CIVIL RIGHTS CLASS ACTIONS: PROCEDURAL MEANS OF OBTAINING SUBSTANCE

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I. INTRODUCTION

I cannot resist the temptation to start this Article with a personal note. The first legal matter I worked on was as a law student writing a memorandum supporting over 4000 Japanese-Americans who had renounced American citizenship while in internment camps during the Second World War. They sought to reclaim that citizenship, claiming that conditions at the camp were so coercive that the renunciations were not voluntary. I had to prepare an argument supporting the position that theirs was properly a class action. They won that case[1] although I have no way of knowing whether my memorandum played any role in the outcome. The court held that there were common questions of law and fact and "that there is a large saving of filing and verification costs and the necessity of proof in each individual case of the conditions at Tule Lake [the internment center]."[2] The court also left open the possibility that the government might prove that certain individuals who had renounced had done so voluntarily, that is that some who claimed to be members of a class which had been subjected to coercion in fact had not suffered that abuse.

It was a neat and probably foreordained outcome; the class action putting its best foot forward. The parties saved time and expense. The facts were readily ascertainable. The possibility of misapplication was covered by an opportunity for individualized adjudication in appropriate cases. The court was in and out of the case efficiently. There was no suggestion of any of the factors floated today in arguing against the class action device: judicial management of social programs beyond the capacity of the judiciary to administer efficiently; imposition or threats of excessive monetary recoveries and/or legal fees which may stimulate litigation in the first place or coerce settlement; a decree which may unfairly bind absent plaintiffs, defendants or affected third parties, and so forth. Large numbers of

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1. McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951).
2. *Id.* at 774.

parties and the legal system as a whole were served with no downside at all.

Since that time the class action device has burgeoned and been used to resolve disputes large and small across an extremely wide legal landscape. It has played a critical role in civil rights litigation, as will be discussed below, although it also has provided an effective and efficient means of resolving many other kinds of disputes for parties and the judicial system alike. At the same time it has posed problems—in civil rights and other areas of the law—which nearly a half century ago were discerned only dimly or if perceived, not viewed as very important.

Civil rights class actions are commonplace. In 1984, for example, civil rights class actions represented 37.3% of all class action suits—the largest of any single category.[3] Class actions have been used to challenge discrimination in employment, education, the use of public facilities and housing, to assert prisoners' rights, and to promote welfare reform, to name just a few areas that conventionally are put in the civil rights category. In one case,[4] a district court granted a stay of execution in a class action habeas corpus proceeding on behalf of a class consisting of all Florida inmates on death row.

Aside from the necessity of conducting a class certification proceeding, class actions are typically more complex and lengthy than ordinary litigation. On the average, class actions take 3.3 times as long as the average civil case of the same type.[5] The tradeoff, of course, is that individual suits by all, or even many members of the class would probably take longer. Moreover, one must factor in possible denial of justice if there were no class action: at least some members of the class might not obtain relief. Indeed, some of the large cases which have drawn the most criticism, like prisoners' rights suits, have reformed large, inefficient, abusive, unconstitutional prison systems which remained unchanged for decades or longer before courts ordered class relief.

Professor Abram Chayes has written about how the class action has contributed to creating "public law litigation."[6] He has observed that the traditional civil adjudication model envisions bipolar litigation between two private parties, in which the remedy is retrospective and self-contained. Class actions, which recognize that "public and private interactions...are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals," have fundamentally changed the nature of civil litigation.[7] Courts of equity have come to enter more broadly based decrees; the remedies have shifted from one-shot, one-way transfers to compensate for past wrongs, to decrees adjusting *future* behavior. He attributes the change, in part, to

3. Angelo N. Ancheta, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 330 n.2 (1985).

4. Adderly v. Wainwright, 272 F. Supp. 530 (M.D. Fla. 1967).

5. Thomas Willging & Laural L. Hooper, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 96 (1996).

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

7. *Id.* at 1291.

the class action's response to "the tendency to perceive interest as group interests."[8] While this relatively recent role of the courts in regulating society has been much criticized, it also has been appreciated enough by those whom it benefits that it now is a permanent part of the legal and, indeed, political landscape.

Civil rights and class actions have an historic partnership. Indeed, those who revised the federal class action rules in 1966 took particularly into account the concerns of civil rights litigants. Professor Albert Sacks, who was Associate Reporter of the revised rules, was intimately familiar with civil rights litigation and had in mind the role of class actions in civil rights litigation in formulating the rule. (For years he was an instructor at legal training sessions of the NAACP Legal Defense and Education Fund and was a consultant to the Fund.) The Advisory Committee specifically noted that Rule 23(b)(2) class certification was designed for class actions in the civil rights field, "where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."[9] Most civil rights class actions are certified as 23(b)(2) classes when, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[10] The partnership between class actions and civil rights has grown to such an extent that the Advisory Committee revising Rule 23 noted that, "[s]ubdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims."

In this Article, it is hardly possible to discuss all of the areas of class actions in the civil rights field. I shall limit myself to a few: prisoners' rights, school desegregation, and employment discrimination, and only to some aspects of each. I shall note something about how the rule has functioned in these areas over the years and reactions to that experience.

II. PRISONERS' RIGHTS

Class actions have played a major role in securing the rights of prisoners. Since the federal class action rule was revised in 1966, prisoner rights litigation has utilized the mechanism of class action to bring broad relief to inmates and detainees throughout the country. Prisoners' rights litigation has thoroughly reformed entire state prison systems in Texas, Florida and Georgia. In cases which lasted for years, those and other systems have been placed under judicial management for long periods of time.[11] Less far-reaching cases have involved class

8. *Id.*

9. 39 F.R.D. 69, 102 (1966).

10. FED. R. CIV. P. 23(b)(2).

11. *See, e.g.*, Costello v. Wainwright, 525 F.2d 1239, 1248–52 (5th Cir. 1976), *aff'd*, 430 U.S. 325 (1977); Miller v. Carson, 401 F. Supp. 835, 862–902 (M.D. Fla. 1975) (detailing order for judicial management of Florida prison system and declaring the order "to remain in full force and effect until specifically modified or rescinded by further order of this Court" *id.* at 902); *see also* JACK GREENBERG, CRUSADERS IN THE COURTS 457–59 (1994).

action relief from double celling,[12] religious discrimination,[13] due process violation in parole standards,[14] restrictions on an inmate's right to marry,[15] solitary confinement,[16] and denial of contact visits.[17]

In 1968, shortly after Rule 23 was revised, the Supreme Court decided *Lee v. Washington*,[18] which involved the issue of racial segregation of prisoners in the Alabama penal system. The case began as an action for declaratory and injunctive relief on behalf of one white and five black prisoners, and was then certified as a class action on behalf of persons, male and female, similarly situated in confinement throughout the penal system of the state of Alabama, including state, county, city and town jails. Thus, when the Court held that racial segregation of prisoners was an unconstitutional violation of the Fourteenth Amendment, the remedy affected *all* prisoners within the Alabama penal system, including minimum, medium, and maximum security prisons, so-called "honor farms," youth centers, educational programs, and hospitals in the penal system. Of course, stare decisis would have mandated the same result, but would have required a great many lawsuits and greater utilization of judicial resources.

Prisoners' rights litigation came to use the class action mechanism frequently and to the fullest extent possible. By 1979 the Second Circuit noted that there had been an "explosion of litigation testing the rights of prisoners."[19] *Marcera v. Chinlund* demonstrates the breadth of remedies in this area: it raised the issue of the right of pre-trial detainees' contact visits, permitting them to shake hands with a friend, or to kiss a spouse.[20] Although the court had repeatedly affirmed this right in at least three separate class actions,[21] in each of them only the plaintiff detainees of a particular institution had been certified as a class. Stare decisis did not seem to be operating. In *Marcera*, however, the plaintiffs had their class certified not as representatives of one institution, but as representatives of all pre-trial detainees throughout the state. Furthermore, the court certified a *defendant* class of all sheriffs in forty-one New York counties who denied contact visits in their jails. In ordering relief, the court recognized that the remedy must be particularized according to the individual architecture, staffing, and inmate population of each institution, but nonetheless warned that "neither convenience of judicial administration nor concern for the delicacies of federal/state relations will excuse a failure to remedy clear constitutional violations."[22]

Class actions involving prisoner rights have certain unique attributes. Because the public interest is served by the vindication of prisoner rights, a court may

12. Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996).
13. Hayes v. Long, 72 F.3d 70 (8th Cir. 1996).
14. Board of Pardons v. Allen, 482 U.S. 369 (1987).
15. Turner v. Safley, 482 U.S. 78 (1987).
16. Wolff v. McDonnell, 418 U.S. 539 (1974).
17. Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979).
18. 390 U.S. 333 (1968).
19. *Marcera*, 595 F.2d at 1234.
20. *Id.*
21. *Id.* at 1234–35.
22. *Id.* at 1240.

authorize a fifteen percent supplement to the lodestar figure of attorneys' fees in such litigation.[23] Indeed, a court has awarded attorneys' fees in a prisoners' rights class action despite the fact that the petition for fees was filed four years after the case was settled.[24] On the other hand, prisoner rights class actions place a heavy burden on the judicial system, taking an average of over five times longer than a non-class action prisoner rights litigation.[25] This invites comparison with the resources that individual suits on behalf of all affected prisoners would consume, factored with the denial of rights which would persist if, as is likely, all of them would not file individual suits.

Nevertheless, the broad-based relief ordered as a result of prisoners' rights class actions has resulted in a congressional backlash. The procedural restrictions which Congress has enacted seem to be fueled at least in part by growing hostility to those accused of a crime, typified by the reemergence of chain gangs, the creation of boot camps, proposals to treat juveniles as adults, and three-strikes-and-you're-out legislation.[26] The recently enacted Prison Litigation Reform Act[27] may have a substantial impact on future class action litigation. The Act establishes several substantive restraints on court-ordered remedies in all civil litigation, including class actions, involving prison conditions based on federal rights. A court may not grant any relief unless that relief is narrowly drawn, is no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. The Act precludes a court from issuing a remedy including a prisoner release order unless that court has previously entered less intrusive relief which failed to remedy the violation of rights. Further, the Act prohibits all prisoners from bringing a federal civil action for mental or emotional injury unless accompanied by a prior showing of physical injury. Finally, and perhaps most importantly, the Act applies retroactively, so that any previously entered relief which does not conform to the Act's stringent restrictions may be subject to a motion to terminate that order for failure to comply with the Act. As a consequence, rights once thought settled are already once more in litigation.

Aside from these substantive restrictions, the Act also imposes procedural barriers. For example, the Act erects a type of "three strikes and you're out" restriction.[28] Under this provision, if a prisoner brings three civil actions which are dismissed on the grounds that they are frivolous, malicious, or fail to state a claim

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23. Imprisoned Citizens Union v. Shapp, 473 F. Supp. 1017 (E.D. Pa. 1979).

24. *See Attorneys Awarded Fees in Litigation Against State Correctional Services*, INSIDE LITIG., Mar. 1996, at 13.

25. Willging & Hooper, *supra* note 5, at 96.

26. *See, e.g.*, Scott Richardson, *Lawmaker, ISU Professor Disagree on Chain Gangs as Crime Deterrent*, PANTAGRAPH (Bloomington, IL) Mar. 9, 1996, at A3 (Illinois State University's criminal justice department chairman calls three-strikes-and-you're-out provision "merely the latest effort to please voters" following the impetus behind chain gangs and boot camps).

27. Pub. L. No. 104–134, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3626, 28 U.S.C. § 1915, 1915f, and 42 U.S.C.A. § 1997e (West 1994 & Supp. 1997)).

28. 110 Stat. 1321 (1996) (codified as 28 U.S.C.A. § 1915 (West 1994 & Supp. 1997)).

upon which relief may be granted, that prisoner is absolutely barred from bringing further civil actions based on violations of federal rights unless the prisoner is under imminent danger of serious physical injury. This is no idle threat, as at least one prisoner has received two such strikes within the first two months of the Act.[29] The Act also establishes a procedural obstacle against the collection of attorneys' fees, establishing a cap of the hourly rate charged, a cap of the portion of the fee which a defendant may be required to pay, and requiring a plaintiff who is awarded a monetary judgment to pay up to twenty-five percent of the fees.

It remains to be seen just how the Prison Litigation Reform Act will affect prisoners rights class actions. Nonetheless it is clear that whatever the eventual effects of the Act turn out to be, Congress has sent a clear message that it wishes to restrict the broad based remedies ordered by courts in prisoners' rights suits and possibly in other types of public interest cases as well.

III. SCHOOL DESEGREGATION

The beginning of school desegregation class actions was *Brown v. Board of Education*.[30] In *Brown II*, the "all deliberate speed" implementation decision, the Court, in explaining factors which a court of equity should take into account in fashioning relief, referred to the cases as class actions in explaining why it had prescribed how district courts should proceed in formulating their decrees.[31] *Brown* is a curious example of the relationship between substance and class action procedure. At the time *Brown* was decided, it was widely believed that the Constitution would be satisfied by admitting black applicants to white schools. Conforming to this view, most southern states passed laws, known as pupil placement laws, which prescribed procedures for application and transfer by individual black children to white schools. Although these transparently were stratagems for maintaining segregation, and although efforts to transfer routinely were frustrated, the courts, including the Supreme Court, for many years upheld the laws. A class action, therefore, would have involved the right of many black would-be transferees or applicants to move to white schools, but only those who chose to transfer. It would not have involved transfer of white children to black schools.[32] Later, the Court made clear that the constitutional right was the right of a black child to transfer to a white school.[33] It was the right to attend school in a desegregated system. Pursuant to this theory a class action, while not inappropriate, presumably would not be necessary. A solitary plaintiff, invoking the right to

29. *See* Abdul-Wadood v. Hawk, No. 95-3716, 1996 WL 368218 (7th Cir. June 10, 1996).

30. 347 U.S. 483 (1954).

31. 349 U.S. 294, 300 (1955).

32. *See* Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956) (holding that black students would be admitted to desegregated schools "as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted"); Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1958) (holding constitutional a law admitting black students to desegregated schools on an individualized basis).

33. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968).

attend school in a desegregated system, ought to have had the right to desegregate all the schools to vindicate his rights. In fact, however, all school cases have been denominated class actions, a formulation which according to the theory I have described would be surplusage. Such criticism as may be directed at the class action device because courts have come to administer many school systems over many years would more appropriately be directed at the constitutional rule that school segregation is unconstitutional, not so inviting a target.

School desegregation remedies, since the early seventies, have been broad-based. As the Supreme Court noted in 1971 in *Swann v. Charlotte–Mecklenburg Board of Education*,[34] once a violation of *Brown* is found to exist, the breadth and scope of the remedy under a court's broad equitable powers is limited only by the nature of the violation. Thus, the Court declared that district courts overseeing desegregation within a district could (1) order the assignment of teachers to achieve a particular degree of faculty desegregation, (2) oversee the construction of new schools to ensure that segregation was not perpetuated, (3) use mathematical racial ratios as a starting point for racial balancing within a district, (4) gerrymander school districts, including the creation of non-contiguous school zones, as a corrective measure, and (5) order bus transportation to implement desegregation.[35] All of this is quite a large role for judges to carry out.

However, *Swann* contained a note of caution, demonstrating that the Court was clearly worried about the breadth and scope of its remedies and the extent of court oversight required to implement those remedies. The Court first stressed that in the absence of a violation demonstrating that the state had deliberately attempted to fix the racial composition of the schools, a court's equitable powers could not be exercised.[36] Then the Court stated that "[a]t some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*."[37] At that point, a court's oversight would end. While these observations constituted a limitation on the reach of equitable relief, they may also be seen as a hesitation to extend judicial supervision of governmental programs too far and for too long—a caution about the kinds of cases that often invoke class relief.

Milliken v. Bradley[38] began in fact to define some limits of these broad remedies. In that case, parents and students filed a class action seeking to desegregate the Detroit school district. The district court found numerous segregation violations by the Detroit School Board. Reasoning that actions taken by school districts which violated *Brown* were linked to the actions of other non-violating districts, the district court ordered an inter-district remedy to integrate school Detroit schools with schools in other school districts. The Supreme Court reversed this remedy, holding that despite the violation within the Detroit school district, the remedy could not be so broad as to include districts in which there was

34. 402 U.S. at 1.
35. *Id.* at 18–30.
36. *Id.* at 28.
37. *Id.* at 31.
38. 418 U.S. 717 (1974).

no violation.[39] While the *Milliken* Court placed some limits on a district court's equitable powers, broad relief was still permitted within a school district which violated *Brown*. After the Supreme Court remanded *Milliken* for the formulation of a new remedial order, the district court entered an order requiring not only student reassignments, but also remedial reading and communication skills education programs, training for teachers and administrators, guidance and counseling programs, and revised testing procedures, requiring large expenditures of funds.[40] These remedies were upheld by the Supreme Court as falling within the discretion of the district court in its exercise of its *equitable* powers.[41]

Recently the Supreme Court has expressed a desire to circumscribe more clearly some broad remedies of the past. When, in 1984, the parents of black public school children filed a nationwide class action in *Allen v. Wright* to challenge the tax-exempt status of racially discriminatory private schools, the Court responded by holding that the parents lacked Article III standing to bring the action.[42] Just four years ago, in *Freeman v. Pitts*,[43] a class action filed by parents and school children in Georgia, the Court took a major step in formulating just how judicial oversight over desegregation would end. Not only may judicial supervision end when a school district has achieved compliance with a court-ordered desegregation plan,[44] but the court may relinquish supervision incrementally even before full compliance is reached.[45] *Board of Education of Oklahoma City v. Dowell*[46] held that the school system of that city was unitary and eligible for withdrawal of judicial supervision.

Missouri v. Jenkins[47] is the Court's most recent effort to place limits upon broad relief ordered in school desegregation class actions. The district court found that the Kansas City, Missouri school district operated a segregated school system and ordered relief which was estimated to cost almost $88 million, and divided the cost between the state and the school district. The district court found, however, that several provision of Missouri state law prevented the school district from being able to pay its share of the remedy's cost by preventing the raising of local property taxes above a certain level. The district court thus enjoined the enforcement of the state law, and ordered the district court to raise its property taxes to cover the cost of the relief.[48] The Supreme Court reversed. It held that principles of comity which govern the district court's equitable discretion were contravened when the court ordered the district to raise property taxes.[49] Although the broad and expensive relief ordered by the court was within its equitable discretion, the court could not order the district to raise taxes in order to pay for the

39. *Id.* at 744–45.
40. *See* Bradley v. Milliken, 402 F. Supp. 1096, 1118–19 (E.D. Mich. 1975).
41. *See* Milliken v. Bradley, 433 U.S. 267 (1977).
42. 468 U.S. 737 (1984).
43. 503 U.S. 467 (1992).
44. *Id.* at 489.
45. *Id.* at 490.
46. 498 U.S. 237 (1991).
47. 495 U.S. 33 (1990).
48. *Id.* at 37–42.
49. *Id.* at 50–52.

relief when a less obtrusive method was available. Since the court could have required the school district to formulate its own plan for paying for the relief, the district court erred in not implementing this less obtrusive method.

While the Supreme Court was signaling that the lower court's equitable discretion had clear limits, it was not wholly rejecting broad relief. After all, the $88 million worth of relief ordered by the district court was upheld, as was the court's order enjoining the enforcement of state law that prevented the school district from raising the revenue necessary to pay for the relief. The only part of the order struck down was the order instructing the district to raise property taxes. Nonetheless, *Jenkins*, *Freeman*, and *Dowell* indicate the Supreme Court's willingness to draw clear lines demarcating the boundaries of relief which may be ordered in school desegregation class actions.

In the area of school desegregation, where the substantive right is one to class relief, we see perhaps most clearly the political and social forces which operate on what in other contexts may be called only a procedural issue.

IV. EMPLOYMENT DISCRIMINATION

Class actions have played a major role in employment discrimination litigation. While it is impossible for public interest lawyers to calibrate closely the sequence of issues which courts will address in a litigation program such as that undertaken by the NAACP Legal Defense Fund in implementing Title VII of the Civil Rights Act, establishing the propriety of class relief had a high priority. Thus it was no accident that the Supreme Court's first Title VII decision was in a 1966, NAACP Legal Defense Fund case which upheld class relief in Title VII cases. *Hall v. Werthan Bag* involved a company later made famous in the movie *Driving Miss Daisy*. In that case, the district court held that Title VII did authorize the filing of a class action.[50] This proposition would later be reaffirmed by the Supreme Court when it stated that "racial discrimination is by definition class discrimination."[51]

Even more precisely focused on the class action aspect of civil rights lawsuits was the Supreme Court's curtailment of the scope of class relief in *Martin v. Wilks*.[52] In that case, a class of black firefighters sued the city alleging that it discriminated in hiring and promoting them. The city and plaintiffs settled the case by a consent decree which provided affirmative action relief for blacks.[53] Blacks would obtain positions in a ratio which meant some whites who might have been appointed would not be. Whites sued, claiming that they were victims of reverse discrimination imposed by a decree in a case in which they had not been parties. The issue was whether such a decree could preclude their rights. The Supreme Court held that it could not, because the white firefighters had not had their day in

50. Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966); *see also* GREENBERG, *supra* note 11, at 415–16.

51. General Tel. Co. v. Falcon, 457 U.S. 147, 157 (1982) (citing Hall v. Werthan Bag Corp., 251 F. Supp. at 186).

52. 490 U.S. 755 (1989).

53. *Id.* at 759.

court.[54]

But Congress overruled that decision in the Civil Rights Act of 1991.[55] That Act, among other things, held that, if persons situated like the *Martin v. Wilks* plaintiffs (a) had notice of the action sufficient to apprise them that it might affect their rights, and (b) a reasonable opportunity to present objections or (c) were adequately represented by another person who had challenged the order on the same legal grounds and with a similar factual situation, then they could be bound by the decree. In essence, the Congress decided that the substantive policies of the Equal Employment Opportunities Act trumped the conventional notice procedure of ordinary litigation.

Class actions make possible monetary relief for many persons in a single case. *Albemarle Paper Co. v. Moody*[56] held that back pay must be awarded in employment discrimination cases, providing a major incentive for companies to reverse such policies instead of waiting for individual employees to bring actions.[57] Without the availability of back pay, an employer who discriminates can continue to do so without cost until an employee wins a case against them. If back pay is available, the employer who uses such a tactic will be forced to pay for years of discrimination rather than simply reverse its policy without further costs; in a class action the amounts can be quite large. It is impossible to imagine effective relief in cases of this sort without class actions.

While prisoners' rights and school desegregation have in recent years been curtailed by Congress and the courts, the Supreme Court's effort to limit the effectiveness of employment discrimination class actions provoked a strong negative response from Congress. The Civil Rights Act of 1991[58] overturned *Martin v. Wilks* and various other decisions which curtailed the scope of Title VII. Moreover, the Act was passed by the largest margin of any civil rights statute in American history, with eighty-nine percent of Congress voting in favor.[59]

While there are many one-on-one employment cases, class actions of considerable scope continue to be filed. While the plaintiff in *Moody* eventually won a $20,000 settlement, one recent employment discrimination class action brought by black workers against a California utility company consisted of a class of 2,500 current and former employees and settled for $18.25 million.[60] The district court of the Middle District of Florida recently certified a class of all female management and non-management employees of Publix Super Markets, including

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54. *Id.* at 761–64.

55. Pub. L. No. 102–166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e–2(n)(1)(B) (1994)).

56. 422 U.S. 405 (1975).

57. *Id.* at 421.

58. Pub. L. No. 102–166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e–2(n)(1)(B) (1994)).

59. *See* Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903, 905 (1993).

60. Stuart Silverstein, *Edison Will Pay $18.25 Million to Settle Racial Bias Class Action*, L.A. TIMES, Oct. 2, 1996, at D1.

those who have worked, are working, or will work in the retail operation from 1991 to the date of the trial.[61] This class covers approximately 100,000 people in about 500 stores in three different states.

V. CONCLUSION

In the three areas I have described—prisoners' rights, school desegregation, and employment discrimination—class actions have played a vital role. They have made it possible to afford relief to large numbers of persons who, realistically, could not have been parties to litigation. As a consequence, courts have become involved in administration of complex orders and decrees, sometimes dealing with inevitable clashes of interest in highly politicized, contentious areas. Notwithstanding that such cases have afforded justice to class members whose rights otherwise would have been denied, some kinds of civil rights class actions have engendered legislative and judicial backlash. But, employment discrimination remains a notable exception to this trend, with classes becoming larger, back pay relief increasing dramatically, and the Civil Rights Act of 1991 restoring the gains of previous litigation. It is tempting to speculate about why prisoners and schoolchildren have evoked one reaction and workers another.

Perhaps the simple answer is that prisoners evoke little sympathy. The expense and difficulties of assuring their rights, particularly on a mass scale, offend enough of the public to make possible legislation that curtails those rights or makes it difficult to realize them. Since those rights typically are grounded in the Constitution, there is no realistic chances of repealing them procedurally. Consequently, legislation has been enacted to undo the kinds of relief often awarded in prisoners class action cases, including class relief obtained in the past. It is highly unlikely that the kinds of political reaction we have had towards reformation of entire prison systems or prohibition of certain treatment of prisoners—for example, double or triple celling or improper diets or medical treatment—would have been engendered if a comparable court order had been limited to an individual prisoner.

In the area of school desegregation, even without class action rules, the relief which courts order is, substantively speaking, of a class nature. It is, of course, regulated by the parameters of the class action rules, but the controversies which have arisen in the school desegregation context have stemmed from the mass reassignment of students. Nothing comparable would occur if a court were to order a single child or two to attend a particular school. This has been the driving force behind curtailment of relief in school cases encountered in decisions like *Milliken I*, *Dowell*, and *Jenkins*.

But employment is different. Whatever residual racial prejudice still afflicts the United States, there is no open support for discrimination in the workplace. The public has shown little sympathy for efforts to make it more difficult to win relief for employment discrimination. On the few recent occasions when courts have

61. Shores v. Publix Super Markets, NO. 95-1162-CIV-T-25(E), 1996 WL 407850 (M.D. Fla. Mar. 12, 1996).

curtailed such relief, Congress has reversed those decisions.