Power and Legal Artifice: The Federal Class Action

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Using case studies and interviews with lawyers and representatives in class actions, this article explores the contribution that class actions make to their ostensible beneficiaries. The article first distinguishes the major types of class actions in terms of the roles of lawyers and class representatives, ranging from very passive representatives to individuals intensively involved with the dispute that gave rise to the litigation. The article next seeks to evaluate the class actions. On the basis of the results of the class actions, the article finds that class actions cannot be proclaimed major contributors to social change. The focus on results, however, is somewhat misleading. The class action plays a much more significant role through its impact on the parties as litigants and as individuals involved with a dispute. To understand this dimension, which has applications beyond the class action, the article suggests that the dispute transformation perspective should be modified to go beyond the metaphor of *a* dispute that changes form as it goes through different processes. Disputants in the class action can be thought of as an audience that interprets itself—and is empowered or disempowered—in part by what it learns from watching a legal dramatization of the dispute.

The federal class action invites scrutiny as a political institution (Mather 1982; Minow 1991; Yeazell 1989). Class actions permit individual litigants and their attorneys to construct a formal collectivity, the class, without actually mobilizing a group or even securing the assent of those who become the members of the class (see generally Yeazell 1987). Since the reform of federal class actions in 1966, class actions have become charged with a political significance beyond any other institutions of civil procedure (cf. Resnik 1991:46–50). Liberal supporters of public law litigation champion the class action as a device to promote the social change promised by civil rights laws and the constitutional values of equal protection and due process (Chayes 1976; *Harvard Law Review* 1976). Conservatives have shown their distrust of class actions by imposing se-

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vere limits on its availability to publicly funded advocates in legal services offices (Kessler 1990). Critics from the left, in turn, have wondered if class actions actually limit social change by channeling resources and energy away from the organization of individuals and instead into a formal construct dominated by an attorney (Bell 1976; Simon 1984:488, 489).

This article explores the politics of the class action through an empirical analysis of concluded federal class actions from the Northern District of California. It will assess critically the "social change" impact of this unique, politically charged, procedural artifice.[1] The key terms of a political assessment are not easily defined. There is no general agreement on what constitutes success or failure in lawsuits that typically end in negotiated settlements or how to determine if a legal proceeding affects the power of individuals and groups in social relationships. Nevertheless, as will be seen, we can use detailed case studies to draw a number of conclusions about power and success in class action litigation. The most obvious conclusion is that there are several very different types of class actions and that even within types there is an enormous range of political possibilities.

A second conclusion, one also quite consistent with studies of litigation generally, is that class actions cannot measure up to any interpretation that loads them with political significance for their overall contribution to social change. We see neither much evidence of social change nor much evidence of the inhibition of potential social movements for change. If class actions have political significance, we do not see it if we look for the mobilization of disadvantaged groups or the winning of momentous litigation that translates into social change.

Detailed case studies, however, invite a more subtle analysis. Building on the insights of the "dispute transformation" literature (Felstiner, Abel, & Sarat 1980–81; Mather & Yngvesson 1980–81) and subsequent work that draws on it, we can shift the context of the political analysis from global results to the nuances of the process and the interactions among the participants. This approach concentrates on the local-level processes of constructing parties as individuals and litigants. From this perspective, the class action can be seen to have sev-

[1] As shown in an earlier article on class actions and private attorneys general (Garth, Nagel, & Plager 1988), the incidence of class actions, the legal theories that lawyers develop, the evidence that they use, and the ability to police a settlement depend crucially on what goes on in the governmental sphere. Class actions can be understood best as private law enforcement on the periphery of the regulatory state. Lawyers and class representatives gain or lose power more from public activities outside of the lawyer-representative-class relationship than from their own conduct of litigation. Nevertheless, this article to some extent abstracts the device of the class action away from the impact of macro-level policies and practices and tries to focus on the practices facilitated by the class action device itself.

eral significant empowering features that may distinguish it from ordinary litigation. In particular, the process of aggregation into the form of a class action tends to change the behavior of the attorneys representing the class in ways that promote a more intense scrutiny of the challenged conduct of the defendant. More surprisingly, the class action form, especially the naming of parties as class representative, turns out in many cases to embolden and strengthen the power of these individuals involved in the case.

Finally, the approach that permits these findings suggests a need to modify the dispute transformation perspective generally as a tool to study disputing and litigation. The sensitivity of the dispute transformation approach is essential to understand the dynamics of class action litigation, but it can be misleading as a metaphor. The metaphor of "dispute transformation" suggests the story of "a" dispute that changes shape by "going through" the legal system. Such an account distracts researchers from the levels at which different forms of the dispute operate *simultaneously* and how the levels relate to each other. As suggested in the conclusion, multiple transformations derive from relationships akin to those between involved audiences and legal dramatizations of their own stories and concerns. The class actions suggest that the litigants' individual struggles outside the legal process are affected—indeed their personal identities in part constructed—by how they see themselves portrayed in the unfolding legal drama.

This article proceeds in six parts. Part I, drawing on scholarly literature exemplifying the post–"dispute transformation" era, provides a theoretical setting for the discussion of the empirical data and describes the basic categories of class action litigation. Part II describes the empirical study on which the article is based. Part III presents nine case studies in some detail, and they are scrutinized critically in Parts IV and V. Part IV applies a skeptical political approach to the case studies, showing the limits of the achievements of the class actions, while Part V shifts the context for a more sympathetic interpretation of the case studies. Part VI presents concluding observations, including suggestions about research into litigation generally.

I. Power and Litigation after the Development of the Dispute Transformation Perspective

The literature on dispute transformation, introduced by two well-known articles in 1981 (Felstiner et al. 1980–81; Mather & Yngvesson 1980–81), provided a novel way to explain why even litigation that resulted in strong settlements or victories in court did not necessarily lead to solutions of the

conflicts that gave rise to litigation. Indeed, litigation could sometimes be seen to ignore those conflicts.

The dispute transformation perspective represented an advance over a line of empirical studies, inspired by Edelman (1964) and later Scheingold (1974), that attempted to learn more mechanistically when legal advocacy promoted "real" as opposed to "symbolic" change. The new perspective showed that it was not just that the haves could use courts more strategically than the have nots (Galanter 1974), or that litigation victories do not necessarily change behavior in ways favorable to the "winners" (Handler 1978; cf. Olson 1984); but the process of moving from a social relationship of conflict to a lawsuit inevitably entails a translation into legal language. Such a legal translation, however, does not exhaust the possibilities for dispute transformation. The dispute changes form, expands or contracts or changes in focus, in response to numerous contextual factors. As a research perspective, dispute transformation effectively united the concerns about power of the political scientists and the sense of language and detail of anthropologists.

The generation of scholarship that followed has taken several approaches (cf. Trubek 1988). One approach has been to emphasize the political downside of dispute transformation, as Kristin Bumiller did with considerable sophistication in *The Civil Rights Society* (1988). Bumiller suggests that civil rights victims gain little and lose much by letting the legal system have their dispute: "Instead of providing a tool to lessen inequality, legal mechanisms, which create the identity of the discrimination victim, maintain division between the powerful and the powerless by means that are obscured by the ideology of equal protection" (ibid., p. 2). The ideology embedded in the legal system impedes the political empowerment of women and minorities (see also Lanoue & Lee 1987).

A second approach has been to try to get beyond context sensitivity toward some predictive model of dispute transformation. Canan, Satterfield, Larson, and Kretzmann (1990), for example, recently sought to learn about lawsuits that seek to chill constitutionally protected political activity. They found that such lawsuits, which force unwilling political activists into a legal arena, succeed or fail in "derailing" the political claims largely on the basis of whether the disputes "were initially tied to a broad cultural or political claims base" (ibid., p. 950). Those tied to the broader base tend to survive the "killing by narrowing" strategy of the opposition. Such predictive generalizations about narrowing or expansion, however, are very difficult to make in settings where, as they note, context is crucial.

Sally Merry's recent and nuanced account of individual confrontations with the courts is especially relevant to the ques-

tions raised here. In a study of the efforts of plaintiffs with relatively minor criminal and civil complaints, she was able to document both empowering and disempowering aspects of the strategy of trying to use the legal system. *Getting Justice and Getting Even* (1990) shows that most individuals who take their problems to lawyers and courts seek power. They attempt to enlist the law and the state on their side: "They go to court because they see legal institutions as helpful and themselves as entitled to that help" (ibid., p. 2). Recourse to court is a last resort for most individuals, but they still believe that the courts will ultimately be helpful in redressing a wrong. These individuals' "legal consciousness" leads them to believe that their rights have been invaded and that the judicial system is therefore available to put the machinery of the state in motion to enforce those legal rights.

These quests for empowerment, however, have "paradoxical consequences" for Merry's litigants (ibid., p. 2): "[They] empower . . . plaintiffs with relation to neighbors and relatives, but at the same time . . . subject . . . them to the control of the court" (ibid.). Moreover, "[o]ne risks being stigmatized for appealing to this form of power. And it may not help" (ibid., p. 3). Individuals assert their rights in the hope of gaining crucial power, but they may be disappointed in practice.

The post-dispute transformation studies provide the setting for the case studies presented in part III. First, this body of research from the beginning has illustrated the need to follow the subtle and not so subtle changes that take place in disputes as they come in contact with the legal system. Context is crucial, and the course of a lawsuit and its ultimate impact can change dramatically even through serendipitous events and encounters that take place outside the setting of the litigation.

Second, it is important to provide enough detail to see aspects of both empowerment and control—the paradox of the encounters with the legal system that Merry describes. Are there sufficient empowering aspects of class actions to change in any significant way Bumiller's portrayal of how victims of discrimination are debilitated through the language of the law and the procedures of the legal system? The critical literature on the class action has already questioned whether the diversion of resources and energy into litigation on behalf of an abstract entity, the class, really helps the ostensible beneficiaries of the action (Bell 1976). Bumiller's findings from individual proceedings add force to those criticisms and suggest the importance of attention to the situation of the individual grievants, caught up in class actions. The language and procedures of the law may end up transforming the individuals' concerns into alienating and debilitating legal constructs.

Distinctive features of the class action, moreover, make it

important to sort out the different stories of the class representatives, the class lawyers, and the represented parties (cf. Tushnet 1987). In contrast to the situations Bumiller and Merry studied, for example, it is not clear in class action doctrine just whose lawsuit and grievance actually matters and should matter. Is the key actor or beneficiary supposed to be individuals, the class, or the lawyers? Many writers have focused attention on the "agency" problems in class action, meaning the issue of whether the supposed beneficiaries in the represented class have the opportunity and incentive to see that their lawyers behave consistent with their interests (Alexander 1991; Coffee 1987; Macey & Miller 1991; Silver 1991). The problems of collective action make it unlikely that class members will organize into any kind of entity that could monitor the behavior of "their" lawyers, and it is not clear that class representatives have either the same interests as the class or enough incentive themselves to monitor the class lawyers (Rhode 1982).

The agency problem tends to undermine legal scholars' assessments of the importance of class representatives (Burns 1990; Chayes 1982; Kane 1987; Macey & Miller 1991; Minow 1991). In support of a weak or nonexistent role for class representatives, scholars argue that the class ought in any event to take precedence over representatives who are charged, after all, with protecting the class interests. Furthermore, as proponents of the abolition of the class representative argue, it is by no means clear that the class representatives have any real significance in the conduct or even the bringing of the lawsuit. The key players, according to this argument, are the class attorneys, themselves acting as private attorneys general to enforce laws on behalf of the class.

A key distinction therefore is lawyer-initiated versus client-initiated class actions. Such a distinction allows the analysis of transformations and empowerment as they relate to the person or entity that turned a potential or actual dispute into a federal class action. In addition, it is useful to distinguish between different substantive areas and different types of attorneys. The employment discrimination cases not only provide a nice comparison with the work of Bumiller but also tend to have more active class representatives than the other class actions. Class actions with more passive class representatives tend to be either those brought by a legal aid or public interest organization on behalf of their general clientele or actions brought by entrepreneurial attorneys who tend to give considerable attention to the fees the lawsuits can generate. While there is considerable variety in the class action case studies, these distinctions tend to color how the dispute is affected by and affects class representatives, class members, and class attorneys, each of

whom can be seen to be empowered (or not) by aspects of the class action.

II. The Class Action Study

The empirical study on which this article is based sought to explore the dynamics of dispute transformation as found in "certified" federal class actions closed in the Northern District of California from 1979 to 1984.[2] My collaborators, Ilene Nagel and Jay Plager, and I personally interviewed 43 plaintiffs' lawyers involved in 37 out of the 46 class action "clusters"—cases grouped together in the court—found in that district, and we also questioned 26 class representatives in person or by telephone.[3] Finally, we collected information on the 67 uncertified class actions brought during the same period.[4] The resulting data set provides a rich picture of the era when class actions were much more common than they are today.[5]

The certified class actions involved the following legal claims: 21 employment discrimination; 5 securities regulation; 5 social security; 4 antitrust; 2 housing eviction and relocation; 2 jails and detention; and 7 others listed in Table 1. Table 1 also summarizes the basic breakdown in terms of legal aid versus private attorneys. The federally subsidized legal aid organizations accounted for 17 of the 46 certified class actions. In addition, Table 1 provides information about the activity of the

[2] We used printouts from the Administrative Office of the U.S. Courts to identify all cases in which the complaint designated the case as a class action. Lawyers filing class actions were supposed to verify that Federal Rule 23 applied to their case. We undoubtedly missed a few cases where the class action box was not checked or where the decision to proceed as a class action was made after the complaint was filed. We surveyed all the court deputies to obtain names of other class actions, which turned up a few otherwise unknown to us. We also found numerous cases designated as class actions that were in fact other types of cases, most notably asbestos litigation or student loan collections. We went through the docket sheets of all identified class actions "closed" during 1979–84 to determine whether they had been certified. We then sought interviews with respect to each certified case. "Certified" means simply that the judge, pursuant to Federal Rule 23, determined that the filed case could in fact be deemed a class action.

[3] In 22 cases we were able to talk to lawyers and class representatives. Interviews took place in the summers of 1984 and 1985. They followed a detailed questionnaire. We also collected and copied the essential documents in the court files of the class actions. Class representatives were extremely difficult to find. Their addresses are not written in court pleadings, and old addresses offer few leads in any event. We located the class representatives by hiring a skip-tracer to find them. Skip-tracers are firms that, on a contingent-fee basis, specialize in locating individuals. They serve mainly a clientele of creditors.

[4] The uncertified cases were ones that were filed as class actions but did not succeed in winning approval from the court to proceed on that basis. We obtained copies of the docket sheets of all the uncertified cases, but we did not conduct any interviews.

[5] Class actions filings peaked in 1976 at 3,584, then declined steadily to 988 in 1984, and have remained under 1,000 per annum since then. See *Annual Report* of the Administrative Office of the U.S. Courts, summarized in Figure 9 of Donohue & Siegelman (1991:1020). The number was 647 in 1989 and 922 in 1990. Administrative Office of the United States Courts 1991:311–12.

Table 1. Certified Class Actions in the Northern District of California, 1979–1984, by Activity, Class Representative, Type of Attorney, and Case Category

Active Class Representative?[a]	Legal Aid ($N=17$)			Private Attorney ($N=29$)			All ($N=46$)		
	Yes	No	?	Yes	No	?	Yes	No	?
Employment discrimination	4	0	0	13	0	4	17	0	4
Welfare and social security	1	5	0	—	—	—	1	5	0
Securities fraud	—	—	—	1	3	1	1	3	1
Antitrust	—	—	—	1	2	1	1	2	1
Other[b]	3	3	1	2	1	0	5	4	1
Total	8	8	1	17	6	6	25	14	7

[a] Activity for the purpose of this table means a continuing active involvement beyond securing the aid of a lawyer. The activity of going to a lawyer is discussed in the text.
[b] Legal aid cases in this category included two cases about housing eviction and one each on jail and detention, retirement benefits, Native American rights, auto towing, and public employment. Private cases concerned mental health rights, discrimination in hotel facilities, and jail.

class representative. In sum, Table 1 confirms the major categories of class actions and the different roles of the three potential constituencies. In employment discrimination cases, whether brought by legal aid or for-profit attorneys, the class representative tends to be active. Legal aid lawyers tend to have passive clients in social security and analogous cases, while entrepreneurial lawyers have relatively passive clients in the securities and antitrust cases that typify the profit-making class action practice. This pattern from the cases studied as a whole is borne out generally in the nine case studies reported here, which were selected both to exemplify the categories and to illustrate the richness of the class actions studied.

III. Class Actions Exemplified

The cases are organized into three categories. The first category consists of cases that are mainly the responsibility of a legal service organization with minimal clientele involvement. The second set of cases are those of entrepreneurial lawyers and passive clients. The third category is characterized by individual plaintiffs taking initiative and staying involved. This last category is exemplified by employment discrimination cases, three of which will be described, and by a few other cases in which aggrieved individuals are the initial motivating force. While this section will not devote as much space to employment discrimination as the numbers would justify, the selections and a few examples from the larger data set will illustrate the basic themes.

A. Category A: Organizational Efforts with Incidental Clientele

Case 1. Overpayments of Unemployment Compensation

Social welfare class actions typify those in which the source of the action is the legal services office itself and not any particular plaintiff. In one case, for example, a legal services program became aware through its clientele that a number of unemployed persons during the recession at the time had received payments after their eligibility period had expired. Program lawyers recognized that under federal regulations, the recipients could be required to repay the amounts they received. While under existing California state programs, individuals who received such payments through no fault of their own were not required to repay the surplus, the U.S. Department of Labor had taken the position in a regulation that state law would not apply to the special federal supplementary program. The Labor Department began to require repayment.

The legal services lawyers had seen the issue before. They had participated in a successful lawsuit about this question with respect to a similar program. Indeed, in the earlier lawsuit they had not only stopped the practice, arguing that such a federal regulation was invalid, but had also succeeded in obtaining retrospective relief. Those who had repaid had been given the right to recover what they had reimbursed. According to the lawyer involved in the lawsuit on the supplementary program, "[we] saw the same cases coming in on this other program and decided why not go for a nationwide class for this one, and we did" (Int. 30:4).[6] The legal aid lawyers decided to file a class action for "effectiveness": "if we were going to put in the time challenging a regulation like this . . . , we had to have a class action. . . . Otherwise 99% of the people affected would not get any benefit out of the lawsuit." The class representatives were recruited by other legal aid lawyers who were part of an "informal network" of legal aid programs. According to the lead lawyer, "I never talked to either of the representatives" (Int. 30:12). The class representatives were simply passive recruits.

The result in court and in the legislature was in many respects quite successful. While the earlier lawsuit, supported by lobbyists from the United Auto Workers and the AFL-CIO, galvanized congressional change, Congress had neglected to change the program involved in the second lawsuit. Legal aid lawyers involved in the new case, however, "went back to Congress . . . and . . . got the same change done for this program the next year. And it was because of all our involvement" (Int.

[6] The notation refers to the lawyer interview for case No. 30 in our sample, p. 4. If we had two interviews for the same case, one would be 30a, the other 30b. Interviews with class representatives are "Rep. Int.," using otherwise the same notation.

30:6). As a result, the lawsuit came to focus on the retrospective relief. Since through the mechanism of a "related case,"[7] the lawyers were able to get this case before the same judge who had earlier supported a retroactive remedy, they were successful again on this issue. They won on summary judgment and then prevailed again on appeal.

Nevertheless, the lawyer reported that the lawsuit was only about 75% effective. Outside of California, the lawyers were unable to get anyone to put pressure on the program's state administrators to reevaluate penalized individuals for the retroactive remedy. Neither the UAW nor legal services offices outside California pushed for the remedy. The lawyers concluded that this aspect of the case was, "at best, marginally effective" (Int. 30:22). The attorneys had requested and been awarded fees to monitor the result, but they could not mobilize persons outside California to ask for overpayments already returned, which made them wonder whether a nationwide class action "had really been a good idea" (Int. 30:23). The lawyers engaged in successful advocacy in several forums, but the litigation gained only a relatively small amount of retrospective relief.

Case 2. Disability Payment Terminations

A similar example was a case in which a plaintiff began the process. He came to a legal aid office "outraged" (Int. 43:2) because of a cutoff in social security disability payments. According to the lawyer who handled the subsequent case, "[w]e spotted constitutional issues" (Int. 43:2), and "once we got one class representative . . . then we started looking around for clients from other offices and basically sent out questionnaires. . . . [W]e had three or four new candidates and from that we chose one or two" (Int. 43:4). To plan and coordinate the litigation, the legal services lawyers contacted lawyers "around the country" and met with several welfare rights organizations (Int. 43:5), although they kept this class action limited to California. Meanwhile, the individuals named as class representatives received hearings that made their own problems moot. Under class action doctrine, however, the mootness of their claims did not stop the action on behalf of the class. Whatever role individuals played in bringing the problem to the surface, therefore, they had virtually nothing more to do with the case or the problems that generated it.

The class action continued, and it changed shape dramatically as it progressed: "the case started out as a kind of deprivation of property without process and then turned into during

[7] At the time a filing of a related case petition could facilitate the transfer of a new case to a judge handling a "related case."

the course of the litigation . . . a much different type of case" (Int. 43:2). At first the lawyers thought that there had been a deprivation without notice and a hearing, but in fact notice had not been omitted. The lawyers shifted their focus to the wording and language of the notice that was in fact sent out. The class lawyers redefined the problem as the "relatively low number of recipients who received hearings [who] exercised their right to counsel . . . [or] to receive aid pending the resolution of their claim. . . . I just thought that the notice was a little complex and it was difficult for them to understand it" (Int. 43:3).

The case shifted to the content of the notice, and that is where it ended. The document detailing the terms of settlement of the case thus stated: "The parties have now reached a class settlement which entails the adoption and use of a new notice and appeal form in the SSI program." The result was a nationwide change in at least the form used to instruct individuals of their rights. The lawyer could not say, however, whether the change affected the number of claimants who exercised their rights to counsel, to pending benefits, or to a hearing, or whether hearings or counsel led to more resources for beneficiaries; but the class action did at least gain a remedy in response to the lawyer's assertion that the wording of notice was too complex.

B. Category B: Entrepreneurial Lawyer with Passive Clients

Case 3. Retail Price Fixing

In the next category of cases, the client is essentially a small investor in the lawsuit. The antitrust cases in general fit this category, and two examples are discussed here. The first case began (at least from the lawyers' perspective) when one of the law office workers read about a grand jury investigation into price fixing among retail stores. She reported her discovery to the lawyers, and the law firm sprang into action. According to one attorney, "I sent someone down to get a hold of the government statements . . . [and] we retyped the complaint the government filed" (Int. 11a:2). The office worker became one class representative, but she had not really purchased much from the upscale stores involved. To find other representatives, the lawyers asked themselves "who would know somebody who would have had enough money to have [shopped at the stores]," and they decided to call their "mother's friends" and evidently a few others (Int. 11a:4). Quick action made the law firm one of the first to get a stake in the action, and it continued to play a major role as other firms with their own clients maneuvered to get into the action as well.

In contrast to the social welfare cases, the class representatives in this case did not stay completely out of the controversy in court. Aggressive defendants took their depositions, as one class lawyer stated, in order "to get the plaintiffs to say dumb things" (Int. 11a:6). Such a tactic is not unusual as a means to fight class certification in these kinds of cases. But the attorneys ran the show, surviving a lengthy litigation that finally culminated in a negotiated settlement that provided damages to at least the charge customers of the stores. Damage remedies ranged from very small to around $20,000, according to the lawyers. Lawyers also received court-awarded fees from the defendants (although they did not feel that they were adequately compensated for their time).

The perspective of two of the class representatives in the action is interesting. The original one, still very close to the attorneys in the case, reported that her involvement was limited to the deposition and a $7 credit on her bill. Another class representative, a lawyer herself, was recruited for the class action as a friend of the lawyers; and she reported that the class lawyer did not keep her informed, was not frank about what the lawsuit involved, and kept stating that it would be over soon. While she received $200, she said that "it all seems stupid when all is said and done" (Rep. Int. 11a:2). Neither of these plaintiffs received much beyond a very small return on the investment and the trouble of a deposition. The lawyers took the case, ran the show, and got some remedy and some fees.

Case 4. Price Fixing to Distributors

The same was essentially true of another price-fixing case, handled by a law firm that specialized in antitrust class actions. In contrast to many major class action cases,[8] and even the one mentioned before, this case did not attract the attention of the national antitrust bar: "This was a regionalized case. It involved only alleged anticompetitive activity in the San Francisco area" (Int. 37b:3).

The class attorneys picked up the case as a referral from the state attorney general's office, which had been investigating price fixing among certain distributors of a product sold to consumers. In the lawyer's words, "Generally what happens is, if the government indicts, either you personally represent a client over a period of time that you have done work for or there are a number of business lawyers who refer clients to antitrust people" (Int. 37b:5). This time the client was referred directly by the government, which also sent the lawyer a copy of the

[8] We omitted from our analyses the class actions transferred under 28 U.S.C. 1407 to the multidistrict litigation panels, and therefore we did not study some of the major national class actions.

government complaint. Other clients came from the lawyer's past associations: "I called [client's name] and said, "Hey, . . . there's another lawsuit. You want to get involved?" (Int. 37b:9).

Another lawyer picked up the same claim simultaneously, leading to consolidation of the two cases. He reported that at the place where he shopped for convenience goods, the proprietor, aware of the lawyer's work in antitrust, showed him the newspaper article about the state investigation. The proprietor noted that he was a victim of the practices under challenge. The lawyer took the case and also invited in clients he had represented in other cases (Int. 37a:4). Plaintiff involvement again seems to have been limited to their depositions as part of the defendants' attack on class certification.

It is not clear whether this case actually resulted in any changed practices. The clients again received small sums from a negotiated settlement, but the one class representative we were able to talk to openly did not find a change in practice (even though the state also secured some injunctive relief earlier) (Int. 37b: 19; Rep. Int. 30:2). The lawyers received 25% of the settlement in damages. The result again was simply that the case added a damage component to a government antitrust case. The lawyers pursued such cases as part of their legal business, and the class representatives served essentially as means to complete the process started by the government claim.

There is evidence that securities class actions generally follow the same model as the antitrust cases just described, except that the attorneys tend to move into action after certain publicized events that involve corporations and affect the value of securities (Alexander 1991; Borden 1989). We were unable to gain access to the lawyers who filed the one case in the Northern District that seemed most to resemble the securities class actions filed more typically elsewhere in the country. Except for the case described below, the securities class actions in the Northern District tended to have plaintiffs who took some initiative to get the cases underway but then did not take other action. They were not merely draftees, but they in effect assigned their claim to an attorney and left it there.

C. Category C: Energetic and Active Plaintiffs

The employment discrimination class actions tell very different stories. The class representatives confirm Bumiller's convincing showing that it is not costless to bring a lawsuit alleging employment discrimination (Bumiller 1988; Lanoue & Lee 1987). It takes remarkable initiative and some anger. Further, the notion of an individual seeking personal empowerment through law, which Merry develops (1990), fits these class

actions much better than does the typical social security or antitrust action. Three cases will show how these cases can work for or against such individuals.

Case 5. Hispanic Complaints against an Employment Test

One class action involved a Hispanic challenge to screening and testing for municipal employment. The particular defendant had already settled actions based on race and gender discrimination. According to the named class representative, he applied for an opening in the transportation field and was not even allowed to take the test: "They wanted blacks, not Latinos" (Rep. Int. 40:1). Thirty-five potential test takers, most of them union members, got together at a restaurant and decided to seek a lawyer. Several then went to a public interest lawyer on the basis of the lawyer's "reputation for class actions and minority representation" (Rep. Int. 40:1).

According to the lawyer, who also was Hispanic, the defendant "had already been hit once or twice. Unfortunately it hadn't been hit by Hispanic plaintiffs nor had Hispanics intervened in the other cases so that in a sense we saw it as part of the enforcement of Title VII" (Int. 40:5). The plaintiff group remained active throughout the course of the suit. They collected information and kept in contact with the attorneys for the class. The plaintiff group, in addition, was aided by the activities of the few Hispanics who already had succeeded in obtaining the desired employment. The lawyers had little difficulty in negotiating a consent decree, which allowed Hispanics to circumvent the random process that had prevented all but a few from taking the relevant test. Later, when some flunked the test, the lawyers were able to negotiate for tutorial classes to try to improve the passage rate.

The class representatives were allowed to take the test, and the defendant pledged affirmative action to bring in others. The original plaintiff got a job and was happy with the result: "The main thing was to break through. . . . [The defendant] got the message" (Rep. Int. 40:2). And the plaintiff's actions did not lead to acrimony: "Everyone sues [the defendant] . . . to get a piece of the action." At the time of the interviews, the plaintiff group continued to meet and stay involved with the issues that surrounded the lawsuit.

According to the public interest attorney, the action was not successful in advancing very many Hispanics. Class members who were active in the group were "frustrated" because "they couldn't see why we couldn't get more . . . and . . . we [did a] lot of explaining . . . how there was a limitation and how we couldn't just get them all positions" (Int. 40:15). A combination of the economic downturn and the impact of Proposi-

tion 13 in California, in addition, meant that there were layoffs rather than substantial new hiring. The defendant, according to the attorney, was still "30% to 35% under what [it] should be" (Int. 40:10). The public interest attorney secured some fees for the public interest organization and a remedy in court consistent with general aims, but the case by itself did not succeed fully in furthering the aim of more Hispanics in public employment.

Case 6. Employment Discrimination against Blacks in Retail Sales

A second example—a highly contested class action—began with a black man who believed that he had been passed over for promotions in a department store, with the positions instead filled by white men hired "off the streets" (Rep. Int. 38a:1). He filed a grievance with the EEOC and secured a right to sue letter, and he then contacted an individual known to him as a "class action lawyer." The lawyer reported that he asked the potential plaintiff if anyone else was in the same situation, and the result was the addition of another named plaintiff. The second plaintiff had also filed with the EEOC, but the defendant had refused to accommodate him. The grievance had remained, but it had stalled: "his was a kind of dead issue" (Int. 38:5).

The attorney asked the plaintiffs to "give me some figures" on the statistics of employment in the higher status positions, "[s]o one of them got hold of the store's EEO report . . . , which showed . . . a very low number of blacks in big ticket [sales] and in division management" (Int. 38:6). The lawyer decided to try to make a statistical case for all the stores in California, but eventually the judge simply cut the class to most of the stores in the Bay Area. The original plaintiff, according to the lawyer, tried to recruit plaintiffs from another store where he knew some black employees, but "he found a lot of intimidated people who did not want to get involved, so he gave up" (Int. 38:10).

As the case progressed, one of the original plaintiffs was fired by the defendant. His marriage broke up and "he looked a wreck. He was a wreck" (Int. 38:11). Nevertheless, that plaintiff reported that, when it was over, he was satisfied with the result "to a large degree" (Rep. Int. 38b: 2). He did have complaints. Seven years was too long. The defendant had changed only in its "public face." He had been unable to get a job for six years because of the derogatory remarks made about him by the defendant, and part of the settlement was that he would not fight for reinstatement. He did, however, receive substantial monetary damages. The other named plaintiff thought the result was

a real change in the behavior of the defendant, and he also received money damages (Rep. Int. 38a:2).

The actual consent decree provided for goals and timetables a little better than those already on record with the EEOC, and it also reiterated the situation at the time of the decree and what needed to be done. Clearly there had already been considerable change during the course of the lawsuit. As part of the negotiations for a settlement, the attorney agreed to a cap on the fees. The cap on fees was accepted because of a need for a settlement: "The statistical proof was not all that solid, as we had problems with the data itself down to the very end" (Int. 38:21). How much the case actually accomplished for the class is therefore difficult to determine.

Case 7. Sex Discrimination in Employment Promotions

A third employment discrimination began in roughly the same fashion. Two black women brought a claim to an attorney. The attorney filed a class action alleging both race and sex discrimination. After a year, with class certification still highly contested, the attorney contacted a more experienced class action litigator, stating, "I'm on to a big case and I don't have the resources to handle it" (Int. 36:6). The attorney who then took the case noted that it was unique in that it had "highly placed plaintiffs," with the class members in professional and managerial job classifications (Int. 36:5). The new attorney felt that the class action needed shoring up with a new class representative "in a higher job position" (Int. 36:7), and he found that another woman had an existing but probably dormant claim on file with the EEOC. He described her as a "very, very powerful woman" (Int. 36:9). She did agree to join the case as a class representative.

As in the previous cases, the attorney obtained a copy of the company's "fairly extensive affirmative action plan" (Int. 36:6) and through discovery secured "a complete data base" to see the extent to which women and blacks were underrepresented (Int. 36:9). The attorney found a mixed story: "we fell completely short on blacks." With respect to claims based on gender, they found some respectable claims (Int. 36:9); "there were some pockets of nondiscrimination where women exceeded any theory of availability we could muster, and we just carved that out of the class." The attorney ultimately elected simply to eliminate the racial discrimination claims, and the certified class action and subsequent settlement concerned only sex discrimination.

The individual class representatives received separate monetary settlements. It does not appear that they were very happy with the results. One of the original plaintiffs thought she

should have received more, but the attorney was convinced that her $5,000 or so was 100% of what the claim was worth (Int. 36:13). Another class representative expressed concern about the case in a letter to the judge: "there is one detail that the consent decree does not actually address. . . . [A] named plaintiff's original complaint raised the issue of race discrimination. Somehow, during the litigation of this lawsuit that issue was eliminated." A back-pay fund of $325,000 was also created for class members asserting claims. Finally, in addition to attorney's fees, the settlement mandated injunctive relief and a reporting requirement for monitoring: "They had an affirmative action plan, so they committed to that principle. It was a matter of getting the numbers up to where I thought they should be" (Int. 36:16). The attorney, our only informant about the case, thought that the goals and timetables were being met by the defendant.

Case 8. Antitrust versus a Prepaid Plan

Outside the civil rights area, there are also several examples of relatively active class representatives. One case concerned a medical practitioner who had been quite unhappy with a prepaid medical plan that he believed had been interfering in the patient-doctor relationship (Rep. Int. 23:1). He became active with a group of like-minded practitioners who formed an organization. The organization spent three years trying to gain control of the prepaid plan by campaigning for political office in the prepaid system, but the efforts failed. According to the principal activist, "then I lost interest," and it "was a dead issue" (Rep. Int. 23:1).

Four or five years later, someone in the organization talked with a specialist in malpractice who expressed interest in such a case. The malpractice lawyer then put the original leader in touch with a law firm in Northern California, which thought that the facts might amount to price fixing in violation of the antitrust laws. The idea, according to the original leader, was to be out of the "political" struggle while letting the courts decide legal issues. He and his group helped put together a list from which the class representatives were picked, and they raised $10,000 to $20,000 in costs for the litigation (not for attorney's fees, which were to be covered by a contingent fee).

The "legal" strategy as politics of last resort left the lawyers in control. The action was brought for money damages, not injunctive relief. According to the antitrust lawyer for the plaintiffs, "in order for me to get paid I had to collect money damages and yet what they were most interested in was injunctive relief . . .: I was not going to bring it as an injunctive action unless they would pay me by the hour" (Int. 23:13). After the

class was certified, several legal precedents made it appear more difficult to prevail on the merits. In settlement negotiations, therefore, according to the class lawyer, he said to the defendant, "Well, change some of these prices and pay my fees, and so that's what ultimately happened. . . . [W]e got changes that we could live with" (Int. 23:15) and more than $300,000 in attorney's fees.

According to the original named plaintiff, the settlement was "no victory at all." He was "not convinced at the time that the firm was right in settling," but they had worked hard and "were anxious to get at least their fees" (Rep. Int. 23:2). The political struggle was left just where it had been before the case was filed.

Case 9. Securities Fraud in a Business Acquisition

A securities fraud action had the same kind of fortuitous beginning. One of the about 50 shareholders in a small corporation opposed its acquisition by a much larger enterprise. The shareholder, who helped operate the business with the other shareholders, was quite angry, and "it festered in his mind for quite a while" (Int. 15:6). He tried to cash in some of the shares he had been provided as part of the acquisition, and the sales transactions took more time than he expected. Finally, he asked informally for advice from his next-door neighbor, a securities lawyer, who saw a potential securities violation in the facts presented to him. The lawyer thought of a class action and asked the shareholder "to develop a cadre" of class representatives. The shareholder was able to provide five more individuals to serve as class representatives, and the class action therefore sought rescission of the acquisition. Not only did they sue the acquiring company, but the plaintiffs also insisted on expressing their anger by naming the directors as defendants. Every aspect of the case was vigorously contested, but the class was certified by the court and proceeded to trial. And as the naming of the defendants illustrates, for these parties the lawsuit was part of a political struggle.

After four weeks of trial, the class representatives "were wearing . . . down emotionally" (Int. 15:19), and "they were losing pay." A few days before the plaintiffs were scheduled to rest the case and four years after the initial pleading, in the lawyer's words, "my people disintegrated as a class" (Int. 15:19). The lawyer stated convincingly, moreover, that there was a sudden change more dramatic than simply an attrition over time in the plaintiffs' resolve.

The defendant made an offer that would have been completely unacceptable before, but only the original named plaintiff, now terminally ill, was willing to oppose it. The other class

representatives forced acceptance of the settlement in the next few days exactly as offered. The settlement involved the payment of some money to the plaintiffs and about $150,000 in attorney fees, but the lawyer opposed it. He felt that the case was worth much more and that he "lost a half a million dollars" that he would have received for winning the suit (Int. 15:27). Why did the plaintiffs capitulate? The attorney did not know for sure, but he argued convincingly that some kind of undue pressure was put on the class representatives by the opponents of the case. The pressure, he felt, made several key class representatives unwilling to continue the litigation. The case ended for reasons that had nothing to do with the merits of the litigation. It began and ended as part of a political struggle that was changed somewhat, but not completely, by class action litigation.

IV. Class Actions and Empowerment: Critical Insights

A. Narrowing

The examples confirm the general insight of the dispute transformation literature: litigation tends to narrow the dispute that gave rise to it. The cases described above and the others in the study suggest that the translation into the language of the law necessarily eliminates much of the richness of disputes.

The expiration of unemployment benefits in a recession moves from an attack on the reimbursement of overpayments to a case about a retroactive remedy (case 1). A long-term struggle about control of a prepaid insurance group becomes framed as a narrow antitrust issue (case 8). A fight about power and fairness among 50 shareholders in a close-knit corporation becomes, for a time at least, a question of compliance with securities laws (case 9). The employment discrimination cases become mainly questions of statistics, moving from the complaints of individuals to whatever items are supported by aggregate statistics (cases 6 and 7). Other securities and antitrust cases seem to represent only pieces of a governmental investigation that already defined the legal and factual cases (cases 3 and 4). A winnowing of social security disability claimants becomes a contest about the adequacy of the wording of the notice (case 2).

The last example is particularly noteworthy, since the legal issue became a variant of notice and the right to be heard. Indeed, due process is the lawyers' theme in the class actions that involve almost any question except securities, antitrust, or employment discrimination. In addition to the case already described, other welfare cases focused on the question of a hearing, an attack on jail conditions focused on punishments of

detainees without some due process, another case attacked detention without some hearing, and another concerned car towing without some notice. The lawyers showed a marked tendency to search for a due process theory to shore up the legal theory of the case (see Chambers & Wald 1985). At the time of these cases, lawyers spoke and courts heard only one basic constitutional phrase: the right to notice and an opportunity to be heard.

B. Political Expansion

The narrowing of the dispute into legally recognizable terms appears on the surface inconsistent with an expansive model of the class actions, but the inconsistency is deceptive. One way to see power being gained from class actions is in the opportunity it offers to expand individual disputes into group actions, mobilizing a group that will develop into an independent force for change. While the claim itself may narrow in the process, it can still serve as a focal point for the mobilization of a group (e.g., Simon 1984:469, 488, 489). If such mobilization does not occur, it may be that the political activity is on the whole reduced (Paul-Shaheen & Perlstadt 1982). Potential group action could become sidetracked into a long, lawyer-dominated court proceeding.

The class actions in this study provide no evidence that the conscientious class attorney uses the class action as an organizing tool to build an activist class. Politically sensitive lawyers might of course take the time and energy to recruit and organize class members into some form of organization, but nothing in the class actions we studied reveals any evidence of it or any particular incentive or strategic reason to do so. This legal device as a practical matter does nothing for the lawyer as organizer.

Two dimensions of power—dispute expansion and group mobilization—support the conclusion that political empowerment has very little to do with class actions. So far, however, we have neglected to assess the accomplishments of the class actions at the more mundane level. We must ask who gets what from class action litigation in terms of legal remedies for legal violations.

C. Agency Issues and the Evaluation of Client Empowerment in Class Actions

The complications of agency in the context of class actions suggest that outcomes will not have the same client scrutiny that is given to outcomes in ordinary civil litigation. Class action lawyers, in the first place, are charged with a duty of para-

mount loyalty to the class, not the class representatives. Accordingly, a settlement or litigated outcome that provides some benefits for the class but little for the class representatives cannot be challenged effectively by the persons who generally have shown the most interest in the case. And if class representatives are treated well, that reduces further their incentive to scrutinize what the class members obtain. Class members do not as a rule have a great individual stake in the action, and therefore they have little incentive to monitor the case (assuming that they even know about it). The class lawyers have the most direct interest in the outcome of the case, but they also have a conflict to the extent that they need to collect their fees through the litigation (see Coffee 1987; Macey & Miller 1991) or accomplish the general aims of a legal aid or public interest organization.

The descriptions provided in this article and the other cases in this study provide a number of examples in which the class representatives do not get much from the class action litigation. In two categories of cases, class representatives are virtually meaningless: they are enlisted on behalf of public interest or private entrepreneurial attorneys. If we limit ourselves to the more active representatives, we can still find some relatively sad stories. One of the plaintiffs challenging promotions in retail sales (case 6) was fired and could not find a job for six years. He received damages but was persuaded not to push for reinstatement. Still more notable was the plaintiff who complained that the original complaint alleged race discrimination in promotional practices (case 7) but that the case settled only on the question of gender discrimination. Another case, not discussed above, led to a settlement of the claim for race discrimination, but the original class representative never got the promotion that he originally sought (Rep. Int. 18:2). And in another settled case involving race discrimination in employment, the original plaintiff was fired by a bank, was "not allowed to testify," and was left only with "the satisfaction that I was doing the right thing" (Rep. Int. 19:2). Many class representatives did receive special relief in employment discrimination actions, but some ended up with no tangible benefit from the settlement of the claim.

Turning to the benefits provided to the class, the facts do not add up to a strong picture of litigation that makes lasting improvements in the lives of class members. As noted before, it is never easy to evaluate negotiated settlements without a very good idea of the posture of the judge, the available facts, and the legal snapshot at the time of negotiations; but it is worth providing some critical scrutiny of the cases described in this article.

Two of the three antitrust cases (cases 3, 4, and 8) essen-

tially had no class representatives, and all three had lawyers who needed to get fees from the settlement. The two that derived from governmental investigations needed no injunctive relief, and the result was simply a damage remedy, distributed with some difficulty, and attorney's fees. The third, which had picked up belatedly on a long struggle over third-party payment to physicians in a prepaid insurance group, resulted explicitly in a few changes in practice in order to justify a settlement and attorney's fees. The original plaintiff, who did monitor the solution, found it to be "no victory at all" for him or the class. The securities case (case 9) was a case where the plaintiffs and class gained power through the class action, but they only succeeded in bringing on extralegal power that compelled them to settle the case. There was, however, a substantial damage component and some attorney's fees.

The employment discrimination cases (cases 5, 6, and 7) are different in that injunctive relief is a basic feature, but these cases also can be scrutinized critically for the benefits brought to the class. The Hispanic challenge to a test succeeded in making more of the positions available to Hispanics. The economic downturn prevented dramatic results, but the case was by and large successful in accomplishing the purpose shared by the plaintiffs and lawyer. The other two cases went from unhappy plaintiffs to statistical analyses to whatever consent decrees could be justified by the statistics. Funds were created by the defendant to compensate victims of discrimination. And for the future the defendants committed themselves to goals and timetables based largely on affirmative action plans already agreed to in principle with the EEOC. The commitment of the consent decree gave more bite to the affirmative action plans, but we cannot know whether there would have been the same effort to comply in any event. One could say these cases, all told, enhanced access to a test, not a job, and aided affirmative action mainly by reaffirming existing plans.

Finally, two social welfare cases brought by legal aid organizations (cases 1 and 2) were victories, but the results are again ambiguous. The first case helped gain the attention of Congress so that it changed the rule about overpayments of certain unemployment benefits, but Congress might have done that under pressure from another labor union initiative anyway; and the winning of retroactive relief did not lead to action outside California even though it was a nationwide class action. The attack on the hearing before the cutoff of disability ended with a change in the language of the notice, but we cannot know whether the notice did anything to cause more hearings or fewer cutoffs. Indeed, we cannot know whether the numerous other class actions that settled for notice or a hearing had any

substantial impact—for example, on the towing of cars in San Francisco or the infliction of punishment on jail inmates.

This negative analysis is of course unduly one-sided even on its own terms. There were some very striking legal victories among the 46 cases we studied. Still, the cases do not add up to a very convincing argument for the class action as a significant tool of empowerment or social change. The results, evaluated in terms of group mobilization or the achievements of the litigation itself, are not overwhelming. This does not mean that plaintiffs deserved better outcomes in individual instances. Nor does this analysis speak to the question of whether class action litigation is socially good according to a number of plausible criteria. The point is simply that, if we examine the cases from the perspective of the supposed beneficiaries and a relatively simple political model, we cannot conclude easily that the class action form creates a practice of substantial benefit and power to plaintiffs.

V. Rethinking Empowerment and Class Actions

Given few lawyer-created groups, few unambiguously successful class representatives, and few clear victories for class members, we could be tempted either to return to "context is everything," which characterizes most litigation, or to a deep pessimism about the role of legal artifice in promoting or hindering social change. Dispute transformation in class actions, it seems, narrows the problem dramatically to get it before the court, and then the resulting settlements do not even provide much in the way of legal remedies.

To get a more balanced assessment of empowerment and results requires a more expansive theoretical perspective. This perspective builds on the sensitivity to the construction of parties characteristic of the dispute transformation literature in general and in particular of the works cited by Bumiller and Merry. According to this perspective, some types of class actions described in the case studies can be seen to result in substantial empowerment. We begin by rethinking what the class action means for the active class representatives found most notably in the employment discrimination cases and sprinkled around the other cases as well. Numerically, indeed, as shown in Table 1, active class representatives are much more common than passive recruits, passive investors, or individuals who bring suit and then move to the sidelines. Next we look at the cases controlled mainly by entrepreneurial attorneys seeking their fees as part of the settlement. Our focus here is on the relatively traditional concerns of access and aggregation, but there is a more subtle point. We must appreciate the way that all the kinds of class actions, in part through aggregation, pro-

vide key litigating advantages typically unavailable to individual litigants or to lawyers taking on a cause or claim which by itself lacks the stakes for an exercise in "big litigation."

A. Class Action Representatives: Odd Persons out or Legally Constructed Activists

We begin with the consequences of the class action for class representatives. This starting point is not self-evident from the literature. The literature of the class action questions whether class representatives ought to be empowered in any special sense from a lawsuit. A recent article terms them "decorative figureheads" and calls for their abolition (Burns 1990; Macey & Miller 1991). One lawyer-interviewee echoed this concern by stating, "I litigate class actions—individuals are irrelevant" (Int. 19a). In many class actions this skepticism about class representatives appears very well justified.

The class representative is not in fact very important in the large-scale, small-claim litigation characteristic of most securities and antitrust class actions (Macey & Miller 1991), which are brought by entrepreneurial plaintiffs' attorneys. The recruited plaintiffs serve lawyers only as "their ticket into litigation" (ibid., p. 117; Burns 1990). Similarly, in the welfare cases the legal aid organization mounts an attack on a practice affecting its general constituency. Class representatives here as well are outside of what is clearly a lawyers' class action.

Beyond those examples, however, the class actions are often quite relevant to the lives of the class representatives. And even when a lawyer, as the quotation above indicates, chooses to make the class representative irrelevant to the *litigation*, that does not mean such a choice lacks consequences for the life of the class representative. The active class representatives merit serious attention.

These lawsuits last several years at a minimum. Many of them—most obviously the employment discrimination cases—start with plaintiffs who are deeply aggrieved. The class action focuses considerable attention on them within their nonlegal lives. They are empowered or disempowered *there*, not simply in the courtroom, and the course of the litigation affects their everyday lives. They also may organize—find friends at least—to bolster their own personal or ideological positions. Indeed, it makes much more sense for them to organize than for their lawyers to do so.

Our information is not as rich as we would like on the details of ground-level activity during the course of the litigation (cf. Schuck 1986). We know how most of the cases got started and what role individuals played in the litigation, but the data are not as complete on the impact of the lawsuit itself on daily

life and disputing. Some tentative observations can nevertheless be made, beginning with the contrast between the class action and the employment discrimination cases Kristin Bumiller (1988) examined. She reported, "these respondents resist perceiving their misfortune as the result of their group identity" (ibid., p. 101), and "[t]he ambivalent invocation of the concept of discrimination stultifies legal action" (ibid., p. 97). The legal process constructs the victim. The class representatives in the employment discrimination cases and in other cases where they asserted themselves, in contrast, seem to have gained some status and strength from their "leadership" of the class action. The class representative status may help to construct an activist. Moreover, the possibility of multiple plaintiffs in the class action allowed individuals to team up and support one another. In some sense their group identity is highlighted (cf. Tushnet 1987:147–50; Yeazell 1987).

The three employment discrimination cases described above (cases 5, 6, and 7) provide examples. The Hispanic challenge to tests involved about 35 persons who often got together (Rep. Int. 40). The class representative was proud that he was "not scared" and that he succeeded in winning "a piece of the action" for Hispanics. In the case concerning promotions in retail sales positions, the class representatives found crucial information, tried to recruit others, and despite tremendous personal hardship experienced by one of them, still expressed general satisfaction with the result. In the third case, as noted before, at least one class representative felt that a racial discrimination claim should not have been eliminated, but the case began with two women acting together (Int. 36:5), and the woman the lawyer discovered went from a dormant claimant *taking absolutely no action* on her EEOC complaint to a strongly assertive position in the conflict with the employer.

Indeed, a fascinating feature of the cases is that they revive claims that might have gone unpursued. It is not inconsistent with strong plaintiff beliefs to see cases where pure serendipity seems to have brought lawyer and class representative together (compare Merry 1990:95). The plaintiff attacking the prepaid plan had gone years before someone revived his interest by mentioning that a particular lawyer might be willing to pay attention (case 8). The securities case began with two neighbors chatting about unfairness "festering" in the mind of one and the other happened to be a lawyer (case 9). And in at least two employment discrimination cases, potential class representatives had stopped pushing their claims. The class actions in many of these cases provide an otherwise unavailable outlet for grievances going nowhere.

If we go beyond the cases described in some detail, moreover, we can find individuals who, for example, "felt many

others had suffered" (Rep. Int. 35:1), began a class action after an informal meeting of a group of women upset with discrimination (Rep. Int. 8a; 8b), or who "wanted a class action from the beginning" (Rep. Int. 31:1). Another black woman took initiative by herself to bring an employment discrimination suit, then began conversations with individuals who "starting alleging things," so "we asked them to come in [to the litigation] as well" (Rep. Int. 42:1). The result for her was that she "gained esteem" and still was thanked often after the lawsuit was over (Rep. Int. 42:2). And in another case a black woman professional, who required psychological counseling because she felt mistreated badly by a hotel bar on account of her race, became emboldened through an evening educational class to seek vindication and won a striking settlement that seems to have confirmed her role as an activist (Rep. Int. 46).

Of course in other cases there was considerable ground-level activity of a much more hostile nature. One Hispanic class representative found that while he put himself on the line, the "worst enemies" were the people at work (Rep. Int. 12:1). He pushed people to get involved, but the result was that he "lost lots of friends" (Rep. Int. 12:2). A woman who alleged employment discrimination found the class action decertified by evidence from 30 potential class members who averred that they felt fairly treated by the company (Int. 9). And one woman in a social welfare case withdrew as class representative after adverse publicity about the case (Int. 7:2).

In some cases, the class action can be empowering personally and through ground-level activity that occurs along with the class action. It may also be personally very costly if whatever status comes with class representative designation is not met with support at the ground level or, for whatever reason, the class representative later becomes an odd person out of the litigation.[9] But the opportunity to go on the offensive, and to gain allies, does seem to be an important feature of class action practice at the ground level.

B. Aggregation

The subtle and elusive potential empowerment of activist class representatives contrasts with the relatively straightforward economic idea of access through aggregation (see Alexander 1991; Coffee 1987). There is no question that some of the cases could not have been brought if the claims of class mem-

[9] Since the class attorney represents the class, not specific named plaintiffs, it is possible to, in effect, ignore the individual claims that began the case. Class action doctrine for the most part provides no special reward or incentive to class representatives. For the argument, which has considerable merit to it, that there should be rewards, see Greenfield (1986). Blum (1991) describes recent case developments.

bers were not aggregated through the class action. All three of the antitrust cases discussed above (cases 3, 4, and 8) fall into this category, as do the securities cases that have not been discussed in detail.

This general observation about access is hardly surprising. The antitrust and securities cases tend to bring together a number of relatively small claims for damages. The amount at stake, which in practice tends to set the boundaries for the attorney's fees in successful litigation, is raised through aggregation, making cases economically viable when they otherwise might not be. The cases seeking primarily injunctive relief, such as the discrimination cases, do not have quite the same access problems. Enough may be at stake from the defendant's perspective to justify attorney investment in the hope of court-awarded fees. Moreover, to the extent that there are highly motivated class representatives involved, which is not the rule in antitrust and securities cases, or ideologically motivated attorneys, such as those from the legal services offices, there may be less of a threshold to go forward. Nevertheless, the class action generally makes it easier to justify the expenditure of resources to bring a complex lawsuit.[10]

This point can be reinforced by reference to the 67 uncertified class actions mentioned earlier but not described. The cases that were filed as class actions but not certified resembled generally the mix of cases of the certified class actions: 27 employment discrimination; 8 antitrust; 4 securities regulation; 5 social security; 4 labor concerns; and 13 other civil rights (which cannot be made more precise from our data set); and 6 others. It is instructive to compare the outcomes generally of these cases with the certified class actions. First, while it is difficult to discern much detail from the docket sheets, it is clear that certified class actions in general have more settlement clout and a greater staying power. As Table 2 indicates, certified class actions were three times as likely as uncertified cases to go to trial on any aspect of the claim (17% vs. 6%). Three of the four uncertified cases that were tried involved employment discrimination claims and the other was a labor dispute. Almost two-thirds of the uncertified cases ended in summary judgment for the defendant (22%), simply died or never really got started (combined as 33% in the table), or were remanded or transferred (9%). While 28% of the uncertified cases resulted in some form of "settlement," the settlement rate was 78% for the certified cases. Moreover, some of the settlements in the uncertified cases probably were tantamount to abandonment;

[10] Also, with the federal courts' increasing tendency to channel its "lesser" cases away from the attention of Article III judges with life tenure, big cases may be necessary to get access to genuine federal judges, not just to the bureaucracy of federal court (Garth 1988; Resnik 1991).

Table 2. Results of Certified and Uncertified Class Actions, Northern District of California, 1979–1984

	Employment Discrimination		Antitrust		Securities Regulation		Social Security		Other Civil Rights		Other		Total No.		Total %	
	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.	Cert.	Uncert.
Remand and transfer	0	0	0	3	0	1	0	0	0	1	0	1	0	6	0	9
Nonstarter or little activity	0	10	0	3	0	0	0	2	0	5	0	2	0	22	0	33
Apparently settled	18	9	4	2	4	2	3	1	3	3	4	2	36	19	78	28
Summary judgment, plaintiff	0	1	0	0	0	0	0	0	2	0	0	0	2	1	4	1.5
Summary judgment, defendant	0	4	0	0	0	1	0	0	0	4	0	6	0	15	0	22
Trial plaintiff	2	1	0	0	0	0	3	0	0	0	0	0	5	1	11	1.5
Trial defendant	1	2	0	0	1	0	0	0	0	0	1	1	3	3	7	4
Total	21	27	4	8	5	4	6	3	5	13	5	12	46	67	100	99

and the remaining settlements may have occurred either prior to a contest on certification, while a certification motion was pending, or when there were plausible arguments for appeal on the class action issue.

The contrasting fates of certified and uncertified class actions lead to a further point. Not only does the number of dismissals and abandonments of the uncertified cases suggest that aggregation is often essential even to access, in both damage actions and many of the other cases; but also it appears that aggregation affects the *conduct* of litigation. Sufficiently high stakes make available some other notable features of the class action that may qualify as empowering.

C. Constructing Big Litigation: Making Available the Practice Tools of the Strong

We have seen how the class action can help to construct an activist outside of court and how it promotes access by aggregation. Shifting attention to the lawyers who handle such cases and the positions they tend to represent, we can add that the class action constructs big-time lawyers for big-time litigation. This key feature of the class action can be seen by contrasting high-stakes, big litigation with the cases of ordinary people with ordinary claims. It is generally accepted that in high-stakes contract litigation, where for one reason or another one side does not comply with the terms of a contract, lawyers will search the arcane doctrines of contract law and probe all factual aspects of the situation to try to find something usable to excuse or justify the breach. The uranium litigation that followed the oil crisis in the 1970s well illustrates this phenomenon. The price of uranium went way up, and many suppliers simply refused to deliver according to the terms of their contracts. Enough was at stake for lawyers to search every possible theory and fact to avoid the contracts. Similarly, if an individual suffers serious enough injuries in an accident that can be traced to a deep-pocket defendant, the personal injury lawyer will spend extraordinary energy and time to find a plausible story of negligence or a defective product. The Audi invisible accelerator probably exemplified this effort. The personal injury bar for a time convinced jurors that Audis simply accelerated on their own. Studies have shown that Audi cars never had such a defect.

In contrast, as Sally Merry (1990:135) shows, ordinary people have little success in finding a way to make their problems into actionable legal concerns.

> As they spend time in court, plaintiffs discover that the courts do not take their family and neighborhood problems very seriously. The courts are not eager to handle these problems,

> nor do they regard them as real legal cases. Plaintiffs find that penalties are rare for the people who have injured them. Nor is there much sympathy for their plight. Instead, plaintiffs are told that these are moral problems unworthy of legal attention, that they are themselves at fault to some extent, and that they need moral advice or counseling rather than the intervention of the law.

While their "legal consciousness" suggests to them that their rights have been violated, these plaintiffs have no way to invoke the power of the law unless they happen to have a claim that fits very narrowly into a legal category recognized by jealous gatekeepers of the state legal system.

Class actions both raise the stakes to justify more effort and provide a procedural tool for taking a generalized consciousness of a violation of rights—asserted by lawyers or plaintiffs—and shaping it toward legally justifiable relief. A review of the cases discussed earlier well illustrates this point. That is not to say that the remedies necessarily amount to very much by most criteria. But the class action allows an intense legal scrutiny, some probing of the facts, and the possibility of a remedy that responds in some positive fashion to what intense legal scrutiny uncovers.

The first case, concerning unemployment benefits, shows experienced lawyers who knew a good legal theory to stop recoveries of overpayments when the recipients were not at fault and even found a way to get the case to a judge sympathetic to the notion of a retroactive remedy. Case 2 started with one theory of the case, a lack of notice, which went nowhere, and ended up with at least some attention to the content of the notice—a very different approach to the problem of benefit terminations. Cases 3 and 4 do not demonstrate this phenomenon, since they amount to no more than making defendants pay a little more for their alleged antitrust violations. Case 5 began with attention focused on the qualifications for Hispanics to take an employment test, but it proceeded to consider even the problem of tutoring to prepare for it. Lawyers shifted around but kept focused on Hispanic access to the jobs. All three of the employment discrimination cases show serious scrutiny of the defendants' practices and composition of the workforce, a shifting of legal theories and even of plaintiffs in order to find a legal pressure point, and eventually some backpay and a decree that helped to keep the pressure on. The last two cases did not accomplish much, but the process of scrutiny and the effort to find a decent legal theory is consistent with class action litigation generally.

Lawyers are not always very imaginative, sometimes doing no more than parroting a claim developed by the state or others or groping for a due process claim with some factual

basis. The probing of the defendant's conduct varies from case to case. But the class action allows a serious probe that goes well beyond the particular situation of one or two plaintiffs, and the stakes in class actions create an economic incentive to find some pressure point on which to base a negotiated settlement and, where relevant, a claim for attorney's fees.[11]

The class action's power, available to whoever succeeds in complying with its legal formalities, can be described more precisely. Success in certification makes it possible to raise the stakes through aggregation, which justifies some greater expenditure of attorney time on the plaintiffs' (and defendants') side. The hours invested make possible a deep rather than a superficial settlement. Liberal discovery can be justified by the stakes and the fact that the scope of class actions justifies a very wide scope for discovery. The class action quite clearly permits a shifting of legal theories to whatever seems plausible. Indeed, even class representatives can be shifted not only to assure certification but also to make a stronger case on the facts.

This use of the legal practice tools of the powerful does not, any more than in general high-stakes litigation, ensure that the results are necessarily efficient or that the results are positive in terms of the level and kind of legal regulation that ultimately gets invoked in support of a settlement or litigated outcome. The point, however, is that one generally plausible role of class actions is to allow those without the resources to invoke the law on their behalf to hold another party's conduct up to the more or less intense legal scrutiny (Ackerman 1984; Chayes 1976; Fiss 1979) characteristic of high-stakes litigation. In contrast to the cases Merry (1990) studied, the processes available for class actions can make some "moral problems" worthy of serious legal attention.

VI. Concluding Observations

Three general points emerge from this study. First, it seems fair to say that the class action is a politically empowering legal artifice, whether or not the results of the class actions actually bring substantial material resources to classes or class representatives. The inevitable narrowing of disputes and the ambiguity of results reflected in successful settlements leave room for different interpretations about results; but the class action at least *permits* significant empowering both of individuals and of the lawyers and the classes they represent.

Second, one of the ways power can be generated is by al-

[11] Among the 67 uncertified class actions, 15 of the 16 summary judgment terminations were in favor of defendants. Some cases are simply weak on the merits, but a contributing factor to these results is the reduced economic incentive in the noncertified class action to invest enough resources for the case to survive summary judgment.

lowing, through aggregation and the availability of the tools of high-stakes litigation, a relatively intense legal scrutiny. There is some disagreement in the legal community about whether intense legal scrutiny by private party litigants is economically worth the cost (Garth 1988). On the one hand, the cases did not uncover very much of great significance about the defendants' behavior, and the costs of litigation were clearly substantial. One could argue that it would be better to leave the defendants free of this scrutiny and instead to let them be regulated by the market or at times the government. On the other hand, the threat of scrutiny through class actions certainly deters some behavior, and the certified class action cases on the whole were fairly strong on the merits.

It is difficult to resolve such an issue about class actions or about other forms of relatively intrusive litigation. At the very least, more research would be useful about the way procedural tools are employed to investigate a defendant, the assessment of the facts uncovered according to various legal standards and theories, and decisions to litigate or settle in light of the facts and law (Kritzer 1991). There is evidence that the attorneys with passive clients in securities cases tend to settle the litigation with only a superficial investigation into the merits (Alexander 1991). The antitrust cases discussed here (cases 3, 4, and 8) support that point. They do not point to any deepening of an inquiry through the litigation process beyond what was known when the cases were filed. On the other hand, high-stakes litigants at times do mobilize the full power of big litigation, and the class action helps distribute *that* power more generally in our society. Whether it is used is an important subject for research, but it is notable that it can be used.

Finally, the analysis of class actions and the class representatives suggests a way to approach the study of litigation that supplements the dispute transformation perspective. The analysis invites a richer image than that of a dispute changing form as it confronts the law and legal procedures. A "gesture from the court," as Sally Merry (1990:87) notes, produces "symbolic power" for the individual litigants in her study. The relationship between the gestures of the legal system and litigants' daily lives should be a focal point of the models that guide research.

One way to envision the relationship, as stated in the introduction, is to imagine an audience watching a dramatization of some of their daily struggles. The drama expresses the story in whatever legal language is available, such as due process or discrimination, and that language may shift as the case develops. The manner of these portrayals affects how the characters in the audience view themselves and act in their lives outside the legal arena. The fact of being named a class representative in a

court document may lend a certain boldness that helps a "victim" of discrimination see herself not only as a legally debilitated victim (Bumiller 1988) but also as a "class representative" at the head of a group of similarly situated persons. Both statuses are legal constructs, but it may be that the class action's particular constructs add special dimensions to the conflict which proceeds in daily lives at the same time a lawsuit meanders through court. As the metaphor of the legal drama suggests, the impact of the legally translated account on the audience may in turn have an impact on the unfolding legal story. A class representative, for example, may gain information from others who respond to that status, and the information may affect subsequent legal developments.

Empirical study informed by this perspective would examine the impacts of the full range of empowering and nonempowering features of class action litigation. It would investigate particular revelations from discovery, the denial or granting of various motions in the case, the judges' seeming attitude toward settlement or the merits, the shifting of legal theories or class representatives, or simply the effect of delay and inactivity; and it would investigate how ground-level events affect the lawsuit. Litigation events, depending on what the audience perceives itself or perceives through lawyer translators explaining the significance in terms of settlement value, may have a notable impact on the individuals, particularly the class representatives whose lives are involved in the litigation. The last point leads to a concluding caution. Those who belittle the importance of class representatives to class actions need to consider not just what happens in lawyers' offices and courts, and not just the results, but also the complex situation of the persons whose statuses are constructed and lives inevitably affected by the filing and conduct of litigation.

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