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Defining a Rule 23(b)(2) Class: An Expository Analysis

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INTRODUCTION

In the summer of 1973 Cairo, Illinois was boiling with racial conflict. Since the early 1960’s, black citizens of Cairo, together with a small number of white persons on their behalf, had been actively seeking equality of opportunity and treatment. Apparent failure resulted in an economic boycott of city merchants who allegedly engaged in racial discrimination. Tension and antagonism among the white citizens and officials of Cairo rose, eventually arrests were made, and the criminal justice system became the center of controversy.

On October 17, 1973 certain black and white residents of Cairo, having brought a class action, argued in front of the United States Supreme Court that the defendants, in the administration of criminal justice in the county, selectively discriminated against the plaintiffs and members of their class.1 This discrimination, plaintiffs argued, effectively deprived the class of their rights under the First, Eighth, Thirteenth, and Fourteenth Amendments. The controversy, however, was never resolved by the Court since the named

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plaintiffs had not shown a "personal stake in the outcome" and the proffered class definition was inadequate. Thus, a conflict which had been brewing for over ten years was left untouched by the judiciary.

The focus of this article is on the Court's latter reason for denying the class action. At first glance the importance of the issue may tend to be minimized since the Court submits no rationale for their conclusion other than the definition was "ambiguous and contradictory". It should not, however, be overlooked for a number of reasons. First, the U.S. Supreme Court has finally specified outright that an adequate class definition is a prerequisite to the invocation of federal jurisdiction in a class action suit. Second, by implication, the Court has endorsed a restrictive view tending to deny the class action when a questionable definition is proffered. Third, the Court has joined a large number of lower courts in promoting a general confusion as to the procedure involved in determining the adequacy of a 23(b)(2) class definition. This article will analyze prior case law and developing theories in order to place O'Shea v. Littleton, and possible future developments into their proper perspective.

The purposes for limiting the scope to a discussion of 23(b)(2) class definitions are two-fold. First, the discussion will expose the reader to the fact that special problems are raised concerning the class definition issue in 23(b)(2) actions which are not raised in other class actions. Second, it is apparent that in light of recent U.S. Supreme Court decisions limiting the usefulness of Rule 23(b)

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2. The class was defined as,

[A]ll those who on account of their race or creed and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.

Id. at 491.

3. The Court's entire discussion of the issue was relegated to one footnote, and the issue was not a controlling factor in the Court's decision to dismiss the complaint. Id. at 494 n.3.

After reading the class definition, and in light of the factual circumstances of the case, the reader may want to analyze the Court's conclusion. What the Court probably meant by terming the definition "ambiguous" was that it would be impossible to distinguish those individuals discriminated against on account of their race or creed and because of their exercise of First Amendment rights, from those who were legally sentenced. In other words, individual class members were incapable of definite identification.
the prime, if not sole importance of Rule 23 has become sub-
section (b) (2). In some instances, the class definition issue now
threatens the usefulness of Rule 23(b)(2) simply because of vague
and confusing statements like those found in O'Shea.6

THE CLASS MUST BE ADEQUATELY DEFINED

It is generally recognized that, in addition to the four require-
ments specified in Rule 23(a) of the Federal Rules of Civil Pro-
cedure6 and those of Rule 23(b),7 there is an essential prerequisite
to any Rule 23 class action that a class must exist and be adequately
defined.8 In some cases only a "general comment" is required at
the complaint stage subject to possible amendment as the litigation
proceeds,9 while in other cases the complete definition must be in-
cluded in the complaint.10 Most courts seem to agree that if there
is no attempt to define a class,11 or the definition is "too broad",12
or "inconsistent",13 or "vague",14 it is inadequate. Since a class is
composed of persons who can be categorized according to the simi-
licity of their factual and legal circumstances,15 the definition

4. See Snyder v. Harris, 394 U.S. 333 (1969); Zahn v. International Pa-
pper Co., 414 U.S. 291 (1973); Eisen v. Carlisle & Jacquelin, 94 S. Ct. 214
(1974); See also Comment, Closing the Courthouse Door: The Aftermath
5. See note 3, supra.
8. 3B J. Moore, FEDERAL PRACTICE AND PROCEDURE ¶ 23.04 at 23-251 (2d
ed. 1974) [hereinafter referred to as Moore]; 7 C. Wright & Miller, FEDERAL
PRACTICE AND PROCEDURE: Civil § 1760 at 579 (1972) [hereinafter referred
to as Wright & Miller]. See also Dolgow v. Anderson, 43 F.R.D. 472, 491
(E.D.N.Y. 1968); Fielder v. Board of Education of Sch. Dist. of Winnebago,
the purported class. This in itself may be a sufficient infirmity to cause
rejection of the request for a class action."); Williams v. Page, 60 F.R.D.
29 (N.D. Ill. 1973).
9. A "general comment" would require merely an attempt to define the
10. See, e.g., Taylor v. Goodyear Tire and Rubber Co., 60 CCH LAB. L.
11. Elko v. Carey, 315 F. Supp. 886, 887 (E.D. Penn. 1970). However,
some courts have been satisfied with merely making their own inference
from the facts stated in the complaint. See, e.g., Saddler v. Winstead, 332
13. See, e.g., Hardy v. United States Steel Corporation, 289 F. Supp. 200
(N.D. Ala. 1967).
15. BLACK'S LAW DICTIONARY 315 (4th ed. 1951), defines "class" as, "[t]he
order or rank according to which persons or things are arranged or as-
sorted." See also Wright & Miller § 1760 at 579.
should include a statement of basic facts, as opposed to a mere repetition of the language of Rule 23.16

A class definition is required out of necessity because of the many complexities inherent in class action suits, foremost of which is the scope of the judgment. It is the court's job to determine whether the controversy extends beyond the named representative parties, and if so, to issue a judgment which will include "those whom the court finds to be members of the class."17 Since the judgment has a res judicata effect in relation to the class, as defined and described by the court, whether favorable or not,18 the concern of the court is in determining who the litigants are in order to satisfy the requirements of due process.19 As the named representatives often plead and prove facts relevant to their own circumstances, they must, as advocates, allege satisfactorily that the same controversy extends beyond the named parties, and describe to whom it extends.20

An adequate class definition probably has the greatest value in connection with Rule 23(a). "Present throughout all four of the prerequisites in Rule 23(a) is the preliminary problem of defining the class."21 If there is no class definition, or one which fails to establish class boundaries, a court cannot estimate the number of class members in order to determine whether joinder is impracticable.22 In addition to the scope of the class, the definition must include factual references to an alleged common question of law or fact,23 an allegation that the claims or defenses of the representa-

16. Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969). Not all courts, however, have so required. See, e.g., Educational Equality League v. Tate, 333 F. Supp. 1202 (E.D. Penn. 1971).
17. FED. R. CIV. P. 23 (c) (3).
18. Id. "[B]y today's order to enlarge the class we merely enlarge the res judicata effects of whatever decision we may reach..." Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 197 (E.D. La. 1968).
tives are typical of the claims or defenses of the class, and an allegation that the representative parties will fairly and adequately protect the interests of the class.

Some courts have so focused on the requirements of 23(a) that, if they are satisfied, the action is simply certified as a class action without determining the adequacy of the class definition. Where the adequacy (or inadequacy) of the class definition is obvious, or where the purported class action must fail anyway under 23(a), the result of this procedure differs little with that of courts which consider the adequacy of the class definition as a point of standard procedure. Where, however, there is a questionable definition, which otherwise would seem to satisfy Rule 23(a), courts taking this view would probably be comparatively lenient in accepting the class as defined.

Most courts take the view that the adequacy of the class definition is a separate determination from that of 23(a). Although, as previously mentioned, consideration of 23(a) requires an adequate and clear class definition, there is nothing in 23(a) which suggests that the four requirements are the sole basis for determining the adequacy of the class definition. In fact, a close reading of Rule 23(a) will lend support to a conclusion that the rule assumes the existence of a defined class prior to any Rule 23 application.

A prerequisite to most procedural questions under Rule 23 is an adequate class definition. It is essential in connection with the notice requirement under Rule 23(c)(2), discretionary notice under 23(d)(2), and dismissal or compromise of the action under 23(e), since all require means by which members of the class can

24. As applied to the class definition issue, the question is basically whether the representative parties are included in the class they have defined. See Bailey v. Patterson, 369 U.S. 31 (1962); The purpose for the requirement is to "ferret out officious intermeddlers." Vernon J. Rochler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335, 338 n.4 (D. Minn. 1971). See also Annot., 8 A.L.R. FED. 461, 466 (1971).
26. Wright & Miller § 1760 at 580.
30. Rule 23(a) reads:

One or more members of a class may sue . . . (1) the class is so numerous . . . (2) . . . questions . . . common to the class, (3) . . . typical of the claims or defenses of the class, and (4) . . . protect
be identified and contacted. If the court must determine whether to divide the class into subclasses pursuant to 23(c)(4), or determine the scope of discovery, it must know at least the general bounds of the class.

Procedural variances between a 23(b)(2) and 23(b)(3) action have resulted in different requirements for an adequate class definition. Unlike Rule 23(b)(3), a 23(b)(2) action does not require notice to each member, nor are class members given an opportunity to “opt out.” Since the plaintiff seeks equitable relief, each member need not be identified to determine whether the claim justifies invoking federal jurisdiction, and there need not be concern with the problem of proving damages. A judgment in a (b)(2) class action describes the members of the class, while a judgment in a (b)(3) action specifies the individual members who have been identified and describes the others. Recently, the Court in Eisen v. Carlisle & Jacquelin suggested:

The procedure involved in applying for prospective injunctive relief is relatively simple and inexpensive, social and economic reforms may be implemented and an end put to illegal practices with far more benefit to the community than that derived from [a 23(b)(3) action].

Thus, while a (b)(3) class definition must be “precise” to allow satisfaction of the various procedural requirements, the trial

the interests of the class. (emphasis added). Furthermore, Rule 23(a) does not take into consideration such factors as the scope of discovery, the scope of the judgment, notice, dismissal or compromise. See text accompanying notes 31-33, infra.

31. WRIGHT & MILLER § 1760 at 583-84.
32. Id.
33. See, e.g., Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).
34. FED. R. CIV. P. 23(c)(2). However, Rule 23(d) gives the trial court authority, at its discretion, to require notice in a 23(b)(2) action. See Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969), where the court required notice in a (b)(2) action on due process grounds.
35. FED. R. CIV. P. 23(c)(3).
The judge is free to exercise a much greater degree of discretion in determining whether a (b) (2) class definition is acceptable.\textsuperscript{41}

\textbf{THE NEED FOR DISCRETION AND THE SEARCH FOR UNIFORM STANDARDS}

Having noted that a trial judge is afforded a greater degree of discretion in determining the adequacy of a (b) (2) class definition, the questions to be answered are: Why and how? The preceding section has explained why procedurally. In addition, a greater degree of discretion is \textit{required} due to the unique nature of a (b) (2) class action. The much quoted statement of the Advisory Committee to the 1966 Amendment of Rule 23 reflects the Committee's recognition that often a 23(b)(2) action is brought on behalf of a class which \textit{cannot} be precisely defined;

Illustrative [of 23(b)(2) actions] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class usually one whose members are incapable of specific enumeration.\textsuperscript{42}

For example, a class of school children affected by a segregationist policy is constantly changing. The trial judge is faced with the problem of issuing a decree which will include all those to whom the conduct extends. Such a difficult task can only be accomplished if the trial judge is given sufficient discretion to, for example, accept a tentative class definition subject to re-definition prior to issuance of the judgment.\textsuperscript{43} A similar exercise of discretion would be difficult in a (b)(3) action where the class should be adequately defined in the complaint.\textsuperscript{44}

\textsuperscript{41} Of course, if the trial judge requires discretionary notice, or there are questions as to the scope of discovery, or one of settlement, a (b)(2) class definition may also be required to be "precise". \textit{See} McAdory v. Scientific Research Instruments, Inc., 355 F. Supp. 468, 472-73 (D. Md. 1973); Butcher v. Rizzo, 317 F. Supp. 899, 904 n.3 (E.D. Penn. 1970).

\textsuperscript{42} Advisory Committee's Note, 39 F.R.D. 98, 102 (1966).

\textsuperscript{43} Note, Proposed Rule 23: Class Actions Reclassified, 51 Va. L. Rev. 629, 649 (1965): A decree which attempts to define the changing class once and for all is likely to be either too narrow to be useful to latecomers to the class or else too broad and vague to respect properly defendant's right to a well-defined order. Accord, Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972). \textit{But see} Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971); Heckart v. Pate, 52 F.R.D. 224 (N.D. Ill. 1971).

\textsuperscript{44} Procedural requirements, such as mandatory notice to all class members, would so require. Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972). \textit{See} text accompanying notes 34-41, \textit{supra}. This does not mean that the plaintiffs' right to maintain a class action cannot be conditional under 23(b)(3). \textit{See}, e.g., Taylor v. Goodyear Tire and Rubber Co., 60 CCH Lab. L. Rep. ¶ 9268 (N.D. Ala. 1969), where plaintiffs' right to maintain a class action was conditioned upon the filing of an amended complaint precisely defining the class, and the filing of a list of class members with the court.  

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In order to provide uniform standards by which to measure the adequacy of a 23(b)(2) class definition, courts have developed two minimum requirements: The definition must meet certain minimum standards of definitiveness and the class must be defined by the actions which a defendant has taken toward the class. It is clear, however, that these two requirements only serve to add to the overall confusion surrounding class definitions. Some courts have entirely neglected these two requirements, while others have tightened the requirement of definitiveness to such an extent that class action status will be denied when a questionable definition (which would otherwise satisfy a minimum standard of definitiveness) is proffered. A third category of decisions have taken a pragmatic approach to the issue by emphasizing the second requirement.

**A Minimum Standard of Definitiveness**

A 23(b)(2) class definition must satisfy a minimum standard of definitiveness, which was first described in *Chaffee v. Johnson*, where the court stated, "[t]he members of a class must be capable of definite identification as being either in or out of it." The requirement reflects concern with all the procedural questions previously discussed; thus it is preferable to satisfy the standard at an early stage in the action. Depending upon what procedural questions must be satisfied, however, it is not essential that the

45. WRIGHT & MILLER § 1760 at 581-583.
47. See Fitzgerald, *When Is a Class a Class?*, 28 BUS. LAWYER 95, 97-101 (1972).
50. E.g., Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).
52. Id. at 448. The court held that a class defined as "all persons who are workers for the end of discrimination and segregation in Mississippi" was inadequate because it depended upon the state of mind of a particular individual, making it impossible to determine class membership. Id. See text accompanying notes 71-75, infra.
53. See text accompanying notes 17-33, supra.
54. WRIGHT & MILLER § 1760 at 583.
What is actually meant by “capable of definite identification” has been the source of much conflict. One view seems to reflect a rather strict interpretation of the phrase;

... the requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.\(^{56}\) (emphasis added)

This interpretation is consistent with the requirements for a 23(b)(3) class definition,\(^{57}\) but seems to be inconsistent with the unique nature of a 23(b)(2) class since it is “usually one whose members are incapable of specific enumeration.”\(^{58}\)

Nevertheless, a number of courts have subscribed to the “strict interpretation” approach, and have consequently issued rather controversial opinions. By implication, the U.S. Supreme Court, in *O'Shea v. Littleton*, has recently subscribed to this view.\(^{59}\) This is further supported by the Court's dismissal of the appeal in *Lopez-Tijerina v. Henry*,\(^{60}\) the leading case espousing the “strict interpretation” approach.

In *Lopez-Tijerina*, the plaintiffs purported to represent a class defined as those persons having Spanish surnames, Mexican, Indian, and Spanish ancestry, and who speak Spanish as a primary or material language. All three characteristics were rejected by the court stating, “their definition of the class is still too vague to be meaningful”,\(^{61}\) because none of the definitions were capable of identifying class members. “Spanish surnames” was inadequate because,

> [t]here are many people in New Mexico who, because of their marriage or the marriage of their ancestors, have Spanish surnames, who are not Spanish Americans. Similarly, there are many people of Spanish or Mexican extraction who, for the same reason, do not have Spanish surnames.\(^{62}\)

\(^{55}\) If the only concern is with constructing a viable decree the standard of definitiveness can be complied with after the merits have been adjudicated. *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972). However, if there are Rule 23(a) questions, discretionary notice requirement, questions as to the scope of discovery, sub-dividing the class, or settlement under 23(e), the standard should be satisfied at the commencement of the action. See *Wright & Miller* § 1760 at 583-584.

\(^{56}\) See *Wright & Miller* § 1760 at 581.

\(^{57}\) See text accompanying notes 34-41, *supra*.

\(^{58}\) Advisory Committee’s Note, 39 F.R.D. 98, 102 (1966).

\(^{59}\) See note 3, *supra*.


\(^{61}\) Id. at 276.

\(^{62}\) Id.
Likewise, it was impossible, according to the court, to determine what constitutes Mexican, Spanish, and Indian ancestry since mixed ancestry is quite common, and it was impossible to determine whether Spanish or English was a primary language because many people in the state were bi-lingual.

Where Lopez-Tijerina would require a definition from which each member can be specifically identified, courts subscribing to a "liberal interpretation" would require a definition from which a membership can be objectively described at the time of judgment. The "liberal interpretation" merely requires that the class be described by identifiable group characteristics, even though individual class members may be incapable of specific enumeration.

Prior to O'Shea v. Littleton, the trend was to liberally interpret the minimum standard of definitiveness outlined in Chaffee v. Johnson. The precise holding in Lopez-Tijerina has been subject to criticism, and "persons with Spanish surnames" has subsequently become an acceptable class description. Professor Moore expressed the policy that, "[i]n actions brought to vindicate civil rights

63. Id. at 277.
64. Id.
65. Illustrative of the "liberal interpretation" is Carpenter v. Davis, 424 F.2d 237 (5th Cir. 1970), where plaintiffs purported to represent a class defined as all those who wrote for, published, sold, or distributed the newspaper or who wish to do so in the future. The newspaper, however, was an "underground publication" distributed near college campuses, and the names of writers and distributors were unknown. The court pointed out that "[i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained", and went on to certify the class action. Id. at 260. See also Broughton v. Brewer, 298 F. Supp. 260, 267 (N.D. Ala. 1969).
66. In each of these cases [cited by plaintiff] the allowed class was both large and to a certain extent indefinite and incapable of specific enumeration. However, in each of these cases it was perfectly clear what the membership of the class was...
67. See text accompanying notes 1-3, supra.
the courts have taken a rather relaxed view of the necessity for precise identifiability of the members of a class.” Whether this trend will continue is speculative.

THREE ISSUES RAISED IN CONNECTION WITH A MINIMUM STANDARD OF DEFINITIVENESS

Three issues arise under either standard of definitiveness. First, where inclusion in the class depends upon the state of mind of the purported class members, the courts cannot objectively identify the membership. Second, when there is an identifiable group which is heterogeneous, the courts are faced with the problem of describing which segment of the group is to be included in the class. Third, when the definition includes persons who, allegedly, will be injured in the future, an additional test must be utilized to determine the class boundaries.

1. State of Mind

As previously mentioned, the class definition in Chaffee v. Johnson was inadequate because it depended upon the state of mind of individual purported members of the class. Where the class is defined entirely by the members' state of mind most courts, regardless of the various standards of definitiveness, would reject the class definition because there would be no apparent characteristics by which a court could objectively distinguish the class boundaries.

However, where there are any objective characteristics from which a class can be ascertained, the state of mind description usually will not defeat class certification. One such objective characteristic can be the conduct of the defendant. The class action, therefore, will not fail if the state of mind description is merely an intent to do some lawful act in the future, which will bring the pur-

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71. See note 52, supra. “State of mind” is the familiar concept wherein the class is defined by the intent, knowledge, intelligence, or belief, etc., of its members. Thus, “state of mind” is strictly a subjective description. Osmond v. Spence, 327 F. Supp. 1349, 1359 (D. Del. 1971), vacated and remanded on other grounds, 405 U.S. 971 (1972).
ported class members in contact with an established discriminatory policy. But, even then, if the alleged discriminatory policy depends upon defendant's state of mind, the definition will be inadequate.

2. Heterogeneous Group

Closely related to the previous issue discussed is the problem arising where the representatives bring the action to protect the constitutional rights of an identifiable group, of which a faction are either indifferent to, or opposed to protection of their rights. Since those in opposition are not technically members of the class, some courts have approached the issue in terms of whether the class definition has sufficiently identified the supportive faction. Of course, since inclusion would depend entirely upon the state of mind of group members it would be rather difficult to satisfy the minimum standards of definitiveness.

Such being the case, most courts seem to have taken a liberal approach to the issue, especially where important constitutional rights are involved. If possible, the courts will deal with the

77. Carroll v. Associated Musicians of Greater New York, illustrative of the approach, was an action by orchestra leaders to enjoin unions from collecting certain taxes, surcharges, and welfare plan payments. The class was basically defined as all those members of Local 802 who were similarly situated. There were many members of Local 802, however, who did not object to the union impositions and thus could not be considered members of the class plaintiffs purported to represent. The court denied class action status because, '... identification [of class members] would not be possible in a case, such as this, of fluid factional groups in a labor union.' 206 F. Supp. at 471, citing Giordano v. Radio Corp. of America, 183 F.2d 558, 560-61 (3rd Cir. 1950). See also Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Penn. 1973); Suchem Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R. 1971); Neal v. Systems Bd. of Adjustment, 348 F.2d 722 (8th Cir. 1965).
78. See cases cited note 77, supra.
79. The possibility that some might not, at this time, wish to exercise their right to freedom of speech does not preclude a class action. Cortright v. Resor, 325 F. Supp. 797, 808 (E.D.N.Y.), reversed on other
situation by establishing subclasses; if that is not possible, by merely ignoring the differences. This approach is more practical in light of the main purpose for Rule 23(b)(2)—to facilitate the bringing of class actions to protect the constitutional rights of a large segment of the population.

3. Persons To Be Injured In the Future

Many definitions will describe a class consisting of, in part, persons who are threatened by defendant’s allegedly unlawful conduct. The usual purpose for including prospective injured parties is to satisfy the numerosity requirement of Rule 23(a).

However, the definition must still satisfy the minimum standard of definitiveness. A court can only identify future membership by focusing on the defendant’s conduct to determine generally who will be affected in the future. Thus, in a case where plaintiff alleged that defendant employer had a policy of discrimination toward women, and the class was defined as those women who will seek employment with defendant in the future, the test was whether defendant’s acts of discrimination were continuing so as to, in time, affect future women applicants.

Where defendant’s conduct is obviously continuing most courts would include in the class definition future persons affected, provided those persons can be described. And, if the conduct cannot continue courts would be inclined not to accept a definition which includes future injured parties. Where, however, it is question-

grounds, 447 F.2d 245 (2d Cir. 1971). See also Moss v. Lane Co., 50 F.R.D. 122, 125 (W.D. Va. 1970), where, even though all purported members of the class signed affidavits disclaiming any authority for plaintiffs to commence the suit, the court decided that, because of the important constitutional rights involved, the class action was maintainable.

81. See, e.g., Cortright v. Resor, 325 F. Supp. 797, 808 (E.D.N.Y.), reversed on other grounds, 447 F.2d 245 (2d Cir. 1971).
82. WRIGHT & MILLER § 1775 at 24. If the Carroll approach, see note 77 supra, is carried to its extreme a class action dealing with highly controversial constitutional rights would be a rarity.
87. See Gerstle v. Continental Airlines Inc., 50 F.R.D. 213, 217 (D. Colo. 1970), where the employer eliminated the discriminatory rule before commencement of the suit, and so no case or controversy could exist as to “present and future employees”.

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able as to whether the harm is continuing, or to whom the harm will extend, confusing opinions have resulted, indicating that the determination is probably based upon the validity of the claim.88

**THE SECOND STANDARD: DEFINING THE CLASS**

**BY DEFENDANT'S CONDUCT**

The second requirement developed as an aid to the exercise of the trial court's discretion is that the class must be defined by the conduct of the party opposing the class. It is the

... conduct complained of [which] is the benchmark for determining whether a subdivision (b) (2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often incapable of specific enumeration.89

The concept generally means that there must be some connection between the group described and the purposes of the suit in preventing harm to class members as a result of defendant's conduct.90

The class, then, will extend as far as defendant's conduct can be expected to extend, regardless of its magnitude.91 However, where the class is defined so broadly that it obviously encompasses individuals who have no standing to sue in connection with the claim being litigated, the definition is inadequate.92 Or, where the facts failed to show that defendant's discriminatory conduct extends be-

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89. Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972). The requirement is derived from the wording of Rule 23 (b) (2):

'The party opposing the class has acted or refused to act on grounds generally applicable to the class . . . .


yond the named plaintiff,93 or the named family,94 then the class, as alleged in the complaint, simply fails to exist.

Those courts which emphasize this requirement, over the requirement of definitiveness, have taken a pragmatic approach to the question concerning the adequacy of the class definition.95 A pragmatic approach is one which deals primarily with the effect of the conduct complained of, as opposed to the identifiability of the class members.96 It is merely an extension of the policy that, "[w]here federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."97 As expressed in Yaffe v. Powers,98 the pragmatic approach gives the trial judge a special responsibility to ask himself, unless a claim is "patently frivolous:"99

[A]ssuming there are important rights at stake, what is the most sensible approach to the class determination issue which can enable the litigation to go forward with maximum effectiveness from the viewpoint of judicial administration?100

However, in defining the class by defendant's conduct it is difficult for a court to determine the adequacy of the initial class definition. Lack of information, lack of time, inartfully drawn complaints, and the simplicity involved in merely refusing to certify the class action, have made it rather difficult to determine exactly what defendant's conduct entailed, and what the effects were.101 Furthermore, any trial lawyer knows that "asservation and fact are sometimes complete strangers."102 Recognizing these problems, the Yaffe court stated that:

[S]ince a Rule 23(b) (2) class is defined by the actions which a defendant has taken toward the class, and which should arguably be enjoined, it may appear sensible to ascertain the nature of the

96. The trial court, in Yaffe v. Powers, was criticized for its "... speculation as to the status of the members of the putative class rather than its focusing on the effect of the conduct complained of." 454 F.2d at 1366.
98. 454 F.2d 1362 (1st Cir. 1972).
100. 454 F.2d at 1367.
actions taken with more precision than reference to pleadings and affidavits permit.\textsuperscript{103}

For these reasons most courts have been sympathetic to a request for some limited form of discovery, with leave to amend the definition if necessary, prior to a determination as to the adequacy of the class definition.\textsuperscript{104} Where, however, there is a request for a preliminary hearing on the issue there is a distinct split of authority. Some courts feel that an evidentiary hearing and discovery "may be essential,"\textsuperscript{105} while others may order an evidentiary hearing only where there is an initial "minimal showing of substance" to the class action claims.\textsuperscript{106} A number of courts have refused to allow a preliminary evidentiary hearing as a denial of the right to a jury trial,\textsuperscript{107} or as merely serving to make the Rule 23 determination "too cumbersome."\textsuperscript{108} All courts have been careful to point out that any preliminary hearing is not a hearing on the merits of the case.\textsuperscript{109}

The effect of allowing limited discovery and an evidentiary hearing seem to be helpful in the exercise of the trial judge's discretion.\textsuperscript{110} Recognizing the value in ascertaining the factual circumstances, some courts have simply refused to make a determination until there are sufficient facts exposed through discovery.\textsuperscript{111} Other courts have approached the question by issuing a conditional order defining a "tentative class" until all the evidence is in, which seems to be the best approach if the main concern is in structuring a viable decree, as opposed to concerns with notice, the scope of discovery, or questions involving satisfaction of Rule 23 (a).\textsuperscript{112}

\textsuperscript{103} 454 F.2d at 1367.

\textsuperscript{104} Huff v. N.D. Cass Co. of Alabama, 485 F.2d 710, 713 (5th Cir. 1973).

\textsuperscript{105} See also Wright & Miller, § 1785 at 131.

\textsuperscript{106} 485 F.2d at 713.

\textsuperscript{107} Rossin v. Southern Union Gas Co., 472 F.2d 707, 712 (10th Cir. 1973).


\textsuperscript{109} Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

\textsuperscript{110} Miller v. Mackery International, Inc., 452 F.2d 424, 427-28 (5th Cir. 1971).


\textsuperscript{112} E.g., Kelly v. Wyman, 294 F. Supp. 887, 892 (S.D.N.Y. 1968).

\textsuperscript{112} Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 192 (E.D. La. 1968), terminated in part and affirmed in part, 321 F. Supp. 1241 (E.D. La. 1971);
Once the factual circumstances are ascertained, the Yaffe approach requires the trial judge to take an even more active role. The court should re-define the class if necessary, or divide it into subclasses, or fashion relief with the vague class definition in mind, or even infer the bounds of the class where plaintiff fails to delineate them. In short,

... the Court under F.R. Civ. P. 23 has the duty, and ample powers, both in conduct of the trial and relief granted to treat common things in common and distinguish the distinguishable. If a mistake has been made the court can subsequently re-define the class, or even dismiss the class action.

However, for two reasons a strictly pragmatic approach, like the "strict" standard of definitiveness, has its disadvantages. First, it is unacceptable if the court decides that additional procedures must be complied with, such as discretionary notice under Rule 23(d), or there are questions as to satisfaction of Rule 23(a). Second, a strictly pragmatic approach would defeat one of the pur-

117. Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968). Courts seem to look favorably upon an initial class definition which is as broad as the evidence may conceivably prove the class to be, subject to being narrowed after the evidence is in. Hicks v. Crown Zellerbach Corp., 49 F.R.D. 194, 192 (E.D. La. 1968), terminated in part and aff'd in part, 321 F. Supp. 1241 (E.D. La. 1971). However, courts seem adverse toward broadening the definition at trial, even though it is recognized that the conduct extends beyond the class as previously defined. Sabala v. Western Gillette, Inc., 362 F. Supp. 1142, 1147 (S.D. Tex. 1973) (Refused to broaden class definition because trial preparation was based upon a limited class definition). Nevertheless, if new evidence at trial appears to show that important constitutional rights will be jeopardized by a narrow decree, most courts would probably broaden the class definition. See Hairston v. Hutzler, 334 F. Supp. 251 (W.D. Penn. 1971), aff'd, 468 F.2d 621 (3rd Cir. 1972).
119. See, e.g., Wecht v. Marsteller, 363 F. Supp. 1183 (W.D. Penn. 1973), where the class was defined as "... all persons who now, have in the past, or will in the future, travel upon the public roads, sidewalks and highways of the City of Pittsburg." It would be impossible for plaintiffs to give notice to class members. Even if notice by publication were sufficient, see Mullane v. Central汉over Bank & Trust Co., 339 U.S. 306 (1950), it would be impracticable since the class could conceivably include all human beings. The same problem would arise under Rule 23(e), if the parties wished to settle the controversy out of court, and where the numerosity requirement of Rule 23(a) (2) was in question. See text accompanying note 22, supra,
poses for developing the two main requirements; to provide uniform standards by which to measure the adequacy of a 23(b)(2) class definition. Like the minimum standard of definitiveness, the best approach, then, would be one approximating a middle ground. It should consider application of Rule 23(b)(2) optimistically, and seize upon the opportunity to adjudicate important constitutional rights. Yet, procedural requirements should not be compromised, nor should uniform standards by which to exercise discretion be ignored.

CONCLUSION

The requirements explored in this article are by no means the only guidelines by which a court will exercise its discretion in determining the adequacy of a 23(b)(2) class definition. Varying factors are present in each factual circumstance presented to a court. Availability of alternative remedies, the apparent validity of plaintiffs' claim, and public policy play a substantial role in the trial judge's exercise of discretion. Even in light of the generally recognized rule that a court may not deny class status in a 23(b)(2) action merely because there is no need for it, it is suspected that some courts use this basis for a determination. Those courts tend merely to confuse the issues and establish precedents which can be used for further abuse of discretion. Thus, if there is to be uniformity of decisions, when faced with similar factual circumstances, the existence of an adequately defined class must stand or fall on its own.

However, in requiring an adequate class definition, courts should not prescribe that which is unnecessary, or unreasonable in light of the unique nature of civil rights class actions under 23(b)(2). One concern with O'Shea v. Littleton is the Court's apparent endorsement of the Lopez-Tijerina approach to the standard of de-

120. 454 F.2d at 1367.
121. See cases cited note 68, supra, and text accompanying note 70, supra.
finitiveness. If this analysis is correct it can have a wide range of effects on the area of civil rights, as the Lopez-Tijerina case well illustrates. Perhaps it is an inadvertent carry-over from the U.S. Supreme Court's recent tendency to limit application of Rule 23(b)(3). Whether it be inadvertent or deliberate, if the present Court does to Rule 23(b)(2) what it has done to Rule 23(b)(3), it may well jeopardize the constitutional rights of all—as one class.

A suggested approach for a trial judge would be the following procedure: (1) Determine what reasons there are, in the particular controversy, for requiring a class definition. Is it a 23(b)(2) action? Will discretionary notice be required? Will the parties require extensive discovery? Are there questions involving satisfaction of Rule 23(a), such as whether the numerosity requirement has obviously been satisfied? What problems can be expected in issuing a viable decree? (2) Determine what standard of definitiveness is required in light of the answers to the previous questions; (3) Apply the Yaffe approach to the question, and take an active role in ascertaining the factual circumstances and constructing a definition which, (a) satisfies the minimum standard of definitiveness, and (b) which will be defined by the conduct of the defendant. The trial judge should bear in mind that, "... the actual definition of the class remains the prerogative of the Court, for which any allegation of plaintiffs as to the scope of the class serves only as 'raw material'".127

126. See text accompanying note 100, supra.
127. Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 196 (E.D. La. 1968). "The class asserted by plaintiffs should serve as the starting point for the definitive fixing of the class by the court under Rule 23(c)(1)." Id. at 196 n.1.