Of Groups, Class Actions, and Social Change: Reflections on *From Medieval Group Litigation to the Modern Class Action*
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ABSTRACT

In this brief commentary celebrating Professor Yeazell's scholarship, I reflect on his seminal book on the medieval roots of group litigation in the light of global developments and technological change.

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INTRODUCTION

Professor Stephen Yeazell is a class act. His scholarship is world class, wide ranging, and catholic in approach. And Yeazell is also a classy guy, with his natty suits and chipper bow ties. He is classy in a more important way, as he is generous with his time and kind with his advice. Because Yeazell is classy in so many ways, it seems only appropriate that he devoted much of his early scholarship to the class action procedure.

In his seminal work, From Medieval Group Litigation to the Modern Class Action, published in 1987, Yeazell delved deeply into the medieval English antecedents of modern class litigation. When I first began reading into scholarship on class actions in the mid-1990s, many colleagues suggested that I begin with Yeazell’s book.

During the decade in which his book was published, legal policymakers, practitioners, and lobbyists were engaged in a fierce debate over Federal Rule of Civil Procedure 23 (Rule 23). This debate ultimately produced the Private Securities Litigation Reform Act in 1995, the first significant revisions to Rule 23 since 1966 in 2001, the Class Action Reform Act of 2005, and most recently, a line of U.S. Supreme Court decisions intended to curb the use of class actions in a host of different circumstances. As attested to by those decisions, the controversy over the proper form and uses of the “modern class action”—to use Yeazell’s term—continues today. Although this controversy was largely cabined to the United States at the time of Yeazell’s research, today it is present worldwide. At last count, about two dozen jurisdictions outside of the United States, including civil law and common law jurisdictions on every continent except Antarctica, have adopted a procedure that lawmakers in those jurisdictions consider a modern class action. These procedures outside of the United States have some, but not all, of the features of Rule 23. Although the legal space available for class actions in the


United States has been restricted, nonclass group litigation, or aggregate litigation, has burgeoned here as elsewhere. When I was invited to participate in this celebration of Yeazell’s contributions to legal scholarship almost twenty years after the publication of his book, I decided to use this as an opportunity to reread his book with these developments inside and outside the United States in mind. I still found it to be enormously useful, although along dimensions that I could not imagine at the time of my first reading. In this Essay, I share some of my reflections.

I. FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION

Yeazell’s book is deeply researched and richly detailed. At the time of its publication in 1987, the leading historical narrative about the roots of the common law class actions was that they emerged in the seventeenth century from the bill of peace, which the English Chancery Court invented to promote efficient dispute resolution by allowing factual and legal issues common to multiple parties to be resolved in a single action. Yeazell’s research uncovered a more complex history that dated back much further and was rooted not in the familiar problem of multiple individual claims with common facts and law but rather in complaints by or against preexisting groups. Group litigation, Yeazell’s research showed, was a common facet of medieval litigation and reflected a society that was so strongly defined by groups that the idea of a group litigating seemed natural and thus was unquestioned by judges. Moreover, the issue of representation that is so central to scholarly analysis of modern class actions never arose. Group litigation, however, gradually disappeared from the English litigation landscape as the structure of society became more individualistic and less collectivist and new legal constructs such as the corporation and new substantive doctrines emerged. By the seventeenth century, the record suggests some uneasiness about binding group members who had not explicitly consented to the litigation to the outcome of a group action, and remedies for group litigation were limited in some circumstances to declaratory relief. Groups did not disappear, but they mutated into associations that were bound loosely and perhaps only temporarily by one or a few

shared interests rather than being bound tightly by a long lasting and all encompassing custom. The notion that a limited and ephemeral interest might suffice as a basis for permitting multiple parties to sue arose in the early 1800s, but did not take hold. Yeazell suggests that perhaps it was difficult to discern the boundaries of group litigation—a problem all too familiar to modern class action scholars. For reasons that are not clear, by the mid-nineteenth century, group litigation seems to have entirely disappeared from the English legal system.

English group litigation thus did not lead to a modern English class action. As Yeazell describes in his book, however, it did lead to the modern U.S. class action. It also indirectly led to the Australian and Canadian class action procedures, which were modeled on U.S. class actions. A good part of Yeazell’s book deals with the rise of interest-based litigation and the emergence of the modern class action in the United States. Upon rereading the book, however, I found myself thinking more about the role of groups in class and nonclass mass litigation, as well as the ways in which this role has been shaped by social change.

II. THE ROLE OF GROUPS AND INTERESTS IN CLASS ACTIONS OUTSIDE THE UNITED STATES

Yeazell’s research on the medieval period was limited to England. I am not a historian of any type, but his description of the group nature of medieval English society is consistent with my impressions of European medieval society. Indeed, the standard sociological description of the transition from traditional to modern societies is a description of the shift from group-based relationships and norms to structures and norms founded on individual interest. In Yeazell’s account of English legal history, that transition results in the gradual demise of group litigation and a hardening of the notion that legal claims belong exclusively to individuals and fictive entities, such as the corporation. Group litigation disappeared in part because groups themselves became less important.

In most European jurisdictions that have adopted a class action procedure, however, the right to bring an action in some or all circumstances is limited to preexisting groups, such as consumer or shareholder associations. As in seventeenth-century England, often the only remedy available to these groups is declaratory relief. In some instances when damages are available, the members of the association are required to opt in to be eligible for any award. When there is

5. Id. at 205–07.
6. Id. at 212.
no relevant preexisting group to bring an action arising out of a mass harm, European legal systems may permit the establishment of a special purpose group, such as a foundation, to bring the action. That group may need only to meet general requirements for incorporation that are not associated with its representative role. Often the statute that provides for the class action procedure contains no mandate that judges assess whether the group can properly represent the class members, even when it is a special purpose group formed exclusively for litigating on behalf of mass claimants.8

I had assumed that the preference for a group, what Yeazell terms the “litigative entity,” reflected the more communitarian orientation of contemporary European society (by comparison to the United States). But after rereading Yeazell’s book, I found myself wondering if the roots of this model lie further back in medieval Europe. I have also puzzled over the seeming lack of concern among European lawmakers about issues of representation and notice (again by comparison to the United States). I now wonder whether this reflects a different understanding than ours about the primacy and functional utility of group action in comparison to individual action. Even if confidence in groups and group action remains high in Europe, however, the question remains whether one should rely on litigating groups—preexisting or especially incorporated for this purpose—to protect class members’ interests, without imposing any litigation-specific regulation. For example, in the Netherlands, there is discussion about whether special purpose foundations established to represent class claimants should be subject to regulation or judicial scrutiny.

The notion of interest as a basis for class actions does not seem central to European or Asian debates about the adoption of class action procedures, but it is integral to many Latin American class action doctrines.9 In countries such as Brazil, Chile, and Mexico, the law recognizes three types of collective actions that are dependent on the type of interest involved. These three types of collective actions include: (1) diffuse interest class actions, in which the right claimed is indistinguishable, such as the right to clean air and water; (2) collective interest class actions comprising mass claims connected by common facts and law, such as mass product injury claims; and (3) homogeneous interest class actions in which all of the claimants have an identical relationship to the defendant, such as consumers with

9. See generally id. (describing class action and other collective litigation procedures in North and South America, Europe and Asia).
a contractual relationship to the defendant. Diffuse interest class actions seem to resemble Rule 23(b)(1) or (b)(2) class actions, while collective and homogeneous interests seem like two varieties of Rule 23(b)(3) class actions with different predominance requirements. Representation, certification, opt-in or opt-out rules, and remedies may differ depending on the nature of the rights. These differences suggest different ways of thinking about the challenges posed by representation under different circumstances than those expressed in conventional American and English legal discourse.

III. THE ROLE OF GROUPS IN AGGREGATE LITIGATION

Although the history of the modern class actions in the United States, as Yeazell details, is entwined with the history of social movements and organizations such as the National Association for the Advancement of Colored People (NAACP), today’s discourse about class actions and aggregate litigation generally seems to have lost sight of the role of both preexisting and emerging groups in mass litigation. Our attention is drawn to the relationship between the lawyer and the mass. But our attention lacks much consideration of whether the mass contains, or is defined by, social groups and, if so, what role they can or should play. Yet, even outside the realm of social impact litigation, groups have helped to shape both class and nonclass mass litigation both in the United States and elsewhere.

First, groups may power litigation. Two examples include the Vietnam veterans in the Agent Orange litigation, which was resolved by a class settlement, and arguably the women’s groups in the silicone gel breast implant litigation, which was resolved in multiple mass settlements after a failed attempt at a class

10. See, e.g., Ada Pellegrini Grinover, Brazil, 622 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2009, at 63, 64–66 (describing the definitions of diffuse, collective, and individual homogeneous interests in Brazilian law).

11. A class action may proceed if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,” FED. R. CIV. P. 23(b)(2), or “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,” FED. R. CIV. P. 23(b)(3).

12. For example, in Mexico, a class member may opt out of a diffuse interest class action but must opt in to a collective or homogeneous class action. See Carlos A. Sugich, Mexico’s New Class Action Laws, ASSN CORP. COUNS. (Apr. 11, 2012), http://www.lexology.com/library/detail.aspx?g=8825c92-d399-42ce-ae70-2eb58eb6bf.

13. YEAZELL, supra note 4, at 240–45.

resolution.\textsuperscript{15} Groups may also impede the settlement of mass litigation by organizing objectors to proposed settlement terms. Hemophiliacs demonstrated this tactic in the first blood products litigation in the United States, which was resolved by a class settlement after an initial class certification was vacated by an appellate court.\textsuperscript{16} Third, groups may fund litigation. The leading Dutch consumer organization, Consumentenbond, demonstrated this practice in the Dexia bank product class action, which was funded by €60 contributions by about 80,000 of its members.\textsuperscript{17} Moreover, groups may monitor the implementation of settlement agreements. Some Holocaust survivor groups have taken this approach with regard to the fund that resolved the Holocaust litigation against Swiss banks.\textsuperscript{18}

However, the role of groups that are not litigative entities in class and nonclass mass litigation is not always recognized by courts. In Rule 23 class actions, the potential for a group to organize objectors to proposed settlements may encourage class counsel to attend to those in the class who share the group’s views. Some judges have recognized this potential. For example, the role of Vietnam veterans’ groups in shaping \textit{Agent Orange} litigation may have incentivized Judge Jack Weinstein to adopt the strategy of holding mass hearings on the proposed class settlement in different U.S. cities.\textsuperscript{19} In another example, Judge Samuel Pointer took the unusual step of appointing Sybil Goldrich, the founder and leader of a silicone gel breast implant victims’ group, to serve along with plaintiff counsel on the plaintiffs’ steering committee.\textsuperscript{20} Goldrich also subsequently served on the committee that represented tort creditors in the Dow Corning bankruptcy. Those of us who worry about representation and conflict of interest issues in class and nonclass mass litigation should think more about the actual and potential role of social groups in this type of litigation.

\textsuperscript{17} Gianika N. Tzankova, \textit{Funding of Mass Disputes: Lessons From the Netherlands}, 8 J.L. ECON. & POL’Y 549 (2012).
\textsuperscript{18} Paul Berger, \textit{German Jews Push Claims Conference to Bare Report on $57M Holocaust Fraud}, \textit{JEWISH DAILY FORWARD} (July 1, 2013), \url{http://forward.com/articles/179682/german-jews-push-claims-conference-to-bare-report}.
\textsuperscript{19} SCHUCK, supra note 14.
IV. **GROUPS, CLASS ACTIONS, AND SOCIAL CHANGE**

Yeazell concludes that the modern class action grew out of the gradually declining importance of customary groups to society and the rise of interest-based social organizations. Looking back, it appears that customary groups offer a more reliable basis for legal representation in comparison to the amorphous and ephemeral interests that we seem not yet to have figured out how best to harness in litigation. But the fundamental message of Yeazell’s book is a story of how social change shapes legal norms, institutions, and procedures. New social media, such as Facebook and Twitter, hint at a new transformation of social organization, one in which networks take precedence over groups and social ties increase in importance. New litigative entities may emerge because of this transformation. These entities may not be groups in the traditional sense but something more than ephemeral interests. As people discover common experiences and common ideas, they may also identify common injuries and seek remedies for them collectively. Some new form of collective litigation may follow the modern class action. This new form may not be necessarily better or worse than its predecessor, but it will be different in character and perhaps also in outcomes. I hope we continue to have Stephen Yeazells in our midst to study them.