On What A "Private Attorney General" Is—And Why It Matters

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I. INTRODUCTION

May 17, 2004 marked the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*.[1] This precise day also marked the sixty-first anniversary of the Supreme Court's first use of the phrase "private attorney general."[2] For about three decades after this initial 1943 appearance, the private attorney general concept surfaced only occasionally in the legal literature. Starting in the 1970s, however, its presence became quite regular, and that regularity has escalated steadily to the present: on average, during the past fifteen years, *every single workday*, somewhere in the United States, some judge has written a legal opinion or some scholar has penned an article invoking the private attorney general concept.[3]

That the phrase is employed so frequently suggests its utility as a concept. What is odd, though, is that when probed, the concept proves surprisingly mercurial.[4] The phrase is sometimes used to refer to plaintiffs,[5] occasionally used to refer to defendants,[6] and typically used to refer to lawyers.[7] (What other concept is so malleable that it can be deployed to signify either a plaintiff or a defendant, a lawyer or a client?) Legislatures create private attorneys general by statute, but before they did and when they have not, courts have created them by judicial decision, and executive agencies by fiat.[8] Congress creates private attorneys general, but so do state legislatures, state courts, and state administrative agencies.[9] The phrase is an integral part of

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1. 347 U.S. 483 (1954).

2. Justice Douglas used the term in a dissenting opinion, citing to Judge Jerome Frank's original use of the phrase in a Second Circuit decision rendered several months earlier. F.C.C. v. Nat'l Broad. Co., Inc., 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting) (quoting Assoc. Indus. of New York v. Ickes, 134 F.2d 694 (2d Cir. 1943) (Frank, J.)).

3. *See infra* Part II.

4. *See* Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 194-95 (1998) (stating that "[i]t is revealing that there is still no legal definition, nor any well-established pattern of usage, which precisely identifies a litigant as a 'private attorney general.' ").

5. *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

6. *See, e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations By Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 251 (1988).

7. *See, e.g.*, 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, 370 (1988); Geoffrey C. Hazard, Jr., *Modeling Class Counsel*, 81 NEB. L. REV. 1397, 1403-06 (2003).

8. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240, 247-61 (1975) (providing a historical overview of the creation of private attorneys general).

9. *See generally*, Ann K. Wooster, Annotation, *Private Attorney General Doctrine – State Cases*, 106 A.L.R. 5th 523, 523 (2004).

the doctrine of standing[10] *and* of the rules concerning attorneys' fees.[11] In its single most important decision about private attorneys general, the United States Supreme Court ruled that the Constitution necessarily restrains the concept, while simultaneously implying that courts of equity nonetheless retain inherent powers to propagate it.[12]

If there is any fixed star in this constellation, it is that the private attorney general is a placeholder for any person who mixes private and public features in the adjudicative arena. Yet even that compass point proves elusive, as there are so many players who mix public and private functions in so many different ways that the concept holds the place for a motley cast of disparate characters. "Anyone," one commentator argues, "can call himself a 'private attorney general.' "[13] While scholars and judges have often stated that the private attorney general performs a mix of public and private functions, they have much less frequently attended to the variety of different public-private mixes contained within this rubric.[14]

My goal in this Article is to map these mixes—to distill from the singular private attorney general concept a range of distinct private attorneys general—and then to convince the reader that this new taxonomy is a helpful heuristic device. I take as the template for the logic of my argument Alfred Kinsey's taxonomy of sexual orientations, an analogy that may be distant in content but is nonetheless similar in form.[15] Kinsey, a taxonomist by training,[16] rebelled against society's insistence that human sexuality occurred in but two diametrically opposed forms: heterosexual and homosexual.[17]

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10. *See* Assoc. Indus. of New York v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

11. *See Alyeska*, 421 U.S. at 263.

12. *Compare id*. at 262 ("[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."), *and id*. at 270 ("[I]t is not for us to invade the legislature's province by redistributing litigation costs."), *with id*. at 258-59 (noting circumstances in which federal courts enjoy "inherent power" to "allow attorneys' fees in particular situations").

13. Rabkin, *supra* note 4, at 194. Given this picture, it is easy to embrace Professor Hazard's conclusion, reached in the context of modeling class action counsel, that the "private attorney general" term "is unhelpful at best, and on balance adds to . . . confusion." Hazard, *supra* note 7, at 1399.

14. On the rare occasions that scholars closely examine the concept, they generally sort private attorneys general in two categories, distinguishing the public interest advocate from the entrepreneurial plaintiffs' lawyer. *See infra* note 36.

15. ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 610 (1948) [hereinafter KINSEY, MALE SEXUAL BEHAVIOR]; ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 446 (1953).

16. On Kinsey's intellectual development, see STEPHEN JAY GOULD, *Of Wasps and WASPs*, *in* THE FLAMINGO'S SMILE 155, 155 (1985).

17. Kinsey explained his philosophy in these words:

Kinsey demonstrated that nature did not deliver human sexuality in two pure forms, but rather in a spectrum of mixes ranging from the purely heterosexual to the purely homosexual.[18]

Lawyering, I will argue, is like sex. There are not just two pure forms—the private attorney on the one hand and the government attorney on the other—but rather an array of mixes of the public and private. After some preliminary comments about the history of the private attorney general concept (Part II), I situate along a spectrum the various different attorneys invariably referred to in the literature as private attorneys general, showing the particular ways each mixes public and private functions (Part III).

This new taxonomy sheds light on current anxieties about the legitimacy of class action lawyers. Part IV demonstrates this by exploring the ramifications of a somewhat exemplary and very timely case: the current California antitrust class action against the Microsoft Corporation. Private attorneys general purporting to represent fourteen million California consumers settled these consumers' antitrust claims for $1.1 billion in, essentially, $20 vouchers; however, if the full amount of vouchers are not redeemed—and how could they be?—two-thirds of the residuary value will be distributed as vouchers to underprivileged schools throughout the state. This so-called "*cy pres"* voucher settlement triggers a central concern about class action attorneys, namely, that they serve their own interests and not those of their clients. Law and economics scholars have sustained this critique for several decades now, demonstrating that the private attorney general framework presents a classic "agency" dilemma. In Part IV, I contend that a subtler understanding of the public/private mixes in the private attorney general concept suggests a new response to this critique. I do not argue that the critique is baseless. I argue that it insufficiently attends to the nuances of what it means to be a private attorney general. Once the various types of private attorneys general are illuminated, it becomes clearer that the class action attorney is an agent for various principals, depending upon where she happens to fall along this spectrum, and hence that the agency problems are more multifaceted then conventionally described. In making this argument,

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> Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects.

KINSEY, MALE SEXUAL BEHAVIOR, *supra* note 15, at 639.

18. *Id*. at 639-59.

I therefore demonstrate the usefulness of the spectral typology I develop here.

II. A BRIEF HISTORY OF THE PRIVATE ATTORNEY GENERAL CONCEPT

Private attorney general is an awkward expression, qualifying the public lawyer, *the attorney general*, with the contradictory appellation, *private*. Before relishing that curiosity, however, it is worth appreciating the oddity of the public phrase itself. *Attorney general* appears to introduce a military metaphor into the lawyering literature. And in fact, solicitors general and attorneys general are often referred to as if they commanded large armies—"General Ashcroft," for example.[19] Yet the military metaphor is not only limited—there are only attorneys general, not attorneys corporal, sergeant, and lieutenant, working their way up the ladder to become attorneys colonel—it is actually inapposite. What puts the "general" in "attorney general" is not strength but scope: "general" defines the ambit of the "power of attorney" given to the lawyer in question, distinguishing, since the fifteenth century, lawyers with general powers of attorney from those with particular or specific appointments.[20] The public attorney general, to apply the concept, has a *general,* not limited or specific, power of appointment from the people.[21]

While the attorney general concept carries this lineage, its counterpart, the private attorney general, made its first appearance in the legal literature in a 1943 decision by Judge Jerome Frank for the U.S. Court of Appeals for the Second Circuit.[22] In that time period,

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19. *See, e.g.*, Marjorie Cohn, *The Evisceration of the Attorney-client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1241 (2003) (stating that "General Ashcroft announced his interim amendment to Bureau of Prisons regulations, which took effect five days later, without the usual public comment period"); Gene R. Nichol, *Ashcroft Wants Even More*, NEWS & OBSERVER, Feb. 20, 2003, at A15, *available at* 2003 WL 3446867 (noting that "what marks General Ashcroft's dream statute, beyond its extravagant grab for power, is the extent to which Patriot II reflects an executive branch determination to go it alone, unilaterally"); Nicholas von Hoffman, *Are You Afraid of the Cops? You May Have Good Reason to Worry About the Bad Ones,* WASH. POST, May 21, 1995, at C1 (referring to Janet Reno as "General Reno").

20. The Oxford English Dictionary reports that:

> The designation began in England, where this officer was at first merely the king's attorney, called from the reign of Edward IV, the "king's general attorney," to distinguish him from those appointed to act on special occasions, or in particular courts. The descriptive designation seems to have grown into a title during the 16th c.

OXFORD ENGLISH DICTIONARY (2d ed. 1989), *available at* http://dictionary.oed.com.

21. *See id.* (describing an attorney general as "[a] legal representative or deputy acting under a general commission or 'power' of attorney, and representing his principal in all legal matters: opposed to *attorney special* or *particular*").

22. Assoc. Indus. of New York v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

courts were working out the jurisdictional issues triggered by Congress' expansion of the administrative state during the New Deal.[23] The issues posed in Frank's case were paradigmatic: who, exactly, did Congress mean to empower when in the Bituminous Coal Act of 1937 it authorized "any person aggrieved by an order issued by the [Bituminous Coal Commission] in a proceeding to which such person is a party"[24] to seek review in a United States Court of Appeals—and how did the Constitution constrain such an authorization? In the decision's key passage, Judge Frank concluded that Congress could authorize a private citizen to file suit even if the sole purpose of the case were to vindicate the public interest as opposed to some private interest of the litigant: "Such persons, so authorized, are, so to speak, private Attorney Generals."[25] And thus the concept was hatched—sort of.

The practice of private lawyers supplementing the enforcement of public laws was hardly novel,[26] and the practice of labeling such persons "private attorneys general" not uncontested. Two years prior to Judge Frank's decision for the Second Circuit, Judge Edgerton, of the D.C. Circuit, commenting on a similar type of litigant, stated, "[H]e appears only as a kind of King's proctor, to vindicate the public interest."[27] In 1943, when Justice Douglas brought the private attorney general phrase into a Supreme Court decision for the first time, he mentioned the King's proctor locution in the same breath.[28] If the concept were likely to catch on in the United States, it was unlikely to do so as a King's proctor, so it is not surprising to find that styling soon retired.[29]

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23. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992).

24. *Ickes*, 134 F.2d at 699 (quoting 15 U.S.C.A § 836(b)).

25. *Id.* at 704 (citation omitted). In drawing this conclusion, Judge Frank analogized this citizen suit to a *qui tam* action. *Id.* at 704-705 (discussing U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537 (1942)).

26. *See* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 290-303 (1989) (describing a variety of ways in which private citizens assisted in the enforcement of criminal laws throughout American history, including pre-False Claims Act *qui tam* actions).

27. Colorado Radio Corp. v. F.C.C., 118 F.2d 24, 28 (D.C. Cir. 1941) (Edgerton, J., concurring).

28. F.C.C. v. Nat'l Broad. Co., 319 U.S. 239, 265 n.1 (Douglas, J., dissenting).

29. Only one contemporaneous opinion applies the King's proctor title to the private attorney general before the phrase disappears from the legal literature. Stark v. Wickard, 136 F.2d 786, 788 (D.C. Cir. 1943). The phrase was popular throughout the nineteenth century, especially in matrimonial cases where it referenced English legal provisions enabling a King's proctor to represent the interests of the Crown in divorce proceedings. The phrase is used in this sense in *Sherrer v. Sherrer*, 334 U.S. 343, 359 n.2 (1948) (Frankfurter, J., dissenting), then it disappears completely from American case law.

What seems more surprising is the slow expansion of the private attorney general concept. The phrase appears but seven times in the legal literature of the 1940s, only another eleven times in the 1950s, and but seventy times during the entire 1960s.[30] Finally, in the 1970s, use of the phrase skyrockets:[31] it appears 759 times in those ten years and its use increases steadily each decade to the present.[32] There are two explanations for the limited early use of the phrase. First, the private attorney general concept, when introduced, was resisted by New Deal jurists who considered these so-called litigants mere rent-seekers challenging the new administrative state.[33] The typical early private attorney general was a losing licensee or a consortium of corporations unhappy with New Deal rate-setting; Justices Frankfurter and Douglas scorned the prospect of giving special status to these interests via the private attorney general concept—Justice Douglas's initial use of the phrase came in a *dissent* in which he (concurring with a similar assessment reached in a companion dissent by Justice Frankfurter) objected to the notion and

30. *See infra* note 32.

31. *See* Rabkin, *supra* note 4, at 179 ("The 'private attorney general' came out of the shadows in the 1970s").

32. Professor Rabkin reports that the private attorney general wilts after its flowering in the 1970s, appearing "less often in case reports." *Id*. at 180. In fact, judges' use of the phrase in case decisions continued to escalate during the 1980s and 1990s, though that increase was not as dramatic as the more than tenfold increase between the 1960s and 1970s. Scholars were about a decade behind, using the phrase more than ten times as often during the 1980s as during the 1970s. All of this data is taken from a Westlaw search I conducted on July 26, 2004, for "private attorney! general" in various databases. In the "JLR" database, the phrase occurs 3,035 times. In the "ALLCASES" and "ALLCASES-OLD" databases, the phrase occurs in legal opinions 3,424 times:

	CASE LAW	LAW REVIEWS	TOTAL	PER WORKDAY (assuming 250/yr)
1940s	7	0	7	.003
1950s	7	4	11	.004
1960s	56	14	70	.03
1970s	705	54	759	.30
1980s	949	605	1,554	.62
1990s	1,035	1,488	2,523	1.01
2000-July 2004	665	870	1,535	1.34
TOTAL	3,424	3,035	6,459	.4

33. Professor Sunstein explains that Justices Brandeis and Frankfurter were "the principal early architects of what we now consider standing limits" and that "[t]heir goal was to insulate progressive and New Deal legislation from frequent judicial attack." Sunstein, *supra* note 23, at 179.

called for its use to be limited.[34] A second reason that the private attorney general phrase was rarely used before the 1970s is that it existed solely as a matter of party status. As such, it was never destined to blossom into a household word. Even in the 1960s and 1970s, when judges used the phrase more frequently as party status doctrines were expanded by public law litigation,[35] these changes contributed to only minor increases in the phrase's appearance. The phrase explodes in the 1970s not because of public law litigation but because it takes root in new attorney's fees statutes and doctrines. Once loosed as a matter of money, the private attorney general concept's diffusion was limited only by the imagination of lawyers seeking attorneys' fees.

Hence the present state of affairs: the widespread use of the phrase in a multitude of different situations, to refer to a plethora of discrete actors, carrying on a range of diverse functions—a muddle with but one common denominator: the mix of public and private features. Can this mess be organized? The primary attempts to do so to date have focused on the singular distinction between the ideological plaintiffs' attorney and the fees-driven plaintiffs' attorney.[36] Professor Coffee introduced this distinction in his seminal work on plaintiffs' attorneys (which I discuss in detail below).[37] For Professor Coffee, who brought a novel law and economics perspective to the field, the distinction is important because it is speaks to the *incentives* that drive the two types of private attorneys general. The distinction caught on, though, because it also makes good sense: the NAACP attorney, paid a small salary for her intense efforts, is

34. *See id*. at 264-266 (Douglas, J., dissenting). *See, e.g.*, F.C.C. v. Nat'l Broad. Co., Inc., 319 U.S. 239, 248-264 (1943) (Frankfurter, J., dissenting);

35. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1289-1304 (1976); Stephen C. Yeazell, Commentary, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles Schools Case*, 25 UCLA L. REV. 244, 257 (1977).

36. *See, e.g.*, 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, 235-36 (1983); Garth, et al., *supra* note 7, at 356-57; Hazard, *supra* note 7, at 1398. Professor Redish takes this dualism (idealistic vs. self-interested) and subdivides the self-interested between those private attorneys general seeking client compensation and those (he alleges) who seek only the bounty of their fee, resulting in three categories. Martin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL. F. 71, 90-93. Professor Erichson does not attempt a grouping, but he describes several discrete examples of current situations in which the public and private functions of attorneys are mixed. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2-23 (2000). Professor Fisch also does not sort private attorneys general into categories, but uses the *qui tam* case as a lens through which to view to public/private mixes in class action cases. Jill E. Fisch, *Class Action Reform,* Qui Tam, *and The Role of the Plaintiff*, 60 LAW. & CONTEMP. PROBS. 167, 167-70 (1997).

37. *See infra* notes 76-81, 116-123 and accompanying text.

generally driven by different incentives than those that motivate the plaintiffs' attorney subsisting on the fees she can draw from her portfolio of class action lawsuits. What's more, as Professor Coffee has demonstrated over the past quarter century, focusing on attorney incentives explains a lot about what cases get filed, how they are handled, and whether and how they settle. This organizing distinction helps explain a lot of things, a lot of the time—but not everything and not always.

It is not, then, the only way to organize the field. Bisecting the field according to plaintiff attorney incentives is a helpful way of describing why attorneys do what they do. Standing alone, though, this organization does not get at why the legal system enables private attorneys general in the first place and what it is we hope to get out of them. This bisection is a powerful way of thinking about means, but perhaps a less direct way of examining ends. In what follows, I propose a different dissection of the field that has value apart from the descriptive value of the prevalent incentive-based organizing method.

III. THE PUBLIC/PRIVATE DISTINCTION IN THE LAWYERING LITERATURE

My claim that the private attorney general mixes aspects of public and private lawyering rests upon an assumption that there are, at least, these two pure forms of lawyering. Although the integrity of the forms does not hold up well upon close observation,[38] there are certain features commonly labeled as "public" and certain features commonly labeled as "private" in the lawyering literature that are useful starting points.[39] A simple case like the toxic environmental harm alleged in the book *A Civil Action*[40] suggests the two archetypes: first, an action for compensatory damages brought on behalf of harmed individuals by private attorneys, and second, a prosecution for civil penalties brought on behalf of the government by a public

38. *See* Fisch, *supra* note 36, at 184 ("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"); Hazard, *supra* note 7, at 1403 ("[T]here is no general proposition, standard, or uniform concept of a *public* attorney general").

39. My colleague Jody Freeman has noted the utility of employing the "public" and "private" constructs at the very moment one is arguing that most, if not all, activities are a mix of the two. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000) (concluding that "while we might talk in terms of "public" and "private" actors, the reader should not conclude that there is such a thing as a purely private or purely public realm.").

40. JONATHAN HARR, A CIVIL ACTION 493-98 (Robert Loomis ed., Random House 1995) (1995).

attorney general. These archetypes highlight three characteristic features of the public/private divide—the lawyer's client, the lawyer's reward, and the lawyer's goal.[41]

A. Individual/Government Clients

The simplest distinction between the public and private lawyer is that the former represents the government and the latter represents some nongovernmental actor. On the private side of the spectrum, it is typical that a single client hires a single lawyer, or law firm, creating an agency arrangement between the principal/client and agent/lawyer.[42] The lawyer then pursues the client's individual interests, with a clear ethical duty of loyalty to those interests. The private arrangement can get far more complicated, particularly when the private client is a corporation or association and the task of identifying the client's interests is thereby complicated. But at least this much is true: in private lawyering, the client's interests are nongovernmental, nonpublic interests.

By contrast, an attorney is a public attorney if her client is the government. The intangible client with amorphous interests, marginal to private lawyering, is the core of public lawyering. What is complicated on this side of the spectrum is not only identifying what constitutes the client/government's interests, but also identifying the public official or group to label as the immediate client.[43] Often public lawyers work for a government agency, which acts as their client. Many public attorneys also, or alternatively, consider "the public" or "the public interest" as their real client in interest; the agency or government official to whom they report is simply an intermediary form of that principal.[44] But at least this much is true: in public lawyering, the client's interests are governmental and public in nature.[45]

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41. *See* Erichson, *supra* note 36, at 3-4.

42. *See* Hazard, *supra* note 7, at 1401 (stating that "the client in the ordinary client-lawyer relationship is the principal and the lawyer the agent, with a corresponding allocation of authority") (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS ch. 2, introductory note (2000)).

43. *See* Erichson, *supra* note 36, at 24.

44. *See, e.g.*, THE LAW AND ETHICS OF LAWYERING 820 (Geoffrey C. Hazard, Jr. et al. eds., 2d ed. 1994) [hereinafter THE LAW AND ETHICS OF LAWYERING] ("Who is the client of the government lawyer? Possible contenders include the agency head, the chief executive officer (e.g., the governor or president), the legislature as the elected representatives of the public and the 'public' "); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.9.2, at 449-51 (Government Lawyer Models and Roles).

45. *See* 7 AM. JUR. 2D *Attorney General* § 23 (2004) ("Absent statutory amplification of the attorney general's authority, he or she can participate in litigation of a private character only

The fit is not perfect, of course. Some private attorneys—for instance, those that solicit victims of mass torts as clients through mass advertising—often have an attenuated connection to their clients; they might be more likely to think of them as an amorphous group of harmed persons with generalizable claims.[46] Conversely, government attorneys occasionally have what look more like individual clients with rather specific and seemingly private needs, such as when a government lawyer defends a particular government official in a Section 1983 case.[47] Nonetheless, it is a widely-utilized trope that private attorneys represent individual clients with private interests while public attorneys represent the citizenry at large pursuing their public interest. Private attorneys are ordinarily agents of their individual clients while public attorneys are ordinarily agents of some public good.

B. Fees/Salary

The nature of the lawyer's relationship to her client determines the fee structure within which she labors. Private attorneys work for individual clients and those clients pay them for their services.[48] Their pay may take the form of a flat fee, an hourly wage, or of a cut of the proceeds of the lawsuit, but regardless of its nature, its source will be the client's purse. By contrast, public attorneys work for the public and are paid a salary to do so. The amount of time they invest in an issue, the amount of sanction they recover, or the amount of harm they deter, has no bearing on their fee. Their priorities, the uses of their billable hours, are generally determined by politics, not money.

The fit is once again not perfect. Private attorneys can recoup their costs from the losing side, or from the public treasury, in certain types of cases or situations. Private legal services lawyers are paid a salary consisting largely of public funds. Public interest lawyers also tend to work for a fixed salary (though typically not one paid by government grants). Conversely, public attorneys may actually directly benefit from their lawsuit if, for instance, their agency is permitted to retain the proceeds of their efforts. Nonetheless, it is a widely-utilized trope that private attorneys are paid a fee reflective of

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when it has a bearing on the interests of the general public or affects the interests and welfare of the general public. Thus, the attorney general may not be appointed by a court to represent a private plaintiff suing for violation of civil rights.") (citations omitted).

46. *See, e.g.*, Judith Resnik et al., *Individuals Within The Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 312-13 (1996) (describing some mass tort lawyers as "wholesalers").

47. *See, e.g.*, THE LAW AND ETHICS OF LAWYERING, *supra* note 44, at 835-36.

48. Fisch, *supra* note 36, at 171.

their time or effort while public attorneys are paid a salary irrespective of the scope or success of particular prosecutions.

C. Compensation/Deterrence Goals

The most beguiling aspect of characterizing lawyers as public or private in nature comes in relation to the type of work each tends to do. The conventional story is that compensation is a private goal and deterrence a public one: private attorneys pursue compensation for individual clients arising out of past injuries (torts, breaches of contracts, discriminatory harms, financial losses) while public attorneys aim to deter future bad behavior.[49] This accepted wisdom allows for exceptions: compensatory damages, especially punitive damages, collected by the private attorney surely deter some bad behavior and, conversely, government actions may compensate for past wrongs. Indeed, private attorneys occasionally bring purely deterrent lawsuits (seeking injunctions against future behavior), while government attorneys occasionally bring purely compensatory lawsuits (seeking civil penalties for historic harms).

The exceptions to the conventional story begin to expose its shortcomings: in reality, both public and private lawyers pursue both deterrence and compensation. Compensation may be the core of private lawyering, but deterrence is far from a marginal activity. In the words of my colleague Steve Yeazell, "private litigants for a millennium have sought prospective, specific remedies: replevin and ejectment were probably the two most commonly used remedies for 800 years, as long as land and livestock were major components of the economy."[50] Similarly, deterrence may be the core of public lawyering, but compensation is far from a marginal activity. Government lawyers regularly pursue compensation, recoupment cases being among the most numerous types of case filed by the government.

Notwithstanding the shortcoming in the conventional account, the deterrence/compensation distinction nonetheless retains some power in distinguishing public from private lawyering. Governments tend to do essentially two things: (1) govern by law, and (2) do business by money, contracts, loans, etc. The Supreme Court has

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49. *See, e.g.*, Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686-87 (1941) (stating that administrative agencies tend to regulate by "outlining a very detailed plan for future conduct," but that "it is important to note than an administrative body does not normally act to remedy wrongs which have occurred").

50. Email from Steven Yeazell, Professor of Law, UCLA School of Law, to William B. Rubenstein, Professor of Law, UCLA School of Law (July 30, 2004, 10:41 AM) (on file with author).

come to call the second category, in many circumstances, "market participation," and in those spheres the law often treats the government as a more private than public actor.[51] As applied to lawyering, when the government pursues compensatory damages, it is typically seeking to be made whole for losses it has suffered in its more proprietary, not law-enforcement, functions. Thus, recoupment cases seek to get back loans paid to citizens who have defaulted; damage cases seek to remedy fraud wrought against the treasury or, for instance, to recover the costs of paying too much for computers equipped with Microsoft software.[52] By contrast, when the government is involved in deterrent matters, it is usually doing those things that are more exclusive to governments, more generally recognized as "public"—prosecuting criminals, enforcing regulatory regimes, and so on. The converse is true as well: though private lawyers pursue both compensation and deterrence, when they pursue deterrence, we tend to categorize such actions as the more public aspects of private lawyering.

In short, even though both public and private lawyers pursue both deterrence and compensation, there remains some nontrivial residual sense in which deterrence is a public goal and compensation a more private one. This may be a consequence of the combination of several of the factors I have outlined here, namely a conjunction of the scope of the client with the nature of the remedy.[53] Deterrence feels

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51. The phrase arises most often in Commerce Clause jurisprudence, where the Court has held that if a state is acting as a market participant, not as sovereign, it may prefer the goods or services of its citizens, even though to do so as market regulator would violate the Dormant Commerce Clause. *E.g.,* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 206-15 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 434-47 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 802-10 (1976). The Court rejected application of a similar distinction in the field of state sovereign immunity, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-87 (1999), thereby providing a wider umbrella of immunity to the states. The distinction is not limited to constitutional law: for example, the Court recently employed it in considering whether certain Postal Service activities constituted a violation of the antitrust laws. *See* U.S. Postal Serv. v. Flamingo Indus. Ltd., 540 U.S. 736, 747 (2004) (holding that the Postal Service's "public characteristics and responsibilities indicate it should be treated under the antitrust laws as part of the Government of the United States, not a market participant separate from it").

52. Professor Erichson discusses some recent high profile instances of government compensatory suits, including tobacco cases and handgun litigation. Erichson, *supra* note 36, at 18-21. While the government has sought damages in such instances, it is important to note that the theory of these cases sought recoupment of the government's *own* damages (for example, state medical assistance spent on tobacco-related illnesses), not the damages suffered by its citizens. These government plaintiffs are acting as any harmed market participant would. What they are *not* doing is acting as a government, i.e., suing on behalf of their citizens on a *parens patriae* theory to recoup the citizens' damages. These government recoupment cases therefore fall on the more private side of governance.

53. *See* Meltzer, *supra* note 6, at 319.

public when it applies broadly to enjoin future activity, because then it operates somewhat like law itself. Compensation seems private because it is almost invariably realized individually. The point is *not* that public lawyers pursue only deterrence and private lawyers only compensation. The point is that when anyone pursues a deterrent remedy, particularly one with wide application, it feels as if they are doing something *public*, while when anyone pursues compensation, it feels as if they are doing something *private*.

D. Mapping The Public/Private Distinction as Spectrum Endpoints

Together, these three features—clients, fees, and goals—provide the conventional benchmarks for the public/private distinction in the lawyering literature. As I am reconceptualizing the terrain here, they instead provide the endpoints of the spectrum of public and private mixes:

	1 **PRIVATE**	2	3	4	5 **PUBLIC**
CLIENT	individual				"the people"
FEE	flat fee or hourly or percentage				salary
GOAL	compensation				deterrence

Having established those endpoints, we can now map some of the mixes.

III. THREE FORMS OF THE PRIVATE ATTORNEY GENERAL

The private attorney general concept is deployed in the legal literature in at least three distinct ways, each of which presents a different mix of the public and private features of lawyering: (1) some private attorneys general *substitute* for the public attorney general; (2) some private attorneys general *supplement* the public attorney general; and (3) some private attorneys general *simulate* an attorney general, acting as the advocate for a group, but solely for a group of private persons.

A. The Private Attorney General as Substitute Attorney General

Some attorneys literally perform the exact functions of the attorney general's office though they themselves are not attorneys general. These attorney general "substitutions" occur in at least three forms. First, occasionally the attorney general will hire a private attorney to do the work of her office. Two recent high profile instances of this practice occurred when in the Microsoft antitrust trial, Deputy Attorney General Joel Klein hired David Boies to try the United States' case against Microsoft, and in the tobacco litigation, when state attorneys general hired plaintiffs' counsel on a contingent fee basis to recoup state governments' monetary losses attributable to smoking.[54] The practice is hardly novel: in *Brown v. Board of Education*, the state of South Carolina hired John W. Davis, "the most accomplished and admired appellate lawyer in America," and "turned the case over to Davis without any strings attached."[55] Special prosecutor laws accomplish a similar result—the replacement of a government attorney by a private lawyer—but through a different process (appointment by a panel of judges after referral by the Attorney General) and for a different reason (outsiders may be able to more *fairly*, not just more *competently*, prosecute government officials).[56] In these instances, public officials privatize their functions, hiring private attorneys to perform as attorneys general, thereby creating, in essence, private attorneys general.

A similar privatization can occur not when the attorney general delegates her function to the private sector but rather when the client —a public official—hires a private lawyer to represent him in his official capacity. In California, for example, public interest lawyers mounted a statewide class action challenging the conditions in public schools throughout the state. Former Governor Gray Davis was a named defendant in the lawsuit. Rather than rely on the state's attorney general to represent him, Davis farmed the work out to one of the state's largest law firms.[57]

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54. *See* Erichson, *supra* note 36, at 17-18, 35-40 (discussing these examples and the risks involved in such arrangements).

55. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 543 (1975).

56. *See, e.g.*, Ethics in Government Act, 28 U.S.C. §49, 591-99 (2004).

57. California law enables state agencies to contract personally for legal services, at the state's expense, when "a conflict of interest on the part of the Attorney General's office prevents it from representing the agency without compromising its position." CAL. CODE § 19130(b)(7) (West 2004). Governor Davis and the Attorney General did not agree on whether a conflict existed in this case, but the Governor nonetheless retained private counsel. *See* Nanette Asimov & Lance Williams, *Gov. Davis vs. Schoolkids: High-priced Legal Team Browbeats Youths About*

A third form of attorney general substitution comes through the *qui tam* action. In the *qui tam* case, private attorneys bring claims on behalf of the government.[58] The *qui tam* lawyer is not hired by the attorney general or other executive department official. Rather, she is a self-appointed bounty hunter, pursuing government fraud where the government has not done so.[59] The *qui tam* lawyer must provide notice to the attorney general and can be replaced by the attorney general's office (thereby demonstrating that it is the attorney general's work she is proposing to do).[60] If the attorney general chooses not to take over the *qui tam* action, however, the private attorney substitutes for him.[61] Her fee is then taken from her bounty, and she is authorized to keep a portion of the proceeds as well.[62]

Shoddy Schools, SAN FRANCISCO CHRON., Sept. 2, 2001, at A1, *available at* 2001 WL 3413085 (stating that Governor Davis retained the firm against the advice of the state's attorney general and that the firm charges $325/hour for attorney work, $140/hour for paralegals); *see also* Nanette Asimov, *Bitter Battle Over Class Standards: State Spends Millions to Defeat Students' Suit*, SAN FRANCISCO CHRON., May 5, 2003, at A1, *available at* 2003 WL 3754421 (noting that "[Governor] Davis has paid $13 million in public funds to the Los Angeles law firm of O'Melveny & Myers to fight the students"). The ACLU Foundation of Southern California represented the plaintiffs in this matter. *Id.* I sat on one of the organization's Boards of Directors.

58. The meaning of *qui tam* is captured by the full Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur* – who pursues this action on our Lord the King's behalf as well as his own. Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (1999). *Qui tam* cases in the United States have raised a host of constitutional questions including ones about whether the government or the *qui tam* relator is the real party in interest, in other words, whether the case is properly characterized as public or private in nature. *See* Gretchen L. Forney, Note, Qui Tam *Suits: Defining The Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 MINN. L. REV. 1357, 1367-74 (1998).

59. *See, e.g.*, False Claims Act [hereinafter FCA], 31 U.S.C. §§ 3729-3733 (2000). Under the FCA, a private person may bring a *qui tam* civil action "in the name of the [federal] Government," *id.* § 3730(b)(1), against "any person" who "knowingly presents . . .[to the] Government . . . a false of fraudulent claim for payment . . . ." *Id.* § 3729(a).

60. The FCA, for example, provides the Attorney General a sixty-day window in which to intervene and assume primary responsibility for the *qui tam* action. 31 U.S.C. § 3730(b)(2), (b)(4), (c). The government enters roughly one in four *qui tam* matters. Forney, *supra* note 58, at 1359 (citing JAMES T. BLANCH ET AL., CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 140 (1996)).

61. The relator nonetheless cannot dismiss the action without the consent of the Attorney General and court. 31 U.S.C. § 3730(b)(1). The extent of the Attorney General's authority to block a settlement has, not surprisingly, been hotly debated in the courts. Forney, *supra* note 58, at 1374-90. This is not surprising because the issue yet again poses the central question of whether these are public or private lawsuits.

62. *E.g.,* FCA, 31 U.S.C. § 3730(d)(1)-(d)(2). These can range anywhere from 15-25 percent if the government intervenes and from 25-30 percent if it does not. *Id.* The Supreme Court has held that the *qui tam* relator has a private interest independent of the government's public interest by virtue of the fact that she may remain in the action if replaced by the Attorney General and, even when replaced, is entitled to a portion of the bounty. *Vt. Agency*, 529 U.S. at 772. This holding underscores the peculiar mix of public and private presented by the *qui tam* action. *See* Fisch, *supra* note 36, at 195 (concluding that "[r]ather than attempting to choose

The *qui tam* relator substitutes for the attorney general, but only in what is arguably the most "private" of government functions: the recoupment of compensatory damages.[63] Outside this compensatory realm, the law generally does not permit private lawyers to appoint themselves *substitute* attorneys general, for instance, to enforce civil or criminal sanctions.[64] Indeed, this stakes out an important boundary on the private attorney general spectrum, a boundary policed by the doctrine of "standing" in the federal courts: the Supreme Court's insistence that a private plaintiff demonstrate injury-in-fact limits Congress's ability to appoint private attorneys general whose only interest is the general one of enforcing the law. For example, as I discuss below, environmental citizen-suit plaintiffs must show their own personal interest in a matter prior to filing suit in federal courts. This places them among *supplemental* attorneys general—those who enforce public policy by pursuing their own interests. The *qui tam* relator feels quite close to this—she assists with the public policy of deterring fraud on the government by pursuing her own interest—but I place her on the *substitute* side of the line for two reasons: first, she more literally represents the government than the private plaintiffs with their own compensatory claims across the boundary; second, she is seen as having standing derivative of the government's standing, an assignee of the government's interests, unlike the supplemental attorney general.

In sum, the most common examples of substitute attorneys general come from areas among the least common in government lawyering. With the exception of the firm hired to defend the government official when the attorney general is alleged to have a

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between public and private enforcement in terms of their relative effectiveness, *qui tam* attempts to coordinate the contributions of both systems").

63. Indeed, the Supreme Court has held that the *qui tam* action is essentially a form by which the government partially assigns its claims for damages to private parties. *Vt. Agency*, 529 U.S. at 773 & n.4; *see also id.* at 788 (Ginsburg, J., concurring in the judgment) ("I agree with the Court that the *qui tam* relator is properly regarded as an assignee of a portion of the Government's claim for money damages"). In the *Vermont Agency* case, the Court also acknowledged that the harm to the government in *qui tam* cases can consist as well of "injury to its sovereignty arising from violations of its law," *id.* at 771, but the Court simultaneously stated that this type of public injury "suffices to support a criminal lawsuit by the Government," *id.*, hence distinguishing the private *qui tam* case from the public criminal prosecution.

64. Jill Fisch has discussed using the *qui tam* suit as a model for reforming class actions. *Id.* In one aspect of this discussion, she identifies the possibility of Congress authorizing a relator to not just do the government's (private) job of recouping its losses but to do the government's (public) job of enforcing the law. *Id.* Professor Fisch identifies the standing problems this would present. *Id.* These problems are theoretically vitiated by the current practice of interposing an injured party client as a class representative. *Id.* at 188. I label and categorize these lawyers "supplemental attorneys general" and discuss them in the following section. *See infra* Part III.B.

conflict, the other familiar substitute attorneys general—those pursuing money damages in the Microsoft or tobacco cases and compensatory damages in *qui tam* matters—perform functions more familiarly labeled private.[65] They are also likely to be compensated not by a government salary, but rather with a private market-like fee or bounty. The substitute attorney general is a first step on the spectrum away from the purely public side; she is removed not only because she is a private attorney substituting for a public one, but also because she tends to perform more private-like functions than those that constitute the core of the attorney general's work.

B. The Private Attorney General as Supplemental Law Enforcer

Lawyers who occasionally stand in for the public attorney general are not the only attorneys dubbed private attorneys general. The literature more commonly employs the label to describe private attorneys whose work for private clients contributes to the public interest by supplementing the government's enforcement of laws and public policies.[66] There are several versions of the supplemental private attorney general. The clearest and narrowest form is the private attorney general who earns her post through a specific delegation by Congress or a state legislature. In the environmental field, for example, Congress has included provisions in most of its statutes for citizen suits; these provisions authorize nongovernmental attorneys to enforce environmental standards if the government has not done so.[67] As just discussed above, this places the citizen-suit

65. *See supra* notes 54-58 and accompanying text.

66. *See* Ann K. Wooster, Annotation, *Private Attorney General Doctrine – State Cases*, 106 A.L.R. 5th 523 ("The private attorney general doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions and that, without some mechanism authorizing the award of attorneys fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.") (citing CAL. CIV. PROC. CODE § 1021.5; People ex rel. Dep't of Conservation v. El Dorado County, 108 Cal. App. 4th 672 (3d Dist. 2003)).

67. Professor Thompson reports that "[e]very major environmental law passed since 1970 now includes a citizen suit provision (with the anomalous exception of the Federal Insecticide, Fungicide, and Rodenticide Act)." Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192. *See also* Beverly McQueary Smith, *Recent Developments in Citizens' Suits Under Selected Federal Environmental Statutes*, *in* ENVIORNMENTAL LITIGATION 701, 708-09 (A.L.I.-A.B.A. Course of Study, Feb. 15, 1995), WL C981 ALI-ABA 701 (providing a list of laws that include citizen suit provisions). That citizen suits are precluded if the government has itself pursued enforcement, *see, e.g.*, 33 U.S.C. §1365 (b)(1)(B), make these citizen suit advocates seem more like substitute attorneys general, such as *qui tam* relators, who fill in for government lawyers. Thompson, *supra*, at 196-97 (stating that citizen suit provisions were heavily influenced by *qui tam* actions). And the two categories do bleed into one another. Nonetheless, there are several key distinctions. *Qui tam* cases seek compensatory damages and *qui tam* attorneys are bounty hunters funded by their catch; most

plaintiff at the boundary closest to the substitute attorney general: if Congress authorizes her to do the government's work, she is being created to substitute for the government lawyer. Supreme Court doctrine, however, limits the plaintiff's appearance in court to those instances in which she can show she pursues *her own injury in fact*. This makes her a supplemental attorney general because she comes to enforce law by pursuing her own interests. To be clear though, her interest may be quite modest compared to the breadth of the statutory provision she derivatively enforces. She is but one small step away from the substitute attorney general, a step that is necessitated by standing doctrine, but the size of the step can be measured by the relatively minute scope of her individual interest.

At the other side of the spectrum are private lawyers whose clients have significant individual interests but who incidentally further some public policy through their litigation activities. At the extreme, commentators occasionally argue that *any* individual lawsuit—even one seeking nothing more than compensation for a single private citizen—benefits the public as the compensatory damages realized in such a case help deter wrongdoing by the defendant. The lawyer in such a case might be labeled a private attorney general under a very broad definition of the term, one that in essence turns every private attorney into a private attorney general.[68] Courts have been understandably wary of embracing this broad notion of the private attorney general as it would authorize fee shifting in every private lawsuit, the exception thereby swallowing the traditional American rule that parties bear their own costs. Hence, black letter law holds that "attorney's fees will not be awarded under

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citizen suits in the environmental field seek deterrent prospective relief and are brought by public interest groups subsisting on statutory fee shifting provisions. This occurs because citizen suits do not all allow for compensatory damages. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 67 (1987) (holding that the Clean Water Act did not authorize citizen suits for past damages). Congress has enacted provisions altering the outcome in *Gwaltney* by permitting some citizen suits for civil penalties. *See, e.g.*, The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 707(g), 104 Stat. 2683; Daniel Riesel, *Citizen Suits and the Award of Attorneys' Fees in Environmental Litigation, in* ENVIORNMENTAL LITIGATION 1073, 1114, 1126 (A.L.I.-A.B.A. Course of Study, June 20, 1994), WL C921 ALI-ABA 1073. Nonetheless, *Gwaltney*'s statement that "the citizen suit is meant to *supplement* rather than to supplant governmental action," *Gwaltney*, 484 U.S. at 60 (emphasis added), remains a sensible characterization of these provisions. *See* Thompson, *supra,* at 199-200 (discussing use of citizen suits to fill enforcement gaps).

68. *See* Redish, *supra* note 36, at 90-91 (stating that individual compensatory lawsuits may "be categorized as private attorney general actions, because they may well have the incidental impact – perhaps even intended by the legislative creation of the private right – of exposing and punishing law violations"); Rabkin, *supra* note 4, at 195 ("If the term is defined simply as one who brings a lawsuit that may benefit third parties, then indeed almost any litigant might qualify").

the private attorney general doctrine where the interests of the general public are only incidental to the primary objectives of the parties of protecting their interests."[69] This is the far end of the spectrum because at this end, the private interest is large, not modest, and the supplemental governmental work is incidental, not central. Attorneys' fees doctrine polices this boundary between the private attorney general and the mere private attorney.

Between these two extremes lies the core case: the class action attorney who pursues representative litigation on behalf of a group of private citizens. Unlike the environmental citizen suit plaintiff, this private attorney general is not necessarily explicitly created by the statute that supplies her substantive claims. Instead, her role is often authorized by the class action rules enabling representative litigation and by common law or statutory rules authorizing fee shifting when a private attorney advances the public interest.[70] *Black's Law*

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69. 7 AM. JUR. 2D *Attorneys at Law* § 256 (2004) (citing Cal. Licensed Foresters Ass'n. v. State Bd. of Forestry, 30 Cal. App. 4th 562 (3d Dist. 1995)). It is true, as I discuss below, that fees may be available in purely private situations, but such fees come from the class of private beneficiaries according to a common fund theory, not by fee shifting according to this private attorney general concept. *See infra* Part III.C.

70. This is not to suggest, as Professor Redish argues, that such suits are illegitimate. *See* Redish, *supra* note 36, *passim*. Redish argues that Congress has not authorized the now-common type of attorney-initiated small claims cases that do not yield significant individual relief. Rather, he claims, Congress has been duped "by indirection and subterfuge." *Id*. at 73. Redish is quite feverish on this point: he accuses the courts of acting "furtively" (four times), *id.*, at 78, 116, 132, 138; "surreptitiously" (six times), *id.*, at 114, 114-15, 115 n.47, 116, 136 n.194, 138; and by "disguise" (four times), *id.,* at 81, 83-84, 84-85, 93. Yet court approvals of class action settlements are public documents, widely available in case reports and on web sites, relatively transparent, and far from unknown to Congress.

Forty years ago, when it approved the current version of Rule 23, Congress was exposed to the idea that the rule could generate small claims cases unlikely to be initiated by private plaintiffs nor to result in any significant compensation for class members. The federal class certification rule explicitly requires courts to examine, "the interest of members of the class in individually controlling the prosecution or defense of separate actions." FED. R. CIV. P. 23(b)(3)(A). The clear implication of this inquiry is that there will be cases in which individuals have scant interest in initiating or controlling the action, namely those cases where their individual interest is minute, and that this is a factor that *cuts in favor of class certification.* Lest this implication be lost on Congress, the Advisory Committee Notes emphasize the point, stating:

> The interest of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. *On the other hand, these interests may be theoretical rather than practical;* the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or the amounts at stake for individuals may be so small that separate suits would be impracticable.*

See FED. R. CIV. P. 23 advisory committee's note (discussing 1966 amendment) (emphasis added).

Since 1966, Congress has rewritten the procedural rules for key areas of federal law in clear reaction to—and hence with full knowledge of—the relationships between small claimants and class action attorneys. In the securities field, Congress reacted to the absence of client control of class actions by requiring that the largest intervening investor be presumptively appointed as lead plaintiff. *See* Private Securities Litigation Reform Act of 1995, § 27(a)3(B)(iii), Pub. L. No.

Dictionary defines the phrase "private attorney general" in these terms:

> The "private attorney general" concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorneys fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons.[71]

The literature contains two competing visions of the supplemental private attorney general. The oldest and most common vision contends that private attorneys general are a necessary supplement to government enforcement because government attorneys lack certain attributes.[72] According to this account, private attorneys general might be better at either discerning or pursuing private wrongdoing,[73] or they may simply supplement public enforcement by increasing the intensity of the penalty wrongdoers must pay.[74] Private attorneys may be better at the first two functions

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194-67, 109 Stat. 737 (codified, *inter alia*, at 15 U.S.C. §§ 77z-1 to 78j-1 (2004)). In the antitrust field, Congress reacted to the absence of client control and compensation by creating power in state attorneys general to pursue compensatory *parens patraie* actions on behalf of consumers. *See* Hart-Scott-Rodino Act ("HRSA") tit. III, § 301, Pub. L. No 94-435, 90 Stat. 1383, (codified at 15 U.S.C. §15c (2004)). While Congress's reaction to the problem in each area was distinct, what is common and indisputable is Congress's appreciation that small claims class actions are not generally initiated by individual claimants and do not generally result in compensation for them. Yet in neither instance did Congress attempt to preclude the filing or settling of such cases. Moreover, on numerous occasions in the past decade, members of Congress have introduced legislation and Congress has held hearings reacting to precisely the state of affairs Redish characterizes as "furtive." *See, e.g.*, S. REP. NO. 108-123, at 16 (2003) ("The common theme is the same: the lawyers get the cash, while the plaintiffs get coupons or less."); S. REP. NO. 106-420, at 8 (2000) ("Judges too readily approve settlements that primarily benefit the class counsel, not the class members who they supposedly represent."). Nonetheless, Congress only recently enacted the Class Action Fairness Act advocated in these reports, a law that will severely curtail the use of coupon settlement.

In sum, Congress has authorized causes of action for small consumer, securities, and antitrust violations knowing full well these were small claims, it has authorized representative and other forms of litigation to vindicate these rights, and it has authorized fee shifting for attorneys who successfully bring these cases.

71. BLACK'S LAW DICTIONARY 129 (6th ed. 1990) (subdefinition of "Attorney General") (quoting Dasher v. Hous. Auth. of Atlanta, 64 F.R.D. 722, 729 (N.D. Ga. 1974)).

72. *See* Deposit Guar. Nat'l. Bank of Jackson v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in . . . a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government."); FLEMING JAMES JR. ET AL., CIVIL PROCEDURE 643-44 (5th ed. 2001) ("The rise of the class action starting in the 1960s reflected the . . . view that government agencies cannot adequately enforce certain rights . . .")

73. *See, e.g.*, Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.").

74. Professor Yeazell uses this language in his recitation of the conventional argument for the class suit:

for a variety of reasons—because public attorneys may be fewer in number, underfunded, less skilled, or prone to political pressures.[75] This original version of the supplemental attorney general embodies a weak public/strong private vision.

Some accounts of current class action practice supply a competing vision of the supplemental attorney general. According to these commentators, many, if not most, securities and antitrust class actions are "piggyback" cases brought only on the heels of a government enforcement action.[76] As Professor Coffee has demonstrated, plaintiffs' attorneys are risk averse entrepreneurs, attempting to maintain diversified portfolios of case investments.[77] For such businesspeople,[78] cases that government attorneys have already deemed relatively meritorious are attractive investments. It is likely the government has undertaken significant investigation before pursuing its action. The private attorney can free-ride on these efforts, reaping the benefits of the government's factual investigation

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> [Kalven and Rosenfield] envisioned representative litigation as a *supplement* to governmental regulation of large, diffuse markets like those in securities. They argued that recent regulation of such markets reflected a consensus that the old, ordinary forms of liability were not functioning to discipline their operations. . . . In their view the representative suit would serve to *supplement* regulatory agencies both by requiring wrong-doers to give up their ill-gotten gains and by ferreting out instances of wrong that might have escaped the regulators' observance.

STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987) (emphasis added).

75. On the differing incentives of public and private lawyers, see Coffee, *supra* note 36, at 225-28 & n.28; Warren F. Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075, 1093 (1980) (arguing that public enforcement may not be optimal because the legislature will shape the prosecutor's case selection and because the prosecutor's behavior will be "influenced by the available opportunities for advancement within the bureaucracy and the impact of his behavior on his career if he leaves the government"); Thompson, *supra* note 67, at 189-92 (discussing limitations on public enforcement in the environmental field).

76. Professor Coffee first began sketching this account more than twenty years ago. John C. Coffee, Jr., *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 435-36 (1981); Coffee, *supra* note 36, at 220-23; *see also* Garth et al., *supra* note 7, at 376 (stating empirical conclusion that "private attorneys tended to 'piggyback' their cases on governmental investigations, even to the extent of copying the government's complaint").

77. *See, e.g.*, Coffee, *supra* note 36, at 230-36, 280-84 ("[T]he lawyer as a bounty hunter has reason to be more risk adverse than the client he represents . . . ."); 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, 704-712 (1986) ("[P]ortfolio diversification is a strategy that permits a plaintiff's attorney . . . to reduce the variance associated with an expected return.").

78. John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5, 12 (Summer 1985) ("[T]he plaintiff's attorney [is] a rational decisionmaker who acts according to the same utility-maximizing criteria as do other businessmen.").

and reducing her own investment in expensive fact discovery.[79] Better still, nonmutual offensive issue preclusion provides a cheap and simple way to take advantage of any issues litigated and determined against the defendant.[80] Such coattail class actions present a vision of the supplemental attorney general that is a strong public/weak private vision. The only *supplemental* function performed by this private attorney general is that of multiplying wrongdoers' penalties: she provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.[81]

The strong public/weak private vision has received significant attention in the law review literature in recent years, but empirical evidence demonstrating that this is the prevalent model is decidedly mixed.[82] On the one hand, class action filings in the securities field, for example, barely exceed the number of SEC enforcement actions, suggesting that private lawyers are not, in fact, supplementing public enforcement by independently ferreting out and pursuing cases.[83] On the other hand, the SEC itself has "repeatedly acknowledged . . . that private litigation enables a level of compliance that would be impossible to achieve if enforcement were limited to the government."[84] Moreover, public attorneys general and large savvy plaintiffs hire private class action attorneys to represent them in important cases. Public attorneys general do so, as noted, in high

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79. *See* Coffee, *supra* note 77, at 682 (stating that entrepreneurial plaintiff's attorneys "gravitate to those areas where search costs [for cases] are lowest"); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 641 (1986-1987) (same) [hereinafter Coffee, *Rethinking the Class Action*].

80. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (authorizing the use of nonmutual offensive issue preclusion in certain circumstances).

81. Coffee, *supra* note 36, at 223 (concluding that "the private attorney general does not seem to broaden the scope of law enforcement, but rather only intensifies the penalty"). As Professor Coffee points out, however, this piling on is far from insignificant—by contrast to the limited penalties that public enforcers can exact, private damage remedies are often quite high and hence an important adjunct to public proscription. *Id.* at 224 n.19.

82. *See, e.g.*, Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413 (1997) (providing a careful assessment of enforcement in the antitrust field).

83. The Stanford Law School Securities Class Actions Clearinghouse lists roughly 500 (493) federal securities fraud class actions filed in 2001. *See* Stanford Law School, Securities Class Action Clearinghouse, *at* http://securities.stanford.edu/ (last updated Jan. 26, 2005). Two scholars report that the Securities and Exchange Commission pursued almost precisely the same number (484) of actions that calendar year. James D. Cox and Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 749 (2003).

84. Fisch, *supra* note 36, at 199 (citing *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).

profile matters like the tobacco and Microsoft cases; large investors do so when such investors are made lead plaintiffs under federal securities rules and given the authority to choose class counsel for the investor class.[85] These public choices of private counsel imply that private attorneys general continue to provide litigation or negotiation skills that supplement those of the public sector's attorneys general. It may also be the case that private enforcement, even if weakened, is important in that "the sheer diversity of enforcers should generate more innovations than a monopolistic government enforcer would produce."[86]

But the real limitation of the strong public/weak private critique of the supplemental attorney general is that it focuses almost exclusively in the areas of securities and antitrust (small claims) class actions. In other fields, supplemental attorneys general continue to play significant detection and pursuit functions. This is true of the *qui tam* relator, for instance, who is authorized, in the first place, precisely because it is believed that private parties (whistle blowers) will be in a better situation to uncover fraud.[87] But it is also true in the broad field of environmental enforcement, where citizen groups play an important monitoring function[88] and where citizen suits, filed often, are an important part of regulatory pursuit.[89] And

85. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 409 (2001) (noting that "even after enactment of the PSLRA, the same exact plaintiffs' law firms that so spurred Congress to act still appear to be representing securities classes") (citing Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience*, 1015 PLI/CORP. 955, 959, 976 (1997); Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 549 (1997)).

86. Thompson, *supra* note 67, at 206; *see also* Kalven & Rosenfield, *supra* note 49, at 721 (concluding that the best situation is to enable both administrative and class enforcement, "permitting both to develop side by side to check and complement each other").

87. *See* Forney, *supra* note 58, at 1364 (stating that "[t]he idea behind [the False Claims Act] was that individuals within the entity defrauding the government would have superior knowledge of fraud over that of the Department of Justice") (citing U.S. *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 745 n.2 (9th Cir. 1993)); *see also* Fisch, *supra* note 36, at 196 ("Indeed, the incentive structure of *qui tam* is tailored to place a premium on the contribution of original information, 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.").

88. Professor Thompson discusses the ways in which citizens play monitoring and informant functions *outside* of doing so in citizen suits. Nonetheless, his article highlights how much work citizen suits continue to do in the environmental context, as opposed to in the securities or antitrust fields. Thompson, *supra* note 67, at 192-216.

89. In a dozen years (1981-1993), more than 2000 60-day notices, initiating citizen suits, were filed under the Clean Water Act alone. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared By the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1573 (1995). The government takes over these private environmental actions only on rare occasions. *See* Thompson, *supra* note 67, at 200 n.74 (citing study showing that "out of 349 60-day notices, 11

commentators have argued that private attorneys general continue to play a key role in unearthing and pursuing mass torts.[90]

The supplemental attorney general is situated in the middle of the litigation spectrum. She is more distant from the public side than the substitute attorney general, though not as close to the private side, as we shall see, as the simulated attorney general. She mixes public and private features in complex ways that, I will argue, both exceed those noted by other commentators *and* have important policy ramifications. Because she is clearly not paid for her services by a government salary, it is tempting to see her compensation as private in nature; yet she is generally not paid from her client's purse, either, but rather by her adversary, according to fee-shifting rules that provide her very title. Because she is clearly not representing the government, it is tempting to see her client as her private class members alone; yet her very position is justified on the grounds that she pursues more than just her clients' private interests, but the *public* interest as well. As she is clearly not a government enforcement official, it is tempting to see her goal as compensation for her clients; but again, in many of her cases each of her clients has so little at stake that her pursuit of their scant interests is justified by the deterrent impact of the class members' cumulative interest.[91]

There are important policy ramifications of the supplemental private attorney general's strikingly dual nature to which I will

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were dropped because of government enforcement and 22 more resulted in government enforcement with private regulation"). That said, "citizen suits are still swamped in magnitude by state and federal enforcement actions," *id.* at 204, with the "vast majority" being Clean Water Act cases. *Id.* Professor Thompson concludes that "citizen suits, in short, provide only a marginal and circumscribed corrective value. But the value is not insignificant and may be quite large in particular regions of the country where nonprofits have filed or threatened to file sizable numbers of citizen suits." *Id.* Other commentators are less positive, seeing even environmental suits as largely piggyback cases: "the kinds of violations most easily 'caught' by private advocacy groups are statutory 'violations' which the EPA has already learned about – and the advocacy groups then learn of them from EPA's own records." Rabkin, *supra* note 4, at 191.

90. *See, e.g.,* Michael L. Rustad, *Smoke Signals From Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 518 (2001) (reporting that "[p]rivate attorneys general, not government regulators, discovered that Firestone Tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation. . . . The NHTSA [National Highway Traffic Safety Administration] based its recall of 6.5 million tires on information provided by plaintiff's counsel, rather than [by] in-house government investigators").

91. *See* Kalven & Rosenfield, *supra* note 49, at 717 (concluding that "the class suit as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice"); Coffee, *supra* note 77, at 1355 (stating that in most small claims contexts, "commentators largely have agreed that deterrence, not compensation, should be the rationale of the class action, and they have doubted the compensation is likely to be achieved") (citing Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1722, 1739-41 (1994)).

return, below. First, though, it helps to situate these by filling out the last part of the private attorney general spectrum.

C. The Private Attorney General as Simulated Attorney General for Private Interests

Some private attorneys are awarded attorneys' fees on the theory that their actions benefit a particular and specific class of persons, not the public generally. This often occurs when an attorney, in representing a single plaintiff, secures a fund that will benefit an entire group of individuals, even if the case was not actually prosecuted on behalf of the whole group or as a representative action.[92] The private attorney is awarded fees out of the fund in these situations on an unjust enrichment theory: if the other beneficiaries are not made to contribute to the fees, they would be unfairly free-riding.[93] Under this broad rationale, fee spreading is justified even if the initial lawsuit does not recover an actual fund so long as there is *some means* for spreading the costs among the group. Thus, the Court applied the theory in a labor case, spreading the costs of an action against a union among all of the benefited union members by taxing fees against the defendant union,[94] and in a derivative case, spreading the costs of the action among all of the benefiting shareholders by taxing fees against the defendant corporation.[95] In this sense of the term, the private attorney general is truly a *private* attorney general—that is, an attorney general for a private group of plaintiffs, not for the public interest generally.

I refer to this private attorney general as a *simulated* attorney general since she is performing a function—recouping a fund for private parties—not typically associated with a public attorney

92. *See, e.g.*, Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 124 (1884); Trustees v. Greenough, 105 U.S. 527, 532 (1881). Occasionally, courts have gone so far as to say the establishment of a legal precedent that directly benefits similarly-situated litigants can justify spreading the costs of an action among the *stare decisis* beneficiaries, at least when their gain is coming from a common source. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1938). *See generally* 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2675, at 322-323 (Supp. 2004) (discussing the "common fund doctrine").

93. *See, e.g.*, Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392 (1970); *id.* at 396-97; Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967); *Trustees*, 105 U.S. at 532 (1881).

94. Hall v. Cole, 412 U.S. 1, 6 (1973).

95. *Mills*, 396 U.S. at 394. Justice Black dissented on the fee issue in *Mills*, arguing that "if there is a need for recovery of attorneys' fees to effectuate the policies of the [Securities] Act here involved, that need should in my judgment be met by Congress, not by this Court." *Id*. at 397 (Black, J., dissenting). In *Alyeska Pipeline*, a majority of the Justices adopted Justice Black's position. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975).

general. She is not substituting for the attorney general, nor is she generally rewarded because her actions contribute to a public good. To be sure, the simulated attorney general bleeds into the supplemental attorney general. This is evident in, for example, securities cases like *Mills v. Electric Auto-Lite*.[96] There the plaintiff in a mixed derivative and securities class action secured an injunction prohibiting the defendant corporation from voting proxies that had been obtained by a misleading solicitation. While the Supreme Court emphasized that the group should pay since the group members derived a benefit,[97] commentators classify the case among those awarding fees to supplemental attorneys general because a "legislatively expressed policy was found to be furthered by the lawsuit."[98] In the purer common fund cases, however, the simulated attorney general is conceptualized as performing a function for a group of ascertainable private parties alone, acting as a sort of attorney general for these private parties.[99] There is little confusion about her goals (they are purely private in nature), her clients (usually one private individual member of the private group), or the private nature of her fee. The question is not whether she will be compensated by the public *fisc*, the opponent, or a private party: the question her fee poses is only whether it will be paid by one private party alone or by the many private parties that benefited from her actions.

The simulated private attorney general is the first step on the spectrum away from the private attorney, but this step is a smaller one than the substitute private attorney general presents from the public side. Unlike the latter, who mixes public and private features, the simulated attorney general is a purer character, more private than "bi."

D. Mapping The Mixes

Together, these three characters—the substitute attorney general, supplemental attorney general, and simulated attorney general—provide the midpoints on the public/private spectrum of

96. *Mills*, 396 U.S. at 377-96.

97. *Id.* at 396-97.

98. *See* 10 WRIGHT ET AL., *supra* note 92, at 329-30 & n.29 (collecting cases).

99. In fact, to return to the derivation of the phrase *attorney general*—a lawyer with general powers of attorney, see *supra* notes 20-22 and accompanying text—the *common fund lawyer* is actually closer to an *attorney particular*, a lawyer with the power of attorney for one specific matter.

lawyering. We can now return to our visual mapping and fill in these points:

	1	PRIVATE ATTORNEYS GENERAL 2	3	4	5
	PRIVATE	SIMULATED	SUPPLEMENTAL	SUBSTITUTE	PUBLIC
CLIENT	individual	individual	individuals & public	the public	the public
FEE	hourly or contingent	hourly or contingent	hourly/lodestar or contingent	hourly/lodestar or contingent	government salary
GOAL	compensation (deterrence)	compensation	compensation & deterrence	compensation & deterrence	deterrence (compensation)
EXAMPLE	tort or contract	Greenough Pettus Sprague	small claims (securities, antitrust) & mass tort environment	tobacco Microsoft *qui tam*	civil enforcement

E. Mapping The Margins

While I place three distinct types of private attorneys general between the public and private attorneys, the middle type—the supplemental attorney general, the conventional class action attorney—is sealed into her position by doctrinal boundaries from each side.[100]

On the public side, the distinction between the substitute attorney general and the supplemental attorney general is defined by the notion of standing. The *substitute* attorney general, though a private attorney, directly represents the government's interest. The *supplemental* attorney general pursues public policies, but she does so incidentally to her pursuit of her clients' private interests. Where Congress has attempted to authorize private citizens to directly enforce public policies, the Supreme Court has resisted by insisting that a private citizen can only do so if she herself has an injury-in-fact

100. *See generally* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (demonstrating that the Supreme Court has recently tightened both of these boundaries—standing and attorneys' fees—hence making private attorney general litigation more difficult to maintain).

sufficient to satisfy standing requirements.[101] Such holdings have limited the environmental citizen-suit plaintiff to articulate injury as a precondition for enforcing Congress's laws.[102] The sole exception to this is the *qui tam* relator, whom the Court has permitted to represent the government directly. The Court has done so through the hedge of the fact that the relator secures a bounty and thereby has an arguably independent interest in the lawsuit.[103] I place the *qui tam* relator on the substitute side of the line, though, because the real party in interest is truly the government, and her bounty is a percentage of the government's recovery. Scholars have suggested that Congress could similarly end-run the standing requirements in environmental citizen-suits by authorizing bounties for prevailing plaintiffs—hence giving them an independent interest in the suit[104]—but to date Congress has not done so. Standing remains the distinction between those who represent the government directly and those who do so (supposedly) only incidentally to the pursuit of their own interests. Standing appears to leave no place for the altruist. In Part IV, below, I return to this distinction.

On the private side, the distinction between the simulated attorney general and the supplemental attorney general is defined by the doctrine of attorney's fees. The *simulated* attorney general represents only private interests and recovers fees, if at all, only from those whom she assists. The *supplemental* attorney general represents public and private interests; her pursuit of the former authorizes courts to require that the losing party pay her fees in recognition of the contribution her efforts have made to furthering public policy. Because every case could conceivably be said to further public ends, courts have struggled in setting the limits for fee-shifting in private attorney general matters. They have largely done so by insisting that the public gain be more than minimal and more than incidental. The spectrum captures the distinction better than a bright

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101. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that the "irreducible constitutional minimum of standing" requires that the plaintiff suffer an "injury in fact").

102. *See* Ann E. Carlson, *Standing for the Environment*, 45 U.C.L.A. L. REV. 931, 941-42 (1998); Sunstein, *supra* note 23, *passim*.

103. *See, e.g.*, Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 772-74 (1999) (discussing how a *qui tam* relator's bounty acts to confer standing upon him despite the fact that the actual injury was suffered by the United States).

104. *See, e.g.*, Sunstein, *supra* note 23, at 232 (positing that "bounty should create an interest and hence standing"). *See also* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (arguing for same concept in the civil rights field).

line, but, if line it be, it is the one between boxes 2 and 3 on my typology.

F. A Note on The Ideological/Entrepreneurial Distinction

Earlier I noted that to the extent other scholars have attempted to organize the private attorney general concept, they have relied on the single organizing principle of distinguishing the ideologically-driven private attorney general (the NAACP lawyer) from the money-driven private attorney general (the entrepreneur).[105] My spectral typology does not rely upon this incentive-based distinction but rather maps the private attorneys general according to the relative amounts of public- and privateness they contain. The ideological/money distinction cuts across all of my categories. Thus, there are both ideologues and entrepreneurs in all three of my categories:

- Two examples of ideological *substitute attorneys general* are whistleblowers driven by principle as much as by the *qui tam* bounty, and private attorneys like David Boies pursuing Microsoft out of conviction as much as for monetary gain (one guesses he did not need whatever the Justice Department paid him). The *qui tam* lawyer pursuing a government case for a bounty is an entrepreneurial substitute attorney general.

- The NAACP attorney pursuing individual client interests but thereby furthering public values is the familiar ideological *supplemental attorney general*. But the big entrepreneurial class action firms so familiar on the current adjudicative landscape are also supplemental attorneys general; they pursue private securities, antitrust, or consumer cases for their own financial rewards, but thereby supplement enforcement of these public norms.

- Lawyers who pursue democratic union rules, and whose fees are then shared among all the union members who benefited thereby,[106] present an example

105. *See supra* notes 36-37 and accompanying text.

106. Hall v. Cole, 412 U.S. 1, 8-9 (1973).

> of an ideological *simulated attorney general*. The private attorney who secures a bond ruling, then takes a fee from the resulting fund, is an example of an entrepreneurial simulated private attorney.

As I stated above,[107] I am not arguing that the ideological/entrepreneurial distinction is without value. What I am arguing is that there are lessons to be learned from a new presentation of the field.

IV. ONE APPLICATION OF THE TYPOLOGY

While arraying the various private attorneys general along the spectrum of distinct public-private mixes they present is itself a contribution to the literature, the effort provides even more value if it can illuminate troubling aspects of the field. In this section I argue that it does just that. I do so by focusing on one case study—the California consumer antitrust class action against Microsoft. I use the Microsoft case because it is widely-publicized, and more importantly, because it is a stellar example of a current class action hotspot: the coupon or voucher settlement.[108] As such, the Microsoft case enables a discussion of a central critique of nonpecuniary settlements: that in agreeing to such settlements, private attorneys general sell out their clients' interests for their own personal gain.

A. The Microsoft Case

On the heels of the Justice Department's pursuit of Microsoft for antitrust violations, class action attorneys filed cases on behalf of private consumers of Microsoft products in state courts throughout the country.[109] In California, plaintiffs' attorneys and Microsoft reached a

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107. *See supra* text accompanying notes 36-37.

108. *See generally* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) (discussing coupon-based settlements and noting the disadvantages of such settlements to class members); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97 (1997) (discussing coupon settlements as an example of nonpecuniary class action settlements); Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996) (discussing in-kind payments in general). While the voucher settlement seems of recent vintage, in fact Professor Coffee noted the development—and the ways it skews class action dynamics—more than two decades ago. Coffee, *supra* note 36, at 243-246; Coffee, *supra* note 77, at 716 & n.129.

109. The original California action was filed before Judge Jackson's ruling in the Justice Department's prosecution. Following that ruling, however, dozens of individual lawsuits were filed throughout California, "piggybacking" on the government's litigation success. These private consumer class actions define their classes so as to exclude, explicitly, government entities, even

$1.1 billion voucher settlement on the eve of a February 2003 trial date. About fourteen million consumers and businesses that acquired certain Microsoft products between 1995 and 2001 for use in California can claim vouchers by filling out a claim form. Following approval of the settlement, vouchers will be mailed to class members who have claimed them. They can then redeem their vouchers if, during the next four years, they purchase any computer hardware or software and mail proof of their purchase with the voucher to the Claims Administrator. The vouchers themselves are for small amounts of money, ranging from $5 vouchers for Microsoft Word purchasers, through $16 vouchers for Windows or DOS operating system purchasers and $26 vouchers for Excel purchasers, to $29 vouchers for Office suite purchasers.

The settling attorneys for each side were well aware that nowhere near $1.1 billion is likely to be claimed $20 at a time (that would amount to fifty-five million $20 vouchers claimed, secured, used, and redeemed). In such small-claims matters, the left-over fund can later be distributed *pro rata* among those class members who have filed claims,[110] can revert to the defendants,[111] or can be deployed towards some other end according to a *cy pres* approach.[112] The

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where those entities are computer consumers. Public entities are left to their own litigation efforts to recover for antitrust-related overcharges on their computer purchases. Michael Bazeley, *California Counties Accuse Microsoft of Inflating Prices for Products*, SAN JOSE MERCURY NEWS, Aug. 28, 2004, *available at* 2004 WL 59250916.

110. *See, e.g.*, Gail Hillebrand & Daniel Torrance, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits,* 28 SANTA CLARA L. REV. 747, 765 (1988).

111. *See, e.g.*, Hailyn Chen, Comment, *Attorneys Fees in Reversionary Fund Settlements in Small Claims Consumer Class Actions,* 50 UCLA L. REV. 879, 880 n.1 (2003).

112. *See, e.g.*, 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.20, at 11-26 to 11-29 (3d ed. 1992) (discussing the *cy pres* doctrine); Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A* Cy Pres *Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 731-32 (1987) (commenting on the use of the *cy pres* doctrine to distribute unused portions of class action settlement funds); *see also infra* text accompanying note 129 (documenting the origins of the *cy pres* doctrine). *Cy pres*-like redistribution occurs in the environmental field as well:

> [A] widespread practice arose in the 1980s of [citizen suit lawyers] negotiating settlements in which firms agreed to devote funds to environmental improvements, while the plaintiff agreed not to pursue the suit toward final judgment (and the ensuring payment of a full fine to the Treasury). The firms then made the payments not directly to the particular litigating organization but to some environmental project in the area – often one conducted by a sympathetic local or allied advocacy group. The firm has no incentive to be fussy about recipients (so long as the total cost is less than the potential fine), nor does the plaintiff have much incentive to focus the relief on the precise injury (supposing there was one) that provoked the lawsuit.

Rabkin, *supra* note 4, at 191. Scholars have debated the value of these types of redistributions. Some argue that they are preferable to civil fines that simply go unearmarked into the federal treasury. *See, e.g.*, Thompson, *supra* note 67, at 207-09 (discussing, *inter alia*, David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 WIS. L. REV. 1181, 1183). Others emphasize that redistributions

California Microsoft settlement adopted this last option: if the total amount of vouchers claimed and redeemed by class members is less than $1.1 billion, vouchers amounting to two-thirds of the money remaining in the fund will be distributed to underprivileged public schools throughout California.[113]

Plaintiffs' lead counsel has requested $97 million in fees and costs for itself and another $197 million for thirty-four other firms that worked on the case. This is about 27 percent of $1.1 billion, but as it is highly likely that less than the full fund will actually be distributed, the attorneys' recovery will be an even greater percentage of the fund.[114] Notice of this settlement was distributed to the class, and about 170 objections were lodged. Despite these protests, the California Superior Court approved the settlement in July 2004.

A significant number of the objectors to the class settlement labeled the *cy pres* aspect of the settlement to be theft. From their perspective, the damages Microsoft is willing to pay are the property of the consumers who purchased Microsoft products—namely, the class members. By the *cy pres* settlement, class counsel has agreed to a deal that takes these private parties' property and redistributes it to public school children throughout California.

B. The Private Critique

While the supplemental private attorney general has her origins in the image of civil rights lawyers like Thurgood Marshall,[115] in the past twenty years, scholars loosely associated with the law and economics movement—most centrally, Professor John Coffee—have

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might skew sensible environmental enforcement patterns. Rabkin, *supra* note 4, at 191 (discussing, *inter alia*, Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1991)). Regardless of the value of these redistributions, my point is simply to note the utilization of a *cy pres* like approach in a distinct regulatory field.

113. Eligible schools are defined as those that have at least 40 percent of their students from low-income households. *See* Settlement Agreement, at 5, *In re* Microsoft Cases, J.C.C.P No.. 4106 (Cal. Super. Ct. June 16, 2003), *available at* http://www.microsoftcalsettlement.com/PDF/SettlementAgreement.pdf.

114. To be clear, however, the attorneys' fee petition is based on a lodestar calculation, not a percentage of the fund method *and* it will not come out of the $1.1 billion fund but will be paid in addition to the voucher distributions.

115. *See* Stephen C. Yeazell, *The Civil Rights Movement and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004). At the time of the 1966 Amendments to Rule 23, class action attorneys were largely, though not entirely, understood as a welcome but small band of ideological crusaders. Those who profited by this endeavor were largely seen as the exception to the NAACP conceptualization.

sketched a competing portrayal of class counsel.[116] Professor Coffee's class action attorney is first and foremost a private entrepreneur, spurred by a profit-based motive to pursue litigation that may or may not be in the public interest. To understand the class action attorney, Professor Coffee argued that scholars need to focus on his private, rent-seeking incentives rather than his presumed public spirit.

Once he had re-focused the field, Professor Coffee demonstrated that the problem presented by entrepreneurial lawyering can be understood in terms of agency costs.[117] In traditional litigation, the attorney is an agent for her client. Translated to the class case, private law scholars view the attorney as the agent of the class members she purports to represent.[118] But in most class actions, class members have so little at stake, and/or lack such information and expertise, that they do not have the incentive or capacity to monitor their agents.[119] Hence, class actions are characterized by a

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116. Professor Coffee has produced his description in a series of articles spanning several decades. *See generally* Coffee, *supra* note 36, *passim*; Coffee, *supra* note 78, *passim*; Coffee, *Rethinking the Class Action*, *supra* note 79, *passim*; Coffee, *supra* note 77, *passim*; John C. Coffee, Jr., *The Regulation of Entreprenurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, *passim* (1987) [hereinafter Coffee, *Regulation of Entreprenurial Litigation*]; John C. Coffee, Jr., *Conflicts, Consent, and Allocation after* Amchem Products – *or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, *passim* (1998); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, *passim* (2000) [hereinafter Coffee, *Class Action Accountability*]. Professor Rosenberg contemporaneously drew a similar portrayal of the class action lawyer in the mass tort field. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice By Collective Means*, 62 IND. L.J. 561, 571-72 (1987) [hereinafter Rosenberg, *Class Actions for Mass Torts*]; David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 889-92, 900-04 (1984) [hereinafter Rosenberg, *The Causal Connection*]. While both Professors Coffee and Rosenberg were influenced by theoretical law and economics scholarship focusing on attorney incentives (for a good overview and introduction to this literature, see ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE (2003)), the sketches they developed in their scholarship were based more on what lawyers did in practice than on theoretical models of what would be rational for them to do in the abstract.

117. *See* Coffee, *supra* note 78, at 76 (stating that the "proper focus should be on the interests of the client and the classic problems that arise when the client, as principal, cannot closely control the attorney, his agent"). *See generally* Kenneth E. Scott, *Agency Costs and Corporate Governance*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 26 (Peter Newman ed., 1998) ("Agency cost theory deals with the inevitable divergence of self interest between principal and agent, owner and manager, or employer and employee, the welfare losses thereby created, and the devices and institutions that have evolved to reduce those losses.").

118. Coffee, *Class Action Accountability*, *supra* note 116, at 379-80 (stating that "underlying the class action is a principal/agent relationship between the attorney and the individual class members").

119. *See* Coffee, *Rethinking the Class Action*, *supra* note 79, at 628 ("High agency costs characterize class action litigation, and permit opportunistic behavior by attorneys; as a result, it is more accurate as a descriptive matter to view the attorney as an independent entrepreneur

rent-seeking entrepreneur pursuing her own interests with little oversight by her principals.[120] Professor Coffee specifically, and law and economics scholars more generally, proposed rules that sought to reduce agency costs by "better align[ing] the interests of the plaintiff's attorney" with those of the class members she represented.[121]

So convincing was this solution that it became a virtual mantra of the class action literature in the 1990s. Scholars from various political viewpoints, who employ many methodologies beyond law and economics and who otherwise agree about very little, could all agree that the central problem in class action jurisprudence was the agency dilemma. Where the scholars differed, however, were in their proposed solutions. Some thought market-type mechanisms could produce alignment.[122] Others, like those that proposed the PSLRA,

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than as an agent of the client."); Coffee, *Regulation of Entreprenurial Litigation*, *supra* note 116, at 882-96 (same).

120. *See* Coffee, *Class Action Accountability*, *supra* note 116, at 376 ("[T]he class action is essentially an organizational form that at bottom involves a principal/agent relationship. From this starting point, it follows that the class members, as the principals, should be deemed to have consented to the representation only if the agency costs associated with the relationship have been minimized.").

121. Coffee, *supra* note 78, at 12; *see also id.* at 33 (stating that "[a]n obvious policy prescription would be to compensate the plaintiff's attorney in a manner that better aligns his interests with those of his involuntary clients, the shareholders"); Coffee, *supra* note 77, at 726 ("[T]he basic goal of reform should be to reduce the agency costs incident to this attorney-client relationship. While various means to this end are possible . . . all should be understood as responses to this agency cost problem and debated in that light."); Coffee, *Class Action Accountability*, *supra* note 116, at 371 ("[M]eaningful reform requires that we consider market-based remedies and checking mechanisms that have worked in related contexts to align the interests of the principal and the agent.").

Some commentators argue not for alignment of interests, but for doing away with the principals altogether by auctioning off their causes of action to the highest bidding plaintiffs' attorney. Professor Coffee first proposed this auction concept. *See* Coffee, *supra* note 36, at 277 n.142 ("An economist might suggest that the case should be auctioned off among the plaintiffs' attorneys by having them bid in terms of the lowest attorneys' fee that they would accept."); Coffee, *supra* note 78, at 77-79 (discussing possibilities not just of auctioning plaintiffs' causes of actions, but also of auctioning rights of representation in specific cases or in a specific type of case through franchise arrangement); Coffee, *supra* note 77, at 691-93 (same). Professors Macey and Miller then provided a sustained investigation of it. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: An Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). *See also* Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165 (1990) (arguing that class counsel should represent the class without the useless class representative intermediary); Fisch, *supra* note 36, at 182-83 (discussing the possibility of removing the client altogether).

122. Professor Coffee, for example, proposed loosening ethical rules so plaintiffs' attorneys could share fees across cases. *See* Coffee, *supra* note 78, at 65-69. Coffee argued that by "permitting fee sharing (within limits), one actually makes the lawyer a better servant of the client by reducing his dependence on a single case, thereby decreasing his level of likely risk aversion and dampening the incentives for early settlement." *Id.* at 67. Elsewhere, he proposed a set of rule-based incentives that would induce "attorneys to mimic the results that a healthy,

imagined that stronger principals were the best mechanism by which to ensure that agents served their clients' interests.[123] Others wanted class action courts to play a more active role in ensuring this alignment, perhaps through the appointment of a guardian *ad litem*.[124] Still others saw opt-outs as the key to aligning the agents' interests with those of the class.[125] Although commentators could not agree on a cure, they were in accord regarding the diagnosis—the virus infecting the class action system was the principal-agent problem and the solution was to align the interests of the class with those of its agent.[126]

The Microsoft *cy pres* settlement in some ways exemplifies the precise problem identified by the agency-costs scholarship:[127] here unmonitored class attorneys have taken their clients' compensatory

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functioning market for legal services would produce." Coffee, *Regulation of Entreprenurial Litigation*, *supra* note 116, at 878. And in mass tort cases, he argued for enabling competing class actions and permitting clients to opt into the one that best suited them, thus creating a market of opportunities for class members. *See* Coffee, *Class Action Accountability*, *supra* note 116, at 422-28; 436-7 (stating that "[t]he deeper premise here is that the best remedy for collusion is competition").

123. As with the auction concept, *supra* note 121, Professor Coffee was the first to propose this large-client monitor approach. *See* Coffee, *Rethinking the Class Action*, *supra* note 79, at 643-44 ("[I]f agency costs are to be reduced, the most effective monitor is likely to be the plaintiff who has the largest stake in the action."); Coffee, *Regulation of Entreprenurial Litigation*, *supra* note 116, at 894-96 & n.35 (same). Professors Weiss and Beckerman then provided a sustained investigation of it. Elliott J. Weiss and 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).

124. *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1092 (1995) ("'[O]rdinarily' a guardian would be required.").

125. *See, e.g.*, Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1206 (1998) ("Even if the defendant wants to maintain the agreement and deal with the opt outs separately, a high number of opt outs may be grounds for the court to conclude that the settlement is insufficient or to doubt representative adequacy.").

126. Professor Rosenberg was something of an exception in that he focused his attention on defending the mass processes of class action cases because of their deterrent effects, rather than on seeking a way to maximize compensation by better aligning the interests of the plaintiffs and their counsel. Rosenberg, *Class Actions for Mass Torts and* Rosenberg, *The Causal Connection*, supra note 116, *passim*.

127. The Microsoft cases represent the fear that class attorneys will sell out their clients' claims. The other prong of the agency cost attack on class action is the strike suit—the fear that attorneys will overlitigate, not undersell. Rubenstein, *supra* note 85, at 397 n.120; *see also* Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000). Given the government's successful pursuit of Microsoft, these private coattail antitrust actions cannot be characterized as strike suits. They are also not perfect sell out cases in that the lawyers arguably sold out the clients here not just for their own fees, but for the benefit of a lot of school children as well.

damages and given them to schools throughout California.[128] While at first blush, the *cy pres* shocks proponents of a private model, at second blush, *cy pres* invokes a doctrine from the world of private (usually charitable) trusts and estates: when a testator's specific instructions can no longer be pursued, a court may redirect the trust's benefits to something "as close as possible" (*cy pres*) to the testators' original desires.[129] As applied to the Microsoft settlement, the *cy pres* concept implies that redistributing their monies to the public schools comes "as close as possible" to fulfilling the nonclaiming class members' desires.[130] But, the private model inquires, how do the agents know this of their principals?[131] The very fact that California provides

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128. It should be noted that it could be worse: some settlements in small claims cases have accorded 100 percent of the settlement to the *cy pres* distribution, leaving class members not even an opportunity to claim their small compensation. Such a procedure occurs most frequently in *parens patriae* actions brought by state governments. *See* Susan B. Farmer, *More Lessons from the Laboratories:* Cy pres *Distributions in* Parens Patriae *Antitrust Actions Brought By State Attorneys General*, 68 FORDHAM L. REV. 361, 399-403 (1999) ("Distributions … do not go directly to the injured citizens represented by the state as *parens partiae*, but to a public purpose designed to benefit those consumers indirectly."). By contrast, the Microsoft case enables any class member who so desires to come forward and claim her vouchers, redirecting a fraction of only that portion of the settlement left unclaimed. Nonetheless, there is little doubt that the settlement will redirect to the schools the vast bulk of the compensatory damages due to the plaintiff class members.

129. According to one commentator:

> The term "cy pres" appears to derive from the Norman-French term "*cy pres comme possible,"* meaning "as near as possible." *Cy pres* is a rule of construction which courts employ to carry out the spirit of a trust's terms when literal application of such terms is not feasible. Rather than have a trust fail and the trust's assets revert back to the testator's successors in interest, courts apply the trust's funds "*cy pres*" or "as near as possible," so that benefits from the trust may continue and the testator's intent may be approximately honored.

Matthew Perkins, Note, *The* Cy pres *Doctrine in the 1980s: The Case For Charitable Favoritism*, 10 PROB. L. J. 163, 165 (1990). *See generally*, Farmer, *supra* note 128, at 391-406 (analyzing the use of the "cy pres" concept in class action law); Patricia Sturdevant, *Using the* Cy Pres *Doctrine to Fund Consumer Advocacy*, TRIAL, Nov. 1997, at 80.

130. Professor Hazard has noted how attorneys general have historically supervised charitable trusts. *See* Hazard, *supra* note 7, at 1405. The private attorney general here could be seen as performing a similar function with regard to the class members' monies. But in the traditional case, the choice to establish the charitable trust came from a donor, not from supervising attorney general herself.

131. Professor Coffee asks essentially this question in the analogous mass tort context where, he argues, class attorneys in certain asbestos cases "simply waived compensation for most class members with non-malignant conditions in return for cash payments to those class members with serious malignant conditions." John C. Coffee, Jr., *Class Wars: The Dilemna of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1398 (1995). Coffee reports that class counsel attempted to justify this on the grounds that, *ex ante*, it is a preference rational class members would have made. *Id.* Professor Coffee is not only skeptical of the empirical basis of this claim; he also finds it ethically bankrupt: "Although a legislature or some politically accountable body might decide to provide compensation to only the worst off on paternalistic grounds, *a private attorney, acting as class counsel, seemingly has no entitlement to abandon the interests of one group of clients to benefit another*." *Id.* (emphasis added). The *cy pres* settlement

relatively little funding for its public schools[132] is good evidence that the missing class members, more than thirteen million California purchasers,[133] would prefer their money to be used in other ways.[134] And numerous other ways existed—the unused portion of the fund could have been distributed among the claiming class members;[135] it could have reverted to Microsoft, with the requirement that similar products be discounted across the board until the settlement fund was depleted;[136] or, the funds could have been distributed to retail stores throughout the state with directions to provide cash rebates on computer product purchases until the fund had been exhausted. These alternatives might not be perfect. Yet any of them, and many other distributive possibilities, would surely have been "*pres*-er" (closer) to the class members' private interests than the school distribution.

In sum, the Microsoft settlement sits uneasily within a purely private model of adjudication. Rent-seeking plaintiffs' attorneys have sold private individual rights to the defendants for a return that will

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is, arguably, even more ethically troubling, in that the class attorney has abandoned—if abandonment it be—the interests of one group of clients to benefit another group of people *that are not even clients*.

132. According to the National Education Association's (NEA), California ranks twenty-ninth among the fifty states in per student expenditures for public K-12 education. NATIONAL EDUCATION ASSOCIATION, RANKINGS & ESTIMATES: RANKINGS OF THE STATES 2003 AND ESTIMATES OF SCHOOL STATISTICS 2004 (2004), *available at* http://www.nea.org/edstats/images/04rankings.pdf.

133. As of July 2004, about 600,000 of the 14 million class members had filed claims seeking vouchers. Rachel Konrad, *Microsoft, California Deal Gets Final OK; Judge Dismisses All Objections*, SAN JOSE MERCURY NEWS, July 8, 2004, at 1C (citing lead attorney's statement).

134. Perhaps the monies could be used to ensure that only English is spoken in public schools (except by our Governor). *See* Ann. Cal. Educ. Code § 300 et eq. (West 1998) (providing that only English can be spoken in public schools). The monies could also be used to ensure that marriage remains the sole province of a man and a woman. *See* Ann. Cal. Fam. Code § 308.5 (West 2000) (codifying the proposition that marriage is solely between a man and a woman). Both policies were—among many others—adopted by California voters at the ballot box in the past decade.

135. Professor Coffee refers to this as the "obvious alternative" because the appearing class members rarely "receive full compensation in any settlement." Coffee, *supra* note 131, at 1369 n.96. Other commentators, however, have expressed concern that the appearing class members would receive not just full compensation, but a windfall. Farmer, *supra* note 128, at 393 (citing Van Gemert v. Boeing Co., 553 F.2d 812, 816 (2d Cir. 1977); Cal. v. Levi Strauss & Co., 715 P.2d 564, 573 (Cal. 1986)).

136. *See Levi Strauss & Co.*, 715 P.2d at 571 ("Under the price rollback approach, the uncollected portion of the fund is distributed through the market by lowering the price of the defendant's product for a specified period."); Farmer, *supra* note 128, at 395 & n.232 ("The options . . . include ordering the defendant to reduce future prices on its products until the total lost profits equal the amount of unclaimed funds.") (citing *In re* Folding Carton Antitrust Litig., 744 F.2d 1252, 1255 (7th Cir. 1984)). As Farmer notes, this solution is less than optimal, particularly in an antitrust matter, both because it requires buyers to purchase the defendant's products and because it thereby solidifies defendant's market share. *Id.*

largely benefit public, not private, interests. The agents have secured a memorable payday, while the principals receive little direct value.[137]

C. The Typology's Lesson

The private attorney general typology helps expose a weakness in this principal/agent, or private, approach to class action jurisprudence. This private conception depends upon identifying a principal that the agent, the class action attorney, serves. Scholars identify that principal as the members of the immediate class, a seemingly logical assumption.[138] The immediate class members are, after all, the class action attorneys' clients, those who provide the causes of action giving rise to the case. The problem with this characterization, however, is that it fully privatizes the class action attorney, pushing her from the middle of the private attorney general spectrum to the private side, conceptualizing her as solely an agent serving the immediate interests of her particular clients. In my terms, it mistakes the *supplemental* attorney general for a *simulated* attorney general. The supplemental attorney general, unlike the simulated attorney general, does not solely serve the interests of the parties to a particular case. She also serves the public interest. The class action literature of the past decade is so focused on *how* to align

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137. Professor Coffee critiques *cy pres* settlements but in so doing he does not focus on the Robin Hood aspects of these redistributions; Coffee's focus is instead on his contention that these settlements are but a "recent variation" of class action collusion – that is, defendants buy *res judicata* cheaply by paying the plaintiffs' attorneys a high, uncontested fee in exchange for a lowball settlement. *See* Coffee, *supra* note 131, at 1367-1373.

138. The most significant debate in the literature about the nature of the principal in class action cases concerns whether to treat the private individuals in the class as individuals or as a collective private entity, like a corporation. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26-32 (1996) (analyzing the benefits of speaking of the class as an entity); David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913, 923-942 (1998) (same). Professor Coffee responded, defending the notion that class members should be treated as individuals. Coffee, *Class Action Accountability, supra* note 116, at 379-380.

All of the participants in this debate promote purely private notions of the client; their difference concerns the nature—individual or entity—of that private principal; none examine the extent to which the *public* is, partially, the principal in certain class cases, as I do here. Similarly, in his later work, Professor Coffee argues that the *agent* (the class attorney) is not a pure fiduciary of the class, but also "the creditor and joint venturer." Coffee, *Class Action Accountability, supra* note 116, at 418. This recharacterization of the agent has ramifications for Professor Coffee's recommendations—it leads him to reconceptualize the principals as not just passive wards but as active consumers, entitled to make market-like choices among creditors and joint venturers. *See id.* at 436-37 ("The critical difference between the fiduciary-based approach and the market-based approach is that . . . the latter views the client as a consumer, whose informed choice should both be expanded and respected."). However this new way of thinking remains a purely private way of imagining both the agent and her principals.

the interests of the agent with that of the class that it underemphasizes questions about *who* constitutes the relevant class.[139]

If we reconceptualize the private attorneys general in the Microsoft antitrust case as supplemental attorneys general, we appreciate that they perform public as well as private functions. Their clients are not just the class members, but the public and the class members; their goal is not just compensation, but deterrence and compensation. Their fee is paid neither by the government nor by the plaintiffs, but rather by the defendants—in addition to the remedy they have already exacted from the defendants for their clients.[140] Thus the plaintiffs' counsel in the California Microsoft matter mixed public and private functions in ways that are distinct from those of the villain in the 1990s class action literature. To conclude, as that literature did, that the goal of class rules should simply be to align the interests of the agent with those of the class is to misconstrue the nature of the private attorney general at issue in this type of class action, and hence to mischaracterize the principal she serves.

If the supplemental private attorney general is an agent for a public as well as a private principal—particularly in her deterrent functions—then she can serve this agent in a variety of ways. One way is surely to capture significant compensatory damages for the

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139. Professor Coffee's work acknowledges the issue but does not dwell on its ramifications. In two successive articles, he uses a graph that demonstrates that the most efficient *private* settlement does not match the most efficient *public* settlement. Coffee, *supra* note 78; Coffee, *supra* note 77, at 689. In an accompanying footnote he maps this problem onto the compensation/deterrence distinction. Coffee, *supra* note 78, at 48 n.116 ("The derivative action also can be analyzed in this light because, to the extent that shareholders are at least partially diversified, they may benefit more from the deterrence generated than from the compensatory recovery."). In a later article, Professor Coffee discusses the problem that emerges in public interest litigation when one organization (say the NAACP) funds a lawsuit, while another set of persons (the individual clients) in theory control it. Coffee, *Rethinking the Class Action*, *supra* note 79, at 631 n.23. He states this problem as a question of "who is the principal—the named plaintiffs or the organization?" and notes in passing that "client objectives should not always control litigation decisions, even in the settlement context." *Id.* at 631-32 & n.23. *See generally* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1676 (1997) (discussing different models of decisionmaking that can be employed to define client objectives in group litigation). But he puts this whole issue "beyond the scope" of his concerns. Coffee, *Rethinking the Class Action*, *supra* note 79, at 631. My argument here is that the question Professor Coffee marginalizes to civil rights cases—"who is the principal?"—is in fact quite present in noncivil rights class actions as well. But other than acknowledging the problem in passing, Professor Coffee and other scholars do not analyze its ramifications for the alignment thesis. Their emphasis remains focused primarily, if not solely, on the private interests. *See* Coffee, *supra* note 77, at 714 (stating that there are "three sets of interests involved in [class] actions: those of the defendants, the plaintiffs, and the plaintiff's attorneys," but not those of the public).

140. I appreciate that in practice, defendants figure this into the amount they are willing to offer the class members, and adjust that amount accordingly.

immediate class members that will then deter future conduct, thus aligning the individual class members interests with the larger public interest. But this is not the only way. The private attorney general's fee itself, if sufficiently large, serves a deterrent function; in a small claims case, the fee, even if a modest percentage of the class members' damages, will typically dwarf the aggregate amount individual class members will step forward to claim. The fee thus plays a significant public function where compensatory damages will not. The *cy pres* settlement, if significant, also serves a deterrent function, even if it does not provide significant compensation for class members themselves. Indeed, each of these alternatives does not put money directly in the hands of the immediate clients, and in that sense the interests of the attorneys negotiating for these types of settlements are not perfectly aligned with the private interests of the immediate class members. The attorneys' interests, however, might be aligned with the public principal's interest in deterrence. Additionally, the larger amorphous class for which the immediate class members are a proxy (say consumers generally, as opposed to these particular consumers; or shareholders generally, as opposed to those in this particular class) might well benefit from settlements distinct from those that narrowly serve the precise interests of the individual class members. It is arguable that our goal in class jurisprudence should be to align the interests of the agent with those of her *public* principal, not just those of her *private* clients.

Once the proper private attorney general conceptualization is applied, what is troubling is not that this agent is redistributing private monies (such as the Microsoft consumers' monies) towards a public goal (underserved schools)—after all, we empower her to serve both private and public principals. Rather, what is beguiling is how to fashion rules that strike a proper balance of the public and private functions that constitute this supplemental attorney general. On the one hand, were she serving only private ends (as a *simulated* attorney general), it would be easy to demand that all monies go solely to the class members. On the other hand, were she a public attorney general, it would be easy to demand that a civil penalty find its way into the public treasury. But if this supplemental private attorney general wears two hats, it is more difficult to establish clear guidelines for her actions.

Although the typology cannot provide perfect guidance, it does illustrate several key aspects of the debate in new ways. First, supplemental private attorneys are synchronic in nature. The dual private/public lawyer presents the problem that is inevitably presented by all things "bi": whether the duality is realized in a

diachronic or synchronic manner.[141] The diachronic bi performs her dual nature one side at a time. Bisexuals, though attracted to both men and women, tend (though not invariably) to have relationships and/or sex with a man or a woman one at a time. Bipolar persons alternate between periods of mania and depression. On the other hand, the synchronic bi performs her dual nature at the same time. Biracial persons are generally biracial at each and every moment, synthesizing their dual heritage into a single synchronic performance. The supplemental private attorney general is a synchronic concept—we imagine these attorneys to be both public and private in nature at the same time. Substitute private attorneys general may be private one day, public the next,[142] but supplemental private attorneys general simultaneously pursue both private and public goals. They represent individual clients, to be sure, but their fee is shifted on the theory that their case supplements public enforcement efforts. So while engendered by a private client, the supplemental attorney general is rewarded for her public contributions.

Second, though synchronically bi, supplemental attorneys general are not all equally synchronic in their mix of public and private functions. They are, as the typology shows, arrayed upon a spectrum. What the spectrum demonstrates is that the relationship between the private interest and the public interest varies. On the more public side, the private interest may be quite minimal (that required to satisfy the Supreme Court that the private attorney general meets federal standing requirements) and the public payoff quite significant (citizen suit plaintiffs can secure quite widespread remedies). On the more private side, the private interest is predominant (for example, damages in mass tort class actions) and the public payoff more incidental (the deterrent effect of the cumulative individual cases).

The private critics of small claims class actions incorrectly situate these on the more private rather than the more public side of this continuum. The law and economics scholars are correct that there are private interests at stake in small-claims cases. But these private, compensatory features are not the only aspects of the small-claims class action—such cases also serve the public function of deterring wrongdoing and thereby supplement governmental law

141. The terms "synchronic" and "diachronic" are borrowed from Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

142. For example, David Boies, a private attorney, becomes a private attorney general when hired by the Justice Department to litigate the Microsoft matter; however once he is operating as a private attorney general, he embodies and performs the duality synchronically.

enforcement. These cases contain private facets, to be sure, but they can be situated at the more public end of my spectrum. The small-claims plaintiff is much more similar to the plaintiff in an environmental citizen-suit than she is to a plaintiff in a mass tort case. Her minute personal interests *enable* the lawsuit, but they do not necessarily define the contours of the remedies that should be sought. Once standing, even on her scant private platform, the citizen-suit plaintiff can vindicate public policies quite broadly.

In sum, the law and economics literature focused attention on plaintiffs' attorneys' incentives and argued that the attorneys' incentives should be aligned with those of the immediate class member/principals that she represented. The typology I present here, approaching the issue from a different perspective, demonstrates that the supplemental private attorney general does not have one simple, private, principal. Supplemental attorneys general serve both private and public purposes; they tend to need a private client with standing to do so, but this private client's particular interest may not be their *raison d'etre* and this private client's interests may pale in comparison to the public function they are performing. Rather than align this agent's interest with those of the class, perhaps the goal should be to align this agent's interest with those of her larger public principal as well, or instead of, those of the class.

This is one application that demonstrates the utility of the spectral typology I present here.

V. CONCLUSION

Scholars and judges have regularly utilized the private attorney general concept in a variety of contexts for nearly a quarter-century. So prevalent is the use of this term that its meaning has become somewhat vague and undifferentiated. My hope is that this Article will make the field somewhat less vague and more differentiated. In particular, I have highlighted four key aspects of the private attorney general concept.

First, private attorneys general are persons who mix public and private functions in the adjudicative arena, but they do so in a variety of ways that can best be understood when mapped onto a spectrum. Private attorneys general occupy the middle portion of a lawyering spectrum that runs from private lawyering on one side to public lawyering on the other.

Second, within this middle, three distinct types of public/private mixes are presently identifiable—those I label

substitute attorneys general, supplemental attorneys general, and simulated attorneys general.

Third, two sets of legal doctrines—standing and attorneys' fees—police the margins between private attorneys general and regular attorneys. Standing doctrine polices the boundary between public attorneys and private attorneys general: the former represent the public interest by job description; the latter are permitted, in federal court, to represent the public interest only when they have some private stake of their own in the matter. Attorneys' fees doctrine polices the boundary between private attorneys and private attorneys general. The former represent only private clients and are paid only by them; the latter perform a function that exceeds pure private representation and are therefore entitled to some different type of fee arrangement.

Fourth, supplemental private attorneys general are synchronically so—performing public and private functions at the same time, not episodically. However, the quantities of public and private presented in the synchronic mix can vary. Some supplemental attorneys general perform significant public functions with only scant private interests at stake (such as environmental citizen-suit plaintiffs) while others perform incidental public functions with significant private interests at stake (such as mass tort class action plaintiffs).

More than a half century ago, Alfred Kinsey relieved us of the sense that sexuality comes in two pure forms, demonstrating instead that our sexual lives can be arranged across a spectrum of mixes. He was, of course, correct, and yet only faint traces of this lesson are imprinted on our public consciousness. Occasionally, we pay intellectual lip service to Kinsey's spectrum, but our minds and our public discourse continue to sort individuals into but two boxes. I suspect some of the reason we do so is that where a person may fall on the Kinsey spectrum—the degree of mixes she embodies—is of so seemingly little import. Kinsey had insisted that "[i]t is imperative that one understand the relative amounts of the heterosexual and homosexual in an individual's history if one is to make any significant analysis of him."[143] But we don't believe it—the relative amounts of the heterosexual and homosexual in an individual's history may tell us very little of his practices and even less about his character.

By contrast, my argument here is that it really *is* imperative that we know the relative measure of the public and private embodied in particular private attorneys general. The legal system can neither

[143] KINSEY ET AL, *supra* note 15, at 647.

be sure what to expect nor certain what to demand from a private attorney general in a given situation without knowing the contours of that person's public/private mix. How much a particular type of private attorney general is thought to be an agent for public ends, in addition to private ones, critically affects the rules by which we should enable (and constrain) her and the fees with which we should reward her. The precision with which we define the private attorney general concept matters.