ARTICLES

THE NEW CLASS ACTION JURISPRUDENCE AND PUBLIC INTEREST LAW

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INTRODUCTION

Class actions have always contended with imputations of illegitimacy.[1] Conservatives have viewed class actions as promoting unproductive litigation.[2] Some progressives have argued that class actions privilege the lawyer's role, stifling the voices of clients.[3] Along with Calmore and Tremblay, among others, I have sought to develop a contextual approach that acknowledges criticisms of public interest law from a progressive perspective while recognizing the importance of institutions already in place, such as federally funded legal services and clinical legal education.[4] The Supreme

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1. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 204–52 (1998).

2. *See* Marshall Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. REV. 1115 (1982) (arguing that law reform litigation by legal services offices is an inappropriate intrusion of politics into legal representation).

3. *See* GERALD P. LOPEZ, REBELLIOUS LAWYERING (1992); Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927 (1999); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 85 (1996); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 U.C.L.A. L. REV. 1101 (1990); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); *cf.* Stephen Ellmann, *Client-Centredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (discussing dilemmas of group litigation); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (same).

4. *See* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695 (1994); Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339 (1999) [hereinafter Margulies, *Mission of Legal Services Lawyers*]; Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071 (1995) [hereinafter Margulies, *Domestic Violence and Poverty Law*]; Peter Margulies, *"Who Are You to Tell Me*

Court has recently issued two decisions, *Amchem Products, Inc. v. Windsor*[5] and *Ortiz v. Fibreboard Corp.*,[6] that invoke concerns about legitimacy and the adequacy of representation to bar class certification and settlement under Federal Rule of Civil Procedure 23(b)(3) in certain contexts involving money damages for "mass torts" such as exposure to asbestos.[7] In deciding these cases, however, the Court left undisturbed the case law on Rule 23(b)(2) class actions, which typically involve suits for injunctive or other equitable relief against governmental or private entities that have allegedly engaged in illegal practices.

This article extends the new mass torts jurisprudence to the public interest realm. It acknowledges the strong public interest in litigation to reform public institutions.[8] However, it argues that the public interest element in such litigation makes it all the more crucial that courts and class

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That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990) [hereinafter Margulies, *Attorney-Client Deliberation*]; Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995) [hereinafter Margulies, *Progressive Lawyering*] (review essay).

5. 521 U.S. 591 (1997).

6. 527 U.S. 815 (1999).

7. For commentary on the issue raised in the mass torts cases, see Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997). *See also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1048 (1995); John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453 (1997); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595 (1997); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998); Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155 (1998); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

8. For histories of two significant law reform campaigns—the efforts to dismantle desegregation and secure rights for people living in poverty—see JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993); David B. Wilkins, *Social Engineers or Corporate Tools:* Brown v. Board of Education *and the Conscience of the Black Corporate Bar, in* RACE, LAW, AND CULTURE: REFLECTIONS ON *Brown v. Board of Education* 137 (Austin Sarat ed., 1997). For examples of the continuum of scholarly concern in the area of structural reform of public institutions, see FEELEY & RUBIN, *supra* note 1; DAVID LUBAN, LAWYERS AND JUSTICE 293–357 (1988); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 431 (1978); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481–94 (1980); Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709 (1989); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993) [hereinafter Morawetz, *Bargaining*]; Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402 (1996) [hereinafter Morawetz, *Underinclusive Class Actions*]; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1184 (1982); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U.

counsel confront the issues of adequacy of representation analyzed by the Supreme Court in its mass torts jurisprudence.

The guiding principle of the new mass torts jurisprudence, this article argues, is temporal equity. Temporal equity refers to the requirement in *Amchem* and *Fibreboard* that class counsel, to be considered "adequate" representatives under Rule 23(a), treat claims that arise or ripen at different times equally, in terms of both the benefits and encumbrances of class membership. This equality need not be exact. However, under *Amchem* and *Fibreboard*, courts must carefully scrutinize material differences in relief or encumbrance, such as the preclusive effect of settlement, for class members' claims based on the time that they arise or ripen. The existence of material differences signals to courts the presence of temporal inequity: unfairly favoring one group of class members over another on the basis of time, because one group is easier to treat with less regard. In the mass torts cases, for example, the proposed relief played favorites in two respects. First, it favored class counsel's individual clients, who filed early complaints, over unidentified class members. Second, it favored those with ongoing symptoms produced by exposure to toxic chemicals such as asbestos, while limiting relief for those who may experience the onset of symptoms in the future.

These trade-offs would be less troublesome if they reflected the full understanding and consent of the affected subgroups or made provision for the "exit" of subgroups that disagreed with proposed relief. Such features are notably lacking in both the mass torts cases and in public interest class actions. The result is a risk of temporal inequity in both contexts.

To appreciate the risk of temporal inequity in the public interest setting, consider the recent growth in class actions to remedy deficiencies in state and local child welfare systems.[9]

Child welfare systems offer services to children who have been adjudicated as abused or neglected, or classified as at risk of abuse or neglect. Such systems are chronically underresourced—a problem that such litigation seeks to remedy.[10] Class remedies in this area can, however, create

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PA. L. REV. 639 (1993) [hereinafter Sturm, *Corrections Litigation*]; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357 (1991) [hereinafter Sturm, *Public Law Remedies*]; *cf.* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) (reviewing FEELEY & RUBIN, *supra*).

9. *See* J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999) (denying class certification in lawsuit alleging violations of wide range of statutes concerning class of children with developmental and mental disabilities); Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997) (affirming certification of class in lawsuit seeking broad changes in child welfare system), *settlement approved*, 185 F.R.D. 152 (S.D.N.Y. 1999); Baby Neal v. Casey, 43 F.3d 48 (3d Cir. 1994) (ordering certification of class in lawsuit challenging child welfare system); *cf.* Charlie H. v. Whitman, 2000 U.S. Dist. LEXIS 774 (D.N.J. Jan. 27, 2000) (granting in part defendants' motion to dismiss in child welfare class action).

10. *See* Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class Action Cases*, 64 FORDHAM L. REV. 1435 (1996).

additional inequities. Subgroups of children within each class action each have needs for resources that in a finite world will be met only through sacrifices by other subgroups. In addition, class definitions may exclude consideration of some groups of children whose interests the lawsuit will affect.

An example of a group excluded from consideration in the child welfare class action would be children living with fit, but impoverished, parents. These children currently have no involvement with child welfare systems and therefore are not part of the class as currently defined. Resources currently allocated to this group may be shifted to pay for more staffing for child welfare systems. This resource drain may precipitate a future "tipping point" for financially strapped parents.[11] Scrambling to make ends meet, some parents may leave their children unsupervised, fail to ensure their children's school attendance, or become unable to provide adequate food or housing for their families. In short, a resource drain would push some parents over the brink into what the law considers child neglect.[12] The children of these parents will then be in much the same position as current members of the class.

Since the relief for the class of children as currently defined will prejudice the interests of future class members, a form of temporal inequity results. As in the mass torts cases, no "structural protections" exist for this group within the class settlement. In the child welfare as well as the mass torts litigation, key players such as class counsel, governmental defendants, and overburdened trial courts have little incentive to deliberate at length about these issues. The groups whose interests the process overlooks are children unable to understand the issues and express a view, and parents too vulnerable and disorganized to make their voices heard.[13] The result is a regime of temporal inequity that makes unacknowledged trade-offs among groups of children, including those with unripe claims who may have a cause of action in the future.[14]

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11. *Cf.* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000) (discussing the consequences of small changes in policies, preferences, and markets).

12. *See* N.Y. SOC. SERV. LAW § 371.4-a (McKinney Supp. 2001) (defining neglect as, inter alia, failing to provide "food, clothing, shelter, education, medical and surgical care. . . [and] supervision"); *cf.* Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 827 (2000) (noting that "[n]eglect itself, in the absence of abuse, is correlated with poverty"); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1722 (2000) (book review) (arguing that lack of resources hinders efforts at family preservation).

13. *Cf.* Guggenheim, *supra* note 12 (discussing obstacles faced by parents living in poverty).

14. *See* Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 L. & SOC'Y REV. 237 (1992). The parallel with the mass torts cases is not exact. In the mass torts cases, relief for certain members of the class—those with current symptoms—depleted cash resources that otherwise might be available for other members of the class who would experience symptoms in the future. In the child welfare situation, class counsel could argue that improvements in the child welfare system would not be dependent on a limited pool of cash

To analyze the dynamics of temporal inequity in the public interest class action and propose solutions, this article relies on a body of work in political science, organization theory, and sociology known as the "new institutionalism."[15] New institutionalism argues that rules are not merely instrumental devices for managing complexity, but are also expressive forms that shape cognition and enact meaning.[16] Applying the notion of rules-as-meaning to Rule 23 of the Federal Rules of Civil Procedure complements the recognition in the Supreme Court's mass torts jurisprudence that Rule 23 generally, and the Rule 23(a)(4) adequacy requirement specifically, embody norms of fairness and equity, not merely techniques for efficient management. If *Amchem* and *Fibreboard* lay down a charter for temporal equity in mass torts, we can also view Rule 23 as a body of rules governing meaning and fairness in the multilevel, multiplayer "institution" of public interest litigation.

A new institutionalist analysis suggests that temporal equity in public interest litigation hinges on two factors: contingency and connection. Contingency refers here to interdependence in institutions and identities. Players in public interest litigation have failed to focus on the development over time of relationships in and among institutions. This interdependence can create unanticipated exits by defendants, which reduce the services and

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that would run out before future beneficiaries could obtain such relief, but would instead be "hard-wired" into future budget allocations. Improved staffing in child welfare systems would therefore still be available when children abused or neglected in the future required it. However, as the discussion in the text indicates, this argument masks an inequity potentially even more troubling than those identified in the mass torts cases. Resource-shifts away from fit but impoverished parents triggered by child welfare class actions may actually increase the incidence of child abuse or neglect in the future for some children. For children at risk of such a perverse consequence, the future availability of child welfare workers is cold comfort.

15. *See* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); Mustafa Emirbayer & Ann Mische, *What Is Agency?*, 103 AM. J. SOC. 962 (1998); Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Benjamin Gregg, *Legal Rules in an Indeterminate World*, 27 POL. THEORY 357 (1999); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 L. & SOC'Y REV. 23 (1998); *cf.* MARY DOUGLAS, *Autonomy and Opportunism*, *in* RISK AND BLAME: ESSAYS IN CULTURAL THEORY 187 (1992) (discussing socioeconomic and psychological accounts of institutional change); PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY (1992) (analyzing normative and descriptive bases for institutions); Sue E.S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 AM. POL. SCI. REV. 582 (1995) (using game theory to elucidate relationships between persons, norms, and institutions); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988) (drawing parallels between "new institutionalism" and critical legal studies).

16. In areas like criminal law, this notion is widely accepted. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (discussing expressive role of norms).

opportunities available to the class.[17] Interdependence is also a neglected factor in conceptualizing the class itself. Class counsel often fail to acknowledge how the intersection of different strands of identity—including but not limited to race, class, gender, sexual orientation, and disability—creates de facto subclasses. This failure leads to unacknowledged and unexamined trade-offs among class members. The lack of attorney-client connection, defined as the commitment to practices of empathy and engagement that allow class counsel to appreciate the human uniqueness of each class member, exacerbates temporal inequity. Solutions to issues of temporal equity in public interest class actions must take contingency and connection into account.

This article consists of five parts. Part I discusses the Supreme Court's new mass torts class action jurisprudence and articulates the parallels between that body of case law and public interest class actions. Part II situates the class action within new institutionalist analysis. Part III discusses problems of connection in class actions, while Part IV focuses on the challenge to temporal equity posed by contingency. Part V offers an "integrative" model that vindicates the values of equity and fairness within class actions.

I.
THE NEW MASS TORTS JURISPRUDENCE, TEMPORAL EQUITY, AND PUBLIC INTEREST CLASS ACTIONS

Fairness to all members of a class is central because of the representative nature of class actions under Rule 23 of the Federal Rules of Civil Procedure. Class actions exist to address grievances that individual complainants would be unable or unlikely to pursue on their own.[18] The practicalities of assembling numerous individual claims into a class require that a court delegate to class representatives much decision-making on the class's behalf. This representation has high stakes. Suppose the representatives settle for a resolution that does not meet the needs of the class. The terms of the settlement may nonetheless bar individual class members from continuing to litigate. Since class members do not choose their representative, such preclusion would be manifestly unfair. Accordingly, courts have held that due process requires a determination prior to class certification that

17. Because my treatment of "exit" includes defendants and class counsel as well as class members, the analysis of exit here is different in scope from the discussion in Coffee, *supra* note 7.

18. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

named plaintiffs and class counsel can adequately represent the class.[19] In addition, the court must approve any proposed settlement. The adequacy requirement codified in Rule 23(a)(4) embodies this understanding.

The Supreme Court's recent mass torts jurisprudence interprets adequacy under Rule 23 to require what this article calls temporal equity: substantive and procedural fairness in allocating benefits and burdens of settlement or other relief among class members over time.[20] In *Amchem Products, Inc. v. Windsor*,[21] the Court ruled that a proposed "settlement" class of victims of asbestos-related illness violated the adequacy requirement of Rule 23. *Amchem*, along with the even more recent decision of the Court in *Ortiz v. Fibreboard Corp.*,[22] outlines the basis for the temporal equity principle.

Amchem demonstrates that class counsel violate temporal equity when they settle on terms favorable to both their own interests and the interests of current individual clients at the expense of other persons in a class they putatively represent. In *Amchem*, attorneys first arranged a settlement on favorable terms for their current clients.[23] Having obtained this relief, which included substantial attorney's fees, the same attorneys in cooperation with defendants filed and settled within a single day[24] a massive class action disposing of all other present and future asbestos-related claims. The proposed settlement gave substantial resources to those currently suffering from asbestos-related symptoms. It also gave class counsel an opportunity to collect more attorney's fees.[25] However, the settlement gave comparatively little to persons called "exposure-only" plaintiffs, i.e., those who as of now had been exposed to asbestos products for a protracted period, but had not yet developed any asbestos-related symptoms. The Court viewed the lesser relief afforded to exposure-only plaintiffs as a violation of the adequacy requirement because of the encumbrance that came with acceptance of the relief: preclusion of future claims. The Court reasoned that the settlement treated exposure-only plaintiffs materially less well in terms of relief than either currently symptomatic plaintiffs or the attorneys in the case, while subjecting them to the same encumbrance, i.e., preclusion. This situation constituted a form of temporal inequity that violated the adequacy requirement of Rule 23.

19. *See, e.g.*, Martin v. Wilks, 490 U.S. 755 (1989); Philips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Hansberry v. Lee, 311 U.S. 32 (1940).

20. *Cf.* Weinstein, *supra* note 7, at 507–10 (discussing trade-offs between present and future claimants).

21. 521 U.S. 591 (1997).

22. 527 U.S. 815 (1999).

23. *Amchem*, 521 U.S. at 601.

24. *Id.*

25. *Id.* at 605 ("Class counsel [were] to receive attorney's fees in an amount to be approved by the District Court."). Commentators looking at the public record in *Amchem* have expressed concern about possible self-dealing and collusion with defendants on the part of class counsel. *See, e.g.*, Koniak, *supra* note 7 (raising concerns about collusion).

A more complex version of temporal inequity emerged in *Ortiz v. Fibreboard Corp.*,[26] which offers an even more sweeping critique of class counsel's right to make allocation decisions for the class. In *Fibreboard*, another asbestos-related case, the Court considered a settlement class constructed to exclude class counsel's substantial "inventory" of individual plaintiffs, who settled separately on favorable terms and avoided the preclusive effects of settlement under Rule 23(b)(1)(B) (the so-called "limited fund" provision). Members of the settlement class, who under Rule 23(b)(1)(B) could not "opt out" of the settlement, would receive materially less relief than class counsel's present individual clients. Further, the parties sought certification of the class under the "limited fund provision" of Rule 23(b)(1)(B) even though substantial disagreement existed on the amount of the sum at issue, including the extent of insurance coverage and the amount that Fibreboard should or could contribute.[27] Apparently to make the favorable treatment of inventory plaintiffs palatable to defendants, the settlement made crucial allocation decisions within the class. These allocation decisions drove down the total amount of the settlement by ignoring significant differences in the value of claims of various subclasses.[28] The attorneys, of course, took their cut up-front.

In holding that the proposed settlement class failed to meet the requirements of Rule 23(b)(1)(B), the Supreme Court identified both substantive and procedural flaws in the agreement. Substantively, the agreement lacked "intraclass equity,"[29] because it treated claims of different value as equivalent. Procedurally, the settlement was flawed because class counsel, to receive their legal fees and preserve assets for the claims of their inventory plaintiffs, had incentives to treat class members unfairly and collude with defendants on crucial issues such as the total insurance dollars available and the share contributed by defendants. To cure these procedural flaws, the Supreme Court opined, the district court should have established "structural protection" for the class, including the division of the class into subclasses with separate representation.[30]

Putting *Amchem* and *Fibreboard* together yields the principle of temporal equity as a core value for class actions. Temporal equity requires both substantive and procedural regard in class certification and settlement

26. 527 U.S. 815 (1999).

27. Fibreboard contributed out of its own funds approximately $500,000 to a settlement package of $1.5 billion. The district court that certified the class had estimated Fibreboard's net value at $235 million, consistent with the estimate of the parties to the settlement. After the settlement, Fibreboard was acquired for a total in cash and assumed liabilities of $600 million. *Id.* at 861.

28. For example, the class relief provided in the settlement did not recognize the greater value of claims which arose during a period when Fibreboard clearly had insurance, as opposed to claims subject to a dispute over insurance coverage.

29. *Fibreboard*, 527 U.S. at 863.

30. *Id.* at 856.

for the interests of persons with a current or future claim against defendants. Groups who at different times are affected by defendants' actions or omissions and benefited or burdened by settlement or other relief, or receive at different times representation by class counsel, should not be subject to materially different substantive or procedural protections.[31] Both substantive and procedural protections were lacking in the mass torts cases reviewed by the Supreme Court.

Similar issues arise in a more subtle form in public interest class actions governed by subsection (b)(2) of Rule 23. These cases involve equitable relief for alleged violations of civil rights committed by an array of public and private defendants, in areas including education, health care, and child welfare. They challenge rules, conditions, and practices that affect hundreds of thousands of vulnerable persons. Resolving these challenges often involves settlements or court orders that restructure policy in complex, multiplayer arenas.[32]

Generally, courts view public interest class actions as posing fewer class conflicts than mass torts litigation. While class members usually have the right to opt out of mass torts litigation, public interest litigation is usually "mandatory," with no opt-out permitted.[33] In part, this judicial view stems from the difference between the equitable relief, such as desegregation of a public school system, sought in public interest litigation and the damages requested in mass torts cases. Courts view the injunctive relief sought in public interest class actions as requiring the participation of all class members to be effective or just. In addition, courts assume the existence of a rough solidarity among class members in public interest class actions, who often all receive government benefits or services, in contrast to the atomized individuals of mass torts cases, whose only bond may be the prospect of obtaining damages.[34] While common issues must "predominate" in the latter group, the mere presence of common issues suffices for public interest litigation.[35]

This benign view of class relationships fails to recognize that the tradeoffs identified in the mass torts cases as a source of temporal inequity are equally pervasive in public interest litigation. Class counsel in public interest class actions do not engage in the blatant self-dealing that the Supreme

31. "Material differences" here can include the like treatment of manifestly unlike claims. A good example from *Fibreboard* is the like treatment of two distinct subgroups of claims: class members' claims clearly covered by defendant's insurance and those subject to disputed coverage.

32. *See* FEELEY & RUBIN, *supra* note 1; Sturm, *Corrections Litigation*, *supra* note 8.

33. *See* Issacharoff, *supra* note 7.

34. Commentators questioned this assumption of solidarity even in the pre-*Amchem* era. *See* Grosberg, *supra* note 8; Morawetz, *Bargaining, Class Representation, and Fairness*, *supra* note 8; Rhode, *supra* note 8.

35. *See* Baby Neal v. Casey, 43 F.3d 48, 63 (3d Cir. 1994) (holding that plaintiffs harmed by systemic failure of governmental agency had adequate common interest, even if plaintiffs were challenging variety of symptoms of that systemic failure).

Court cautioned against in *Amchem* and *Fibreboard*. Frequently, however, the policy changes sought in public interest class actions entail express, implied, or unintended trade-offs between the interests of subgroups within the class over time. For example, recent cases have requested certification of "super classes" to challenge a wide spectrum of deficiencies in state and local policies regarding children in state custody or at risk of abuse and neglect.[36] Resolving such litigation requires prioritizing interests within the class, either actively or tacitly.[37] The vastness of the litigation, along with the difficulty of communicating with class members, also heightens the risk that some important subgroups or interests will escape consideration altogether. As in the mass torts cases, these issues should trigger a careful analysis of adequacy under Rule 23.

Unfortunately, such an analysis of adequacy has rarely occurred in the public interest class action context. Courts have not viewed adequacy as a concern in these cases because defendants usually concede that class counsel are competent lawyers.[38] If one takes a temporal equity perspective, however, the technical competence of counsel becomes an excessively narrow basis for adequacy analysis. When relief involves political and distributional trade-offs within and between service sectors, expertise alone does not offer an impartial place to stand. Each subgroup subject to being traded off against the interests of another has, under *Amchem* and *Fibreboard*, an ethical dignity under Rule 23 that may require separate representation. In response, courts have asserted that differences within the plaintiff class are less important in actions for injunctive relief than in damage actions.[39] Unfortunately, this distinction between injunctive relief and damages is painfully artificial.

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36. *See, e.g., id.* (ordering certification of class challenging child welfare policies and practices in Philadelphia).

37. *Cf.* Weinstein, *supra* note 7 (analogizing mass torts to public law litigation); Geoffrey C. Hazard, Jr., *Reflections on Judge Weinstein's* Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U. L. REV. 569, 572–77 (1994) (same).

38. *See Baby Neal*, 43 F.3d at 54 n.13.

39. *Id.* at 63. The Third Circuit's distinction between injunctive or other equitable relief and damages is particularly noteworthy because the author of the *Baby Neal* opinion is Judge Becker, whose analysis in *Amchem* foreshadowed many of the Supreme Court's points in that case. Judge Becker observes in *Baby Neal* that there are differences in the treatment of mass tort and public interest class actions under Rule 23. Mass torts are governed by Rule 23(b)(3), which requires that common issues "predominate" among class members. Public interest class actions for injunctive relief are governed by Rule 23(b)(2), which requires merely the presence of a common issue. This point does not, however, fully dispose of the adequacy concerns raised in *Amchem* and *Fibreboard*. It is telling in this respect that the breadth of the "super class" in *Baby Neal* far exceeded the breadth of the classes in the cases relied on by the court, which often involved either one kind of benefit program, such as Social Security/Disability, or one institution or kind of institution, such as juvenile detention facilities. The *Baby Neal* court underestimated problems with temporal equity in these settings. *See infra* notes 103–73 and accompanying text. Moreover, "mixing and matching" systems, as the super class cases seek to do, raises far more serious problems of manageability for courts and class counsel. Ultimately, this makes relief less effective and lasting, and more likely to overlook important interests.

The lower standard for class actions seeking injunctive relief ignores the fact that injunctive relief is often far more wide-ranging than damages and has far more consequences for the future. Class counsel in public interest class actions seek justice from institutions not merely retrospectively, through damages for wrongs done, but prospectively. Their goal is the transformation of institutions' future functioning and sometimes their fundamental premises.[40] Yet, the very indeterminacy of the relief sought in public interest class actions, coupled with the difficulty in mobilizing class members, makes the conduct of class actions both highly contestable and highly dependent on the vision of class counsel.[41] Relief in such cases can also be far more central to members of the plaintiff class, involving the delivery of crucial services such as health care and education to persons who are often among the most vulnerable, such as abused children, psychiatric patients, or subordinated racial groups. In contrast, damages in (b)(3) class actions often involve small awards of relatively low marginal utility to individual class members.[42] If injunctive relief has wider consequences for persons with more at stake, *Amchem*'s concerns about adequacy of representation under Rule 23 should be at least as compelling in the public interest realm.

II.
THE INSTITUTIONAL LIFE OF PUBLIC INTEREST LITIGATION

The dynamics of temporal inequity in public interest class actions invite analysis in light of what political scientists and sociologists call the "new institutionalism." On this view, institutions consist of interrelated ways of thinking, speaking, and doing. Institutions such as the law reform bar have a "central logic" composed of "a set of material practices and symbolic constructions."[43] Institutions need not be formal organizations, such as governmental units or corporations. Instead, institutions can be informally constructed "interpretive communities" that share cognitive frameworks, rhetorics, and routines.[44]

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40. *See* Sturm, *Public Law Remedies*, *supra* note 8.

41. *See* Rhode, *supra* note 8, at 1184 (noting that "the often indeterminate quality of relief available makes conflicts within plaintiff classes particularly likely" in public interest class actions).

42. Indeed, this low utility, which impedes filing individual actions for recovery, is a core rationale for the (b)(3) class action. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997); Issacharoff, *supra* note 7.

43. *See* Friedland & Alford, *supra* note 15, at 248; *cf.* FEELEY & RUBIN, *supra* note 1, at 214 ("Every institutional role carries with it a remarkably complex set of behavioral expectations, expectations that exist in the minds of the institution's members."); BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF THE LAW 149 (1997) (discussing the "internal attitude [that] is the (phenomenological) cognitive style or framework of thought which characterizes thinking while engaging in a given practice").

44. *See* Crawford & Ostrom, *supra* note 15, at 582 (describing institutions as "enduring regularities of human action in situations structured by rules, norms, and shared strategies,

Institutional actions and expectations[45] do not conform to any metric of optimal rationality: they are social in nature.[46] Images and cognitive scripts[47] that drive decision-making stem from an interaction of social contexts. Some images and narratives, such as a distrust of science and technology, are more "available" in particular institutions because of history, language, and practice.[48] Other images and narratives, such as a concern for children's safety, are pervasive.[49] Of course, what an institution fails to think about is just as significant as the objects of its attention. As one commentator observes, "The zone of indifference is not entirely a private matter. What one can safely ignore is largely contained within a boundary etched by a collective process."[50] This suggests that which voices get heard in that collective process is of crucial importance. Most institutions, however, amplify some voices over others.

Public interest class actions resemble other institutions in this respect. The "central logic" of the public interest class action is setting norms for accountability and change within social institutions. The stakeholders in this institution include the judiciary, the public interest and government bar, legislators, administrators, social scientists, community organizations,

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as well as by the physical world"); Gregg, *supra* note 15, at 358 (discussing the "'seen but unnoticed' substructure of assumptions and practices implicit in the organization of social action" (quoting Melvin Pollner, *Left of Ethnomethodology: The Rise and Decline of Radical Reflexivity*, 57 AM. SOC. REV. 370, 371 (1991)); *cf.* TAMANAHA, *supra* note 43, at 148 (elaborating on Stanley Fish's notion of a legal interpretive community, consisting of "groups of people bound together by shared knowledge, language or terminology, and often a basic corpus of ideas, beliefs, and attitudes. One becomes a member of an interpretive community by undergoing indoctrination—by learning and internalizing the shared 'meaning system' of the interpretive community."). This view is generally consistent with a postmodern perspective that situates human agency in a nest of practices and cognitive paths. *See* MICHEL FOUCAULT, *Two Lectures*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 96 (1980) (urging study of how power "invests itself in institutions, becomes embodied in techniques, and equips itself with instruments"); *cf.* Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721 (1996) (interpreting Foucault).

45. *See* MARCH & OLSEN, *supra* note 15, at 18 (arguing that the coherence of institutions is often sufficient to justify a pragmatic view of institutional "interests, expectations, and the other paraphernalia of coherent intelligence" associated with individual persons).

46. *See* Gregg, *supra* note 15, at 359.

47. *See* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1228–33 (1994) (discussing role of sociolegal scripts); Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AM. J. SOC. 847, 855 (1994) (noting the "informal and not always fully conscious nature of schema as action-orienting assumptions, as found . . . in rules of democracy, etiquette, and gender").

48. *See infra* notes 91–96 and accompanying text (discussing public interest litigation in mental health arena).

49. *See* MARY DOUGLAS, *Witchcraft and Leprosy: Two Strategies for Rejection*, *in* RISK AND BLAME, *supra* note 15, at 83, 86 (noting that shunning of a group often culminates in linking the group with risk to the dominant group's children, as in the "blood libel" that stigmatized Jews in medieval Europe).

50. *See* MARY DOUGLAS, *Autonomy and Opportunism*, *in* RISK AND BLAME, *supra* note 15, at 187, 199.

and class members.[51] Mixed together, this diverse group comprise what new institutionalists provocatively but not necessarily pejoratively call a "garbage can"[52] of norms, routines, customs, and narratives. Governance of the class action garbage can is relegated to what one commentator has called the "singularly laconic" language of Rule 23.[53]

The limited guidance offered by Rule 23 is especially troubling because of the importance of public interest class actions to U.S. democracy. Class actions are linked in the U.S. narrative to the "rights revolution" of the 1960s.[54] Institutional defendants in public interest class actions often practice injustice, in areas ranging from education, health care, and corrections to housing and employment. The need to address these injustices makes the public interest class action an important engine of accountability in U.S. public life.[55] To preserve that mission, however, the institution embodied in public interest class actions should also be accountable.[56]

In considering the need for accountability, the institutionalist analysis offered here focuses on the public interest bar. Accountability is crucial because through legislation, the work of foundations, and the commitment of generations of lawyers, the public interest bar has itself become an institution.[57] One crucial dynamic for the public interest bar is the interaction

51. *See* Aaron Porter, *Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociolegal Import of Philadelphia Cause Lawyers*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 151, 153 (Austin Sarat & Stuart Scheingold eds., 1998) ("[I]nstitutions can become linked with other organizations in cultural relationships. These linkages can become complex in their makeup and impact the public sphere or social fabric in a number of ways, depending on how specialization in a particular field or profession is used within the context of other organizations or on the net effect or movement from one institution to another.").

52. *See* MARCH & OLSEN, *supra* note 15, at 11–14.

53. Rhode, *supra* note 8, at 1191.

54. *See* DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS: A DECADE OF STRUGGLE FOR SOCIAL JUSTICE 50–54 (1984).

55. *Cf.* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS 128 (1998) (tracing public interest law back to Louis Brandeis and noting that Brandeis's work was "designed to level the playing field by providing representation to underorganized interests").

56. Some conservatives have invoked accountability in order to curb the role of class actions in policing government and corporate misconduct. *See* Margulies, *The Mission of Legal Services Lawyers*, *supra* note 4; *cf.* Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 29 U. MICH. J.L. REFORM 741 (1993) (discussing conservative retrenchment in welfare policy); Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547 (1998) (same). My project here is to offer a rationale for accountability in public interest litigation that consolidates, rather than eviscerates, its role in promoting positive social change.

57. Of course, the public interest bar is not monolithic. Within and among different subgroups of public interest lawyers, discourse, strategy, and guiding assumptions will be heterogeneous. In addition, lawyers of exceptional vision and talent, from Brandeis to Thurgood Marshall to Ruth Bader Ginsburg, will always challenge conceptual categories. *Cf.* Margulies, *Progressive Lawyering*, *supra* note 4 (discussing traditions in progressive lawyering). My discussion here is a rough guide, not a rigid recipe.

between affective and instrumental modes of cognition and decisionmaking.[58] Public interest lawyers share an affective drive to remedy injustice and an instrumental focus on shaping the future.[59] This combination of affect and instrumentalism in public interest law is a source of both its strength and its drift into temporal inequity.

The combination of affect and instrumentalism in public interest law yields three attributes that are crucial to democracy: hope, faith, and expertise. Public interest lawyers hope that the future can be better than the present. They have faith—sometimes a fragile faith, to be sure—in their expertise in predicting and shaping the future.[60] Without this combination, no one would bother doing public interest law, particularly given the lack of remuneration involved. Unfortunately, particular combinations of affect and instrumentalism can exclude as well as include important interests and information. The result is that, along with the institutions they challenge, public interest lawyers also have "zones of indifference,"[61] organizational flaws, and forms of expertise left uncultivated. The other players in the larger institution of public interest class actions, including courts and defendants, do not compensate for these institutional gaps in the public interest bar. Temporal inequity therefore is a significant risk.

The risk of temporal inequity makes *Amchem* relevant to public interest class actions. The gravamen of the Supreme Court's temporal equity concern in *Amchem* and *Fibreboard* is that the risks lawyers believe they can "safely ignore"[62] can be dangerous for a substantial portion of their clients. To guard against these risks, the public interest class action requires a greater degree of structural protection for class members. Formulating those structural protections requires a deeper understanding of the nature of the risk. The next two sections of this article refine that understanding, focusing on two factors: connection and contingency.

58. *See* Margulies, *Domestic Violence and Poverty Law*, *supra* note 4; *cf.* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999) (discussing tension between affective mode, which seeks connection with others, and instrumental mode, which seeks results).

59. This dialectic between commitment and craft is in some fashion crucial to all good lawyering. As always, of course, the particular details of the dialectic reflect institutional norms and narratives. For example, because it focuses on institutional change, commentators have characterized the public interest bar as a group of "social engineers." *See* Wilkins, *supra* note 8. This label may seem negative today, although it was viewed more positively in the days of pioneering Progressive Era champions of the public interest such as Brandeis. Nevertheless, the term has resonance in its emphasis on the future-regarding focus of public interest lawyers and on their instrumental approach to shaping that future.

60. *Cf.* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (discussing difficulty of creating social change through litigation).

61. DOUGLAS, *supra* note 15, at 199.

62. *Id.*

III.
FAILURES OF CONNECTION IN PUBLIC INTEREST CLASS ACTIONS

Temporal equity falters in class actions for the same reason that efficiency thrives: the absence of connection between attorney and client. By connection, I mean the development of relationships with others, for its own sake and for the sake of acquiring greater wisdom and judgment.[63] This commitment to cultivating a "web of relationships" is crucial to the human condition.[64] The human self "strains toward concreteness . . . toward appreciating the uniqueness of persons and situations."[65] In a democracy, creating institutional space for the sentiments of others is a crucial good.[66] In attorney-client relationships, communication and client self-determination are important values that the attorney must protect.[67] The institution of the public interest class action therefore dispenses with connection at its peril.[68]

63. *See* MARCH & OLSEN, *supra* note 15, at 147 ("The future interests of present and future citizens secure their voice, if they do, through the ability of current citizens to feel empathy with them."); SELZNICK, *supra* note 15, at 193 (arguing for the importance of a "framework of bonding to other persons and to person-centered activities"); *see also id.* at 169–70 (discussing connection and relationship in the work of Carol Gilligan); Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1061–66 (1992) (discussing connection in legal practice); Margulies, *Domestic Violence and Poverty Law*, *supra* note 4 (same); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999) (same); *cf.* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984) (discussing relationships and mutual interests in negotiation). Howard Lesnick asks a pointed question that sums up the dilemma of public interest class actions: "[C]an we actualize our desire to be effective and constructive as problem solvers without suppressing our humanity?" HOWARD LESNICK, *Legal Education's Concern with Justice: A Conversation with a Critic*, 35 J. LEGAL EDUC. 414, 419 (1985).

64. *See* HANNAH ARENDT, THE HUMAN CONDITION 181–84 (1958); *cf.* MARCH & OLSEN, *supra* note 15, at 127 (citing Arendt, inter alia, in discussing the importance of "common cultures, collective identities, belonging, bonds, mutual affection, shared visions, symbols, history, mutual trust, and solidarity"). Of course, connection can also be notoriously selective. *See* HANNAH ARENDT, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC 51, 89–92 (1972) (analyzing corrosive effects on American democracy of historic disenfranchisement of African-Americans); *cf.* Richard Delgado, *supra* note 3 (discussing how rhetoric of empathy can be used to disempower dissenting voices). Finding mutuality in difference, and celebrating difference in mutuality, is the hard work of connection as conceived here.

65. SELZNICK, *supra* note 15, at 170.

66. *See* MARCH & OLSEN, *supra* note 15, at 149 (arguing for the importance to democracy of institutions that "involve face-to-face contact and mutual dependence").

67. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) ("A lawyer shall explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); LUBAN, *supra* note 8; Margulies, *Domestic Violence and Poverty Law*, *supra* note 4. This dialogic process can transform the views of both lawyers and clients. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); Margulies, *Attorney-Client Deliberation*, *supra* note 4.

68. *See* SELZNICK, *supra* note 15, at 193 (noting that while bonding and connection are more prevalent in intimate relationships, they also should inform "the proper organization of more distant, more impersonal, more task-oriented settings").

Unfortunately, class actions, in the name of efficiency, sacrifice the attorney's role in promoting connection. Public interest class actions usually start with some kind of affective reaction to injustice. This sense of injustice can come from personal experience or a vicarious source. It usually comes with a sense of calling—a sense that personal involvement in overcoming injustice is not so much a choice as a part of who one is.[69] The link between identity and an affective reaction against injustice gives public interest lawyers the fortitude to persevere in an often hostile climate.[70] Unless lawyers and judges are exceptionally vigilant, however, the instrumental logic of class actions quickly overwhelms the human urge to connect. Class action lawyers and the trial courts that certify classes have virtually no connection with the great mass of individuals who comprise the class. Many class members and/or their allies and guardians either have no idea of what is transpiring on their behalf, or feel that the institutional workings of public interest class actions ignore, marginalize, or suppress their concerns.[71] Even named plaintiffs in class actions may be bound by retainer agreements that limit their ability to settle without class counsel's consent.[72] Judicial concerns about efficiency in clearing dockets weaken the structural safeguard against lack of connection embodied in the requirement that a court approve a class action settlement.[73] However, efficiency rationales cannot replace the idea, closely allied with connection, that the Supreme Court's mass torts jurisprudence locates at the heart of Rule 23: due regard for all members of the class, whatever their stance in relation to class counsel's or the court's objectives.[74]

Depriving clients of "voice" would be less troublesome if clients retained the opportunity to exit—to opt out if their concerns are not addressed. Unfortunately, while courts and lawyers can disconnect from the "concreteness" and "uniqueness" of identifiable clients and litigants in class actions, most class members in Rule 23(b)(2) actions do not have the

69. MILNER S. BALL, THE WORD AND THE LAW 21 (1993) (discussing public interest attorney who started legal services program in Appalachia because he and his wife "wanted to settle into a community where they could invest themselves over the long term and help make life better for others"). This sense of identity is often reinforced by a sense of communal heritage. *See id.* (according to the lawyer just mentioned, his "commitment to justice and the service of others . . . is a clear but hard-to-articulate function of his Jewish heritage").

70. *See id.* at 21 (noting that when lawyer first set up a legal services office in Appalachia, the local bar association "passed a resolution that legal services did not belong in the area and ought to be defunded").

71. *See* Garth, *supra* note 14, at 257 (discussing cases which "provide a number of examples in which the class representatives do not get much from the class action litigation").

72. *See* Bell, *supra* note 3 (discussing limited retainers).

73. *See* Issacharoff, *supra* note 7, at 829; Coffee, *supra* note 7.

74. Susan Koniak's powerful denunciation of the settlement in *Amchem* clearly invokes not only concerns about models and processes in an instrumental sense, but also affective concerns that require "bear[ing] witness" to the callous treatment of victims and their survivors. *See* Koniak, *supra* note 7, at 1048.

legal or practical opportunity to respond in kind, by opting out of a proposed class or settlement. This asymmetry between the power of courts and lawyers and the power of class members lies at the heart of temporal inequity in class actions.

Of course, some constraints on the extent of counsel's and a court's connection with class members are inherent in the very factor that makes class actions socially desirable, namely, their ability to offer relief to large groups. Particularly in large public institutions or systems, lawyers encounter difficulties in meeting all individual class members, just as they encounter difficulties in mass torts lawsuits involving hundreds of thousands of plaintiffs. The connection discussed here will always to some degree be a kind of virtual connection, contemplating the lawyer's textured understanding of class members' situation rather than insisting on a personal acquaintance with each member of the class.[75] Unfortunately, elements of the institution of public interest litigation make such virtual connection difficult to achieve.[76]

Two factors impede actual or virtual connection in public interest class actions: (1) the interaction of organizational forms and cognitive frames for class counsel, and (2) the role of financial pressures. I discuss each in turn.

A. Organizational Forms and Cognitive Frames

Organizational forms work against meaningful connection in public interest class actions. The fulcrum of this pressure is of course the perception of the class action vehicle itself. Public interest lawyers value this vehicle because it is more efficient than individual litigation in addressing policy issues. Defendants can moot out individual lawsuits, by offering plaintiffs attractive settlements that leave the existing policy in place. Since a class action survives such strategic behavior by defendants, it is a more powerful tool for lasting change.

There is a thin line, however, between appreciating the uses of the tool and allowing the perceived logic of the tool to dictate the framing of the problem. This is always a risk in a "garbage can" view of public policy. In a public policy garbage can, particular tools or devices emerge independently of a problem, as the class action emerged in the 1960s as a product of the streamlining of civil procedure.[77] Once those tools are available,

75. *See* Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 Nw. U. L. Rev. 579, 586–87 (1994).

76. *Cf.* Neil P. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 131 (1994) (noting that "the inadequacies in the class action mechanism . . . become more pronounced as dispersion and numbers [of class members] increase").

77. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614–15 (1997).

they then influence the problem's identification and definition.[78] In this fashion, the efficiency rationale of the class action crowded out the urge to cultivate affective ties.

Cognitive factors exacerbate problems with connection in public interest class actions. The cognitive feature that blocks development of a nuanced view is called the representativeness heuristic.[79] The representativeness heuristic is one device among many that institutional actors tend to use unreflectively to save cognitive time and effort.[80] Representativeness holds that institutional actors focus on salient characteristics shared by a group and make judgments about that entire group based on those shared characteristics.[81] The result is that institutional actors think about groups, including proposed or certified classes under Rule 23, in monolithic rather than nuanced terms. Consider, for example, the role of race, class, or legal

78. *See* MARCH & OLSEN, *supra* note 15, at 13 (noting that a "solution [in public policy terms] . . . is an answer actively looking for a question"). Massive problems of injustice and inequality clearly preceded emergence of the modern class action. However, a new institutionalist analysis holds that the availability of class actions shaped how lawyers viewed those problems. The perspectives of lawyers also influenced wider public perceptions, as lawyers' images and narratives helped constitute the social world. *See* Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45 (1998) (discussing how images of subordinated groups advanced by lawyers in criminal trials help shape broader social perceptions); Martha M. Umphrey, *The Dialogues of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 L. & SOC'Y REV. 393 (1999) (same); *cf.* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (discussing interaction of substantive law, empirical investigation, and political meaning). The new critical lawyering literature has developed a similar analysis. *See* LOPEZ, *supra* note 3; Alfieri, *supra* note 3.

79. *See* Margulies, *Attorney-Client Deliberation*, *supra* note 4, at 233–34.

80. For discussion of another heuristic, availability, that skews judgment based on the vividness of the image, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999). With reflection, institutional actors can develop more nuanced perspectives. Developing such perspectives requires that the institution both acknowledge the problem and commit itself to a solution. The discussion of the judicial role in Part V, *infra*, is a step toward this goal.

81. *See* Margulies, *Attorney-Client Deliberation*, *supra* note 4, at 233:

> [P]eople draw inferences about causation on the basis of the representativeness of particular events and conditions, that is, the extent to which these events or conditions resemble each other. Points of resemblance between persons, conditions, and events are likely to be salient characteristics, which are graphic, easy to visualize, and have emotional resonance.

Id. Cf. Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23–24 (Daniel Kahneman, Paul Slovik & Amos Tversky eds., 1982) ("[P]eople view a sample randomly drawn from a population as highly representative, that is, similar to the population in all essential characteristics. Consequently, they expect any two samples drawn from a particular population to be more similar to one another and to the population than sampling theory predicts . . . .").

status.[82] Obviously each of these elements creates a wide range of commonalities.[83] However, each status also incorporates significant diversity.[84] In the cognitive framework of public interest class actions, taking such diversity seriously is far more difficult than the wholesale attribution of aspirations, interests, and needs to a group or community. Uniqueness and diversity disappear in the shuffle.

The professional self-image of class counsel further additional obstacles for connection. Lawyers generally like to do what they view as law, not social work. Elite lawyers, who by training focus on developing new legal theories, like to do elite law.[85] Engaging with individual circumstances is for elite lawyers the equivalent of spinning one's wheels: a lot of time and effort is involved, but not very much gets done.[86] Plaintiffs can be

82. "Legal status" would include whether a person was in state custody as an abused child, a person committed under mental health statutes, or a person incarcerated pursuant to a criminal conviction.

83. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 84 (Richard Delgado ed., 1995) [hereinafter CRITICAL RACE THEORY] (discussing how African-American conceptions of rights differ from Critical Legal Studies view).

84. *See* Kimberlè Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); *infra* notes 153–73 and accompanying text (discussing intersectionality).

85. *See* DAVIS, *supra* note 8, at 99–100 (discussing tensions between test case litigators and neighborhood lawyers and activists).

86. *See* Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 611 (1989) (quoting attorney for class in ground-breaking mental health litigation as acknowledging, "I played God. I never met [the named class action plaintiff] or his aunt. And I never needed to do so. I knew what needed to be done."). This is one reason that students at elite law schools often avoid fields like family law, where factual issues often dominate and connection is a crucial element, albeit one sometimes honored more in the breach than in the observance. *See* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LIFE AT HARVARD AND BEYOND 139 (1992) (quoting Harvard law student as observing that, "although family law is interesting, no one does it because it's not seen as being that difficult"); *cf.* Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLINICAL L. REV. 545 (1996) (discussing importance of complex and controversial cases for lawyers' professional development). *But see* Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999) (discussing findings of survey of civil rights and poverty lawyers in which few respondents cited "making new law" as an important professional achievement).

Of course, some public interest class counsel can and do respond on an affective level to their clients. For example, lawyers for the Advocacy Center for People with Disabilities, a Florida public interest law firm, recently won a class action to help people with mobility impairments caused by conditions such as multiple sclerosis enhance their options for life and work by obtaining technologically up-to-date wheelchairs under the federal Medicaid statute. *See* Esteban v. Cook, 77 F. Supp. 2d 1256 (S.D. Fla. 1999). When one of the named plaintiffs in this lawsuit suffered a setback and needed to enter the hospital, the lead Advocacy Center lawyer, who engaged in a regular e-mail correspondence with her client, took time on a weekend to visit. Full disclosure of my own "connections" compels me to reveal that the lawyer, Ellen M. Saideman, is my wife. For other examples of Medicaid advocacy for life-enhancing technology that does not raise the issues of contingency and connection addressed here, see Ellen M. Saideman, *Helping the Mute to Speak: The Availability of*

difficult and demanding people, who call at inopportune moments.[87] In addition, plaintiffs can be ambivalent, conflicted, and focused on emotion-laden issues that lawyers do not feel professionally or personally equipped to address.[88] Cutting through the "noise" of individual complexities and idiosyncrasies with a streamlined class lawsuit seems like an ideal solution to these problems.[89] The result is that the class action creates a bureaucratic logic of its own, which stresses readily quantifiable results and discounts affective concerns.[90] A good example here is Marsha Matthews's story about how, in settling a case challenging conditions in a state foster care system, she was initially willing to bargain away expansion of children's opportunities to visit their siblings in different foster care placements. The sibling visitation issue seemed at first blush to be less significant than more readily quantifiable concerns about staffing and services.[91] Matthews changed her mind after attending a conference at which a teenage foster child spoke about her experiences. Matthews's candor testifies eloquently to the importance of attorney-client connection. Temporal inequity is the consequence of such trade-offs.

To analyze the importance of connection in public interest class actions, consider two lawsuits focusing on the same institutional problem: the

Augmentative Communication Devices Under Medicaid, 17 N.Y.U. REV. L. & SOC. CHANGE 741 (1989).

87. *See* Margulies, *Domestic Violence and Poverty Law*, *supra* note 4.

88. *See* AUSTIN SARAT & WILLIAM L. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995); Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605 (1999) (advocating model of "empathetic engagement" with clients). A related issue is the extent to which class counsel develop ties with community organizations. Although class counsel have made strides in this area, evidence suggests that class counsel sometimes feel that doing organizing work is a distraction from litigation and a detriment to clearing the orderly decision path that litigation supposedly embodies. The NAACP Legal Defense and Education Fund's early resistance to Martin Luther King's more confrontational and populist approach is an example of this phenomenon. *See* Wilkins, *supra* note 8, at 145 (quoting Thurgood Marshall's comments to his biographer to the effect that "blacks in Montgomery, Alabama could have saved themselves all of the aggravation associated with their bus boycott if they had just waited for the Legal Defense Fund to have the transit company's discriminatory policies struck down in court"); *cf.* Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449 (1999) (arguing that many public interest lawyers work closely today with community groups).

89. Indeed, the importance of insulation from such clutter is evident in the location of most law reform offices, which are typically in or near downtown areas, closer to the legal establishment of a population center than to the communities feeling the effects of the problem the lawyers wish to address. *See* JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 113 (1982) (drawing distinction between test case attorneys in "downtown" offices and "neighborhood staff lawyers" who participate less in law reform litigation).

90. *See* LOPEZ, *supra* note 3; Alfieri, *supra* note 3; Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, NLADA Briefcase, Aug. 1977, at 106; Margulies, *Domestic Violence and Poverty Law*, *supra* note 4; Tremblay, *supra* note 3; *cf.* Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 485–90 (1996) (arguing that cost-benefit analysis undervalues harms to personhood).

91. *See* Matthews, *supra* note 10, at 1435–36.

segregation of persons with mental retardation in state facilities where they received minimal training and services, amidst unsafe living conditions. In one case, *Halderman v. Pennhurst State School & Hospital*,[92] involving a notorious facility in Pennsylvania, the lawyer for the plaintiff class consulted very selectively with parents of class members. Many of the parents who were not consulted did not share class counsel's agenda, which called for shutting down Pennhurst. These parents felt betrayed when they finally learned of this goal and were confronted with the uncertainty of placements and services for their children in the community. The judge did not see the need earlier for getting the issues out in the open, and, if necessary, appointing separate counsel for dissident parents to address the issues of temporal equity which those parents raised.[93] The institutional rigidity of the class action mechanism here mirrored the rigidity of those administering the state "schools" that the lawsuit challenged.[94]

In contrast, consider the Willowbrook experience, involving a New York institution whose shockingly inhumane conditions were brought to light by Robert Kennedy and the young Geraldo Rivera.[95] When lawyers got involved, they were up-front about their political goals,[96] and made efforts to communicate with all parents.[97] Because of this consultation, the results of negotiation were accepted more readily as equitable by the parents and guardians of the class members. The Willowbrook litigation illustrates how connection can prosper in class actions when an institutional commitment is present.

B. Financial Issues As a Barrier to Connection

Financial pressures also undermine the patience, empathy, and regard for class members' situations that connection requires. When we consider the financial interests of public interest class counsel, it is useful to consider how those interests differ from the financial interests of the mass tort bar, but also risk yielding similar consequences in terms of temporal equity. One way of conceptualizing this mix of differences and similarities is to view mass tort lawyers as displaying an acquisitive approach to financial

92. 446 F. Supp. 1295 (E.D. Pa. 1977). For more commentary on *Pennhurst*, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 140–42 (1990); Robert A. Burt, *Pennhurst: A Parable*, *in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 265 (Robert H. Mnookin ed. 1985); Rhode, *supra* note 8.

93. *See* Burt, *supra* note 92.

94. *Id.* at 357.

95. *See* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (preliminary injunction); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (consent decree); MINOW, *supra* note 92, at 364–66; ROTHMAN & ROTHMAN, *supra* note 54; Burt, *supra* note 92, at 337–43.

96. *See* ROTHMAN & ROTHMAN, *supra* note 54, at 62.

97. *Id.* at 359–60 (noting that class counsel "made efforts to consult with the parents of the class members, especially when tough points of settlement arose during negotiations with the state").

concerns, while public interest attorneys, including those in the private sector, exhibit a defensive approach.

The acquisitive lawyer sees financial compensation as a central factor fueling her commitment to lawyering.[98] In contrast, public interest lawyers' standard of living demonstrates that they really do not care about making money as a primary motivation, because otherwise they would clearly be in another line of work.[99]

This lack of acquisitiveness as a motivation does not mean, however, that financial concerns are irrelevant in public interest practice. One can classify the import of those concerns in the public interest arena as defensive. That is, public interest lawyers make decisions, reasonably enough, that take into account the importance of securing enough money to survive, and avoiding expending so much money that survival becomes difficult. Indeed, as one article notes, public interest lawyers have a "sober sensitivity to the issue of costs."[100] They clearly consider costs in considering what litigation to initiate.[101] While the "black letter law" of professional responsibility generally holds that lawyers who start a case have an obligation to vigorously prosecute it regardless of cost if the costs were foreseeable at the start of the litigation,[102] banishing such cost concerns from the conduct

98. *Cf.* Koniak, *supra* note 7 (discussing apparent self-dealing and collusion in mass torts cases).

99. *See* Louise Trubek & Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice, in* CAUSE LAWYERING, *supra* note 51, at 201, 219 (public interest lawyers' "choice to serve different socioeconomic constituencies and utilize different sources of funding" limits their incomes).

100. Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States, in* CAUSE LAWYERING, *supra* note 51, at 261, 271.

101. *See id.* at 271 ("There was considerable awareness of the time and monetary costs associated with litigation, and these costs were heavily weighed when deciding whether or not to proceed with litigation."). Moreover, there is some evidence that concerns about funding influence choices about the subject matter and remedies sought in litigation. For example, Derrick Bell has asserted that sources of funding helped dictate the focus of the NAACP's desegregation enforcement strategy. *See* Bell, *supra* note 3; *cf.* Stephen Ellmann, *Cause Lawyering in the Third World, in* CAUSE LAWYERING, *supra* note 51, at 349, 354 (discussing role of American foundations in shaping public interest litigation agendas in the "Third World"); Margulies, *Mission of Legal Services Lawyers, supra* note 4 (discussing conflicts of interests in public interest law firms based on funding concerns). In addition, settlement in the public interest context, particularly in fact-intensive litigation with extensive depositions and other discovery, may also be made more attractive for public interest organizations by bottom-line concerns. Going to trial is expensive and burdensome in such cases, involving experts and other costly resources. Public interest law firms without the back-up of a major law firm are at a substantial disadvantage in posing the credible threat to go to trial that is necessary for a favorable settlement. *See* McCann & Silverstein, *supra* note 100, at 261 (noting importance of enlisting pro bono assistance from big firms and other in-kind resources).

102. This is true at least where a client's promise to pay the lawyer on an ongoing basis has not formed the consideration for the lawyer's decision to go forward. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(4) (allowing termination of lawyer's services after reasonable warning where client fails to fulfill obligations); Rule 1.16(b)(5) (allowing withdrawal where representation will result in "unreasonable financial burden").

of litigation is more easily said than done. It seems reasonable to believe that financial concerns, in this defensive sense, play a role in public interest law settlement decisions. When financial concerns trigger trade-offs within the class, the result is temporal inequity.[103]

IV.
CONTINGENCY IN PUBLIC INTEREST CLASS ACTIONS

Failures of connection weaken the virtual representation contemplated in public interest class actions. The tendency of class counsel to underestimate the contingency of human institutions compounds this failure. Here, as well, a new institutionalist perspective clarifies this failure's adverse effect on temporal equity.

From a new institutionalist perspective, contingency prevails because of the interdependence of institutions in and over time. Public interest class actions at first blush seem to reverse the direction of temporal equity noted in the mass torts cases. In mass torts litigation, lawyers benefit themselves and present clients by sacrificing the future. In public interest class actions, class counsel often invoke the future to impose burdens on present clients. The express rationale for such present sacrifices is a prediction by class counsel that they will transform institutions in the longer run.[104] If such predictions are not sound, temporal inequity reappears.

To see how interdependence can frustrate prediction in public interest law, it is useful to begin with the commitments of public interest lawyers. For public interest lawyers, the path to prediction starts with an affective reaction to injustice. However, indignation at injustice, like any other human act of understanding or cognition, entails inferences about causation and remedy. Such inferences often fail to reflect the full range of human, institutional, and temporal interdependence.

But see Rule 1.16(c) (requiring that lawyer continue representation when ordered to do so by tribunal).

103. *See* Sturm, *Corrections Litigation*, *supra* note 8, at 646 n.22 (reporting that corrections litigators tended to litigate issues about prison conditions in male, not female institutions because they viewed the former as "more likely to generate attorney's fees"). The fact that most trade-offs will not vitiate court-awarded attorney's fees for class counsel probably plays a role as well. Plaintiff's lawyers get paid through a civil rights attorney's fee award when they achieve sufficient relief for the class to be deemed the prevailing party by the court, even if the relief class counsel secures does not help many of their current clients. *See* 42 U.S.C. § 1988 (1994 & Supp. IV 1998) (setting out standard for attorney's fees). The fact that trade-offs do not preclude an attorney's fee award may have played a role in a case like *Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998). In *Rutherford*, a class of persons of color including job applicants and current employees alleged racial discrimination in hiring and promotion. The lawsuit was settled for relief only in the hiring process. The lawyers here evidently felt that bargaining over promotion with the well-organized uniformed services union would have been fruitless. However, they might have pushed harder if their remuneration had depended on it.

104. *See* LUBAN, *supra* note 8; Rhode, *supra* note 8, at 1183–84.

This failure occurs because class counsel are as prone as others to the typical failures of cognition that afflict all human beings. Humans generally tend to see issues and events in terms of a handful of core narratives and images. Often images and narratives with a powerful, graphic component become more salient in cognition.[105] In addition, "first impressions" of situations are more powerful than images received later in time.[106] Because cognitive space and effort are finite commodities, salient images tend to drive out less vivid images, including those involving future consequences of litigation.

These failures of judgment and inference are problematic because for institutionalists, predictions and policy regimes confront a contingent world.

> Preferences are neither clear nor stable. They develop over time. They are shaped not only by forces exogenous to politics and decision making but also by the processes of politics themselves. Thus, the current interests of citizens are only a fraction of their interests as they unfold over their lifetimes, and that unfolding is affected by choices along the way.[107]

In this changing world, institutional change often has less to do with the intentions of the actors and more to do with the interdependency of institutions.[108] Public policy, in areas from health care and child welfare to education, depends not on geographically discrete institutions like hospitals or schools,[109] but on a network of "complex, competing, and overlapping systems."[110] In addition, interdependence focuses not on problems or on consequences, but on time. Decisions and policies emerge because institutions, actors, theories, and issues are thrown together in "time-dependent flows."[111] The institutionalists use the metaphor of the "garbage can" to

105. *See* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 123–25 (1980) (noting that factors perceived as visually striking or out of the ordinary play disproportionate role in inferences about causation); Margulies, *Attorney-Client Deliberation*, *supra* note 4, at 232–34 (same); Kuran & Sunstein, *supra* note 80 (analyzing how cognitively salient factors play disproportionate role in public policy).

106. *See* NISBETT & ROSS, *supra* note 105, at 172–75 (discussing "primacy effect" in human inference).

107. MARCH & OLSEN, *supra* note 15, at 146; *cf.* Emirbayer & Mische, *supra* note 15, at 967 (noting that "ends and means develop coterminously within contexts that are themselves ever changing and thus always subject to reevaluation and reconstruction").

108. *See* MARCH & OLSEN, *supra* note 15, at 12; *cf. id* at 81 (noting that "the course of events surrounding a [governmental] reorganization seems to depend less on properties of the reorganization proposals or efforts than on the happenstance of short-run political attention, over which reorganization committees typically have little control").

109. *See* W. Richard Scott & John W. Meyer, *The Organization of Societal Sectors: Propositions and Early Evidence*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 15, at 108, 118 (noting that "societal sectors are defined in functional, not geographic terms").

110. *Id.* at 114.

111. MARCH & OLSEN, *supra* note 15, at 12.

capture how policy emerges from variables occurring simultaneously, largely independent of the "explicit intentions of actors."[112] Unless actors take this phenomenon of interdependence into account, temporal inequity results.

The modern public interest class action is good example of "garbage can" dynamics. A number of variables contributed to its evolution, many coming together from unrelated areas. The central impulse came from the 1960s "rights revolution" which prompted long overdue examinations of institutions in a variety of sectors of life and work, from public accommodations to psychiatric hospitals and prisons.[113] Ferment in communities and within the legal profession was a formative component.[114] These parallel phenomena do not, however, exhaust the interdependencies that constitute the public interest class action as an institution.

The class action "garbage can" also contains a number of other less obvious variables. One was the move to modernize civil procedure, a move underlying the adoption and revision of the Federal Rules of Civil Procedure, resulting in the enactment of Rule 23 in 1966.[115] Another variable that emerged about a decade later, as many class actions were being prosecuted or settled, was the tightening of state budgets, which affected state responses to class actions.[116]

In subject-matter specific areas, other variables such as developments in technology had considerable impact. The proliferation of the automobile and the interstate highway system led to the growth of suburbs, making integration more difficult absent a "metropolitan" solution.[117] In the mental disability area, new drugs that promised to regulate psychiatric symptoms without physical constraints became readily available. In the child welfare area, the emergence of mass media that immediately disseminate tragic stories of child abuse has shaped the policy debate.[118] As institutional actors such as class counsel synthesize these disparate trends, human inference and judgment default to images that are more vivid and emotionally loaded, focusing on the emergency du jour and not on the more elongated process of temporal sorting that determines policy in a "garbage can" dynamic.

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112. *Id.* at 14.

113. *See* ROTHMAN & ROTHMAN, *supra* note 54, at 50–53; Burt, *supra* note 92, at 268–69.

114. *See* KATZ, *supra* note 89.

115. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614–15 (1997).

116. *See* PAUL S. APPLEBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE (1994).

117. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 772 (1975).

118. *Cf.* Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431 (1996) (discussing focus on excesses of child protection officials in cases involving white, middle-class families, and focus on abuse and neglect in cases involving parents living in poverty).

Public interest lawyers with an appreciation for institutional and temporal interdependence can work with other actors to create lasting positive change.[119] However, class counsel in public interest class actions sometimes channel their affective commitment to ending injustice into a narrowly instrumentalist mode. This mode of thought, wherein the risk of temporal inequity resides, neglects interdependence issues and fosters overconfidence in predicting the future. The following subsections analyze two aspects of interdependence that create temporal inequity: exit by defendants and the intersectionality of disparate axes of subordination among class members.

A. Exit

To appreciate both the importance of the issue of interdependence and the inappropriateness of addressing that issue with narrow instrumental calculations, consider class counsel's treatment of the possibility that defendants will react to litigation with exit.[120] In institutions generally, exit is one important avenue for stakeholders to register their disapproval with an institution's direction.[121] In the public interest litigation context, defendants, usually government agencies, can exit by "getting out of the business" of administering particular programs and services, for example, in-patient psychiatric care. Defendants exit in this fashion because of a variety of concerns, including political pressures, policy changes, and budgetary constraints.

Discerning the probability and consequences of defendants' exit requires not instrumental calculation, but careful consideration of institutional interdependence. When class counsel's goals, as in the litigation against state institutions for persons with mental retardation, are consistent with institutional interdependencies, defendants' exit from one kind of institution permits radical and positive change for class members.[122] However, when class lawyers substitute instrumental calculation for nuanced judgments about interdependence, defendants' exit creates temporal inequity.

Lawsuits against state-operated psychiatric institutions illustrate how class counsel helped foster temporal inequity by neglecting exit issues.[123]

119. Litigation to provide community alternatives to institutional living for people with mental retardation is a good example. *See* ROTHMAN & ROTHMAN, *supra* note 54.

120. *See* Margulies, *Attorney-Client Deliberation*, *supra* note 4, at 234.

121. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)

122. Even here, process issues make a difference in the experiences of stakeholders.

123. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced* 344 F. Supp. 373 (M.D. Ala. 1972), *and* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Alderholt, 503 F.2d 1305 (5th Cir. 1974). I have participated as counsel for plaintiffs in two significant class actions involving psychiatric institutions in New York, *Doe v. Cuomo*, No. 83 Civ. 4068 (S.D.N.Y. 1988) (settlement requiring improvements in institutional conditions at Manhattan Psychiatric Center) and *Klosterman v. Cuomo*, 463 N.E.2d

This litigation proceeded from an affective reaction to injustice. Psychiatric institutions, first appearing in the late eighteenth century as a reform,[124] had become warehouses of oppression, abuse, and neglect.[125] Administrators running psychiatric institutions, which housed over half a million people in the smaller America of 1955,[126] had pursued a rigid, unitary "medical model" of mental illness that left little room for the rights, relationships, or personhood of patients. From a temporal equity standpoint, the problem is that the theoretical reaction to the warehouse model paid equally little attention to context.

Lawyers, as well as some psychiatrists and sociologists, were influenced in the 1960s not only by the rights revolution, but also by theories that seemed designed instrumentally to combat the medical model, rather than capture the interdependencies embedded in mental health law and policy.[127] The "anti-psychiatry" theories, now largely discredited, suggested that mental illness had no relationship to the complex biochemistry of the brain. Instead, under this view, mental illness was purely a label imposed by society on those deemed deviant. It further argued that many behaviors associated with mental illness, including delusion, confusion, passivity, or hostility, stemmed not from mental illness but solely from the distorting effects of institutional living.[128] Anti-psychiatry advocates had no patience with a conception that depicted mental illness in society as an interactive process involving both individual biochemistry and social policy.

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588 (N.Y. 1984) (holding that lawsuit seeking community placements and services for state psychiatric patients ready for discharge was justiciable), and as counsel for amicus curiae in other significant mental health cases, including *Riggins v. Nevada*, 504 U.S. 127 (1992) (requiring procedural due process prior to forcible medication of allegedly incompetent criminal defendant).

124. *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

125. *See* Olmstead v. L.C., 527 U.S. 581, 588 (1999) (acknowledging historic segregation of persons with disabilities in institutions); *see also* WOMEN OF THE ASYLUM: VOICES FROM BEHIND THE WALLS, 1840–1945 (Jeffrey L. Geller & Maxine Harris eds., 1994) (collecting harrowing stories of women's confinement and discussing its function as part of stereotypes of women's roles in society).

126. *See* APPELBAUM, *supra* note 116, at 50.

127. *See* Peter Margulies, *The Cognitive Politics of Professional Conflict: Law Reform, Mental Health Treatment Technology, and Citizen Self-Governance*, 5 HARV. J. L. & TECH. 25 (1992) (discussing flaws in "anti-psychiatry" discourse). Mental health law scholarship today is much more nuanced, conceding an important role for mental health treatment and services. *See* David P. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT'L J. L. & PSYCH. 99 (1994).

128. *See* APPELBAUM, *supra* note 116, at 4–8. Recognizing that mental illness has biochemical causes that create damaging and painful symptoms in human beings should not obscure the ways in which the meaning of mental illness and its consequences for life chances are "socially constructed." *Id.* at 50–51. As in the case of conditions such as HIV and AIDS, biochemical and social elements are interdependent in the development of discourse and policy. *See* Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999).

Interdependency also found itself under attack in other realms related to mental health. For example, families have often been an important support network for people with mental illness.[129] However, lawyers and other experts critical of psychiatry accused families of abandoning relatives to institutions,[130] promoting inappropriate treatment,[131] or even causing mental illness.[132] Even those who accepted the medical model believed that medical technology would make interdependence obsolete. Under this view, new medications such as Thorazine would make low-cost, low-maintenance treatment in the community only marginally more complex than taking vitamins.[133] State governments embraced this low-maintenance approach to mental health care, since in-patient psychiatric facilities by the 1960s were consuming a major slice of state budgets.[134] State exit from the provision of in-patient psychiatric care seemed both feasible and beneficial to lawyers bringing mental health class actions. If lawsuits to improve conditions in state institutions pushed the state to shut down the facilities rather than bear the increased costs, so much the better for all concerned.

Unfortunately, the same neglect of interdependency that undermined 1960s theories on mental health also undermined class counsel's calculations in the 1970s about the crucial terms of state exit from in-patient psychiatric care. The difficulties that released psychiatric patients encountered in community living demonstrated that mental illness was not totally unrelated to biochemistry.[135] Moreover, treating mental illness in the community was more complicated and expensive than many had supposed.[136]

129. *See* CHRISTOPHER JENCKS, THE HOMELESS 31 (1994) (noting role of friends and relatives who help people with mental illness deal with public agencies).

130. *See* Steven J. Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities*, 17 N.Y.U. REV. L. & SOC. CHANGE 651, 662 (1989).

131. *See* David Cohen & Michael McCubbin, *The Political Economy of Tardive Dyskinesia: Asymmetries in Power and Responsibility*, 11 J. MIND & BEHAV. 465, 473 (1990).

132. *See id.* at 473–74 (noting that "psycho-social formulations of the 'causes' of 'schizophrenia' implicitly or explicitly blamed families for producing behavior then labeled 'schizophrenic'").

133. *See* APPELBAUM, *supra* note 116, at 8–9; *cf.* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63 (1991).

134. *See* APPELBAUM, *supra* note 116, at 50 (discussing how legislatures' underfunding of in-patient psychiatric care led to massive release of patients).

135. *Id.* at 50–51 (noting that "schizophrenia and other major mental disorders—not the effects of institutional life—were the real stumbling blocks that prevented mentally ill people from functioning on their own").

136. *See* Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375 (1982); Andrew Scull, *Deinstitutionalization: Cycles of Despair*, 11 J. MIND & BEHAV. 301, 308 (1990) (noting the lack of necessary aftercare or follow-up services).

However, the same fiscal interests that pushed states to favor closing facilities also made it unlikely that services in the community would be present.[137] The release of patients without services also decimated support networks such as friends and families.[138] The result was that many ex-psychiatric patients ended up on the streets, or, if they engaged in behavior that prompted involvement with law enforcement, in institutions such as prisons or jails that are even more restrictive than psychiatric facilities.[139] In other words, after a few tantalizing moments of "freedom," many former psychiatric in-patients were "essentially abandoned."[140] Many also traveled through the "revolving door" of hospital admissions, endeavoring to survive in the community while periodically being readmitted to in-patient facilities for short-term stays that had become the norm under the new regime.[141] While in the hospital, patients benefited from the improved conditions won in class actions.[142] Such improvements were a valuable consequence of class counsel's efforts. These improvements were underwritten, however, by shorter hospital stays and more frequent encounters with homelessness in the community upon release. In temporal equity

137. *See* APPELBAUM, *supra* note 116, at 217 (discussing how the importance to states of closing state hospitals for fiscal reasons, along with "the failure to provide alternative community services, the disappearance of low-cost housing, and other policies . . . have contributed to homelessness"); JENCKS, *supra* note 129, at 29–31 (coming to same conclusion); Rhode, *supra* note 8 (same).

138. *See* JENCKS, *supra* note 129, at 31.

139. *See* APPELBAUM, *supra* note 116, at 51 (noting that process of deinstitutionalization is more accurately described as "*trans*institutionalization") (emphasis added). Addressing the transinstitutionalization issue has awaited the development of a cadre of public interest litigators whose background make them more sensitive to the interdependencies involved. These litigators, often with a background in advocacy for the homeless and in prisoners' rights as opposed to traditional mental health advocacy, have fought to develop a continuum of care that will also cover persons caught up in the criminal justice system. *See* Nina Bernstein, *Freed Inmates Must Get Care If Mentally Ill*, N.Y. TIMES, July 13, 2000, at B1 (discussing New York State Supreme Court order, in case brought by, inter alia, the Urban Justice Center and New York Lawyers for the Public Interest, requiring New York City to ensure provision of mental health services to persons discharged from jails). The transinstitutionalization process can sometimes move in the other direction, as legislators dissatisfied with outcomes in the correctional system, such as the release of sex offenders, seek to use the mental health system to confine offenders for longer periods of time. *See* Keri Gould, *If It's a Duck and Dangerous—Permanently Clip Its Wings or Treat It Till It Can Fly: A Therapeutic Jurisprudence Perspective on Difficult Decisions, Short-Sighted Solutions and Violent Sexual Predators After* Kansas v. Hendricks, 31 LOY. L.A. L. REV. 859 (1998).

140. *See* APPELBAUM, *supra* note 116, at 50–51; JENCKS, *supra* note 128, at 29–31 (1994) (discussing impact of changing civil commitment standards on life chances of former psychiatric patients); Perlin, *supra* note 133 (arguing that homelessness resulted primarily not from mental health law reform but from state budget cuts and gentrification of low-cost housing).

141. JENCKS, *supra* note 129, at 28.

142. Here, as elsewhere, class counsel seeking to vindicate rights in federal court encountered setbacks courtesy of the Burger Court. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982) (acknowledging that persons involuntarily committed have right to treatment, but deferring to "professional judgment" in nature and extent of treatment); Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

terms, the results were similar to the familiar mass torts dynamic: mortgaging class members' future to pay off the present.[143] Litigation to provide community options to persons with mental retardation or developmental disabilities[144] bore a surface resemblance to the litigation on behalf of institutionalized persons with mental illness that I critique in this subsection, but succeeded to a far greater degree because it took interdependency into

143. Corrections reform litigation supplies another telling example of class counsel's failure to deal adequately with exit issues. Prison reform litigators believed that prison administrators and legislators, faced with rising costs of prison administration because of court-ordered better conditions, would exit by moving from incarceration to alternative sentencing. *See* FEELEY & RUBIN, *supra* note 1, at 375–76. Their exit scenario "failed miserably" as prophecy, *id.*, because, as in the mental health litigation context, it offered an inadequate account of institutional interdependence. In the mental health litigation, class counsel had underestimated the cost and complexity of community alternatives to institutionalization. In the correctional reform context, class counsel stressed cost issues in their exit scenario and focused accordingly on the set of opponents most affected by cost concerns, i.e., prison administrators. Class counsel in corrections cases failed to recognize the power of political forces arrayed against them, including the nexus of fear, racism, and moral outrage that "generated a thirst for incarcerating criminals that was largely insensitive to the economic costs involved." *Id.* The result of these political pressures is that the United States, far from getting out of the prison business, now has over one million people behind bars. *See id.* at 379; *cf.* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 205–29 (1993) (discussing shift in parole administration from rehabilitation to re-imprisonment); JOHN HAGAN, CRIME AND DISREPUTE 158 (1994) (same). This expansion of punishment has had a disproportionate effect in low-income communities of color. *See* Tracey L. Meares & Dan M. Kahan, *When Rights are Wrong: The Paradox of Unwanted Rights*, *in* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3, 13 (Tracey L. Meares & Dan M. Kahan eds., 1999) ("Fully one-third of African-American men between the ages of twenty and twenty-nine are currently incarcerated, on probation, or on parole.").

Where exit has occurred, it has only been intra-systemic in nature. Administrators have moved incarcerated persons from one prison to another, or from prisons to jails, to comply with court-ordered reductions in overcrowding. *See* FEELEY & RUBIN, *supra* note 1, at 379 (discussing increase in jail population caused by reaction to population caps in prisons); Sturm, *Corrections Litigation*, *supra* note 8, at 677 ("Population limits in state correctional institutions have in some cases caused delays in the transfer of sentenced prisoners to state custody, thereby dramatically increasing overcrowding in local jails."). While some class members in corrections litigation may benefit in the short run from such a shell game, intra-systemic exits leave no one better off in the long term.

Corrections litigation has, like mental health litigation, nonetheless been successful in enhancing accountability and due process in prisons, in improving diet and hygiene, and in curbing some of the most egregious violations of prisoners' rights, including unauthorized uses of force by guards. *See* FEELEY & RUBIN, *supra* note 1, at 365–79; Sturm, *Corrections Litigation*, *supra* note 8; Schlanger, *supra* note 8. These successes fulfill the temporal equity criterion, because they have improved conditions for all prisoners. Such significant successes have occurred, however, not because of class counsel's instrumental calculations about defendants' exit, but because corrections reform litigation has helped change the discourse of prison administration, initiating and reinforcing a turn toward professional standards. *See* FEELEY & RUBIN, *supra* note 1, at 368–75. Changes in discourse, which necessarily involve collaboration with all actors in an interdependent process, are the most important legacy of public interest litigation. *See* Sturm, *Public Law Remedies*, *supra* note 8.

144. *See supra* notes 92–97 and accompanying text. Persons with mental retardation or developmental disabilities may have varying levels of cognitive, verbal, or physical limitations that manifest themselves before attaining eighteen years of age. Addressing these

account. Litigation on behalf of persons with mental retardation and developmental disabilities was successful because it expressly coupled shutting down institutions with the provision of stable community placements. It also leveraged family involvement into political support for increased community expenditures. Finally, it depended on efficacious technology, such as motorized wheelchairs or assistive communication devices, rather than technology of questionable use, such as much psychotropic medication, that often did not meet the needs of the persons it was supposed to serve.[145]

A different but equally difficult problem of interdependence occurs when class counsel, instead of misjudging the consequences of exit, fail to anticipate that exit will occur. That failure was part of the dynamic in this century's most momentous public interest law campaign—the effort to destroy segregation in public education. The desegregation campaign's landmark case, *Brown v. Board of Education*,[146] with its insight into the damage that a legally decreed and enforced regime of racial inferiority did to the "hearts and minds" of African-American children, was a milestone in America's continuing struggle for social justice.[147] In the battle to implement *Brown*'s nondiscrimination mandate, however, class counsel did not adequately anticipate three exits that over time partially undermined *Brown*'s promise. To some degree this failure, like the ones in mental health and correctional litigation, flowed from the instrumental focus of the desegregation lawyers.

The desegregation lawyers made three strategic decisions early in their campaign. First, they decided that the best chance for African-Americans to get a quality public education was to pursue integration with white schools, as opposed to obtaining resources for education in predominantly

limitations and maximizing the capacities of persons with mental retardation or developmental disabilities requires training, services, and technology to enhance communication or mobility. However, persons with mental retardation or developmental disabilities do not necessarily have conditions—like mental illnesses such as schizophrenia or bi-polar disorder—that call for treatment per se. *See* ROTHMAN & ROTHMAN, *supra* note 54; Burt, *supra* note 92, at 267; *see also* A GUIDE TO CONSENT (Robert D. Dinerstein, Stanley S. Herr & Joan L. O'Sullivan eds., 1999) (discussing decision making by and in collaboration with persons with mental disabilities).

145. *See* ROTHMAN & ROTHMAN, *supra* note 54.

146. 347 U.S. 483 (1954).

147. *See* GREENBERG, *supra* note 8; Wilkins, *supra* note 8. *Brown*, the result of a litigation campaign begun by Charles Houston and carried forward by Thurgood Marshall and the lawyers of the NAACP Legal Defense and Education Fund, was also the century's consummate example of craft and commitment in lawyering. *See* Peggy Cooper Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in* Brown v. Board of Education, *in* RACE, LAW, AND CULTURE, *supra* note 8, at 23; Wilkins, *supra* note 8; Margulies, *Progressive Lawyering*, *supra* note 4.

African-American communities.[148] Second, they decided that the most effective rhetoric for accomplishing that goal was the rhetoric of color-blindness applied to children, rather than the rhetoric of citizenship applied to all African-Americans.[149] Third, they supported both arguments with social science evidence that pathologized the African-American community, implicitly discounting institutions such as historically Black schools as artifacts of self-hate.[150]

These strategic choices contributed to three important exits that adversely affected African-American interests over time: the flight of resources from African-American schools; the flight of whites from central

148. *See* Bell, *supra* note 3; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 767–71.

149. *See* Davis, *supra* note 147, at 25–32.

150. *See* DARYL M. SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGES OF THE DAMAGED BLACK PSYCHE, 1880–1996, at 82–83 (1997) (discussing research and theoretical perspective of social scientists working with desegregation lawyers in *Brown*, particularly Kenneth and Mamie Clark, whose "doll experiments" purportedly showed that Black children subjected to discrimination preferred white dolls). The problem with the use of the Clarks' doll experiments in *Brown* is that their results supported not integration with whites but enhanced resources for African-American community schools. In the experiments, self-hate was measured by the frequency with which Black students chose white dolls as more desirable than "colored" dolls. In the study, a large percentage of Black students from both the South and North responded that the "colored doll . . . looks bad." However, Black students in the South, where de jure segregation prevailed, were significantly *less likely* (49% compared with 71%) to exhibit this response than Black students in the North, where segregation, while substantial, was often de facto and less rigidly enforced. *Cf.* Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children, reprinted in* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 152, 153 (3d ed. 1994).

Given the criterion that the Clarks had helped establish, the results suggested that African-American children in the segregated South suffered *less* self-hate than African-American children in the North. *See* SCOTT, *supra*, at 123. Viewed more generally, the results suggested that African-Americans in both the North and South suffered from low self-esteem, rooted in a pervasive system of white supremacy, and not wholly in the de jure segregation aspect of that system typical of the South. *Id.* at 124–25. Indeed, extrapolating further from the Clarks' findings, "integration" that did not dismantle white supremacy could create additional problems in self-esteem, stemming from the indignities suffered by African-American adults in daily contact with whites that subsequent critical race scholars have described as racial "micro-aggressions." *See* Peggy Davis, *Law as Microaggression*, *in* CRITICAL RACE THEORY, *supra* note 83, at 169; *cf.* Peter Margulies, *Inclusive and Exclusive Virtues: Identity, Responsibility, and Merit in Recent Legal Thought*, 46 CATH. L. REV. 1107 (1997) (discussing critical race theory's implications for analyzing the persistence of racism). Voluntary segregation in some aspects of life and work can be an effective coping response to such indignities. *See* SCOTT, *supra*, at 124–25. This is why "historically black" schools are a national resource, not merely a legacy of Jim Crow.

Social science used by law reformers has also had some adverse impacts in the criminal law arena. *Cf.* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (arguing that social science evidence of "group contagion" used by defense counsel in trial of African-American men accused of beating white truck driver in wake of first Rodney King verdict in Los Angeles reinforced and legitimized images of Black deviance); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1990) (noting how some uses of social science evidence in cases involving survivors of domestic violence can further stigmatize women); Margulies, *supra* note 78 (discussing "identity impact" of social science evidence).

cities; and the flight of white support for "second-generation" remedies for racial subordination such as affirmative action.

Each exit issued from interdependencies incompletely addressed by the desegregation lawyers. The flight of resources from African-American schools was the first exit of consequence. Often school districts seeking to comply with desegregation decrees closed Black schools, dismissed Black teachers, and demoted or shunted aside Black principals.[151] This exit left at least some segments of the Black community worse off in material terms and in terms of institutions available to the community. This exit may have represented a sacrifice worth making if the promise of integration had been realized. Unfortunately, the second exit—the departure of many whites from the cities to the suburbs—frustrated this goal.[152] Finally, the extremely effective color-blind rhetoric of the desegregation lawyers succeeded too well, setting up the third exit: the diminution of white support for remedies such as affirmative action which take race into account to redress injustice.[153] This exit has threatened gains made by African-Americans in the decades since *Brown*. While predicting and reacting to these three exits would have taxed even the exceptional vision, talent, and conviction of the desegregation lawyers, addressing even one would have decreased the temporal inequity that flowed from *Brown*'s promise.

B. Intersectionality

Interdependence is important not only in considering the possibility of exits, but also in conceptualizing adequately the class of people public interest lawyers seek to help. Class counsel can fail to recognize differences in identity, perspective, and need within the proposed class. This can lead

151. *See* DERRICK BELL, AND WE ARE NOT SAVED 109 (1989). Although civil rights lawyers did fight attempts to destroy or decimate African-American schools, *id.* at 109, this was to some degree an afterthought, responding to a problem that lawyers had failed to identify in the formative years of the struggle leading up to *Brown*. In that formative period, concern about unintended harm to Black institutions in the wake of desegregation efforts may have been perceived as at best a distraction, and at worst an apologia for segregation itself. Of course, hindsight is always twenty-twenty. The discussion here acknowledges the extraordinary achievements of the desegregation lawyers, who dared to imagine and effectuate a future without legally enforced segregation. *See* Margulies, *Progressive Lawyering*, *supra* note 4 (praising efforts of desegregation lawyers as a central example of lawyers working for justice); Wilkins, *supra* note 8 (same). Indeed, a measure of the *Amchem* problem in public interest law is that even the gifted lawyers of the desegregation effort failed to fully address temporal equity issues.

152. Here, too, the desegregation lawyers obviously did not initiate the exit and indeed sought to address the problem by arguing for interdistrict remedies. The Supreme Court rejected interdistrict remedies in *Milliken v. Bradley*, 418 U.S. 717 (1974). It is far from clear that the desegregation lawyers could or should have done something to stop white flight. However, appreciating the possibility of this exit would have informed the choices of class counsel, once *Brown* had struck down de jure segregation, to stress integration or more resources for African-American communities.

153. *See* Paul Gewirtz, *The Triumph and Transformation of Antidiscrimination Law*, *in* RACE, LAW, AND CULTURE, *supra* note 8, at 110, 125–28 (arguing that focusing on diversity as a rationale for affirmative action moves too far from the formal equality ideal).

to inappropriate or unacknowledged trade-offs within the plaintiff class—a prime focus of the Supreme Court's mass torts jurisprudence. In public interest litigation, such trade-offs often stem from the phenomenon commentators have described as "intersectionality."[154] Intersectionality refers to the convergence of different strands of subordination in a particular group along axes like race, class, gender, sexual orientation, or disability. Challenges at the intersection of such strands of subordination—for African-American women, for example—increase the complexity of reform efforts. Sometimes, indeed, efforts to address discrimination along one axis can exacerbate it along another. However, such effects are not readily cognizable by those who have not experienced them directly. One tenet of new institutionalist thought is that we see what we want to see and what we are used to seeing. The correlate of this premise is that decisionmakers and legal actors do not see what they do not wish to see or are not used to seeing.[155] In an institution like the public interest class action, which channels affective responses into instrumental strategies, the time and space to appreciate intersectionality is in short supply.

In confronting intersectionality, the cognitive framework of public interest class actions yields two central responses: prioritization or aggregation. People and institutions tend to either stress one form of subordination over another—for example, race at the expense of gender, or gender at the expense of class—or aggregate the two—as in, "If things are bad for women, they must be *really* bad for African-American women."[156] However, neither of these responses addresses the core of the issue. Stressing one strand is not helpful if the two strands are braided together. Similarly, aggregation suggests that one can disaggregate the two strands. However, the braiding together of different sources of both subordination and identity makes disaggregation not merely unhelpful, but impossible. Yet, these counterproductive approaches are common, because policymakers, including class counsel, find it easier to tell a story about oppression that either prioritizes or aggregates.

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154. *See* Crenshaw, *supra* note 84; Darren L. Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (advancing conception of "interdimensionality" that reflects overlapping strands of identity). Intersecting and interactive strands of identity have been a central concern for LatCrit scholarship. *See* Alice G. Abreu, *Lessons for LatCrit: Insider and Outsider, All at the Same Time*, 53 U. MIAMI L. REV. 787 (1999); Berta Esperanza Hernandez-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997).

155. *See* MARCH & OLSEN, *supra* note 15, at 44 (noting "the elementary screening devices used by individuals in looking at the world tend to obscure those elements of reality that are not consonant with prior attitudes").

156. *Cf. id.* at 125 (discussing aggregative institutions); Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 81, at 191–94 (noting role of "salience bias" in human cognition, which tends to focus attention on attributes perceived as novel, to the exclusion of other less remarkable factors).

To see the impact of intersectionality on trade-offs,[157] consider recent class actions in the child welfare area. In a number of jurisdictions, advocates for children's welfare[158] have brought class action lawsuits challenging state and local procedures for initiating and executing child abuse

157. Of course, trade-offs can occur for reasons other than intersectionality. In the employment discrimination context, for example, the Supreme Court has recognized that a subgroup consisting of job applicants, concerned about securing employment, has different interests than a subgroup of current employees, concerned about promotion. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147 (1982); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996); *cf.* Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on* Davis v. City and County of San Francisco, 29 U.S.F. L. REV. 911 (1995) (discussing conflict and collaboration in lawsuit brought by women and black job applicants and black employees against municipal fire department). Groups outside the plaintiff class may also be subject to trade-offs. Courts have recognized, for example, that employment discrimination lawsuits brought by a class consisting of persons of color also affect the interests of both white employees and white job applicants. *See* Martin v. Wilks, 490 U.S. 755 (1989); Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992). Arguably, the interests of whites reflect advantages yielded by institutionalized racist practices and therefore are legitimate arenas for remedial orders. *See* Thomas Ross, *Innocence and Affirmative Action*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 83, at 551. However, courts have expressed a greater solicitude for whites' interests.

The solicitude for third-party interests can in turn force trade-offs within the plaintiff class. In *Rutherford v. City of Cleveland*, 137 F.3d 905 (6th Cir. 1998), for example, current Black employees concerned about discrimination in promotion received virtually no relief, apparently because of the difficulties of negotiating with a strong uniformed services union dominated by white employees. Relief focused on Black job applicants, instead. The *Rutherford* court allowed a class of white job applicants to move to modify the settlement, holding that their interests had not been adequately represented by the union or any other party.

Other class actions pose trade-off issues that are more manageable. These include cases seeking one-shot relief for clients, including retroactive awards of benefits, and revision of legal procedures within the control of one institutional "player," such as the Social Security Administration. *See, e.g.*, Dixon v. Heckler, 589 F. Supp. 1494 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *vacated sub nom.* Bowen v. Dixon, 482 U.S. 922 (1987) (memorandum); Stieberger v. Sullivan, 792 F. Supp. 1376 (S.D.N.Y. 1992), *modified*, 801 F. Supp. 1079 (S.D.N.Y. 1992); Robinson v. Heckler, No. 83 Civ. 7864 (LFM) (S.D.N.Y. May 17, 1985) (order entering consent judgment); *cf.* Morawetz, *Underinclusive Class Actions*, *supra* note 8 (discussing trade-offs and fairness issues in Social Security class actions).

158. I use the term "advocates for children's welfare" instead of the more straightforward "advocates for children" to convey that there is nothing straightforward about a lawyer representing a child client. Issues of a child's decisional capacity necessarily shape the relationship, even with older children. *See* JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: CONTEXT, ETHICS, AND PRACTICE (1997) (outlining interdisciplinary approach for representing children); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); Peter Margulies, *Lawyers as Caregivers: Child-Client's Competence in Context*, 64 FORDHAM L. REV. 1473 (1996). In class actions, where the question, "Who is the client?", is ubiquitous, these problems multiply. *See* David L. Chambers & Michael S. Wald, Smith v. Offer, *in* IN THE INTEREST OF CHILDREN, *supra* note 92, at 67, 93 (describing lawyer appointed to represent foster children in class action whose "thirty years' experience told her what she believed she needed to know about foster children's needs . . . and the position she should take"); Matthews, *supra* note 10.

investigations and subsequent proceedings involving foster care and adoption, and for providing services, including education and health care, to children in the child welfare system.[159] Typically, these cases, which involve huge numbers of children and families in a vast spectrum of geographic and service settings, proceed on may be called a "super class" theory.[160]

Class counsel in the super class cases acknowledge that many of the claims, which involve a variety of state and federal causes of action from substantive and procedural due process to the Medicaid statute and the Americans with Disabilities Act, do not apply to all of the children. This raises familiar class action issues of typicality and commonality. Class counsel have responded to these concerns with mixed but largely favorable results by arguing that the commonality and typicality issues are satisfied by the defendant's failure to fulfill a legal duty it owes pursuant to one statute or another to all class members. Adequacy concerns have been left unaddressed.[161]

The problems with temporal equity arise because the super class cases fail to adequately address trade-offs stemming from the intersection of child welfare issues with class, sexual orientation, and disability.[162] This

159. *See* J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999) (denying class certification in lawsuit seeking appropriate services, placements, and vindication of rights to family integrity for proposed class of children with developmental and mental disabilities who entered state custody through juvenile justice and abuse and neglect proceedings and unidentified other means); Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997) (affirming certification of class in lawsuit seeking broad changes in child welfare system), *settlement approved*, 185 F.R.D. 152 (S.D.N.Y. 1999); Baby Neal v. Casey, 43 F.3d 48 (3d Cir. 1994) (ordering certification of class in lawsuit challenging child welfare system); *cf.* Charlie H. v. Whitman, 2000 U.S. Dist. LEXIS 774 (D.N.J. Jan. 27, 2000) (granting in part defendants' motion to dismiss in child welfare class action). If disagreements in the circuits intensify on this issue, which touches on the administration of federal programs and interpretation of federal substantive legislation, the Supreme Court may decide to intervene. *See* Samuel Estreicher & John Sexton, REDEFINING THE SUPREME COURT'S ROLE (1986) (discussing standards for Supreme Court review).

160. *See, e.g.*, Baby Neal v. Casey, 43 F.3d 48, 56–57 (3d Cir. 1994) (ordering certification of class in lawsuit challenging child welfare system).

161. This is true even in *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), where the court upheld a denial of class certification on commonality and typicality grounds but did not consider adequacy. The court's analysis in *J.B.* is nonetheless largely consistent with the discussion in the text.

162. Smaller, more focused class litigation on children's behalf does not necessarily raise these problems, at least not to the degree found in the "super class" cases. For descriptions of such litigation, for example, on services for "hard to place" children, see Mark Soler & Loren Warboys, *Services for Violent and Severely Disturbed Children: The* Willie M. *Litigation, in* STEPPING STONES: SUCCESSFUL LITIGATION FOR CHILDREN 61 (Sheryl Dicker ed., 1990); *cf.* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1998). Nevertheless, even the cases just mentioned involve significant interdependency issues. For example, making it more difficult to place a child in a juvenile detention center will make it more likely that the child either is relegated to an inadequate support network in the community or, depending on the age of the child and his or her alleged offense, is referred to criminal court and receives a disposition that involves either a prison sentence or admission to an

failure to address important interests is not immediately apparent. As in the desegregation cases, class counsel have fashioned a resonant rhetoric focused on children's needs. Reinforcing this rhetoric is a cognitively charged but empirically dubious deployment of social science.[163] The facts of these cases involve examples of abuse and neglect by governments, private service providers, and parents that courts rightly call "pathetic"[164] and "tragic."[165] If the super class cases improved society's response to such appalling situations, they would be an unambiguous force for social good.[166] Unfortunately, such fine tailoring is difficult in the "garbage can"[167] of child welfare policymaking.

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adult psychiatric center. *See* CURT R. BARTOL & ANNE M. BARTOL, DELINQUENCY AND JUSTICE: A PSYCHOSOCIAL APPROACH 279–80 (2d ed. 1998).

163. As commentators have noted, early litigation by lawyers subsequently involved in the super class child welfare cases relied on projections that were "highly speculative . . . [and] based on theories rather than data." *See* Chambers & Wald, *supra* note 158, at 122.

The tendency to focus on children without fully acknowledging the role of class was an early trend in public interest legal practice. For example, consider legal efforts in support of maximum hours laws for women in the early twentieth century, spearheaded by Louis Brandeis and an extraordinary group of women activists. Brandeis and his allies believed that maximum hours were a humane reform for all workers, but particularly for women, asserting that long working hours interfered with women's role in child-rearing. To support this argument, Brandeis and the women activists submitted an amicus brief in the case of *Muller v. Oregon*, 208 U.S. 412 (1908), consisting of social science evidence purporting to show how long working hours harmed women's physiology, portrayed in the social science literature as necessarily more delicate than male physiology. *See* NANCY WOLOCH, *MULLER V. OREGON*: A BRIEF HISTORY WITH DOCUMENTS 109, 115 (1996) [hereinafter *MULLER V. OREGON*] (offering excerpts from "Brandeis Brief" including quote from Havelock Ellis asserting that women "are often absent on account of slight indisposition, and . . . break down sooner under strain").

The Brandeis argument ignored issues of class, even as it focused on a "maternalistic" account of gender. There was little acknowledgment from maximum hours advocates that enacting maximum hours legislation for women but not for men could place women at a competitive disadvantage in seeking employment. Women who needed to work to support their families, unlike the affluent women who worked with Brandeis, would experience negative effects. Indeed, subsequent research has suggested that women seeking entry into occupations dominated by men were pushed out by maximum hours legislation. *Cf.* Nancy Woloch, *Legacy: Labor Law, Women's Politics, and Protective Policies, in MULLER V. OREGON*, *supra* at 58, 61–62 (1996) (discussing mixed effects of maximum hours legislation for women). Intersectionality effects in the early women's movement extended to race as well as class. *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 117 (1994) (noting that in the first decades of the twentieth century, "the national network of white women reformers usually excluded black women").

164. Baby Neal v. Casey, 43 F.3d 48, 53 (3d Cir. 1994).

165. Charlie H. v. Whitman, 2000 U.S. Dist. LEXIS 774 (D.N.J. Jan. 27, 2000).

166. Child abuse investigators are hampered by excruciatingly tight budgets, daunting caseloads, and high turnover. Such problems require attention. Attention paid will result in better outcomes for at least some children, particularly those whose safety or well being requires a transfer of custody from biological or foster parents. *Cf.* DAVID MUSICK, AN INTRODUCTION TO THE SOCIOLOGY OF JUVENILE DELINQUENCY 151 (1995) (discussing links between abuse and neglect and subsequent pattern of criminal behavior by victimized children).

167. *See* MARCH & OLSEN, *supra* note 15, at 11–14.

Garbage cans impose a cognitive ordering which privileges some narratives over others. In this interdependent realm, the rhetoric of child protection has three flaws. First, the rhetoric offers a convenient substitute for informed policy.[168] Second, the tragic images outlined by class counsel drive out other less vivid but equally tragic stories of the life chances stunted over time by poverty and inequality.[169] Third, the rhetoric of the super class cases obscures substantial differences within the proposed classes.

Taken together, these flaws trigger significant adequacy concerns. In the child welfare super class cases, states and localities that spend limited resources on heightening child abuse enforcement will spend less on education for children and families, job training, Medicaid, and other benefits. The result of this skewed agenda is a higher probability that in the future more children will be at risk for child abuse and neglect.[170]

In addition, conflicts exist even within the child welfare realm for this super class. Consider for example conflicts between children who are currently being abused and neglected, and children who are at risk of being abused and neglected if families do not receive timely services and intervention. Enhancing preventive services to reduce abuse and neglect and keep children with their parents will drain resources away from child abuse enforcement, and vice versa. Children at risk in this sense have different interests than children who are being abused, or children already in the foster care system. In addition, other subgroups of children in the class, including children with different types of disabilities,[171] older children with

168. *See* Chambers & Wald, *supra* note 158, at 122 (questioning empirical assumptions of child welfare litigators). Such leaps are not restricted to child welfare litigation. *See, e.g.*, 3004 Albany Crescent Tenants Ass'n v. City of New York, No. 95 Civ. 10662, 1999 U.S. Dist. Lexis 18421 (S.D.N.Y. Nov. 24, 1999) (declining to certify class of 1.8 million low-income tenants of color alleging inaction by city agency in requiring landlords to make repairs, when class representatives failed to show that their claims were consistent with those of proposed class members and failed to include representatives from geographic areas that included 60% of the proposed class).

169. *See* Kuran & Sunstein, *supra* note 80. In addition, child protection rhetoric does not always readily make room for stories of abuse that do not fit the paradigm, such as stories of the abuse of gay and lesbian adolescents. *See* Marisol A. v. Giuliani, 185 F.R.D. 152 (S.D.N.Y. 1999) (approving settlement and minimizing concerns of representatives of this subgroup).

170. *Cf.* Sandra K. Danziger & Sheldon Danziger, *Child Poverty and Public Policy: Toward a Comprehensive Antipoverty Agenda*, DAEDALUS, Winter 1993, at 57 (discussing links between children's well being and alleviation of poverty); *see also* BARTOL & BARTOL, *supra* note 162, at 341–42 (discussing difficulties with family-based preventive services that fail to address broader community issues such as crime and poverty).

171. For example, issues may arise about how to allocate resources between children with mental illness and children with mental retardation. Focusing on disability creates other problems of intersectionality. *See* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237 (noting that some school districts have turned special education programs designed for children with disabilities into dumping grounds for low-income children of color that the schools found difficult to handle). Public interest litigators have sometimes been stymied in addressing such issues of intersectionality

issues involving sexual orientation,[172] or children entering state custody through the juvenile justice system as opposed to abuse and neglect proceedings,[173] may be either advantaged or disadvantaged by a settlement. Each of these groups has interests that may either conflict with the interests of others or may have special needs that could benefit from more focused legal attention.[174] Failure to provide such representation, coupled with preclusion of subgroups that have not received it, violates temporal equity.[175]

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by appellate courts that are too eager to categorize social and legal problems in unitary ways. *See* Lora v. Bd. of Educ. of N.Y. 456 F. Supp. 1211 (E.D.N.Y. 1978) (addressing issues of disproportionate placement of students of color in special education backgrounds), *vacated*, 737 F.2d 1239 (2d Cir. 1984).

172. *See Marisol A.*, 185 F.R.D. at 152.

173. *See* J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999).

174. Intersectionality is an affective and cognitive issue, not merely a material one. Material trade-offs may be less of a problem if class counsel can leverage more resources from defendants to take settlement out of a "zero-sum" mode. However, using those resources wisely requires the development of connection with a subgroup and in-depth knowledge of issues relating to the group that is virtually impossible in the super class setting.

175. Two other examples suffice to show the scope of the intersectionality problem. The problems of women in prison until recently were not a primary focus for class-action litigators on prisoners' rights issues, who concentrated on the interests of male prisoners. FEELEY & RUBIN, *supra* note 1, at 378; *cf.* Sturm, *Corrections Litigation*, *supra* note 8, at 646 n.22. This set of priorities may have stemmed from the gender of most of the early players in correctional litigation, as well as the relatively low numbers and lower degree of violence associated with women in corrections. *See* FEELEY & RUBIN, *supra* note 1, at 378. It also probably derives from a cognitive framework that corrections litigators share with the rest of society, which links images of violence with men, particularly men of color. *See* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 467–68 (1993). The predicament of women in prison cannot match the availability and salience of these images. *Cf.* MUSICK, *supra* note 166, at 134 (noting historic lack of interest in gender issues among scholars studying juvenile delinquency).

Even with a class drawn along intersectional lines, class counsel can fail to take intraclass differences into account. Counsel representing a class of low-income tenants of color must adequately address the class members' "dual frustration" about crime: first, they are disproportionately victims of crime, and, second, they are singled out for excessive law enforcement responses. *See* Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Disorder in the Inner City*, 32 L. & SOC'Y REV. 805 (1998). Accommodating both of these concerns is a challenge. For example, in *Spence v. Reeder*, 416 N.E.2d 914 (Mass. 1981), class counsel suing to stop race discrimination in public housing focused on the first problem, disproportionate victimization, and accepted a settlement that provided for, inter alia, summary eviction for tenants accused of violent offenses. *Id.* at 918. This component of the settlement was the subject of a lawsuit by tenants who were adversely affected by the summary eviction procedure, arguing that class counsel had failed to consider the problem of excessive law enforcement responses. Holding that class counsel had not adequately represented those tenants, the court ruled that the settlement did not bar the suit. *Id.* at 921.

Of course, it is easy to envision the inverse scenario, in which class counsel addressed the problem of excessive law enforcement responses but failed to deal with the problem of disproportionate victimization by violence. Suppose a Housing Authority adopts a policy that speeds up the eviction process for tenants found to have either committed violent acts or tolerated the commission of such acts by persons who availed themselves of the tenant's unit with the tenant's consent. Class counsel prosecuting a lawsuit opposing such a policy, representing a class purporting to consist of all of the tenants of the housing project, would experience difficulty in addressing class members' concerns about tenant-on-tenant crime.

V.

AN INTEGRATIVE APPROACH TO PUBLIC INTEREST CLASS ACTIONS

Now that we have identified problems with some aspects of public interest class actions under *Amchem*, we need to consider how to address these issues. The goal here should be to address the issue of temporal equity while ensuring that public interest class actions are still available to redress wrongs. The following measures involving both professional responsibility and civil procedure seek to strike this balance through what new institutionalists would call an "integrative" approach to class actions.[176]

New institutionalists draw a distinction between aggregative and integrative institutions. Aggregative institutions are those in which efficiency is the guiding norm. Rights exist to facilitate exchange between constituents of the institution and other institutions.[177] In contrast, integrative institutions are emblems not of exchange, but of identity. They express the aspirations of human beings living together and emphasize empathy, reciprocity, and participation in a shared search for core values.[178] The goal of an integrative institution is not homogeneity of perspectives, but instead an equitable regard for the importance of diverse points of view.[179] An integrative institution should be responsive to those diverse points of view, not just at a particular moment, but over time. Flexibility and the capacity to experiment are therefore crucial elements of integrative institutions in ensuring temporal equity.

This institutional responsiveness, consistent with the concept of temporal equity developed above, has both a substantive and processual component. Substantively, developing different perspectives yields a better result, as more elements that can help inform the prophecy inherent in public interest class actions are exposed to view. From a process perspective, reckoning with diversity, even if at the end of the day some interests

See Luban, *supra* note 8, at 339 (arguing that class counsel in the housing case were entitled to take into account the concerns of many class members on "problems posed by violence in public housing"); Margulies, *Mission of Legal Services Lawyers*, *supra* note 4 (discussing dilemmas in public interest lawyering posed by housing case); Tremblay, *supra* note 3, at 1126 n.91 (same). An "integrative" judicial role that seeks to identify these interests and provide for their articulation is the appropriate response to difficulties such as these.

176. *See* MARCH & OLSEN, *supra* note 15, at 124–29.

177. *Id.* at 125 ("Within an aggregative process, rights are either rules designed to ameliorate imperfections in the system of exchange, or they are resources distributed as initial endowments and available for barter.").

178. *See id.* (noting that, in an integrative process, "rights express key aspects of the structure of social belief. They are metaphors of human unity, symbolizing the common destiny and humanity of those who share them.").

179. *Id.* at 126–27; *cf. id.* at 127 (rejecting use of integrative institutions to cloak social conflict or co-opt groups subjected to ongoing subordination).

receive greater weight than others, is a good in and of itself. By incorporating a regard for diversity in the structure and process of institutions, the integrative view affirms the importance of that value for democratic life.

The integrative approach to public interest class actions addresses the two problem areas identified above: contingency and connection. Each area requires changes both in the attorney-client relationship and in the role of courts. In both the attorney-client and judicial realms, two complementary values inform the integrative approach: first, enhancing the articulation of multiple interests, and, second, minimizing asymmetries in power between class members and class counsel. Concentrating on these values recalls the beginning of public interest class actions in an inclusive vision of the common good, and transcends the pursuit of efficiency that has sometimes subverted that mission.

A. Minimizing Asymmetries in Power Between Class Members and Class Counsel

An integrative approach to public interest class actions should start with connection between lawyers and clients. As noted above, lack of connection is a pervasive problem in class actions.[180] Problems with connection in public interest class actions stem from the coercive and instrumental approach that such litigation adopts toward members of the class. Disrupting these coercive practices is a good way to promote connection and address contingency. The following subsections argue for two steps in this direction: (1) barring limited retainers, and (2) allowing for opting out of both class certification and settlement in Rule 23(b)(2) class actions

1. Barring Limited Retainers

In most litigation, the law of lawyering reserves for the client the right to determine the objectives of a lawsuit and decide when and if to settle.[181] Yet lawyers planning litigation to establish a principle, such as desegregation or deinstitutionalization, often require clients to sign retainers that limit these rights.[182] By agreeing to such terms, clients sign away the expectation of temporal equity that should be inalienable under an integrative regime.

180. *See supra* notes 63–103 and accompanying text.

181. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1992) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . [and] whether to accept an offer of settlement of a matter."). *But see id.* Rule 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

182. *See* Bell, *supra* note 3 (discussing limited retainers).

The right to control objectives and settlement is a crucial metaphor for the procedural and substantive concerns of temporal equity.[183] Client control promotes connection and reflection about contingency. It accomplishes these goals by reducing asymmetries in the ability to exit that favor class counsel over their clients.

In the public interest class action, class members' ability to exit complements the power of their voice. Public interest litigation is ultimately about the effect of policies, practices, and doctrine on persons. Attorneys as persons can readily exit from these effects. Even if a class action settlement ultimately makes some clients worse off, lawyers retain their "social capital."[184] Clients do not have this luxury. Because of client control, attorneys must engage in dialogue with clients that will "temper ideas in the light of social reality."[185] For example, as Derrick Bell notes, a greater commitment to client control might have led class counsel in the desegregation cases to take more seriously concerns about the exit of resources from African-American schools.[186] In contrast, granting control to lawyers removes these incentives for dialogue.[187] An integrative approach would

183. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing for greater client participation in development of legal strategy and arguments).

184. "Social capital" here refers to a professional degree and a resume, and the ability to leverage other forms of capital such as computers and attorney's fees. Good public interest lawyers will nonetheless have a powerful affective reaction to harm to clients. Exiting from these feelings can be difficult. If, however, lack of connection or a failure to understand contingency mask such harms, the issue of exit does not arise. *See* Margulies, *Mission of Legal Services Lawyers*, *supra* note 4.

185. *See* SELZNICK, *supra* note 15, at 411.

186. *See* Bell, *supra* note 3.

187. When attorneys have control, the resource limitations of most public interest clients make it difficult for clients to insist on dialogue. This is one reason for the lack of connection in public interest class actions. *See supra* notes 63–103 and accompanying text; *cf.* Bell, *supra* note 3 (critiquing use of limited retainers in public interest litigation).

To be sure, there are significant purposes served by limited retainers. First, limited retainers can emphasize the larger principles, like desegregation, at stake in class actions and prevent defendants from buying off those principles. Joining the concern with larger principles like desegregation is a concern about resource allocation for public interest lawyers. Because legal representation in public interest cases is a scarce resource, class counsel do not want to devote time, effort, and money to cases where principles will fall by the wayside. The way to vindicate such concerns is through the same process that lawyers in other settings use: the counseling process, where lawyers can advise clients about the appropriateness of settlement. Invoking principle is entirely proper here, as one factor—perhaps the most important one—for the client to consider. *See* Margulies, *Attorney-Client Deliberation*, *supra* note 4. Limited retainers short-circuit that process. They impoverish the future discussions about client goals and principles that the right of settlement is designed to promote.

Of course, client counseling also features asymmetries that favor lawyers, particularly in the public interest context. Lawyers routinely use a spectrum of devices to minimize the time they spend with clients or avoid having a balanced conversation. Indeed, the lawyer's arsenal of persuasion, as well as her often superior training and institutional supports, such as working phones, faxes, and internet access, often skew public interest lawyer-client counseling. *See* Delgado, *supra* note 3. Limited retainers compound these asymmetries, instead of reducing them.

prohibit limited retainers only when they strip the client of control over settlement. Retainers that limit the subject matter of the representation, so that civil rights lawyers remain free not to do their client's tax work, would still be acceptable. Such retainers ultimately sound in the lawyer's obligation to safeguard her professional competence under Rule 1.1 of the Model Rules of Professional Conduct. Barring limited retainers brings the dialogue back in, enhancing temporal equity.[188]

Of course, barring limited retainers does not fully restore client self-determination in the class action context. Most class members do not enter into express lawyer-client relationships, and the named plaintiffs' wishes are not dispositive as to the class. However, by affecting the discourse in instances where something approaching a lawyer-client relationship does exist, barring limited retainers may help modify the instrumental focus of class counsel that generates temporal inequity in public interest class actions.

2. *Allowing Opt-Outs*

While the canons of professional responsibility can promote symmetry of exit by barring limited retainers, the Federal Rules of Civil Procedure can promote symmetry by broadly allowing class member opt-outs not only at the class certification stage, but also at the settlement stage in Rule 23(b)(2) class actions.[189] Here, too, promoting symmetries in exit minimizes the impact of contingency and lack of connection. By making public interest class actions more responsive over time, opt-outs enhance temporal equity.

Because public interest class actions under Rule 23(b)(2) typically involve injunctive relief, not damages, and also may involve groups lacking information, options, or even decisional capacity, opting-out is more complicated in this context. In a class action for damages under Rule 23(b)(3), class members can opt-out by retaining their own counsel at the class certification stage, or by declining the amount they are supposed to receive

188. Commentators stressing the advantages of coercive group litigation have often claimed that it is lack of exit that encourages voice, since dissidents cannot leave and therefore have no alternative but to make their voices heard. *See* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 481–82 (1984). However, this view fails to acknowledge that, for class members in public interest litigation, resource disparities or complexities of identity such as intersectionality can make voice much more difficult to project. In such situations, exit and voice are not necessarily inconsistent, but can be complementary. Accountability within institutions requires not one alternative or the other, but the elusive "optimally effective mix of exit and voice." *See* HIRSCHMAN, *supra* note 121, at 125. For institutions that have long relied on voice, a turn to exit when voice has congealed into silence can promote dialogue and disrupt complacency. *Id.* (noting that "when voice is the dominant reaction mode, exit can be . . . galvanizing").

189. *See* Issacharoff, *supra* note 7 (urging greater role for opt-outs); Weber, *supra* note 7 (same).

under a proposed settlement and continuing with their own advocacy efforts. Injunctive relief, however, is not as readily severable or divisible among class members. Indeed, the general rule has been that opting-out is not allowed at either the certification or settlements stage in (b)(2) class actions.[190] An integrative approach to public interest class actions requires re-thinking this rule.

An integrative approach would consider opt-outs where practicable to promote experimentation with different forms of relief over time. Opt-outs might be elected by class members or their guardians. Monitoring the results and level of class satisfaction produced by different alternatives would provide courts and litigants with more information with which to cope with contingency. The monitoring function would also oblige courts and litigants to engage in greater connection with class members. Such an approach would enhance temporal equity.

Consider, for example, a school district subject to an integration decree. A court could order busing in some areas, but, in response to concerns raised by parents of class members in a particular neighborhood, could focus on enriching neighborhood school resources in other areas.[191] Over time, studies comparing results would offer more information on the desirability of each alternative. As a result, institutional actors have more information at their disposal to address issues of exit. Moreover, dissenting parents feel connected, instead of disenfranchised. While opting-out in other situations may raise more difficult issues of feasibility or justice, a flexible standard for opting out in (b)(2) class actions can meet these challenges.[192]

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190. *See* Issacharoff, *supra* note 7.

191. John Leubsdorf has pointed out to me that courts in school desegregation cases may be constrained by substantive legal requirements that districts found to have practiced segregation implement a "unitary" system. Allowing opt-outs may compromise this goal, permitting pockets of segregation to persist. However, requiring a "unitary" system should not mean that a system must be monolithic. Equal educational opportunity is a concept broad enough to honor the wishes of parents and communities of color who believe that greater resources and community control are more important than proximity to white students. *See* Bell, *supra* note 3; Peller, *supra* note 144, at 767–71.

192. Opting out of injunctive relief would create justice and feasibility issues in certain circumstances involving unitary, site-based institutions such as psychiatric hospitals and prisons. For example, if a settlement set minimum constitutional standards for hygiene or medical care in a prison, allowing prisoners for whatever reason to opt out of such minima would offend justice. Administratively, as well, setting different medical care standards for different prisoners or cell blocks would obviously be difficult.

In other areas, however, even in unitary institutions, opting out could be consistent with justice and feasibility. Consider the issue of prison food service. *See* FEELEY & RUBIN, *supra* note 1, at 362–65. Arbitrary distribution of food among inmates at the prison cafeteria is a fixture of both prison life and popular cultural depictions of correctional settings. *Id.* at 362 (noting archetypal scene in prison movies where staff member serving food, "with a malignant smirk, dishes out a particularly scrofulous piece of meat, or tosses a dollop of mashed potatoes into the protagonist's coffee"). In at least one prison, a class action settlement addressed this problem by providing for an automated food delivery system, featuring a robot that delivered hot, uniform servings to individual inmates in their cells. *Id.* at 363.

B. An Integrative Role for Judges

Once we view class actions as integrative institutions, we must also conceptualize judging in a more integrative light. On this view, the judge does not merely facilitate exchanges between the parties, as he would on an aggregative account. Instead, the judge takes temporal equity as a guiding principle, one not waivable by the parties. In the integrative mode, the judge must seek out and protect class interests that the parties deny, discount, or fail to discover.[193]

In conducting this heightened inquiry, the judge should focus on adequacy issues under Rule 23. Contingency and connection should be special concerns. The court's integrative focus should include (1) requiring candor from the parties, (2) tailoring the class and class representatives, (3) expanding notice requirements, (4) strengthening review of the fairness of settlement, and (5) presumptively permitting modification when groups raise concerns about contingency and connection.

1. Courts, Lawyers, and Candor about Social Science Authority

Judges are accustomed to pressing counsel on the legal authority they bring to bear. Indeed, the Model Rules require counsel to be candid with the tribunal on this score, citing and distinguishing contrary legal authority.[194] Courts addressing issues of temporal equity in class actions need counsel's help in identifying contingencies such as exits, trade-offs, and intersectionality that can frustrate the remedial purposes of public interest class actions. To enlist counsel's help, courts in class actions should require memoranda from counsel for both sides and all other parties that cite and distinguish not only contrary legal authority, but also contrary social science authority.

Focusing on social science is important because social science has been a mainstay of law reform efforts in the past 100 years. Prominent examples

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However, some inmates might enjoy the old-fashioned trip to the prison cafeteria, as a break from the oppressive monotony of incarceration. *Id.* There seems to be no clear reason why a court could not allow inmates, as part of a class action settlement, to opt out of the robot system and elect to continue frequenting the cafeteria. Over time, the court and litigants could collect information about the robot and cafeteria alternatives, perhaps generating further alternatives that combined the best of both systems. Of course, here, as elsewhere, opt-outs are "defectors" from collective action who make that action more difficult. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1977). Nevertheless, the added information over time that this kind of opt-out would provide is worthwhile, particularly if courts and litigants are not sure, given contingency, that the proposed solution—the food service robot—is the best approach.

193. Judge Jack Weinstein, who presided over the Agent Orange case as well as other mass torts and public interest cases, is a compelling model for this integrative role. *See* Weinstein, *supra* note 7. *But see* PETER SCHUCK, AGENT ORANGE ON TRIAL (1986) (discussing virtues and pitfalls of enhanced judicial role); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983 (1999) (same); Mullenix, *supra* note 75 (arguing that enhanced judicial role promotes overreaching).

194. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1992).

include the "Brandeis brief" that helped persuade the Supreme Court to uphold maximum hours legislation for women in *Muller v. Oregon*[195] by arguing that long hours interfered with women's delicate constitution and capacity for child rearing, and the Clarks' "dolls study" in *Brown v. Board of Education*[196] that claimed to capture the complex harms that segregation inflicted on African-American children. Celebrating Brandeis and *Brown* should not obscure the realization that use of social science in these landmark cases was an instrumental device that succeeded by ignoring the very questions that an inquiry about contingency pushes to the foreground.[197] Ignoring these questions exacerbates the risk of temporal inequity.

The institutional design of public interest class actions under Rule 23 should address this risk. The court must have an understanding of the social science issues in the case, just as it must understand the case law. For this reason, ethical obligations to be candid with the court regarding decisional and other legal authority should extend as well to social science authority.[198] This extension of the duty of candor is necessary under an integrative conception of institutions.

Leaving such disclosures to adversarial relationships will not produce the needed information. Neither side has an incentive to produce information about exits, trade-offs, and intersectionality. Defendants certainly lack such incentives. Acknowledging adverse effects of relief makes defendants seem either mercenary, as in the case of exits and trade-offs, or oblivious, as in the case of intersectionality. In litigation about conditions in mental health facilities, for example, states rarely if ever volunteered that improving conditions would make institutional care more expensive, thereby promoting the wholesale release without services of institutional clients.[199] Class counsel discussing contingencies also appear less than scintillating. By conceding the role of contingency, class counsel acknowledge that the relief they seek may not be quite as salutary as they claim. The parties' reluctance to put themselves in an awkward position is understandable.[200] However, the institutional need to address contingency should not be held hostage to such concerns.

In developing information about contingency, courts should supplement the disclosure this enhanced obligation of candor requires with factual inquiries of the parties regarding related issues. For example, in the child welfare context, this combination of mandatory disclosure pursuant to

195. 208 U.S. 412, 419 (1908).

196. 347 U.S. 483, 494 (1954).

197. *See supra* notes 146–53 and accompanying text.

198. *See* Margulies, *supra* note 78; *cf.* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (discussing standard for scientific evidence under Federal Rules of Evidence).

199. *See supra* notes 119–39 and accompanying text (discussing mental health litigation).

200. *See* Weinstein, *supra* note 7, at 509 (discussing similar issues in mass torts context).

the ethics rules and judicial inquiries should produce more information on trade-offs that could occur as a consequence of settlement. With this information, the court will be in a better position to gauge whether enhanced child welfare enforcement will siphon off resources needed to address other pressing social ills affecting children and families. More information about such issues enhances the prospects for temporal equity.

2. *Tailoring the Class*

When courts detect the presence of concerns about contingency or connection, they should fashion the "structural protections" the Supreme Court outlined in the mass torts cases. For example, if the court believes that a significant group within the proposed class will be adversely affected by defendants' exits from services and programs, the court should initiate an integrative process to address those concerns. The first phase of the process would involve requesting more information and analysis from the parties. Second, the judge could ask each party to submit a list of experts, class members, and other interested parties to sit on an unpaid "equity review panel." Finally, if none of these measures proved adequate to offer protection, a court could utilize the method recommended in the mass torts decisions, and decline to certify the class, or divide the class into subclasses with separate representation with the financial resources to bring the case to trial.

3. *Notice, Voting, and Deliberation within the Class*

Class notice and voting should also reflect temporal equity concerns. Commentators have long argued[201] that some deliberation within the class, no matter how diffuse and dispersed, is important to lend legitimacy to decisions about settlement in the class action context. For example, in the relatively modest number of desegregation cases where the class members seem solidly opposed to continuing the lawsuit, a vote should be dispositive. In the face of a strong expression of class members' will, the institutional preference for democracy and client-centered decisionmaking should prevail. In addition, class counsel should on a new institutionalist approach have face-to-face contact in small group settings with at least a sample of class members. This focus group approach may surface issues that will get lost in larger gatherings. Here, too, interdependence is crucial. A mix of mechanisms for notice and feedback, including hard copy, in-person notification, cyber-messaging, and large and small groups, will work better than reliance on any single approach.

201. *See* Grosberg, *supra* note 8; Morawetz, *Bargaining, Class Representation, and Fairness*, *supra* note 8.

In other cases, however, things are not that easy. In the children's cases, notice may be difficult or even impossible because of temporal equity issues. The children's cases are brought in part on behalf of those children "at risk" of being abused. Some of the relief requested is designed to push states and localities to do a better job of identifying those children. Predicting who will be abused is a venture into classifying the future, however. Sending out notices to this group will be difficult because of such identification and prediction issues. In addition, of course, capacity issues are central. The solemn opining of the *Marisol* court that it had received only eight objections to the proposed settlement,[202] from a class consisting of abused or neglected children in foster care who probably had other things on their minds, suggests the difficulty of getting meaningful consent. In these situations, the onus of responsibility falls on the court itself to safeguard class members' interests in assessing the fairness of a proposed settlement.

4. Fairness and Implementation

Unfortunately, most judges seem unwilling to accept the responsibility entailed in a meaningful inquiry about a settlement's fairness. The same scarcity of time and effort that defeats connection transforms most fairness inquiries into mere rubber-stamp exercises.[203] Processes for assisting the court in assessing fairness, such as naming a special master or convening a committee of experts, often end up compounding the problem. Such devices combine a unitary perspective elicited from the "usual suspects"—typically prominent academics and lawyers—with even less accountability than that possessed by class counsel or the court.[204]

Judges can deal with such problems by changing both the charge to and the composition of facilitative mechanisms such as special masters and advisory panels. The court's charge to facilitative entities should focus on questions of contingency, by asking two simple questions: (1) What are the assumptions embodied in the proposed settlement? and (2) Why are those

202. *See* Marisol A. v. Giuliani, 185 F.R.D. 152, 161 (S.D.N.Y. 1999).

203. *See* Issacharoff, *supra* note 7.

204. *See Marisol A.*, 185 F.R.D. at 152 (noting role of "Advisory Panel" of academic and administrative experts); Mullenix, *supra* note 75, at 589–90 (noting problems linked with the limited number of special masters and courts' tendency to minimize special masters' conflicts of interest). Expert panels can be helpful if they supply perspectives on contingency neglected by the court and the parties. However, experts do not automatically supply such perspectives. Indeed, many so-called experts, regardless of their substantive education and other credentials, distinguish themselves principally by their overconfidence in their own judgments. *See* Baruch Fischhoff, *Debiasing*, *in* JUDGMENT UNDER UNCERTAINTY, *supra* note 81, at 422, 438–40 (discussing problem of expert overconfidence and possible corrective procedures). Court-ordered mediation or other alternative dispute resolution has the same pitfalls. *See also,* Sturm, *Public Law Remedies*, *supra* note 8. In these cases, much depends on the perspective and assumptions of the mediator or arbitrator.

assumptions wrong?[205] Answers to these questions may disturb the universe of the parties. These answers will, however, do much to reveal issues of contingency while there is still some opportunity to address them.

Composition of panels is another avenue for reducing the impact of contingency. Panels should include significant representation from class members. Asking class members to explain, based on their observations and experience, why the experts are wrong may jolt class members out of the passivity imposed on them by the bureaucratic class action process. It will also supply concrete insights that experts may overlook.[206]

5. *More Liberal Intervention and Modification of Settlements*

One problem with implementing a regime of temporal equity is that some interests worth safeguarding may also be so unripe at the time of certification of a class or entry of an order of settlement that representing those interests triggers Article III concerns.[207] Responses to such concerns are several: the court can engage in fact-finding through panels, masters, and public meetings that will ferret out temporal equity concerns that do not meet Article III standards, ensuring their consideration in the certification and settlement process; the court can insist on class boundaries that will not result in preclusion for future grievants; and the court can allow liberal intervention and modification of settlements to permit the voices of future grievants to be heard.[208]

To promote temporal equity, courts considering modification and preclusion should expressly address issues of contingency and lack of connection. For example, they should acknowledge that groups that raise intersectionality issues, including, for example, gay and lesbian adolescents in state custody,[209] are particularly likely to receive short shrift in settlements.[210] The complexity of such issues, featuring interwoven strands of subordination and identity, makes contingency a heightened concern, and connection more difficult to achieve. Moreover, courts considering such requests by intersectional groups on a case-by-case basis tend to compound

205. *See* Fischhoff, *supra* note 204, at 438 ("overconfidence was reduced by having respondents list reasons why their preferred answer might be wrong").

206. A good example offered by Matthews is the comment by a foster child about the importance of sibling visitation. *See* Matthews, *supra* note 10, at 435.

207. The Supreme Court acknowledged this as a concern in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997).

208. Liberalizing intervention and modification will trigger substantial concerns on the part of plaintiffs as well as defendants. Overly generous intervention and modification provisions can frustrate the entire remedial process, and make the class action procedure so unwieldy that it will not serve the beneficent ends for which it was designed. *See* Rhode, *supra* note 8. An integrative approach must tailor intervention and modification to meet those concerns.

209. *See* Marisol A. v. Giuliani, 185 F.R.D. 152 (S.D.N.Y. 1999).

210. *See supra* notes 77–96 and accompanying text (discussing how cognitive framework of public interest class actions obscures intersectionality concerns).

these problems by treating the concerns raised as marginal.[211] For these reasons, courts should accord intersectional groups seeking modification of settlements a presumption that their representation in the class action was inadequate. Such a presumption will extend temporal equity to a group often unheard in class certification and settlement.

CONCLUSION

Considering issues such as intersectionality affirms that the public interest class action, despite its role in democratic governance, can generate significant temporal inequity. Much like the mass torts settlement classes assailed by the Supreme Court in *Amchem* and *Fibreboard*, public interest class actions can involve deciding who gets meaningful relief and who gets left out in the cold. This does not mean, as some conservatives argue, that the legal system should preclude class actions by vulnerable persons against powerful public and private entities. However, precisely because the public interest class action is a crucial institution for upholding rights and expressing dignity, the system should ensure that the governance of the class action itself is consistent with those goals.

This analysis suggests that the "structural protections" the Court required under Rule 23 in the mass torts cases are just as important in the public interest arena. The stakes in public interest litigation are high for class members and for society, involving questions about the present and future functioning of fundamental public institutions, such as schools, prisons, and child welfare systems. Settlements in such cases, for example, in the child welfare "super class actions" upheld in most federal courts, entail resource allocations that determine policy for years to come. Frequently, settlements, which district courts typically review with a deferential standard, proceed inevitably after class certification. The result is that fundamental resource allocations receive very little scrutiny. Despite the best intentions of class counsel, temporal equity is often a casualty in this process.

When structural protections are absent, fairness for class members becomes a sometime thing. Often, this selective fairness takes the form of an express or institutional preference, as in the mass torts cases, for class members whose claims arise at a particular time, coupled with sacrifices from class members whose claims ripen at times less favored. When such allocations are made without accountability or sound information about the future, temporal inequity results. The child welfare "super class" cases, for example, trigger concern about unacknowledged or unreviewed tradeoffs between children who have been abused by caregivers in the past, children at risk of being abused in the future, children with special needs, and

211. *See Marisol A.*, 185 F.R.D. at 162-72 (approving settlement and minimizing objectors' concerns).

children and families who face the pervasive but less vivid risks of poverty and despair.

To analyze temporal equity in public interest class actions, a new institutionalist perspective is helpful. On this view, temporal inequity emerges from the cognitive frameworks, rhetorics, and routines characteristic of public interest litigation as an institution. The central story of public interest litigation is the move from the affective reaction to injustice that spurs litigation to the instrumental calculation that too often drives the litigation process. This move masks the importance of two factors: connection and contingency.

Connection involves human contacts and communication between class counsel, courts, and class members. This communication is important not just for developing sound information, but for its own sake, as an emblem of the importance of class actions in a participatory democracy. Often, however, such communication is fleeting or incomplete, as in the neglect of parents in the *Pennhurst* litigation on shutting down institutions for people with mental retardation, or in the lawyer-driven structure of child welfare "super class" actions.

Contingency is a problem because class counsel locked into an instrumental mode miss the impact of interdependence on institutions, time, and identity. Interdependence makes itself felt through unanticipated exits by defendants that undercut classwide relief. Mental health litigators, for example, did not adequately predict that improving conditions in state psychiatric institutions would push the state to "exit" precipitously from running these institutions, leaving former patients without supports in the community. Similarly, the superb lawyers of the desegregation campaign never fully reckoned with the exit of resources from African-American community schools. Interdependence is also evident in the intersecting axes of identity such as class, race, and gender that generate unacknowledged trade-offs, and make some relief unavailing or unavailable. The historical neglect of women in prison by class counsel in prison conditions cases is an example of this phenomenon.

Contingency and lack of connection transform the public interest class action from an integrative institution that expresses norms of human dignity to an aggregative institution that stresses expediency. Moving the public interest class action back to its roots as an emblem of equity requires an integrative approach to both lawyering and judging. This approach stresses communication and public values of equity and fairness, while reducing the asymmetries in class actions that favor class counsel over class members.

An integrative approach would require changes in both attorney-client relationships and the judicial role in class actions that would serve two values: first, enhancing the articulation of multiple interests, and, second, minimizing asymmetries in power between class members and class counsel. It would bar devices like limited substantive retainers that allow clients

to exchange fundamental rights like settlement control. Courts should also permit opting out by class members in Rule 23(b)(2) class actions so that the possibility of exit by clients can promote class counsel's accountability to clients. For judges, the class certification and settlement review process should be more proactive. Courts and professional responsibility rules should require candor about both legal authority and the sometimes shaky social science authority that often passes for informed prediction in public interest litigation. In addition, courts should not hesitate to: deny class certification or fashion subclasses with separate representation when contingency and connection problems emerge, as in the child welfare "super class" actions; require face-to-face notice for at least a representative sample of class members; vigorously review settlements for fairness by charging diverse review panels with the task of uncovering contingencies not raised by the parties; and presumptively allow modification of settlements by groups that can demonstrate the impact of contingency or lack of connection on their interests.

Integrative institutions are necessarily works in progress. Institutional arrangements alone will never guarantee equity, which ultimately flows from the habits and commitments of the institution's participants. Structural features can, however, nurture a discourse that respects equity as a fundamental value. Fortifying the terse charter of Rule 23 with structural protections can help promote temporal equity within public interest litigation and ensure that public interest litigation continues its crucial role in U.S. democracy.