Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenors

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INTRODUCTION

This panel has been assembled to discuss the problems and prospects of participation in emerging public law litigation. We will of necessity labor under varying definitions of what is or should be included in this discussion. The works of Professor Chayes[1] and Fiss[2] provide a good starting point because they have identified the operative features of public law actions.[3] An action which challenges statutory and constitutional policies for the purpose of restructuring important social institutions is clearly within their view of a public law action. An action which seeks individual relief and requires no change in the policies of major institutions in order to achieve the relief requested, clearly does not qualify as a public action. The range of actions which lie between these extremes render the task of definition highly unproductive.

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[1] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[2] O. FISS, THE CIVIL RIGHTS INJUNCTION (1978). *See also* Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979).

[3] Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Professor Fiss notes that: "Adjudication is the social process by which judges give meaning to our public values. Structural reform . . . is . . . distinguished by the constitutional character of the public values, and even more importantly, by the fact that it involves an encounter between the judiciary and the state bureaucracies." *Id.* at 2.

Chayes, *supra* note 1, at 1284 observes that "[p]erhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead the object of litigation is the vindication of constitutional or statutory policies . . . [A]lthough the label is not wholly satisfactory, I shall call the emerging model 'public law litigation.'"

In recognition of these definitional difficulties, I have confined my comments to a genre of litigation which all will agree satisfies our notion of the public law action — the lawsuit in which a white plaintiff challenges the constitutionality of a race-conscious admissions policy of a professional school. These cases provide an excellent vehicle for testing the problems and prospects of public law litigation. Typically, the plaintiff wishes to pursue individual relief, while at the same time asking that the court provide a remedy which will inevitably affect the life of the institution and the lives of qualified minority competitors for the same position.

In recent years, there has been an explosion of cases in which federal courts have been asked to expand the constitutional and statutory protection of civil rights. Increasingly, federal judges have been called upon to assume an often unaccustomed role in the resolution of significant social issues.[4] Courts have acted to desegregate public schools;[5] to equalize the availability of property tax revenues for public education;[6] to equalize the distribution of public benefits such as housing and municipal services;[7] and to decide the constitutionality of race-conscious admissions programs in higher education.[8]

Monetary relief and simple injunctive orders are often inadequate solutions. Courts have, by sheer necessity, become involved to an unprecedented extent in designing and implementing changes in the operation of complex social institutions. The modern genesis of this form of litigation is *Brown v. Board of Education.*[9] A predictable consequence of this explosion of sub-

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[4] For examples of these cases, *see* Chayes, *supra* note 1, at 1284.

[5] *See, e.g.*, Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

[6] For example, the California Supreme Court decision in Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977) held that the use of a system of property taxation to finance public schools violated the equal protection principle. While the task of correcting the identified constitutional defects has been committed to the legislature, the prospect exists that the ultimate remedy will be devised and supervised by judicial action.

[7] *See, e.g.*, Monell v. Department of Social Services, 436 U.S. 658 (1978) in which the Court held that municipal entities could be sued under 42 U.S.C. § 1983 for constitutional violations which are the result of official policy. This case will surely create a veritable revolution in judicial involvement in assessing the constitutionality of local governmental policies.

[8] *See, e.g.*, Bakke v. Regents of the Univ. of Cal., 438 U.S. 265 (1978); De Ronde v. Regents of the Univ. of Cal., *hearing granted*, 3 Civ. 16461, 16732, and 16872 (Cal. Sup. Ct. Apr. 10, 1980).

[9] 349 U.S. 294 (1955).

stantive rights is the inevitable pressure for attendant procedural reform.[10]

My remarks proceed from the premise that recent challenges to affirmative action programs have gone forward as individual actions without the benefit of direct representation of the interests of minority applicants — the intended beneficiaries of such programs. This inadequate representation arises largely because of procedural barriers which reduce the likelihood that the views of minority group representatives will be solicited to shape the range of issues to be considered.[11]

If properly utilized, intervention of right under Federal Rule 24[12] holds some promise for correcting this exclusion. Intervention is a procedure by which an outsider with some personal stake in the outcome of a lawsuit may come in as a party, even though not named by the original litigants.

When taken together, the theories of joinder of parties and intervention provide a logical symmetry underlying the rationale for ascertaining when the original parties may or must bring additional persons before the court, and when non-parties may introduce themselves into pending litigation to protect interests imperiled by the action. The chief advantage of these two procedures lies in the protection which they afford non-parties who may have diverse interests which are of substantial social, political and/or financial importance.

I will comment on the limitations of traditional standards of intervention under Federal Rule of Civil Procedure 24 in affirmative action cases. The traditional model of litigation is structurally and functionally unresponsive to the diversity of interests which are typical of affirmative action cases.

Inherent in early intervention theory was a model of litigation which assumed that litigants would assert directly opposed interests. Adding parties on either side of the controversy was viewed as a method of augmenting what were essentially only two antagonistic interests. This supposition of polarity was an integral

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[10] *See, e.g.*, Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978). *See also* Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979).

[11] Jones, *supra* note 10, at 31-35. The absence of procedural models which permit judges who choose to solicit direct participation by minority group members — or their representatives — is the chief shortcoming of the current conception of intervention.

[12] FED. R. CIV. P. 24(a).

part of the federal requirement that the interests of plaintiffs and defendants be sufficiently adverse. While this older, two-party view of litigation no longer predominates, its influence is nevertheless reflected in current intervention standards,[13] such as the restriction on permissive intervention which will "unduly delay or prejudice the adjudication of rights of original parties."[14]

This focus on the original parties reflects a proprietary conception of litigation. Those who first bear the costs of invoking the judicial process are rewarded by protection of their stake in the status quo. This protection arises from the requirement that consideration be given to whether new entrants will upset the balance of the conveniences established for the original parties.[15] Professor Friedenthal goes even further by suggesting that an individual plaintiff "should be given every fair chance to control his own lawsuit."[16]

Thus, even if intervention is allowed, it is frequently conditioned upon the limitation of issues to those raised prior to intervention, or other restrictions on the scope of participation.[17] Intervention under Rule 24 is classified as either "permissive" or "of right."[18] But these labels suggest a greater distinction in entitlement than exists in fact. Intervention of right under 24(a)(1) — which requires a federal statute conferring an unconditional right of intervention — represents a very small proportion of the total intervention actions. Furthermore, the courts have narrowly construed those statutes which grant anything less than an unconditional right of intervention.[19] The remaining intervention cases reflect in reality a large discretionary standard.[20]

The discretionary nature of intervention is its principal limita-

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[13] *See, e.g.*, E.E.O.C. v. Wood, Wire and Metal Lathers Union, 23 F.R. Serv.2d 567 (1977). Consent of parties was deemed a factor in allowing intervention.

[14] FED. R. CIV. P. 24(b).

[15] In permissive intervention cases, the balancing is more explicit. *See, e.g.*, United States v. Allegheny Ludlum, Indus., Inc., 517 F.2d 826 (5th Cir. 1975). Stadin Co. v. Union Electric, 309 F.2d 912 (8th Cir. 1962).

[16] *See* Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, this issue at 259, 262.

[17] *See, e.g.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970).

[18] *Supra* notes 12 and 14.

[19] *See* cases discussed in 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1906 (1978).

[20] *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 758 (1968).

tion in affirmative action cases. Intervention of right, when not based on statute, is conditioned on a showing of: 1) timeliness; 2) sufficient interest in the subject of the action; 3) a demonstration that existing representation of this interest is inadequate; and 4) that the disposition of the action will practically impair or impede the intervenor's ability to protect that interest. Though each of these threshold inquiries permits discretionary exclusion, a court sympathetic to the merits of the underlying claim will be more inclined to remove the procedural barriers.[21] Given the increasing social and judicial hostility to race-conscious programs in all spheres of activity, minorities cannot rely on the benevolent exercise of discretion where critical civil rights are at stake.

Ironically, the representativeness of a non-class action is only tested once a self-appointed representative with adequate resources steps forward to contest the representativeness of the ongoing litigants. Frequently, there is no group with either the resources or sophistication to propose joinder in a timely fashion. In addition, the divergent views of affirmative action beneficiaries are ignored either by oversight or judicial passivity. Many recent "reverse discrimination" actions have been litigated as though they were private controversies. They are conducted without benefit of the protective devices designed to insure representation in class actions and other explicit public litigation.

All too frequently, the scenario in these cases involves an exclusion by default.[22] The typical reverse discrimination plaintiff frequently prefers to challenge the program individually rather than pursuing a class action. Often, the plaintiffs' assertion of individual rights antagonistic to group rights is the philosophical, if not procedural, foundation of the case. The pursuit of an individual claim often masks the true character of the controversy, including its potential impact on unrepresented persons or groups. The defendants are also frequently cast in a position of ethical and legal conflict.[23] If the affirmative action program was voluntarily instituted, it is ordinarily defended as necessary to encourage

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[21] The most notable example is Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

[22] The *DeRonde* cases, noted *supra* at 8, precisely embody this problem.

[23] The unwillingness of the University — indeed, its inability — to plead its own prior discrimination to justify affirmative action programs is the principal source of the conflict. In rare instances, the defendant may introduce findings of its own prior discrimination to justify the program. *See, e.g.*, Price v. Civil Service Comm'n of Sacramento County, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980).

voluntary alleviation of a general social problem. This defense is usually advanced despite the availability of information concerning the defendant's past discrimination which, if offered, would support a mandatory affirmative action program. With the stage thus set, the judge is neither required by law, nor conditioned by experience or training, to search for the powers which he or she may possess to ascertain the spectrum of interests affected by the action. An inquiry about the representativeness of the institutional defendant is rarely initiated except when the issue is raised by a volunteer seeking to intervene.

I. NOTICE

Exclusion of the direct representatives of minority beneficiaries is, in part, a problem of lack of notice. Since the pleading and pretrial phases of litigation often receive little, if any, publicity, it is extremely unlikely that those who might be affected will come forward before judgment has been entered. One accepted justification for a notice requirement to non-parties is that of claim and issue preclusion by either res judicata or collateral estoppel. These concepts of preclusion have their origin in the traditional legal and equitable models of adjudication which reflect an individualistic notion of dispute resolution and the effect of judgments.

Traditionally, notice to non-parties has not been required in individual actions, since these are perceived as having no preclusive effect on non-parties other than that deriving from stare decisis. In several aspects, however, this concept has lost its efficacy in matters of public law litigation.

The new litigation often requires reordering vast areas of public interest through the individual suit. This modern day David-and-Goliath encounter is a well-established feature of substantive and adjective law. Absent the class action, however, there is little to ensure representation of the interests of absentees who are sure to be affected. The absence of procedural protections for unrepresented interests in non-class action litigation is, therefore, a significant limitation.

II. WHAT IS AT STAKE?: THE RISKS OF NON-REPRESENTATION

The litigation of constitutional questions requires a delicate balancing of legal and political considerations. It is, at best, a task fraught with many hidden dangers. When the issue involves highly charged normative and moral considerations, the task of

predicting which of many courses of action will be taken by the Supreme Court becomes even more difficult. The reverse discrimination debate has produced substantial academic and popular literature and comment reflecting the diversity and irreconcilability of views on this issue.

Yet, the penchant for racial diversity — evidenced by the adoption of special admissions programs — is a recent phenomenon whose longevity no one can predict. Not a single Black or Chicano student was admitted to the U.C.L.A. Medical School from the time of its establishment in 1951 until 1966.[24] Not a single Black person was admitted to the University of California, San Francisco Dental School between 1946 and 1967.[25] While startling today, these statistics were an accepted reality of professional education throughout California.

In light of this historical exclusion, it is not surprising that minority communities were suspicious of the sincerity with which the University of California defended its affirmative action programs. Minorities, by contrast, had everything to lose in the University's race to decision. Even if the Supreme Court decided such a case on narrow statutory or constitutional grounds, the political aftershock might destroy all voluntary, race-conscious programs.

The fragility of affirmative action programs is well appreciated by its principal beneficiaries.[26] Popular misconceptions about the nature of affirmative action created tremendous pressures to eliminate the newly-created access programs. Thus, even the most carefully reasoned opinion, providing only limited support for affirmative action, was sure to create the basis for eliminating a voluntarily adopted program.[27] As early as 1970, academics op-

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[24] Brief of Jerome A. Lackner, M.D., et al, as *Amici Curiae* at 15, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[25] *Id.* at 16.

[26] *See, e.g.*, Lawrence, *When the Defendants Are Foxes Too: The Need for Intervention by Minorities in Reverse Discrimination Suits like Bakke*, 34 GUILD PRAC. 1 (1976).

[27] *See, e.g.*, the startling judicial defiance in DeRonde v. Regents of Univ. of Cal., *hearing granted*, 3 Civ. 16461, 16732, and 16872 (Cal. Sup. Ct. Apr. 10, 1980):

> The long awaited opinion of the United States Supreme Court in [*Bakke*] proved weak and inconclusive. Instead of collectively and forthrightly addressing the simply Fourteenth Amendment phrase "nor shall any state . . . deny to any person . . . the equal protection of the laws," the Supreme Court Justices intellectualized

posed to preferential admissions began to set the analytic stage for the demise of affirmative action. Some minority lawyers counseled against an appeal of the *Bakke* decision because of the inadequate record. This view can only be understood, however, in the broader context of political controversy.[28]

III. Due Process and Equal Protection

While the risks of the minority beneficiaries were considerable, the broader social implications of exclusion and non-representation deserve mention here. Race in general and the treatment of racial minorities in particular remains the single most divisive issue in America today. Its significance surpasses sex classification, economic disparity and religious affiliation. Support for this proposition can be found in every quarter of American life and literature. Given the divisiveness of race, any decision on the fate of minority aspirations made without their direct participation courts disaster. Moreover, the legitimacy of judicial authority and leadership in resolving fundamental social conflicts is eroded where minorities are excluded.

My primary emphasis has been on the role available to intervenors. A second and related inquiry concerns "necessary" and "indispensible" parties. Intervention is a highly desirable partial solution which permits direct challenges to the adequacy of existing representation. Thus, one whose personal stake in the outcome requires protection through direct participation may join the original parties. The joinder procedure under Rule 19 requires the court and the original parties to ascertain the potential effect of the lawsuit upon non-parties.[29]

In the reverse discrimination context, however, joinder depends upon parties who, by the very nature of the action, have no motivation to include minority representatives. The defendant will usually assert that there is no law which either requires or prohibits the program. If the defendant is an educational institution, it will proudly declare the importance of its academic freedom without admitting its own prior discrimination. The same principle is

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themselves into decisional obscurity.
Slip opinion at 9.

[28] *See, e.g.*, Smith, *Reflections on a Landmark: Some Preliminary Observations on the Development and Significance of Regents of the University of California v. Allan Bakke*, 21 How. L.J. 72 (1978).

[29] Fed. R. Civ. P. 19.

at work where the defendant is an employer.[30] This scenario has recurred repeatedly in recent cases.[31] One can certainly see an intrinsic institutional conflict which requires rethinking the procedures applicable to affirmative action litigation.

CONCLUSION

We have seen that traditional procedures increase division between institutions and minority beneficiaries. One can only assume that unless broader participation is allowed, this division will continue. In fact, there are several options available to ensure such participation: 1) *amicus curiae* status; 2) association of experienced civil rights counsel; and 3) joinder by the court. The latter option might include recent proposals for mandatory joinder, compulsory intervention or intervention either of right or permissively.

I have nowhere suggested that minority participation per se will insure an equitable outcome. Questions concerning the representativeness of the self-appointed representatives may also arise. The effectiveness of any new procedure will, of necessity, depend partially upon the quality and experience of counsel representing minorities.

The fundamental structural question raised here remains: Are there procedural barriers to direct minority representation in reverse discrimination actions which unnecessarily frustrate the legitimate expectation that all affected parties should be heard when litigation affects their basic interests? The prohibition against litigation without representation rests on partially inchoate notions of due process and fair play which must be protected in affirmative action cases as they have been in other actions.

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[30] *E.g.*, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979), *rehearing denied*, 100 S. Ct. 193 (1979).

[31] *E.g.*, De Ronde v. Regents of Univ. of Cal., *hearing granted*, 3 Civ. 16461, 16732, and 16872 (Cal. Sup. Ct. Apr. 10, 1980).