers of individuals affected should alert the court to expect changes in the positions of individuals as the litigation progresses.

Through the course of the litigation there may be a large variety of interests within each complex party and among absentees and interest groupings that cross party lines. At any point in the litigation, however, the interest groupings may be seen as limited by the number of possible outcomes on the issue then being considered. In the liability stage, when the choice is bipolar, there are two interest groups, but in the remedy stage, when the choices are multiple, there may be multiple interest groups.

Rather than satisfying itself with an initial determination of adequacy of representation, the court should repeat the analysis of interests each time a new issue is to be decided. Inquiry into the interest array in public interest litigation must continue from the liability to the remedy phase, from an initial concern with whether the parties agree on the desirability of liability being found to an examination of the preferences of various individuals who will be affected by the available remedial choices. It is clear that the test of adequate representation of an absent individual's interest is outcome oriented. The court, therefore, must recognize that the outcome of public interest litigation is not concluded with the liability phase, but is largely dependent on the array of interests afforded advocacy in the remedy phase.

The third rule of functional interest analysis and advocacy is that the individuals who may be affected and whose positions are being represented must be actively involved in the lawsuit and must have a mecha-

119. It may at first seem heretical to propose that formal parties are not entitled to have their own counsel present evidence and argument to the court, but instead may be forced to rely on the services of someone else's lawyer if he advocates the same position. Yet this is precisely the effect of the use of lead counsel, which is common in complex litigation. Thus the MANUAL FOR COMPLEX LITIGATION, pt. I, §§ 1.90-.92, 4.53 (1977), provides for the judge to appoint lead counsel, to conduct the litigation on behalf of numerous formal parties with their own several lawyers. As long as their position is adequately represented, they have no right to individual participation.

nism for information and idea exchange with their outcome oriented representative. The court should not passively wait for the people affected by a case to intervene because they may never show up. Rather, it should actively seek their participation and views.[120] The affected individuals will comply more readily with the decree if their views have been solicited, and the court will better be able to decide an issue if it is presented with all pertinent information. If the advocates have access to the knowledge of all affected individuals, rather than just that of their formal client, they can better formulate their advocacy presentation.[121]

In obtaining information as well as organizing the interest groupings for advocacy, the court and the lawyers should solicit direct expression from the affected individuals rather than relying on their own untested assumptions about the absentees' desires. The court should distribute frequent notice defining the issues under consideration and inviting response. This "sampling notice"[122] should be given in a manner designed to evoke a response from a representative sampling of the affected individuals. Polls or questionnaires may also be used to obtain necessary information and expressions of desired results. Special masters may be used to investigate what outcome positions are held by those who may be affected.[123]

Once the court has determined the various outcome positions on an issue, it should insure that a lawyer, be it a party's counsel or an amicus curiae, is assigned to represent each position.[124] The judge should not represent any position himself, because that undercuts the perceived impartiality of the court. Finally, the court should notify the affected individuals of which lawyer is representing which position so that the individuals may communicate with their representative. The lawyer, of

120. *See* Note, *supra* note 30, at 440.

121. Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981) (communication between counsel and class members helpful to notify class members of lawsuit, to assist them in making choices relating to lawsuit, and to obtain information relating to merits of lawsuit may not be prohibited absent finding of potential abuse).

122. "Sampling notice" seeks a response from the recipient indicating, for example, his preferred outcome to a litigation issue. *See generally* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1793 (1972). *See also* MANUAL FOR COMPLEX LITIGATION, pt. I, § 1.45 (1977).

123. *See* Wilton, *supra* note 71, for a more detailed discussion of techniques to obtain information from and involve the absentees who may be affected. *See also* Comment, *supra* note 30, at 881-83, 907-09.

124. *See* Comment, *supra* note 30, at 907-08.

course, should investigate and communicate with the individuals who support his position to discover what information and arguments they have that may assist his advocacy.

Through this method of functional interest analysis and investigation, the court will obtain a more accurate assessment of the identity of the significantly affected individuals and of their preferred outcome positions, rather than the distorted view the party structure yields. As long as each outcome position is advocated by counsel with access to his constituents' information, each individual is adequately represented. By inviting communication between the lawyer and the individuals and defining the advocate's constituency to accurately coincide with his goal, the system increases the fairness of the process.

Application of these principles to two of the cases discussed above, the *Airline Stewards* case[125] and the *Ann Arbor "Black English"* case,[126] will illustrate their operation.

Both cases are typical of modern public litigation: they have only two sides in the liability phase but are more complex in the remedy phase of the litigation. Thus, in the *Airline Stewards* case, the issue initially was the legality of the rule on firing pregnant stewardesses. Only two positions were possible: either the rule was legitimate or it was not. The litigation already had a lawyer advocating each of these positions. At this point, having ensured that the outcome positions were all represented, the court should have issued notice to the potentially affected individuals, encouraging them to communicate any information they considered helpful to the advocate for their position. Even on the issue of legality, stewards or stewardesses possibly could find it in their interest to support upholding the rule[127] and could have factual information that would serve to justify it.[128] They should be encouraged to supply this information not to the lawyer who represents the union, the party of which they are a technical part, but to the company's lawyer, who advocates their outcome oriented interest. The union's lawyer probably would suppress the information because it

125. *See* notes 58-60 *supra* and accompanying text.

126. *See* notes 89-94 *supra* and accompanying text.

127. Stewards and stewardesses who do not intend to become pregnant, for example, might find the rule to be in their interest because they will advance in relative seniority more quickly if their pregnant co-workers are fired.

128. One can speculate on just what this information might be. There is no report in the case of such information, because the dissenting stewards and stewardesses had no representative to channel this information to the judge.

harms his case, but the company's lawyer may use the information. The judge will thus be more fully informed. Similarly, the corporation may contain people who oppose the firing rule and have factual information that undercuts its justification. They, too, should be encouraged to communicate not with their formal representative, the company's lawyer, but with their functional representative, the lawyer who will advocate their position of opposition to the rule, even though he is employed by the union.[129]

Assuming the court finds liability and proceeds to the remedy, a new and more complex analysis of interests becomes necessary. Outcome positions on each issue must be determined, and the individuals who support each position must be aligned with the advocate for that position. Thus, on the seniority issue, two basic outcome positions are readily identified: either the improperly fired stewardesses should have seniority credit restored or they should not. In addition, however, some individuals may believe the stewardesses should receive some but not all seniority credit, or that some but not all stewardesses should receive seniority credit. If these individuals have specific legal reasons for their position, they may compose another outcome position requiring advocacy. If, however, their position is meant to constitute a compromise between the two basic positions, then their group will not require a separate advocate. The correct compromise between the two positions will be achieved by advocacy of each of the two basic positions according to adversary theory.[130]

Thus, depending on the views held by the individuals concerned,

129. There is no legal rule prohibiting such communication, but neither is there any rule or practice encouraging it. In the absence of information about its propriety, most individuals probably are afraid to initiate communication with the lawyer for the opposing party, even if they agree with his position.

130. For example, one might take the position that stewardesses who were fired or resigned with some formal protest should have seniority restored, while those whose resignations apparently were voluntary should not, because the causal link between the rule and their termination is tenuous. This is a position based on law, a basic outcome position requiring advocacy. One might take the position that the stewardesses should get back seniority less one year, the approximate period of time they would not be working because of maternity leave. Again, there is an independent reason for this outcome position, and it should have an advocate if it is supported by any of the affected individuals. On the other hand, one might take the position that the airlines and the stewardesses were both partly at fault and that they should compromise and as compensation give the stewardesses some seniority but not all. This is a compromise position, one that is between the basic positions but cannot stand on its own. Advocacy for such a position would simply draw from arguments for each of the basic positions, but would present no new arguments or evidence of its own. Functionally, then, such advocacy is redundant and unnecessary. Only

their outcome preferences, and the reasons for them, there may be two, three, four, or perhaps even more outcome positions requiring advocacy. The court or a special master can make this determination by sampling notice, polls, or even by a hearing. The question then becomes one of where to get the advocates for each position.

The union lawyer's natural constituency probably opposes the accrual of seniority by the fired stewardesses.[131] The company, through its lawyer, may have no position at all or may oppose it as well.[132] If it has no preference on the issue, it may retire from this particular fight, for it would be unfair to require a party to support and pay an attorney to advocate a position in which it has no interest.[133] If both lawyers oppose accrual of seniority, then one must be primarily responsible for presenting that position. The two counsel may agree on which of them will be lead counsel for the position or, if they cannot agree, the court should designate lead counsel.[134] Advocacy for the other position or positions, those not represented by the parties' counsel, must be supplied by appointed counsel.[135]

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primary positions require advocacy; the test for a primary position is whether it is likely to present new evidence or legal argument.

131. *See* note 59 *supra*.

132. If seniority determines only who gets what routes, the airlines may not care about back seniority. If salary increases are tied to seniority, however, the airlines may oppose it.

133. On the other hand, because attorney fees in these cases are often awarded to the prevailing party and taxed as costs against the losing party, *see* note 135 *infra*, it would not be inappropriate for the court to employ the losing party's counsel as advocate for a position when the party itself has no outcome preference. The court must ensure, however, that the advocacy for the position is vigorous and the advocate's loyalty is undivided. Thus, the court should not ask counsel to advocate a position opposed to the outcome preference of his employer and should weigh carefully whether to ask counsel to advocate a position when his employer has no preference, lest the advocacy be less than vigorous.

134. This is the procedure suggested by the MANUAL FOR COMPLEX LITIGATION, pt. I, §§ 1.90-.93, 4.53 (1977).

135. It is not unlikely that a list of counsel willing to undertake such interest representation on a *pro bono* basis could be compiled and would be extensive. *See* Miller, *Frankenstein Monsters, supra* note 38, at 675; Miller, *Overview, supra* note 38, at 213. Indeed, the Court could simply appoint counsel on an uncompensated basis if it wished without waiting for volunteers, though this might result in half-hearted advocacy. *See* Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance,* 81 COLUM. L. REV. 366 (1981). Fees for appointed counsel, should the interests be unable to hire counsel, and should *pro bono* counsel be unobtainable, may come from several sources. 42 U.S.C. § 2000e-5(f) (1976) provides for appointment of counsel in Title VII cases. *See* Amalgamated Meat Cutters Local 340 v. Safeway Stores, Inc., 52 F.R.D. 373, 376 (D. Kan. 1971). Counsel fees may be awarded, for example, to the prevailing party in an action to enforce certain federal civil rights, 42 U.S.C. § 1988 (1976), or voting rights, 42 U.S.C. § 1973*l*(e) (1976) (and "prevailing party" may be liberally interpreted), or to any party in a citizen suit to enforce federal water pollution standards, 33 U.S.C.

On the back pay issue, the company's lawyer is undoubtedly in opposition and can represent that position. In light of the company's intransigence on the issue, the union's lawyer probably would like to see the issue settled quickly, so the fired stewardesses can obtain reinstatement, but does not care particularly how it is settled.[136] The few stewardesses who are entitled to back pay, however, create a third position, one unrepresented in the litigation. They, too, should be represented, and their interest should not be compromised without advocacy. Yet, because they seek money and can probably obtain private counsel, the court need not appoint counsel for this interest. The judge should notify those who may be entitled to back pay that the issue is in litigation and should invite them to hire counsel and intervene, either individually or as subclass. If, in the end, several lawyers represent the position, one of them must serve as lead counsel. If none of these individuals intervenes, due process still has been satisfied, for they had notice and an opportunity to respond.

In the *Black English* case, the initial issue was the liability of the Board under the federal statute prohibiting racial discrimination in schools by failing to respond to a student's language barrier.[137] Two positions were obvious, and the parties' lawyers represented both. The problem was, however, that the lawyers were aligned with the formal parties rather than with the individuals who supported their positions. The judge should have required broad notice to all who might have been affected, informing them of each advocate's position and inviting communication with the advocate who represented their view.

Many individual members of the defendant entity supported plaintiff's position on liability.[138] Their information might have been helpful in deciding the issue, and they should have been encouraged to contact plaintiff's lawyers. Among plaintiffs, on the other hand, none

§ 1365 (1976). *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act,* 80 COLUM. L. REV. 346 (1980); Note, *Awards of Attorneys' Fees to Legal Aid Offices,* 87 HARV. L. REV. 411 (1973). Numerous other statutes also provide for the award of attorney's fees in specific types of cases. Counsel may be paid from the group damage award should one be obtained. *See* Dawson, *supra* note 28. Even if counsel fees are not payable or recoverable by some party, however, it is appropriate that counsel for otherwise unrepresented interests be paid from public funds, because his representation is essential to a fair and just judicial decision and is truly in the public interest. Because much of this work is now being done by judges, and because counsel would be paid less than a judge, this suggestion is economic in the long run.

136. *See* note 60 *supra* and accompanying text.

137. 20 U.S.C. § 1703(f) (1976).

138. *See* note 92 *supra* and accompanying text.

supported defendant's position, because this was an individual, not class, action. Had the plaintiff group been a class, it is not inconceivable that some plaintiff class members might have supported the defendant on liability. Because the plaintiff group was not a class, however, many persons who might have been affected, such as the other students and their parents, not only in the King School, but in all Ann Arbor schools, were not included in the formal party structure.[139] Formal individual notice to all these people was not necessary, but some form of group notice should have been supplied, coupled perhaps with a direct mailing to a group large enough to obtain a representative sampling of views. In this way the affected individuals could have been fully involved, and the judge could have made his decision after advocacy by lawyers with access to the full range of information supporting their positions.

After liability was found in this case, a complex remedial program had to be prepared. The judge wisely ordered the party defendant to prepare the program. Unwisely, he did no more to involve all the affected individuals. Many judges in complex litigation who recognize the difficulty of enforcing such a remedial scheme on a daily basis believe it is necessary to give the defendant a stake in the plan's success. If the defendant entity designs the plan for its own restructuring, it will be more likely to enforce the plan itself.[140] The flaw in this reasoning, however, is that when the defendant is a complex bureaucracy, the designers of the plan are rarely the ones who must carry it out. In the *Black English* case, for example, the superintendent and his staff designed the plan, but the teachers were responsible for its success or failure. The teachers in many respects were not consulted about the creation of the plan. They had little incentive, therefore, to work for its success.

When the judge ordered the defendant entity to prepare the plan, he should also have ordered that the various affected interests, particularly teachers, parents, and children, be consulted and involved. More importantly, after the plan was prepared, he should have invited the individuals who would be affected to make comments and alternative

139. The case had a direct effect only on the King School. The remedial plan, however, could easily be extended to all other schools in Ann Arbor, either voluntarily as the administration recommended or by pro forma litigation, because collateral estoppel would bind the school board. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

140. *See* Chayes, *supra* note 24, at 1298-1301; Comment, *supra* note 30, at 809-12; Note, *supra* note 30, at 432-40.

suggestions. This could be done through general notice, sampling notice, and polls. From this process, specific alternatives on particular aspects of the plan could be developed, advocates for each could be assigned, and a full adversary presentation, if necessary, could be made.

In reality, only plaintiffs' counsel presented opposing suggestions to the proposed plan, all of which were rejected without further investigation by the judge. If the individuals affected by the case had been polled, however, it would have become clear that there was substantial, even overwhelming, support among the teachers for plaintiffs' version of several plan features.[141] This would certainly have helped the advocacy of plaintiffs' counsel, if it had been necessary. Most likely, however, the defendant would simply have agreed to plaintiffs' proposals on these points, because they were supported strongly by the constituent members of the defendant group. No one bothered to ask the teachers directly what they preferred. Everyone assumed they preferred the superintendent's plan.

Functional interest analysis, involvement, and advocacy in each of these cases would have resulted in a fairer decision making process. The holdings in the cases, the decisions themselves, might have been no different. The cases would have been more effective, however, because the people who ultimately had to be satisfied, those who must abide by the decree, would have thought that the process by which the judicial system made the decisions affecting their lives was a fair process, one deserving of respect and obedience.

The current adversary party organization and representation of interests is ineffective to ensure that people who are affected by modern public litigation will have their views heard through a representative advocate. The active solicitation of involvement of individuals who may be affected, and the organization of their views into outcome positions for advocacy, efficiently promotes the true policies of the adversary system. It results in a more fully informed decision by the judge and in a public more satisfied that the judicial process is fair and just. This public confidence in the fairness of the judicial process is crucial because it ensures voluntary compliance with the remedial scheme. Functional interest advocacy, therefore, is essential to enhance the legitimacy and effectiveness of the judicial system in modern complex litigation.

141. *See* note 93 *supra* and accompanying text.

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