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Class Action Reform, *Qui Tam*, and the Role of the Plaintiff

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I

INTRODUCTION

On February 5, 1997, the Delaware Court of Chancery awarded $1 million in attorneys' fees to plaintiffs' counsel in *In re QVC, Inc. Shareholders Litigation*.[1] The original class action suit was filed after QVC and CBS announced tentative terms for a merger; the suit was settled after QVC agreed to enter into a somewhat different merger with Comcast Corp. and Liberty Media Corp.[2] Although the eventual merger price was $2 per share higher than the price originally offered by Liberty, the settlement did not involve any acknowledgment of wrongdoing, payment of damages, or creation of a "common fund."[3] Together with the proposed order of settlement, plaintiffs' counsel applied for a total of $5.5 million in fees and expenses.[4]

In making the fee award, the Chancery Court concluded that the terms and price of the eventual merger were agreed upon prior to negotiations with plaintiffs' counsel and "without any specific regard for [their] efforts."[5] Judge Steele specifically stated, "I cannot conclude that counsel's efforts resulted in the increased transaction price."[6] Moreover, the court found that counsel engaged in "substantial duplicative effort" and assumed no "substantial risk" in the litigation.[7] Despite every indication that the value rendered by counsel's participation was minimal, the court justified the fee award on the basis that counsel recorded some 1,500 billable hours and "proceeded through the appropriate motions and maneuvers with requisite professional skill."[8]

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1. No. 13590-NC, 1997 Del. Ch. LEXIS 14 (Feb. 5, 1997).
2. *See id*. at *2-3.
3. *See id*. at *3-4.
4. *See id*. at *1.
5. *Id.* at *11.
6. *Id.* at *8.
7. *Id.* at *11-12.
8. *Id.* at *12.

It is difficult to imagine any individual client agreeing to pay $1 million in legal fees for the services described by the *QVC* court. In a class action, however, there is no analogue to the individual client. Instead, plaintiffs' counsel represents a class of plaintiffs whose claims are simultaneously too small and too numerous to warrant separate litigation. In place of the traditional client, the Federal Rules of Civil Procedure provide that one or more members of the class may bring suit as class representatives.[9]

Although in theory the class representative or named plaintiff plays the role of client, the relationship between class representative and class counsel differs substantially from the traditional attorney-client relationship. Typically, class counsel is compensated by a court-ordered fee award based on statutory fee shifting, the common fund doctrine, or other similar approaches. Thus, the amount of the fee award is the result of a judicial determination rather than market forces. Moreover, the size of the fee award is substantially greater than the damages recovered by individual members of the plaintiff class. The resulting disparity between the stake of plaintiffs' counsel in the litigation and the stakes of the class members gives rise to a variety of agency problems. Additionally, the nature of counsel's stake creates an incentive for counsel to prefer a quick settlement—even one involving a significant reduction in total recovery.[10] The conflict engendered by this incentive may be aggravated by pressure from defendants who often also have an incentive to settle cases involving allegations of corporate wrongdoing quickly.[11]

Particularly problematic is the possibility that class action litigation will produce handsome compensation for class counsel but little discernible benefit for class members.[12] Critics of the existing class action structure point to cases like *QVC* as an illustration of its shortcomings. Although many class actions do result in substantial plaintiff recoveries, in others, such as *Hoffman v. BancBoston Mortgage Corp.*,[13] plaintiffs have even wound up owing rather than receiving money as a result of a class action settlement, although class counsel received a generous fee award.[14]

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9. *See* FED. R. CIV. P. 23(a).

10. *See* Epstein v. MCA, Inc., 126 F.3d 1235, 1250 (9th Cir. 1997) (describing the "jarring misalignment of interests" between class members and counsel and the incentive for counsel to settle quickly even if settlement was not in the interest of the class).

11. *See, e.g., id.* at 1253 n.17 (noting defendant's "curious degree of inaction" in failing to move for dismissal, and alluding to possibility that defendant preferred cheap settlement).

12. *See generally* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 245 (1983) (describing antitrust litigation in Maryland in which, as a result of settlement, plaintiffs received certificates redeemable for brokerage services at a 5% brokerage fee on the sale of their next home, and plaintiffs' counsel received $350,000 in costs and fees); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1054 (1996) (discussing settlements of GM Truck and Ford Bronco II cases); Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810, 810 nn.3-8 (1996) (citing numerous settlements in which plaintiffs received no cash award, and questioning the compensatory value of such settlements).

13. No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994).

14. *See* Koniak & Cohen, *supra* note 12, at 1057-68 (describing terms of the settlement and award of $12 million in attorneys' fees to class counsel in *Hoffman*).

The observation that the class action has, in some cases, moved away from a focus on victim compensation has led some commentators pejoratively to term it "lawyer driven litigation" and to call for reforms to produce greater client control.[15] The recent federal securities fraud legislation, for example, attempts to restructure class actions so that they more closely resemble traditional individual litigation.[16] At the same time, other commentators have applauded the growth of entrepreneurial representative litigation as a means of enabling private attorneys general to supplement government law enforcement.[17] Indeed, defenders of the modern class action advocate more substantial departures from the traditional litigation structure to deter corporate misconduct more efficiently.

These two approaches diverge with respect to the role of the class action plaintiff because of a fundamental disagreement about the proper objectives of the class action. Empowering the class representative enables the client to exercise greater control over class counsel and the conduct of the litigation. This should lead to a greater emphasis on recourse and victim compensation. In contrast, proposals to eliminate the class representative or the entire plaintiff class are based on the premise that representative suits serve a general social interest and that the incentive structure in class action litigation should seek to maximize deterrence.

As class actions struggle to combine the monetary incentives provided by plaintiff compensation with the societal interest in enforcement and deterrence, they begin to resemble a hybrid between traditional individual cases, with their focus on the client, and government enforcement actions that have no client except the public at large. Existing reform proposals have resisted this hybrid character in favor of pushing the class action in the direction of either individual or public litigation. Before accepting either approach—and the resulting choice between strengthening the plaintiff's role and eliminating it entirely—it would be helpful to understand better the implications of the hybrid model.

These implications can be examined by an analysis of the relatively recent use of an explicitly hybrid litigation procedure: the *qui tam*[18] action.[19] The *qui tam* suit allows plaintiffs without a traditional interest to initiate litigation in order to increase corporate compliance. Examination of the *qui tam* suit fo-

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15. One such recent attempt at reform was the Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong., § 202.

16. *See infra* text accompanying notes 54-68.

17. *See infra* text accompanying notes 49-53.

18. The term "*qui tam*" derives from the Latin phrase "*qui tam pro domino rege quam pro se imposo hac parte sequitur*," meaning "who sues on behalf of the king as well as himself." In re Schimmels, 127 F.3d 875, 877 n.1 (9th Cir. 1997). The private plaintiff is referred to as the "relator." *Id.*

19. Several federal statutes contain *qui tam* provisions. *See* 18 U.S.C. § 962 (1994) (providing for forfeitures of vessels privately armed against friendly nations); 25 U.S.C. § 201 (1994) (providing for recovery of penalties for violation of Indian protection laws); 35 U.S.C. § 292 (1994) (implementing penalties for patent infringement); 46 U.S.C. § 723 (1994) (providing for forfeiture of vessels taking undersea treasure from the Florida coast to foreign nations). The discussion in this article will focus on the *qui tam* provision of the Federal False Claims Act, which has been the basis for most *qui tam* litigation.

cuses attention on the role of the plaintiff and the purposes behind the structural requirements of traditional litigation. *Qui tam* illustrates the prospect of greater flexibility in regulatory form, demonstrating that current proposals to eliminate the class representative are not as radical as they appear. An analysis of *qui tam* suggests advantages and implications of viewing the barrier between private litigation and public enforcement of the law as permeable.

This article will start by analyzing, in Part II, the evolution of the class action, focusing in particular on its departures from traditional individual litigation. Part III looks at various proposals for reform of class action litigation motivated by these departures and their effect on litigation incentives. Current reform proposals seek either to remodel class litigation so that it more closely resembles traditional litigation by strengthening the role of the class plaintiff, or to facilitate the deterrence objectives of representative litigation by freeing it from the structural confines of the individual suit. Ultimately the conflict between these approaches stems from disagreement about the appropriate objectives of class litigation. Part IV uses the *qui tam* provision as a model for exploring the structure and objectives of enforcement litigation. *Qui tam* litigation is a unique hybrid in which public and private resources are combined in a litigation partnership. The article explains the issues raised by *qui tam* and concludes in Part V by demonstrating that, although class actions are not directly analogous to *qui tam* suits, by lowering the conceptual barrier between public and private litigation, *qui tam* suggests new ways to improve the ability of representative litigation to pursue the dual objectives of victim compensation and deterrence of corporate misconduct.

II

THE EVOLUTION OF THE CLASS ACTION AND THE DEPARTURE FROM TRADITIONAL LITIGATION

The traditional model of litigation is based on the theory that private litigants file suit because they have information leading them to believe they have a claim, they have suffered an injury compensable through litigation, and the damages they expect to receive exceed their expected litigation costs. This simplified model includes several important attributes. First, the model assumes that a plaintiff's primary objective is monetary recovery or the equivalent.[20] As a consequence, plaintiffs will not file frivolous cases because they benefit only from a suit that has an expected net gain.[21] Second, although an individual's decision to bring suit will not be based on the public or social value

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20. Private litigation may be viewed as preserving the plaintiff's right to recourse. Recourse can be framed in monetary or nonmonetary terms, and this article uses the term "compensation" to encompass the full vindication of plaintiffs' rights.

21. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 77 (1972) ("An accident victim will not spend more money on litigation than he can reasonably hope to obtain in damages."). The division of recovery between lawyer and client has no effect on the presumption that the level of litigation will be efficient as long as the client's recovery provides a sufficient incentive to file suit. *See id.* at 83.

of the litigation, society can adjust litigation incentives to align the interests of the individual litigant and the interests of society.[22] Filing fees and amount-in-controversy requirements, for example, serve as entry barriers that prevent the litigation of some claims, while treble damage awards increase the plaintiff's litigation incentive. Third, the standing requirements that enforce this model are designed to limit judicial involvement to plaintiffs who have suffered a particularized injury and to claims that can be redressed through litigation as opposed to generalized grievances more appropriately addressed through the political process.[23] Finally, the model treats the attorney-client relationship as an agency relationship in which the plaintiff, as the principal, assumes financial responsibility for the costs of the litigation, including attorneys' fees, and the attorney is subject to the plaintiff's control.[24] This control can be exercised to ensure that litigation decisions are designed to maximize the plaintiff's expected recovery.

The class action suit differs from this model in a number of respects. First, although Rule 23 of the Federal Rules of Civil Procedure ostensibly provides a procedure by which a plaintiff voluntarily can seek to act in a representative capacity, the named representative in a class action bears little resemblance to a traditional plaintiff. As a practical matter, class suits are often initiated by lawyers[25] who identify a cause of action and then search for a suitable individual to meet the requirements of Rule 23.[26] Lawyers define the parameters of the plaintiff class, with the understanding that increasing the class size, to the extent practical, is likely to increase the ultimate fee award.[27] Class members do

22. A broad literature explores the degree to which the private and social incentives for litigation are linked. Peter Menell's initial analysis asserted that social and private incentives to sue are linked. *See* Peter S. Menell, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41, 41-42 (1983). Subsequent commentators, such as Steven Shavell and Louis Kaplow, have questioned the strength of this linkage. *See* Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 372-74 (1986) (arguing that Menell and Shavell both correctly note that a plaintiff will sue only where damages exceed litigation costs, but disputing Menell's contention that an injurer takes into account all such costs in making its decisions); Steven Shavell, *The Social Versus the Private Incentive To Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 334 (1982) (arguing that private costs of suing are less than social costs because plaintiffs are not responsible for costs to defendants or society); *see also* Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEGAL STUD. 483, 488-89 (1987) (discussing the Shavell and Menell-Kaplow models of private versus social costs of suit).

23. *See* United States v. Hays, 515 U.S. 737, 743-45 (1995).

24. Ethical rules, for example, give the client the right to determine the objectives of litigation and require the client to decide issues such as whether to accept a settlement offer. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1982).

25. *See, e.g.*, Stephen E. Frank, *First USA Settles Lawsuit Alleging It Switched Rates*, WALL ST. J., Sept. 4, 1997, at B8 (quoting Atlanta attorney Douglas Campbell as describing "a whole group of plaintiffs' lawyers . . . who spend their time looking for both contractual irregularities and violations of regulatory statutes and regulations").

26. For example, lawyers have used newspaper and television advertisements to urge women with breast implants or those who used Norplant to participate in litigation.

27. Courts exercise relatively little control over the process by which counsel determines the size of the plaintiff class, even in high profile cases. Counsel's estimation may amount to nothing more than "an educated guess." *See, e.g.,* Ann Davis & Milo Geyelin, *Issues of Eligibility Remain Hazy in*

not make an affirmative decision to participate in litigation, but instead receive some limited notice of the lawsuit providing an opportunity to opt out.[28] In the traditional context, a procedure whereby the lawyer commences a lawsuit and then contacts the plaintiffs and informs them that by doing nothing they consent both to the representation and the outcome would run afoul of legal and ethical constraints such as the prohibition against solicitation.[29]

Second, the attorneys' fees in representative litigation are neither paid by the client nor determined by market forces. Instead, the court awards a portion of the settlement fund or damage award to be paid to class counsel in a successful suit.[30] The fee award is calculated either as a percentage of the total recovery[31] or on the basis of the actual time devoted to the litigation, but, importantly, the judgment about whether the attorneys' services merit the fee award is made by the court, not the plaintiff.[32] In exchange for this loss of control, plaintiff class members typically receive a corresponding benefit: freedom from responsibility for legal fees if the suit is unsuccessful. Because of the nature of class action litigation, and of small claimant class actions in particular,[33] the size of the fee award, whether calculated as a percentage of the total recovery or by reference to the hours of service provided, is far greater than the damages recovered by any individual litigant. This creates one of the most significant dif-

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Secondhand Smoke Settlement, WALL ST. J., Oct. 16, 1997, at B8 (describing judicial acceptance of lead counsel's estimate that client class in recently settled suit by airline flight attendants for secondhand smoke-related illnesses included 60,000 plaintiffs; lead counsel subsequently conceded that the 60,000 figure was too high, although the large figure gave the case a higher profile).

28. *See* FED. R. CIV. P. 23(c)(2); *see also* Hansberry v. Lee, 311 U.S. 32, 39-44 (1940) (holding that class members could not be bound by judgment in suit in which they were given neither notice nor an opportunity to opt out); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 267-77 (describing and analyzing notice requirements).

29. *Cf*. Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding, on invasion of privacy grounds, state ban on sending targeted, direct-mail solicitations to personal injury victims within 30 days of an accident). Although the Supreme Court has held that state ethical rules cannot establish absolute bans on direct-mail solicitations, the Court's holding rested, in part, on the premise that advertisements can be "put in a drawer to be considered later, discarded or ignored," a rationale that would not extend to a notice whereby such conduct constituted consent to representation. *See id.* at 635 (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475-76 (1988)).

30. Alternatively, some statutes commonly applicable to representative litigation provide for fee shifting, in which the unsuccessful defendant pays the plaintiffs' attorneys' fees. *See, e.g.*, Clayton Act, 15 U.S.C. § 15(a) (1994); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1994); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1994). Under fee-shifting statutes, the court also determines the amount of attorneys' fees for which the defendant is responsible.

31. The percentage of recovery method of compensation resembles the contingency fee that is employed in most personal injury litigation. *See, e.g.*, JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 37 (1986) (stating that approximately 95% of personal injury plaintiffs retain lawyers on a contingency fee basis).

32. Even in individual actions, contingency fees recently have come under attack on the ground that they do not reflect reasonable compensation for the services provided. *See, e.g.*, Richard B. Schmitt, *Courts Whittle Down Lawyers' Fat Contingent Fees*, WALL ST. J., Jan. 28, 1998, at B1 (describing recent decisions scrutinizing standard contingency fee agreements in cases involving minimal risk and legal work).

33. For a description of the distinction between "small claimant" and "large claimant" class actions, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1351-52 (1995).

ferences between traditional and representative suits. In traditional litigation, the lawyers' recovery generally is limited to a fraction of the damages recovered by the client. Indeed, ethics provisions address the maximum percentage allowed in contingency fee arrangements.[34] However, in the typical class action, although plaintiffs' counsel receives only a fraction of the total recovery, that award greatly exceeds the amount recovered by any single litigant. This gives the lawyer, rather than the client, the greatest stake in the case.

These factors combine to create a system of lawyer-driven litigation. Plaintiffs' lawyers effectively act as entrepreneurs who manage litigation to further their own economic interests.[35] Consequently, the traditional incentive structure controlling the initiation of suit is absent.[36] The lawyers, who have the greatest financial interest in class suits, are strangers to the litigation; they have suffered no injury and lack the predicate standing to file a claim themselves. The ostensibly injured plaintiffs become mere figureheads, with little financial or other interest in the suit.[37]

Moreover, although the litigation system relies on the client to monitor the lawyer's conduct in initiating and conducting litigation, the class plaintiff lacks both the interest and the ability to monitor.[38] The same absence of a significant financial stake that warranted the substitution of a class action for an individual suit also limits the economic incentive for plaintiff monitoring. The plaintiff's expenditure of time in monitoring is costly, and the expected value of this expenditure is limited substantially by the small size of plaintiff's interest. The plaintiff's interest in monitoring is reduced further by the virtual elimination of

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34. *See* RULES REGULATING THE FLORIDA BAR 4-1.5(f), *reprinted in* FLA. BAR J., Sept. 1992, at 526-28; TENN. CODE ANN. § 29-26-120 (1980); E.D. TEX. R. CV-83(a)(1) (1997); *see also* Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949 (1990) (evaluating the ethical considerations of contingent fee controls in light of the need for plaintiff representation).

35. *See generally* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; 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 (1991).

36. It is somewhat naive, of course, to view traditional litigation as driven exclusively by the incentives of the client, rather than those of the lawyer. *See generally* Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523 (1996).

37. *See* Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990); Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 658-60 (1994).

38. Courts appear ambivalent about the ability of the class representative to understand the case and effectively monitor litigation decisions. For example, the Supreme Court has stated that due process requires that the named plaintiff be an adequate representative of absent class members. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). However, the Court also has concluded that a plaintiff who barely spoke English, "did not understand the complaint at all," and who could not explain the nature of the defendants' alleged misconduct was an adequate class representative. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 366 (1966). On the extent to which the Due Process Clause requires adequate representation, see Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975).

the traditional downside risks associated with unsuccessful litigation. If the class suit is unsuccessful, plaintiff class members rarely will be responsible for paying the costs of the suit, including the fees of plaintiffs' counsel; even more rarely will they be liable for sanctions under Rule 11 of the Federal Rules of Civil Procedure.

Furthermore, judicial decisions have substantially limited client control over litigation decisions in class actions. Although an individual client has the right to be represented by his or her choice of counsel, courts have held that the class representative is not entitled to make the decision to replace counsel.[39] Similarly, decisions traditionally within the purview of the litigation client, such as whether to accept a settlement[40] or file an appeal,[41] may be made in the class action by plaintiffs' counsel with the approval of the court, even over the objections of the class representative or other members of the plaintiff class.[42]

Consequently, although the degree to which class plaintiffs participate in the litigation varies, the role of the class plaintiff bears little resemblance to the conduct of traditional individual litigants. Even though the class representative is charged with representing the interests of absent class members, the class representative often is absent from litigation proceedings.[43] In sum, client monitoring of class counsel may be virtually nonexistent.[44]

Critics of the class action argue that these differences between traditional and representative litigation cause some meritless suits to be filed in an effort to coerce settlement and may tempt lawyers to settle meritorious suits too cheaply.[45] These commentators argue that without sufficient client monitoring class suits do not meet the objective of compensating injured victims. Although recoveries vary,[46] evidence of suits settled for nominal payments to class mem-

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39. *See* Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995).

40. *See, e.g.*, Camp v. Union Mfg. Co., 549 A.2d 285 (Conn. App. Ct. 1988) (per curiam) (holding that consent of the representative plaintiff is not required for approval of the settlement in a shareholder derivative suit, and citing federal cases in accord with this holding).

41. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1178 (5th Cir. 1978) ("Where the named plaintiffs wish to appeal, but the class attorney concludes that an appeal is not in the best interest of the class, the district court must exercise its discretion in deciding whether to substitute class counsel to allow the named plaintiffs to maintain the appeal on behalf of the class.").

42. *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997). Woolley notes that, "[u]nlike plaintiffs in ordinary litigation, class members are denied the right to make critical decisions about their claims, including the most crucial of all decisions: whether to settle or pursue their claims." *Id.* at 571.

43. In three of four federal districts analyzed in a study conducted by the Federal Judicial Center, class representatives attended the settlement approval hearing in only 11% to 28% of the cases; the attendance rate in the fourth district was 46%. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 100 (1996).

44. *See* Jonathan R. Macey & Geoffrey P. Miller, *Auctioning Class Action and Derivative Suits: A Rejoinder*, 87 NW. U. L. REV. 458, 459 (1993).

45. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 35, at 685-86.

46. *See* Willging et al., *supra* note 43, at 84 (finding that, over a two-year period, the median level of recovery per class member ranged from $315 to $528).

bers or noncash recoveries suggests a reduced focus on compensation.[47] Some recently publicized settlements, for example, have provided plaintiffs with coupons offering discounts on future transactions with the defendant, in lieu of any cash recovery.[48]

Recognizing that victim compensation is not the motivation for the resulting suits, some commentators have recharacterized the objective behind representative litigation as "the socially useful function of deterring undesirable conduct."[49] Class suits are applauded for the role they play in supplementing governmental efforts to enforce the law against corporate defendants whose wrongdoing results in widespread societal harm. This deterrence rationale characterizes class plaintiffs and their lawyers as "private attorneys general" who vindicate the public interest through private litigation.[50]

The deterrence rationale provides powerful support for lawyer-driven litigation. To the extent that class suits provide a financial incentive for lawyers to search out and redress corporate wrongdoing, the fees awarded to class counsel are justified by the social utility of the suits. Corporate decisionmakers are encouraged by the possibility of class litigation to comply with the law instead of taking the risk that wrongdoing will be undetected or will produce harms too small to warrant litigation. Moreover, if deterrence rather than compensation is the primary objective of class litigation, it becomes less important to justify departures from the traditional litigation structure.

This trend has been reflected in the modification of ethical rules to accommodate the lawyer-driven nature of representative litigation.[51] Although ethical standards for lawyers historically have required the client to be responsible for paying the costs of litigation and have prohibited lawyers from picking up those costs, as Judge Easterbrook has recognized, these standards are inconsistent with the intent of Rule 23.[52] Similarly, the notices distributed to members of the plaintiff class are not treated as improper client solicitation even though the notices effect representation unless the recipient affirmatively opts out. Although the ethical standards were designed to assure lawyer loyalty to the client, client loyalty may be sacrificed along with client control if class suits are not really client-centered.

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47. *See, e.g.*, Frank, *supra* note 25 (describing terms of proposed settlement of class action suit based on misleading credit card solicitations in which members of the plaintiff class would receive a maximum of $3.85 each).

48. *See* Note, *supra* note 12, at 812-15.

49. Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 35, at 678.

50. *See generally* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988).

51. *See, e.g.*, Committee on Professional Responsibility, Association of the Bar of the City of New York, *Financial Arrangements in Class Actions, and the Code of Professional Responsibility*, 20 FORDHAM URB. L.J. 831, 832 (1993) (describing conflicts between ethical rules and practical needs of class action litigation and recent trend by courts favoring public policy considerations when faced with such conflicts); Macey & Miller, *supra* note 35, at 97-105 (discussing ethical problems that would occur if ethical rules were applied strictly to representative litigation).

52. *See* Rand v. Monsanto Co., 926 F.2d 596, 600-01 (7th Cir. 1991).

The deterrence rationale has not convinced all courts to modify traditional legal standards, nor has it persuaded all critics to embrace the lawyer-centered litigation model. Some reform efforts, such as recent legislative reform of securities fraud class action suits, have attempted to reverse the departure of class litigation from the traditional model and to restore client control and monitoring to the class suit. Other proposals take the existing modifications as a starting point and propose more extensive changes to the traditional litigation structure to facilitate representative litigation. To a degree, the structure of class action litigation stands at a crossroads.[53]

III

PROPOSALS FOR CLASS ACTION REFORM

The Private Securities Litigation Reform Act ("PSLRA")[54] reflects a highly publicized attempt to reform class litigation through client empowerment. The PSLRA, which was motivated by congressional desire to transfer litigation control away from lawyers and back to clients,[55] adopted a number of provisions to reduce class counsels' control over litigation decisions and to facilitate client monitoring.[56] The reforms included banning professional plaintiffs, requiring certification by class representatives that they reviewed the complaint and authorized the litigation, and eliminating bounties and other special payments to class representatives.[57] Most importantly, the PSLRA adopted a provision establishing a special plaintiff role in securities fraud suits: the "lead plaintiff" position.[58]

The PSLRA vests the lead plaintiff with control of securities fraud class actions, including the power to select class counsel. The history of the legislation suggests that it was intended to encourage institutional investors to become

53. *See* Joel Seligman & Lindsey Hunter, *Rule 23: Class Actions at the Crossroads*, 39 ARIZ. L. REV. 407 (1997).

54. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C. (Supp. I 1995-96)).

55. *See, e.g.*, H.R. CONF. REP. NO. 104-369, at 2-3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730-31 (explaining Congress's objective of "protect[ing] investors who join class actions against lawyer-driven lawsuits by giving control of the litigation to lead plaintiffs with substantial holdings of the securities of the issuer").

56. *See* Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 536-37 (1997).

57. *See id.*

58. The PSLRA provides that, although any member of the plaintiff class may file a securities fraud class action, the filing plaintiff must provide notice of the complaint to other members of the class. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i) (Supp. I 1995-96). Within 90 days after publication of this notice, the court is required to appoint a lead plaintiff to oversee the conduct of the litigation. *See id.* § 78u-4(a)(3)(B)(i). The statute instructs the court to appoint the "member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." *Id.* The statute establishes a presumption that the most adequate plaintiff is the person or group with the largest financial interest in the claim. *See id.* § 78u-4(a)(3)(B)(iii)(I)(bb).

more active in monitoring the initiation, conduct, and settlement of litigation.[59] In particular, in establishing the presumption that the class member with the largest financial interest is the most adequate representative of the class, Congress accepted the premise that a class representative with a large financial stake has the greatest incentive to ensure that litigation decisions reflect the interests of the plaintiff class and society as a whole.

Although experience under the PSLRA is limited, there are some indications that an empowered institutional investor can exercise control more analogous to that of a traditional individual client than the typical class representative. In *Gluck v. Cellstar*,[60] a case publicized as the first example of institutional investor activism under the PSLRA, the State of Wisconsin Investment Board ("SWIB") successfully obtained appointment as lead plaintiff.[61] SWIB then negotiated for the provision of legal services by a firm that traditionally does not represent class action plaintiffs, pursuant to an atypical fee structure designed to increase the incentive for counsel to maximize recovery to the plaintiff class.[62] The court approved SWIB's choice of lead counsel over the objections of Milberg, Weiss, a traditional plaintiffs' firm.[63]

Preliminary results suggest, however, that cases like *Gluck v. Cellstar* are atypical and that the lead plaintiff provision has had little influence on the structure or conduct of securities fraud litigation. The SEC has reported that few institutional investors have sought lead plaintiff status.[64] Instead, the traditional plaintiffs' bar[65] has sought to enable its clients to obtain lead plaintiff status by combining multiple shareholders into lead plaintiff groups.[66] Moreover, the statute has served to increase the dominance of the traditional plaintiffs' bar, especially the Milberg, Weiss firm.[67] The participation of institutional

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59. The lead plaintiff provision was proposed by two law professors who suggested that institutional investors with substantial stakes could monitor securities class actions and thereby reduce agency costs. *See* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

60. 976 F. Supp. 542 (N.D. Tex. 1997).

61. *See id*. at 543.

62. *See* Keith Johnson, *Institutional Investor Participation in Class Actions After the Private Securities Litigation Reform Act of 1995*, ALI-ABA, Nov. 7, 1996, at 386-87.

63. *See Gluck*, 976 F. Supp. at 543 n.3, 550 n.9.

64. *See* UNITED STATES SEC. & EXCHANGE COMM'N OFFICE OF GEN. COUNSEL, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (visited Mar. 26, 1998), *available at* <http://www.sec.gov/news/studies/lreform.txt>.

65. *See* James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 909 n.27 (1996).

66. *See* Seth Goodchild & Stephenie L. Brown, *Institutional Investors as Lead Plaintiffs*, N.Y. L.J., June 6, 1997, at 1 (describing efforts by traditional plaintiffs bar "to continue its domination by 'cobbling' together groups of unrelated small investors aggregating their holdings to meet the PSLRA criteria").

67. *See* Joseph A. Grundfest & Michael A. Perino, *Ten Things We Know and Ten Things We Don't Know About the Private Securities Litigation Reform Act of 1995: Joint Written Testimony Before the Subcomm. on Sec. of the Senate Comm. on Banking, Housing, and Urban Affairs on July 24, 1997* (visited Mar. 26, 1997), *available at* <http://securities.stanford.edu/report/testimony/970724sen1.htm>

investors as lead plaintiffs does not appear to pose a substantial threat to this dominance.[68] Indeed, the ability of the bar to respond to the lead plaintiff requirement suggests that the PSLRA has done little to alter the degree of lawyer control over securities fraud class actions.

In contrast to the PSLRA, client elimination proposals, such as that suggested by Jean Wegman Burns, acknowledge the reality of lawyer control over class litigation and, rather than seeking to reduce that control, attempt to move the class action structure even further from traditional litigation.[69] Burns proposes eliminating the class representative in favor of a model in which class counsel represents the plaintiff class as a group.[70] Burns identifies a number of procedural obstacles created by the role of class representative and finds no identifiable benefit to retaining the role.[71] Moreover, elimination, she argues, "would have only a negligible effect on class action practice" in light of the fact that the "class attorney fashions the claim, decides on strategy, presents the evidence, and represents the interests of the class."[72] Burns argues that her proposal would "result in less confusion and inconsistency in class action doctrine" and would highlight the differences between the class suit and traditional litigation.[73]

Although Burns' proposal is consistent with the direction in which class action doctrine is moving, it has several problems. A system that allows a lawyer merely to identify a class of plaintiffs and then file suit without requiring that any injured plaintiff approve the complaint or the retention of the lawyer eliminates any client check on the initiation decision. Such a system would seem to increase the opportunity for excessive and frivolous litigation that has been identified as a potential abuse of lawyer-driven litigation.

Furthermore, Burns proposes that courts consider the following question in ruling on motions for class certification: "Is there is a sharply defined issue presented in a concrete factual setting that the parties want resolved?"[74] This test highlights the problem with her approach. Under the existing incentive structure, plaintiffs' counsel may well have an issue that they want resolved. Nonetheless, dedication of judicial resources to resolve this issue may not be in the best interest of either the plaintiff class or society as a whole. In addition, Burns' effort to vest litigation decisions in class counsel threatens to weaken the already thin connection between class suits and the vindication of individual rights. Although viewing the class as the party-in-interest may satisfy the

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(describing nationwide pre-PSLRA appearance ratio of Milberg, Weiss as 31% and estimating the firm's 1996 appearance ratio at about 59%).

68. *See, e.g.*, In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156 (S.D.N.Y. 1997) (appointing institutional investor Emanon Partners as sole lead plaintiff and approving its selection of Milberg, Weiss and Wolf, Popper, another traditional plaintiffs' firm, as co-lead counsel).

69. *See* Burns, *supra* note 37, at 165-66.

70. *See id*. at 186.

71. *See id*. at 173-78.

72. *Id*. at 189.

73. *Id*.

74. *Id*. at 193.

minimum constitutional requirements of standing,[75] the policies behind the standing doctrine suggest that judicial resolution may not be appropriate in every case in which the parties seek judicial involvement.[76]

Eliminating the class representative also removes any possibility that the representative will monitor counsel's performance. Burns finds little harm in this result, correctly observing that plaintiff monitoring under the current system is largely ineffective.[77] Burns' proposed solution is to appoint class monitors, who need not be class members but who have the specialized skills to monitor counsel's behavior.[78] By introducing strangers into the litigation process, Burns' proposal creates an artificial layer between the decisionmaker and those whose interest the decisionmaker is supposed to protect. In essence, Burns proposes the creation of a new agency structure within the class action suit. The problem with this proposal is its failure to acknowledge the substantial agency costs that would result from this structure. The class suit already suffers from the agency costs resulting from the divergence between the interests of class counsel and the plaintiff class. Independent monitors who lack a stake in the litigation would have less incentive than class members to monitor effectively, and monitors with a discrete interest in the subject matter of the litigation[79] would bring their own incentives and conflicts to the case.[80]

Burns's proposal raises additional issues. How are costs and sanctions to be allocated if the litigation is unsuccessful or even frivolous? Will lawyers explicitly be permitted to finance a suit? Will notice be required, and if so, when? Can costs be taxed from absent class members? Is control of a class suit the reward for winning the race to the courthouse, or is the court empowered to approve the adequacy of class counsel? How should the court treat successive complaints purporting to represent the same class? The traditional model of litigation offers procedures for dealing with these questions. Although Burns correctly observes that, in many cases, these procedures are ineffective when applied to class actions,[81] severing the conceptual tie between traditional and representative litigation does not eliminate the need to address these concerns.

The identification of limited monitoring by class representatives, a common theme in both Burns' proposal and the PSLRA, suggests the need for structural reform to reduce the agency costs of the class action. An alternative way of addressing this problem would be to combine the roles of class counsel and class representative. Generally, courts have been hostile to the prospect of a

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75. *See id*. at 188.

76. *See* Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997).

77. *See* Burns, *supra* note 37, at 182-83.

78. *See id*. at 196.

79. Burns proposes selecting monitors with "a special interest in the subject matter of the lawsuit." *Id*.

80. Indeed, the evolution of monitoring structures in corporate law bears testament to the difficulty of creating an independent monitor to mediate between the conflicting interests of centralized decisionmakers and a large group of dispersed small stakeholders. *See* Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 268-69 (1997).

81. *See* Burns, *supra* note 37, at 179-86.

lawyer serving in the dual capacity of class representative and class counsel.[82] Indeed, the federal courts have adopted a rule of *per se* disqualification providing that

> no member of the bar either maintaining an employment relationship, including a partnership or professional corporation, or sharing office or suite space with an attorney class representative during the preparation or pendency of a Rule 23(b)(3) class action may serve as counsel to the class if the action might result in the creation of a fund from which an attorneys' fee award would be appropriate.[83]

The basis for this rule is Canon 9 of the Code of Professional Responsibility, which counsels lawyers to avoid even the appearance of impropriety.[84] The federal courts have found, virtually without exception, such impropriety in the conflict of interest created by the fact that the lawyer's fees as class counsel would greatly exceed any damage award received as a class member.[85]

Although courts have used this reasoning as a basis to disqualify class representatives, their relatives, and their partners from serving as class counsel,[86] the lawyer's interest in a class action offers no possible impairment of his or her functioning as plaintiffs' counsel. While it is true that the expected legal fee is likely to dwarf the significance of damages received as a class member, combining the roles of class representative and lawyer increases the alignment of interests between the lawyer and the absent class members. This structure, in which the agent is given a financial stake in the subject of the agency, is commonly used to reduce agency costs. Instead, the risk created by the dual role is the ineffective functioning of lawyers as class representatives because they are unwilling or unable to monitor their own actions as class counsel. In theory, the appropriate judicial remedy for this risk should be removal of the dual-capacity lawyer as class representative, rather than replacement of class counsel. However, if plaintiff monitoring is ineffective anyway, as Burns suggests, or if the monitoring can be performed by someone else, the diminution in the dual-capacity lawyer's ability to monitor should not prevent him or her from holding both positions.

Judicial skepticism of counsel acting as class representative may stem from a deeper ethical concern: suspicion that lawyer-driven litigation violates traditional prohibitions against maintenance and champerty.[87] These old English

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82. *See* Neil L. Rock, Note, *Class Action Counsel as Named Plaintiff: Double Trouble*, 56 FORDHAM L. REV. 111 (1987).

83. Kramer v. Scientific Control Corp., 534 F.2d 1085, 1093 (3d Cir. 1976).

84. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

85. *See generally* Rock, *supra* note 82, at 126 (citing cases); *see also* Barliant v. Follett Corp., 384 N.E.2d 316, 321 (Ill. 1978) (discussing alternative rationales for prohibiting dual capacity representation and observing that the "vast majority" of federal cases prohibit such representation).

86. *See* Holland v. Goodyear Tire & Rubber Co., 75 F.R.D. 743, 747-48 (N.D. Ohio 1975); Rock, *supra* note 82, at 112.

87. Black's Law Dictionary defines maintenance as "maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend" litigation. BLACK'S LAW DICTIONARY 954 (6th ed. 1990). Champerty is "[a] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds." *Id.* at 231.

rules forbade strangers to litigation, and lawyers in particular, from purchasing and pursuing other people's legal claims because of the risk that litigious persons would foment excessive litigation for the purpose of harassment or personal gain.[88] Although the modern trend is to move away from these ethical standards in connection with the increasing tendency to view the practice of law as a business rather than a profession, some commentators question the impact of this development on the legal profession and the judicial system. Judge Kanne articulated this concern in *Rand v. Monsanto Co.*,[89] observing, "I do not believe that the legal profession, or the American public which it serves, is better off when lawyers are first given authority to foment litigation and then are permitted to carry on that litigation at their own cost and risk."[90]

Jonathan Macey and Geoffrey Miller suggest another alternative mechanism for addressing the agency problem: allowing the court to auction the right to litigate a class action suit as a private attorney general to the highest bidder.[91] The proceeds of the auction would be paid to members of the original plaintiff class who would then have no further role in the litigation. The proposal would eliminate the difference between the incentives of the plaintiff class and its counsel by reuniting the financial interest in the suit with control over litigation decisions. After the auction, the litigation would be conducted, in a sense, the same way as a traditional individual lawsuit.

The strength of the Macey and Miller proposal is its ability to combine the deterrence model of litigation with victim compensation. Indeed, the authors argue that, due to the competitive bidding process and the elimination of the skewed incentives of the current class structure, class members would recover more than under the existing class action procedure.[92] Critics have warned, however, that structural problems may interfere with an auction's ability to price the lawsuit fairly.[93] To the extent that the auction price is designed to compensate the victims of the wrongdoing, this is a serious objection. The objection is less problematic, however, if the primary goal of class litigation is to provide effective deterrence and victim compensation is only a subsidiary objective. In particular, the auction model virtually eliminates the incentive for

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88. *See, e.g.*, Desenne v. Jamestown Boat Yard, Inc., 781 F. Supp. 866, 872 (D.R.I. 1991), *aff'd*, 968 F.2d 1388, 1390 (1st Cir. 1992) (identifying objective behind rules against champerty and maintenance as preventing purchasing of claims "by intermeddling volunteers for their own profit"); *cf. Holland*, 75 F.R.D. at 748 (observing that to allow class suits by attorneys acting as counsel for themselves would conflict with policy of judicial economy that disfavors the creation of lawsuits "where none previously existed").

89. 926 F.2d 596 (7th Cir. 1991).

90. *Id*. at 603 (Kanne, J., concurring).

91. *See* Macey & Miller, *supra* note 35, at 6; Macey & Miller, *supra* note 44, at 460.

92. *See* Macey & Miller, *supra* note 35, at 108-09.

93. *See, e.g.*, Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423 (1993). Thomas and Hansen argue that auction bidders have imperfect information about a suit's value, that this information problem would be compounded if defendants were permitted to bid on the suit, and that the auction process would be prohibitively expensive because of the discovery necessary to gauge the value of a suit. *See id*. at 425.

counsel to settle strong cases cheaply and thereby sacrifice class and public interests in favor of personal gain.

The auction proposal also retains the crude aggregation effect of the existing class structure. Under the proposal, a suit seeking damages of one dollar each for a million class members and a suit seeking one hundred dollars each for ten thousand class members would be valued the same. This aggregation effect contributes to the perception that class suits are initiated in situations in which they are undesirable from a societal perspective; even a minimal recovery per class member can accumulate into a sizable award if the class size can be made sufficiently large. Moreover, freeing counsel from the responsibility for defending the adequacy of the awards made to individual class member encourages class size puffery. It is far better, from counsel's perspective, to represent an absent multitude that has no claim to a share of the proceeds.

As with the proposal to eliminate class representatives, the auction proposal also may encourage excessive litigation. A law firm can increase the riskiness of its litigation portfolio if it holds the residual interest in the claim, and it can reduce the risk associated with a specific suit through diversification. This makes it economically viable to bring suits that were too risky under traditional procedures. Determining the appropriate level of litigation depends on a variety of factors that are beyond the scope of this article and requires an empirical assessment of the effect of the auction proposal.

Finally, as Randall Thomas and Robert Hansen have noted in commenting on the proposal, the auction has the potential to undercut the incentive to commit resources investigating possible corporate wrongdoing.[94] Because the auction procedure allows an entrepreneurial lawyer to outbid the plaintiff or lawyer who files the initial suit, the financial rewards of representative litigation do not go to those who search out wrongdoing.

The proponents of these reforms describe their proposals as novel or radical.[95] From a legal realist perspective, however, proposals to eliminate the plaintiff from class actions are hardly innovative; as a practical matter, the plaintiff is already gone. In the evolving structure of representative litigation, an article exploring the role of the class action plaintiff would have little utility, except from a historical perspective. Indeed, these proposals suggest that reform of the class action structure could be even more dramatic. If the objective is deterrence rather than victim compensation, why not eliminate the client from the class action completely and allow plaintiff's counsel to sue directly in his or her individual capacity? The court could award damages on the basis of proof of the economic damage caused by the defendant's conduct or according to a schedule of civil damage awards or fines based on the nature of the wrongdoing. The lawyer would receive a specified percentage of the amount recovered, akin to a contingency fee, and the remainder of the damage award could

94. *See id.* at 430 n.39.
95. *See* Macey & Miller, *supra* note 35, at 105; Burns, *supra* note 37, at 165.

be used to create a fund for injured victims or allocated to benefit the victims indirectly through a *cy pres* distribution.[96]

Uniting the lawyer and the plaintiff class into a single entity would eliminate the problem of agency costs most effectively.[97] Concededly, allowing lawyers to forgo identifying a figurehead client as the price of courthouse admission would trigger the objection that this mechanism would be champertous. In fact, however, explicitly empowering lawyers to act directly as private attorneys general would move the class action structure closer to truth than the illusion of the current system.[98] Instead of pretending that class members have assented to an attorney-client relationship when they fail to object after receiving notice of the possibility that, by doing nothing, they can receive a few dollars or a coupon, allowing class counsel to serve as plaintiff simply would unmask the non-traditional nature of representative litigation.

To recognize that class actions bear little resemblance to traditional individual litigation is not the equivalent of either endorsing or condemning their evolution. Indeed, as the variety of these reform proposals suggests, severing class actions from their ties to a more traditional litigation structure may increase the obligation to justify reform in terms of recognizable social goals. This is particularly important with respect to proposals that reduce or eliminate the traditional plaintiff's role because of the risk that such proposals would sacrifice victim compensation.

One tool for analyzing the implications of departure from a traditional litigation model is the *qui tam* provision of the federal False Claims Act ("FCA").[99] *Qui tam* allows third-party relators who have suffered no cognizable injury to initiate and control litigation in exchange for a share of the damage award. *Qui tam* thus offers a model of privately initiated litigation freed from the traditional constraints of control by the injured client. Although class actions differ from suits under the FCA in important ways, examining *qui tam* can provide some insight into the issues and effects of modifying the plaintiff's role in an effort to facilitate enforcement-oriented litigation.

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96. *See* 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 10.15, 10.17, at 372-74 (3d ed. 1992) (describing use of *cy pres* distribution to allocate unclaimed portion of class recovery in a manner that benefits class members indirectly).

97. *See* Note, *Investor Empowerment Strategies in the Congressional Reform of Securities Class Actions*, 109 HARV. L. REV. 2056, 2065 (1996) ("If, instead, the class and the class attorney were a single entity, that actor would make litigation decisions in the joint interest of the two parties that maximized the gains for them both.").

98. *See* Coffee, *Regulation of Entrepreneurial Litigation*, *supra* note 35, at 899.

99. 31 U.S.C. §§ 3729-33 (1994).

IV

QUI TAM AND CLASS ACTIONS

A. *Qui Tam* and Private Enforcement of Law

Eliminating the plaintiff's role vests responsibility for litigation decisions in the hands of a stranger to the suit, whether that stranger is a class monitor, class counsel, or the successful purchaser at an auction, rather than in the hands of an injured plaintiff. This concept is alien to our traditional approach to private civil litigation, but common in public litigation,[100] in which society places control in the hands of a disinterested government prosecutor rather than the victim.[101] Although various efforts have been made to draw principled distinctions between private and public litigation in terms of objectives or remedies, such distinctions break down both as a historical matter and in modern litigation practice. As Harold Krent has described, the use of private litigation to supplement government law enforcement efforts dates from the eighteenth century in both the United States and England.[102] Today, civil fines and punitive damages blur the line between compensation to victims and the punishment of wrongdoers.[103]

The private attorney general model of class actions similarly draws support from the perception that class suits can supplement or substitute for government enforcement efforts. Such suits may be described as privatizing the enforcement of laws against corporate wrongdoing. Moreover, although the objectives of deterrence and compensation clearly are related in the sense that the obligation to pay compensation is the reason civil litigation deters corporate wrongdoing,[104] this compensation need not be paid to the victims to achieve deterrence. Accordingly, a private attorney general should not have to recruit an identifiable victim as a ticket to the courthouse.

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100. This article focuses on the distinction between private and public enforcement, the latter of which can occur via criminal prosecution or a civil enforcement proceeding. The distinction between criminal and civil law is beyond the scope of this article. For further analysis of the distinction, see Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

101. *Cf.* Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987) (upholding appointment of private plaintiff to prosecute criminal contempt case but invalidating the appointment of a private prosecutor with an interest in the case).

102. *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290-96 (1989).

103. *See* Cheh, *supra* note 100, at 1352, 1356-57; *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991) (describing the standard of review of punitive damage awards in terms of accomplishing "society's goals of punishment and deterrence")(quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989)).

104. *See, e.g.*, Posner, *supra* note 21, at 32-33 (explaining why plaintiff's damages are the right amount to make the defendant pay in order to achieve appropriate deterrence); *cf.* Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1515 (1996) (suggesting legislation to sever the tie between the size of the damage award and the plaintiff's injury by providing a schedule of fines awardable to successful plaintiffs in private securities fraud litigation).

This analysis forms the basis for the *qui tam* provision of the FCA.[105] Congress reasoned that "'one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain.'"[106] Accordingly, Congress created a mechanism whereby volunteer private litigants could serve as citizen prosecutors and enforce the government's fraud claims against third parties.

The *qui tam* provision in the FCA was originally enacted in 1863, but initially few private suits were brought under the statute. Subsequent legislative revisions and unfavorable judicial interpretations led the *qui tam* provision to fall into disuse.[107] In the early 1980s, however, congressional concerns about the "sophisticated and widespread fraud" being perpetrated against the government[108] resulted in adoption of several substantial legislative changes. The 1986 amendments to the FCA increased the civil penalties for a false claim, increased the relator's share of any recovery under the Act, enhanced the relator's control over the litigation, and removed some procedural impediments to the use of *qui tam* suits.[109] Since 1986, use of the *qui tam* provision has increased dramatically—relators have initiated approximately 2,000 lawsuits generating some $1.8 billion in total recovery.[110]

Although *qui tam* authorizes private litigants to enforce government claims, *qui tam* suits are not the equivalent of traditional private litigation. Instead, the statute establishes a hybrid procedure in which the relator's litigation decisions are subject to coordination with and control by the U.S. government. Initially the relator files a complaint under seal and serves a copy of the complaint on the government. The government then has sixty days to evaluate the complaint and conduct an investigation.[111] At the conclusion of this period, the government may intervene and assume primary control over the litigation or decline to intervene and allow the relator to proceed privately.[112] If the government declines to intervene, the relator may continue to conduct the litigation in the name of the government.[113] In either case, the initial filing bars all subsequent

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105. The FCA imposes civil liability on those who defraud the U.S. government. The statute vests the Attorney General with primary responsibility for enforcment. *See* 31 U.S.C. § 3730(a)(1994).

106. S. REP. NO. 99-345, at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276 (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)).

107. *See* Ara Lovitt, Note, *Fight for Your Right to Litigate:* Qui Tam*, Article II, and the President*, 49 STAN. L. REV. 853, 856-57 (1997).

108. S. REP. NO. 99-345, at 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67. One commentator estimated that contractors were cheating the U.S. Treasury out of $25 to $70 billion per year in the early 1980s. *See* Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 NOTRE DAME L. REV. 995 (1983).

109. *See* United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (describing changes made by 1986 amendments to encourage citizen enforcement actions).

110. *See* Telephone Interview with Joseph Krovisky, Office of Public Affairs, United States Dep't of Justice (Sept. 29, 1997) [hereinafter DOJ Statistics].

111. *See also* David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 ANNALS HEALTH L. 127, 131-32 (1995) (describing *qui tam* filing procedure).

112. *See* 31 U.S.C. § 3730(b)(4) (1994).

113. *See id*. § 3730(b)(4)(A).

suits based on the facts in the original complaint; no copycat suits are permitted.[114] After the government intervenes, it controls litigation decisions.[115] Although the relator remains a party to the action, the government has the authority to settle or dismiss *qui tam* suits over his or her objection. Nevertheless, the relator is entitled to a judicial hearing prior to disposition of the case,[116] and in addition to receiving a share of the recovery, he or she is entitled to participate in the litigation.[117]

The FCA establishes a schedule for determining the bounty paid to the successful relator. The relator receives a percentage of any settlement or judgment against the defendant, as well as reasonable attorneys' fees and costs "depending upon the extent to which the person substantially contributed to the prosecution of the action."[118] The relator can receive from fifteen to thirty percent of the total recovery, depending on the nature of the information provided, the degree of the relator's participation in the case, and whether the government has intervened.[119] Because the FCA contains a mandatory civil penalty and a treble damage provision for actual government losses, the size of the bounty to which the relator is entitled may be substantial. In *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*,[120] for example, the relators received a bounty of approximately $11 million plus attorneys' fees.[121]

B. Constitutional Objections to Private Law Enforcement

Congress enacted a variety of *qui tam* statutes in the early years after ratification of the Constitution, and the use of *qui tam* to supplement government law enforcement dates back to eighteenth century England.[122] Nonetheless, the *qui tam* provision of the FCA has been subjected to repeated constitutional challenge.[123] Litigants and commentators have argued that relators are not proper plaintiffs and lack standing to bring suit under the Act, that *qui tam* violates separation of powers, and that statutory authorization of third-party

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114. *See* Ryan, supra note 111, at 132.

115. *See* 31 U.S.C. § 3730(c)(1).

116. *See id*. § 3730(c)(2)(A).

117. *See id*. § 3730(c)(1), (3).

118. *Id*. § 3730(d)(1).

119. *See id*. § 3730(d)(1), (2). In cases in which the court determines that the action results primarily from information that has been disclosed in a government proceeding or investigation or in the news media and not from information provided by the relator, the court is authorized to award a reduced bounty of up to 10% of the total recovery. *See id*.

120. 41 F.3d 1032 (6th Cir. 1994)

121. *See id*. at 1036.

122. *See* Krent, *supra* note 102.

123. The Supreme Court has not ruled on the constitutionality of the *qui tam* provision of the FCA. *See* Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1875 n.3 (1997) (reserving constitutional questions about *qui tam*). Lower federal courts have almost uniformly upheld the provision against constitutional challenge. *See, e.g.*, Lovitt, *supra* note 107, at 854 (discussing decisions and observing that, as of the publication of the note, no federal court had accepted the constitutional challenges to the provision). *But see* United States ex rel. Riley v. St. Luke's Episcopal Hosp., 982 F. Supp. 1261, 1269 (S.D. Tex. 1997) (striking down *qui tam* provision as unconstitutionally attempting to confer standing on uninjured plaintiff in violation of separation of powers).

suits violates the Appointments Clause.[124] It is not the purpose of this article to evaluate the constitutionality of *qui tam*. Understanding these challenges, however, provides insight into both the analogy between *qui tam* and class actions and the constitutional issues raised by proposals to eliminate the plaintiff from class action litigation.

Although challenges to relator standing theoretically could be based on both prudential standing doctrine and the constitutional constraints imposed by Article III, the Court has refused to apply prudential limits on standing to cases in which Congress statutorily authorized the plaintiff to bring suit.[125] Because *qui tam* explicitly grants the relator a cause of action, these precedents effectively limit the argument in *qui tam* cases to the constitutional standing issue. Similarly, modifications to the existing class action procedure to eliminate the plaintiff and grant uninjured third parties the authority to bring suit presumably would be made by statute. Accordingly, prudential standing limits would not apply.

Nonetheless, Article III limitations on standing remain. Article III requires that the plaintiff have a personal stake in the litigation and have suffered a particularized injury resulting from defendant's conduct likely to be redressed by the relief requested.[126] In *Raines v. Byrd*,[127] a 1997 decision striking down the legislative grant of standing to members of Congress to challenge the Line Item Veto Act, the Supreme Court reaffirmed that Congress cannot eliminate the standing requirement of Article III simply by legislatively granting a plaintiff the right to sue.[128]

Defendants have challenged relator standing under the FCA on the basis that the relator has suffered no injury as a result of the defendant's conduct. Courts have used two primary theories to uphold relator standing against this challenge. One theory treats the *qui tam* statute, by granting a monetary award to a successful relator, as vesting the relator with an interest in the outcome of the litigation sufficient to satisfy Article III.[129] The other theory views the government as the real party-in-interest;[130] the relator obtains standing as the government's assignee.[131]

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124. U.S. CONST. art. II, § 2, cl. 2. *Compare* James T. Blanch, Note, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J. L. & PUB. POL'Y 701 (1993) (arguing that *qui tam* violates standing, separation of powers, and Appointments Clause), *with* Thomas R. Lee, Comment, *The Standing of* Qui Tam *Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990) (arguing in favor of relator standing based on assignment theory), *and* Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341 (1989) (arguing that *qui tam* provisions are constitutional).

125. "Congress'[s] decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential standing limitations." Raines v. Byrd, 117 S. Ct. 2312, 2318 n.3 (1997).

126. *See id*. at 2317-22.

127. 117 S. Ct. 2312 (1997).

128. *See id*. at 2317.

129. *See* United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748-49 (9th Cir. 1993).

130. In addition to the issues identified herein, identification of the real party-in-interest in *qui tam* litigation is essential to resolving a variety of litigation questions such as the availability of personal

The two rationales have somewhat different implications. Congressional creation of a bounty payment grants the relator an identifiable interest in the subject of the litigation. The relator brings suit in an effort to obtain an economic benefit similar to the traditional private plaintiff. Commentators such as Cass Sunstein have argued that Congress can legislate around the standing limitations imposed by the Court in cases such as *Lujan v. Defenders of Wildlife*[132] by simply offering a cash bounty to litigants who are successful in bringing suit under any statute Congress wishes to have enforced by private parties.[133] Janet Cooper Alexander has argued for application of this principle to federal securities fraud, proposing a model in which damage awards would be replaced with a schedule of civil penalties, payable to the United States Treasury, and successful plaintiffs would receive a percentage of the penalty as a bounty, along with attorneys' fees.[134] Accepting that the congressional grant of the bounty is sufficient to confer standing offers the possibility of broadly replacing figurehead plaintiffs with third-party relators.

It is unclear, however, that the statutory bounty is sufficient to allow uninjured plaintiffs to satisfy Article III. One problem with this approach is that it conflates the requirement that the plaintiff have an interest in the litigation with the requirement that the plaintiff be injured. The bounty provides a relator with the type of interest mandated by the prudential standing requirements, including a sufficient concrete stake to ensure vigorous prosecution of the case. It does not, however, create a concrete injury in the plaintiff. The Court emphasized as recently as last term that a plaintiff must suffer such an injury to satisfy the requirements of Article III.[135]

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defenses, the application of estoppel and waiver, and the applicability of the special procedural rules for government litigation. *See* Valerie R. Park, Note, *The False Claims Act,* Qui Tam *Relators, and the Government: Which is the Real Party to the Action?*, 43 STAN. L. REV. 1061 (1991).

131. *See* United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1096 (C.D. Cal. 1989); *see also* United States ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995) (accepting assignment theory to uphold validity of *qui tam* provision in Indian Gaming Regulatory Act). Courts also have considered the established history of *qui tam* provisions and the relator's personal interest in the litigation resulting from his or her employment situation, including the risk of retaliation, in upholding relator standing. *See, e.g.*, Burch ex rel. United States v. Piqua Eng'g, Inc., 145 F.R.D. 452, 454 (S.D. Ohio 1992) (upholding standing based on the potential ramifications to plaintiffs' employment relationship from bringing *qui tam* action).

132. 504 U.S. 555 (1992).

133. *See* Cass R. Sunstein, W*hat's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 230 (1992). Sunstein identifies the difficulty in distinguishing legitimate congressionally created entitlements from bounties. *See id*. at 232-33. Congress has granted a multitude of entitlements to variously defined groups. Once created, an entitlement is a legal right and denial of that right confers an injury that may be vindicated through litigation. Sunstein argues that, by granting an entitlement, Congress is essentially exercising the power to define an injury where no case or controversy existed before, and that this power need not be limited to injuries that were recognized at common law. *See id*. at 230-31. A detailed analysis of this argument is beyond the scope of this article but, if Sunstein is correct in concluding that Congress can grant standing to an uninjured third party by creating a statutory award, then Article III's limitation on congressional power is reduced to little more than a drafting constraint. *See* Blanch, *supra* note 124.

134. *See* Alexander, *supra* note 104, at 1515-20.

135. *See* Raines v. Byrd, 117 S. Ct. 2312 (1997).

The Court's decision in *Raines* also suggests that it may be unwilling to accept Sunstein's argument that legislating a cash bounty is akin to creating a legal right that qualifies for judicial protection. Sunstein's suggestion threatens to expand congressional power substantially and to render ineffective the Court's effort to limit congressional attempts to authorize private citizens to act as regulatory authorities. There is no basis for inferring this broad congressional power from judicial acceptance of the private attorney general enforcement model; a plaintiff acting as private attorney general, unlike a *qui tam* plaintiff, has been personally injured by defendant's wrongdoing.[136]

In the alternative, viewing the relator as an agent or assignee who is pursuing a cause of action that belongs to the government[137] allows a court to look to the government's injury to satisfy Article III. The relator need prove only that the government has been injured, proof that generally is part of any case under the FCA.[138] Under this theory, the relator is akin to the government prosecutor; he or she does not need to show a personal stake in the litigation to act as the government's agent. The theory also is consistent with the historical underpinnings of *qui tam* in treating the statute as deputizing a private litigant as government prosecutor.[139]

The assignment theory raises interesting questions about the degree to which the legislative power encompasses congressional authority to make this assignment of the government's rights. It nonetheless provides a substantial basis for upholding relator standing in *qui tam* suits under the FCA, as the government, like a private litigant, is a defrauded victim seeking to recover its damages. However, this rationale for relator standing proves problematic when extended to the type of corporate compliance claims that form the basis of traditional class actions. It would require a substantial stretch to characterize the government as the victim of a corporation's violation of antitrust, securities, or consumer protection law.

In cases in which the government is not an injured victim, third-party standing requires that the government have the power to assign its role as prosecutor.[140] The relator would act as a private attorney general in the sense of a substitute for a government enforcement official. In so doing, the relator would exercise a traditional governmental function: the executive power to enforce the law. Such congressional delegation of government enforcement authority to ordinary citizens can be attacked narrowly under the standing doc-

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136. *Cf.* United States ex rel. Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1041-42 (6th Cir. 1994) (analogizing *qui tam* provision to traditional laws that authorize individuals to act as private attorneys general in order to uphold its constitutionality).

137. *See* United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993).

138. *Cf.* United States ex rel. Simmons v. Smith, 629 F. Supp. 124, 126 (S.D. Ala. 1985) (holding that an allegation of an injury to the United States Treasury is an essential element of a *qui tam* action under the FCA).

139. *See* John P. Robertson, Comment, *The False Claims Act*, 26 ARIZ. ST. L. REV. 899, 900-01 (1994).

140. *But see* Young v. United States, 481 U.S. 787, 793 (1987) (upholding judicial appointment of private plaintiff to prosecute criminal contempt proceeding).

trine, as set forth in *Lujan*. In *Lujan*, the Court refused to accept a statutory provision creating a citizen suit.[141] The Court held that vindicating the public interest was a governmental function, and that Congress could not vest the general law enforcement authority in uninjured citizens.[142] The *Lujan* Court was particularly concerned about the capacity of citizen suits to turn federal judges into overseers of the President's power and duty to execute the laws.[143]

A broader challenge to the relator as prosecutor can be made under the Appointments Clause[144] and the Take Care Clause[145] of the Constitution. Under either clause, the general argument is that allowing a volunteer citizen to enforce the law in the name of the United States violates principles of separation of powers. The statutory deputization of the relator is said to interfere with the executive power to initiate and control government litigation.

These challenges to *qui tam* present difficult questions. The structure of the FCA *qui tam* provision offers one response to this challenge. The FCA provides the government with substantial control over false claim litigation, including relator-initiated cases. The government may intervene, exercise primary control over the litigation, and settle or dismiss a case even over the objections of the relator.[146] Although relators may object to government efforts to limit their participation,[147] this control constrains the ability of the relator to interfere with government litigation strategy or enforcement policy.

Moreover, even if the government declines to intervene and thus leaves prosecution of the case in the hands of the relator, the government retains some degree of control. The relator is required to provide the government with copies of pleadings and depositions, and the government may be permitted to intervene subsequently upon a showing of good cause. Furthermore, the government has the right to receive notice of the terms of any settlement proposed by the relator.[148] Also, if the relator settles the case, the government is entitled to its share of the proceeds, whether or not it has intervened formally.[149] Additionally, the Fifth Circuit recently concluded that the statutory language gives

141. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

142. *See id*. at 576.

143. *See id*. at 576-77.

144. U.S. CONST. art. II, § 2, cl. 2; *see* Lovitt, *supra* note 107, at 860.

145. U.S. CONST. art. II, § 3, cl. 4; *see* Robertson, *supra* note 139, at 907.

146. Even if the procedural protections and litigation control afforded to the government by the FCA are sufficient to pass constitutional muster, these controls are unique to the FCA and are not generally characteristic of *qui tam* provisions. The other statutes currently authorizing *qui tam* suits do not contain analogous provisions preserving government control. *See* United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1086 n.3 (C.D. Cal. 1989).

147. *See* United States ex rel. Burr v. Blue Cross & Blue Shield, 882 F. Supp. 166 (M.D. Fla. 1995) (describing relator's repeated objections to being excluded from discovery process).

148. *See* United States ex rel. McGough v. Covington Techs. Co., 967 F.2d 1391 (9th Cir. 1992).

149. *See, e.g.*, United States v. Texas Instruments Corp., 104 F.3d 276, 277 (9th Cir. 1997) (upholding power of court to recharacterize settlement payment as proceeds rather than legal fees and to award government its share of those proceeds).

the government an unqualified right to veto a relator's effort to settle an action, even in a case in which the government has not intervened.[150]

The problem with arguing that the control given to the executive branch adequately addresses separation of powers concerns is that the government's exercise of this control is subject to judicial oversight. The government must obtain court approval to settle or dismiss a *qui tam* suit.[151] The government's decision to dismiss appears to be subject to a rational basis standard of review.[152] Although the court in *United States ex rel. Sequoia v. Sunland Packing House Co.*[153] acknowledged that principles of separation of powers limited its authority to interfere with the exercise of prosecutorial discretion by the executive branch, the opinion reveals the extensive burden placed on the government to justify its decision to dismiss.[154]

Judicial oversight of the government's decision to settle is even greater. The standard of review of a proposed settlement, which is equivalent to that used by courts in class action and derivative litigation, requires the court to find that the settlement advocated by the government is "fair, adequate, and reasonable under all the circumstances."[155] Thus, the court is required to exercise its independent judgment in evaluating the propriety of the settlement. Moreover, the statute does not authorize the court to consider many factors potentially relevant to a government decision to settle, including inconsistency of the case with government law enforcement policies or priorities, concern about parity in comparison to other cases, the efficient allocation of government resources, and the extent of the defendant's cooperation in continuing government investigations.[156]

The court's task in evaluating the settlement decision is complicated by the fact that the relationship between the relator and the government may be adversarial or even hostile at this point in the case.[157] Particularly in cases in which the government has assumed the primary burden of conducting the litigation, the relator's interest in maximizing the amount recovered may be inconsistent with the legitimate government objective of efficiently deploying its

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150. *See* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154 (5th Cir. 1997). *But see* United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 724-25 (9th Cir. 1994) (holding that, per 31 U.S.C. § 3730(c)(3) (1994), government must show good cause to intervene at a late date and that such language applies to an intervention to challenge a proposed settlement).

151. The government also must seek judicial assistance in limiting relator attempts to interfere with or delay the government's prosecution of the case. *See also* United States ex rel. Sequoia v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Cal. 1995) (describing government efforts to exclude relators from settlement discussions due to the concern that the relators would use confidential information thereby obtained to harass defendants).

152. *See id.* at 1340-41.

153. 912 F. Supp. 1325 (E.D. Cal. 1995).

154. *See id.* at 1341-46.

155. 31 U.S.C. § 3730(c)(2)(B) (1994); *see also* Gravitt v. General Elec. Co., 680 F. Supp. 1162 (S.D. Ohio 1988) (finding settlement sought by government inadequate and refusing to approve it).

156. *See Sequoia,* 912 F. Supp. at 1342-46.

157. *See, e.g.*, *id.* at 1332-33 (describing high level of mistrust and hostility between relators and the government).

prosecutorial resources.[158] The relator also may perceive the proffered settlement as an attempt to undercut its previously expended litigation efforts. Thus, the judicial oversight provided by the FCA over government litigation decisions raises serious separation of powers concerns with deputized private prosecutors.[159] At one level, the decision to initiate or terminate government litigation appears to be a core executive function; arguably it is inappropriate to grant the courts the power to decide whether such decisions are legitimate. Even if judicial supervision were appropriate in theory, the process of judicial review places a burden on the government that can require the Executive Branch to expend substantial resources defending its position and could compromise a variety of government policy interests. These effects are not accidental; congressional enactment of the 1986 amendments was premised on the belief that the Justice Department was not litigating with sufficient vigor and therefore required the help of citizen suits.

The lower courts have uniformly upheld *qui tam* against separation of powers challenges based on the Appointments Clause and the Take Care Clause. In large part, the analysis of these decisions has relied on the Supreme Court's decision in *Morrison v. Olson*.[160] *Morrison*, which upheld the independent counsel provisions of the Ethics in Government Act of 1978,[161] provides a tenuous foundation for upholding *qui tam* as a general delegation of government law enforcement power to private litigants. First, *Morrison* rests on a strongly functionalist view of separation of powers that marked a break from prior decisions of the Court.[162] Second, *Morrison* was concerned primarily with the President's power to remove executive officers. The exercise of limited executive powers by a government officer[163] whom the President cannot remove is

158. This conflict is not unlike that identified between class counsel and members of the plaintiff class. *See supra* text accompanying notes 10-14.

159. Moreover, the evolution of the Executive Branch into a structure with extensive and politically accountable law enforcement resources offers a partial response to those who rely on the historical acceptance of *qui tam* suits as a basis for defending its constitutionality. *Qui tam* provisions were common in this country immediately after ratification of the Constitution, an era in which the federal government was small. *See* Krent, *supra* note 102, at 290-92, 296. *Qui tam* suits provided a valuable supplement to the limited public enforcement resources at a time in which there was no FBI, no SEC, and no IRS. *See id*. at 296-300. The growth in the size of the federal government coupled with the development of the administrative state reflect substantial changes in the capacity of the Executive Branch to enforce the law and increase the risk that private enforcement will interfere with, rather than complement, public enforcement efforts.

160. 487 U.S. 654 (1988); *see, e.g.*, United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 751 (9th Cir. 1993) (describing *Morrison* as "the authority most analogous to this case").

161. 28 U.S.C. §§ 49, 591-99 (1994).

162. These prior cases include *INS v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986). The political context of the *Morrison* decision made it particularly attractive for the Court to accept some limitation on executive power. *See* Earl C. Dudley, Jr., Morrison v. Olson*: A Modest Assessment*, 38 AM. U. L. REV. 255, 265 (1989). However, the degree and permanence with which the Court has rejected formalism remains unclear.

163. The *Morrison* Court explicitly found that the independent prosecutor was a government officer appointed consistent with the Appointments Clause. *See* 487 U.S. at 671.

not unique[164] and is a relatively modest encroachment on executive discretion.[165] Third, even if *Morrison* is read as a broad endorsement of the independent prosecutor's authority to litigate in the name of the government, the independent prosecutor is a government officer, not a private citizen.[166]

More generally, principles of separation of powers raise two concerns for *qui tam* litigation that are not adequately addressed by *Morrison*: conflicts and accountability. Implicit in the objection that *qui tam* impermissibly delegates government control over litigation decisions is the concern that the relator and the government will disagree. As indicated above, the FCA limits the degree to which such conflicts will intrude upon the executive power by giving the government extensive control over the litigation. In addition, the potential conflict under the FCA is minimized because the government shares the relator's interest in recovering damages from the fraud.[167] This commonality provides some reason to trust the procedure of government investigation and intervention. If the relator presents a case involving strong allegations and substantial fraud, the government presumably will be eager to initiate litigation. If the relator's case is weak or insignificant, the government will not proceed.

Although academic commentary has considered whether a private attorney general has the appropriate incentives to engage in socially desirable litigation, private litigation generally is not viewed as a threat to government policy. To the extent that it is, we might expect Congress to reduce the volume of private litigation. As *qui tam* illustrates, however, Congress and the Executive Branch may disagree about law enforcement policy. If private litigation is justified as an enforcement tool rather than a means of victim redress, it becomes more important to consider the degree of conflict and coordination between private and public enforcement efforts.

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164. Independent agencies, distinguished from executive agencies in part by the limit on presidential removal powers, currently exercise executive authority and substantially supplement the law enforcement efforts of the Department of Justice. *See, e.g.*, KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 14 (1976) (listing 63 independent agencies over which the President has limited removal power). Although the President exercises limited control over enforcement decisions by independent agencies, their law enforcement activities have been upheld based in part on their political accountability and in part on their limited jurisdiction. *See id.*

165. The *Morrison* Court premised its acceptance on the independent prosecutor's limited jurisdiction and the fact that an appointment required the affirmative request of the Attorney General, in much the same way that the President exercises control over independent agencies through the appointment power. *See* 487 U.S. at 695. Accordingly, the Court was able to conclude that "we do not think that the Act works any judicial usurpation of properly executive functions." *Id.*

166. Following a request by the Attorney General, the independent prosecutor is selected by a three-judge panel appointed by the Chief Justice; the prosecutor is not a self-selected volunteer. *See* 28 U.S.C. § 49 (1994).

167. Because the government has the ability to intervene, its interests are not compromised by deficiencies in the capacity of the relator to pursue the case. This obviates the need to inquire into the adequacy of the relator as government representative. *See, e.g.*, United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 760 (9th Cir. 1993) (upholding *qui tam* provision against constitutional challenge on the basis that "*both* the government and the relator . . . share a single interest in successful litigation"); *cf.* United States ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658 (D.S.D. 1996) (evaluating Indian Tribe's motion to intervene in *qui tam* suit under Indian Gambling Regulatory Act on ground that relator did not adequately represent the Tribe's interests).

The potential conflict is increased in actions outside the FCA, in which the government's only interest is enforcement, rather than recovering damages. The President's enforcement priorities are based on a variety of factors, including the general public interest, political concerns, public opinion, and the appropriate delegation of executive and judicial resources. These factors also influence the choice of enforcement action, including the decision whether to pursue criminal sanctions. A core element of the executive function is the designation of these priorities. Third-party interference with this process poses a substantial threat to the executive prerogative.[168]

One reason we care about this interference is accountability. *Qui tam* suits, like citizen environmental and taxpayer suits, pose the question of whether it is legitimate or advisable to delegate law enforcement power to those outside the political system.[169] The importance of political accountability has received extensive attention in the literature on a unitary executive.[170] Although private attorneys general seemingly pose the problem of being outside the political process, commentators have debated the definition of accountability and the extent to which the President and Executive Branch are accountable. Is it appropriate to hold those who make enforcement decisions accountable to actual voters, to those affected by the applicable laws, or to the public interest? Citizen suits and private enforcement actions allow individuals to check or counter politically determined enforcement priorities with which they disagree, a mechanism that actually may increase the responsiveness of the enforcement process. Ultimately, granting prosecutorial power to private plaintiffs may be seen as profoundly democratic.

C. *Qui Tam* as an Enforcement Partnership

The foregoing analysis demonstrates that, although *qui tam* and the private attorney general model of class action litigation share common elements, privatizing enforcement litigation to the extent contemplated in some of the plaintiff elimination proposals would raise more difficult constitutional issues than the *qui tam* provision. The temptation of some commentators to analogize from *qui tam* to private enforcement appears to stem from some confusion about how to conceptualize *qui tam*. Many of the courts that have considered the constitutionality of *qui tam* under the FCA have concluded that the provision is most defensible if the government is viewed as the rights-holder that has

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168. *Cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15 (1994) (describing failure of Constitution to make explicit textual grant of prosecution power to the President).

169. In the case of the independent prosecutor, such a delegation is justified by the maxim that "no person should be judge in his own cause." *See id.* at 109.

170. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 76 (1990); Lessig & Sunstein, *supra* note 168, at 4.

assigned its claim to the relator by statute.[171] Under such a reading, however, *qui tam* does not vindicate privatized enforcement of the law.

It is inappropriate, however, to characterize the FCA *qui tam* provision as a simple assignment by the government of its right to pursue a damage claim. Instead, *qui tam* combines the government's role in law enforcement with the resources and incentive structure of private litigation. *Qui tam* neither fully privatizes enforcement of the FCA nor reduces the relator's role to that of government informant. As such, *qui tam* offers a unique model. Rather than attempting to choose between public and private enforcement in terms of their relative effectiveness, *qui tam* attempts to coordinate the contributions of both systems.[172]

What contribution does private litigation make? In monetary terms, the value of the *qui tam* provision to the government is substantial. *Qui tam* suits resulted in the recovery to the government of more than $1 billion in the first ten years after adoption of the 1986 amendments.[173] This recovery represented approximately one-third of the government's total recovery under the FCA during this period.[174] The pace of *qui tam* recovery seems to be accelerating as a result of increased familiarity with the provision; the most recent Justice Department statistics report a total recovery of $1.8 billion.[175] Economic surveys commissioned by Taxpayers Against Fraud ("TAF"), a nonprofit litigation group, estimate that the provision has deterred more than $35 billion in fraud since the 1986 amendments.[176] TAF further projects recovery of $6.87 billion of federal fraud losses and $105 billion of savings from fraud deterrence.[177]

What does the relator add to the government's ability to enforce the statute? Three components of the plaintiff's role add value: initiating litigation, providing information and investigative assistance, and providing litigation resources and support. The substantial bounty awarded to successful relators provides ample incentive for plaintiffs to initiate litigation under the FCA.[178]

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171. *See* United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1096 (C.D. Cal. 1989); *see also* United States ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995) (accepting assignment theory to uphold validity of *qui tam* provision in Indian Gaming Regulatory Act).

172. *Cf.* Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413 (1997) (considering relationship and relative effectiveness of government enforcement and private class actions in antitrust).

173. *See* DOJ Statistics, *supra* note 110.

174. *See id.*

175. *See id.*

176. *See* Taxpayers Against Fraud, *Recovery of $6.87 Billion of Federal Fraud Losses and $100 Billion of Savings from Deterrence Projected from "Whistleblower" Suits During Next Ten Years* (visited Oct. 20, 1997), *available at* <http://www.taf.org/taf/docs/tafrel.html> [hereinafter TAF Statistics]; *see also* Charles Tiefer, *Justices Ducked Major Issue in "Hughes,"* NAT'L L.J., July 14, 1997, at A21 (describing TAF statistics concerning recoveries from fraudulent contractors and estimated fraud deterred by *qui tam* suits).

177. *See* TAF Statistics, *supra* note 176.

178. The fact that the relator receives a proportion of the total recovery also preserves the relator's incentive to pursue the case vigorously and cooperate with government investigations. This incentive structure provides greater assurance that the relator will represent the government's interests ade-

Indeed, Congress adopted the 1986 amendments to increase the incentives for plaintiffs to use *qui tam*.[179] Congress was concerned that the Executive Branch was insufficiently energetic in prosecuting fraud and that this laxity contributed to the extensive fraud perpetrated against the government.[180] The legislative history of the 1986 amendments indicates that Congress intended private plaintiffs, through their capacity to file claims, to operate as a check on the government.[181] Private litigants also have the incentive to proceed without unnecessary delay, which may cause relator litigation to quicken the bureaucratic pace of government action.

The informational contribution of the relator also is substantial. Indeed, the incentive structure of *qui tam* is tailored to place a premium on the contribution of original information,[182] with the intent that the unique access and insight of *qui tam* plaintiffs into the operations of government contractors may enable them to identify instances of fraud that the government would be unable to address on its own.[183] Furthermore, the relator can assist the government during the investigation process. The government has used private plaintiffs to review documents, formulate strategy, and obtain additional information during the course of an investigation. The government has even used a relator to obtain wiretap evidence of fraudulent conduct.[184] The structure of the *qui tam* provision facilitates this partnership because, unlike the typical victim cooperating with the government's investigation, the *qui tam* plaintiff has a financial interest in ensuring a successful enforcement action. This commonality of interest between the relator and the government is likely to foster increased cooperation.

Finally, the relator can supplement the government's litigation effort with private resources. The conduct of *qui tam* litigation varies depending on the nature of the case, the personnel involved, the practice of the particular government office, and a variety of other factors. In some cases, however, the government has given the relator's counsel a role akin to that of co-counsel. Be-

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quately than does the requirement applicable to class representatives under Rule 23. *See* United States ex rel. Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658, 664-67 (D.S.D. 1996) (finding that identity of interests between relator and Indian Tribe under Indian Gaming *qui tam* statute assured adequacy of representation).

179. The amendments also protect the relator with a whistle blower provision preventing employers from discharging or discriminating against plaintiffs who file a *qui tam* suit. *See* 31 U.S.C. § 3730(h) (1994).

180. *See* S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67.

181. *See, e.g.*, *id.* at 25-26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290-91 (describing value of amendments "in acting as a check that the [g]overnment does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason").

182. Although *qui tam* lawsuits may be filed by a plaintiff who is not the original source of the information in the complaint, the statutory recovery provided to the relator in these cases is substantially reduced. *See* 31 U.S.C. § 3730(d)(1) (1994); *see also* United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990) (awarding 5% bounty where action was based primarily on disclosure of information in a government audit).

183. *See* S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

184. *See* United States ex rel. Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1038 (6th Cir. 1994).

cause the resources available to private lawyers in terms of both money and manpower frequently exceed those of the government, this participation may result in the government reaping the benefit of more depositions and greater use of expert testimony. The government also may benefit from the litigation skills of private counsel. These benefits are provided to the government at no monetary cost[185] in *qui tam* cases because the relator's counsel fees are paid by the defendant and do not come out of the government recovery.[186]

If private litigation is successful, why does *qui tam* retain such an extensive role for the government? Although the constitutional considerations discussed above may partially explain Congress's effort to vest the Justice Department with sufficient control over *qui tam* litigation, members of the *qui tam* bar attribute the success of *qui tam* litigation to the partnership between the private litigant and the government. The sixty-day period during which the government can review and investigate *qui tam* complaints provides it with the opportunity to monitor private initiation decisions. The government's subsequent power to intervene, decline intervention, or affirmatively seek dismissal allows it to play a major role in selecting meritorious suits for prosecution. *Qui tam* practitioners invest considerable effort persuading the government to intervene by convincing the Justice Department of the quality of the case. Ultimately, it appears that the Justice Department is an effective judge of quality. Government statistics indicate that the Justice Department has intervened in approximately twenty-two percent of *qui tam* suits filed since the 1986 amendments.[187] In those suits, the average recovery was more than $8 million.[188] By contrast, cases in which the government declined to intervene resulted in an average recovery of only $30,000, and the vast majority of these cases were dismissed with no recovery.[189]

The government also plays a role in coordinating enforcement efforts. Although a *qui tam* suit may require the government to share its recovery in an enforcement action with the relator, the joint nature of the action obviates the need to consume litigation resources in duplicative public and private enforcement proceedings. Duplicative proceedings are commonplace in many areas in which class actions are deployed, such as antitrust and securities fraud. The government also can oversee the total compliance effort under the FCA and ensure consistency in litigation and settlement practices. Finally, the govern-

185. There is a cost, however, to the relator's involvement in *qui tam* cases. Increasingly, the government and the relator have been involved in collateral litigation over the bounty award and counsel fees. This collateral litigation imposes transaction costs on the use of the hybrid structure, costs that can be expected to increase if the use of the *qui tam* provision is expanded.

186. This structure carries with it the typical shortcomings of fee shifting, including the absence of an incentive for either the relator or the government to monitor counsel's expenditures of time and money. Indeed, this component of *qui tam* is most directly analogous to the problematic tendency of class action suits to generate excessive litigation costs.

187. *See* DOJ Statistics, *supra* note 110.

188. *See id.*

189. *See id.*

ment can coordinate private litigation with its own investigation and enforcement efforts to prevent multiple lawsuits from resulting in overdeterrence.

Government participation additionally serves to monitor the relator's contribution to the case, particularly the quality of the information provided.[190] Because the government is in a position to investigate the relator's information and also inform the court about the appropriate bounty, the incentive structure of the statute operates more effectively. In cases in which the relator has little original information to contribute, the ultimate award is likely to be too low to interest either the relator or counsel in filing suit. In cases in which the public benefits because the relator contributes new and useful information to the government, the relator is rewarded well. If the goal of *qui tam* is to engage private resources in searching out and redressing compliance issues, it seems essential to adopt a structure that tailors the financial incentive to the information contributed as a result of these efforts.

V

EXTENDING THE MODEL: THE APPLICATION OF *QUI TAM* TO CLASS ACTIONS

What lessons does *qui tam* offer for civil enforcement suits that are based on the private attorney general rationale, such as class actions? Although the *qui tam* model may not translate directly into other substantive areas, the value of coordination and cooperation between public and private law enforcement extends beyond the FCA. Perhaps the most important lesson from *qui tam* is that the conceptual barrier between private and public litigation need not be impermeable. By breaking down this barrier, *qui tam* offers new ways to unite both the litigation process and the goals of two systems that currently operate independently. Indeed, an analysis of *qui tam* suggests that we should consider the viability, both in prudential and constitutional terms, of a unified litigation process for enforcing corporate compliance with the law.

The *qui tam* partnership provides a mechanism for coordinating the enforcement efforts of the government and the private bar. Under the existing system, private enforcement litigation, such as class actions and citizen suits, often duplicates government enforcement efforts.[191] Multiple investigations and lawsuits based on the same conduct waste resources.[192] Private litigation also may undercut government compliance efforts by threatening the defendant's

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190. The government also may be able to monitor the risk that relators will pursue litigation for an improper purpose such as harassment.

191. Absence of coordination also allows plaintiffs to file multiple class actions in different jurisdictions. Additionally, opt out rights permit individual litigation to duplicate class suits. *See* Leon E. Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 SETON HALL L. REV. 617, 635 (1994).

192. *See, e.g.*, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) (identifying the importance of considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation").

ability to negotiate a resolution with government prosecutors.[193] To the extent that the defendant faces subsequent private liability, it may be unwilling to admit wrongdoing or agree to sanctions.

Duplicative civil and government enforcement proceedings also risk overdeterrence. To the degree that compensation remedies impose the appropriate level of deterrence, any additional government penalties imposed will be excessive from a perspective of social utility.[194] In the event that compensatory damages provide insufficient deterrence, adjustments such as punitive damages are less expensive than multiple litigation.

Although duplicative litigation could be avoided by eliminating private enforcement and dedicating greater resources to public enforcement, this approach would sacrifice the valuable role of the private incentive system in supplementing government enforcement. In many areas, government enforcement levels have been criticized as inadequate. Private enforcement serves as a valuable check on government laxity and inefficiency, as well as signaling public dissatisfaction with the government's response to corporate wrongdoing.[195] Private lawsuits also can extend scarce government resources. The Securities and Exchange Commission ("SEC") repeatedly has acknowledged, for example, that private litigation enables a level of compliance that would be impossible to achieve if enforcement were limited to the government.[196]

The absence of coordination between the government and the private bar also leads to confusion. Levels of enforcement may vary, carrying conflicting messages about the appropriate standard of conduct or the degree of corporate compliance. Because the incentive structure motivating the private bar need not mirror the government's priorities, no single decisionmaker can identify enforcement priorities and channel resources to meet those priorities. Litigation results can reflect inconsistencies as independent actors drive policy in multiple directions. The multiplicity of litigation also reduces the transparency of the system, especially when many cases are settled privately with stipulations that limit disclosure of the settlement terms or the nature of the defendant's behavior. As it becomes difficult to determine how the laws are being enforced, it

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193. *See generally* Heather L. Maples, Note, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 VA. ENVTL. L.J. 195 (1996) (describing cases in which courts have found that citizen environmental suits interfered with the government's prosecution efforts).

194. *See, e.g.*, George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 831 (1996) (asserting that "the strongest theory in the modern tort academy is that full compensatory damages generate exactly the optimal level of deterrence of accidents—not too little and not too much").

195. *See* Maples, *supra* note 193, at 224 (arguing that "citizen-litigators' incentives may be better aligned with fulfilling the goals of the statute" than those of state enforcement officials).

196. *See, e.g.*, *Securities Litigation Abuses: Testimony of Arthur Levitt, Jr., Chairman of the Sec. and Exchange Comm'n Before the Subcomm. on Sec. of the Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. (1997), *available at* 1997 WL 416650 (stressing that the deterrence value of private litigation serves as a necessary supplement to the SEC's power to enforce the federal securities laws).

becomes harder to evaluate and improve the enforcement process. Transparency also reduces the potential for collusion or corruption.[197]

Qui tam suggests that government and private enforcement efforts need not operate with complete independence. Indeed, the *qui tam* model offers a unified structure combining the incentives of private litigation with the benefits of government supervision and monitoring. Similarly, class actions and citizen suits might benefit from greater involvement by the appropriate regulatory authority. Although the plaintiffs' bar presumably would balk at the prospect of a government approval requirement, the obligation to submit a securities fraud complaint to the SEC or an antitrust suit to the Federal Trade Commission prior to filing might be less onerous than legislative restrictions on private rights of action. Moreover, plaintiffs' lawyers most likely would object to a government notification requirement due to concern that they would lose the opportunity to benefit financially from their work investigating the case or the risk that government involvement would result in undue delay or interference. These problems could be addressed, as with *qui tam*, by retaining a substantial financial reward for the plaintiff who successfully persuaded the government to initiate litigation, by a prompt government response to notification, and by preserving the plaintiff's right to sue if the government declined to intervene.

Government agencies might be able to function as the type of monitors envisioned by Burns,[198] but with greater technical expertise and incentives to participate than neutral third-party class monitors. Notification may enable the government, as with *qui tam*, to identify strong cases and to signal its evaluation to the litigants and the court. This role could facilitate the early dismissal of meritless cases. More importantly, the government's participation could reduce the risk that strong cases would be sold out through cheap settlements.

A unified enforcement proceeding could accomplish more than coordination. It also could combine the litigation resources of the private bar and the government. In some areas, the government's ability to deter corporate misconduct is limited by financial constraints, absence of personnel, or lack of technical expertise. The funding capacity and litigation experience of the private bar might cause cases to be litigated more efficiently and effectively. On the other hand, the government possesses unique law enforcement resources, including broad subpoena power, extensive records, and the ability to persuade reluctant agency officials to cooperate in investigation efforts. Rather than attempting to choose between public and private enforcement on the basis of relative effectiveness, an empirical question that may be difficult to resolve, a partnership allows society to exploit the strengths of both partners.

A single proceeding could also combine the litigation objectives of compensation and deterrence that currently are pursued separately. *Qui tam* differs from most government enforcement proceedings by retaining the focus on vic-

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197. *See* Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996).

198. *See supra* text accompanying notes 78-80.

tim compensation. The primary goal of a *qui tam* suit is to maximize recovery of damages for the injured victim. *Qui tam* thus suggests that an effective enforcement proceeding need not sacrifice the compensation objective in favor of deterrence. The success of the *qui tam* provision of the FCA demonstrates the viability of using the private/government litigation partnership to pursue both goals. Through a unified proceeding, the private bar could pursue a compliance suit in partnership with the government to recover damages based on the injuries caused by the defendant's wrongdoing. The complaining plaintiff and his or her counsel could obtain a percentage of the recovery and attorneys' fees to reflect litigation services provided. The remainder of the recovery could be distributed to the victims of the wrongdoing in the manner currently employed in class actions.

This analysis is merely a preview of the type of litigation possibilities suggested by the *qui tam* model. Admittedly, current class action litigation differs from FCA claims in a number of ways. Most importantly, under the FCA, the relator often has unique information about the case. This enables the relator to contribute to the government's ability to enforce the law in a way that is unlikely to exist in cases involving consumer fraud, securities violations, or even civil rights. On the other hand, class actions make their most meaningful contribution to public enforcement when they are initiated by injured plaintiffs rather than by copycat claimants who base their complaints on public information or who duplicate government proceedings. Although the plaintiff in a products liability case may lack the secret information of a whistleblower, he or she may nonetheless supply important initiative and personal experience. Indeed, legislative efforts to preclude class representatives from receiving payment for their role, such as the provision in the PSLRA forbidding class representatives from receiving special compensation,[199] improperly discourage plaintiffs from active involvement.

This model would extend hybrid litigation further to cases in which the government has no direct stake—unlike *qui tam* in which the government is seeking to recover on its own claim for damages. Moreover, the government would sacrifice its current monetary recovery in enforcement actions in favor of compensation for injured victims. Critics might question the incentives for active government involvement under these circumstances. Three responses are possible. First, the private attorney participating in a coordinated case would check government shirking more effectively than under the current system. Second, monetary incentives appear less essential to the behavior of government officials. Government prosecutors currently do not share in the government's recovery, and in many enforcement actions, the sanctions sought are nonmonetary. Third, enforcement actions in which the government has a financial stake, such as civil forfeitures, appear to present particular opportunities for prosecutorial over-

199. *See* 15 U.S.C. § 772-l(a)(4) (1994); *id*. § 78-u(a)(4) (Supp. I 1995-96).

reaching.[200] Accordingly, eliminating the government's financial incentive may be desirable.

VI

CONCLUSION

Critics of the class action have suggested a variety of reform proposals to increase its efficiency and effectiveness. Concerns about the participation of the class representative have caused many of these proposals to focus on the role of the plaintiff, but calls for reform point in opposite directions. One approach seeks to empower the plaintiff to increase client control over the litigation process. The other approach would reduce or eliminate the role of the plaintiff in favor of enhancing the ability of the class action to deter corporate misconduct. The conflict between these approaches stems, in large part, from disagreement about the relative importance of victim compensation and deterrence of wrongdoing as litigation objectives.

Before choosing between these proposals, we should give further thought to the implications of the role of the private attorney general in enforcement of the law and, in particular, the traditional demarcation between public law enforcement and private litigation. *Qui tam* litigation under the federal False Claims Act provides a unique vehicle for examining the issues raised by allowing uninjured plaintiffs to bring suit as private prosecutors. More generally, the *qui tam* provision demonstrates the possibility of a more flexible regulatory process in which we are not forced to choose between the relative advantages of public and private enforcement, or between the pursuit of compensation and deterrence.

Remodeling class actions along the lines of *qui tam* is a radical suggestion. By breaking down the conceptual barrier between private litigation and public enforcement, however, *qui tam* provides important insights about enforcement litigation as well as possibilities for more incremental reforms. For example, *qui tam* raises the question of why government enforcement proceedings do not recover damages and compensate injured victims of corporate misconduct. Although legislative authorization might be required, government enforcement could pursue, as does *qui tam*, the dual objectives of compensation and deterrence.[201] More generally, by expanding the role of the government in private litigation and increasing the importance of the plaintiff in public enforcement, we may increase the effectiveness of litigation both in providing recompense and in deterring corporate misconduct.

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200. *See, e.g.*, Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 3-4 (1994).

201. *Cf.* Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 662 (1996) (suggesting that money recovered in private attorney general litigation should be paid to the government rather than distributed to investors).