

4-1-1976

Vindicating the Public Interest through the Courts: A Comparativist's Contribution

Mauro Cappelletti
University of Florence

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Comparative and Foreign Law Commons](#), [Consumer Protection Law Commons](#), [Intellectual Property Law Commons](#), and the [Litigation Commons](#)

Recommended Citation

Mauro Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist's Contribution*, 25 *Buff. L. Rev.* 643 (1976).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol25/iss3/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

VINDICATING THE PUBLIC INTEREST THROUGH THE COURTS: A COMPARATIVIST'S CONTRIBUTION*

MAURO CAPPELLETTI**

INTRODUCTION

Devices for representing public and group interests in civil litigation, whether already in existence or merely proposed, have frequently been analyzed in their legal, economic, social, and political aspects.¹

* Copyright © 1976, Mauro Cappelletti.

** Professor of Law, University of Florence and Stanford University; Director, Institute of Comparative Law of the University of Florence; D. Jur., University of Florence, 1952.

This article is adapted from the James McCormick Mitchell Lecture delivered by the author at the Faculty of Law and Jurisprudence, State University of New York at Buffalo, on November 20, 1975. The study has been prepared within the framework of a research project on "access to justice" and the "quality of justice" in contemporary societies, conducted at the Florence Center of Comparative Judicial Studies under the sponsorship of the Ford Foundation and the Fondazione G. Agnelli of Turin, and at the Florence Institute of Comparative Law under the sponsorship of the Italian Research Council.

The author wishes to acknowledge that the subject matter of this article also represented the theme of both a lecture on "La protection d'intérêts collectifs et de groupe dans le procès civil—Métamorphoses de la procédure civile," delivered at the Spring 1975 Session of the Société de Législation Comparée (published in 27 *Revue Internationale de Droit Comparé*), and a general report on "Formazioni sociali e interessi di gruppo davanti alla giustizia civile," presented at the Semi-Centenary Jubilee Congress of the University of Florence School of Law on May 10, 1975 (published in 30 *Rivista di Diritto Processuale* 361 (1975)). A close connection in contents and form of the three studies was unavoidable. Also, a more detailed comparative analysis of some of the problems treated in this article appeared in the author's general report to the Ninth International Congress of Comparative Law (Tehran, September/October 1974), based on 26 national reports representing each of the world's major legal families. This general report is published in Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 *MICH. L. REV.* 793 (1975) [hereinafter cited as *Comparative Study*] and in M. CAPPELLETTI & J. JOLOWICZ, *PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION* 5-153 (1975) (Milan/Dobbs Ferry, N. Y., Giuffrè/Oceana Publications).

Finally, the author thankfully acknowledges the generous help in the form of discussion, criticism, and advice in the preparation of this article from a number of friends and colleagues, and particularly from Professor Adolf Homburger of the Faculty of Law and Jurisprudence, State University of New York at Buffalo, as well as Professors Guido Calabresi of Yale University, William Cohen and Jack Friedenthal of Stanford University, and John McCoid of the University of Virginia. Robert Bush and Bryant Garth, two recent law graduates of Stanford University, are also thanked for their invaluable linguistic, editorial and research assistance.

1. Understandably, not even the behavioral aspect has been neglected. See Sedler,

Some writers have discussed the "economic justification[s] of the class action";² others have demonstrated the vital importance of "public interest law," and especially the class action, as a tool to equalize the parties in litigation;³ still others have analyzed the legal significance of developments in the area of public interest representation in one or another particular country,⁴ especially the United States where such developments have been most advanced and meaningful.⁵

I do not intend to add to these efforts. Instead, I will try to indicate and analyze needs and trends which are apparent at the larger scale of macrocomparison. Utilizing comparative analysis, this article will begin with the recognition that some basic socio-economic and political needs are shared by all advanced societies and, on this premise, will examine the "legal answers" given to those common needs. It will focus especially, but not exclusively, on the civil law "half" of the world, with particular emphasis on Continental Europe. Yet, I am confident that fundamental similarities with legal problems and developments in the common law world, especially in America, even though often merely implicit, will readily become apparent. Indeed, the civil law experience and its problems can provide a relevant message for common law lawyers, particularly in view of the heated debate in the

Standing, Justiciability and All That: A Behavioral Analysis, 25 VAND. L. REV. 479 (1972).

Much too little research exists, in contrast, concerning the quantitative aspects of public and group interest litigation. For preliminary research along these lines, see SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., CLASS ACTION STUDY (Comm. Print 1974), especially at 1-2; cf. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 300 (1973).

2. See, e.g., Adler, *The Viability of Class Actions in Environmental Litigation*, 2 ECOLOGY L.Q. 533, 538-43 (1972); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969). See generally R. POSNER, ECONOMIC ANALYSIS OF LAW 343-53, particularly at 349-50 (1972) (Boston, Little, Brown & Co.). The reasons supporting the move from individual to class actions are similar to those adduced by Professor Calabresi in justifying the move from voluntary negotiations (property rules) to collectively determined rights to damages (liability rules). See Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-11 (1972).

3. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 143, 150 (1974). See also Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975).

4. See Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343 (1974) [hereinafter cited as *Private Suits*], also published in A. HOMBURGER & H. KÖTZ, *infra* note 5, at 9-68.

5. There is also a very valuable, recent bilateral study covering the Federal Republic of Germany and the United States: Kötz, *Klagen Privater im öffentlichen Interesse*, in A. HOMBURGER & H. KÖTZ, *KLAGEN PRIVATER IM ÖFFENTLICHEN INTERESSE* 69-102 (1975) (Frankfurt am Main, Metzner Verlag) (Volume 68 of the series "Arbeiten zur Rechtsvergleichung.")

United States concerning representation of the public interest in civil litigation.

I will not elaborate further on the relevance of a comparative analysis of this kind. Suffice it to say that if a legal trend is apparent in all, or most, of the countries which have reached a roughly similar state of cultural, economic, and social development, then there must be compelling reasons for such a common trend. If the need at the root of that trend, far from being the ephemeral expression of a passing situation, is a lasting and growing one, then even such value-laden concepts as "progressiveness" or "backwardness," "justice" or "injustice," can be objectively measured against the milestone of such a trend. Comparative analysis, in short, can and should provide one more measuring unit to probe the validity, utility, and "justice" of legal developments in a given place or country—for instance, the validity, utility, and "justice" of the restrictions on class and public interest litigation recently imposed by the Supreme Court of the United States.⁶

I. AN EMERGING, GROWING, AND LASTING NEED OF MODERN SOCIETIES, AND ITS REFLECTIONS IN THE FIELD OF CIVIL LITIGATION

Our contemporary society—or, to use a more ambitious term, our civilization—is frequently characterized as a "mass production—mass consumption" civilization. That characterization reflects, no doubt, a typical feature of modern economies in all parts of the world—"massification." But this feature extends far beyond the economic sector; it

6. *See*, in particular, *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which held that in a class action suit for which the federal \$10,000 amount-in-controversy requirement was applicable, each of the unnamed (as well as the named) members of the class had to satisfy the requirement; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which held that rule 23(c)(2) of the Federal Rules of Civil Procedure requires that individual notice be sent, at the expense of the plaintiff, to all class members who can be identified through reasonable effort. *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), which rejected the doctrine that a prevailing public interest plaintiff, as a "private attorney general," may be awarded attorneys' fees against the defendant, must also be regarded as part of a trend against public interest lawsuits, either by a class or an individual. Finally, public interest litigation is adversely affected by standing barriers affirmed in various Supreme Court decisions. *See United States v. Richardson*, 418 U.S. 166 (1974) (which denied standing to a citizen and taxpayer challenging, on constitutional grounds, the statutory accounting procedures of the Central Intelligence Agency); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (which similarly denied standing to citizens, taxpayers, and army reservists challenging, on constitutional grounds, army reserve membership by congressmen); *Warth v. Seldin*, 422 U.S. 490 (1975) (which denied standing to groups challenging a zoning law on the ground that they were excluded by its provisions from living in the community). This trend is discussed generally in *Comparative Study* at 798-800, 852-56.

characterizes social relationships, feelings, and conflicts as well. For example, consider the emergence and growth of such phenomena, practically unknown in pre-industrial societies, as the massive organization of labor, the unprecedented dimension of class conflicts, the rise of the mass-oriented "welfare state" government, and the often frightening development of a mass psychology molded by modern mass media.

This "massification" is perhaps best exemplified by the present "urban explosions" in a growing number of countries. As Arnold Toynbee, the great British historian, wrote a few years ago:

This development . . . is part of one that is world-wide. The megalopolises on all the continents are merging to form ecumenopolis, a new type of city that can be represented by only one specimen, since ecumenopolis is going, as its name proclaims, to encompass the land-surface of the globe with a single conurbation.

The open question is not whether ecumenopolis is going to come into existence; it is whether its maker, mankind, is going to be its master or to be its victim. Are we going to succeed in making the inevitable ecumenopolis a tolerable habitat for human beings?⁷

Faced by such fascinating, yet dangerous, social phenomena of gigantic and universal dimensions, the law, as an instrument of social order, must undertake tasks unknown in previous times. More and more frequently, because of the "massification" phenomena, human actions and relationships assume a collective, rather than a merely individual, character; they refer to groups, categories, and classes of people, rather than to one or a few individuals alone. Even basic rights and duties are no longer exclusively the individual rights and duties of the 18th- or 19th-century declarations of human rights inspired by natural law concepts, but rather meta-individual, collective, "social" rights and duties of associations, communities, and classes. This is not to say that individual rights no longer have a vital place in our societies; rather, it is to suggest that these rights are practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all. Thus, a modern bill of rights, national or international, would protect not only the traditional individual rights (essentially requiring non-interference by governmental authorities with the private sphere of the individual), but also the new social rights which essentially require active intervention by the state and other public entities.⁸ Among these social rights are freedom

7. A. TOYNBEE, *CITIES ON THE MOVE* 196 (1970) (London, Oxford Univ. Press).

8. See, e.g., Cappelletti, *I diritti sociali di libertà*, in *PROCESSO E IDEOLOGIE* 511-24 (1969) (Bologna, Il Mulino). One particularly important example is the Pre-

from indigency, ignorance, and discrimination, as well as the right to a healthy environment, to social security, and to protection from massive financial, commercial, corporate, or even governmental oppressions and frauds.

Indeed, more and more frequently the complexity of modern societies generates situations in which a single human action can be beneficial or prejudicial to large numbers of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair.⁹ For example, false information divulged by large corporations may cause injury to all who buy shares in that corporation; an antitrust violation may damage all who are affected by the unfair competition; the infringement by an employer of a collective labor agreement violates the rights of all his employees; the imposition of an unconstitutional tax or the illegal discontinuance of a social benefit may be detrimental to large communities of citizens; the discharge of waste into a lake or river harms all who want to enjoy its clean waters; defective or unhealthy packaging may cause damage to all consumers of these goods. The possibility of such mass injuries represents a characteristic feature of our epoch.

As a rule, however, the individual alone is unable to protect himself efficiently against such injuries. Even if he has a legal cause of action, other factors may preclude judicial relief: his individual right may be too "diffuse" or too "small" to prompt him to seek its protection; excessive costs may obstruct his legal action in court; he may fear the powerful violator; he may even be unaware of his right. It is necessary to abandon the individualistic, essentially *laissez-faire*, 19th-century concept of litigation, a concept which awards the right to sue, if at all, solely to the subject personally aggrieved in his own narrowly-defined individual rights—for example, to the owner of a neighboring property in a case of pollution or of a zoning violation. The new social, collective, "diffuse" rights and interests can be protected only by new social,

amble of the French Constitution of 1946, which was incorporated by explicit reference in the Preamble of the present Constitution of 1958. It acknowledges that the addition of new "social" and "economic" rights to the traditional civil rights is "particularly necessary in our time." Among the new rights it affirms are the right to work and to obtain employment; the right to health, material security, and repose and leisure for children, mothers, and the old; the right of adequate means of support for those who cannot work; and the right to education.

9. See, e.g., W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 119-60 (2d ed. 1972) (London, Penguin/Stevens & Sons); P. SAVATIER, *LES MÉTAMORPHOSES ÉCONOMIQUES ET SOCIALES DU DROIT CIVIL D'AUJOURD'HUI* 28-30 (3d ed. 1964) (Paris, Dalloz); Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 299, 308-10 (1973).

collective, "diffuse" remedies and procedures. Indeed, the quest for these new remedies and procedures is, in my judgment, the most fascinating feature in the modern evolution of judicial law.

II. META-INDIVIDUAL (DIFFUSE) INTERESTS AND THE PROBLEM OF STANDING

Even though the newly emerged meta-individual rights and interests represent an undeniable and growing reality of all modern societies, they still remain to a large extent alien to the schemes, concepts, and fictions that play so large a role in legal processes. To start with—and to use a Pirandellian formula¹⁰—they are rights and interests "in search of an author." Who "holds" them? And who has standing to sue for their defense?

Traditional legal doctrine, especially in the civil law world, has sharply distinguished substantive law and rights into "private" and "public." "Private" rights are those which "belong" to private individuals, whereas "public" rights are those which "belong" to the general public—the *populus*—represented by the state or *Res publica*.¹¹ Consequently, the traditional doctrine of standing (*legitimitas ad causam*) attributes the right to sue either to the private individual who "holds" the right which is in need of judicial protection, or, in case of public rights, to the state itself, which sues in court through its organs (usually, the *ministère public* or *Staatsanwalt*, that is, the governmental attorney general, who is the general representative of the state in litigation).¹² Thus, the basic rule in *civil* litigation is that standing to sue belongs exclusively to the private person who is, or is the legal representative of,¹³ the holder of the right in issue,¹⁴ whereas in *criminal* litigation, where a public (state) interest is always seen to be at stake, the "mo-

10. L. PIRANDELLO, *SEI PERSONAGGI IN CERCA D'AUTORE* (1918).

11. The Latin adjective *publicus* originates from *populus*—the people.

12. For a detailed comparative study and some historical information on the *ministère public*, see *Comparative Study* at 800-37. The *ministère public* roughly corresponds to the American federal and state attorneys general and district attorneys.

13. *E.g.*, the guardian of a minor or incompetent person.

14. See C. PRO. CIV. art. 81 (Italy); and especially H. SOLUS & R. PERROT, 1 *DRÖIT JUDICIAIRE PRIVÉ* 249 (1961) (Paris, Sirey). Only in those exceptional cases expressly provided for by law may a person who is not the legal representative of another, but who is qualified for "extraordinary" or "anomalous" standing, bring suit to protect the other's rights. See, *e.g.*, P. CALAMANDREI, 4 *OPERE GIURIDICHE* 131-33, 477-81 (M. Cappelletti ed. 1970) (Naples, Morano); H. SOLUS & R. PERROT, *supra*, at 216, 252.

nopoly" to sue belongs to the *ministère public*.¹⁵ Sometimes a "public" right can be the subject matter of civil litigation as well, as is the case in incompetency and certain matrimonial proceedings. In these exceptional cases, the *ministère public* also has standing to commence, or to intervene in, civil litigation, since the state is viewed as the "owner," or one of the "owners," of the litigated right.¹⁶

This "proprietary" concept of rights and *locus standi* is very clear and simple in the civil law tradition—indeed, much too simple to reflect present realities. The Classic Roman *summa divisio* between "public" and "private"¹⁷ has become, as incisively stated by a British observer,¹⁸ a "mighty cleavage" with no connecting bridges—or intermediaries—between the two aspects of the dichotomy: the individual and the state. Today's reality, however, is much more complex and pluralistic than that abstract dichotomy: between the individual and the state there are numerous groups, communities, and collectivities which forcefully claim the enjoyment and judicial protection of certain rights which are classifiable neither as "public" nor "private" in the traditional sense.¹⁹

As we have seen, modern societies bring to the forefront new rights and legitimate interests—a newer kind of "property"—which, although not "public" in the Roman and Civilian sense of the word (that is, belonging to the *Res publica* or state), are collective or diffuse; in the sense that either they do not "belong" to any individual in particular, or that individuals own only an insignificant portion of them. Who is the "owner" of the air that we breathe? The ancient concept of the right (or standing) to sue as the monopoly of the sole person or persons to whom the substantive right in issue "belongs" appears hardly applicable to those "rights without a holder" that belong, at one and the same time, to everyone and to no one.²⁰ Indeed, a rigorous applica-

15. See, e.g., Bihl, *L'action "syndicale" des associations*, 93 GAZETTE DU PALAIS, DOCTRINE 523, 524-26 (1973): "[T]he State, represented by the *ministère public*, is the only collectivity recognized by a penal law profoundly rooted in individualism." *Id.* at 525.

16. See, e.g., C. PRO. CIV. arts. 69-70 (Italy).

17. See especially DIGEST 1.1.1.2 (Ulpianus).

18. T. E. Holland, cited by J. MERRYMAN, *THE CIVIL LAW TRADITION* 99 (1969) (Stanford, Cal., Stanford Univ. Press).

19. See notes 139-54 *infra* and accompanying text.

20. *Rights without a holder* should be distinguished, of course, from those rights which do belong to specific individuals, but which are *too small* to prompt their individual holders to act for their protection (e.g., many consumer and social rights). However, from our point of view the two categories of the *rights which are too small* and the *rights which have no holder* can be considered together. They present similar problems insofar as their effective judicial protection is concerned.

tion of this concept amounts to a denial of "justiciability"²¹ of these rights. Yet, it is precisely the struggle for the protection of such "newer property"—the struggle, to pursue the above example, for the conservation of clean air—that represents one of the major challenges of all legal systems in industrial societies. To deny the justiciability of collective and diffuse interests—as courts in many countries, to a large extent, still do,²² including the United States Supreme Court in its recent crusade against public interest litigation²³—may well be the logical and rigorous consequence of a concept that attributes the right of action only to the "holder" of the substantive right in issue. Such a denial, however, represents an offense to the most vital values and exigencies of our epoch, since the protection of diffuse rights has become of crucial importance for the progress, perhaps even the survival, of humankind.²⁴

III. TWO INSUFFICIENT ANSWERS TO THE PROBLEM OF STANDING IN THE AREA OF DIFFUSE INTERESTS

The "proprietary" concept mentioned above, although still tenaciously prevailing almost everywhere, and especially in the civil law world, is becoming less rigid in many countries. There is a growing

21. The term justiciability is used here in the general sense of access to judicial protection. Of course, the connection between standing and justiciability is widely recognized, even though the concepts are not interchangeable. *See, e.g.,* *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968).

22. For some typical recent examples from Europe, see *Comparative Study* at 863-64 n.316 (Germany); Decision of July 14, 1972, No. 475, [1972] *Foro Ital.* III 269 (Consiglio di Stato) (Italy) (with a strongly critical note by A. Romano).

23. *See, e.g.,* *Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166, 177-80 (1974). What is striking in these decisions is not so much the denial of standing to taxpayers and citizens, but the strong language used, which indicates that the liberalization of standing requirements in such previous cases as *United States v. SCRAP*, 412 U.S. 669 (1973), is far from a peacefully accepted development. Indeed, such liberalization is viewed by those later decisions as an unwarranted expansion of judicial power. *See* note 162 *infra*.

24. *See* Justice Douglas' powerful dissent in *Warth v. Seldin*, 422 U.S. 490 (1975):

Standing has become a barrier to access to the federal courts, just as "the political question" was in earlier decades. . . . [C]ases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists, there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises.

Id. at 519 (Douglas, J., dissenting).

awareness in Europe that, no less than individual rights, collective or diffuse interests must also be assured "access to court," and that the narrow "proprietary" concept stands in the way of such access.

However, the stubborn tenacity of traditional schemes, concepts, and fictions—in particular, the tenacity of the Roman *summa divisio* between private and public—is apparent even in certain European developments that represent a partial movement away from the rigid tradition. Thus, while gradually abandoning the most conservative approach, which would deny *in toto* access to judicial protection of diffuse interests, many civil law systems have allowed standing to sue either to any of those individuals who are "personally interested" or to the state. In the first case, however, the private individual is allowed to sue *merely to vindicate his own interest*—in particular, to recover his personal damages—rather than *to vindicate the interest of the entire group, community, or class involved*. We can speak here of the "individual standing" solution. In the second case, standing to sue has been attributed to the traditional representative of the state in litigation—the *ministère public* or governmental attorney general. Here we can speak of the "governmental standing" solution. Neither of these two solutions, however, has proved adequate.

A. Standing Attributed to the Individual Directly and Personally Injured

The "individual standing" solution is manifestly insufficient. If the individual "personally aggrieved" is allowed to sue merely on his own behalf, the diffuse interest in most cases will not find adequate protection. Typical is the case of the consumer. On the one hand, the individual consumer's personal interest usually will be too small to encourage him to sue; on the other, even if a consumer occasionally may have a sufficient interest to sue, the wrongdoer will not be sufficiently deterred by this suit from continuing his illegal activity. The limitation of this solution is especially severe, and indeed insuperable, since it is essentially an economic limitation, as is widely recognized by recent writings in the area of law and economics.²⁵ Similar considerations hold true for other kinds of violations of meta-individual inter-

25. See, e.g., R. POSNER, *supra* note 2, at 348-51; Note, *The Cost-Internalization Case For Class Actions*, *supra* note 2. See also G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 205 (1970) (New Haven, Conn., Yale Univ. Press).

ests, such as the many forms of racial, religious, and social discrimination, urban development abuses, and pollution.

B. *Standing Attributed to the "Governmental Attorney General" as the General Representative of the State*

The second solution, entrusting the right to sue to the governmental attorney general, has also proved inadequate. Most Civilian experts are in unison in denouncing the usual laxity and "passivity" of the *ministère public* or *Staatsanwalt* in performing his new tasks as a defender of "collective interests,"²⁶ and, more specifically, his failure to bring to court such cases as those involving racial offenses,²⁷ oppressive sales practices,²⁸ or environmental violations.²⁹

The fact that these and similar matters are "too alien to the pre-occupations of traditional justice"³⁰—too alien to the *ministère public's* traditional role in litigation—is not difficult to understand. First, and quite apart from historical reasons,³¹ the governmental attorney general is too dependent upon the political branches of government to act as an advocate against abuses which are frequently generated, or at least deliberately tolerated, by political and administrative bodies. This dependence is even stronger for the common law analogues to the civilian *ministère public*—the attorney general and district attor-

26. See, e.g., Bekaert, *La mission du ministère public en droit privé*, in 2 MÉLANGES EN L'HONNEUR DE JEAN DABIN 419, 441 (1963) (Brussels/Paris, Bruylant/Sirey); Vigoriti, *The Role of the Ministère Public in Civil Proceedings: Italy*, in ITALIAN NATIONAL REPORTS TO THE IXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 269-89, especially at 283-89 (1974) (Milan, Giuffrè) (Italian report).

27. See, e.g., Foulon-Piganiol, *La lutte contre le racisme*, in 1972 RECUEIL DALLOZ SIREY, CHRONIQUE 261, 263. See also Foulon-Piganiol, *Réflexions sur la diffamation raciale*, in 1970 RECUEIL DALLOZ SIREY, CHRONIQUE 133; Foulon-Piganiol, *Nouvelles réflexions sur la diffamation raciale*, in 1970 RECUEIL DALLOZ SIREY, CHRONIQUE 163.

28. See, e.g., Calais-Auloy, *Les ventes agressives*, in 1970 RECUEIL DALLOZ SIREY, CHRONIQUE 37, 39. See also M.-L. RASSAT, *LE MINISTÈRE PUBLIC ENTRE SON PASSÉ ET SON AVENIR* 220-21 (1967) (Paris, Pichon et Durand Auzias), stating that: It is well known . . . that the *ministère public* often refrains from prosecuting those violations that only slightly upset *ordre public* when the evidence concerning the elements of the violation is awkward. This happens for almost all violations of commercial legislation and, particularly, of corporate legislation, since in order to prove such violations, much expert evidence on accounting is needed, which is complicated and expensive.

29. See, e.g., Bihl, *supra* note 15, at 527, 529; cf. Despax, *La défense juridique de l'environnement*, 1970 LA SEMAINE JURIDIQUE, JURIS-CLASSEUR PÉRIODIQUE, DOCTRINE No. 2359.

30. Calais-Auloy, *supra* note 28, at 39.

31. See *Comparative Study* at 801-04.

ney.³² Second, in many civil law countries the *ministère public* is a member of a career judiciary.³³ In other words, he is essentially a judge who, for certain periods of his judicial career, acts in the role of a governmental attorney. His status, education, and psychology, however, remain essentially those of a judge, "*au dessus de la mêlée.*"³⁴ Partisan advocacy is something to which he is a total stranger. In the words of a leading French magistrate (the Attorney General of Lyon), the *ministère public* "would hardly be suitable for acting as the champion of a class, a group of citizens, or their interests."³⁵ Third, there is the important fact that, like judges and advocates, the civil law governmental attorneys general are specialists in only one field, the law; this is no less true for American (and, generally, for the common law) attorneys general. As legal specialists, the attorneys general and the *ministères publics* may be sufficiently equipped to perform the relatively simple tasks of "traditional justice," such as prosecution of traditional crimes (essentially individual in nature and typified by the triad of theft, robbery, and murder) and representation in civil litigation of such traditional public interests as the maintenance of the family structure and the legal capacity of individuals. However, the *ministères publics* (and, likewise, their common law analogues) are very poorly equipped, both as criminal prosecutors and as representatives in civil litigation, to handle new, more complex, and highly sophisticated situations, essentially collective in nature: economic crimes and other illegal activities by banks and corporations which are detrimental to large numbers of small savers or shareholders; abusive monopolies; industrial pollution; unlawful land development; fraudulent advertising; food and drug violations. To act as defenders of such new collective

32. While their Continental-European counterparts are generally "magistrates," that is, members of the judiciary, which connotes a degree of independence, attorneys general and district attorneys are merely part of the executive branch of government. See *Comparative Study* at 828-31.

33. In France, for example, the members of the office of the *Ministère public*, like the other members of the judiciary, are law graduates who entered the judiciary at a young age and will remain as "magistrates" virtually for life.

34. See, e.g., Krings, *Le rôle du ministère public dans le procès civil*, in *RAPPORTS BELGES AU IXE CONGRÈS INTERNATIONAL DE DROIT COMPARÉ* 139, 166 (1974) (Brussels, Centre Interuniversitaire de Droit Comparé) (Belgian report).

35. J. Jegu, *Le rôle du ministère public dans le procès civil* 7 (unpublished French report prepared for Section II.C.1. of the Ninth International Congress of Comparative Law, held in Tehran from September 27 through October 4, 1974, on the general topic of "The Role of the *Ministère public* in Civil Proceedings") (on file both at the Institute of Comparative Law of the University of Florence and at the International Academy of Comparative Law). See also Krings, *supra* note 34, at 147, 165-66.

interests, the governmental attorneys general would have to be much more than what they now are—lawyers. They, or their staffs, would have to command, from time to time, expertise in economics and accounting, in banking and marketing, in urban planning, chemistry, ecology, and various other fields.

Belgian, French, and Italian experience in this area is enlightening. Since 1881 in Belgium, since 1913 in France, and since 1942 in Italy, the *ministère public* has been entrusted with a general right to sue or intervene in civil cases involving "*ordre public*" or "public interest."³⁶ These terms are quite vague and flexible,³⁷ and ample discretion is allowed the *ministère public* in the ascertainment of what constitutes the "*ordre public*" or "public interest" in a specific case. Nevertheless, it is a recognized fact that the *ministère public* has used his broad powers much too rarely to protect effectively newly-emerged meta-individual interests, such as fundamental freedoms of ethnic, political, or religious minorities, the conservation of natural resources, and the rights of consumers.³⁸ Apparently, the American experience, and that of other common law countries, is not very different. Although the idea that the attorney general has standing to commence or to intervene in civil cases as the general representative of a vaguely defined "public interest"³⁹ is deeply rooted in the common law tradition, the American attorney general seems to be about as ineffective as his European counterpart.⁴⁰ Recent comparative research has led me to similar

36. For more detailed information, see *Comparative Study* at 812-16.

37. See *id.* at 797 n.4.

38. See *id.* at 813-15 & nn.87-91 (France and Belgium), 815-16 & nn.92-95 (Italy).

39. See *id.* at 828 & n.153, 848-49 & nn.249-53. See generally NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 32-61 (1971) [hereinafter cited as REPORT ON THE OFFICE OF ATTORNEY GENERAL].

40. See *Comparative Study* at 830-31 & nn.162-67, 848-52.

There are nevertheless increasing signs that American attorneys general, particularly at the state level, are becoming more active in asserting the public interest in such areas as consumer and environmental protection. See, e.g., NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, ATTORNEY GENERALS' INTERVENTION BEFORE REGULATORY AGENCIES (1975); Immell, *Pollution Control in Illinois—The Role of the Attorney General*, 23 DE PAUL L. REV. 961-73 (1974); Morgan, *The People's Advocate in the Marketplace—The Role of the North Carolina Attorney General in the Field of Consumer Protection*, 6 WAKE FOREST INTRA. L. REV. 1 (1969); O'Brien, *The Role of the Attorney General as a Public Lawyer*, 44 L.A.B. BULL. 495-98, 531-33 (1969); Comment, *The Attorney General as Consumer Advocate: City of York v. Pennsylvania Public Utility Commission*, 121 U. PA. L. REV. 1170 (1973); Note, *The Role of the Michigan Attorney General in Consumer and Environmental Protection*, 72 MICH. L. REV. 1030 (1974).

The attorney general is still a *political* officer, however, and not all attorneys

conclusions for a number of other nations, including Mexico,⁴¹ Japan,⁴² and others.⁴³ Even in the Soviet Union, notwithstanding the potentially unlimited growth of the *Prokuratura's* powers in civil litigation, it seems that little use is made by the governmental attorney general of such powers when non-traditional collective interests are at stake.⁴⁴

IV. NEWER SOLUTIONS

A. *The "Specialized Governmental Attorney General": Comparative Illustrations*

Faced by the manifest inadequacy of the two basic traditional solutions—the "individual standing" and the "governmental standing" solutions—modern legal systems, within and without the civil law world, have tried to fashion newer and more effective devices.

One such attempt is represented by the opening and gradual enlargement, in a growing number of countries, of a first important breach in the closed citadel of the governmental attorney general's exclusive power to represent public interests in litigation. This breach can be described as the "*specialized governmental attorney general*" solution, since it consists of a proliferation of governmental agencies, highly specialized in certain areas of modern life and welfare government,

general will want, or will be able, to adopt the role of "people's lawyers" actively pursuing the protection, often against the government itself, of nontraditional public interests. *See, e.g.,* REPORT ON THE OFFICE OF ATTORNEY GENERAL 416-17, 434-37 (dealing with the lack of adequate staffing). Further, without positive legislation, attorneys general lack the power to vindicate the public interest by winning damages for individuals. *See Note, The Role of the Michigan Attorney General in Consumer and Environmental Protection, supra*, at 1035-36 & nn.29-35. Finally, the activist state attorney general faces possible conflicts of interest, in that the "public" interest he sets out to vindicate may conflict with the interest of the governmental agency he must represent. *Id.* at 1034-35. *See also* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE OF THE OFFICE OF ATTORNEY GENERAL, ATTORNEY GENERALS' INTERVENTION BEFORE REGULATORY AGENCIES, *supra*, at 25-28. In sum, it is clear that reforms in this area, while welcome, cannot be the complete answer to the problem of public interest representation. *Cf.* REPORT ON THE OFFICE OF ATTORNEY GENERAL 380-82, 408-09. *See also* Section IV B *infra*.

41. *See* S. Oñate, El Papel del Ministerio Público Dentro del Proceso Civil Mexicano (unpublished Mexican report; *see* note 35 *supra*).

42. *See* T. Kojima, The Representation of Collective and Public Interests in [Japanese] Civil Litigation 2, July 1974 (unpublished paper on file at the University of Florence Institute of Comparative Law); C. Suzuki, The Role of the "Minister Public" in Civil Proceedings in Japan 13-15 (unpublished Japanese report; *see* note 35 *supra*).

43. *See generally Comparative Study passim.*

44. *See id.* at 821-25 & nn.124-41.

entrusted, *inter alia*, with the power to commence or intervene in civil litigation within those areas.

Some illustrations of this phenomenon seem appropriate; we may choose them, almost at random, from among the very many examples offered by comparative analysis.

(1) In Sweden, a Consumer Ombudsman was created in 1970. His office is composed of 25 members: the ombudsman, his deputy, and a team of specialists including lawyers, economists, and marketing experts. One of the Consumer Ombudsman's tasks is to bring lawsuits before the newly established "Market Court" in cases of improper marketing and advertising practices detrimental to consumers.⁴⁵

(2) In England, a Director-General of Fair Trading was created in 1973. One of his tasks is to initiate proceedings before the "Restrictive Practices Court" against monopolistic practices that are "contrary to the public interest," with a view, *inter alia*, toward protecting consumers.⁴⁶

(3) Again in England, since 1968 the Race Relations Board has been entrusted with the task, among others, of bringing civil proceedings against various kinds of racial discrimination that are "unlawful" but not criminal.⁴⁷

(4) In India, based on the Indian Monopolies and Restrictive Practices Act of 1969, the Registrar for Restrictive Trade Agreements has the power to act as an "advocate of public interest" by investigating and initiating proceedings against restrictive trade agreements and practices.⁴⁸

(5) Finally, in Ghana, an Environmental Protection Council was created in 1974; apparently it is endowed, *inter alia*, with the power to conduct civil litigation for environmental protection.⁴⁹

45. See *id.* at 846-47 & nn.238-45; D. KING, CONSUMER PROTECTION EXPERIMENTS IN SWEDEN 3-18 (1974) (South Hackensack, N. J., Fred Rothman & Co.). For the now vast literature, see, for example, Bernitz, *La protection des consommateurs en Suède et dans les pays nordiques*, 26 REVUE INTERNATIONALE DE DROIT COMPARÉ 543, 556-59, 573-76 (1974); Stenberg, *L'ombudsman suédois pour les consommateurs*, 26 REVUE INTERNATIONALE DE DROIT COMPARÉ 577 (1974).

46. See I. Jacob, *The Representation of the Public Interest in English Civil Proceedings* 17-18, 33-38 (unpublished English report; see note 35 *supra*).

47. See *id.* at 17-18, 39-42; *Comparative Study* at 841 n.213.

48. See L. Singhvi, *Representation of Public Interest in the Indian Legal System* 8-10 (unpublished Indian report; see note 35 *supra*); *Comparative Study* at 841-42 n.218.

49. See N. Ollenu, *Representation of Public, Collective, and Group Interests in Civil Litigation* 5-6 (unpublished Ghanaian report; see note 35 *supra*); *Comparative Study* at 841-42 & n.219.

It should be emphasized that these are but a few examples of a burgeoning phenomenon which is rapidly spreading over much of the world, a phenomenon which, while familiar to American lawyers for many years, and especially since the New Deal era, is essentially new to other nations. As for the United States, in addition to the numerous administrative agencies that have been operating for several decades—such as the Food and Drug Administration, the Securities and Exchange Commission, and the Federal Trade Commission—Congress has recently created an Environmental Protection Agency and a Legal Services Corporation and is trying to create a Consumer Protection Agency. Apparently, the principal task of this latter agency would be to act, even in court, as an advocate, or ombudsman, for the consumer.⁵⁰

B. *Inadequacies of the "Specialized Governmental Attorney General" Solution*

The "specialized attorney general" solution has represented, no doubt, notable progress on the difficult road toward assuring that the emerging diffuse interests enjoy effective access to justice, a progress in which the United States has been in the vanguard for more than 40 years. Notable progress also has been represented by another, very similar attempt, in which the United States is once more in the forefront: the departmentalization of the office of the governmental attorney general, whereby some departments are specialized in such matters as welfare, antitrust, civil rights, consumer protection, and environmental protection.⁵¹

Yet, even this solution has proven to be largely inadequate. Even specialized agencies (or departments) tend to assume a bureaucratic psychology and a hierarchical structure that often render their action too slow, rigid, and centralized. They, too, often lack the aggressiveness, imagination, and flexibility that are so necessary for an effective attack, both preventive and corrective, against the new, sophisticated types of

50. See C. Halpern, *Some Observations on Developments in the United States Regarding Representation of Public Interests in Civil Litigation* 15-18 (June 1974) (unpublished paper on file at the University of Florence Institute of Comparative Law); Leighton, *The Consumer Advocacy Agency Proposal . . . Again*, 27 AD. L. REV. 149, 153-61 (1975). On further innovative American experiments with agencies for public advocacy, see note 56 *infra*.

51. See generally L. HUSTON, *THE DEPARTMENT OF JUSTICE* 54-109 (1967) (New York, Praeger). On the same phenomenon at the state level, see, for example, *REPORT ON THE OFFICE OF ATTORNEY GENERAL* 390-91; Note, *supra* note 40, at 1053-54.

abuses which are frequently originated by centers of political or economic power and are so difficult to discover and control. It should also be added that the creation of specialized governmental agencies usually requires legislative action which, in turn, is very slow and difficult to achieve and, once achieved, even slower and more difficult to readapt to new experiences and new circumstances. The risk is thus to have structures that are created too late, and, once created, are adapted too late to meet rapidly changing needs—burdensome, costly, useless entities which, like parasites, impoverish and paralyze the economic and social life of a country. Sadly, post-World War II Italy has an unfortunately rich experience in this area. But even in a country like the United States, where the experience with the specialized governmental attorney general has been, on the whole, quite positive for several decades, not a few illusions have had to be abandoned. The tendency today is to recognize that regulatory agencies have frequently been “captured,” both psychologically and politically, by the very interest groups that they were supposed to control.⁵²

Thus, as recently documented in a thorough study by Professor Hein Kötz of Germany,⁵³ increasingly, many Western experts—from

52. A leading American expert in public interest problems noted that in the United States,

there has been considerable disillusionment with governmental agencies with a broad mandate to regulate corporate behavior . . . in the public interest. These agencies, many of which were begun in the New Deal years, are now perceived as being “captured” and being too responsive to the industries which they are intended to regulate, and too unresponsive to the interests of the general public.

C. Halpern, *supra* note 50, at 6. See also *id.* at 17; Scott, *Two Models of the Civil Process*, in STANFORD LEGAL ESSAYS 413, 415 (J.H. Merryman ed. 1975) (Stanford, Cal., Stanford Univ. Press); Weinstein, *supra* note 1, at 304-05 (on the “incapacity” of administrative agencies “to carry the entire burden”). For the criticism at its strongest, see Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 876 (1973).

In a recent, thorough study of administrative law, Richard B. Stewart gives four reasons for the industry orientation of American regulatory agencies: (1) the conservatism inherent in the “division of responsibility” between the regulated firms and the administrator—this division of responsibility limits the administrator to negative action which, if pursued too far, may lead to economic dislocation for which he will be held accountable; (2) the tendency of the bureaucracy to become “regulation minded”—this tendency leads to a proliferation of rules which inevitably restricts the entry of new competitors, buttressing the position of established firms; (3) the relative lack of resources—“in terms of money, personnel, and political influence”—of the agency as compared to the industry, which forces the agency to rely on compromise; and (4) the connected need of the agency to depend on outside sources of information, which tend to be organized interests with a stake in the outcome and which are predominantly the regulated firms themselves. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685-86 (1975).

53. See Kötz, *supra* note 5, at 81-82 & nn.26, 59, 90, 96.

Germany to the United States—have adopted the view that not even specialized administrative agencies can become the effective defenders of the new economic, social, and environmental interests of collectivities and groups. Recent research of ours has reached similar conclusions for other countries as well, including the Soviet Union and Japan.⁵⁴ Political science adds its own explanation for this world-wide phenomenon by observing that modern collective interests, such as those in a healthy environment, in consumer protection, and in traffic safety, are too “diffuse”⁵⁵ to be sufficiently “felt” and “taken seriously” by the public administration in its day-to-day action.⁵⁶ Economic analysis sup-

54. See *Comparative Study* at 824-25 & n.139 (Soviet Union), 843 & n.223 (Japan).

55. The German writers speak of “breitgestreute Allgemeininteressen.” See note 56 *infra*.

56.

[I]n a system of pluralistic democracy, it is difficult to organize and make politically effective such diffuse societal interests (*das breitgestreute Allgemeininteresse*) as the public's health, the protection of the environment, traffic safety, and the protection of consumers. This is the reason why such interests are not taken seriously enough by the public administration in its everyday action.

Kötz, *supra* note 5, at 96-97 (with bibliographical references). See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (Cambridge, Mass., Harvard Univ. Press).

A positive development in the United States aimed specifically at this problem is the device of setting up agencies that have the specific objective of helping diffuse, unorganized, and relatively weak groups to gain influence in regulatory agencies feared to be “captured.” The perfect example is the proposed Consumer Protection Agency (see note 50 *supra* and accompanying text), of which Ralph Nader has stated: “I would consider it a \$15 million contribution to public interest law.” Green, *The Public Interest Law*, *THE NEW REPUBLIC*, Sept. 20, 1975, at 21. Of course, it is too early to judge whether this optimism is justified, or whether such agencies will themselves succumb to some of the same problems which undermine the effectiveness of other governmental agencies.

The same trend toward the creation of specialized governmental agencies for the unorganized can be seen in the concept of “Public Counsel,” put into practice by the Rail Reorganization Act of 1973, 45 U.S.C. § 715(d)(2) (Supp. 1975). The Public Counsel, according to Bloch and Stein, “seeks to assure more constructive participation by providing factual data and well-reasoned, well-organized testimony from a broad cross section of interested parties, thus increasing the probability that a full and credible record will be developed for the agency from these divergent, often unorganized, and frequently uninformed sources.” Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 WM. & MARY L. REV. 215, 235 (1974).

Also of increasing importance as a model for state legislation is the New Jersey Department of the Public Advocate, established in 1974, which, *inter alia*, is mandated to “represent the public interest in any such administrative and court proceedings, other than those under the jurisdiction of the Division of Rate Counsel . . . as the Public Advocate deems shall best serve the public interest.” N.J. STAT. ANN. § 52:27E-29 (Supp. 1975). The law establishes within the Department of Public Advocate an “Office of Inmate Advocacy,” a “Division of Rate Counsel,” a “Division of Mental Health Advocacy,” a “Division of Citizen Complaints and Dispute Settlement,” and the “Division of

ports the same conclusion.⁵⁷ Perhaps too skeptically, but quite realistically, Pietro Verri—Beccaria's great inspirer—would presumably repeat today his observation of two centuries ago, that "ordinarily, the last to see clearly society's real interests are precisely those who are paid to do so."⁵⁸

C. *The "Private Attorney General" Solution and the Value of "Combined" or "Multiple" Solutions: Comparative Examples*

Faced by the proven inadequacy of the traditional solutions, contemporary legal systems have been turning to more complex, sophisticated, and flexible solutions which have proven much more effective in dealing with the problem of protecting the emerging diffuse rights. Essentially, these modern solutions consist of (a) utilizing the initiative and zeal of *private* persons and organizations by allowing them to act in court for a general or group interest, even though they may not be directly injured in their own individual rights, and (b) *combining and integrating* this private zeal with the initiative of, and/or control by, governmental bodies, whether or not specialized. In the first case, borrowing from Judge Jerome Frank's well-known terminology,⁵⁹ we may speak of a "private attorney general" solution; in the second, we may speak of "combined" or "multiple" solutions.

Examples of these newer kinds of solutions are numerous. In the United States one would immediately think, of course, of class and other representative and public interest actions,⁶⁰ an extremely important phenomenon, especially in the last ten years or so, which once again has brought the United States to the forefront of modern legal developments.⁶¹ Indeed, the very philosophy of class and public interest actions, which has been so severely challenged by recent decisions of the United States Supreme Court⁶² and some lower American courts, represents

Public Interest Advocacy" whose jurisdiction is described in the statutory provision quoted above. N.J. STAT. ANN. §§ 52:27E-1 to -27 (Supp. 1975).

The remarkable feature of these innovative American experiments is that the public advocate tends not merely to substitute for, but also to stimulate and organize, the participation of individuals and groups to influence governmental decisions in which they may be concerned. In a sense, these experiments are examples of those "combined" solutions discussed below. See Section IV C *infra*.

57. See R. POSNER, *supra* note 2, ch. 27, at 386-92.

58. Verri, *Pensées détachées*, first published from the author's manuscript in MILANO IN EUROPA 138 (M. Schettini ed. 1963) (Milan, Cino del Duca).

59. See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

60. For a most comprehensive discussion, see *Private Suits* at 343-410.

61. See notes 103-126 *infra* and accompanying text.

62. See notes 63-65 *infra*. See also note 23 *supra*.

the core of a tremendously important, world-wide contemporary evolution, an evolution in which the American institutions often have been considered the models to follow. Paradoxically, after the rigid and, in my opinion, quite formalistic limitations imposed by *Zahn v. International Paper Co.*,⁶³ *Eisen v. Carlisle & Jacquelin*,⁶⁴ and *Alyeska Pipeline Service Co. v. The Wilderness Society*,⁶⁵ developments outside America may now appear, in part, more promising in this very area in which the United States was looked to, and admired, as the courageous forerunner. The inadequacies of the traditional standing solutions—individual and governmental—described in the previous sections of this article become even more significant when placed in this context, for it is on those demonstrably inadequate methods of protecting meta-individual rights that American citizens may be left to rely if the limitations of *Eisen* and other recent decisions signal a lasting retreat from the advanced position United States jurisprudence had achieved.

The two newer kinds of solutions just mentioned deserve some further illustration. The first is the *private attorney general solution*—the flexible utilization of the initiative of private persons or organizations for the protection of diffuse rights. From among the numerous examples of this development, I wish to discuss only a few; they all reflect innovations after World War II and represent a mere sample of a universal evolution of major importance:

(1) In Bavaria, every person, physical and legal, even though not directly interested, has standing to bring proceedings before the Bavarian Constitutional Court to attack *Land* legislation violative of civil rights (whether individual or social) proclaimed by the 1946 *Land* Constitution.⁶⁶ The idea at the basis of this *Popularklage* or citizen

63. 414 U.S. 291 (1973).

64. 417 U.S. 156 (1974). The case is analyzed, e.g., in Bennett, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy*, 1974 Wis. L. Rev. 801. For a generally convincing criticism of the United States Supreme Court's decision, see Dam, *Class Action Notice: Who Needs It?*, 1974 Sup. Ct. Rev. 97. For a thorough analysis of the *Eisen* case prior to the Supreme Court decision (and, in fact, *ante litteram* criticism of the Supreme Court's decision), see Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973).

65. 421 U.S. 240 (1975). See Comment, *The Discretionary Award of Attorney's Fees by the Federal Courts: Selective Deviation from the No-Fee Rule and the Regrettably Brief Life of the Private Attorney General Doctrine*, 36 OHIO ST. L.J. 588 (1975).

66. See M. CAPPELLETTI, *LA GIURISDIZIONE COSTITUZIONALE DELLE LIBERTÀ* 69-72 (1955, 3d printing 1974) (Milan, Giuffrè); C. LEUSSER, E. GERNER, K. SCHWEIGER & H. ZACHER, *DIE VERFASSUNG DES FREISTAATES BAYERN* 42 (2d ed. 1970) (Munich, Beck).

action is that when one person's fundamental rights are violated, everyone's freedom is indirectly violated. If the court holds the challenged statute unconstitutional, its decision has *erga omnes* and retroactive effect.⁶⁷

(2) In Italy, a law of 1967 grants "everyone" standing to sue against the unlawful issuance of construction permits by local authorities.⁶⁸ Here, too, the decision, if favorable to the plaintiff, has *ultra partes* effects.

(3) In the Federal Republic of Germany, a statute of 1909, amended in 1965, allows consumer associations (in addition to merchants and their associations) to challenge in court acts of unfair competition. There is no need to prove direct and personal injury.⁶⁹

(4) In various countries, including India,⁷⁰ Italy,⁷¹ and Tanzania,⁷² *acciones populares* or citizen actions are allowed to attack unlawful electoral activities.

This list of examples could easily be extended. Suffice it to add that similar developments, although still in a very embryonic and tentative phase, can be seen even at the level of international organizations.⁷³

As for the other variant of the newer solutions—the *combined* or *multiple* solutions—the following illustrations are especially interesting.

A first, most instructive example is offered by Swedish consumer protection law. We have already mentioned⁷⁴ that the Consumer Ombudsman, a "specialized governmental attorney general," has the power

67. M. CAPPELETTI, *supra* note 66, at 71 & n.234.

68. Law of Aug. 6, 1967, No. 765, art. 10, [1967] Gaz. Uff. 4846, 4848-49. Unfortunately, the Consiglio di Stato (Italy's Supreme Administrative Court) has interpreted the 1967 statute in a restrictive sense, clearly a *contra legem* interpretation condemned by most commentators and justified merely by the tenacity of traditional concepts. Decision of June 9, 1970, No. 523, [1970] Foro Ital. III 201, Giur. Ital. III 193 (Consiglio di Stato) (the latter contains a critical note by E. Guicciardi). Even after this restrictive interpretation, however, standing is recognized for "everyone" who "lives in the area" surrounding the unlawful construction.

69. *Comparative Study* at 877-78 & nn.374, 379; Kötz, *supra* note 5, at 93-94.

70. *Comparative Study* at 877-78 & n.376, with references. Whether this still holds after the latest political developments in India—which led the Indian Parliament to enact legislation in 1975 barring the Supreme Court of India from deciding a case concerning Indira Gandhi's election—is a matter that must be left open here.

71. *Id.* at 877 & n.375. See also F. CARPI, L'EFFICACIA "ULTRA PARTES" DELLA SENTENZA CIVILE 99-119 (1974) (Milan, Giuffrè).

72. See G. Onyiuke, The Role of the *Ministère Public* in Civil Proceedings in the United Republic of Tanzania 4-5 (unpublished Tanzanian report; see note 35 *supra*), discussed in *Comparative Study* at 878 & n.377.

73. See COUNCIL OF EUROPE CONSULTATIVE ASSEMBLY, PARLIAMENTARY CONFERENCE ON HUMAN RIGHTS 27, 66-67, 83 (1972) (Strasbourg). See also *Comparative Study* at 878 & n.378.

74. See note 45 *supra* and accompanying text.

to bring proceedings before the Market Court. However, this power does not belong exclusively to him. Private consumer associations also have standing to commence cases before the Court,⁷⁵ thus possibly substituting for, and in any case stimulating, the initiative of the special administrative agency. In fact, even the Swedish *ministère public* may have a role in the proceeding,⁷⁶ with the consequence that the competence, initiative, and control of both private organizations and (special and general) governmental attorneys general are most ingeniously intermingled and combined.

Modern Swedish legislation offers still another typical example. Standing to bring proceedings in the courts to obtain an injunction against activities harmful to the natural environment is granted not only to a special administrative body (another kind of "special governmental attorney general"), but also to private individuals, even those only "indirectly" aggrieved.⁷⁷

A third noteworthy example is provided by France. Due to the already mentioned, well-recognized incapacity of the *ministère public* to provide adequate protection of consumers' rights,⁷⁸ a remarkable statute enacted on December 27, 1973, commonly known as *loi Royer*, has opened the doors of the courts of justice to associations of consumers, granting them standing to sue in case of "facts directly or indirectly detrimental to the collective interest of the consumers."⁷⁹ At the same

75. Section 6 of the law of 1970 (the Marketing Practices Act) and section 3 of the law of 1971 (the Act Prohibiting Improper Terms of Contract). For an English translation of these laws and an informative discussion of consumer protection in Sweden, see D. KING, *supra* note 45. Section 7 of the law of 1971 allows an even more complex combination of efforts, since it entrusts with the Public Prosecutor the task of "instituting proceedings before the ordinary courts in regard to the imposition of fines." Thus the following combinations are possible in order to enforce the rights of consumers: Both (1) the consumer ombudsman and (2) a private association can bring complaints before the Market Court; (3) the Market Court can issue injunctions prohibiting, under penalty of fine, further use of certain contract terms; in case of noncompliance, (4) the *ministère public* brings suit for the imposition of the fine, but he does so only upon notification by (5) the consumer ombudsman or (6) any other person who had applied to the Market Court for the injunction. See *Comparative Study* at 846-47.

76. See note 75 *supra*.

77. Swedish Law of 1969 for the Preservation of the Environment. See *Comparative Study* at 840 n.210, 877 & n.372.

78. See Section III B *supra*, and in particular, note 38 and accompanying text.

79. Statute No. 73-1193 of December 27, 1973, art. 46, [1973] J.O. 14139, [1974] D.S.L. 30, 35, [1974] B.L.D. 30 ("*loi Royer*"):

[T]he associations duly certified, whose purpose, as expressly declared in their charters, is the protection of consumers' interests, may, so long as they are authorized for this purpose, bring civil actions in all courts concerning facts

time, however, the *loi* has also provided for a series of controls which are intended to assure that consumers are adequately represented by the associations bringing suit and, generally, to prevent abuses by these associations; such controls are entrusted, in part, to the *ministère public* himself.⁸⁰ The *loi Royer* thus represents yet another illustration of the myriad ways to combine, and mutually integrate, the "partisan zeal of private interested groups" with the equilibrium, the detachment, and the "neutrality" of a governmental official who is midway between a judge and a public administrator. It should be mentioned that another French statute recently has adopted a somewhat similar solution with a view to protect minority groups against certain racial offenses;⁸¹ this solution will most probably also be adopted in that country to deal with violations of urban planning regulations.⁸²

A further significant illustration is provided by recent legislation in the United States. As is well known, the Clean Air Act of 1970 allows not only the Administrator of the Environmental Protection Agency (a "specialized attorney general" in our terminology), but also any private citizen, even though not directly injured, to bring suit—typically a "citizen action"—against polluters.⁸³

V. OLD INSTITUTIONS ADAPTED TO NEW NEEDS AND GOALS

The "private attorney general" solution, and a variety of "combined" or "multiple" solutions, have evolved in a number of countries

directly or indirectly detrimental to the collective interest of the consumers. A decree [by the executive] will establish the conditions under which the consumers' associations may be so authorized; before such authorization is granted, an opinion of the *ministère public* must be considered, as well as the association's representativeness at the national and local level. The authorization can only be granted to associations which do not themselves exercise professional activities in any form

Id.

80. Art. 46, § 2 of the "*loi Royer*" requires the opinion of the *ministère public*. See note 79 *supra*.

81. Statute No. 72-546 of July 1, 1972 ("concerning the fight against racism"). Article 5-II of this statute grants standing to act as *partie civile* (see section V A *infra*) to "every association that has been duly certified at least five years before the time of the facts, whose purpose, as set out in its charter, is to fight against racism."

82. See, e.g., Thevenon, *La réforme foncière à l'Elysée*, *Le Figaro*, March 17, 1975, at 1. This commentator observes that the reason for the envisaged reform granting standing to a number of associations is the laxity of the *ministère public* and of the public administration generally in uncovering and prosecuting violations of that code.

83. See, e.g., *Comparative Study* at 843 n.226, 877 n.371; *Private Suits* at 394. In the case of an action initiated by a private citizen, the Administrator always has the right to intervene in the action. 42 U.S.C. § 1857h-2(c)(2) (1970).

by way of gradual adaptations of older institutions, rather than, or in addition to, *ad hoc* legislative innovations, illustrations of which were discussed in the preceding section. Thus, some old institutions have assumed new content and achieved new vitality, as may be indicated by the following three examples drawn from France, England and Australia, and the United States, respectively.

A. The French "Constitution de Partie Civile"

It should again be recalled that, while the French governmental attorney general—the *ministère public*—is an efficient prosecutor of the traditional crimes, he is, on the contrary, quite inefficient in the prosecution of such newer crimes, essentially collective in nature, as abuses in the sale of securities, false advertising, food and drug frauds, pollution, and illegal construction.⁸⁴ Fortunately, the French governmental attorney general, unlike his analogues in other civil law countries, such as Italy,⁸⁵ does not have a monopoly on the power to commence criminal prosecutions. Within certain limits, it is possible in France for individuals and private groups claiming to be aggrieved by a crime to put in motion a criminal proceeding without the initiative, and even against the will, of the *ministère public*. They can do so by bringing a civil action ("*constitution de partie civile*") for the recovery of their damages, sometimes merely symbolic, caused by the crime. The civil and criminal actions will then be joined in one single proceeding.⁸⁶ It is generally recognized that this important exception to the *ministère public's* exclusive power to prosecute crimes has led to results which are very positive, especially in view of the more effective protection thus obtained against the newer "collective" crimes mentioned above.⁸⁷

84. See Section III B *supra*. See also note 82 *supra*.

85. But see Amodio, *L'azione penale delle associazioni dei consumatori per la repressione delle frodi alimentari*, in 1974 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 515, 518-36 (an isolated, though quite elaborate, opinion not accepted by the courts).

86. C. PRO. PÉN. art. 88; M.-L. RASSAT, *supra* note 28, at 204, 233, 239. Various rules are intended to prevent abuse. See, e.g., C. PRO. PÉN. arts. 88, 91. In Spain the situation is still more radical: a penal action may be initiated by any citizen, not only by the victim of the crime. See *Comparative Study* at 837-39 n.204.

87. See the references in Section III B *supra*. See also Audinet, *La protection judiciaire des fins poursuivies par les associations*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 211, 229 (1955); *Comparative Study* at 837-39 n.204. On the possibility of certain groups taking special advantage of the procedure outlined in the text for the protection of diffuse interests, see notes 79, 81-82 *supra*.

B. *The Relator Action in England and Certain Other Common Law Countries*

As we saw above, the common law governmental attorney general has, in theory, very extensive powers to commence, or to intervene in, civil cases in his capacity as *parens patriae*—that is, as the representative of a broadly defined “public interest.”⁸⁸ Such powers include the general duty “to promote the interest of all sections of the community and to prevent the wrongdoing of one, resulting in the injury of the general welfare.”⁸⁹ Recent research based on national reports from several common law countries,⁹⁰ however, has demonstrated that the attorney general’s broad powers are, in fact, rarely used,⁹¹ due to a number of reasons including, but by no means limited to, shortage of manpower.⁹² As a consequence, the actual role of the common law governmental attorneys general (as well as district and state attorneys) in civil litigation is, perhaps, even more modest than that of their analogues in most civil law nations.⁹³ This very fact may explain the reason why another traditional institution, the “relator action,” has become quite vital in England⁹⁴ and Australia⁹⁵ and in some other common law countries in which class actions are little used.⁹⁶

88. See note 39 *supra* and accompanying text.

89. G. Taylor, *The Role of the Ministère Public in Civil Proceedings* 10 (unpublished Australian report; see note 35 *supra*).

90. *Comparative Study* at 794-96 n.1.

91. See note 40 *supra* and accompanying text.

92. For other reasons, see Section III B *supra*.

93. In post-World War II Germany, however, the role of the *Staatsanwalt* in civil litigation has been so drastically curtailed that it may now be even more modest than in most common law countries. See *Comparative Study* at 812-13 n.86.

94.

In English law questions of title to sue in actions of public concern are obviated when proceedings are brought in the name of the Attorney-General on the relation of a member of the public . . . This procedure has been much used to review the legality of local authority activities; to secure relief in cases of infringement of a public right, e.g. public nuisances; and to secure the proper administration of public and charitable trusts.

SCOTTISH LAW COMMISSION, MEMORANDUM No. 14: REMEDIES IN ADMINISTRATIVE LAW 48 (n.d.) (recently published).

In Scotland, on the contrary, the institution of the relator action is not used. See *id.*; J. Thomson, *The Power of the Lord Advocate to Intervene in Civil Litigation in Scotland* 4 & n.17 (unpublished Scottish report; see note 35 *supra*).

95. See *Comparative Study* at 849 & n.254.

96. Cf. *id.* at 851-52 & nn.276-77.

On the much less frequent use of class litigation in Great Britain and Australia as compared to that in the United States, see, e.g., Alston, *Representative Class Actions in Environmental Litigation*, 9 MELBOURNE U.L. REV. 307, 310, 317 (1973). Alston complains about the infrequent use of the class device and believes that class litigation may represent a very important potential in British and Australian law.

The relator action consists of a suit brought in the public interest by a private individual or group⁹⁷ that otherwise would have no standing, but which sues in lieu, and with the consent or "fiat," of the attorney general. The latter retains a controlling power (in fact, sparingly exercised) over the entire progress of the action.⁹⁸ The relief sought must be such as to "benefit . . . the public or at least a section of the public,"⁹⁹ and not only the relator actor. The most frequent examples of relator actions are suits to stop a public nuisance, to restrain conduct injurious to the public welfare, to restrain developers of land,¹⁰⁰ and to obtain "prohibitions and restrictions directed towards public health and comfort and the orderly arrangement of municipal areas."¹⁰¹

Thus, by means of the relator action, private persons (or groups) may fill the gap left by the inertia of the governmental attorney general; but they do so after the authorization, and under the continuous control (even though more potential than real), of the attorney general himself, who can thereby prevent frivolous suits and other abuses.¹⁰²

C. *The Class Action in the United States: A Civilian's Appraisal*

The third illustration¹⁰³ is provided by the tremendous, although recently impaired, development in the United States, especially since 1938,¹⁰⁴ but even more so since 1966,¹⁰⁵ of yet another traditional institution, the "class" (or "representative") action.

97. As for relator actions brought by groups, see the examples in G. Taylor, *supra* note 89, at 8.

98. *Id.* See S. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 401 (3d ed. 1973) (London, Stevens & Sons); cf. I. Jacob, *supra* note 46, at 50-52.

99. G. Taylor, *supra* note 89, at 12. See S. DE SMITH, *supra* note 98, at 404.

100. See *Comparative Study* at 850 & nn.259-64.

101. G. Taylor, *supra* note 89, at 8, 12. See also S. DE SMITH, *supra* note 98, at 404-05.

102. For a more detailed description of relator actions, see *Comparative Study* at 848-52 and the references therein.

103. Still another example of great interest, although not discussed in this article, is the participation of amicus curiae in civil litigation. The historical origins and development of this institution are discussed in some detail in Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE L.J.* 694 (1963). For recent developments and comparative perspectives, see C. Halpern, *supra* note 50, at 14; *Comparative Study* at 876 n.368; T. Kojima, *supra* note 42, at 2-3.

104. See, e.g., F. JAMES, *CIVIL PROCEDURE* 495 (1965) (Boston, Little, Brown & Co.); 7 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1752, at 511 (1972).

105. In 1966, *FED. R. CIV. P.* 23 was completely rewritten with the aim of making it more pragmatic and functional. See 7 C. WRIGHT & A. MILLER, *supra* note 104, at § 1753; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 *HARV. L. REV.* 356, 380-94 (1967).

This section is not intended as an analysis of this unique feature of the United States legal system; I wish only to make a few observations, essentially an outsider's observations, to convey a civilian's appraisal of this American institution.

First, it seems clear that there have been very persuasive reasons for the extraordinary growth in America of this old and, from a practical point of view, once rather unimportant device rooted in equity.¹⁰⁶ These reasons can be easily identified with the compelling need, typical of all modern societies but particularly strong in the United States, to provide a flexible, efficient protection of group and collective interests against the abuses of a mass economy and a mass government (or, indeed, a welfare government).¹⁰⁷ Thus, developments in the area of the modern class action—but also of the shareholders' derivative action and, more generally, of the "public interest action"¹⁰⁸—may be explained as manifestations of the very same philosophy, or *raison d'être*, that gave powerful impetus to parallel developments in so many other countries, as surveyed above.¹⁰⁹ Indeed, the unprecedented growth of class actions represents the most typical "American answer" to the exigency of giving adequate protection to those emerging diffuse rights—the "newer property"—which have become so fundamental in the contemporary world.

Second, class actions represent yet another instance of those "combined" or "multiple" solutions which, as discussed above, have the potential of being the most effective method of vindicating the emerging meta-individual rights. The class suitor is typically a "private attorney general," in that his initiative is not limited to the defense of "his own" rights. At the same time, even though the class suitor is different from the relator suitor in England or Australia, in that he does not need the "fiat" and is not subject to the control of the governmental attorney general, he nevertheless is subject to limits and controls enforced by the court and determined both by the legislature and by a large amount

106. See F. JAMES, *supra* note 104, at 494-95; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 609-12, 626-29 (1971). The original purpose of the class action in equity was simply to provide "a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." 7 C. WRIGHT & A. MILLER, *supra* note 104, § 1751, at 503, quoting *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

107. See Hazard, *supra* note 9, at 308-10.

108. The distinctions, but also frequent overlappings, between public interest actions and class actions are ably analyzed by Professor Homburger in *Private Suits* at 387-89.

109. See Section I *supra*.

of judicial discretion.¹¹⁰ In particular, it is for the court to ascertain whether the class suitor is actually a member of a class, whether he acts for the general benefit of the class, and whether he is an "adequate," albeit self-appointed, representative of the class.

Thus, the class action represents another fascinating illustration of the combination of private initiative and public (court) control. It may well be, of course, that the combination could still be improved and that not all the possible abuses have been taken into account by statutory limitations and court supervision. Indeed, I want to make it clear that I am by no means an unconditional enthusiast of class actions; the class action is an extremely valuable instrument *only if* accompanied by adequate controls.¹¹¹ With this proviso, however, an outsider's appraisal can only be essentially favorable to this American institution. In fact, I do not know of any serious evaluation by non-American experts which has not been favorable,¹¹² even though doubts sometimes may have been cast on the feasibility of importing the American solution to other parts of the world.¹¹³ This is the reason why recent decisions of the United States Supreme Court, which seem to have interrupted the steady progress of American jurisprudence in this area, are cause for concern to the civilian observer. The institutional and procedural difficulties, problems, and inadequacies which have been, and in

110. On the broad judicial discretion in class actions, *see, e.g.*, Weinstein, *supra* note 1, at 302. Justice Black, in fact, in response to this increase in judicial discretion in class actions, opposed the adoption of the amendments to rule 23 in 1966, stating as follows: "It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that class suits can be maintained either for or against particular groups whenever in the discretion of the judge he thinks it wise." Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1035 (1966) (Black, J., dissenting).

111. Controls, however, should not be confused with formalistic limitations (*e.g.*, Zahn v. International Paper Co., 414 U.S. 291 (1973)) and with requirements susceptible of either eliminating the very possibility of class litigation in vital areas (*e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)) or of depriving the class action of its needed impact, as would be the case if, for instance, the condemnation of the fluid recovery concept by the Second Circuit Court of Appeals in Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), should become the law. *See* Section VII *infra*, and in particular note 160 and accompanying text.

112. *See, e.g.*, T. Kojima, *supra* note 42, at 18-27; Kötzt, *supra* note 5, at 78-88; Taruffo, *I limiti soggettivi del giudicato e le "class actions,"* 24 RIVISTA DI DIRITTO PROCESSUALE 609, 631-36 (1969).

113. *See* T. Kojima, *supra* note 42, at 21-23; Kötzt, *supra* note 5, at 86-88. Professor Kötzt has suggested that the absence of the contingent fee system outside the United States particularly hinders the development of class actions. *See* Kötzt, *supra* note 5, at 87. This suggestion, however, is not convincing since, even without a contingent fee system, there can be other financial inducements to a class suitor and his lawyers. *See Comparative Study* at 875 n.365, 878-79 n.380.

part continue to be, faced by the civil law world in assuring effective representation of meta-individual interests had been met in America by a solution which, on the whole, appeared optimal to non-Americans. Therefore, outsiders have frequently regarded the American experience with class actions, particularly in civil and welfare rights and in environmental and consumer protection, as an appealing model for civil law countries trying to overcome the difficulties and the inadequacies which have remained despite the first reforms that have been made.

Indeed, it should be emphasized that this is perhaps the real message for the common law world, and particularly the United States, to draw from the civil law experience with public interest litigation: a retreat from the relatively advanced position taken by American jurisprudence in the past few decades may ultimately mean falling back onto ground which the civil law world has found, through painful experience, to be insufficient, inadequate, and—as measured by the comparative yardstick—unjust, since it is incapable of providing an effective means of asserting the most important of contemporary interests.

At this point, however, it seems fair to add that, notwithstanding the latest developments in the United States, advocating the collective interest may still be relatively easier and have a greater impact in American courts than in most courts of civil law nations. At least three reasons for this fact may be cited.¹¹⁴

First, public interest law firms, virtually unknown in other countries, have become increasingly important and respected in the United States.¹¹⁵ This phenomenon has blossomed to the point that the American Bar Association in recent years has switched from a position of hostility to one of affirming a general responsibility of the legal profession “to provide public interest legal services.”¹¹⁶ Despite the 1975

114. It should also be noted that, notwithstanding recent American decisions such as those mentioned in note 23 *supra*, standing requirements today are not major barriers in most public interest litigation in the United States, in contrast to much of the civil law world. *See, e.g.*, *United States v. SCRAP*, 412 U.S. 669 (1973).

115. *See, e.g.*, C. Halpern, *supra* note 50, at 8-10; Green, *supra* note 56. For a useful survey of the role of public interest lawyers in the United States, and the likely future of that role, see Ford Foundation, *The Public Interest Law Program—Five Years Later*, October 1975 (unpublished manuscript).

Even in the United States this phenomenon is of very recent origin, if it is true that, as remarked by United States Senator Edward Kennedy, as recently as 1970 “almost the entire public interest bar of Washington [could be fit] around a single table.” Green, *supra* note 56, at 20-21.

116. American Bar Association, *Special Committee on Public Interest Practice, Recommendations*, adopted in Montreal by the House of Delegates of the American Bar Association in August, 1975. *See* 61 A.B.A.J. 1084 (1975).

United States Supreme Court decision in *Alyeska Pipeline*,¹¹⁷ it may still be easier in America to find a qualified public interest lawyer willing to charge no fee than it is elsewhere in the world.¹¹⁸

Second, it should be noted that, notwithstanding the recent hostility of the Supreme Court and other federal courts toward public interest litigation and the institution of the "private attorney general," a brighter picture is perhaps on the horizon. Recent New York legislation on class actions, effective since September 1, 1975,¹¹⁹ best exempli-

117. 421 U.S. 240 (1975). See note 6 *supra*. It should be noted, however, that a number of federal laws still permit the awarding of attorneys fees to a prevailing plaintiff enforcing the law. This is the case for violations of the antitrust laws, 15 U.S.C. § 15 (1970); the Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000 a-3(b) (1970), and Title VII, 42 U.S.C. § 2000 e-5(k) (1970); the Clean Air Amendments of 1970, 42 U.S.C. § 1857 h-2(d) (1970); the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970); the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); the Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. II 1972); the Consumer Credit Protection Act, 15 U.S.C. § 1640(a) (1970); and the Water Pollution Control Act, 33 U.S.C. § 1365(d) (Supp. III 1973). While these laws cover a number of important public interest areas, they do not cover the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970), or the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 185 (1970), under which authority the plaintiffs in the *Alyeska Pipeline* case sought to enjoin (and did temporarily enjoin) the construction of the Alaska Pipeline.

There is, of course, still the possibility of further congressional action to expand the list of areas where the prevailing "public interest" plaintiff can collect attorneys' fees from the defendant. Legislation has been introduced permitting attorneys' fees in actions under the Mineral Lands Leasing Act of 1920 (H.R. 7825, 8218), actions for injunctive relief under the Clayton Act (H.R. 7827, 8219), civil rights actions (H.R. 7828, 8220, 7968, 8743), actions under the National Environmental Protection Act (H.R. 7829, 8222), suits for the review of administrative action (H.R. 7968, 8742), and actions generally in the interests of justice (H.R. 7826, 8221) (all 94th Cong., 1st Sess. (1975)).

118. See R. Buxbaum, Report of Conference [held in Bonn, Germany, August 22-24, 1973] on Comparative Legal and Institutional Aspects of Public Interest Activity in the Environmental Sector 12-17, November 23, 1973 (unpublished manuscript on file at the University of Florence Institute of Comparative Law). See also note 113 *supra*; *Comparative Study* at 878-79 n.380.

119. N.Y. CIV. PRAC. LAW §§ 901-06, Rules 907-09 (McKinney Supp. 1976) [hereinafter New York Civil Practice Law and Rules will be cited as N.Y. CPLR]. This exceptionally interesting statute deserves to be set out in full (emphasis added):

§ 901. Prerequisites to a class action.

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

§ 902. Order allowing class action.

Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. The difficulties likely to be encountered in the management of a class action.

§ 903. Description of class.

The order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice.

§ 904. Notice of class action.

(a) In class actions brought primarily for injunctive or declaratory relief, notice of the pendency of the action need not be given to the class unless the court finds that notice is necessary to protect the interests of the represented parties *and* that the cost of notice will not prevent the action from going forward.

(b) In all other class actions, *reasonable* notice of the commencement of a class action shall be given to the class in such manner as the court directs.

(c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider

- I. the cost of giving notice by each method considered
- II. the resources of the parties and

III. the stake of each represented member of the class and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class.

(d) I. Preliminary determination of expenses of notification. Unless the court orders otherwise, the plaintiff shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

II. Final determination. Upon termination of the action by order or judgment the court may, but shall not be required to, allow to the prevailing party

ties an encouraging trend which has begun to appear in state systems.¹²⁰

the expenses of notification as taxable disbursements under article eighty-three of the civil practice law and rules.

§ 905. Judgment.

The judgment in an action maintained as a class action, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.

§ 906. Actions conducted partially as class actions.

When appropriate,

1. an action may be brought or maintained as a class action with respect to particular issues, or
2. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this article shall then be construed and applied accordingly.

Rule 907. Orders in conduct of class actions.

In the conduct of class actions the court may make appropriate orders:

1. determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
2. requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, or to appear and present claims or defenses, or otherwise to come into the action;
3. imposing conditions on the representative parties or on intervenors;
4. requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;
5. directing that a money judgment favorable to the class be paid either in one sum, whether forthwith or within such period as the court may fix, or in such installments as the court may specify;
6. dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

Rule 908. Dismissal, discontinuance or compromise.

A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Rule 909. Attorneys' fees.

If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

See also Ray v. Marine Midland Grace Trust, 35 N.Y.2d 147, 316 N.E.2d 320, 359 N.Y.S.2d 28 (1974), which considerably liberalized class action requirements in New York prior to the enactment of the new law.

120. *See, e.g.,* Scott, *supra* note 52, at 417-18, and the references to California decisions in notes 8-10 therein. Unfortunately, the California Supreme Court may have retreated from its advanced position relative to class actions. *See* San Jose v. Superior Court, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974) (with a strong

While preserving the basic features of the federal class action rule 23, the New York law allows in that state precisely what the holdings of *Eisen* and *Alyeska Pipeline* took away at the federal level.¹²¹ Indeed, other recent New York legislation addresses the Supreme Court holdings in *United States v. Richardson*¹²² and *Schlesinger v. Reservists Comm. to Stop the War*¹²³ as well.¹²⁴ Professor Homburger, who is recognized as the principal draftsman of the New York class action statute,¹²⁵ describes this development as follows:

The need for effective group and public remedies in the United States is overwhelming. In view of the gradual attrition of public interest litigation in the federal courts under the harsh command of the Supreme Court, it is gratifying that we may perhaps expect a compensating upsurge in the states.¹²⁶

dissent by Tobriner, J.). The California Supreme Court, in addition, is facing the important issue of attorneys' fees to private attorneys general in *Serrano v. Priest*, L.A. No. 30398, *hearing granted*, September 29, 1975.

Besides California, there is growing evidence of an increasing concern for liberal state class action reform. *See, e.g.,* Donne & Van Horn, *Pennsylvania Class Actions: The Future in Light of Recent Restrictions on Federal Access?*, 78 DICK. L. REV. 460 (1974); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39 (1975); Note, *Class Actions in Illinois: A Viable Alternative to Federal Rule 23*, 8 JOHN MARSHALL J. 113 (1974); Note, *State Class Actions: A Comparative Analysis*, 60 IOWA L. REV. 93 (1974).

121. First, with respect to the holdings by the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the New York law (a) does not "require individual notice [in common question actions] to all members who can be identified through reasonable effort." *See* N.Y. CPLR § 904(c) (McKinney Supp. 1976) (set out in note 119 *supra*); (b) allows notice requirements to be tailored to the plaintiff's resources and the hardship of the costs. N.Y. CPLR § 904(c); and (c) in certain instances allows costs to be imposed initially on the defendant after a preliminary hearing. *Id.* § 904(d). Second, with respect to the holding in *Alyeska Pipeline Serv. Co. v. The Wilderness Society*, it allows the court, in its discretion, to award attorneys' fees to the class attorneys. N.Y. CPLR R. 909.

122. 418 U.S. 166 (1974).

123. 418 U.S. 208 (1974).

124. *See* N.Y. STATE FIN. LAW §§ 123-123j (McKinney Supp. 1975). This law, effective September 1, 1975, allows citizen-taxpayer suits in the State of New York, and even provides for the establishment of a common fund for the payment of attorneys' fees to prevailing plaintiffs. *Id.* §§ 123g,h.

The catalyst for the enactment of this law was a New York Court of Appeals decision of July 2, 1975, in the case of *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975), which judicially overruled prior New York law, thus allowing taxpayers "to challenge enactments of our State Legislature as contrary to the mandates of our State Constitution." *Id.* at 362, 334 N.E.2d at 580, 372 N.Y.S.2d at 624. Prior to that decision, New York had been one of the few states failing to recognize taxpayer suits. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.09, 22.10 (1958); *cf. Private Suits* at 390 & nn.212-13.

125. The 1975 statute is a slightly modified version of a model statute drafted by Professor Homburger five years ago. *See* Homburger, *supra*, note 106, at 609, 655-57.

126. Letter to the author from Professor Adolf Homburger, October 31, 1975.

Third, it should not be overlooked that, despite the present limitations at the federal level, class actions in the United States still represent forceful instruments and retain a great potential for serving public interest purposes.

VI. SPECIAL OBSTACLES TO CLASS AND PUBLIC INTEREST
LITIGATION IN CIVIL LAW COUNTRIES AND TRENDS
TOWARD SURMOUNTING THESE OBSTACLES

In contrast with the United States, basic features of the Continental European tradition place special and formidable obstacles in the way of introducing devices similar to class and public interest actions.

A. *The Orientation of Civil Law Judges*

In addition to a still prevailing individualistic conception of civil procedure—with all the corollaries already discussed, especially in the area of *locus standi*—there is the fact that civil law judges, typically bureaucratic “career judges,” are less suited than their American counterparts to handle a type of adjudication that reaches far beyond the parties “present” in the proceeding.¹²⁷ Of course, American judges are also often reluctant to assume this broad judicial role,¹²⁸ and this explains, in part, the recent backlash against class and public interest litigation. But the education and training of civil law judges, rooted in many layers of civil law history and in a rigid conception of separation of powers, makes them even more wary of too evident manifestations of law-making through the courts.¹²⁹

127. See, e.g., R. BUXBAUM, DIE PRIVATE KLAGE ALS MITTEL ZUR DURCHSETZUNG WIRTSCHAFTSPOLITISCHER RECHTSNORMEN 26, 32 (1972) (Karlsruhe, Müller).

128. See, e.g., note 162 *infra*.

129. For two studies by leading European proceduralists of a modern-evolution departing substantially from the tradition, see Baur, *Sozialer Ausgleich durch Richterspruch*, 1957 JURISTENZEITUNG 193; Calamandrei, *La funzione della giurisprudenza nel tempo presente*, 9 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 252 (1955), republished in P. CALAMANDREI, 1 OPERE GIURIDICHE 598 (M. Cappelletti ed. 1965) (Naples, Morano). See also M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM 195-97, 203-06, 249-77 (1967) (Stanford, Cal., Stanford Univ. Press); M. CAPPELLETTI, PROCESO IDEOLOGÍAS, SOCIEDAD 365-452, 566-70 (1974) (Buenos Aires, Ediciones Jurídicas Europa-América); Cappelletti, *L'attività e i poteri del giudice costituzionale in rapporto con il loro fine generico*, in 3 SCRITTI GIURIDICI IN MEMORIA DI PIERO CALAMANDREI 83 (1958) (Padua, Cedam).

B. *The Revolutionary Tradition Against "Intermediate Societies"*

There is still another obstacle¹³⁰ which is of extraordinary importance, even though there are now signs that it is being gradually overcome in civil law nations. This obstacle consists of a traditional reluctance to accept groups united to further a common interest.

Many class and public interest actions in America have been brought by private groups and spontaneous organizations created to represent otherwise unorganized interests: civil rights associations, environmentalists' and consumers' organizations, and last, but not least, public interest lawyers organized in larger or smaller groups.¹³¹ Similarly, relator actions in England, Australia, and other common law countries have been brought by private groups and organizations acting for the general public interest or for the interest of one sector of the public,¹³² rather than by isolated individuals or aggregates of non-organized individuals. The fact is that even the most liberal granting of standing to individuals would be an insufficient solution to the problem of asserting diffuse rights if the "private attorneys general" were not allowed to associate and fight as an organized group.¹³³

This very fact, however, constitutes an additional obstacle for the representation of meta-individual interests in civil law courts. It should be recalled that among the principal targets of the great bourgeois revolution initiated in France in 1789, and which later spread over much of Continental Europe, were the "*corps intermédiaires*"—the organizations intermediate between the individual and the state, which were identified with the feudal structure of the *ancien régime*. As Max Rheinstein put it: "With eighteenth century Enlightenment the individualizing view of society began to be preponderant. In the French Revolution the new ideology became official. . . . The state was now clearly conceived to be composed of individual citizens. The inter-

130. Still other obstacles are mentioned in note 113 *supra*, and in *Comparative Study* at 864-65 (problems of the conception of a civil action, the structure and mentality of a career judiciary, and the mechanics of allowing group representation) and at 873-75 & nn.361-63 (problems in the Eastern European socialist countries). See generally *id.* at 878 n.380.

131. See note 115 *supra*. On the advantages of ongoing organizations in the American legal system, see Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, *supra* note 3, at 143.

132. See note 97 *supra*.

133. This phenomenon has been defined as the "organizational private attorney general" (as contrasted with the "individual attorney general") in *Comparative Study* at 856-80, where its growing importance in both the Western and the socialist nations is analyzed.

mediate groups of manor, guild, estate, province were swept away"¹³⁴

Of course, this initial attitude of hostility and distrust vis-à-vis "intermediate societies" soon had to come to grips with the very profound changes of European societies in the post-Revolution epoch. Industrialization, in particular, brought about the need for articulate organization of both capital and the emerging labor class. Yet, the resistance against the new was strong. In France, for instance, it was only in 1884 that labor unions were definitively recognized as legitimate entities.¹³⁵

Legal fictions were frequently used to adapt the existing law to the new social needs. A "legal personality," for instance, was fictitiously attributed to partnerships, corporations, and professional associations; thus, the principle that only individual "persons"—natural or legal—can be participants in the legal and judicial processes was preserved.

At least two problems, however, still remain largely unsolved: first, the problem of the legal status of non-"personalized," unincorporated, de facto associations and other organizations; second, the problem of organizations (incorporated or not) seeking access to court not to protect their own rights, as in the case of a trade union or a political party claiming damages for the pillage of its own premises,¹³⁶ but rather to protect the rights of their members or the collective rights of classes or groups that the organizations purport to represent.¹³⁷ The first prob-

134. Rheinstein, *The Family and the Law*, in 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 13 (A. Chloros ed. 1974) (Tübingen/The Hague, Mohr/Mouton). According to one commentator, "traditionally, French law looks with mistrust at the [intermediate] groups: the old execration by Rousseau vis-à-vis the intermediate societies—which disrupt the relationships between the Sovereign and the citizens and impede the formation of the general will (*volonté générale*)—joins with the fear by the state of seeing the groups compete with its activities and create new feudalities." De Soto, *L'individualisme dans la jurisprudence du Conseil d'Etat*, in 2 MÉLANGES OFFERTS À MARCEL WALINE: LE JUGE ET LE DROIT PUBLIC 759, 771 (1974). See also, e.g., Bihl, *supra* note 15, at 525; Dupeyron, *L'action collective*, 1952 RECUEIL DALLOZ, CHRONIQUE 153, 155.

135. See 1 H. SOLUS & R. PERROT, *supra* note 14, at 223.

136. For this example, based on French law, see *id.* at 219; Perrot, *L'action en justice des syndicats professionnels, des associations et des ordres professionnels*, 10 ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE 99, 100 (1969).

137. An example, again based on French law, could be an association of doctors, claiming to represent the general interests of the medical profession, bringing suit against persons abusively exercising that profession. See 1 H. SOLUS & R. PERROT, *supra* note 14, at 220; Perrot, *supra* note 136, at 100.

lem cannot be dealt with here.¹³⁸ The second, however, must be discussed, since it is central to any study of modern public interest advocacy in the courts.

C. *The Rise and Proliferation of New "Intermediate Societies" Acting as "Organizational Private Attorneys General": Ideological Parties and the Danger of a "Return to Feudalism"*

New groups have been rising and proliferating in recent times to fight the new menaces of our epoch—the tyranny of racial, religious, and political majorities, the oppressions of the modern corporate society, the red tape of bureaucracies, the blind selfishness of producers and polluters. The essential aim of these groups is not to protect rights "belonging" to them, but rather to represent the aggregate of many "small rights" and the diffuse "rights without a holder"—the "newer property." Their very essence is—to borrow from a widely accepted definition by Louis Jaffe—to act as "ideological," not as "Hohfeldian," plaintiffs;¹³⁹ in other words, to act for the public good as "organized private attorneys general."¹⁴⁰ Should they not be allowed to so act, their very reason for being would disappear.

Of course, this development, unprecedented in its size and impact, is not itself without dangers. Opponents have described it as a dreadful "return to feudalism,"¹⁴¹ and undoubtedly new abuses and tyrannies can grow out of it. Labor unions, political parties, national and transnational corporations, and professional organizations can themselves become fearful centers of oppression against both their members and third parties.¹⁴² Abuses can be, and have been, perpetrated even by less pervasive groupings, such as consumer associations acting for selfish purposes,¹⁴³ unable to see beyond the interests of limited groups.¹⁴⁴

138. For a brief discussion and references, see *Comparative Study* at 861-62 & nn.304-06.

139. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

140. See note 133 *supra*.

141. See, e.g., De Soto, *supra* note 134.

142. See, e.g., S. ERLICH, *LE POUVOIR ET LES GROUPES DE PRESSION* (1971) (Paris/The Hague, Mouton); M. HORKHEIMER, *THE ECLIPSE OF REASON* 128, 141-48 (1947) (New York, Oxford Univ. Press).

143. For some examples of such abuses, see N. TROCKER, *PROCESSO CIVILE E COSTRUZIONE* 214 & n.100 (1974) (Milan, Giuffrè).

144. As noted by Green, public interest lawyers have been denounced on the grounds that, "given the current unresponsiveness of the political system to ethnic minorities, the allocation of public interest law resources to majoritarian, middle-class, white concerns is contrary to the public interest." Green, *supra* note 56, at 22.

And, legal instruments valuable per se, such as class actions, have sometimes been used as tools of blackmail.¹⁴⁵

This is the reason why public checks and controls, those very kinds of checks and controls that characterize the "multiple" or "combined" solutions discussed above, are particularly vital. Recall that such controls are entrusted to the attorney general in the English relator action, to the judge in the American class action, and to the *ministère public* in the actions brought in France by consumer associations.¹⁴⁶

Neither the dangers of abuse nor the tenacity of traditionalism, however, seem able to stop the grand movement. Newer and newer intermediate organizations have been arising, even in civil law countries. Since their reason for being is to act as "ideological plaintiffs," they have been struggling to overcome—both through court interpretation and legislative intervention—the obstacles deriving from the traditional law. France, Germany, and Italy can again provide instructive illustrations. As early as 1913, a landmark decision by the French *Cour de cassation*, confirmed in 1920 by legislation, recognized the power of labor unions and other *syndicats professionnels* to represent in court the "collective interest of the association";¹⁴⁷ and, as discussed earlier, recent French¹⁴⁸ and German¹⁴⁹ statutes have granted standing to private organizations to sue for the diffuse interests of consumers and racial minorities. In Italy, a 1973 decision by the Supreme Administrative Court, breaking an uninterrupted "Hohfeldian" tradition of that court, granted standing to a private environmental association

145. It seems, however, that the phenomenon of abuse of class and public interest litigation has been less frequent than certain critics would allege. See CLASS ACTION STUDY, *supra* note 1, at 9, 22-23. See also Weinstein, *supra* note 1, at 299-306.

146. See Section IV G *supra*; notes 84-114 *supra* and accompanying text.

147. Decision of April 5, 1913, [1914] D.P. I. 65 (Cass. ch. réun.); see 1 H. SOLUS & R. FERROT, *supra* note 14, at 225-26; J. VINCENT, PROCÉDURE CIVILE 43 (17th ed. 1974) (Paris, Dalloz); Audinet, *La protection judiciaire des fins poursuivies par les associations*, 53 REVUE TRIMESTRIELLE DE DROIT CIVIL 211, 213, 214, 223 (1955); Bihl, *supra* note 15, at 524; Dupeyron, *supra* note 134, at 153-54; Vouin, *De la recevabilité de l'action "syndicale" des associations*, 1955 LA SEMAINE JURIDIQUE, I-DOCTRINE 1207. See also *Comparative Study* at 862 & nn.307-08.

The statute confirming the decision is C. TRAVAIL, liv. III, art. 11 (law of March 12, 1920) ("[unions] can, before every court, exercise all the rights belonging to a *partie civile* concerning situations that involve a violation, whether direct or indirect, of the collective interest of the profession they represent").

148. See notes 79-82 *supra* and accompanying text. After the adoption of the law of March 12, 1920 (see note 147 *supra*), in the 1940's some other laws aimed in the same direction, granting to certain associations in several areas standing to sue for the collective interest (e.g., hunting associations, leagues against alcohol abuse, associations for the protection of the family). See Bihl, *supra* note 15, at 524.

149. See note 69 *supra* and accompanying text.

called "Italia Nostra"—a European analogue of the "Sierra Club"¹⁵⁰—to bring suit against the government for the "diffuse" interest of environmental conservation.¹⁵¹ Since the 1973 decision allowed "Italia Nostra" to litigate *as an organization* rather than as a representative of injured individuals, it went an important step beyond the 1972 doctrine of the United States Supreme Court in *Sierra Club v. Morton*.¹⁵² I welcomed the Italian decision as "a badly needed turning point from a long period of unchecked spoliations of the Italian environment and artistic heritage."¹⁵³ Finally, in Germany, where the "Hohfeldian" doctrine still prevails, especially in the administrative courts, an important departure, similar in content to that in Italy, even though not yet at the supreme court level, also occurred in 1973. In a sensational decision, the administrative court of Bavaria granted standing to an environmental association that requested a court order to stay the construction of a hotel.¹⁵⁴

150. *Italia Nostra*, the "National Association for the Protection of the Historical, Artistic and Natural Patrimony of the Nation," was founded in 1955 and, as of 1974, had a membership of nearly 20,000 persons in Italy and 50,000 living outside of Italy. Its purpose, according to its charter, is "to contribute to the protection of the historical, artistic, and natural patrimony of the nation." It has been especially active in the areas of environmental protection, urban planning, protection of works of art and archeological sites in Italy, and preservation of important archives and libraries. For this and further information, see A. Nicholson, *Italia Nostra* and Problems of Standing in Italian Public Interest Litigation in the Environmental Sector 3-10, June 1974 (unpublished paper, on file at the Florence Institute of Comparative Law).

151. Decision of March 9, 1973, No. 253, [1974] *Foro Ital.* III 33, 49 *Foro Amm.* 261 (§ II) (Consiglio di Stato). The decision gave *Italia Nostra* standing to challenge the lawfulness of an administrative act of the province of Trento on the ground that the act authorizing construction of a road through a park was illegal.

152. 405 U.S. 727 (1972) (denying standing to the Sierra Club on the grounds that the Sierra Club failed to allege that it or any of its members had been or would be injured by the conversion of a game reserve into a privately operated resort). In contrast, the *Italia Nostra* decision granted standing to the organization as a representative of the *public* interest, not merely that of itself or its members.

153. See *Comparative Study* at 864.

At least one more recent decision of the *Consiglio di Stato*, however, casts doubt on the issue of whether Italy will continue the positive trend in standing. In Decision of November 13, 1973, No. 829, [1974] *Foro Ital.* III 262-64 (Consiglio di Stato), it denied standing to the Association of Venician Gondoliers to challenge the closing of several canals in Venice.

154. *Bayerischer Verwaltungsgerichtshof*, Decision of February 2, 1973, [1973] *BAYERISCHE VERWALTUNGSBLÄTTER* 211; see *Comparative Study* at 863-64 n.316.

As for France, it should be said that, unlike Italy and Germany, the jurisprudence of the *Conseil d'Etat*—that country's supreme administrative court—has consistently allowed broad standing to groups to challenge administrative decisions. J. M. AUBY & R. DRAGO, *TRAITÉ DU CONTENTIEUX ADMINISTRATIF* 450-88, especially §§ 1040, 1042 (1975) (Paris, Librairie Générale de Droit et de Jurisprudence).

VII. FEATURES AND PROCEDURAL SAFEGUARDS OF PUBLIC INTEREST LITIGATION

The gradual rise and growth of the "ideological plaintiff" in both civil law and common law countries is, of course, a multifaceted phenomenon. Only a few aspects of it could be examined here, but other aspects are no less important.¹⁵⁵ Two of them will be touched upon, very briefly, in the remainder of this article. One is the new role of the judge in public and group interest litigation. The other is the problem of due process and, more generally, of preserving the right to a fair hearing for those involved in such litigation.

A. *The Role of the Judge*

Traditionally, the role of the civil judge has been determined by the individualistic character and private content of civil litigation. The court's task has been to restore to the aggrieved party the enjoyment of his own rights vis-à-vis his adversary; consequently, the direct effects of a judicial decision were *not* to reach beyond the sphere of the actual parties in the proceeding.

In the case of the new *actions collectives*¹⁵⁶ or public interest actions, however, the traditional "privatistic" schemes are clearly inadequate. By definition, the plaintiff does not sue merely for himself, but for the collectivity, for a class or subclass of persons; it is the class, not merely the party, that has to be restored to the enjoyment of its "collective right." As a consequence, both the duties of the ideological party and the controlling responsibility of the court become more intense. On the one hand, the party cannot freely "dispose" of the collective right in issue; on the other, the judge is responsible for insuring that the party's procedural behavior is, and remains throughout the proceeding, that of an "adequate champion" of the public cause. The Federal Rules of Civil Procedure express, in part, this idea by providing that in both class actions and shareholders' derivative actions the "approval" of the court is necessary for the action to be "dismissed or compromised."¹⁵⁷ As Professor Homburger correctly put it:

The most distinctive feature of class litigation . . . may be the uncommonly active role which the judge must play in the control and supervision of the proceedings. The public interest in the prosecu-

155. On the institution of the *amicus curiae*, see note 103 *supra*.

156. For this expressive French terminology, see, for example, Dupeyron, *supra* note 134, at 153.

157. FED. R. CIV. P. 23(e), 23.1.

tion of a class action is far greater than in ordinary civil litigation. It is the court's function to protect that interest as well as the interests of the absent members of the class. The successful management of a class action, therefore, requires a procedure that leans more toward court-prosecution than ordinarily is the case in the American system.¹⁵⁸

Also, and again by definition, the effects of judicial decisions rendered in public interest litigation must go beyond the sphere of the parties actually present in the proceedings. The traditional principle that *res judicata* effects are limited to the actual litigants, a principle that someone has called "the last refuge of individualism" in civil litigation,¹⁵⁹ simply cannot prevail if diffuse rights are to be protected by the courts. Even such admittedly unorthodox concepts as that of "fluid recovery," so strongly condemned by the Court of Appeals of the Second Circuit in its review of *Eisen*,¹⁶⁰ does not appear to be out of line in this light, since the ideological plaintiff is not suing merely to have his own damage restored, but rather to have the wrongdoer provide indemnification for all the damage he has caused to the group, the class, or society as a whole.¹⁶¹ The larger polluter, for instance,

158. *Private Suits* at 349.

Aside from the examples discussed below (see notes 160-62, 180-85 *infra* and accompanying text), rather striking illustrations of judicial activism and control are given in Note, *The Wyatt Case: Implementation of a Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1340-47 (1975). With respect to class and public interest actions, the note discusses special masters, receivers, monitors, committees, and even ombudsmen set up by judges to supervise implementation of their decrees. To insure compliance with a decree, the judges thus create their own supervisory institutions, rather than simply relying on the usual method of complaints by one of the adversary parties.

159. See U. ROMAGNOLI, *LE ASSOCIAZIONI SINDACALI NEL PROCESSO* 36 (1969) (Milan, Giuffrè). The traditional principle is expressed in the well-known Latin "res inter alios iudicata alteri non nocet nec prodest."

160. 479 F.2d 1005, 1014-18 (2d Cir. 1973). See also note 6 *supra*. The Supreme Court, however, in its holding in the *Eisen* case, made no ruling on the suitability of the fluid recovery concept. 417 U.S. at 172 n.10.

For a brief but penetrating analysis of French concepts comparable to that of a "fluid recovery," see Dupeyron, *supra* note 134, at 154-55.

161. In the field of diffuse rights, recovery should tend to cover *the total damages caused by the defendant*, rather than merely *the damages suffered by the plaintiff*. The concept of fluid recovery is one manifestation of this idea; rejecting that concept would imply rejection of one essential feature of effective protection of diffuse rights. Cf., e.g., Scott, *supra* note 52, at 414-15. Indeed, a focus on the total damages caused by the injurer, rather than on individuals who are damaged, increases the likelihood that an economically "optimal" level of the injury-causing activity will be reached. As Professor Calabresi has pointed out, what matters from an economic viewpoint is not the compensation of individuals, but the assignment of the correct market value to the injury-causing activity. G. CALABRESI, *supra* note 25, at 201-05.

Unfortunately, following the lead of the Second Circuit Court of Appeals in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), most federal courts appear

would hardly be forced to stop his wrongdoing should he merely be sued by individual victims and only for the damage inflicted on one or some of the myriad of affected persons. Clearly, a blind refusal to accept such concepts as "fluid recovery" can be tantamount to an a priori refusal by the courts to provide for the effective defense of diffuse rights—a strange attitude, indeed, if it is true that those rights are becoming more and more important in all advanced societies, and that judicial protection is the most trustworthy and sophisticated safeguard of legal rights ever designed by human civilizations.¹⁶²

to reject the fluid recovery. *See, e.g., In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974) (recovery to users of 600 hotels would have been at best \$6 per user); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 64 F.R.D. 43 (D. Del. 1974); *Turoff v. Union Oil Co. of Cal.*, 61 F.R.D. 51 (N.D. Ohio 1973). However, United States Congressman Peter Rodino of New Jersey, Chairman of the House Judiciary Committee, has proposed that a "*parens patriae*" bill be enacted for antitrust claims, in part to rectify this problem. H.R. 38, 94th Cong., 1st Sess. (1975). It would allow a state attorney general to sue under the federal antitrust laws to recover the reasonably estimated aggregate damages sustained by the state's citizens. The damage fund would then be allocated among the citizens either in a manner provided by state law or according to a plan developed by the federal district court; alternatively, the fund would escheat to the state. The bill thus allows fluid recovery, but only when the state attorney general brings suit.

The traditional concept of civil liability as limited to the damages *suffered by the plaintiff* is shared by civil law and common law countries. *See, e.g., Alston, supra* note 96, at 307, 312 (1973), *quoting* the King's Bench opinion in *Markt & Co. v. Knight S.S. Co.*, [1910] 2 K.B. 1021, 1040-41:

[D]amages are personal only. To my mind no representative [class] action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

However, that traditional concept has certainly been implemented in a more inflexible way in civil law than in common law countries.

162. A most drastic expression of the attachment to traditional views of the judicial role can be found in Justice Powell's concurring opinion in *United States v. Richardson*, 418 U.S. 166, 180-96 (1974). The central points of the opinion are that "relaxation of standing requirements is directly related to the expansion of the judicial power," and that such relaxation "would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *Id.* at 188. Justice Powell's concern about the expansion of the judicial power, however, apparently neglects that such expansion is but one facet of a general expansion of governmental power in modern times—of all branches of government. The ever increasing powers of the legislative and executive branches justify and, indeed, necessitate a corresponding broadening of the judicial power in order to maintain a balanced system. To be sure, a bourgeois "night watchman" view of government could go hand-in-hand with a conception of judges limited to rendering justice in traditional, essentially individual, litigation. But the growth of the modern welfare government and the parallel growth of socio-economic interdependence of groups, categories, and classes of citizens call for a corresponding growth of the task of "judicial protection." As for the "shift away" from democracy, an elementary awareness of sad historical experience should suffice to convince that precisely the opposite is correct. A democratic government is one in which citizens can have *access to justice* to vindicate legal rights—old and new,

B. *The Parties' Right to Be Heard: From Individual to Social Due Process*

To be sure, resistance—even blind refusal—is perfectly comprehensible, even if not justifiable. At stake is not merely a question of traditionalism and attachment to the “old”; serious problems are present in the new course.

The most apparent of these problems concerns the parties' right to be heard, the most fundamental of all guarantees of a fair proceeding. The principle *audi et alteram partem* is sanctioned by the constitutions of many countries, including the United States,¹⁶³ and by modern transnational bills of rights, such as the European Convention of Human Rights, which is presently binding for eighteen nations.¹⁶⁴ Indeed, it is a most ancient aphorism of human wisdom that, as put by Aristophanes 24 centuries ago, “a judgment shall not be made before the arguments of both sides are heard.”¹⁶⁵ How then can we accept the fact that judgments rendered in public interest cases extend their binding effects beyond the sphere of the actual litigants, possibly prejudicing¹⁶⁶ persons, and sometimes, legions of persons, who were not

individual and meta-individual—and one in which societal, including governmental, legal duties can be judicially enforced, since judicial protection is what assures the “rule of law.” Also, democratic government is one in which people have a sense of participation, a sense that distant legislatures and administrative apparatuses so frequently alienate. Judges, of course, can themselves become bureaucrats insulated from society; however, the very fact that they are called daily to adjudicate concrete “cases and controversies” is the powerful antidote against that danger. And public interest litigation is no less litigation—no less “case and controversy”—than traditional two-party litigation. See Jaffe, *supra* note 139.

163. See the references in FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION 449-52, 676-77 (M. Cappelletti & D. Tallon eds. 1973) (Milan/Dobbs Ferry, New York, Giuffrè/Oceana) (United States). See also *id.* at 15-19, 677-79 (Federal Republic of Germany); *id.* at 548-51, 680-81 (Italy).

164. Art. 6, para. 1, 1st sentence, of the Convention establishes that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an impartial tribunal established by law.”

165. ARISTOPHANES, THE WASPS, lines 725-26 “Πρὶν ἂν ἀμφοῖν μὲθρον ἀκούσῃς, οὐκ ἂν δικάσῃς.”) See G. DEL VECCHIO, LA GIUSTIZIA 176 (4th ed. 1946) (Rome, Studium) (1959). For the English translation, see G. DEL VECCHIO, JUSTICE 172-73 n.13 (A. H. Campbell transl. & ed. 1952).

166. Prior to 1966, in so-called “spurious” class actions (analogous to actions now brought under amended FED. R. CIV. P. 23(b)(3)), the absent members of the class were not bound by a judgment for the defendant, but could intervene and share the benefits if the plaintiff prevailed. This system was termed “one-way intervention.”

For an interesting discussion about whether the Supreme Court decision in *Eisen* foreshadows a return to the “one-way intervention” system, see Dam, *supra* note 64, at 121-26.

given an effective opportunity to be heard? At first glance, an opinion such as that rendered by the United States Supreme Court in *Eisen*¹⁶⁷ would seem perfectly correct, and perhaps even too liberal, since the Court was willing to forego individual notice at least to those members of the class who could not easily be identified.¹⁶⁸ Strictly construed, due process would seem to require that adequate notice, which is a necessary ingredient of the right to be heard,¹⁶⁹ be given to *all* the individual members of the class who are to be affected by the decision.¹⁷⁰

This individualistic concept of a fair hearing, however, will soon appear too rigid if measured against its practical consequences. Judicial protection of diffuse rights, frequently involving large numbers of persons, is often made impossible for all practical purposes by a strict adherence to traditional notice and fair hearing requirements. In the *Eisen* case, for instance, notice, even limited to identifiable persons, would have cost the ideological plaintiff \$225,000,¹⁷¹ clearly an impossible burden.¹⁷²

167. See note 6 *supra*.

168. In fact, the decision prescribes individual notice only to the members of the class identifiable through "reasonable effort," and is limited to rule 23(b)(3) actions. In *Eisen*, this would still have left 4 million members of the class without individual notice. See Bennett, *supra* note 64, at 813. Of course, the United States Supreme Court in the *Eisen* case does not explicitly address itself to the constitutional, due process aspects of notice in class actions, but merely to the statutory requirements of rule 23(c)(2).

169. As stated by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Other legal systems are in agreement. The Italian Constitutional Court, for example, has stated that "Notice is a necessary instrument of a fair hearing . . ." Decision of June 6, 1965, No. 57, 10 *Giur. Cost.* 717, 723 (Corte Costituzionale 1965). Although the decision concerned a criminal case, its language clearly applied to civil matters as well. For Germany, see, e.g., Constitutional Court, Decision of Feb. 1, 1967, No. 17, 21 *BVerfG* 132 (failure to notify the father about a legitimacy hearing held to violate the right to be heard).

170. In the words of one commentator, "[T]he procedural device of the class suit—any class suit—conflicts with the deep rooted principle of Anglo-American jurisprudence that no one shall be bound by a judgment without having had an opportunity to litigate his own claim in his own way." Simeone, *Procedural Problems of Class Suits*, 60 *MICH. L. REV.* 905, 944-45 (1960).

171. And this for postage alone. See *Eisen v. Carlisle & Jacquelin*, 52 *F.R.D.* 253, 257-58 (S.D.N.Y. 1971); Dam, *supra* note 64, at 103, 107.

172. One of the *Eisen* holdings by the Supreme Court was that the costs of notice, absent a fiduciary relationship between the parties, must initially be borne by the plaintiffs, with only the possibility of reimbursement if the plaintiffs prevail in the lawsuit. 417 U.S. at 178. For the impact in general of this holding, cf., e.g., SENATE COMM. ON COMMERCE, CLASS ACTION STUDY, *supra* note 1, at 26-27.

Even the most sacred principles of "natural justice"¹⁷³ must therefore be reconsidered in view of the changed needs of contemporary societies. Reconsideration, however, does not mean abandonment, but rather adaptation. The old schemes of a merely individualistic "procedural guarantism" must be transformed in order to be adapted to the new meta-individual rights; in other (and more American) terms, an individualistic vision of procedural due process should give way to, or be integrated with, a social or collective concept of due process, since this is the only possible way to assure judicial vindication of the new rights. Hence, the right to be heard must indeed be preserved and guaranteed—not necessarily, however, to all the individual members of the class, but to the ideological party. This party, *if adequately representative*,¹⁷⁴ shall be allowed to act for the entire class, including those members who are not identified, not served, in sum, not "heard" in a strictly literal sense of that term. In fact, these members of the class will have a better "day in court" if representative litigation is allowed than if it is not, since, as a rule, they would simply be unable to go to court individually.¹⁷⁵

The problem, of course, is thus shifted, not resolved. What is "adequate representation"? How can it be decided whether or not an "ideological plaintiff" or "private attorney general" is honest, prepared, and aggressive enough—in one word, whether he is "serious" enough¹⁷⁶

173. On the two rules of natural justice, *i.e.*, *nemo iudex in causa sua* (judicial impartiality) and *audi alteram partem* (the right to be heard), see, for example, H. MARSHALL, *NATURAL JUSTICE* 3-20 (1959) (London, Sweet & Maxwell); S. DE SMITH, *supra* note 98, at 134-245; Cappelletti, *General Report*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION*, *supra* note 163, at 669-70.

174. On the concept that in class actions *adequacy of representation* should be the essential due process requirement, see, for example, Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313-34 (1973); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir. 1975).

175. "It is a landmark in judicial sophistry to use the due process concept in the name of protecting the interests of class members, to reject the only litigation procedure capable of doing so." Scott, *supra* note 52, at 420, criticizing Judge Medina's holding for the Second Circuit in the *Eisen* case.

This point is particularly apparent in such cases as *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part, sub. nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), where the class suitor represented all the mentally retarded and mentally ill residents of Alabama involuntarily confined in the state's public mental institutions, claiming that the state was denying them the right to receive adequate treatment. Clearly, this "class" has a better day in court in a system which allows representative litigation, than in a rigidly individualistic system. For a discussion of the *Wyatt* case, see Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, *supra* note 158.

176. See note 181 *infra* and accompanying text.

—to be held adequately representative of an entire class or subclass? How can negligence, abuse, and blackmail be prevented?

Some countries have tried to give a legislative answer to these questions, at least in certain fields of public interest litigation. A French *loi* of 1972,¹⁷⁷ already mentioned, is an example in the field of representation of racial minorities,¹⁷⁸ and another example is provided by a 1970 Italian statute in the field of labor disputes.¹⁷⁹ However, comparative analysis tends to demonstrate that it would be absurd to expect legislation to provide complete and uniform answers to this problem. A degree of judicial discretion and flexibility is unavoidable and even desirable, especially at the present, still rudimentary phase of our experience in the public interest field.¹⁸⁰ Whereas in ordinary litigation the "seriousness" of the plaintiff is generally assured by the traditional limitation of standing to the person directly affected in his own rights, in public interest litigation the judge must measure the plaintiff's seriousness,¹⁸¹ and hence his adequacy as a representative, by means of more various and variable yardsticks. These yardsticks may from time to time include the past history of a plaintiff,¹⁸² the internal organization, the funding sources,¹⁸³ and the statutory objectives¹⁸⁴ of a private group, as well as the numerical and geographical size, and the local or national character of a public interest organization.¹⁸⁵ Adopting a legislative and rigidly uniform solution would be like using the axe of the woodsman to perform delicate surgery.

177. Statute No. 72-546 of July 1, 1972 ("concerning the fight against racism").

178. See note 81 *supra*.

179. Art. 28, para. 1 of the *legge* of May 20, 1970, No. 300 ("*Statuto dei diritti dei lavoratori*"), establishing the requirements for labor unions to be granted standing to sue in the collective interest of the workers against management for unfair labor practices. See *Comparative Study* at 865-66 n.324.

180. See, e.g., *id.* at 866 n.326, outlining the interesting suggestion of three German experts on environmental problems.

On the inevitable "role normatif" and "fonction créatrice" of the courts in fields, such as environmental law, which are in a phase of rapid formation and transformation, see, for example, de Lanversin, *Contribution du juge au développement du droit de l'environnement*, in 2 MÉLANGES OFFERTS À MARCEL WALINE: LE JUGE ET LE DROIT PUBLIC, *supra* note 134, at 519, 522, 525-29.

181. On this problem of the "serious" plaintiff in public interest litigation, see the references in *Comparative Study* at 866 n.325.

182. Consider the five-year requirement for French associations against racism. See note 81 *supra*.

183. See *Comparative Study* at 865 n.323.

184. Consider again the 1972 French *loi*. See note 81 *supra*.

185. See *Comparative Study* at 865-66 n.324. See also Audinet, *supra* note 147, at 235, with particular reference to the formula, so important (even in Italy) in disputes concerning labor unions, of the "*syndicat le plus représentatif*."

THE ONGOING REVOLUTION IN THE LAW AND PRACTICE OF
CIVIL LITIGATION: A CONCLUSION

My first concluding remark is of a comparative nature. Recall the civilian private law—public law dichotomy¹⁸⁶ and the historical cleavage between the individual and the state.¹⁸⁷ These dichotomies, upon which the inadequate “aggrieved individual” or “governmental agent” scheme of standing is based, have never been as influential in the common law world, where the reactive effects of the French Revolution against feudalism and “intermediate societies” were never deeply felt. The United States, in particular, has always been rich in intermediate societies, as Alexis de Tocqueville remarked with admiration almost one and a half centuries ago.¹⁸⁸ These societies have frequently recognized their role in furthering the assertion of social and meta-individual rights, and have utilized such devices as *amicus curiae* briefs, representative standing, and, perhaps most recently, group legal services. American jurists may not be at the best vantage point to realize the potential impact of recent decisions which undermine or obstruct the effectiveness, and hence, as a by-product, sap the vitality, of such intermediate societies. That potential impact is to throw the burden of asserting meta-individual rights back onto single individuals and government officials, the very scheme proven inadequate by the civil law experience.

In addition, the limitations on the power of the civil law judge to award damages beyond those individually suffered¹⁸⁹ and, more generally, his inability—again, for historical reasons—to construct creative and imaginative new remedies to effectuate diffuse rights have never been, at least to the same degree, characteristic of the common law world. The activism and imagination of common law judges in “remedial law-making” has once again been a focus for admiration in the civil law world.¹⁹⁰ Here too, however, and especially in an area where this creative strength is most needed to protect new and important rights through new remedies, it is disturbing to see American

186. See notes 11-16 *supra* and accompanying text.

187. See notes 16-18 *supra* and accompanying text.

188. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485-88 (J. Mayer & M. Lerner eds. 1966) (New York, Harper & Row). “Americans of all ages, all stations in life, and all types of disposition are forever forming associations.” *Id.* at 485.

189. See note 161 *supra* and accompanying text.

190. See, e.g., A. PEKELIS, *LAW AND SOCIAL ACTION* 42-74 (M. Konvitz ed. 1950) (Ithaca and New York, Cornell Univ. Press).

developments now casting a long shadow upon such remedial innovations as fluid recovery.¹⁹¹ Again, the common law jurist may perhaps not fully realize the negative impact of restricting new, innovative remedies in this area—an impact which forces reliance on traditional, essentially individualistic remedies whose ineffectiveness for securing meta-individual rights is demonstrated by the experience in the civil law world.

My second, and last, concluding remark is of a more general nature. Whatever the oscillations and whims of a particular time and place, there are today basic developments and trends shared in common by all modern societies.

Clearly, modern societies are witnessing the progressive decline of a two-party, laissez-faire concept of civil justice, a decline forcefully announced in the United States as early as 1906 by Roscoe Pound.¹⁹² Dean Pound's concern some 70 years ago, however, was essentially for the inefficiency of the courts, the "exaggerations of the contentious procedure," and the need for a more activist judiciary to speed up litigation.¹⁹³ Today, our concern is much more complex. New social rights have emerged which only a few decades ago either were unknown or were considered mere charities and nonjusticiable privileges. *Goldberg v. Kelly*¹⁹⁴ is an American milestone in this new development, but similar developments have occurred in other countries as well, through both legislation and adjudication.¹⁹⁵ A "new property"¹⁹⁶ has emerged, and with it, a new role for the courts,¹⁹⁷ as well as the need

191. See notes 160-61 *supra* and accompanying text.

192. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), republished in 8 BAYLOR L. REV. 1, 6 (1956). (Citations are to the latter.)

193. *Id.* In particular, see *id.* at 12-25.

194. 397 U.S. 254 (1970).

195. See, e.g., M. CAPPELLETTI, *PROCESSO E IDEOLOGIA* 511-24 (1969) (Bologna, Il Mulino); L. SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* 28-50 (1974) (London, Stevens & Sons); *LA RECONNAISSANCE ET LA MISE EN OEUVRE DES DROITS ÉCONOMIQUES ET SOCIAUX* (1972) (Brussels, Centre interuniversitaire de droit comparé).

196. According to the Supreme Court's ruling in *Goldberg v. Kelly*, "[s]uch sources of security [as social security, governmental subsidies, long-term governmental contracts, routes for airlines and channels for television], whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials fully deserved, and in no sense a form of charity . . ." 397 U.S. at 262 n.8. The Court cited, *inter alia*, Reich, *The New Property*, 73 YALE L.J. 733 (1964), in which governmental benefits were first recognized as "new property."

197. On the new "active" and "social" role of the judge, which is dictated by the modern equalitarian ideal of effective (rather than merely formal) access to justice and by the need to place the parties on a more equal footing, see, e.g., Cappelletti,

to reconsider and adapt old principles and structures of civil litigation which have proven unsuitable to that new role.

This development is far from being concluded. An even newer type of "property" has emerged, including those "rights without a holder" that often share with social and welfare rights the need for affirmative state action, but present further difficulties in being brought to, and given adequate protection by, the courts.

I have tried to indicate some basic trends emerging in a growing number of legal systems—both in the civil law and the common law areas—in their effort to deal with these newest phenomena and needs. We have seen that a turmoil, indeed a real revolution, is in progress, in which even the most sacred ideas and themes of judicial law, such as due process and the right to be heard, are being challenged.¹⁹⁸ As a consequence of that challenge, basic changes are gradually taking place everywhere.

To be sure, advocating changes of traditional structures and long-accepted concepts is intellectually much more difficult than simply proposing their conservation. Such new concepts as "diffuse rights," "fluid recovery," and the "ideological plaintiff" may admittedly appear dangerous, iconoclastic, and confusing. Yet, they reflect the unprecedented complexity of contemporary realities. They require open analysis, not blunt rejection. The contribution of this article, if any, is to show that these new concepts represent not a development of merely local character, nor the ideological biases of limited groups in the United States or elsewhere, but rather a deeply motivated, major trend of universal dimensions.

Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe, 69 МІСН. L. REV. 847, 854-55 & n.38, 870-81, 883-84 (1971) and references cited therein.

198. Indeed, the turmoil goes beyond the law of civil procedure, and includes the very idea of the civil sanction, with important consequences in the fields of torts, civil liability, and damages. Cf. Hazard, *supra* note 9, at 307; Weinstein, *supra* note 1, at 303. See also notes 160-61 *supra* and accompanying text.