Fordham Law Review

Volume 64 | Issue 4 Article 27

1996

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Cover Page Footnote

J.D. 1985, University of Pennsylvania. Between 1987 and 1995 the author served as staff counsel for the Children's Rights Project of the American Civil Liberties Union and in that capacity litigated class-action, foster-care reform cases around the country. The views expressed in this Article are those of the author and do not reflect ACLU policies or positions.

THE ETHICAL LEGITIMACY OF CLASS-ACTION, INSTITUTIONAL-REFORM LITIGATION ON BEHALF OF CHILDREN: A RESPONSE TO MARTHA MATTHEWS

*Christopher Dunn**

INTRODUCTION

IN an effort to defend "structural reform" litigation from the charge that it is little more than a vehicle for activist lawyers to use children to override legitimate legislative choices, Martha Matthews suggests a number of ways through which plaintiffs' counsel in these cases can do a better job of ascertaining and representing the interests of children class members.[1] Unfortunately, her suggestions, though likely to improve representation, do little to advance the effort to give client children a greater say in this type of litigation. The good news, however, is that this does not undermine the ethical legitimacy of this work.

I. THE PROBLEMS IN ASCERTAINING AND REPRESENTING THE PREFERENCES OF CHILDREN IN STRUCTURAL REFORM CLASS-ACTION LITIGATION

As Matthews notes, lawyers encounter special problems when representing children in class-action cases seeking to reform government systems such as mental-health systems, foster-care systems, and juvenile-detention systems—cases she refers to as "structural reform" cases.[2] These problems fall into two categories: those endemic to representation of children and those endemic to representation of classes.

As an initial matter, attorneys in children's litigation face the challenge of representing clients who, by virtue of their maturity, may be incapable of forming or expressing informed and rational judgments about the issues that are the subject of the representation. Though most classes will include children who will be able to form and express judgments, they also will include large numbers of children who, as

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1. See Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Client's Class-Action Cases*, 64 Fordham L. Rev. 1435 (1996).

2. *See id.* at 1436 n.2 (citing Owen M. Fiss as the scholar who first coined the term "structural reform").

Matthews puts it, "cannot state their own needs and desires."[3] For example, class actions on behalf of abused and neglected children will include many infants and toddlers who are incapable of developing useful judgments.

Beyond the issue of client capacity in structural-reform litigation are problems peculiar to class actions seeking injunctive relief on behalf of clients in a variety of situations, as is typical of structural-reform litigation. As Matthews observes, such cases involve hundreds or even thousands of clients whose different situations suggest different interests.[4] Thus, using again the foster-care reform case that Matthews discusses, some children class members may need improved investigations into reports of suspected abuse, other children may need better foster homes, other children may need improved adoption services, and yet other children may have families who need material assistance so the child can return home from foster care. Each of these situations suggests a different set of client interests.

Recognizing these two problems, Matthews proposes a variety of approaches that lawyers representing children in structural-reform litigation can employ to increase client control and to mediate potential conflicts. In response to the client-control problem, Matthews suggests (1) that counsel educate themselves about "child and adolescent development" so as to make attorney communication with child clients as meaningful as possible;[5] (2) that counsel use a combination of techniques—such as client interviews, polls, group meetings, and even public hearings—to solicit client opinions;[6] (3) that counsel pay particular attention to the views of named plaintiffs as well as to the views of adults—parents, guardians,[7] even defendants—who are interested in the litigation;[8] and (4) that counsel employ "the values of 'client-

3. *Id.* at 1442; *see also id.* at 1459 (stating that Model Rule 1.4 "should be interpreted as creating a duty to use all feasible means to communicate with and solicit the views of child clients").

4. *Id.* at 1446-48. This encompasses the problem of future unknown class members that Matthews discusses, as these children simply have different interests by virtue of the fact that they have not yet joined the class.

The potential attorney-based conflicts raised by Matthews seem to present a set of issues unrelated to the structural-reform context (though they arise in it). The question of pressure on attorneys to settle cases and get fees as opposed to engaging in protracted litigation, *see id.* at 1447-48, flows from the payment arrangement between the client and the lawyer; attorneys engaged in personal-injury representation on a contingency basis are under the same pressure as are public-interest attorneys litigating structural-reform cases. As for the question of pressures created by the policies of organizations employing attorneys conducting structural reform litigation, *see id.* at 1448, this flows from the employer/employee context in which many lawyers operate (be they employed by law firms, the government, or corporations) rather than on any peculiar aspect of structural-reform litigation.

5. *Id.* at 1458.

6. *Id.* at 1460, 1462.

7. *Id.* at 1460.

8. *Id.* at 1467.

centered lawyering.' "[9] As for mediating the diverse interests amongst class members, Matthews proposes (1) that counsel study "available social-science and developmental literature on the impact of alternative approaches to the children's situations;"[10] (2) that counsel make unusual efforts "to disclose any emerging conflicts to the court at all stages of the litigation"[11] and "never stifle or conceal any hints of emerging dissent"[12] within the class; and (3) that counsel consider strategies other than litigation to obtain appropriate relief for their clients.[13]

Most attorneys and commentators probably would agree that these steps might well enhance the quality of representation in structural-reform litigation. The suggestion, however, that this is a program for solving the client-control and divergent-interest problems identified by Matthews seems misguided to me.

Looking first at the proposed client-control strategies, the suggestions that lawyers should become more sophisticated in interacting with child clients and should employ a mix of techniques for collecting information about client preferences are useful only if client preferences exist to be communicated and collected; as Matthews points out, however, structural-reform litigation on behalf of children presents the unique feature that many of the clients have no formed or expressible preferences, and thus even a perfect system for gauging client preferences is useless for these clients and thus cannot solve the client-capacity problem. Similarly, while Matthews's suggestion that counsel pay particular attention to the views of the named plaintiffs and of adults interested in the litigation may give the attorney more information about other people's opinions of class member preferences, it does not help with the client-control problem; rather, it simply shifts the problem to another group of persons who appear no more able than class counsel to make the determinations that Matthews seeks.[14]

The class-conflict mediation approaches raise similar problems. The suggestions that counsel become more sophisticated about understanding the impact of certain remedies on children and that they make unusual efforts to disclose emerging conflicts presumably would

9. *Id.* at 1461.
10. *Id.* at 1462.
11. *Id.* at 1463.
12. *Id.* at 1464.
13. *Id.* at 1470. Matthews also discusses potential limits on class certification, but she ultimately takes no position on this and thus does not appear to be urging this as a strategy for resolving possibly diverging interests within classes certified in structural-reform litigation. *See id.* at 1465-66.
14. This problem is compounded with the named plaintiffs in that they may lack the requisite decision-making capacity. And even if named plaintiffs could form and express rational judgments bearing on the representation, the views of a handful of children selected by plaintiffs' counsel from amongst a class of hundreds or thousands should not necessarily be accorded any special weight, as Matthews herself acknowledges. *See id.* at 1447.

enhance the knowledge of attorneys and courts about the existence and nuances of divergent interests amongst class members. Matthews, however, does not explain how these approaches will assist the attorney in actually reconciling those divergent interests. In a similar vein, the suggestion that counsel consider alternatives to litigation—even if relevant[15]—simply suggests another fault line that may run through a class without explaining how class counsel might bridge that gap.

II. The Ethical Legitimacy of Class-Action, Structural-Reform Litigation on Behalf of Children Should Not Be Assessed Using Traditional Ethical Standards

Though Matthews's proposals do not remedy the problems of limited client control and divergent class interests in structural-reform litigation on behalf of children, I do not share her concern that these problems undermine the ethical legitimacy of such litigation. Unlike Matthews, I do not accept that attorneys doing this work "must apply ethical norms premised on a single client with articulated interests" to their representation of children in these cases.[16] Rather, I start from the proposition that such norms cannot be applied to this work, which then leads me to the question of alternative, appropriate ethical standards that might apply to structural-reform litigation.

A. *Traditional Norms Concerning Client Control and Uniform Client Interests Cannot Be Applied to Structural-reform Litigation on Behalf of Children*

Despite Matthews's commendable attempt to bring structural-reform litigation representation within the bounds of traditional norms of client control and uniform client interests, her effort is unavailing. This shortcoming reflects less on the merits of her proposals and more on the difficulty of the task.

First, class control is not possible in these cases. As Matthews notes, many of the clients will, by virtue of age, be too immature to form or express rational judgments about any subject, and no amount of sophisticated data collection or consultation with other adults can change this. Moreover, structural-reform litigation presents significant client-capacity problems beyond those that Matthews suggests, for even developmentally mature child class members will have little to contribute to the types of decisions that must be made in this type of litigation: What limits should be placed on worker caseloads?

15. To the extent that Matthews's article is intended to explore ethical obligations flowing from an attorney-client relationship, the question of mediating class conflicts through advocacy other than litigation does not seem to relate directly to the topic on hand as no class attorney-client relationship exists in the absence of class certification, which can occur only in the context of litigation.

16. *Id.* at 1437.

What training should workers receive? How many days should be permitted for the development of case plans? Which consultants should be retained to develop an information system? Though counsel in these cases must be well-informed about the interests and needs of children class members, this is litigation in which the notion of client control is meaningless.

Uniform client interests in structural-reform litigation are also unattainable. These cases proceed with the recognition that "structural" problems deprive children enmeshed in government systems of legally mandated benefits and thus that the legal violations for any child or group of children can be remedied only through "structural" reform. Because such reform is best obtained after a showing of a broad pattern and practice of legal violations and because target government systems encompass children in a wide variety of situations, these suits necessarily include children who may have a wide range of interests.

Thus, returning to the foster-care context as an example, individual children in state, foster-care custody have legal rights to a variety of services, including written case plans, appropriate medical services, safe and appropriate placements, and services designed to return children home or to allow them to be adopted if returning home is not possible. The single state agencies that have custody of these children often fail to provide these legally mandated services because of structural problems such as the failure to employ sufficient numbers of qualified and trained social workers, the failure to recruit sufficient numbers of foster and adoptive parents, and the failure to develop necessary service resources. The only way to remedy the legal violations caused by these structural problems is to bring a class action on behalf of all children in a jurisdiction's foster-care custody, as such a suit allows advocates to adduce evidence of a broad pattern and practice of legal violations that in turn will support broad relief targeted at the structural problems. Such a suit, however, necessarily encompasses children who, while "similarly situated" for Rule 23 purposes[17] by virtue of being in the foster-care custody of a single state agency, nonetheless find themselves in different circumstances—some needing case plans, some needing foster homes, some needing adoptive homes, some needing to go home, and some needing medical services. Structural-reform litigation thus necessarily encompasses children with linked but varying interests.

B. *An Alternative Approach to Ethical Considerations for Guiding the Representation of Children in Structural-reform Litigation*

If one accepts that traditional notions of client control and uniform client interests cannot be applied to structural-reform litigation, one

17. *See* Fed. R. Civ. P. 23(a)(4).

then must consider alternative ethical norms. Though this is not the forum and I am not the person to propose a new set of standards for attorneys representing children in structural-reform litigation, I do have some suggestions about ways in which attorneys and courts can respond better to the client-control and divergent-interest qualities inherent in this work so as to assure that child plaintiffs in structural-reform litigation receive effective, appropriate, and ethical class representation.

* *Counsel Should Have Substantive Expertise in the Area.* Given client incapacity, plaintiffs' counsel must have the substantive knowledge necessary to make decisions on behalf of the class. Whether by training, experience, or even access to experts, every lawyer undertaking structural-reform litigation on behalf of children should have a specialized understanding of the substantive issues that are the subject of the litigation, be those issues related to child welfare, mental health, juvenile detention, or other areas.

* *Counsel Must Make an Unusual Effort to Identify the Interests of Plaintiff Class Members.* Because counsel in these cases will need to make decisions on behalf of class members and because the class members will know little about the facts that are relevant to the litigation, attorneys in these cases should be obliged to make unusual efforts to inform themselves of the factual circumstances of the class members. Through consultation with interested adults (be they parents, advocates, guardians, or others), review of documents, inspection of facilities, and interviews with (or depositions of) relevant state officials, attorneys in structural-reform litigation should be expected to engage in extensive fact gathering so as to maximize their ability to make informed decisions on behalf of their clients.

* *Counsel Must Have the Ability to Undertake Structural-reform Litigation.* In light of the lack of client control of structural-reform litigation, the potentially broad impact of this work, and the fact that children cannot opt out of these classes, lawyers prosecuting these cases should have a special duty to assure that they are capable of undertaking this litigation. First, they need to have the litigation experience to handle complex cases that often involve massive amounts of discovery and extensive substantive litigation that usually is based on novel and difficult legal theories. Second, they need to have the financial resources to litigate to conclusion cases that can cost hundreds of thousands of dollars. Finally, they must have the ability and commitment to stick with these cases for many, many years, as implementation of re-

form obligations—whether court ordered or negotiated—has proven to be an extremely slow process that requires considerable energy and diligence from plaintiffs' counsel. Counsel should also be under a special obligation to inform the court immediately if circumstances change such that counsel no longer is able to continue aggressive prosecution of the case.

* *Courts Should Scrutinize the Qualifications of Counsel Before Certifying a Class.* Though the special expectations of counsel listed above might be reflected in formal ethical standards, courts also have a role to play in protecting the interests of children class members in structural-reform litigation. Of paramount importance, courts should use the class certification stage to assure themselves that counsel seeking to represent a class have the expertise, resources, and commitment to undertake this representation. Judicial concern about class certification in these cases should focus less on the scope of the proposed classes and much more on the requirement of Rule 23 that the attorneys "will fairly and adequately protect the interests of the class."[18]

* *Courts Should Make Unusual Efforts to Assess the Propriety of Relief.* Given the potentially diverse interests within the classes certified in structural-reform litigation and the limited client input, courts should go to great lengths to assess the appropriateness of proposed relief. Whether the relief is negotiated and thus triggers a fairness hearing conducted pursuant to Rule 23(e)[19] or is court-ordered, the court should make unusual efforts to solicit the input of persons or entities able to offer meaningful comments about the proposed relief. The court should also consider the appointment of experts pursuant to Rule 706 of the Federal Rules of Evidence[20] to assist it in formulating court-ordered relief or in assessing relief proposed by the parties. The court may also need to inquire about the details of the fact-finding done by plaintiffs' counsel prior to any settlement so as to assure itself that counsel is sufficiently informed about the interests of the class members.

* *Courts Should Take Unusual Steps to Assure that Counsel are Litigating Cases Diligently.* Given the lack of client control, courts need to make special efforts to assure that attorneys representing children in structural-reform litigation are

18. *Id.*

19. *See id.* 23(e) (requiring notice of a proposed dismissal or compromise of a class action to all members of the class prior to the dismissal or compromise).

20. *See* Fed. R. Evid. 706.

pursuing their clients' interests aggressively. Whether this is done through regular status conferences, written submissions to the court, or other procedures, courts have a special obligation in these cases to assure ongoing and aggressive representation. This is particularly important in the post-judgment phase, in which the energy that goes into these cases often lags.

CONCLUSION

Matthews correctly identifies two major challenges that confront lawyers involved in structural-reform litigation on behalf of children: lack of client control and diverse intraclass interests. Though her proposals do not solve these problems, the problems themselves do not have the ethical implications that concern Matthews; rather, they are inherent in this litigation. Consequently, the more fruitful response to this situation is to consider a new set of standards to guide the lawyers and courts involved in these cases.