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SCHOOL DESEGREGATION, CLASS SUITS, AND THE VEXING PROBLEM OF GROUP REMEDIES
KEITH JUROW*

Introduction

Although in many respects the decision by the Supreme Court in Brown v. Board of Education\(^1\) marked the culmination of an effort to undo the effects of Plessy v. Ferguson,\(^2\) it also began what was to become the much more difficult task of eliminating segregation in the public schools. Speaking on behalf of a unanimous Court, Chief Justice Warren announced that separate schools were inherently unequal and hence a denial of equal protection of the laws.\(^3\) Having stated this basic principle, the Court wisely called for reargument the following term on the question of appropriate remedies. After reargument, the Court noted the complexities which would arise in “the transition to a system of public education freed of racial discrimination” and warned that the primary burden of dealing with them would fall on the local school authorities.\(^4\) Because the federal district courts were more familiar with local conditions, Warren thought it appropriate to remand the cases so that the courts could consider the adequacy of plans drawn up by the school districts to eliminate segregated schools while retaining jurisdiction in the suits.

The Chief Justice then laid down guidelines which were general enough to allow flexible application by the district courts yet sufficiently vague to cause considerable disagreement about what they actually meant. He pointed out that equity had always been characterized by “a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”\(^5\) The traditional flexibility of equity courts was rather

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2 163 U.S. 537 (1896). In Plessy the Court espoused the separate-but-equal doctrine in sustaining a state statute requiring equal but separate accommodations for white and Negro railway passengers.
3 347 U.S. at 495.
5 Id. at 300. He supported this assertion by citing two equity cases, Alexander
clear, but what did Warren mean by "adjusting and reconciling public and private needs"? The personal interests were declared to be "admission to public schools as soon as practicable on a nondiscriminating basis," but the public interests were left undefined. Warren did suggest that this public interest was related to the elimination of segregated school systems in a "systematic and effective manner," yet he provided few clues as to whether or not the district courts were to balance the public interest of Negroes in general against the private rights of Negro plaintiffs. His earlier statement about reconciling public and private needs suggested that there might be some instances where the public needs outweighed the personal right to be admitted to a nonsegregated school; and that when the group rights of Negroes as a class outweighed the personal rights of individual Negroes, equitable remedies were to focus on group relief. This interpretation made considerable sense because the suits had been brought as class actions on behalf of all Negro children who were similarly situated. Perhaps the Chief Justice did not elaborate further on the question because it seemed clear that every Negro schoolchild had the same interest in being admitted to the public schools on a "nonracial basis." Subsequent events and years of litigation were to show that it was not so simple.

Before the district courts could provide any kind of equitable relief, they had to be certain of the wrongs which had been committed by state and local authorities. In Brown I the Chief Justice spoke of the rights of Negro children not to be separated from other schoolchildren "solely because of their race," and in Brown II he defined the constitutional right of Negro children as "admission to the public schools as soon as practicable on a non-discriminatory basis." By characterizing the right in negative terms, however, the Court suggested that remedies were to be shaped toward the purpose of breaking down the system of segregated schools and that

v. Hillman, 296 U.S. 222 (1935) and Hecht Co. v. Bowles, 321 U.S. 321 (1944), the only other cases to which his opinion referred. In the Alexander case, the Court stated that "courts of equity may suit proceedings and remedies to the circumstanc- es of cases and formulate them appropriately to safeguard, conveniently to ad- judge and promptly to enforce substantial rights of all the parties before them." 296 U.S. at 239. In the Hecht case, the Court pointed out the advantages of equity for the "adjustment and reconciliation between the public interest and private needs." 321 U.S. at 329.

* 349 U.S. at 300.
* 347 U.S. at 393, 394.
the local school authorities were to be given considerable latitude in restructuring their schools on a non-segregated basis. Although this was a sensible approach to the problem, it left the district courts with the difficult job of determining what an adequately desegregated school system would be. Furthermore, the practices and remedies devised by courts of equity in other fields offered little in the way of guidance except the question-begging idea that remedies ought to be both flexible and appropriate. The problem was made even more complicated by the class-action nature of the suits.

**THE CASE FOR THE CLASS SUIT**

Most of the suits to desegregate school districts in the South as well as in the rest of the country have been brought by the Legal Defense Fund of the NAACP, and have uniformly been instituted as class actions on behalf of Negro plaintiffs and other Negro children similarly situated. A strong argument can be made for both the necessity and the appropriateness of the class suit in school desegregation cases. It is appropriate because segregation of schoolchildren solely on account of race is directed at Negroes as a class: the policy of segregation actually creates the class. While the effect of discrimination is felt by each member of the class, the "practice is directed against the group as a unit and against individuals only as their connection with the group invokes the anti-group sanction." The class suit challenges the policy of "system-wide racial discrimination."

The class suit is necessary because while an action by individual Negroes seeking admission to public schools on a nonracial basis might obtain relief for the individuals, it would not necess-

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9 Parker v. University of Delaware, 75 A.2d 225 (Del. Ch. 1950).
11 Potts v. Flax, 313 F.2d 287, 289 (5th Cir. 1963). In a desegregation suit decided a year earlier, the same Court of Appeals had declared that "when a School Board maintains a parish-wide discriminatory policy or system, the discrimination is against Negroes as a class." Bush v. Orleans Parish School Bd., 308 F.2d 491, 499 (5th Cir. 1962). This was in marked contrast to the earlier position taken by the Fourth Circuit Court of Appeals when the court admitted the right to nondiscriminatory admission to the public schools, but declared that Negroes were to be admitted as individuals rather than as a class, and that it was as individuals that their rights under the Constitution were asserted. Carson v. Warlick, 238 F.2d 724, 729 (4th Cir. 1956).
ily result in the elimination of the policy of racial segregation. The successful plaintiffs might win admission to a particular school, but the school district would be under no compulsion to discontinue its practice of discrimination against the other Negro schoolchildren in the district. Without the class suit and the use of injunctive relief against the policy of segregation, each Negro child would have to institute a separate suit to obtain appropriate relief for himself. This would be unnecessarily repetitive, time-consuming, and expensive. For those children unable to bear the expense, there would be a possibility of not obtaining any relief at all.¹²

PROBLEMS WITH THE CLASS SUIT

Although the class action is an appropriate means by which to challenge a school district policy of segregation, serious problems have arisen with regard to the remedies for eliminating this policy. By accepting the suit as a class action, a court will almost invariably focus on the group wrong and an adequate group remedy. The court may perceive, as it did in United States v. Jefferson County Board of Education, that “the ‘personal and present’ right of the plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education.”¹³ While it is likely that this approach taken by the Fifth Circuit in 1966 developed gradually as a result of both the frustration encountered by the district courts in obtaining good-faith compliance with their orders to desegregate and of the realization that the individual-remedy approach of the Fourth Circuit had proven wholly inadequate,¹⁴ it suggested that the rights of Negroes as a class to desegre-

¹² As the court stated in Potts v. Flax, “to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination proscribed in Bush.” 313 F.2d at 289.

¹³ 372 F.2d 866, 868 (5th Cir. 1966). This decision was a major turning point in the approach to desegregation suits in the South. One of the most important points in the opinion was the complete and final rejection of the distinction between desegregation and integration which had been announced by Judge Parker in Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955). In criticizing Parker’s distinction, the Court of Appeals stated that “Briggs [overlooked] the fact that Negroes collectively are harmed when the state by law or custom operates segregated schools or a school system with uncorrected effects of segregation.”

¹⁴ By 1962, in Green v. School Bd. of Roanoke, 304 F.2d 119 (4th Cir. 1962), the Court of Appeals had been forced to concede the failure of this approach and had opened the door to greater use of the class suit.
gated schools might have to be obtained at the expense of individual Negroes. It is certainly debatable whether or not the basic thrust in the Jefferson County case was a departure from Chief Justice Warren's opinion in Brown II or merely an extension of its basic principle into areas where problems had been unforeseen in 1955. In either case, it had become clear that by 1966 the Fifth Circuit had decided to focus its attention not on the claims of individual Negroes but on the group remedies to be provided in each school district. This was an important shift which raised the question of whether or not the courts were free to disregard the interests of individual Negro schoolchildren in the quest for class relief.\footnote{The Court of Appeals justified its rejection of the individual-remedy approach taken by the Fourth Circuit by stating that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." 372 F.2d at 899.}

A second difficulty concerning remedies in these class actions is that the court is forced to act on the assumptions that the interest of all Negroes who compose the class is the same, and further, that the plaintiffs can adequately represent them all.\footnote{Both the old Rule 23 of the Federal Rules of Civil Procedure and the 1966 revision require the plaintiffs in a class suit to represent adequately the absent class members.} Although all of these assumptions are highly questionable,\footnote{See, e.g., Note, Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23, 53 BOSTON UNIV. L. REV. 406-32 (1973); Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L. J. 470 (1976); Brill, The Uses and Abuses of Legal Assistance, 31 PUB. INTEREST 38 (1973); Hegland, Beyond Enthusiasm and Commitment, 13 ARIZ. L. REV. 805 (1971).} federal courts have yet to scrutinize adequate representation in school desegregation suits. By uniformly certifying the school desegregation cases as class actions, the courts have been more or less compelled to receive proposals on the question of relief from counsel for the plaintiffs (which, in fact, has meant proposals drawn up by the NAACP) and counsel for the school board. More recently some of the district courts have turned to education experts\footnote{E.g., Swann v. Charlotte-Mecklenburg School Dist., 402 U.S. 1 (1971).} and occasionally to court-appointed masters,\footnote{E.g., Amos v. Board of Directors of Milwaukee, 408 F. Supp. 765 (E.D. Wis. 1976); Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass. 1975).} but these persons do not claim to speak on behalf of the class members. Although it has been argued that school boards are entitled to speak for and can repre-
sent the interests of all schoolchildren in their districts, it is doubtful that a multi-member elected body can adequately represent the interests of all Negro schoolchildren, especially if a majority or even a substantial minority of the board members is white.

Only the plaintiffs can make a reasonable case for adequately representing the interests of the absent class members. It is important to bear in mind, however, that these plaintiffs will be represented in court by their counsel, one of whom will usually be a member of the NAACP legal staff. Thus the courts are often faced with the situation where plaintiffs, claiming to represent adequately the interests of all other Negroes in the class, are represented in court by counsel whose very name is probably unknown to the plaintiffs and whose legal presentation, including the request for relief, is made without consultation with the clients. Given these realities, it seems unwarranted simply to assume that counsel from the NAACP can adequately represent the interests of the plaintiffs or to assume that these plaintiffs, acting through their counsel, can adequately represent the rest of the class. It may not be going too far to suggest that the real relationship between counsel from the NAACP and the plaintiffs is the reverse of what the relationship between counsel and client ought to be: the plaintiff in a discrimination suit is used by the NAACP to further and promote the aims of the organization.

Federal Rule 23

Before it was substantially rewritten in 1966, rule 23 of the Federal Rules of Civil Procedure specified two prerequisites to bringing a suit as a class action:

1) the persons who constitute the class must be so numerous as to make it impractical to bring them all before the court.
2) named representatives must be such as will fairly insure the adequate representation of them all.

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21 See the very informative discussion of the relationship between NAACP counsel and plaintiffs in Derrick Bell’s article supra note 17. Bell was a staff attorney specializing in school desegregation cases with the NAACP Legal Defense Fund from 1960 to 1966.
22 One could argue that there was no one else who could legally represent Negroes in the South, but this is not persuasive after enforcement of the 1965 Voting Rights Act began to bring large numbers of Negroes to the polls, and it was never a compelling argument for regions outside the South.
In general, for a suit to be allowed as a class action under the old rule 23, the plaintiff had to be a member of the class which he claimed to represent and the interests of the plaintiff had to be compatible with the interests of the absent class members. Only a few cases concerning racial discrimination dealt with the question of the suitability of a class action. In *McDaniel v. Board of Public Instruction*, a federal district court allowed a Negro principal to sue on behalf of Negro teachers in order to obtain a declaratory judgment that the policy of paying Negro teachers less than what was paid to white teachers was a denial of equal protection. The judge disagreed with the defendant’s contention that the principal could not represent the class because he was not a teacher, pointing out that “the principal of the high school and teachers therein and teachers in the elementary schools are all members of the same profession and are required to be possessed of certain qualifications prescribed by the Board.” Four years later, however, an Alabama federal district court held that a class action was inappropriate in a suit to enjoin the registrar of voters in Macon County from refusing to register Negroes solely because of race. The court stated that registration was an individual matter and, therefore, the court could not rule on the question of unconstitutional discrimination against groups or classes. Similarly, in 1952 a federal district court in Missouri refused to allow Negro plaintiffs, who were challenging the operation of separate Negro and white swimming pools, to bring a class suit.

It is an elementary principle in constitutional law that it is the individual who is entitled to the equal protection of the law, and if he is denied a facility or convenience which, under substantially the same circumstances, is furnished to another citizen,

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22 Hansberry v. Lee, 311 U.S. 32, 45 (1940). The Court held that due process of law was denied when the substantial interests of the representatives were “not necessarily or even probably the same as those whom they are deemed to represent.” A year later in *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 91 (7th Cir. 1941), it was held that “the class suit, although binding on all members for whom the suitors may speak, is not binding upon those whose interests are at variance with the position taken by the true members of the class.” See also Moore’s Federal Practice ¶23.35 [2], at 23-601 (2d. ed. 1977).
24 *Id.* at 641. See also *Parker v. Univ. of Delaware*, 75 A.2d 225 (Del. ch. 1950).
26 This reasoning was similar to Judge Parker’s in *Carson v. Warlick*, 238 F.2d 724 (4th Circ. 1956), where the judge refused to allow a class suit to challenge the enforcement of North Carolina’s Pupil Placement Law.

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the individual alone may complain that his constitutional privilege has been invaded, and he has no standing to sue for the deprivation of similar rights of others.\textsuperscript{30}

Because of widespread disenchantment with its usefulness, rule 23 was revised in 1966.\textsuperscript{31} For the two prerequisites to a class action under the old rule, the following four were substituted:

1) the class is so numerous that joinder of all parties is impracticable.
2) there are questions of law or fact common to the class.
3) the claims or defenses of the representative parties are typical of the claims or defenses of the class.
4) the representative parties will fairly and adequately protect the interests of the class.

If all four of these prerequisites are met, the representative party must satisfy one of three additional requirements in section (b). Subsection (b)(2), which was viewed by the Advisory Committee that drafted the rule as especially appropriate for civil rights discrimination suits,\textsuperscript{32} is applicable when

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.\textsuperscript{33}

Section (c) requires the court to determine as soon as practicable whether the action is maintainable as a class suit, but permits the judge to amend this at any time before a decision on the merits. Decisions in (b)(1) and (b)(2) class actions are binding on absent class members, and decisions in (b)(3) actions are binding on those members who have received notice of the suit and who have not requested exclusion. An action may be brought as a class suit with respect to particular issues, and the class may be divided into subclasses. Where appropriate in (b)(1) and (b)(2) class actions,


\textsuperscript{31}For criticism of the old rule, see, e.g., Fed. R. Civ. P., Notes of the Advisory Committee on 1966 Amendments; Donelan, Prerequisites to a Class Action Under New Rule 23, 10 B.C. Ind. and Com. L. Rev. 527 (1969); Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433-70 (1960).

\textsuperscript{32}Fed. R. Civ. P. 23(b)(2), Notes of the Advisory Committee on 1966 Amendments.

\textsuperscript{33}Fed. R. Civ. P. 23(b)(2).
the court may order that some kind of notice be given to class members so that they might have an opportunity to inform the court whether they consider the representation to be "fair and adequate," or to intervene, or "otherwise come into the action."

It is evident from the Advisory Committee Notes that one of the main purposes of subsection (b)(2) was to remove any remaining doubts about the appropriateness of class actions in racial discrimination suits. Subsection (c)(3) eliminated doubts about the binding effects of class action judgments. Although there are considerable practical advantages to binding absent class members, the drafters of the revised rule recognized that this was a serious limitation on the traditional due process requirement of notice and a hearing. To minimize the dangers inherent in holding absent class members bound by the decision, the drafters provided carefully-drawn safeguards designed to protect their interests. Notwithstanding the 1966 revisions, however, the federal district courts continued routinely to certify school desegregation cases as class suits without giving serious consideration to the requirements of amended rule 23. This lack of judicial interpretation of rule 23 in school desegregation suits makes it difficult to assess the impact that close scrutiny of the rule might have had in these cases; the interpretation given to the rule in other kinds of class suits, however, may help to provide some guidelines.

Subsections (a)(3) and (a)(4) of amended rule 23 are the most important prerequisites. They were intended to insure that the representative parties were the appropriate ones to speak in court on behalf of the absent class members. A useful starting point for examining these requirements is the obvious, but nonetheless important, prerequisite that the class be reasonably identifiable. It may be a matter of degree whether or not the class has been drawn with "some precision," but it is not asking too much for the representative party to be able to define who "is in or out of the

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33 Even Justice Douglas had to admit that "many federal district judges have been careless in their dealings with class actions and have failed to comply carefully with the technical requirements of Rule 23." Board of School Comm'rs v. Jacobs, 420 U.S. 128, 133 (1976) (dissenting opinion).

class" with some specificity. In the view of one commentator, this requirement is closely linked to the (a)(3) prerequisite because "precision in the definition of a class vis à vis the representative's status is the very essence of the concept of typicality." If the representative is unable to define clearly the class which he purports to represent, it seems reasonably certain that his claims will not be typical.

Although some courts have refused to allow class actions when they found the alleged class to be too "amorphous" or overly broad, the Fifth Circuit Court of Appeals in an important 1969 case overturned a district court decision because the class had been defined too narrowly. The suit had been brought under Title VII of the 1964 Civil Rights Act by a Negro who claimed to have been fired from his job because of his race. He attempted to bring a class action on behalf of all Negroes seeking employment with the defendant company without discrimination on account of race or color and sought to have the company enjoined from discriminatory practices and compelled to award back pay to those persons who had been discharged because of their race. The district court held that the plaintiff could represent only other Negroes who had been discharged. Speaking on behalf of the court of appeals, Judge Cabot overruled this definition of the class. "It is clear . . .," he stated, "that . . . appellant's suit is an 'across the board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination."

Believing that there was a real similarity between this suit and school desegregation class suits, Cabot then quoted from the 1963 decision of the court of appeals in Potts v. Flax, where the court had held a class suit to be appropriate because the action was "directed at the system-wide policy of racial discrimination [and] sought obliteration of that policy of system-wide racial discrimination." Cabot conceded that there were different factual questions

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39 See Note, Class Actions, supra note 17, at 413.
42 Johnson v. Georgia Highway Express Inc., 417 F.2d 1122 (5th Cir. 1969).
43 As in the school desegregation cases, this suit was brought by the NAACP.
44 417 F.2d at 1124.
45 313 F.2d 284 (5th Cir. 1963).
46 313 F.2d at 289.
with regard to different employees, but he pointed out that the threat of a racially discriminatory policy hung over the entire racial class. The district court, upon remand, was to determine whether the plaintiff, as a discharged employee, could adequately represent the interests of Negroes presently employed by the company. To prevent the suit from becoming unmanageable, Cabot suggested that the district court might resort to the use of sub-classes as provided in rule 23 (c)(4). He also noted that the district court could require appropriate notice to the members of the class even though notice was not specifically required in (b)(2) class suits.

Judge Godbold concurred in the reversal of the district court, but he expressed some misgivings about the implications of the majority's broadly-worded opinion. He agreed that "overly-technical limitations of classes by the district courts [would] drain the life out of Title VII, as [would] unduly narrow scope of relief once discriminatory acts are found," but he warned that "without reasonable specificity the court [could not] define the class, [could not] determine whether the representation is adequate, and the employer [would] not know how to defend." Godbold also suggested that because the plaintiff had been discharged by the company he might be the last person whom currently employed Negroes would want to represent their interests. Since notice to absent class members was permitted but not required in (b)(2) class suits, the district court might determine the question of adequate representation in the absence of the overwhelming majority of those persons affected by the decision.

Because the court of appeals held the class to have been too narrowly defined by the district court without specifying just how broad a class the plaintiff was entitled to represent, it is difficult

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" 417 F.2d at 1126.

" It was for this reason that a district court in California had refused to allow a discharged employee to represent a class composed of current employees when the issue involved present working conditions. Burney v. North American Rockwell Corp., 302 F. Supp 86 (N.D. Cal. 1969). In 1970, however, the Fifth Circuit Court of Appeals allowed job applicants who had been refused employment to represent a class composed not only of applicants but of current employees working under discriminatory policies or conditions. Carr v. Connoco Plastics Inc., 423 F.2d 57 (5th Cir. 1970). For a discussion of this suit and other class actions under Title VII of the Civil Rights Act of 1964, see Comment, Class Actions and Title VII of the Civil Rights Act of 1964: The Proper Representative and the Class Remedy, 47 Tul. L. Rev. 1005-16 (1973)."
to gauge the real import of the decision. Clearly the majority believed that a discharged Negro employee could represent at least some and perhaps all of the currently employed Negroes in addition to all Negroes who had been similarly discharged. How could this be reconciled with the requirement that the representative in a class suit be a member of the class? Although both the plaintiff and currently employed Negroes were members of the same race, plaintiff would obviously not be a member of a class defined as Negro employees. The class which he wanted to represent—all Negroes seeking equal employment opportunities without racial discrimination—might include all present and former Negro employees as well as every Negro who wanted to work for the company. To avoid these problems the district court had limited the class to the one of which the plaintiff was most definitely a member—discharged Negro employees. This was sensible since his claims would be typical of the claims of every other discharged Negro employee. He might also be able to represent them adequately because their interests, though perhaps not identical to his, were at least not clearly incompatible with it. This would not be the case were he permitted to represent currently employed Negroes who had an interest in their own jobs, in promotion and employment practices, and also in the well-being of the company. The discharged employee who did not seek reinstatement would have no interest in the prosperity of the company and might seek damages or back pay which could adversely affect the interests of current employees. Even were he to seek reinstatement, his interest might be incompatible with the interests of current Negro employees.

For similar reasons a federal district court in Louisiana had refused to allow fourteen female employees of two different companies to institute a class suit on behalf of all women employed in the state.49 The suit challenged the constitutionality of Louisiana laws which limited the maximum daily and weekly hours that women could work. The district court stated that the class was overly broad and that not all female employees would want these work laws removed. If the laws were struck down as unconstitutional, the women might then be obligated to work longer hours or risk being discharged. Because of these differing interests, the court held that the plaintiffs could not fairly and adequately protect the interests of all who were members of the class.50

50 See also Carroll v. American Federation of Musicians, 372 F.2d 155, 162 (2d
That same year, a three-judge district court in Georgia refused to permit inmates, former inmates, and prospective inmates to bring a class suit challenging the continued existence of public work camps in Georgia.\(^{51}\) The district court doubted that all inmates in the work camps would prefer being transferred to the state penitentiary. They thought it probable that many of them preferred "the comparative freedom, the proximity to their families, and the general association with less-hardened criminals in the work camps."\(^{52}\) The plaintiffs were also not allowed to institute a class action to demand the hiring of more Negro employees at state correctional institutions. Since the inmates were not prospective employees, they were not members of the class on whose behalf they desired to bring the suit, and the court held that under rule 23(a) the plaintiffs could not represent a class of which they were not a part.\(^{53}\)

These two cases are significant because they suggest that the court should focus on the remedy sought in order to determine whether or not the representative will "fairly and adequately protect the interests of the class" as required by subsection (a)(4).\(^{54}\) Although the representative may be able to define the class with enough precision to enable the court to rule on the typicality of the claims, there is still the possibility that the interests of the class members are not compatible and that the representative will not be able adequately to protect these different interests. In numerous class actions under subsection (b)(3) where the relief sought was damages, however, the courts have failed to examine the potential conflict over the desirability of the remedy sought. Often this seemed to be the result of their viewing subsection (b)(3) as facilitating the prosecution of small claims by large numbers of persons.


\(^{52}\) Id. at 1012.

\(^{53}\) Id. at 1010. The court did allow plaintiffs to bring a class action to challenge the segregated conditions in Georgia correctional institutions which were ruled unconstitutional under the Supreme Court holding in Lee v. Washington, 390 U.S. 333 (1968).

\(^{54}\) For a good discussion of why it is important to focus on the remedy, see Note, Class Actions, supra note 17, at 418-27.
An important example of this is Eisen v. Carlisle & Jacquelin. The suit was brought by Eisen on behalf of himself and all other purchasers or sellers of odd lots on the New York Stock Exchange against two brokerage firms alleged to have conspired to monop- lize odd-lot trading and to have fixed the odd-lot differential at an excessive amount in violation of the Sherman Antitrust Act. The district court held that the suit could not be brought as a class action because the plaintiff had not demonstrated that he could adequately protect the interests of the class he sought to represent, the notice required by subsection (c)(2) could not be given, and the questions common to the class did not predominate over questions affecting individual members.

In overruling this decision, the Second Circuit Court of Appeals emphasized that class actions served an important function by “providing small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.” The majority conceded that amended rule 23 required that courts “carefully scrutinize the adequacy of representation in all class actions,” but held that the lower court was unwarranted in assuming that a single plaintiff with only a miniscule interest in odd-lot transactions could not adequately represent a class of at least several hundred thousand persons. The court of appeals pointed out that adequate representation did require a qualified and experienced attorney capable of handling the proposed suit. It also required that there be no collusion involved and that the interests of the representative not be antagonistic to those of the absent class members. It was possible, however, for a relatively few claimants to represent adequately a large number of persons in a class suit, especially since the other class members might later join in the suit once they were assured of a forum.

This solicitous attitude toward small claimants notwithstanding, the court of appeals held that due process of law required that notice be given in all class suits and that subsection (c)(2) required only a particular kind of notice. The question as to what kind of notice would be adequate was left for the district court to decide.

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53 391 F.2d 555 (2d Cir. 1968).
55 391 F.2d 560.
56 Id. at 562.
57 Other courts have held that notice is not required in (b)(2) class actions. See, e.g., Vaughns v. Board of Educ. of Prince George’s County, 355 F. Supp. 1034 (D. Md. 1972); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968).
but the court of appeals seriously doubted that some obscure announcement in a newspaper would suffice. If the district court found that a considerable number of the class members could be identified, but that financial considerations prevented the plaintiff from sending personal notice to them, it might then be necessary to dismiss the class suit.

Although the court of appeals declined to rule on whether or not Eisen could adequately represent the absent class members, it said nothing to suggest that disagreement among class members over the appropriate remedy was a relevant factor in considering the adequacy of representation. By stating that "differences among the class members bear only on the computation of the damages," the majority seemed to assume that none of the class members would object to a potential damage award of twenty to sixty million dollars, even though this might lead to the bankruptcy of the two brokerage firms. It is likely, however, that more than a few members of the class preferred the continued existence of the firms to the minimal damage award to which they would probably be entitled. If there was a real likelihood that a substantial number of class members would have chosen to have taken no legal action rather than the remedy proposed by the plaintiff, it is doubtful that the claims were typical or that the representative party could adequately protect the interests of the absent class members. Such a determination could only be made if the trial court were to take into account, when ruling on the appropriateness of a class suit under subsections (a)(3) and (4)(4), the remedy proposed by the plaintiff.

**Rule 23 and School Desegregation Cases**

The decisions mentioned in the previous section which refused to permit the institution of a class action are relevant to the school desegregation cases in two respects. First, they suggest that a considerable burden should be placed upon the representative plaintiff to show that his complaint about unconstitutional discrimina-

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40 Recent decisions have taken this factor into account in determining the adequacy of representation: E.g., Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972). In 1973 the Fifth Circuit Court of Appeals held that a plaintiff who had obtained retroactive relief for himself but had failed to appeal the denial of retroactive relief to the rest of the class did not adequately represent the interests of the absent class members. Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

41 391 F.2d at 566.
tion is essentially the same as that of all the other members of the class. Second, they imply that when members of the class might disagree about appropriate remedies, a strong presumption is established that the representative will not be able to protect adequately the interests of the entire class. Both of these inferences are especially relevant to school desegregation cases in nonsouthern school districts where the school authorities had never separated children solely on account of race. In these cases the complaint has usually been that more subtle actions (or inactions) on the part of the school board over a period of years had resulted in the creation of numerous one-race schools. A good example of this is the suit which was brought to desegregate the Detroit public schools.

The action was instituted in 1970 by the Detroit branch of the NAACP and by individual parents on behalf of a class which the district court later defined as “all school children of the City of Detroit and all Detroit resident parents who have children of school age.”42 Defendants were the Detroit Board of Education and its members, the former Superintendent of Schools, the Governor, Attorney General, State Board of Education, and the State Superintendent of Public Instruction. The plaintiffs alleged that the Detroit public school system had been and was still segregated on the basis of race as a result of official policies and actions of the defendants and their predecessors. Unlike the desegregation suits in the south which had challenged the policy of dual school systems based solely on racial separation, the Detroit plaintiffs tried to show that discrete yet related actions and evasions over more than a decade had led to racially segregated schools. Some of the more important allegations against the board of education included the creation and maintenance of optional attendance zones for neighborhoods undergoing racial transition; the drawing of school attendance zones along north-south boundary lines, which tended to minimize racial mixing; the failure to bus Negro children to predominately white schools; the busing of Negro children away from white schools to more distant predominately Negro schools; and the building of small schools in predominately Negro residential areas to “contain” the Negro population. Among the more serious allegations against the state of Michigan were the failure

42 Bradley v. Milliken, 338 F. Supp. 582, 584 (E.D. Mich. 1971). The standing of the NAACP was not contested by the defendants and the district court issued no ruling on the matter.
to provide funds for the transportation of pupils in Detroit while providing the full range of state-supported transportation in the neighboring, mostly white, suburban school districts, and the passage of Act 48 by the legislature in 1970 which prevented the implementation of a voluntary plan for integration that had been drawn up by the Detroit school board.

The crux of the plaintiffs' argument was that these actions and failures to act on the part of local and state authorities over a period of years had resulted in the existence of large numbers of Detroit schools which were predominately either Negro or white. Although the racial composition varied considerably from school to school and numerous schools were neither overwhelmingly Negro or white, the district court made no attempt to inquire whether the claims of the plaintiffs were typical of those of absent class members. Since the plaintiffs had asserted that they represented all children similarly situated, the requirement of subsection (a)(3) was crucial in determining whether the suit was appropriate as a class action. Instead of assuming that the plaintiffs' claims were typical, the judge could have examined whether any of the alleged actions or inactions by the school board had affected all Detroit Negro schoolchildren in a similar manner. For example, the use of optional attendance zones with a right of transfer might have affected all Negro children within those zones but not those outside the zones. The same thing could be said with regard to the allegation that certain Negro children had been bused away from closer white schools to predominately Negro schools. The claim about building small elementary schools in Negro residential areas since 1959 related only to a handful of schools when compared to the total number of schools in the city. The charge that the school board had never bused white children to predominately Negro schools was more difficult to handle because it involved acts of omission. Would this allegation be typical of the claims of all Negro children who went to schools where the racial composition was more than 50% Negro? or 75%? or 95%? If the similarity were not so much the racial percentage but rather the uniform policy of not busing whites to predominately Negro schools, could the court determine the typicality of the claim without having to assume that all Negroes in these schools objected to this omission?\textsuperscript{63}

\textsuperscript{63} A similar difficulty would be encountered with the allegation about failure to provide funds for public transportation.
The problem of determining the typicality of the claims was further complicated by the time factor. As the district court pointed out, Detroit had undergone major population shifts since 1950 with the Negro population increasing from 16% to 44% and the Negro school population expanding to 64%. Many areas which were white in 1950 had become predominately or completely Negro by 1970. Thus almost all of the allegations pertained to zones which had undergone substantial change in their racial composition. Given this dramatic change, was it possible to isolate any claim that would be typical over such a lengthy period?

If the district court had made this careful inquiry about the claims of the plaintiffs and had found none of them typical of the broad class (all Negro schoolchildren in Detroit), it might have divided the class into subclasses under subsection (c)(4) depending upon the particular allegation. Such a course of action, however, would probably have created serious problems concerning the manageability of the suit and would have been vigorously resisted by both the plaintiffs and the school board. By dividing the class into subclasses, the district court might have framed the issues in a way that would have permitted only limited remedies covering specific attendance zones. This would have run counter to the desire of the NAACP for a Detroit-wide remedy at the very least and perhaps a metropolitan-area remedy which included the surrounding suburban districts. The Detroit school board could have insisted on dividing into subclasses and narrowing the issues, but it must be remembered that this board had already attempted voluntarily to implement a city-wide integration plan of its own which was blocked in 1970 by the state legislature. Both the NAACP and the school board wanted the court to define the class as broadly as possible so that it would have to provide a remedy encompassing the entire school district. One could argue that the action had many of the characteristics of a collusive suit. The only

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44 Another example of this problem is the Atlanta school desegregation case which was instituted in 1958. After years of litigation, the school district had changed from being substantially white in 1958 to being 85% Negro in 1975. With a sense of resignation the Fifth Circuit Court of Appeals recognized the magnitude of this change when it accepted a compromise plan which the district court had found to be "constitutionally realistic and viable for the Atlanta school district." Calhoun v. Cook, 522 F.2d 717, 719 (5th Cir. 1975). See the article written by Dr. Benjamin E. Mays, President of the Atlanta School Board, Comment: Atlanta—Living With Brown Twenty Years Later, 3 Black L. J. 184 (1974).

45 The Supreme Court overturned the district court's later attempt to provide a metropolitan remedy in Milliken v. Bradley, 418 U.S. 717 (1974).
persons who might have had an interest in narrowing the class, dividing into subclasses, or disputing the remedy proposed by both parties were the absent class members—parents of Negro schoolchildren who did not view the matter as had the counsel for the NAACP.

**INTERVENTION**

In addition to substantial changes in rule 23 governing class actions, amendments to rule 24 concerning intervention were also made in 1966. Subsection (a)(2) allows intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."\(^\text{67}\)

The Supreme Court gave a very broad interpretation of this right to intervene in 1967,\(^\text{68}\) but the lower federal courts have been somewhat reluctant to allow intervention in school desegregation cases. District courts have permitted intervention in certain instances where the ethnic identity of the applicants differed from that of the original Negro plaintiffs,\(^\text{69}\) but they have not yet admitted that parents of Negro schoolchildren have interests that may be just as distinct from those of the named plaintiffs.\(^\text{70}\) The Supreme Court seemed to recognize these distinct interests in a different context when, in 1972, it upheld the right of a union member to intervene in a suit brought by the Secretary of Labor to overturn a union election.\(^\text{71}\) Speaking on behalf of the Court, Justice Marshall pointed out that the Secretary of Labor might not be able to

\(^{64}\) *Fed. R. Civ. P. 24.*  
\(^{65}\) *Fed. R. Civ. P. 24(a)(2).*  
\(^{67}\) *E.g., Johnson v. San Francisco Unified School Dist.,* 500 F.2d 349 (9th Cir. 1974) permitted intervention by parents of Chinese schoolchildren.  
\(^{68}\) Negro students were permitted to intervene in a suit to desegregate the public schools of Indianapolis, but the original action had been brought by the United States. *United States v. Board of School Comm'rs of Indianapolis,* 466 F.2d 573 (7th Cir. 1972). The Fifth Circuit Court of Appeals did permit intervention by CORE and the NAACP in the Atlanta school desegregation case, *Calhoun v. Cook,* 487 F.2d 680 (5th Cir. 1973), but this was under Rule 23(e) concerning the settlement of class suits. Bell suggests that the court may not have been as willing to allow intervention in ongoing litigation. Bell, *supra,* note 17 at 510. See his discussion of intervention on pp. 503-11.  
\(^{69}\) *Trbovitch v. United Mine Workers,* 404 U.S. 528 (1972).
represent adequately the union members because the applicable statute gave him two roles which sometimes conflicted. Marshall saw no reason why the intervenor could not assist the court in fashioning a suitable remedy.\textsuperscript{72}

A good example of the need for both intervention and a more appropriate way of handling class action suits in desegregation cases is \textit{Norwalk CORE v. Norwalk Board of Education.}\textsuperscript{73} The city of Norwalk, Connecticut, had voluntarily chosen to bus inner-city children to outlying white schools and to close several inner-city schools. CORE brought a class suit on behalf of Negro and Puerto Rican elementary school students in the city "who [did] not attend a neighborhood school and for whom the privilege and right of a neighborhood school would exist but for the action of defendant in denying them a neighborhood school."\textsuperscript{74} The named plaintiffs had attended the Ely School until it was closed by the board of education. They sought relief which would order the board to reopen the school and to bus white students into the school. Another group attempted to intervene in the suit on behalf of Negro and Puerto Rican children "whose rights to attend racially integrated schools or to have their children attend such schools [would] be deprived by the policy of racial segregation demanded by the plaintiffs in their complaint in this action."\textsuperscript{75}

The district court denied the motion to intervene on the grounds that the proposed intervenors had no interest which was threatened by the suit. According to the court, the interest of the applicants was the right to attend integrated schools. Since integration would be achieved no matter which party prevailed, the court found that the interests of the applicants would not be impaired by disposition of the action. After the motion for intervention was denied, the court ruled that the plaintiffs could maintain their suit as a class action, but that they would have to bear the initial costs of sending notice to all members of the class. The notice ordered by the court described the nature of the suit, ex-

\textsuperscript{72} Id. at 537. Marshall also referred to \textit{Moore's Federal Practice} ¶ 24.09-1[4] (1969) which states that the requirement of Rule 24(a)(2) is satisfied if the applicant for intervention is able to show that the representation of his interest may be inadequate. \textit{Id.} at 538.

\textsuperscript{73} 298 F. Supp. 208 (D. Conn. 1968).

\textsuperscript{74} \textit{Norwalk CORE v. Norwalk Bd. of Educ.}, 298 F. Supp. 210, 211 (D. Conn. 1968).

\textsuperscript{75} 298 F. Supp. at 209.
explained the rulings which had been made, and announced that hearings would be held on the question of whether the suit should continue as a class action. Persons notified who believed that their interests were different from those of other members of the class, or who thought that their interests were inadequately represented by counsel for the plaintiffs, were required to attend the hearings and offer proof to substantiate their claims; otherwise the court would assume that nonresponding class members did not object to being represented by the named plaintiffs. The court eventually permitted the class action but held that the integration plan of the board did not deny plaintiffs equal protection of the laws.

The handling of this suit was in marked contrast to that of the Detroit case and almost every other school desegregation class action. Although the suit did not challenge segregated schools but rather the method by which the board of education sought to integrate the schools surrounding the inner-city minority schools, it posed many of the same problems for the district court. In this case the district court judge, having taken evidence on whether the prerequisites of rule 23 had been met, carefully and narrowly defined the class which the plaintiffs would be allowed to represent. One could question his ruling on the motion to intervene since the interest of the applicants was not simply the establishment of integrated schools but involved the right of minority children to attend superior white schools. By requiring that notice be sent to all class members and that hearings be held on the issue of the adequacy of representation, the judge permitted the applicants to intervene, in effect, through the back door. The court sought to meet the basic prerequisites of due process and to insure as much as possible that the absent class members actually wanted to be represented by the plaintiffs and their counsel. By itself, such an approach will not solve the problem of determining adequate remedies for segregated schools, but at least it minimizes the danger that self-appointed spokesmen will disregard the interests of those whom they claim to represent.

76 See supra, note 24.