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TWO VIEWS OF THE CLASS ACTION

*Alexandra D. Lahav**

INTRODUCTION

Class actions present a series of dualities. There are two dominant views of the class action's structure and two dominant views of the class action lawyer. Some see the class action as an aggregation of individuals, a complex joinder device and nothing more. Others view the class action as transforming the class members into an entity. Similarly, there are two dominant views of the class action lawyer. Many see the class action lawyer as an entrepreneur, seeking out litigation and personally benefitting from gains accruing to class members.[1] Others view the class action lawyer as a public servant or a "private attorney general," privately vindicating rights through lawsuits that public officials do not have the resources to pursue.

The procedural law does not definitively adopt one of these views. In fact, looking to the law to answer the question of what the class is, what the class members' relationship is with counsel, and what the lawyer's role is vis á vis the class yields no definitive answers to these questions. This is because the law of class actions reflects a deep ambivalence about this procedural device that can be used to benefit class members and enforce the substantive laws, but can also be abused by lawyers seeking to extract rent from the class. At the root of this ambivalence is the relationship between the class and its lawyer. Every lawyer to some extent frames—or forms—the interests of the client. On a spectrum of lawyer control and client consciousness, the class action seems to be on one extreme end.[2]

In this Symposium Essay, I propose a thought experiment in which we reconceptualize the relationship between the lawyer and the class as an exercise of the lawyer's imagination. The class is a phantom client; like a ghost, it at once exists and does not exist. The question is whether the

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1. The less generous might call the lawyer-entrepreneur a "bounty hunter." *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983).

2. We might also fruitfully consider the role of the judge, but that is beyond the scope of this essay. For a few different views of the role of the judge in complex litigation, see generally, Martha L. Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003); Judith Resnik, *Courts: In and Out of Sight, Site and Cite*, 53 VILL. L. REV. 771 (2008); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

lawyer's act of imagining this phantom client is a positive one that realizes the goals of the law and serves the needs of the class and of society, or a negative one that realizes the goals of self-enrichment at the expense of the class, the defendant, and society. One implication of understanding the class as a phantom client is that the requirement that the class representative "adequately represent" the interests of the class ought to be seen as a mandate for the lawyer to responsibly construct a class client by consulting class members through polling.[3]

In Part I, this Essay describes the two dominant views of the class action, as an aggregation of individuals or an entity. Part II describes the two dominant views of the plaintiff's lawyer in the class action, as an entrepreneur or a public servant. Each of these two introductory sections also describes the contradictions and tensions in the law of class actions as well as the policy arguments favoring each view of the class and class counsel. Part III proposes an alternative view of the relationship between the lawyer and the class client: the class is a phantom client created by an act of the lawyer's imagination. By reconceptualizing the class as a phantom client we can better understand the tensions and inconsistencies in the procedural law. There is no satisfactory way to resolve the tension created when a lawyer is unmoored from a client, as is the case in the class action context. The most commonly advocated solution to this problem is to create incentives that will align the interests of the lawyer with those of the class. Perhaps we have maximized the use of incentives to drive class counsel toward conduct beneficial for the class and society. We ought to add to the discussion the importance of virtue.

Civil society cannot survive without virtuous citizens. Nor can the class action device survive without virtuous lawyers. The problem class counsel faces is not only resisting the temptation of making a quick fee at the expense of the clients. Lawyers also need to determine what the phantom client wants and what the goal of the law is. These determinations require a public discussion of the goals of the law and the best methods for achieving those goals. One way to foster such an exchange of ideas is for class counsel to poll class members regarding their goals for the litigation as a prelude to settlement and, in doing so, to join together with class members in the enterprise of imagining the class as a client.

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3. Much has been written on the adequacy of representation requirement. *See, e.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 354 (discussing the U.S. Supreme Court's approach to adequacy of representation and stating that "[t]o the extent that the Rules direct courts to focus on the named class parties, they provide what is at best a distraction from the real source of legitimacy in class actions: the incentives for faithful representation by class counsel"). For a recent debate on the issue of adequacy, compare Elizabeth Chamblee Burch, *Procedural Adequacy*, 88 TEX. L. REV. SEE ALSO 55, 57–59 (2010) (critiquing the view of class counsel and class representatives as purely self-interested), with Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1176 (2009) (arguing that the standard for adequacy of representation on collateral attack ought to be that representation "is adequate if and only if the actions of the class representative and class counsel . . . [leave] that class member in no worse a position than that class member would have enjoyed had [that member] retained control of her own case").

I. TWO VIEWS OF THE CLASS ACTION: AGGREGATION OF INDIVIDUALS OR ENTITY

The two dominant schools of thought on the structure of the class action consider it to be either an advanced joinder device, merely aggregating individual cases, or a transformative procedural rule that creates an entity out of a dispersed population of claimants.

These two views are illustrated in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[4] a recent U.S. Supreme Court decision addressing the question of how to apply the *Erie* doctrine to class actions brought under state law in federal court.[5] Shady Grove Orthopedic Associates provided medical care to a patient who assigned to them her rights to insurance benefits under a health insurance policy issued by Allstate Insurance.[6] Allstate delayed payment and refused to pay the statutory interest that had accrued as a result of the late payment.[7] Shady Grove alleged that it was owed approximately $500 in interest under New York law.[8] Shady Grove's lawyers filed a class action lawsuit on behalf of all the providers who had claims for statutory interest based on overdue payments from Allstate.[9] Now, instead of being confronted with a single suit for $500, Allstate faced a collective litigation with an interest penalty in excess of $5 million.[10]

The class counsel filed the lawsuit in the U.S. District Court for the Eastern District of New York.[11] The lawyers were able to file the suit there because the Class Action Fairness Act of 2005 (CAFA) grants broad jurisdiction to the federal courts over all class actions where any class member is from a different state than any defendant and the matter in controversy exceeds $5 million.[12] New York's Civil Practice Law and Rules, however, prohibits class actions for statutory penalties.[13] Allstate argued that this required the federal court to dismiss plaintiffs' class action since Shady Grove sought to obtain a statutory penalty through the class action mechanism.[14] The question before the Court was whether the class action rule is procedural for *Erie* purposes, such that Shady Grove could maintain its lawsuit under Rule 23 of the Federal Rules of Civil Procedure, or substantive, so that the New York rule would govern and require

4. 130 S. Ct. 1431 (2010).
5. *Id.* at 1436.
6. *Id.*
7. *Id.*
8. *Id.* at 1436–37.
9. *Id.*
10. *Id.* at 1437 n.3.
11. *Id.* at 1436.
12. 28 U.S.C. § 1332(d) (2006). The statute requires the federal court to remand the case to state court when more than two-thirds of the class members are citizens of the same state as the primary defendant and makes remand discretionary when between one-third and two-thirds of the class members are citizens of the same state as the primary defendant. *Id.* § 1332(d)(3), (4); *see also Shady Grove*, 130 S. Ct. at 1437.
13. N.Y. C.P.L.R. 901(b) (MCKINNEY 2010); *Shady Grove*, 130 S. Ct. at 1437.
14. *Shady Grove*, 130 S. Ct. at 1437.

dismissal of the suit.[15] The Supreme Court, in a plurality opinion, allowed the class action certification motion to proceed under Rule 23 rather than the New York rule.[16]

From the defendant's perspective, a five *hundred* dollar suit—which was all Shady Grove was permitted to maintain under the New York rule—is far different from the five *million* dollar suit Shady Grove sought to maintain under the federal rule.[17] Because the absent class members had little individual interest in filing a lawsuit, whether Allstate would face any significant liability would be determined by the certification of the class action.[18] In the absence of the class action, Allstate was unlikely to face more than a handful of small claims actions.[19] Accordingly, there was a lot at stake for Allstate in the case.

A plurality of justices asserted that the class action was nothing more than a sophisticated joinder device.[20] Class actions, the opinion explained, allow plaintiffs the opportunity to bring together lawsuits that were not economical to maintain on their own.[21] The class action mechanism did not alter the substantive law, but instead merely aggregated cases to which the substantive law would apply in the same way that it would in any individual case. Justice Scalia, writing for the plurality, explained:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.[22]

To the extent that permitting a class action would result in greater liability for Allstate, because individuals were unlikely to bring actions on their own, the Court explained, this was merely an "'incidental effect[t]'" of the procedural rule.[23] In other words, the plurality adopted wholeheartedly the "aggregation of individuals" view of the class action.

By contrast, the dissent saw this class action as an entity, a creation that transformed the substantive law. In the opening lines of the dissenting opinion, Justice Ginsburg wrote, "The Court today approves Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy."[24] The dissent saw a strong interest on the part of the State of New York to limit class actions precisely because class actions can effect this transformation. This required the dissent to consider the class action from the perspective of

15. *Id.*
16. *Id.* at 1448.
17. *Id.* at 1443.
18. *Id.*
19. *Id.*
20. *Id.* at 1443.
21. *Id.*
22. *Id.*
23. *Id.* (alteration in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)).
24. *Id.* at 1460 (Ginsburg, J., dissenting).

the defendant and class counsel rather than from the viewpoint of the individual absent class members, whose recovery remained at $500 regardless of the size of the class. This perspective is consistent with (perhaps even required by) the entity view and it changes the outcome. Instead of a procedure that does nothing to the substantive law, the dissent saw class actions as altering it impermissibly. The implication of the dissent's position is that in this case the class action rule violated the Rules Enabling Act, which prohibits the alteration or enlargement of a substantive right.[25]

Class action doctrine offers little help in choosing between the aggregation and entity views. If the class is an aggregation of individuals, it follows that each individual has a right to participate in the class suit just as they would in an individual litigation; class members should be permitted to choose (or terminate) class counsel, and settlements ought not to be approved over their objection. Yet none of these approaches are the default rule in class actions. The law does not allow class members to choose their attorney, to fire her, or to determine her compensation.[26] Furthermore, settlements may be adopted over the objection of class members. Absent class members cannot intervene in side settlements reached by class counsel, defendant, and objecting class members, nor can they obtain discovery of those settlements.[27] Absent class members are not parties for purposes of conducting discovery or making motions for summary judgment, but must formally intervene in order to have a say, just as a stranger to the litigation would have to do.[28] They are not parties to the

25. Rules Enabling Act of 1934, 28 U.S.C. § 2072 (2006). The dissent instead preferred to argue that there was no direct conflict between the federal and the New York rules and therefore the New York rule should govern. *Shady Grove*, 130 S. Ct. at 1460. For an argument that the class action rule violates the Rules Enabling Act, see generally MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009). For a different view, see Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17 (2010) (advocating a radical reinterpretation of the Rules Enabling Act); Alexandra Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993 (2011) (reviewing REDISH, *supra*).

26. *See* FED. R. CIV. P. 23(g) (stating that the court picks the lawyer); FED. R. CIV. P. 23(h) (stating that the court determines compensation); Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590 (3d Cir. 1999) (holding that class counsel need not be disqualified when the class representative, who had hired the lawyer, objects to the settlement). *But see* 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I)(bb), 78u-4(a)(3)(B) (2006) (requiring that entity with largest financial stake in the relief sought be appointed lead plaintiff and choose class counsel).

27. Under Rule 23(e)(5), the court must approve the withdrawal of objections, but this does not mean that the terms of a side settlement must be disclosed, and it is not clear under what circumstances the terms of such side settlements would be discoverable. *See* Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 6–7 (1st Cir. 1999) (refusing class member post-judgment discovery of side settlement).

28. *See* Devlin v. Scardelleti, 536 U.S. 1, 15–16 (2003) (Scalia, J., dissenting). *Devlin* held that objecting class members need not intervene in order to appeal. *Id.* at 14 (majority opinion); *see also* ALBA CONTE & HERBERT B. NEWBERG, 5 NEWBERG ON CLASS ACTIONS § 16:1 (4th ed. 2002) ("Absent class members should not be required to participate actively during the pretrial and trial stages of the litigation, since such a requirement would impose an affirmative obligation, not expressly required by Rule 23 and would frustrate the rule's goals.") Treatises note some disagreement over whether class members are parties for

litigation for diversity jurisdiction purposes.[29] Defendants are not required to file compulsory counterclaims against them.[30] Defendants may contact class members for individual settlement prior to class certification, contact that would be prohibited in individual representation.[31] Finally, a settlement or adjudication binds the entire class, precludes class members from future litigation, and is only assailable based on the adequacy of the class representative.[32] All of these rules favor the entity view of class actions.

From the preceding discussion, it would seem that the entity view has the upper hand. But other doctrines support the aggregation view. If the entity view truly was to prevail, class members would be required to intervene in order to appeal. Yet the Supreme Court has held that objecting class members are parties for purposes of appeal.[33] Similarly, under entity theory class members' ability to collaterally attack on the basis that they were not adequately represented in the class action ought to be severely limited. Yet courts have been open to permitting class members to collaterally attack settlements on adequacy grounds, particularly in cases involving future claimants.[34]

Finally, there are a set of rules relating to class actions that can be categorized as supporting both the entity and the aggregation view, or perhaps neither. For example, the tolling of statute of limitations pending the outcome of the certification motion, the right to opt out of money damages class actions, and the right to participate in fairness hearings are all procedural protections that are consistent with both views.[35] These are all rights that inhere to the individual, recognizing class members as rights holders who are entitled to pursue their own litigation and to have their say in the pending class action. At the same time, they are analogous to the type of rights that are available to members of entities and have particularly apt analogues to the corporate form. Most of the time shareholders of companies may freely sell their shares, just as class members in money damages class actions may opt out. Shareholder meetings, somewhat like fairness hearings, allow shareholders to air their views and submit proposals

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purposes of discovery or counterclaims. *See* CONTE & NEWBERG, *supra*; *cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) (noting that absent class members "are almost never subject to counterclaims or cross-claims, or liability for fees or costs."). The disagreement largely comes up in the context of defendants wanting to depose absent class members, not in the context of absent class members wishing to control the discovery process.

29. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005).

30. *See Phillips Petroleum*, 472 U.S. at 810.

31. CONTE & NEWBERG, *supra* note 28, § 15:19.

32. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 261 (2d Cir. 2001), *aff'd in part and vacated in part*, 539 U.S. 111, 112 (2003) (affirming with respect to Stephenson, and vacating and remanding with respect to other plaintiffs).

33. *Devlin*, 536 U.S. at 1.

34. *Stephenson*, 273 F.3d at 261.

35. *Devlin*, 536 U.S. at 10 (observing that the statute of limitations is tolled for absent class members); *see also* FED. R. CIV. P. 23(b)(3) (requiring that absent class members be permitted to opt out of money damages class actions); FED. R. CIV. P. 23(e) (requiring fairness hearings before approval of settlements in class actions).

for reform. And individual shareholders are not liable for the misconduct of the company, much as the statute of limitations is tolled for claimants in advance of certification.

The difficulty of choosing one view over the other is illustrated by *Lazy Oil Co. v. Witco Corp.*,[36] a case about what happens when sophisticated class representatives and class counsel disagree on case strategy. The principal of Lazy Oil, an oil producer named Bennie G. Landers, conceived of a lawsuit against Witco, hired a lawyer and pursued the suit as a class action.[37] Unlike many class actions where the class representative does not play a significant role in prosecuting the case, Landers seems to have been vigorous and independent-minded.[38] When class counsel settled the case, these qualities may have been one reason that Lazy Oil and another class representative objected to the settlement and moved to have class counsel disqualified.[39] When the class representatives objected, the lawyers they had hired to represent them and the class withdrew from representation of the objectors and purported to represent the class in the settlement.[40] Lazy Oil argued that the situation constituted an impermissible conflict of interest because the lawyers were "representing a party (i.e., [the non-objecting class]) adverse to [the] one they previously represented (i.e., the objectors)."[41] The ethics rules forbid a lawyer from representing a party in a matter where the former client is now an adversary absent consent of both parties.[42] If the test for disqualification had been applied to *Lazy Oil* as it is in any ordinary litigation, class counsel would have been disqualified. Nevertheless, the Third Circuit held that class counsel need not be disqualified.[43] Instead of applying the disqualification rule "'mechanically'" to class actions, the court applied a balancing test, weighing the interest of the class in continued representation against the prejudice to the objectors.[44] The reason for this departure is that a class representative could hold hostage, delay, or scuttle a good settlement by objecting and thereby disqualifying class counsel.[45]

What does this doctrine say about the entity and aggregation of individuals views of the class? One might look at the case as a victory for the entity view because it implies that the class representative (or any individuals within the class for that matter) is not the client, but rather the whole class is. Once the representative objects, he is entitled to some

36. 166 F.3d 581 (3d Cir. 1999).
37. *See id*. at 583.
38. *See id*.
39. *See id*.
40. *See id*.
41. *Id*. at 588.
42. MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2011).
43. *Lazy Oil*, 166 F.3d at 591.
44. *Id.* at 589–90 (quoting *In re* "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18–19 (2d Cir. 1986)) ("[C]lass counsel may continue to represent the remaining class representatives and the class, as long as the interest of the class in continued representation by experienced counsel is not outweighed by the actual prejudice to the objectors of being opposed by their former counsel.").
45. *Id.*

consideration but not to the automatic disqualification of his former attorney that an individual client would get. At the same time, the case also supports the aggregation view because it renders meaningless the idea that the class representative has any special role in governing the "entity." It leaves open the question of what happens to this inchoate and leaderless group once the class representative objects. If having meaningful leadership is a condition precedent to the creation of an entity, *Lazy Oil* militates against seeing the class this way. The case supports most strongly the notion, discussed below, that the class's lawyer is unmoored from any client at all, be it an entity or an aggregation.

Many of the leading scholars of class actions have espoused, either explicitly or implicitly, the entity view.[46] Some analogize the class to a political entity.[47] Others analogize the class to a corporation.[48] Whatever the precise analogy, as Samuel Issacharoff, one of the most prominent scholars in the law of class actions, explains: "Classes do take on the form of an 'entity,' . . . with rather immediate consequences for the prospect of successful prosecution of a claim."[49] These consequences include the potential that plaintiffs will not be able to vindicate their rights at all if a court declines to certify a class, or the possibility that defendants will be pressured to settle despite a very low probability of a liability finding because the possible losses if that unlikely event occurs are too large to tolerate.[50]

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46. The entity theory seems to have been proposed initially by Edward H. Cooper. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 16 (1996); *see also* Samuel Issacharoff, *Preclusion, Due Process, and the Right To Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002); Nancy J. Moore, *"Who Should Regulate Class Action Lawyers?,"* 2003 U. ILL. L. REV. 1477; David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913 (1998).

47. *See* Issacharoff, *supra* note 3 at 338 ("[I]t is useful to think of the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state, particularly in those situations in which the state has not or cannot perform its regulatory function, or it would be inefficient for the state to undertake such regulation directly.").

48. As John C. Coffee, Jr. explains, "From a governance perspective, a class action is an organization, often with thousands of members, that persists for an indefinite period, usually several years from the case's filing to its resolution." John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 306 (2010). My own work has been consistent with Coffee's approach; *see also* Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003).

49. Issacharoff, *supra* note 46, at 1060 (citing Shapiro, *supra* note 46, at 917).

50. This view was famously advocated by Judges Henry J. Friendly and Richard A. Posner. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118–20 (1973); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299–300 (7th Cir. 1995). For critiques of the blackmail argument, see Alexandra D. Lahav, *The Curse of Bigness and the Optimal Size of Class Actions*, 63 VAND. L. REV. EN BANC 117 (2010), http://www.vanderbiltlawreview.org/content/articles/2010/11/Lahav-The-Curse-of-Bigness-63-Vand.-L.-Rev.-En-Banc-117-20101.pdf; Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1386–90 (2003).

II. TWO VIEWS OF THE CLASS ACTION LAWYER: ENTREPRENEUR OR PUBLIC SERVANT

The doctrine governing the lawyer's duties to the class is just as unstable as the procedural law implicating the nature of the class action. Class counsel has a fiduciary duty to individual class members, which is why subclassification is required when the interests of the class representative and class members are not aligned.[51] At the same time, Rule 23 states that the job of class counsel is to represent the interests of the class, not of individual class members.[52] In fact, the Court has sometimes permitted "headless class actions," allowing a class action to proceed when the class representative's claims are mooted.[53] The ethics rules state that unnamed class members are not clients and that lawyers need not obtain consent from absent class members in the event of a conflict or potential conflict of interest.[54] As a comment to the Model Rules of Professional Conduct (Model Rules) explains, lawyers "representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class."[55] Unlike binary litigation, defendants may contact class members before a class is certified and, with the court's permission, may sometimes contact class members after class certification.[56] In sum, the doctrine provides no consistent definition of the class action lawyer's role.

Instead of articulating a vision of the nature of the relationship between class counsel and the class, the Model Rules defer to the procedural law, stating that class counsel "must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class."[57] The lack of special ethics rules distinguishes the class action from formal entities, which are subject to a specialized rule governing lawyer conduct.[58]

Scholars have stepped into the breach with two views of the class action lawyer as entrepreneur or public servant. The first suggestion is that the lawyer is a type of entrepreneur (more negatively referred to as a "bounty hunter") who conceives of the lawsuit, finds the client, and pursues the

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51. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625–27 (1997) (stating that class representative must represent particular interests of class members); *see* FED. R. CIV. P. 23(g) (requiring the court to appoint class counsel); FED. R. CIV. P. 23(c)(5) (treating subclasses as a class under the rule).

52. *See* FED. R. CIV. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class.").

53. *See* Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. REV. 1239, 1265 n.118 (1989) (citations omitted).

54. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [25] (2011); *id.* R. 1.8 cmt. [13].

55. *Id.* R. 1.8 cmt. [13].

56. CONTE & NEWBERG, *supra* note 28, § 15:19.

57. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [13].

58. *See, e.g.*, *id* R. 1.13 (governing relationship between counsel and corporation); *see also* Moore, *supra* note 46 (arguing for specialized professional ethics rules governing the lawyer-client relationship in class actions).

litigation for private gain.[59] The second view of the class action lawyer is as a public servant, sometimes called a "private attorney general" who furthers the deterrent effect of the law by harnessing the power of representative litigation.[60] Each of these views is a reaction to the central problem in class action representation, the agent-principal problem, so a brief explanation of that problem is necessary before exploring these approaches.

In any agency relationship, there is an incomplete overlap between the interests of the principal and those of the agent. When this gap is significant, the agent may seek to take advantage of the principal in order to further her own interests.[61] The agent-principal problem is present in the corporate context (between shareholders and directors or management), the individual representation context (between lawyer and client), and in the class action context (between the lawyer and the class). The agent-principal problem is a crucial issue in the class context because neither the class as a whole nor its individual members exercise control over the lawyer. An individual client can threaten to fire the lawyer, but the class cannot. An individual client, particularly the corporate client, may be a repeat player. Class members are decidedly not. Individual clients can negotiate lawyer pay and may withhold pay or negotiate discounts, while class members cannot. The class's lawyer has an incentive to do right by the court, which appoints class counsel, fixes attorneys' fees, and may seek the same lawyer again to represent additional classes. But the lawyer-client relationship in the class action context permits none of the safeguards that are supposed to prevent lawyers from taking advantage of their clients in ordinary litigation. The more extreme problems posed by a relationship between a collective and its agent makes the entity model a particularly attractive lens through which to view the class action. Because they exercise little or no control over the litigation, it is difficult as a practical matter to see class members as an aggregation of individuals. This lack of individual say suggests a collective approach is the right one. The fairness hearing, right to appeal and to collaterally attack are the exceptions to this understanding.

A. The Lawyer Entrepreneur

The description of the class counsel as a type of entrepreneur follows very nicely from the entity model of the class action. The association between corporate management and the class action lawyer flows naturally from the diagnosis of the agent-principal problem, which was a staple of corporate law scholarship long before it was used to analyze the problems in class actions. The problem with the analogy is that its parameters are not quite clear.

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59. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 888–89 (1987).

60. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

61. Kenneth J. Arrow, *The Economics of Agency*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 37, 37–51 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

Consider first the analogy between the class action lawyer and the management of a corporation. This is a poor analogy for two reasons. First, a corporation is created by a legitimating governance structure, a feature that is missing in the class action. Management is appointed by the board of directors, which is elected by the shareholders. This gives both management and directors a certain theoretical legitimacy that the class action lawyer lacks. After all, the class counsel is a self-appointed leader that serves at the pleasure of the judge, drawing no legitimacy from the consent of the class itself.[62] Yet perhaps the analogy has more bite as a critique. Many prominent corporate law scholars have criticized the method by which directors are elected. Lucian A. Bebchuk, for example, has written that "shareholders do not in fact have at their disposal those 'powers of corporate democracy.' As a result, the shareholder franchise does not provide the solid foundation for the legitimacy of directorial power that it is supposed to supply."[63] Second, existing corporate governance structures do not seem to do a very good job of controlling the agents of the corporation as recent concerns about executive pay demonstrate.[64] Even if legitimacy and class member franchise were irrelevant or only a means to the end of improving settlement value in class actions, failures in corporate governance make it a poor model for addressing the agency problems in class actions.

A second analogy, which might be more fitting, is to associate the class action lawyer with in-house counsel. This analogy is not useful because the corporation's lawyer answers to the management and there is no management in the class action context. The exception that proves this rule is securities litigation, where a lead plaintiff is empowered to choose class counsel.[65] Even then it is by no means clear that the lead plaintiff is empowered to control class counsel the way that management can in the corporate context. If there were some kind of class member-management committee that could control the lawyer, the past misdeeds of in-house lawyers provide little solace that describing the role as in-house class counsel guarantees that the lawyer will look out for the best interests of class members.[66]

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62. *See* FED. R. CIV. P. 23(g)(1) (appointment of class counsel by the court).

63. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 676 (2007).

64. *See, e.g.*, Lucian A. Bebchuk, Martijn Cremers & Urs Peyer, *The CEO Pay Slice*, (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 679, 2010), *available at* http://www.law.harvard.edu/faculty/bebchuk/pdfs/Bebchuk-Cremers-Peyer_CEO-Pay-Slice_Sept2010.pdf. There is some hope for change on the corporate front but it is hard to see how readily applicable mechanisms such as staggered boards are to the class action context. *Cf.* Lucian A. Bebchuk, Alma Cohen & Charles C.Y. Wang, Staggered Boards and the Wealth of Shareholders: Evidence from a Natural Experiment (Feb. 3, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1706806 (finding that staggered boards tend to improve shareholder value).

65. *See* Coffee, *supra* note 48, at 300.

66. *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 17–25 (2002) (describing the role of lawyers in the Enron scandal); Matthew A. Smith, Note, *Advice and Complicity*, 60 DUKE L. J. 499, 515–17 (2010) (same).

A final analogy that has its origins in the business world is the idea of the class counsel as an entrepreneur. This analogy accounts for the fact that the lawyer runs the show: picking the client, defining the class, running the litigation, and proposing the amount of compensation to the judge.[67] John C. Coffee has made an excellent case for this approach, writing that "one better understands the behavior of the plaintiff's attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions."[68] Taking this analogy to its logical endpoint, scholars have recently proposed that in small claims class actions the entire settlement should go to the attorneys rather than be distributed among class members, in order to realize the deterrent rationale of consumer protection laws.[69]

The lawyer as entrepreneur analogy is in many ways satisfactory because it reflects the reality of practice in this area of the law. But it does not take account of any notion of fiduciary duty between the lawyer and the class and does not account for the provisions of the law directed at class members specifically, creating interests that the lawyer is obligated to protect. In other words, it kills off the client altogether despite what the law in fact requires. This problem is nicely illustrated by the proposal that the interests of the class client be taken out of consideration altogether and the award in any class action be given directly to the lawyer. Despite the appeal of this approach from the perspective of a deterrence rationale, it does not address the fact that the law provides for compensation of class members.[70] No consumer protection law I know of expressly allocates the proceeds of any litigation directly to the lawyers.[71] There are substantial costs to killing off the client in this way, even if it does describe the state of affairs on the ground in certain class actions.

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67. Of course there are legal limits on the creation of the class action; the lawyer is not permitted to pay plaintiffs or others who bring them cases. *Cf.* John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 1016–17 (2009).

68. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 683–84 (1986).

69. *See, e.g.*, Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010) (arguing that class action lawyers should receive 100% of the proceeds of class actions to create optimal incentives to bring deterrent small claims suits); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (arguing that in small claims class actions, "[a]ll that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions," not to whom it pays those costs).

70. *See* Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 498 (1996) (describing the problem of settlements providing little or no relief to class members with viable claims).

71. *See, e.g.*, 15 U.S.C. § 1681n(a) (2006) (imposing a civil penalty of between $100 and $1000 for violations of the Consumer Credit Reform Act of 1996).

B. The Public Servant

Courts sometimes say that the class counsel holds a position of "public trust."[72] This is the root of the conception of the class action lawyer as a public servant or a "private attorney general."[73] The class counsel as private attorney general supplements the work of public officials by bringing actions government lawyers do not have the resources to pursue.[74]

There are several problems with the private attorney general conception of the class action lawyer.[75] The first is the substantive law. While it is certainly true that many consumer protection laws have a deterrent function, and some even provide for statutory damages or fee shifting in order to realize this deterrent goal, these laws also require compensation to individual plaintiffs.[76] To the extent that compensation is *a* goal, albeit not the only goal, the lawsuit has to proceed at least in part on behalf of class members rather than the public at large. The lawyer in that case is not *only* a public servant but also a fiduciary to the class. Calling the lawyer a private attorney general does not solve the problem of how to define that duty.

Second, the incentive structure in the private attorney general model is flawed. These flaws are evoked by the pejorative term "bounty hunter."[77] The private attorney general is meant to supplement the enforcement of public attorneys general and regulatory agencies. To the extent that private attorneys general merely piggyback on regulatory work already done, they are not serving this supplemental enforcement and deterrence function.[78] Whether this is the case or not, just as whether there is in fact over-deterrence, is an empirical question that has not been satisfactorily answered. The rationale for "coattail" suits is that they further the deterrence goals of the law by increasing penalties to defendants and they compensate plaintiffs.[79] But if the lawyers accept lower settlements in order to obtain a benefit for themselves (at the expense of the class), then such "coattail" actions are rightly criticized. As Coffee has explained:

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72. *See, e.g.*, Stewart v. Gen. Motors Corp., 756 F.2d 1285, 1294 n.5 (7th Cir. 1985).

73. *See, e.g.*, Rubenstein, *supra* note 60, at 2130–31 (presenting a taxonomy of uses of the private attorney general concept and arguing for a more nuanced view of the clients the attorney is serving and what their interests are).

74. For example, in the debate over CAFA, fourteen state Attorneys General wrote in opposition to a notice provision in the Act that "class actions provide an important 'private attorney general' supplement to our efforts to obtain redress for violations of state consumer protection, civil rights, labor, public health and environmental laws." 150 CONG. REC. 14,366 (2004).

75. For a critique that has stood the test of time, see Coffee, *supra* note 1.

76. *See, e.g.*, 15 U.S.C. §§ 1681c(g), 1681n(a) (barring retailers from reprinting more than five digits of a customer's credit card number, providing a minimum of $100 in statutory damages, and allowing for attorney's fees for successful suits).

77. *See* Coffee, *supra* note 1, at 218.

78. *Id.* at 220–26. *See generally* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000).

79. *See generally* Erichson, *supra* note 78.

> The problem then is two-fold: First, when the private attorney general becomes a "free rider," society loses the promise . . . that private resources would supplement public efforts in the detection of law violations by bringing actions that otherwise would not have been initiated. Second, the ability of private law enforcement to create a credible penalty structure is undercut if the private watchdog can be bought off by tossing him the juicy bone of a higher-than-ordinary fee award in return for his acceptance of an inadequate settlement.[80]

The reason for these flaws brings us to the third criticism, which is that the private attorney general has no client to discipline her behavior.

The absence of a client to answer to is a serious flaw of the private attorney general approach, one that mimics the problems associated with the entrepreneurial model. They are really two sides of the same coin. The lawyer who is independent from any client discipline is more likely to settle for a suboptimal amount, more likely to work in a crowded field where the distribution of fees among the many lawyers who raced to the courthouse will dilute the incentive of lawyers to file suits in the future, and more likely to seek out cases based on governmental action because the cost of independently searching out clients and strong lawsuits is very high.[81] The risk that the class counsel would not live up to the public trust spurred a provision in CAFA requiring notice of class action settlements to appropriate state and federal officials.[82] This notice provision garnered significant criticism from state Attorneys General.[83] Although not opposed to the idea of notice itself, they worried that such a requirement might lull class members and judges into thinking that the state Attorneys General would protect absent class members' interests. Financial and administrative constraints limit the ability of state officials to review a settlement adequately and intervene if it is unfair.[84]

The fourth and final problem with the private attorney general model is that there is no universally agreed-upon definition of the "public good" by which her performance can be judged. As Austin Sarat has observed, "[t]he public interest is a notoriously slippery concept that generally does little or no analytic work."[85] In a pluralist society, there are multiple conceptions of the public good. For example, when lawyers bring consumer class actions against financial institutions, do these lawsuits deter future misconduct and compensate claimants for violations, or merely extract rent from the companies that will be passed on to consumers in the form of higher fees? If the former, these suits serve the public good. If the latter, they serve the private interests of the lawyers. As we do not have an empirical answer to

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80. Coffee, *supra* note 1, at 226.

81. *Id.* at 234–35; *see also* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 162–63 (2001).

82. 28 U.S.C. § 1715.

83. *See supra* note 74.

84. *See* Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1975 (2008).

85. Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 STAN. L. REV. 1491, 1497 (2002).

this question, we are left with a series of nearly baseless suppositions. This is why the debate about whether class actions are in the public interest is so dissatisfying.

Upon closer inspection, the public interest begins to look like the "vaguer sanctions of conscience," to use Oliver Wendell Holmes's phrase.[86] The law does not always make clear what the public interest is, or at least what conception of the public interest has been adopted by democratically elected bodies. It is much easier to deduce what is in the financial interest of the lawyer and what her private incentives must be than to determine what is truly in the "public interest." Consider class action suits for statutory damages. If a company has violated a consumer protection law with respect to a million consumers and the law provides a $1000 statutory penalty, the lawsuit will cost the company $1 *billion.*[87] Is pursuing such a penalty, even if it is permitted by law, in the public interest? Does the class action lawsuit lead to an absurd result, as some courts have held in striking down such suits, or does it realize the intent of the legislature which should only be amended by democratic processes?[88] Furthermore, the lawyers' private interests need not always be pecuniary. In the civil rights context, for example, lawyers have been accused of privileging their own ideological preferences over those of their relatively unorganized clients.[89]

III. A THOUGHT EXPERIMENT: THE PHANTOM CLIENT

The two most convincing approaches to the class action lawyer, as an entrepreneur and as a public servant, liberate the lawyer from her client. For this reason they are each an incomplete account for how the law simultaneously recognizes and ignores the class client. There is a way of integrating the law's conflicted approach to the class client and that is to understand the class action as a work of the lawyer's imagination. Perhaps the client was killed off, but still she returns to haunt the lawyer. The class is a phantom client.

What does it mean to say that the class counsel constructs the client as an exercise of imagination? What I mean by this is that the class definition, which is a requirement for the certification of a class, is a construct of the lawyer. This is the crucial insight of the "entrepreneurial" model of class action litigation. The lawyer defines the parameters of the class and, in so doing, also defines—sometimes in dialogue with the courts—the class's goals and ultimately its recovery. The class action is not the only context

86. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

87. *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 25–27 (2d Cir. 2003) (Newman, J., concurring) (discussing the due process implications of certifying a class action brought on behalf of one million cable subscribers under a privacy law that provided a $1000 statutory penalty to each absent class member).

88. *See id.*; *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103 (2009) (arguing against statutory damages class actions on due process grounds).

89. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

where the lawyer's construction of the client's goals might be questioned. It is merely on one extreme end of the spectrum of lawyer-client relationships.

But how does the lawyer construct this definition, which then becomes the class? Constructing the class is an act of imagination, that range of mental activities that relates to the individual's "capacity to conceive of objects or experiences not presently available to the senses."[90] From the perspective of a cognitive psychologist, imagination can mean the capacity for any "counterfactual process of thinking," that is, the construction of alternatives.[91] From the perspective of a social psychologist, imagination can mean the way "in which individuals gain emotional understanding" of others.[92] Finally, from a psychoanalytic perspective, imagination may be "the mind's creative capacity for conceiving of desires, needs, and wishes in words and images."[93] For the purpose of this Essay, it is enough to speak broadly of a creative mental process that allows us to see things not directly before us. This is what the class action lawyer must do for a class to exist at all.

Poets and lawyers often place law or reason in opposition to imagination. As the poet Wallace Stevens, who was also a lawyer, once wrote: "The reason (like the law, which is only a form of the reason) is a jealous mistress."[94] But law need not be understood as the opposite of imagination. In fact, sometimes imagination allows the goals of reason and of law to be realized. Imagination, in other words, may be the route to justice.

The Romanticist[95] poet Percy Bysshe Shelley explained:

> Ethical science arranges the elements which poetry has created, and propounds schemes and proposes examples of civil and domestic life: nor is it for want of admirable doctrines that men hate, and despise, and censure, and deceive, and subjugate one another. But poetry acts in another diviner manner. It awakens and enlarges the mind itself by rendering it the receptacle of a thousand unapprehended combinations of thought. Poetry lifts the veil from the hidden beauty of the world, and makes familiar objects as if they were not familiar.[96]

The Romanticist poets saw the world through a lens of the "double problem of making a new world and making it in the knowledge that man is both creative and limited, a doer and a sufferer, infinite in spirit and finite in

90. Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175, 177 (2010).

91. *Id.*

92. *Id.* at 177–78.

93. *Id.* at 178.

94. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1570 (1990) (quoting Letter from Wallace Stevens to Barbara Church (Sept. 29, 1952), *in* LETTERS OF WALLACE STEVENS, at 761 (H. Stevens ed., 1966)).

95. The proper usage of the terms "Romantic" and "Romanticism" has been the subject of intense debate. Here, I adopt by inference Jacques Barzun's definition, which defines Romanticism both by a set of artists, poets, and writers prominent during a historical period and an attitude or approach. *See* JACQUES BARZUN, CLASSIC, ROMANTIC AND MODERN 14–17 (2d ed. 1961).

96. PERCY BYSSHE SHELLEY, A DEFENCE OF POETRY 33 (1904).

action."[97] They saw themselves as undertaking a project of reconstruction and in this project valued the human traits of energy, moral enthusiasm, and original genius. As much as they saw the potential of man's creativity to overcome problems, they were keenly aware of "man's wretchedness."[98]

This duality is also a critical component of the problem facing the modern class action. Shelley's wife was Mary Shelley, most famous for writing the novel *Frankenstein*.[99] That monster, a creature of its creator's imagination and meant to evoke the dangers of modern science, has sometimes been used as a metaphor for class action lawyers' misconduct.[100] The lawyer's imaginative role may be analogized to two romanticist visions inspired by the two Shelleys: the savior of the world and the destroyer of it.

In more recent times, philosophers such as Martha C. Nussbaum have argued that imagination is necessary to achieving a just legal system because it allows us to empathize with others.[101] Nussbaum's argument is chiefly about the value of literature, but it might be applied to the imaginative faculty of any person, including a lawyer, who is put in the position of making a decision on behalf of another. Imagination, in this sense, is a form of reality testing. It allows people "to make realistic choices from among imagined alternatives."[102] But as Anne C. Dailey points out, striking the right balance between fantasy and reality is not always easy: "The creative imagination has a central role to play in producing alternatives to the present state of affairs. It also . . . can stray too far from reality and, if not controlled, can undermine the individual's ability to assess realistically the available options."[103]

Consider the role that imagination plays in the class action. To sustain a class action, the class needs to be defined. Who is to create this definition but the lawyer through a thought exercise? A lot is riding on this exercise of imagination. To the extent that the lawyer correctly identifies the parameters of the class and is able to construct a narrative about its shared interests, a class action may be sustained and wrongs remedied. But to the extent that the lawyer misidentifies the class or its interests, class members may be left without compensation or with less than they are entitled to. The lawyer might also disgorge so little from the defendant that the lawsuit has minimal deterrent effect and perpetuates injustice.

One example is the case where class counsel seeks to settle a lawsuit without seeking compensation for certain groups of class members. In *Mirfasihi v. Fleet Mortgage Corp.*,[104] for example, a lawsuit was brought

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97. BARZUN, *supra* note 95, at 17.

98. *Id.* at 16.

99. MARY SHELLEY, FRANKENSTEIN, at iii (Candace Ward ed., Dover Publ'ns 1994) (3d ed. 1831).

100. *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979).

101. *See generally* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995).

102. Dailey, *supra* note 90, at 189.

103. *Id.* at 187.

104. 356 F.3d 781 (7th Cir. 2004).

arising out of the sale of consumers' personal information without their permission.[105] In the settlement, a portion of the class received no compensation.[106] Defending this outcome, both sides argued that the uncompensated class members received vindication, in the form of the satisfaction that defendant did pay something to someone, even if not to them.[107] The court rejected this rationale, explaining:

> Such a claim would not be a sure bet, but colorable legal claims are not worthless merely because they may not prevail at trial. A colorable claim may have considerable settlement value (and not merely nuisance settlement value) because the defendant may no more want to assume a nontrivial risk of losing than the plaintiff does.[108]

The class counsel in this case imputed interests to the class membership, as did the judge. But both were exercises of imagination.

Similarly, albeit with opposite results, in *Brown v. Ticor Title Insurance Co.*,[109] the U.S. Court of Appeals for the Ninth Circuit affirmed the use of a mandatory class action to resolve antitrust claims against a title company through injunctive relief rather than compensatory damages.[110] Putative class members attempted to file their own lawsuit, arguing that their money damages claims could not be resolved through a mandatory injunctive class action. The court found that although they had been adequately represented in the first suit for purposes of foreclosing their claims to injunctive relief, because they did not have the right to opt out of the first lawsuit they were not precluded from pursuing their monetary damages claims.[111] This case raises the question of how much the initial act of imagination should matter when it emerges that the actual class members, who have been trapped within the construct created by the class's lawyers, disagree with the lawyer's decisions.

All class actions share a basic common element: the interests of the class are imputed rather than ascertained, as no provision in the procedural law requires a lawyer to canvass the class and find out individual members' shared desires. This act of imagination is the most pronounced in two of the more controversial aspects of class actions: fluid recovery and *cy pres* remedies. Fluid recovery encompasses various forms of indirect recovery to a group of persons similarly situated but not identical with the class.[112] For example, when a public transit system overcharges its customers, it is

105. *Id.* at 782.
106. *Id.* at 782–83.
107. *Id.* at 783.
108. *Id.* Ultimately the court found that the claims discussed in this opinion were in fact worthless. *See* Mirfasihi v. Fleet Mortg. Corp., 551 F.3d 682, 686–87 (7th Cir. 2008) ("We are disheartened that the litigation by the information-sharing class has been allowed to drag on for eight years, when it had no merit—and that as a matter of law, without need to take evidence.").
109. 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) (stating writ of certiorari was "improvidently granted").
110. *Id.* at 387, 389.
111. *Id.* at 390–91.
112. 3 CONTE & NEWBERG, *supra* note 28, § 10:17.

impossible to determine who those persons were and to compensate them directly. Instead of attempting to find the original victims, the court might order the transportation authority to lower fares for present riders for a period of time.[113] Courts have largely rejected fluid recovery schemes by focusing on the narrowest possible definition of the class and requiring a tight linkage between the harm to class members and the remedy.[114]

Courts have been more open to *cy pres* distributions in the settlement context, although these too remain highly controversial.[115] The doctrine allows the court to direct settlement money that otherwise cannot go to individual class members to the next best use. After the court or lawyers have attempted to find individual class members to provide them with their recovery, there may be monies left over because some class members cannot be identified. Those sums may be distributed in ways that reflect the spirit of righting the wrong at issue.[116] While some courts have permitted funds to be given to uses unrelated to the litigation,[117] the general standard for *cy pres* distributions is that there be a nexus between the proposed use of the fund and the class on whose behalf the suit was brought or between the proposed use and the underlying purpose of the statutes that the lawsuit was brought to vindicate.[118]

Cy pres distributions have been criticized for violating the ideal that litigation is meant to compensate individuals who were harmed. For example, Judge Richard A. Posner has written:

> In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members. There is no indirect benefit to the class from the

113. *See, e.g.*, Democratic Cent. Comm. v. Wash. Metro. Area Transit Comm'n, 84 F.3d 451 (D.C. Cir. 1996).

114. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

115. *See* BLACK'S LAW DICTIONARY 444 (9th ed. 2009). *Cy pres* translates into "as near as" and is a concept imported from the law of trusts and estates.

116. *See, e.g.*, *In re* Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1031–32 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001).

117. *See, e.g.*, Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999).

118. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 424 F.3d 132, 147–49 (2d Cir. 2005) (approving the district court's *cy pres* distribution to the neediest members of the class of Jewish Holocaust victims, the majority of whom were located in the former Soviet Union); Six Mex. Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1308 (9th Cir. 1990) (rejecting a proposed *cy pres* distribution to the Inter-American Fund for indirect distribution to Mexico because it "benefit[ed] a group far too remote from the plaintiff class"); Schwartz v. Dall. Cowboys Football Club, Ltd., 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (rejecting *cy pres* distribution to law school clinical program because it did not "touch upon the subject matter of the lawsuit (football or sports-related activities)"). Reasonable minds can differ on the question of whether the recipient of a *cy pres* distribution in fact shares a nexus with the underlying suit. *See, e.g.*, Powell v. Georgia-Pacific Corp., 119 F.3d 703, 707 (8th Cir. 1997) (approving a distribution in a discrimination class action to establish a scholarship fund for minority students in the same geographic area in which the class members lived); *Schwartz*, 362 F. Supp. 2d at 577 (approving a *cy pres* distribution in an antitrust class action to NFL Youth Education Town Centers which "ha[d] some involvement in the same area of commerce as the subject matter of the law suit (football or sports-related activities)").

> defendant's giving the money to someone else. In such a case the "cy pres" remedy . . . is purely punitive.[119]

This is not quite right because the law may recognize a deterrence rationale for the award of damages that is not a punishment, at least in the retributive sense of the term. In any event, the line between compensatory and punitive damages is conceptually difficult to draw because both can serve a deterrent function. There is no logical requirement that a deterrent remedy need also compensate the affected persons directly. It is certainly possible to imagine class members consenting to the redistribution of small amounts of compensatory damages to other, more beneficial uses. The problem is that the class action rule does not provide a mechanism for finding absent class members and polling them on this issue. Therefore we must ask: is the act of imagining the next best use beneficial or detrimental to the class and society as a whole?

There is both a positive side and a negative side of the construction of a class client out of an unformed number of individuals. On the positive side of the ledger, the act of imagination allows lawyers to pursue cases, especially small claims actions, that would not be brought otherwise because class members do not know the law and, in any event, the amounts at stake are too small to justify independent suits (even in small claims court). On the negative side, the class action allows the lawyer to construct the clients' interests in ways that benefit the lawyer at the expense of the clients. The more significant the outcome of the lawsuit to the lives of individuals, the more serious the consequences of the act of imagination can be for the clients. Even the most lauded class action litigations, such as injunctive actions seeking to integrate public schools in the South, have been criticized on these grounds. Derrick Bell wrote in the 1970s that the National Association for the Advancement of Colored People (NAACP) had assumed

> a perpetual retainer authorizing a lifelong effort to obtain racially balanced schools. . . . [and] fail[ed] to reflect any significant change in representational policy from a decade ago, when virtually all blacks assumed that integration was the best means of achieving a quality education . . . , to the present time, when many black parents are disenchanted with the educational results of integration.[120]

Lawyer imagination spurs the creation of new doctrines, thus the allowance in Rule 11 for the pursuit of novel legal claims.[121] But it can also treat with brutal force the heterogeneous interests of class members.

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119. Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004); *see also* Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 622–23 (2010) (arguing that *cy pres* awards are an example of class actions exceeding the bounds of the law in part because they create the illusion of class member compensation).

120. Bell, *supra* note 89, at 492.

121. *See* FED. R. CIV. P. 11(b)(2) (requiring that lawyers certify that the claims and defenses in a given suit are "warranted by existing law or by a nonfrivolous argument for . . . establishing new law").

Imagination is necessary to the creation of the class action but also makes us wary of it. In the end, the problem with class actions is not too much imagination, but the direction that imagination takes.

Part of what makes the act of imagination, the creation of the phantom client, possible is the self-interest of the lawyer. It is the lawyer, after all, who is engaged in the act of imagining the needs, wishes, and desires of the phantom client. In one of his most beautiful poems, Wallace Stevens wrote of a man playing on a blue guitar: "Things as they are/Are changed upon the blue guitar."[122] Tough-minded realism is represented by "things as they are" and tender-minded idealism by the "blue guitar."[123] These opposites exist simultaneously. Stevens does not try to find a synthesis for this dialectic, but recognizes that both things exist at the same time. So too does the class action lawyer experience both the demands of self-interest and fiduciary duty.

It is a truism in class action scholarship that the interests of the lawyer drive the class action; this is also the greatest criticism of class actions. A virtuous lawyer would leave little for scholars to write about, after all. Consider the following quote from the Russian author, Nikolai Gogol:

> So I haven't chosen a man of virtue for my hero, and I can explain why: the poor virtuous man must be given a well-earned rest, because the very phrase *virtuous man* is beginning to sound shallow on people's lips, because the virtuous man is being turned into a sort of horse and there's no author who hasn't ridden him, urging him on with his whip or whatever comes to hand. And so, they've exhausted the virtuous man; there's not even a trace of virtue left in him, and indeed he has nothing left but skin and ribs. And all this because they've used the virtuous man hypocritically, because they don't respect him! Now I feel the time has come to make use of a rogue. So let's harness him for a change![124]

In the law of class actions by contrast, we have been harnessing the rogue for some time. Class action lawyers have been seen by scholars and judges as a type of Holmesian bad man "who cares only for the material consequences which [knowledge of the law] enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[125] This approach, as Robert W. Gordon points out, "discards the traditional roles for lawyers as seekers of justice, social mediators, and curators of the legal framework."[126] Holmes himself did not intend the "bad man" to represent a complete picture of the capacity of the lawyer in society.[127] In an address to the Suffolk Bar Association in 1885, Holmes described a rousing vision of the lawyer's relationship to law: "Nor will his task be done until, by the

122. WALLACE STEVENS, *"The Man with the Blue Guitar," in* THE COLLECTED POEMS OF WALLACE STEVENS 165 (Vintage Books 1990) (1954).

123. *See* Grey, *supra* note 94, at 1571.

124. NIKOLAI GOGOL, DEAD SOULS 251 (Andrew R. MacAndrew trans., 1961).

125. Holmes, *supra* note 86, at 459.

126. Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1018 (1997).

127. *See* Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 433–34 (1998).

farthest stretch of human imagination, he has seen as with his eyes the birth and growth of society, and by the farthest stretch of reason he has understood the philosophy of its being."[128]

Proceduralists ought to be concerned that in our attempts to "harness the rogue" class action attorney, we assist in turning him into one. When proposals for class action reform focus solely on incentives to align the interests of class members with the lawyer, an assumption that the lawyer's role is purely self-interested becomes imbedded in the law, encouraging self-interested behavior. But lawyers' self-interest is not enough to produce beneficial results for class members. Because the class is formed, especially in the class action context, by the lawyer's imagination, it matters whether that lawyer is a rogue or a hero.

But can the class action lawyer be something other than a rogue or a bad person maximizing her own self-interest? Is the only counterpoint the "vaguer sanctions of conscience" that the lawyer's duty to the public trust evokes? Is it possible for a virtuous class counsel to represent responsibly a disaggregated and dispersed group of persons to whom that lawyer cannot really answer directly because of the structure not only of the class action rule but also of modern life? These questions have been at the heart of the study of professional responsibility for the last twenty years. Scholars have tried to find something more in the lawyer than a rational self-maximizer who pursues private goals with the hope of some public gain as a side benefit.[129] In the class action scholarship, there have been a few voices trying to reconstitute the phantom client.[130] But for the most part class action scholars have accepted what seem like indisputable facts: the client is a phantom—as good as dead—and the lawyer is a rogue.

IV. THE IMPLICATIONS OF THE PHANTOM CLIENT THEORY FOR THE TWO VIEWS OF THE CLASS ACTION AND A MODEST PROPOSAL

The fact that the class client is only a phantom helps us understand the tension expressed in the doctrine between the aggregation of individuals view and the entity view of the class. The structure of the class action rule (and sometimes the structure of substantive laws that lawyers seek to vindicate using that rule) is such that there is no cohesive client on which to rely. This is the reason for the various doctrines that support the entity view of the class action: settlement may be approved over the objection of individual class members; individual class members are not entitled to full disclosure with respect to the content of side settlements entered into by

128. OLIVER WENDELL HOLMES, *The Law*, *in* COLLECTED LEGAL PAPERS 25, 27 (1920).

129. *See generally* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) (favoring a lawyer's duty to build just institutions); Russell G. Pearce, *Professional Responsibility for the Age of Obama*, 22 GEO. J. LEGAL ETHICS 1595 (2009) (reviewing LUBAN, *supra*).

130. *See, e.g.*, Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. (forthcoming 2011) (manuscript at 12–26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552462.

class counsel; and myriad other rules policing the lines between absent class members and persons with a decision-making role in the class action.

At the same time, the procedural law seeks to help the lawyer construct that client by giving class members a voice. These procedural rules include soliciting class members' views at fairness hearings, allowing class members to collaterally attack settlements where representation was inadequate, and allowing objecting class members to appeal without formally having to intervene. All this is a peripatetic attempt to bring the lawyer into line by giving form to a client that really does not exist. The lawyer unmoored from the client, as we have seen, is a recipe both for beneficial exercises of imagination and bad behavior.

So what is to be done about the phantom client? The tension between the aggregation and entity views of the class action, like the tension between the entrepreneur and public servant views of class counsel, is not resolvable. The lawyer is both the savior of the public interest and the destroyer of it. Incentives, in the form of fee regimes that reward lawyer actions which inhere to the benefits of the class, and monitoring, in the form of court oversight and the encouragement of objectors, are key components to ensuring that the lawyer acts for the benefit of the class even as class counsel seeks to make a fortune from the litigation.[131] But there is one more component that is rarely addressed because it seems so "soft," although I think upon reflection it is quite important, and that is the role of virtue in lawyering.[132]

The lawyer is sometimes a rogue, but the more our system accepts this as true and seeks to harness the rogue, the more our system creates roguish behavior. Instead of only looking at the lawyer as a rogue, it might be useful (and at any rate it would be refreshing) to see the lawyer as capable of redemption. In addition to being a "bad man" seeking to maximize self-interest, there should be room to see the lawyer as a "custodian of the law."[133] By this I do not mean that lawyers should simply do what the law requires, as though what the law requires is obvious and uncontroversial. Nor do I mean that we ignore the risk of rent-seeking behavior when we know that incentives are necessary because the class is merely a phantom. Instead, I mean that lawyers can be catalysts for discussions—in court or in public debate—about what aims the law seeks to achieve and how well it achieves them. Lawyers can help bring to the surface the competing goals of the law, such as compensation and deterrence, and the resolution of any individual class action can be seen as part of an ongoing conversation

131. *See generally* Lahav, *supra* note 48 (making detailed, specific recommendations for improving class action governance).

132. I use the term "virtue" here very loosely, but other scholars have presented a more rigorous analysis of lawyer-virtue ethics. *See, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty To "Seek Justice,"* 82 NOTRE DAME L. REV. 635 (2006).

133. W. Bradley Wendel, *Professionalism As Interpretation*, 99 NW. U. L. REV. 1167, 1178 & n.31 (2005).

between citizens, the bar, the judiciary, and the legislature about what the law is and ought to be.

One way to begin this conversation is by seeing the phantom client as a resource for opinions with respect to the direction of the class. Rather than relying solely on the class representative to represent the "interests" of the class, this approach would shift the locus of the inquiry into the class's interests to the absent class members themselves. This could be done by polling the class. The lawyer's role in this poll is to frame the debate, just as the lawyer frames the parameters of the class itself and frames issues for clients in ordinary binary litigation. Lawyers frame the debate by determining what questions ought to be asked of the class and how to ask them.

Polls have been suggested before.[134] As far as I can tell, the suggestion that class counsel poll the class has never been implemented although a poll that is based on a sufficiently large, randomly selected sample of class members should not be prohibitively expensive. One reason for the omission is the Rule itself. Rule 23 does not require the lawyer to canvass the class but instead relies on a very thin notion of representation.[135] Representation can mean many things and need not invoke popular self-government.[136] In the class action context, the class representative is merely a person authorized to act on behalf of a constituency. The basis for this is that the class representative *looks like* the class in relevant ways by virtue of meeting the typicality and adequacy requirements of Rule 23(a).[137]

Just because the class representative is a sort of mirror of the class does not mean she is not a distorted one.[138] To the extent that reasonable class members could differ about the litigation in various ways, determining where the lines of disagreement are is the first step toward resolving those differences. That can only be done by going to class members themselves. This approach opens up a can of worms from the perspective of class counsel and the judge. But that difference of opinion (and its resolution) is unavoidable if the fairness hearing is to be robust. Ascertaining who the

134. *See* Bell, *supra* note 89, at 492. In the article, Bell quotes the general counsel of the National Association for the Advancement of Colored People (NAACP) as saying that he cannot be expected to poll every class member before filing suit. *Id.* But, of course, every class member need not be polled, only a sample randomly selected and large enough to yield significant results. *Cf.* Alexandra D. Lahav, Rough Justice 24–29 (Aug. 9, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1562677 (discussing optimal methods for sampling in litigation).

135. *See* Lahav, *supra* note 48, at 101–03 (discussing the limited guidance provided by Rule 23 and scholarly responses).

136. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 2 (1967).

137. FED. R. CIV. P. 23(a).

138. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (stating that whether class should be divided into multiple, independently represented subclasses depends on whether the class "has sufficient unity so that absent members can fairly be bound by decisions of class representatives"); Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999) (affirming settlement in the face of objections from the class representative); *see also* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375 (2000) (discussing the representative as a "mirror" of the class).

class is and the parameters of its interests is crucial to a fair resolution of a class action lawsuit.

This policy proposal is one modest change that the reconceptualization of the class as a phantom client inspires. Polling does not resolve the contradictions in the law of class actions or the difficulty of determining who this phantom client is. In fact, if members of the class who are polled disagree among themselves or with counsel as to the purpose of the litigation or their preferred outcome, this proposal only complicates an already complicated litigation.

To avoid or bury conflict is not the answer. The philosopher Stuart Hampshire argues that the management of conflict, rather than the resolution of it through substantive principles, is the hallmark of a just society.[139] I disagree with Hampshire to the extent he implies that substance and procedure can be separated and that universal procedural principles can resolve disputes without recourse to substantive principles.[140] Nevertheless, there is something to be said for the role of litigation in managing conflict as part of the maintenance of a just society and a just legal system.[141] The model for resolving conflict ought to be dialogue, not repression. Hampshire's observation that there is no permanent harmonious equilibrium in a pluralist society,[142] strikes me as very apt to the class action context. The class action is a process, and one that needs to give some kind of form to the phantom class. We need not resign ourselves to the idea that this form comes only from the self-appointed lawyer or class representative who acts largely for their own personal interests. Instead, we can harness this process to aid in the class counsel's (and the class representatives') reflection about the ultimate goals and needs of the phantom client.

Legal philosopher Benjamin C. Zipursky has written that "the perception that one's integrity is under attack—the pangs of conscience and self-reproach felt, from time to time—may actually be a positive force in the life of the lawyer."[143] These pangs can only be felt when there is the higher expectation of virtuous conduct. The first step to encouraging that more virtuous class counsel is to commence a dialogue about the purpose, scope, and ultimate goals, not only of the class action device, but of the class she seeks to represent.

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139. *See generally* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000).

140. *Cf. id.* at 79, 95–96.

141. *Id.*

142. *See id.* at 3–4.

143. Benjamin C. Zipursky, *Integrity and the Incongruities of Justice: A Review of Daniel Markovits's* A Modern Legal Ethics: Adversary Advocacy in a Democratic Age, 119 YALE L.J. 1948, 1990 (2010); *see also* Alexandra D. Lahav, *Absence Makes the Heart Grow Fonder: Dead Souls, Phantom Clients and the Modern Class Action*, 40 STUD. IN L., POL. & SOC'Y 153 (2007) (arguing that the class action lawyer must be in a constant state of questioning her aims and goals).