
RESPONSE

ATTORNEYS' FEES AND THE SOCIAL LEGITIMACY OF CLASS ACTIONS

DAVID MARCUS[†]

In response to Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010).

Do class action lawyers make too little? For many, one might as well inquire into the Pope's religious affiliation, or whether the Cubs have a chance at winning the World Series. To Brian Fitzpatrick, however, the conventional answer—no—is wrong. In an arresting article, he makes a utilitarian argument for why plaintiffs' lawyers often should receive a much higher share of a class's recovery than they presently do.¹

Fitzpatrick contends with justification that courts lack a normative metric to determine attorneys' fees in class actions.² Unprincipled fee awards trouble him because he believes that courts systematically undercompensate plaintiffs' lawyers in "small-stakes" class suits in which each class member has "only a few dollars or a few hundred dollars" in potential damages.³ These cases do not really compensate anyone, Fitzpatrick argues, since minor per capita recoveries for class members create no social utility.⁴ Their only function is deterrence.⁵ If 100%

[†] Associate Professor of Law, University of Arizona James E. Rogers College of Law. I am grateful for Brian Fitzpatrick's patient and valuable reactions to this Response.

¹ See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046 (2010) (invoking a "social-welfarist utilitarian perspective").

² *Id.* at 2053.

³ *Id.* at 2067.

⁴ Fitzpatrick's argument hinges on the claim that compensatory damages function

of the class's recovery went to counsel as fees, lawyers would have the greatest possible incentive to bring small-stakes class actions. Maximum deterrence would result at no cost to class member utility. Fee percentages, however, typically hover around 25%.⁶ Plaintiffs' lawyers thus eschew a possibly meritorious case when its expected litigation costs exceed 25% of its expected aggregate value. Potentially valuable deterrence never materializes from these (mostly quite small) cases.⁷ If the entire recovery in these small-stakes suits went to class counsel, courts could minimize this suboptimal result.

Fitzpatrick writes so lucidly that his article's many strengths speak for themselves. His discussion of the functions that small-stakes class suits do and do not play is particularly interesting, and he elegantly pivots from this analysis to his utilitarian case for higher fees. But questions remain. Does existing doctrine permit courts to award the class's entire recovery to class counsel? Has Fitzpatrick made a sufficient utilitarian case for his proposal? Is utilitarianism the best normative guide for fee awards in aggregate litigation? In my opinion, the answer to each is no.

I. DOCTRINAL DIFFICULTIES

Does existing law permit courts to award counsel 100% of the class's recovery? Fitzpatrick does not frame the issue quite this way. He acknowledges that such awards might be legally difficult to render, and in the end recommends that lawyers earn "as much as legal and political constraints permit."⁸ But whether 100% fee awards are doctrinally possible is a useful question for two reasons. First, although

as a form of insurance. *Id.* at 2058. Because individuals are not risk averse with respect to small losses, they would not purchase insurance to protect against such losses. *Id.* at 2067-68. As I understand the logic, because these individuals would not purchase insurance *ex ante*, there is no gain in social utility if they receive the equivalent *ex post* in the form of damages.

⁵ *Id.* at 2068.

⁶ *Id.* at 2046.

⁷ One hundred thousand dollar fee requests are not difficult to find. *E.g.*, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) (approving a \$100,000 fee request when the proposed settlement for the class equaled \$300,000); *Hopson v. Hansebrands Inc.*, No. 08-0844, 2008 WL 3385452, at *1 (N.D. Cal. Aug. 8, 2008) (conditionally certifying a settlement class under terms including "up to \$100,000 maximum . . . to attorney fees"). Taking this figure as the minimum a plaintiffs' lawyer needs to expect in order to file a class action, Fitzpatrick's proposal would incentivize lawyers to file cases worth less than \$400,000 (25% of which is \$100,000) and cases worth more than \$400,000 but involving unusually high litigation expenses.

⁸ Fitzpatrick, *supra* note 1, at 2079 (emphasis omitted).

his focus is primarily theoretical, Fitzpatrick does suggest, albeit guardedly, that applicable law might permit such fees.⁹ Second, if existing doctrine permits only a partial implementation of Fitzpatrick's proposal, then the theoretical rigor his analysis promises for fee awards loses some of its luster.

Fitzpatrick addresses several doctrinal challenges to his proposal, but two merit more examination than he provides.¹⁰ The Rules Enabling Act (REA)¹¹ poses the first challenge. Fitzpatrick believes that Federal Rule of Civil Procedure 23(h), which licenses "reasonable" fee awards in class actions,¹² permits courts to do what he urges.¹³ But the REA prohibits rules of procedure that "abridge, enlarge or modify any substantive right,"¹⁴ and this limitation might preclude an interpretation of "reasonable" to include such all-encompassing fee awards. An order giving the lawyer everything would effectively assign class members' claims to their counsel without their consent. Doctrine that regulates claim assignment is substantive law,¹⁵ and the Federal Rules themselves may not modify these assignments.¹⁶ Although the issue is quite complicated,¹⁷ Rule 23(h) might violate the REA's substantive rights limitation if applied in the manner Fitzpatrick desires.

⁹ See *id.* at 2076 (arguing that Rule 23 of the Federal Rules of Civil Procedure "might permit judges to award fees as high as they wish"); *id.* at 2077 (analyzing statutory fee caps and concluding that "it is not clear that these caps would prevent judges from awarding fees consistent with deterrence-insurance theory"); *id.* at 2077-78 (reviewing the *Erie-Hanna* doctrinal implications of state statutory fee caps and suggesting why Rule 23 might preempt them).

¹⁰ Fitzpatrick mentions the unjust enrichment issue briefly. *Id.* at 2075 (noting that "the common law of unjust enrichment . . . might not permit" 100% fee awards).

¹¹ 28 U.S.C. §§ 2072-2077 (2006).

¹² FED. R. CIV. P. 23(h).

¹³ See Fitzpatrick, *supra* note 1, at 2047-48, 2075-76 (noting that a 100% fee award could be permissible if state-law caps are preempted, and could be considered reasonable in light of the broad discretion vested in district court judges in approving fee awards).

¹⁴ 28 U.S.C. § 2072(b).

¹⁵ See *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) ("Whether a plaintiff is entitled to enforce the asserted right is determined according to the substantive law."); *Payne v. Wyeth Pharm., Inc.*, No. 08-0199, 2008 WL 4890764, at *1 (E.D. Va. Nov. 12, 2008) (same); 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1545 (4th ed. 2010) (theorizing that substantive law relating to the assignment of claims is the basis for the real-party-in-interest rule).

¹⁶ See *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 49 n.14 (2d Cir. 2005) ("The procedural mechanisms set forth in Rule 17(a) for ameliorating real party in interest problems may not, under the Rules Enabling Act, be employed to expand substantive rights." (citation omitted)).

¹⁷ For example, it is uncertain whether as-applied challenges to the Federal Rules are permitted. See, e.g., Catherine T. Struve, *Institutional Practice, Procedural Uniformity*,

Second, the doctrinal source for class counsel fees might not allow Fitzpatrick's proposal. Concerns of unjust enrichment—or the fear that class members would enjoy a windfall at an attorney's expense—justify courts using their equitable power to tax a class's recovery for fees.¹⁸ This “common fund” doctrine allows fees when “the classes of persons benefited by the lawsuits ‘[are] small in number and easily identifiable,’” when “[t]he benefits [can] be traced with some accuracy,” and when “there [is] reason for confidence that the costs [of litigation can] indeed be shifted with some exactitude to those benefiting.”¹⁹ A class action that makes no pretense of compensation might deter, but society at large, not just class members, would enjoy better defendant behavior in the future as a result.²⁰ A case without a small and readily identifiable class of beneficiaries, and featuring only the “vindicat[ion of] a general social grievance,” could not legitimately result in a fee award.²¹

Fitzpatrick criticizes the “indeterminate multifactor test[s]” courts presently use to calculate fees as unprincipled,²² and in contrast he offers a normative justification for a 100% fee award. But if the REA or unjust enrichment problems would require some significant downward departure from this percentage, I question whether courts using his utilitarian analysis and giving lawyers “as much as they can”²³ would in the end award fees in any more theoretically robust a manner.

and As-Applied Challenges Under the Rules Enabling Act, 86 NOTRE DAME L. REV. (forthcoming 2011) (discussing how the Supreme Court left the question open in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010)).

¹⁸ See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.”).

¹⁹ *Id.* at 478-79 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263-67 & n.39 (1975)); cf. *Geier v. Sundquist*, 372 F.3d 784, 790 (6th Cir. 2004) (interpreting *Van Gemert* for the requirement that a case must “result in the creation of a fund to be divvied up among the plaintiffs” to justify a fee award).

²⁰ Deterrence likely would not be readily quantifiable and thus could not justify a fee award. See *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (holding that because the value of injunctive relief is difficult to quantify, it can only rarely be included in common fund calculations).

²¹ *Van Gemert*, 444 U.S. at 479.

²² Fitzpatrick, *supra* note 1, at 2053.

²³ *Id.* at 2083.

II. UTILITARIAN PROBLEMS

Has Fitzpatrick made a sufficient utilitarian case for his proposal? I have two doubts. First, fee awards of the ilk Fitzpatrick prefers might cause a net deterrence loss. His proposal would apply in all cases involving minor per capita recoveries.²⁴ But a case's aggregate value determines whether the game is worth the candle for the plaintiffs' lawyer. As a recent case illustrates, potential damages of three dollars per class member would hardly thwart litigation if the case as a whole might win \$9.5 million.²⁵ Fitzpatrick's proposal might produce a greatly diminished settlement in this sort of case. Presently, if an attorney wants \$2.5 million in fees, she must obtain a \$10 million settlement. But if the lawyer gets 100% of the recovery, a \$2.5 million settlement would earn her the same amount. The defendant could take advantage of class counsel's higher rate of return and discount a settlement offer by \$7.5 million. A risk-averse plaintiffs' lawyer might accept such an offer, and there are reasons to think that risk aversion would be likely in this context.²⁶ Whatever additional deterrence the eschewed \$7.5 million might have created vanishes. The small cases Fitzpatrick's proposal would generate might engender some deterrence, but I am not sure it would counterbalance this loss.

I also doubt that Fitzpatrick has made the utilitarian case for more lawsuits. The expectation of larger fees might fuel litigation, and with it, the more robust enforcement of the substantive law. A utilitarian would applaud this result only if, to quote Fitzpatrick, "the substantive law correctly assesses damages for the claims on which small-stakes class actions are based."²⁷ The obvious problem is that the substantive law might not optimally deter litigation.²⁸ But Fitzpatrick argues that this concern should not militate against his proposal. If full enforcement of the substantive law does not maximize utility, "the proper response" is not to deter litigation with inadequate attorney compensa-

²⁴ See *id.* at 2066 (embracing the idea that "courts should not lower fee percentages no matter how large the aggregate class recovery may be").

²⁵ See Class Action Settlement Agreement at 31, *In re Classmates.com Consolidated Litig.* (W.D. Wash. Mar. 12, 2010) (No. 09-0045), available at <http://www.cmemailsettlement.com/sa.pdf>.

²⁶ See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 390-91 (2000) (discussing the diminishing marginal utility of class counsel compensation).

²⁷ Fitzpatrick, *supra* note 1, at 2070.

²⁸ See *id.* at 2071 (noting that overdeterrence may result if the substantive law does not accurately assesses damages).

tion but “to confront [the] problem directly by changing the substantive law.”²⁹

Fitzpatrick distinguishes too rigidly between substance and procedure. His idea seems to be that, once a right exists in the substantive law, all nonsubstantive (or procedural, to use the term expansively) barriers to its full vindication are pathological.³⁰ Put more weakly, the idea is that the substantive law has sole responsibility for optimizing social utility.

But, as a descriptive matter, social utility does not fall so exclusively in the substantive law’s bailiwick. Governments regularly use procedural devices to fine-tune the regulatory force of the substantive law.³¹ Indeed, legislatures may well create substantive rights with an appreciation for the nonsubstantive barriers and facilitators that help determine their real-world impact.³² At the least, this claim is no less plausible than the contestable notion that the substantive law itself strives to maximize social utility.³³ If both claims are true, then an onslaught of small-stakes class actions sparked by the sudden decision to quadruple attorneys fees would significantly distort the intended regulatory effect of the substantive law and the optimal deterrence it ostensibly seeks. As a normative matter, I know of no convincing argu-

²⁹ *Id.*

³⁰ Fitzpatrick’s late colleague, Richard Nagareda, thoroughly expounded upon this idea. See Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1888 (2006) (discussing the concerns around settlement pressure arising from substantive law).

³¹ See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring) (noting that states traditionally refine substantive law through the use of procedure). For example, at least twenty-three states have laws that restrict the use of class actions to enforce particular rights. See Brief for Respondent at app. B., *Shady Grove Orthopedic Assocs.*, 130 S. Ct. 1431 (No. 08-1008) (listing the state statutes limiting the availability of class actions). In addition, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, (1991), provides for jury trials and shifts the expert witness costs of a prevailing plaintiff to the defendant in order to enhance the regulatory effect of Title VII. See Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 11-12 (2009) (describing the procedural changes that Congress enacted as a direct response to a line of cases that had narrowed the scope of substantive rights conferred by the statute). One could easily multiply the examples.

³² See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1929 (2006) (noting that legislatures frequently are aware of the procedural background against which they legislate).

³³ But see, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283 (1988) (summarizing the public-choice critique of legislation).

ment for why the achievement of optimal utility cannot depend in some measure on nonsubstantive barriers and facilitators.

If responsibility for social utility does indeed lie both with the substantive law and the complex of nonsubstantive forces that affect its implementation, then the argument that plaintiffs' lawyers should have the maximum incentive possible to litigate all potential class suits needs more utilitarian grounding. Fitzpatrick must at least explain why financial disincentives to litigate class actions should not help determine the optimal level of deterrence.

III. PROBLEMS WITH UTILITARIANISM

Does utilitarianism provide the proper normative metric for fee awards?³⁴ An alternative metric, rooted in the perceived social legitimacy of the class action, can justify existing practices and better protect the class-suit device against attempts to enervate or destroy it.

If plaintiff compensation in small-stakes class suits is worthless, then the current fee-award doctrine resembles other aspects of class action law that burden cases with costs and yield little benefit. These aspects include, for example, the individual notice and opt-out requirements in small-stakes money damages class suits.³⁵ The requirement that a class action have a named plaintiff is also arguably pointless from a cost-benefit perspective.³⁶

If one assumes that these ostensibly inefficient requirements perform some valid function, they challenge utilitarianism as a complete normative guide for the law of aggregate litigation. Letting a case proceed without a named plaintiff likely would not change its outcome and hence would not affect any deterrence value it might have.³⁷

³⁴ Fitzpatrick rightly acknowledges that the persuasiveness of his proposal hinges upon whether one shares his utilitarian outlook. Fitzpatrick, *supra* note 1, at 2058.

³⁵ For a discussion of notice, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27-28 (1991). For a discussion of opt-out rights, see David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 35-46. Cf. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367-68 (discussing the "limited utility" of opt-out rights in suits with low-value claims).

³⁶ See Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 165-66 (1990) (arguing that the elimination of the named-plaintiff requirement would improve consistency and encourage courts to focus on the real issues in aggregate litigation).

³⁷ The named plaintiff in a small-stakes class suit has little incentive to monitor class counsel. See, e.g., Macey & Miller, *supra* note 35, at 5, 19-20 (describing the systemic and practical barriers to a lead plaintiff's ability to monitor effectively under these circumstances); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitor-*

But a spate of clientless cases would underscore the charge, quite detrimental to the class action's social legitimacy, that class litigation enriches lawyers and does nothing for class members.³⁸ Money damages suits without opt-out rights might imperil the device similarly.

The recent experience of cases settling for coupons illustrates how an asymmetric distribution of the recovery between class members and their counsel can create problems of social legitimacy.³⁹ The Class Action Fairness Act of 2005 (CAFA), part of which addressed such distributions, has been the most significant legislative attack on class actions since their recreation in 1966. Prior to its enactment, courts often based attorneys' fees on the aggregate face value of coupons distributed (their nominal value), not their redemption rate (their real value).⁴⁰ This tendency meant that counsel often earned much more than 25% of the recovery. For example, a fee award of \$150 million amounts to 15% of a \$1 billion settlement if class members actually use the coupons the settlement awarded them. But if class members redeem only 10% of the coupons, a \$150 million fee award represents 64% of the settlement's real value.⁴¹

In the years leading to CAFA's passage, the class action weathered significant criticism due to the great imbalance between the often worthless coupons that class members received and the sizeable fees their attorneys reaped. From the very first congressional hearing on the bill⁴² to the last days of debate in the Senate and the House eight

ing: *How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2064-65 (1995) (noting that many of the constraints clients place on lawyers are not typically present in the class action context).

³⁸ E.g., Stephen Labaton, *Senate Approves Measure to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1 (quoting Charles Grassley, chief sponsor of the Class Action Fairness Act of 2005 (CAFA) as critiquing "a class-action regime that many times serves no one but the lawyers who bring these class action lawsuits").

³⁹ Fitzpatrick's determination that the average fee award amounts to 25% of the class's recovery does not account for these settlements. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 831 (2010) (acknowledging that a calculation of fee percentages does not reflect "indefinite cash relief" or "noncash relief").

⁴⁰ Compare Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1059-60 (2002) (discussing how judges have been encouraged to believe that face value is equivalent to true value), with THOMAS A. DICKERSON, *CLASS ACTIONS: THE LAW OF 50 STATES* § 9.03[1], at 9-39 to 9-40 (2005) ("In evaluating the merit of a non-cash settlement, the only proper means of measuring true value is by estimating the actual redemption rate.").

⁴¹ The numbers for this hypothetical are based on the settlement in *Shaw v. Toshiba American Information Systems, Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000).

⁴² *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees: Hearing Before the S. Comm. on Admin. Oversight & the Courts of the Comm. on the Judiciary*, 105th Cong. 2-3

years later,⁴³ the statute's supporters invoked the large fees that accompanied worthless coupons as evidence of a "broken"⁴⁴ system that produced "outrageous decisions."⁴⁵ The corporate interests pushing the bill disingenuously invoked the issue for helpful political cover.⁴⁶ As enacted, CAFA began with an ironically named "Consumer Bill of Rights," which included a provision meant to link attorney compensation to actual class member recovery,⁴⁷ even as its central provisions were intended to weaken class actions brought to enforce consumer and other state law protections.⁴⁸

To the extent that the votes a bill wins are a window into social legitimacy, the strong bipartisan support that CAFA enjoyed suggested some problems along these lines for the class action.⁴⁹ Fitzpatrick's proposal would result in settlements with no pretense of class member compensation and thus risks an even greater threat to the class action's health than that posed by coupon settlements. To an extent, he recognizes these dangerous shoals, conceding that "it would be politically difficult" to implement his proposal.⁵⁰ Such a backlash might be thought to reflect a failure to appreciate the utilitarian realities Fitzpatrick describes. Alternatively, taken as communicating something about what legitimates the class action, the backlash might gesture toward an alternative normative source that can justify some class action requirements that resist a cost-benefit rationale.

The bounds of this Response do not permit a thorough exploration of social legitimacy as a normative principle for aggregate litigation.

(1997) (statement of Sen. Charles Grassley, Chairman, S. Comm. on the Judiciary).

⁴³ See 151 CONG. REC. S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions) (expressing concern over the role of plaintiffs' attorneys in shaping settlement terms); see also 151 CONG. REC. H727 (daily ed. Feb. 17, 2010) (statement of Rep. Boucher) (discussing the gap between fees and actual plaintiff recoveries).

⁴⁴ 151 CONG. REC. H737 (daily ed. Feb. 17, 2010) (statement of Rep. Jackson-Lee).

⁴⁵ 151 CONG. REC. S1226 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter).

⁴⁶ Cf. *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 33 (2003) (statement of Brian Wolfman, Staff Att'y, Public Citizen Litigation Group) ("[T]he corporate community's use of stories about coupon settlements to drive the class action debate drips with irony [D]efendants love coupon settlements . . .").

⁴⁷ See generally 28 U.S.C. § 1712 (2006); see also Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698-705 (2006) (critiquing CAFA's coupon-settlement provisions).

⁴⁸ See, e.g., David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1252 (2007) (commenting on the federal courts' hostility to state-law causes of action that led to the drafting of CAFA).

⁴⁹ The Senate passed CAFA by a vote of 72-26, and the House by a vote of 279-149.

⁵⁰ Fitzpatrick, *supra* note 1, at 2075.

tion. I can only suggest how it might justify the current fee practices Fitzpatrick finds unprincipled. The individual action, based in the “deep-rooted historic tradition that everyone should have his own day in court,”⁵¹ enjoys such a solid foundation of social legitimacy that, at least presently,⁵² American law only grudgingly permits deviations from this ideal.⁵³ Sometimes, as with small-stakes class suits, individual control over claims has to yield to practical realities. But this departure is disquieting. Mechanisms that preserve, to the extent possible, the individual-action ideal without unduly compromising the practical benefits of claim aggregation act as a corrective of sorts. Hence an attempt to let class members at least know that they are plaintiffs (individual notice), a device to preserve at least a modicum of individual control over claims (opt-out rights), and the fiction that an injured party, as in an individual action, initiated the suit (the named plaintiff requirement).

If mechanisms to mitigate the deviation from the individual action ideal help entrench the social legitimacy of the class action, then the tendency to award 25% of the class’s recovery to counsel is not unprincipled but makes ample sense. This fee schedule roughly approximates what one might expect in an individually negotiated, contingency fee representation agreement. If it saddles class litigation with costs—a set of particularly small class suits that do not get filed—perhaps, like individual notice and opt-out rights, it also promises certain legitimacy benefits that in the end strengthen the overall vitality of the class action. Even a utilitarian, I would think, might find this result attractive.

Preferred Citation: David Marcus, Response, *Attorneys’ Fees and the Social Legitimacy of Class Actions*, 159 U. PA. L. REV. PENNUMBRA 155 (2011), <http://www.pennumbra.com/responses/02-2011/Marcus.pdf>.

⁵¹ Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)) (internal quotation marks and citation omitted).

⁵² Cf. Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 209-18 (1992) (discussing the demise of traditional “interest representation” practice during the twentieth century).

⁵³ See *Sturgell*, 553 U.S. at 893-95 (discussing six exceptions to the general rule of nonparty preclusion).