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ADJUDICATING THE RIGHTS OF THE PLAINTIFF CLASS: CURRENT PROCEDURAL PROBLEMS

ALLEN R. KAMP*

I. INTRODUCTION

This paper discusses the procedural problems raised by the use of the class action as a means of delineating the social and political rights of a class. The desirability of courts acting like administrative agencies or legislatures is not discussed. Authors such as Chayes[1] and Fiss[2] have discussed the legitimacy and justification of the use of adjudication to obtain institutional change rather than in its traditional role of deciding controversies between private persons. This article takes as a fact that courts are now acting as political and administrative institutions and that the procedural mechanism for effectuating those roles, the class action, has been validated by the Supreme Court. Whatever the Court's view of the substantive law,[3] it has approved the class procedure in such recent cases as *Deposit Guaranty National Bank v. Roper*[4] and *Califano v. Yamasaki.*[5]

This article focuses on how the class action affects the members of the class. In adjudicating a class action, a court does more than grant the class its rights against the opposing party; it also defines and limits the rights of the class members—they get the rights granted in the decree and no more. A class member cannot sue for further relief because he is bound by res judicata.[6] This procedural limitation

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1. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as *Chayes*].

2. Fiss, *The Supreme Court, 1978 Term/Forward*: *The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter cited as *Fiss*].

3. *See id.*, for a description of the Burger Court's reaction to "structural" litigation.

4. 445 U.S. 326 (1980).

5. 442 U.S. 682 (1979).

6. *See, e.g.*, Bronson v. Bd. of Education, 525 F.2d 344 (6th Cir. 1975), *Cert. denied*, 425 U.S. 934 (1976); Wren v. Smith, 410 F.2d 390 (5th Cir. 1962). *See*

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of the members' rights enables the class action to operate as a political forum that can weigh the various social and political rights of

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generally Annot., 48 A.L.R. Fed. 675 (1980). In securities litigation such as Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979), for example, the Court found in a lawsuit between A and B that B violated the securities law. A class of persons now exists, the class harmed by B's violation, who may sue B. B may be estopped from relitigating the finding of a violation of the law because of collateral estoppel.

The distinction between res judicata, collateral estoppel, stare decisis, and the law of the case, which are all types of preclusion by litigation, must be kept clear:

> *Stare decisis*, let that which has been decided stand, is a principle of the broadest application. It is concerned with rules of law, and in giving consistency and permanence to our jurisprudence. Thus, if a court adjudges, in litigation between *A* and *B* that the applicable rule of law is "*X-Y*" this is the *law of the* case for the *A-B* litigation, but the court also establishes "*X-Y*" as the rule of law to be applied by it, and all courts owing obedience to it, in all subsequent litigation between any and all parties where such a rule is relevant and has applicability. . . .
>
> *Res judicata*, on the other hand, is a salutary doctrine of repose that gives conclusive finality to a final, valid judgment; and if the judgment is on the merits, precludes further litigation of the *same* cause of action between the same parties or those in such legal relationship to them that they are said to be in privity and bound by the judgment. The *same* cause of action is emphasized, because a judgment on the merits as to cause of action (1) is not res judicata, using this term in its technical sense, as to cause of action (2). But by virtue of collateral estoppel, subsequently elaborated, relevant and material matters that were adjudged are binding upon the parties and their privies in subsequent litigation, although the parties are not precluded from litigating issues not adjudged, even though the issues could have been.
>
> Thus, if the *A-B* litigation goes to a final, valid judgment on the merits for *B* as to cause of action (1), the matter that was litigated or should have been litigated is settled between them or those in privity with them, even though in subsequent litigation between *A* and *B*, or their privies, the court hearing the subsequent case is convinced that the former judgment is erroneous because (1) of error in finding the facts (a factual error), or (2) of error in applying principles of law (an error of law), or (3) of errors of both fact and law. Stated differently, as a general proposition if the principle of res judicata applies in the subsequent litigation, the court in that litigation may not and will not go into the merits underlying the *A-B* judgment. Res judicata normally makes a *judgment* conclusive under the conditions stated.
>
> The principle of collateral estoppel (or, as it is sometimes termed estoppel by record, by findings, by verdict or by judgment) is a facet of judicial finality and related to res judicata, but it is broader in some aspects yet narrower in others. It will be recalled that res judicata makes a final valid judgment on the merits, between the parties and their privies, conclusive as to all matters that should have been litigated in reference to the *same* cause of action and does not operate as a merger or bar in a suit on a different cause of action. But matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended are conclusive upon the parties and their privies; and they are collaterally estopped as to such matters in other litigation involving a different cause of action. To this extent the doctrine of collateral estoppel has a broader reach then technical res judicata. On the other hand it has a nar-

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the parties and strike a balance between limiting and granting the class rights.

The importance of this limiting function of the class action has assumed greater importance since the rejection of mutuality of estoppel in *Parklane Hosiery Co., Inc. v. Shore*,[7] which has changed the role of the class action into one that protects the defendant by limiting further litigation by class members. *Parklane* has made every lawsuit into a potential "beneficial" class action in which there is now a class of people who may take advantage of the prior judgment against the opposing party. Only the class is benefited by a prior judgment against the defendant. If the opposing party wins, members of that class suing the opposing party in a subsequent action would not be estopped by the prior litigation because they did not have their day in court.[8]

Because ordinary litigation now holds the prospect of binding the losing party without binding members of a "beneficiary class", the class action takes on a new role: protection of the defendant by definitively adjudicating the rights of present and future plaintiffs. The certification of a class now means that the class members risk losing something if the decree goes against them; prior to certification, they could only win, being a member of a "beneficial class" under *Parklane*. The new role of class certification means that the defendant has real reasons for preferring the class procedure.

The recent Supreme Court class action cases and *Parklane* require reassessment of the class device by plaintiffs and defendants facing the prospect of class action litigation. This article will explore the contemporary procedural mode of the class action that allows the courts to function as allocators of political rights and the procedural problems inherent in such an allocation.

II. THE NEW PROCEDURAL MILIEU

A. *Deposit Guaranty and U.S. Parole Commission*

The modern class action gives the courts the tools necessary to act as political agencies in rendering binding decrees affecting the social and political rights of all persons encompassed by the litigation

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> rower reach in that the prior judgment does not conclude the parties and their privies as to matters not adjudged, although the matter(s) could have been.

1B MOORE'S, FEDERAL PRACTICE ¶0.401, at 11-13, 17-18 (2d ed. 1980).

7. 439 U.S. 322 (1979).

8. Professor George calls this phenomenon "bootstrap estoppel." George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 659 (1980) [hereinafter cited as *George*].

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by certain governmental policies.[9] Professor Chayes discussed how the class suit reflects a changing understanding of the role of litigation in modern society:

> The class suit is a reflection of a growing awareness that a host of important public and private interactions—perhaps the most important in defining the conditions and opportunities of life for most people—are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals.[10]

Professor Yeazell points out that class actions have historically served as political devices designed to solve the problems of social and economic groups. He takes this analysis one step further, finding that courts in class suits act as political bodies to deal with groups whose problems are not solved by traditional political processes:

> For the past three centuries group litigation has served as a temporary litigative stopgap, enabling courts to deal with the momentarily pressing problems of groups whose claims seemed legitimate and whose position in the social and economic structure made a solution seem important. In our time racial minorities and women have occupied such a position, and many of their most pressing claims against public and private institutions have found expression in class actions brought under Rule 23(b)(2).[11]

Two Supreme Court cases decided at the end of the 1979-80 term discussed the function of the modern class action in terms that echo Professors Chayes and Yeazell. *Deposit Guaranty National Bank v. Roper*[12] and *U.S. Parole Commission v. Geraghty*[13] permitted appeals from denials of class certification despite objections based on mootness and lack of standing. In *Deposit Guaranty*, the Court ruled that the named plaintiffs could appeal the denial of class certification even though they had been granted judgment for the amounts claimed in their individual capacities.[14] In *U.S. Parole Commission*, the Court found that the named plaintiff had standing to appeal the denial of class certification even though he had been released from prison.[15] Both cases discussed the modern function of the class action. In *U.S.*

9. *See* Advisory Committee Notes, Rule 23, *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 100-02 (1966).

10. *Chayes, supra* note 1, at 1291.

11. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 U.C.L.A. L. REV. 1067, 1119 (1980) [hereinafter cited as *Yeazell*].

12. 445 U.S. 326 (1980).

13. 445 U.S. 388 (1980).

14. 445 U.S. at 333.

15. 445 U.S. at 404. *See also* Note, *The Mootness Doctrine in Class Actions: U.S. Parole Com'n v. Geraghty*, 34 SOUTHWESTERN L.J. 1023 (1980).

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Parole Commission, the Court pointed out that the benefits of the class mode included the protection of the defendant from inconsistent obligations and the realization of efficiency in litigation. The Court also noted that the named representative in a class action acted more as a public representative than as an enforcer of his own rights.[16]

In *Deposit Guaranty*, the Court determined that the function of the class action was to serve as a response to the failure of governmental regulation and was necessary to provide relief where relief through the traditional lawsuit would be economically unfeasible.[17]

> 16. The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, e.g., Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C. app., pp. 427-429; Note, Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318, 1321-1323, 1329-1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are by products of the class-action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement.

445 U.S. at 402-03 (footnotes omitted).

> 17. The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.
>
> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses doe not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

Id. at 338-39 (footnotes omitted).

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The Court's attitude was especially significant in that it recognized and approved the modern class procedure. After the cases of *Eisen v. Carlisle & Jacquelin*,[18] which required individual notice to members of the class in Rule 23(b)(3) actions, and *Zahn v. International Paper Co.*,[19] which required each member of the class to satisfy the jurisdictional amount in controversy requirement, critical commentary suggested that the Court was displaying hostility towards class actions. Professor Chayes saw the Burger Court as "embarked on some such program for the restoration of the traditional forms of adjudication."[20] With the decisions in *Deposit Guaranty* and *Yamasaki*, the Court reversed its direction and recognized the class action as a natural response to social conditions. Language in *Deposit Guaranty* that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government"[21] can be read as the Court's conservative answer to a perceived failure of New Deal regulation.

B. *The Approval of the Procedural Mechanism of the Class Action—Califano v. Yamasaki*

A successful class action must surmount at least two procedural barriers: it must overcome the requirements of individual notice, personal jurisdiction, service, and the like,[22] and it must be able to render a binding judgment on all members of the class.[23]

Yamasaki goes a long way towards freeing the class action, at least in its (b)(1) and (2) forms, from burdensome procedural requirements, thus enabling the action to proceed to a binding judgment. The case arose out of a dispute concerning recoupments under certain sections of the Social Security Act. Section 204(a)(1) of the Act[24] authorizes recoupment of overpayments made to Social Security recipients. Section 204(b) limits this recoupment by providing that there shall be no adjustment "if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[25] The Secretary of Health and Human Services

18. 417 U.S. 156 (1974).
19. 414 U.S. 291 (1973).
20. *Chayes, supra* note 1, at 1304.
21. Deposit Guar. Nt'l Bank of Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980).
22. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (an example of a class action that was unable to proceed because individual notice to each class member was required).
23. *See, e.g.*, Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921).
24. 42 U.S.C. §404(a)(1) (1968).
25. 42 U.S.C. §404(b) (1968).

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usually made an *ex parte* determination of overpayment, notified the recipient, and then shifted the burden to the recipient to (1) ask for reconsideration or (2) ask the Secretary to forgive the debt and waive recovery pursuant to Section 204(b). The recipient's request would then be sent to a regional claims office. If the regional office denied the request, the recoupment process began. A hearing was held only if the recipient continued to object after denial of the request by the regional office.[26]

These procedures gave rise to several law suits. In *Elliott v. Weinberger*[27] certain Hawaiian beneficiaries were notified of the Secretary's determination to recoup benefits. They filed suit in Hawaii district court, which found the recoupment procedures to be constitutionally defective and ordered injunctive relief for the class.[28]

In an unreported lower court case known as *Buffington*,[29] the recipients were charged for previous overpayments. They brought suit in the District Court for the Western District of Washington, which certified a nationwide class composed of "all individuals eligible for [old age and survivor's benefits] whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for hearing."[30] The district court excluded residents of Hawaii and the Eastern District of Pennsylvania, where suits raising similar issues had been brought, and all other persons who had participated as plaintiffs or members of a plaintiff class in litigation against the Secretary on similar issues if a decision on the merits had previously been rendered. The Washington district court then granted summary relief for the class.[31]

On appeal, the Ninth Circuit consolidated the two actions. It affirmed the holdings that the procedures were unconstitutional and rejected the Secretary's contention that a nationwide class should not have been certified.[32]

The Supreme Court remanded the case to the court of appeals for further consideration in light of *Matthews v. Eldridge*,[33] which

26. *See* Califano v. Yamasaki, 442 U.S. 682, 687 (1979).

27. 371 F. Supp. 960 (D. Haw. 1974). Nancy Yamasaki was substituted for Evelyn Elliott, 441 U.S. 959 (1979).

28. *See* Elliott v. Weinberger, 371 F. Supp. 960 (D. Haw. 1974).

29. *See* Califano v. Yamasaki, 442 U.S. 682, 690 (1979).

30. *Id.* at 689.

31. *Id.*

32.
> It found nothing in Rule 23 indicating that such a class was improper, and it believed as a practical matter that, because respondents did not seek damages, no manageability problems were present. It indicated that to require recipients to sue individually would result in an unnecessary duplication of actions, the evil that Rule 23 was designed to prevent.

Id. at 690.

33. 424 U.S. 319 (1976).

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held that the due process clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. The court of appeals reaffirmed its prior decision.[34] The Supreme Court again granted certiorari to review the Ninth Circuit's decision.[35] On the substantive issues, the Court ruled that section 204(a) of the Social Security Act and the Constitution do not require a hearing before the Secretary decides there has been overpayment, but section 204(b) does require a hearing on the issue of waiver of the right to recoupment because of hardship to the beneficiary or the like.[35]

The Secretary argued against the class certification on procedural grounds. First, he argued that the court of appeals erred in basing jurisdiction on mandamus under 28 U.S.C. 1361. Furthermore, he posited that section 205(g) of the Social Security Act[36] does not allow a class suit but permits only individuals to bring an action. The Court rejected this challenge to the class action, stating that the Federal Rules of Civil Procedure "govern the procedure in the United States district courts in *all* suits of a civil nature."[37] Thus, section 205(g) does not contain

> the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure. The fact that the statute speaks in terms of an action brought by "any individual" or that it contemplates case-by-case adjudication does not indicate that the usual Rule providing for class actions is not controlling, where under that Rule certification of a class action otherwise is permissible.[38]

Thus, there may be class relief under a federal statute unless Congress expressly prohibits it. The Court, which could have seized on *Yamasaki* as an opportunity to undermine the class action, as it had already done in *Eisen,* stated that class relief in *Matthews* was peculiarly appropriate.[39] As to subject matter jurisdiction, the Court

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34. *See* Califano v. Yamasaki, 442 U.S. 682, 690-91 (1979).

35. *Id.* at 693.

36. Section 205(g) provides: "Any individual, after any final decision of the Secretary made after a hearing to which he was party . . . may obtain a review of such decision by a civil action . . ." 53 Stat. 1370 (1939).

37. 442 U.S. at 700 (emphasis added). The Court relied on Rule 1 of the Federal Rules of Civil Procedure in making this determination.

38. *Id.*

39.
> The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class. The ultimate question is whether a pre-recoupment hearing is to be held, and each individual claim has little monetary value. It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Id. at 701.

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ruled that the district court had jurisdiction over the class by virtue of its jurisdiction over the individual claim: "Where the District Court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding."[40]

The Secretary further argued that, assuming a class action may be maintained under section 205(a), it was an abuse of discretion to sustain the nationwide class in the *Buffington* litigation. The Secretary contended that a nationwide class forecloses "reasoned consideration of the same issues by other federal courts and artificially increases the pressure on the docket of this Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require our immediate attention" and that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff."[41] The Court rejected any per se geographical limit in Rule 23 for equity jurisprudence. However, it did agree that adjudication of an issue in different factual contexts by different courts, would often be preferable to class treatment.[42] The determination of the geographic scope of the lawsuit, however, is within the discretion of the district court and the Court did not find that the lower court had abused that discretion.[43]

The Secretary succeeded in restricting the class to those who filed the request for reconsideration or waiver,[44] but the Court upheld the district court's grant of an injunction, stating that it may be necessary to protect the interest of absent class members and to prevent repetitive litigation.[45]

In *Yamasaki*, the Court approved a nationwide class procedure in a situation where presumably few class members had any knowledge, let alone official notice, that their rights would be conclusively litigated. The Court had an ideal opportunity to require notice before certifying such a large class but declined to do so. The Court also ignored the involuntary nature of assuming subject matter and personal jurisdiction over the rights of class members. Although the Court did not deal with issues of notice or personal jurisdiction, its silence is significant. The Court could have created procedural barriers to the class action as it did in *Eisen* and *Zahn*. Instead, although the opinion lacks any theoretical justification, the Court approved use of the nationwide class. *Yamasaki* thus represents the ap-

40. *Id.*
41. *Id.* at 702, *citing* Dayton Board of Education v. Brinkman, 443 U.S. 406 (1977).
42. *Id.*
43. *Id.* at 703.
44. *Id.* at 704.
45. *Id.* at 705.

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proval of a procedural mode that can determine the rights of individuals on a nationwide basis.

C. *Parklane Hosiery Co., Inc. v. Shore—The Rejection of Mutuality of Estoppel and the Creation of the Beneficial Class Action*

In *Parklane Hosiery Co., Inc. v. Shore*,[46] the Supreme Court was faced with the issue of "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party."[47] Leo Shore had filed a stockholder's class action in a federal district court against Parklane Hosiery Company, alleging Parklane had issued a false and misleading proxy statement in violation of securities laws. Eighteen months later, while Shore's suit was still pending, the Securities and Exchange Commission (SEC) filed for injunctive relief against Parklane alleging virtually the same violations. The SEC action went to trial without a jury and resulted in a finding that the proxy statement was false and misleading as alleged.[48] Thereafter, Shore moved for partial summary judgment arguing that Parklane was collaterally estopped from relitigating the issue of whether the proxy statement was false and misleading. The district court denied the motion. The Second Circuit reversed, reasoning that the policies behind res judicata and collateral estoppel would be subverted if Parklane were allowed to relitigate issues previously determined adversely to it.

The Supreme Court began its analysis of *Parklane* by examining the propriety of allowing a nonparty to assert collateral estoppel against a party to the first action in a later action brought by the nonparty. The Court decided that "none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present" and that Parklane was "collaterally estopped from relitigating the question of whether the proxy statements were materially false and misleading."[49] The Court noted that applying collateral estoppel would not be appropriate in all cases, but should rest with the discretion of the district court.[50]

By rejecting mutuality of estoppel in *Parklane*, the Court has created a class of beneficiaries who may use a favorable result in the first litigation to sue the loser in subsequent litigation. Thus, there is a class of parties created by the collateral estoppel doctrine. This could be termed a "beneficial class" because this class can use the

46. 439 U.S. 322 (1979).
47. *Id.* at 324.
48. SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976) *aff'd*, 558 F.2d 1083 (2nd Cir. 1977).
49. 439 U.S. at 331, 333.
50. *Id.* at 333-37.

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prior litigation to its benefit and yet not be detrimentally affected by a prior adverse determination because the parties composing the class did not have their day in court.

Professor George uses the term "estoppel class" to characterize this class which may take advantage of the prior judgment.[51] The application of collateral estoppel to issues of law and fact thus transforms the ordinary two-party litigation into a class action. What is missing in this "estoppel class" is risk: the beneficiaries of the class are not bound by an adverse decision because they have not had their day in court.[52] This absence of risk causes a major change in the function of a class action so that it protects the defendant and reequalizes the risk between the parties. Parties opposing the class may feel that the action should be certified as a class.

An example of this phenomenon has arisen in cases involving inconsistent adjudications of rights to social security benefits. Several suits have been filed attacking gender-based discrimination in payment of social security benefits under section 202(f)(1) of the Social Security Act. One suit was filed as a nonclass action attacking this alleged discrimination, and the Secretary prevailed.[53] Later a class action was filed in Texas and the section was declared unconstitutional.[54] All members of this nationwide class are direct beneficiaries of the second judgment but are not adversely affected by the first litigation because they did not participate. If the second case had been lost by the class representative, however, all class members would have been bound by res judicata because they were legally present by means of the class action procedure. The presence of the members of the class, of course, is entirely fictional: they are no more present in the courtroom in the class action than they were in the first action. Indeed, because no notice need be given in a (b)(2) action, the class members are, in all probability, ignorant of the entire proceeding.

Although the doctrine of mutuality of estoppel has been ridiculed, it is based on a principle of fairness. It seems wrong that a party should bear all the risks in litigation without any of the benefits. Although *Parklane* does provide protections against the unfairness of applying offensive collateral estoppel across the board,[55] its rejection of mutuality transforms the class action device into one that *limits* the rights of the class.

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51. *George, supra* note 8, at 659.

52. "If the cases ultimately permit use of the doctrine offensively, then collateral estoppel would give non-party members of a plaintiff or defendant class all the advantages of a class action without the disadvantage of being bound by adverse decision." Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 454 (1960).

53. Morris v. Califano, No. N79-0023C (E.D. Mo. 1980).

54. Mertz v. Harris, No. B-78-164 (S.D. Tex. 1980).

55. 439 U.S. at 333-37.

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D. *The Interaction of the Recent Precedent: The Increased Popularity of the Class Action*

The interaction of *Yamasaki* and *Parklane* should result in an increased scope and use of class actions. Plaintiffs now can argue that the Supreme Court has approved the use of class actions by declining to place additional procedural limitations on them.[56] *Parklane* exposes the individual defendant to a one-way estoppel that a class action does not risk. At the same time, the class is now definitely able to encompass a nationwide class. As a practical matter, the class action should be even more popular with litigants than previously.[57]

After *Parklane*, plaintiffs' counsel may hesitate in moving to certify a class, for if the first lawsuit is victorious, the plaintiffs could estop the defendant against any subsequent plaintiffs. On the other hand, it is the defendant who should want a class certified. Yet plaintiffs' counsel routinely move for certification and defendants' counsel routinely oppose it. In fact, the arguments are so cut-and-dried that the Memoranda in Support of or in Opposition to the Motion to Certify a Class are stored in computer typewriters ready for battle.[58]

Perhaps it is just a matter of habit. There are good reasons, however, for plaintiff's counsel to want a class action.[59] Several advantages accrue to the class forum. For example, the suit cannot be mooted by a change in circumstances of the named plaintiff, such as a prisoner being released from jail.[60] Compensation for the attorneys may be derived out of any common fund recovered for the class.[61] Members of the plaintiff class can be non-diverse from the defendants, thus avoiding the rule of complete diversity.[62] A case may appear more convincing when one is seen to represent all the prisoners

56. *Eisen* and *Zahn*, however, will still plague the (b)(3) class action.

57. What follows is based mainly on personal impression as someone who worked with Legal Services for four years and who has followed poverty and civil rights litigation. Material from observed law suits rather than law reviews in a law review article is, I realize, to paraphrase Stendhal, like "a pistol shot in the middle of a concert. The noise is deafening without being emphatic. It isn't in harmony with the sound of any instrument." STENDHAL, THE RED AND THE BLACK 189 (C. Scott-Moncrieff trans. 1926). In defense, I have been unable to find material describing the factual decisions that go into a counsel's supporting or opposing a motion to certify a class.

58. Professor Miller notes the Pavlovian practice of inserting class action allegations in complaints in his book, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 37-38 (1977).

59. *See generally* H. NEWBERG, 1 CLASS ACTIONS §§ 1010-1010.4, at 25-43 (1977).

60. *See, e.g.*, United States Parole Comm'n v. Geraghty, 445 U.S. at 388.

61. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).

62. *See* Supreme Tribe of Ben-Hur v. Cauble, 225 U.S. 356 (1921).

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or all the social security beneficiaries, rather than just one disgruntled client. There are also elements of prestige. A Legal Services attorney filing a massive class action is seen as doing a better job than if he had successfully defended one eviction. By picking the right judge or circuit, the attorney may obtain a favorable result that would have a nationwide effect. Other advantages to the class action include the tolling of the statute of limitations, avoiding the requirement of individual exhaustion of administrative remedies, and utilizing the enforcement mechanism of the court's contempt power to implement the class decree.

The use of the class action as a political mechanism may be of overriding importance. Individual relief against a polluter or a segregated school system is ineffective. One cannot integrate black and white students one at a time.

On the other side, although defendants may oppose a class merely because the plaintiff is for it, there may be good reasons for opposition to certification. In a mass accident case, it may be less expensive to deal with the plaintiffs individually. Some cases may be settled cheaply while other potential plaintiffs may never bring suit. In a nonclass action, troublemakers can be bought off, leaving the defendant free to continue business as usual. In my experience at Legal Services in Chicago, large creditors favorably settled any cases we represented. Since our clients represented less than one percent of their business, settlement was cheap protection. Individual plaintiff's claims can become moot and lead to the dismissal of the case.

In a case such as *Yamasaki*, one wonders why the Secretary would not prefer a nationwide class. Would it not be better to determine the issue of due process in Social Security recoupment once and for all on a nationwide basis? After *Parklane*, the alternative might be a series of ratchet-like lawsuits, with each plaintiff getting more relief. Perhaps the implications of *Parklane* have not yet been thought through.

A defendant could obtain a class action by counterclaiming for a declaratory judgment that his actions were legally justified and moving for certification of a defendant class comprising all persons affected by his actions. A question arises as to whether this defendant class action requires notice and personal jurisdiction over each member of the class.[63] It could be argued that the implications of such cases as *Yamasaki* apply only to plaintiff class actions. The weight of opinion, however, is that a defendant class action is possible and practical

63. *See generally* Wolfson, *Defendant Class Actions*, 38 OHIO ST. L.J. 459 (1977) [hereinafter cited as *Wolfson*]; Note, *Personal Jurisdiction and Rule 23 Defendant Class Action*, 53 IND. L.J. 841 (1978); Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978).

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without individual jurisdiction, service and notice being necessary for each member of the defendant class.[64]

Whatever the decision of counsel, it seems likely there now will be more class actions than ever. Plaintiffs find them useful and can cite the recent Supreme Court decisions in support of their motions to certify the class. Defendants have good reasons not to oppose such motions.

In any event, the increased use and scope of class actions give rise to several procedural problems. These problems have to a large extent not been explicitly addressed by the Supreme Court. The nationwide class action was created without a theoretical analysis of the procedural mechanism by which a court may arrive at a judgment that binds the class. As Professor Yeazell noted, the class action is a "device no one understands."[65]

III. THE PROCEDURAL PROBLEMS OF OBTAINING A DEFINITIVE CLASS ADJUDICATION

An effective class action must give a definitive adjudication of the rights of the class members. In doing so, the system is faced with a variety of procedural requirements, many of historical origin, that may prevent complete adjudication. A primary source of problems is the distinction between Rule 23 (b)(1) and (b)(2) class actions, on the one hand, and (b)(3) suits on the other. These two types of class actions are treated differently, even though these differences are hard to justify.[66] The differences include the right to opt out of a class and the right to receive individual notice in (b)(3) cases.[67]

A. *A Brief History of Rule 23*

Rule 23, as adopted in 1938, posited three types of class actions: the true, the hybrid, and the spurious. Each type had a different res judicata effect.[68] The judgment in a true class action was binding

64. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1757, at 566-57 (1972).

65. *Yeazell, supra* note 11, at 1120-21.

66. Briefly, (b)(1) and (b)(2) actions are those that have involved injunctive or declaratory relief ((b)(2)) or that are necessary to avoid inconsistent adjudications imposed on the defendant ((b)(1)(A)) or would impair the interests of the other class members ((b)(1)(B)). The (b)(3) action is a residual provision in which there are common questions of law and fact and the class mode is the best way of proceding. As we will see, the lines have been blurred in practice.

67. Eisen v. Carlisle & Jacquelin, 417 U.S. at 156.

68. *See* CHAFEE, SOME PROBLEMS OF EQUITY 249 (1950) [hereinafter cited as CHAFEE]; Note, *Collateral Attack On The Binding Effect Of Class Action Judgments*, 87 HARV. L. REV. 589, 591-92 (1974) [hereinafter cited as *Collateral Attack*].

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upon the entire class; the judgment in a hybrid action concluded only the interests of the members of the class in the specific property in controversy; and a judgment in a spurious class action bound only the parties actually before the court. The spurious class action permitted a person to opt into the class after the judgment was rendered to take advantage of the judgment against the defendant.

These categories were criticized from the beginning as formal and meaningless, but they nevertheless influenced courts in the treatment of class actions.[69] The treatment of the (b)(3) class is derived from the differing characterizations of the spurious class action.[70] The basic concept underlying the "true" and "hybrid" categories was that both involved some common property interests. The spurious action, as its name implied, was somewhat dubious and illegitimate. In other words, class members must have "jural relations (a shared legal interest)" with one another in order for there really to be a class action.[71]

The distinctions drawn between the classes have been severely criticized. Professor Chafee, for example, denied that class actions were ever required to involve a piece of property.[72] Early class actions in fact were similar to the civil rights actions of today in that they involved the adjudication of the political rights of a class. Professor Marcin,[73] describes two early class actions. In *Brown v. Vermunden*,[74] a vicar brought suit against the miners of his parish to collect the equivalent of tithes from them. It was held that a judgment against the four miners appearing in the lawsuit bound a non-appearing member of the class to pay his tithe. In a 1309 case dealing with the complaints of residents of the Channel Islands, it was held that all the residents' rights would be decided in a single action.[75] In general, the English courts ruled that adverse parties were bound if the criteria for class actions were present. These criteria were: a group too large for joinder, members with a common interest, and adequate representation of absent members.[76]

Despite its lack of logic or historical basis, the concept of the

69. *See* Kalven & Rosenfield, *The Contemporary Function Of The Class Suit*, 8 U. CHI. L. REV. 684, 707 n. 73 (1941) [hereinafter cited as *Kalven*]; CHAFEE, *supra* note 68, at 247.

70. I realize that Rule 23 did away with the old categories of true, hybrid, and spurious. I am arguing, however, that the attitude towards the spurious class has been applied to the (b)(3) class, which causes problems in that type of action.

71. 3B MOORE'S FEDERAL PRACTICE ¶ 23.10(1) at 23-2602 (2d. ed. 1980).

72. CHAFEE, *supra* note 68, at 216.

73. Marcin, *Searching For the Origins Of The Class Action*, 23 CATH. U. L. REV. 515 (1974) [hereinafter cited as *Marcin*].

74. 22 Eng. Rep. 796 (Ch. 1676).

75. Discart v. Otes Channel Islands Case, 30 Seld. Society 137 (No. 158, P.C. 1309) (1914).

76. *See Collateral Attack, supra* note 68, at 590.

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necessity of a shared property right was instrumental in dividing the (b)(1) and (b)(2) classes from the (b)(3) class action in Rule 23. Many of the rules concerning the ability of the class judgment to bind the entire class stem from that basic concept dividing the "true" and "hybrid" from the "spurious" action. For example, the right to exclude oneself from the class is deemed to be necessary in (b)(3) actions because of lack of "jural relations" between members of a (b)(3) class.[77]

Further complications arise from the courts' practice of ignoring any sharp line between (b)(1), (b)(2) and (b)(3) actions. A (b)(3) action can include a request for injunctive relief,[78] and a (b)(1) or (2) action can ask for monetary relief, such as back pay in employment discrimination suits.[79] Where the need for injunctive relief has become moot, one court has held that the remaining monetary claim can continue in the (b)(2) form.[80] There is as much difficulty distinguishing (b)(1), (b)(2), and (b)(3) actions as there was in differentiating the true, hyrid, and spurious categories.

B. *The Procedural Problems of Including the Class Members in the Binding Effect of the Decree*

Given this brief history of Rule 23, we may turn to the procedural questions raised by the binding effect of class actions on all

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77. FED. R. CIV. P. 23(c)(2).

> There will be situations where the class is cohesive, or where the legal relationship of the members enable one or more to stand in judgment for all, and where the representatives are truly representative and faithful—a most important factor. In these and related situations we suggest that, although some notice to the members may be desirable and may be given as provided in (d)(2), a judgment should be res judicata as to all the class, even in the absence of notice, in the (b)(1) and (b)(2) situations when the requirements of Rule 23 have been satisfied. On the other hand, in the (b)(3) type of class suit, where notice is mandatory, there is no jural relationship between the members. They are legal strangers related only by some common question of law or fact and with a right to opt out of the class. The mandatory notice under (c)(2) informs them of that right, and satisfies the presumed due process pre-condition to entering a judgment binding against them.

3B MOORE'S FEDERAL PRACTICE ¶23.55, at 23-442 (2d ed. 1980) (footnotes omitted).

78. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. at 156.

79. *See, e.g.*, Alexander v. Aero Lodge No. 735, 565 F. 2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Bolton v. Murray Envelope Corp., 553 F.2d 881 (5th Cir. 1977); Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1978); Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Johnson v. Georgia Highway Express Inc., 417 F.2d 1122 (5th Cir. 1969). *See also* Note, *Antidiscrimination Class Actions Under The Federal Rules Of Civil Procedure: The Transformation Of Rule 23(b)(2)*, 88 YALE L.J. 868, 876, n. 46 (1979) [hereinafter cited as *Antidiscrimination Class Actions*].

80. Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3d Cir.

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the members of the class, except those who have opted out of a (b)(3) class. These questions can be classified under the labels of personal jurisdiction, subject matter jurisdiction, and notice.

1. Personal Jurisdiction

Can a district court in the state of Washington adjudicate the rights of a Maine citizen who is a member of the plaintiff class? Evidently it can, for the Court in *Yamasaki* speaks approvingly of the nationwide class action, and nowhere does it state that the district courts can not adjudicate the rights of members of the class that are beyond its jurisdictional reach.[81] A federal court normally has only those service of process powers enjoyed by the state court of the state in which it sits.[82] Moreover, in cases dealing with personal jurisdiction over defendants, the Supreme Court has been strict in limiting the jurisdictional powers of the state courts.[83] In *Yamasaki*, the Court has implicitly promulgated a different rule for class actions.

A comparison of the class action judgment with the doctrine of stare decisis shows the increased territorial power of the district court. Stare decisis always has influenced parties not before the court. For example, the case of *Hadley v. Baxendale*[84] today affects the contractual relations between parties who never participated in that decision, who in fact were not alive at the time the case was decided. The class action has the same effect through res judicata: all members of the class are bound by the decision on the law.[85] Stare

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1975), *cert. denied*, 421 U.S. 1011 (1975). *See also* Note, *Civil Procedure—Class Action Suits*—Applicability Of Rule 23(b)(2) To Class Actions In Which The Need For Injunctive Relief Has Been Obviated—*Wetzel v. Liberty Mutal Insurance Co.*, 37 OHIO ST. L.J. 386 (1976).

81. Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23(b)(2), the limitations on class size associated with Rule 23(b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.

442 U.S. at 702.

82. *See* FED. R. CIV. P. 4. *See also* Elliot v. Weinberger, 564 F.2d 1219, 1229 n.14 (9th Cir. 1977) (class judgment would be conclusive on the class members).

83. *See* Kamp, *Beyond Minimum Contacts; The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19 (1980) [hereinafter cited as *Kamp*].

84. 156 Eng. Rep. 145 (Ex. 1854).

85. In fact, several courts have rejected class action status on the grounds that the stare decisis effect of the decision would adequately resolve the issues. *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974); Birnbaum v. U.S., 436 F. Supp. 967 (E.D.N.Y. 1977); Feld v. Berger, 424 F. Supp. 357 (S.D.N.Y. 1976).

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decisis, however, normally has a limited geographical effect: a decision by the Second Circuit will have the effect of stare decisis within that circuit only. Another circuit is free to ignore the decision.[86] In a nationwide class action, one circuit, or one district court, binds the interests of class members outside that circuit or judicial district. Thus, using the nationwide class action device, a district court's decree can have the same effect as a Supreme Court decision.

It was this phenomenon of the increased territorial power of the district court that the defendant Secretary complained of in *Yamasaki* stating,

> that a nationwide class is unwise in that it forecloses reasoned consideraton of the same issues by other federal courts and artificially increases the pressure on the docket of this Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require our immediate attention.[87]

The Court rejected this argument, stating that although it is often preferable to allow several districts to adjudicate an issue, the decision to have a nationwide class is "committed in the first instance to the discretion of the district court."[88] The Supreme Court has thus given to the district court the power of nationwide res judicata.

Such nationwide power applies where one is bound by representation, as in a class action, as opposed to where one is bound as a named defendant.[89] The theoretical basis for this distinction is not clear. Judge Frankel stated the problem as follows:

> To a generation raised on *Pennoyer v. Neff* . . . it is a rather heady and disturbing idea to be told that people in faraway places who receive a letter or are "described" in a newspaper "notice" which does not come to their attention are exposed to a binding judgment unless they take some affirmative action to exclude themselves.[90]

Prior Supreme Court precedent on binding persons to a judgment through representation is contradictory. In the 1912 case of *Bigelow v. Old Dominion Copper Mining and Smelting Co.*,[91] the Court ruled that a New York court could not use the concept of privity to bind a Massachusetts defendant. The plaintiff had sued a New York joint tortfeasor located in New York. The suit was dismissed by the Dis-

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86. Comment, *Rules of Civil Procedure—Question of Class Status Should Be Postponed When Test-Case Alternative Is Superior To Immediate Class Certification, Katz v. Carte Blanche Corp.*, 88 HARV. L. REV. 825, 827 n.10 (1975).

87. 442 U.S. at 701-02.

88. *Id.* at 703.

89. *See* RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS §85, Illustration (f) (Tent. Draft. No. 2, 1975).

90. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1968) (citations omitted).

91. 225 U.S. 111 (1912).

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trict Court of New York. Plaintiff then sought to sue Bigelow, a joint tortfeasor located in Massachusetts. The question was whether the Massachusetts defendant could set up the New York judgment as a bar. Since mutuality of estoppel then applied, the New York plaintiff would be bound by his prior loss only if the Massachusets defendant would have been bound if the litigation had gone the other way. The question then was whether the Massachusetts defendant could have been bound by the litigation. The Court stated that:

> The New York court had no jurisdiction to render judgment *in personam* against Bigelow. He was confessedly not a party. He did not voluntarily appear. He had no legal right to appear, no right to introduce evidence, control the proceedings, nor appeal from the judgment. To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or law of New York, would be to give the law of New York an extra-territorial effect, which would operate as a denial of due process of law.[92]

In another case, *Christopher v. Brusselback*,[93] the Court ruled that jurisdiction was necessary over each defendant. Creditors of a land bank had sued the bank's shareholders. The creditors won in a suit brought in the District Court of Northern Illinois.[94] The creditors then sought to enforce that judgment in a second suit against stockholders residing in Ohio who were not served with process in the first action. The Court ruled that it would be possible to draft a statute providing that the corporation represent all stockholders in the action, but no such statute existed in the case at bar. Therefore, in personam jurisdiction over the Ohio defendants was required to bind them. The Court stated that "[t]he obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render judgment against them *in personam*."[95] The Court ruled that Equity Rule 38 prescribed only the class action procedure and did not enlarge the district court's jurisdiction. The Equity Rules' "purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction."[96]

The application of this language is a matter of some controversy. One interpretation is that personal jurisdiction over each member of

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92. *Id.* at 137.
93. 302 U.S. 500 (1938).
94. Brusselback v. Chicago Joint Stock Land Bank, 85 F.2d 617 (7th Cir. 1936).
95. 302 U.S. at 502.
96. *Id.* at 505.

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a defendant class is necessary.[97] By analogy, the same jurisdictional requirement should be imposed on adjudication of the interests of members of a plaintiff class. However, *Christopher*, involved a plaintiff class, not a defendant class,[98] and the issue of jurisdiction over class members was not decided by the Court. As stated by one commentator:

> The shareholders in *Christopher*—the "absent defendants" to whom the Court referred—were held not bound by the decree in the prior plaintiff class action against the corporation only because there was no statute to put defendants on notice that the corporation would stand in judgment for them, and there existed no other jurisdictional nexus.[99]

Thus, the law was unclear as to whether personal jurisdiction over class members was necessary. The *Restatement (Second) of Judgments* rejects any such requirement, stating that personal jurisdiction is not necessary to adjudicate the rights of individuals who are represented by a party in an action. If a court has personal jurisdiction over the named party, it has jurisdiction over every person that party represents.[100]

Professor McCoid[101] criticizes the concept of binding through representation, arguing that the standards for personal jurisdiction should be more in such cases than when one is suing the party directly.

> It makes no sense to me to say that a court without authority to adjudicate directly against one as a party has authority to bind him indirectly as a nonparty. And if the response is that the court has jurisdiction over one with whom the nonparty is in privity, then the scope of privity becomes doubly suspect: authority to adjudicate and opportunity to be heard, both governed by due process, are at stake.[102]

Yamasaki implicitly adopts the *Restatement* position, since the issue of personal jurisdiction was not raised. In a class action, however, a court has the duty to protect the class members' procedural rights on its own intitiative. Furthermore, if the Court is hostile to class actions, it may dismiss the suit on personal jurisdiction grounds.

One could distinguish the above cases by stating that *Bigelow* involved money judgments while *Yamasaki* involved an equitable

97. *See, e.g.*, *Collateral Attack, supra* note 68, at 590 n.10.

98. Brusselback v. Chicago Joint Stock Land Bank, 85 F.2d at 619.

99. Wolfson, *supra* note 63, at 465.

100. "A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process." RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS §85(2) (Tent. Draft No. 2 1975).

101. McCoid, *A Single Package For Multi-Party Disputes*, 28 STAN. L. REV. 707 (1976).

102. *Id.* at 713 (footnote omitted).

decree adjudicating political rights to a government welfare program. It could also be argued that *Yamasaki* only applies to (b)(2) actions while the requirement for individual personal jurisdiction is still required in a defendant class action brought under (b)(3). Such an explanation makes little theoretical sense, for there should not be that much difference between the treatment of plaintiffs and defendants. If, for example, the Secretary of Health and Human Services had sued Social Security beneficiaries for a declaratory judgment, would personal jurisdiction over each member of the class have been required? Regardless of type of class, the rights of the class members are still going to be determined in the adjudication.

Nothing in *Yamasaki* indicates that the Court is in any way bothered by questions of a district court's personal jurisdiction over class members. The Court in *Yamasaki* can be seen to have implicitly adopted, at least for (b)(1) and (b)(2) actions, the *Restatement's* disregard of personal jurisdiction in representative lawsuits.[103]

2. Subject Matter Jurisdiction

In *Yamasaki* the Court held that a class action may be maintained on the basis of a grant of special federal question jurisdiction, unless Congress has explicitly prohibited the class action procedure. The Secretary argued that there was not subject matter jurisdiction for a class action because section 205(g) of the Social Security Act provides for individual relief only.[104] The section states that it applies to "[a]ny individual," suggesting that only individual and not class relief may be obtained.[105]

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103. State court class actions present other problems. A Harvard note concludes that "[a] consensus about the extent of state court jurisdiction in the modern common-question class action is yet to emerge." Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 HARV. L. REV. 718, 721 (1979). *See also* Note, *Toward A Policy-Based Theory Of State Court Jurisdiction Over Class Actions*, 56 TEX. L. REV. 1033 (1978); Comment, *Civil Procedure: In Personam Jurisdiction Over Nonresident Plaintiffs In Multistate Class Actions*, 17 WASHBURN L.J. 382 (1978). These writings were spurred by Shutts v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), *cert. denied*, 434 U.S. 1068 (1978), *reh. denied*, 435 U.S. 961 (1978), in which the Kansas Supreme Court ruled that it could entertain a class action in which the members of the class of natural gas lessors were located across the country. The Kansas court concluded that although minimum contacts are required for jurisdiction over defendants, only procedural due process is required for jurisdiction over the plaintiffs. The conclusion fits with the results of *Bigelow*, which involved a defendant, and *Yamasaki* which was a plaintiff class. Certainly there are problems of federalism present in state court jurisdictional questions that are not present in federal class actions. *See also Kamp, supra* note 83.

104. 442 U.S. at 698. The Court of Appeals, doubtful of jurisdiction under the Social Security Act, based jurisdiction under mandamus, 28 U.S.C. §1361 (1976). The Court did not reach the mandamus issue.

105. Any individual, after any final decision of the Secretary made after a hearing to which he was a party . . . may obtain a review of such decision

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The Court rejected this argument. It noted that section 205(g) prescribed that judicial review must be a civil action brought in a district court. The Federal Rules of Civil Procedure govern the procedure in all civil suits and Rule 23 provides for class actions. Thus, in the absence of a direct expression by Congress to the contrary, class relief is appropriate.[106]

By stating that the rights of the class can be adjudicated by virtue of a grant of individual review, the Court is enlarging the jurisdiction of the district court. In individual actions, the district court can exercise jurisdiction only over those particular claims brought before it by the individual involved. When a class action is brought, the court has subject matter jurisdiction over all individual claims in the entire country, despite the fact that the beneficiaries involved did not voluntarily bring their claims before the court. The class action mode changes the submission of the claims to the subject matter jurisdiction of the district court from a voluntary to an involuntary procedure.

Thus, class actions may be maintained for any federal question where jurisdiction has been granted by Congress.[107] That the action adjudicates rights of the class members without their consent is not seen as a problem.

3. Notice

Rule 23 mandates notice to class members only in (b)(3) actions.[108] Notice for (b)(1) and (b)(2) classes remains discretionary with the court. The much debated quesion is whether and to what degree notice is constitutionally required for any of the categories of class actions.[109]

Notice affects the binding nature of a judgment in a class action in two ways: it must be given if the (b)(3) action is to proceed at all; and, if it is constitutionally required, must be given if a (b)(1) or (b)(2) action is to bind the plaintiff and protect the defendant from

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> by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

42 U.S.C. §405(g) (1976).

106. 442 U.S. at 699-700.

107. For the peculiar rules regarding diversity and amount in controversy jurisdictional requirements, see Currie, *Pendent Parties*, 45 U. CHI. L. REV. 753 (1978).

108. *Eisen v. Carlisle & Jacquelin* interpreted this literally and strictly: individual written notice must be sent to each member of the class even where the cost of the notice would as a practical matter make it impossible for plaintiffs to continue the action. 417 U.S. 156, 173-76.

109. *See Developments In The Law—Class Actions*, 89 HARV. L. REV. 1318, 1324 n. 19 (1976) [hereinafter cited as *Developments*] which lists 19 articles dealing with the necessity of notice. Since then many other articles have been written, *see, e.g.*, Comment, *Notice In Rule 23(b)(2) Class Actions For Monetary Relief*, 128 U. PA. L. REV. 1236 (1980) [hereinafter cited as *Notice in Rule 23(b)(2) Class Actions*].

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subsequent suits. If notice is held to be constitutionally required, the class decree could not validly bind the plaintiff class, enabling its members to relitigate the defendant's liability. The approval of offensive collateral estoppel in *Parklane* makes the question even more important for the defendant. If the defendant loses in the first suit, a member of the plaintiff class who sues subsequently will, if not bound by the decree, be able to argue for more damages or greater equitable relief without needing to establish liability.[110]

a. The Supreme Court

The Court has not yet explicitly addressed the question of whether notice to class members is constitutionally required. The cases of *Mullane v. Central Hanover Bank and Trust Co.*,[111] *Hansberry v. Lee*,[112] and *Eisen v. Carlisle & Jacquelin*[113] must be considered. The Court in *Mullane* ruled that reasonable individual notice to known trust beneficiaries, rather than notice by publication, was required where New York had created an accounting procedure relieving the trustee of liability for any misfeasance of his duties to the trust. The Court in *Hansberry*, although invalidating an Illinois class action, stated that the key to binding the class was adequate representation. *Eisen* required notice, but did so on a literal interpretation of Rule 23 rather than on constitutional grounds. The *Eisen* Court's discussion of *Mullane*, however, indicated that its literal interpretation of Rule 23 was based on the underlying necessity for notice. The Court in *Eisen* stated that the Rules Advisory Committee in developing the Federal Rules of Civil Procedure had provided for mandatory individual notice in order to fulfill due process requirements, citing *Mullane* for the proposition that "publication notice could not satisfy due process. . . ."[114] What these cases mean with respect to any constitutional requirement of notice has been argued extensively.[115]

Proponents of notice requirements argue for a broad reading of *Mullane* and maintain that *Eisen's* interpretation of Rule 23 was based on constitutional requirements. Opponents of mandatory notice seek to restrict *Mullane* to its facts: a large trust corpus involving relatively

110. The use of such offensive collateral estoppel is discretionary with the court.
111. 339 U.S. 306 (1950).
112. 311 U.S. 32 (1940).
113. 417 U.S. 156 (1974).
114. *Id.* at 174.
115. *See, e.g.*, Hinds, *To Right Mass Wrongs: A Federal Consumer Class Action Act*, 13 HARV. J. ON LEGIS. 777, 800-07 (1976) [hereinafter cited as *Hinds*]; Note, *Constitutional and Statutory Requirements Of Notice Under Rule 23(c)(2)*, 10 B.C. INDUS. & COM. L. REV. 571 (1968-69) [hereinafter cited as *Constitutional and Statutory Requirements*].

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few beneficiaries. *Eisen*, by its terms, purports to apply only to (b)(3) actions.

Yamasaki makes no mention of notice. The Court's approval of the nationwide class in that case, however, may be read as an implicit rejection of any requirement of notice. The Court states that the district court may exercise jurisdiction over each member's claim: "[w]here the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding."[116] It assumes that adjudication of the issue is to bind all members of the class: "[a]nd the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23."[117] Later, the Court indicates that the purpose of the class action is both to protect the interest of the class members "and to prevent repetitive litigation."[118]

If the class were not to be bound in *Yamasaki*, there would be little need to have a class, for the same result of binding the defendant could be achieved through offensive collateral estoppel.[119] The issue was not in front of the Court, but the Court certainly could have struck down the proceeding on the ground that the lack of notice invalidated it. A court's duty to protect class members would have mandated such a result if notice were required by due process. *Yamasaki*, then, appears to approve the lack of notice. The Court's divergence in *Yamasaki* from *Eisen* can be explained as a literal reading of the rule requiring notice only for (b)(3) actions. The divergence can also be explained as an approval of the type of sociopolitical litigation in *Yamasaki* distinct from the damage lawsuit of *Eisen*.

b. Lower Courts

The lower courts have split on the requirement of notice, although the great majority have held that mandatory, individual notice is not required under (b)(1) and (b)(2).[120] Generally, courts

116. 442 U.S. at 701.

117. *Id.*

118. *Id.* at 705.

119. *See George, supra* note 8.

120. Cases finding that notice is constitutionally required include: Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970); Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969); Cranston v. Freeman, 290 F. Supp. 785 (N.D.N.Y. 1968). Cases not requiring notice include: Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1373-74 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Bolton v. Murray Envelope Corp., 553 F.2d 881, 883 (5th Cir. 1977); Larionoff v. U.S., 533 F.2d

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have relied on the discretionary notice provisions or adequate representation as fulfilling constitutional requirements.[121]

The Ninth Circuit in *Johnson v. General Motors Corp.*[122] recently upset the generally accepted division between (b)(1), (b)(2), and (b)(3) classes, by ruling that notice is required to preclude a class member's monetary claim. A prior case, *Rowe v. General Motors Corp.*,[123] concerned an action by the hourly employees of a General Motors plant attacking racial discrimination in which injunctive relief was obtained. Mr. Johnson, a black employee who was a member of the class in *Rowe*, sued in a new lawsuit for injunctive and monetary relief.[124] The Fifth Circuit reversed the lower court's holding that Johnson's monetary claim could be barred by the res judicata effect of the prior suit without notice to Johnson. It stated that Johnson's injunctive claim could be barred because the "cohesive nature" of the class justified lack of notice where equitable relief was sought, but that notice was required where monetary relief is sought:

> Where, however, individual monetary claims are at stake, the balance swings in favor of the provision of some form of notice. It will not always be necessary for the notice in such cases to be equivalent to that required in (b)(3) actions. . . . In some cases it may be proper to delay notice until a more advanced stage of the litigation; for example, until after class liability is proven. . . . Before an absent class member may be forever barred from pursuing an individual damage claim, however, due process requires that he receive some form of notice that the class action is pending and that his damage claims may be adjudicated as part of it.[125]

Note that *Johnson* can still be seen to be good law after *Yamasaki*: the latter case focused on the equitable due process issues, rather than the monetary relief sought.

1167, 1184 (D.C. Cir. 1976); Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 254 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Johnson v. Georgia Highway Express Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

121. FED. R. CIV. P. 23(d)(2). *See, e.g.*, Berman v. Narragansett Racing Ass'n, Inc., 48 F.R.D. 333 (D.R.I. 1969).

122. 598 F.2d 432 *reh. denied*, 605 F.2d 554 (9th Cir. 1979). *Accord*, Ellison v. Rock Hill Printing and Finishing Co., 64 F.R.D. 415 (D.S.C. 1974). *See Notice In Rule 23(b)(2) Class Actions, supra* note 109; Comment, *Class Action: Certification and Notice Requirements*, 68 GEO. L.J. 1009 (1980).

123. 4 Empl. Prac. Dec. ¶ 7715 (N.D. Ga. 1969); *rev'd and remanded*, 457 F.2d 348 (5th Cir. 1972).

124. The case was complicated by the failure in *Rowe* to certify the class as required by Rule 23. The Fifth Circuit ruled that the prior class was a valid class action despite the failure to comply with the Rule. Johnson v. General Motors Corp., 598 F.2d 432, 437 (5th Cir. 1979).

125. *Id.* at 438.

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Why the same class should be more cohesive when the action involves equitable relief than when the action involves monetary relief is not explained. Moreover, one would think that the equitable relief often would be more important to the individual than monetary relief. The long-term conditions of employment, retention, and promotion should be more important to an individual than a few thousand dollars in monetary damages.

c. The Explanations

We have, then, the split between requiring notice in (b)(1), (b)(2), and (b)(3) actions, with the Fifth Circuit rejecting an analysis based on Rule 23 and distinguishing between claims for injunctive and monetary relief. There are various explanations for these differences.

Professor Moore excuses notice for those actions in which the parties share "jural relations," sharing rights that are joint, common or derivative. Examples of members with jural relations are beneficiaries of a trust fund, union members, shareholders of a corporation, and owners of individual mineral rights.[126] This concept of "jural relations" derives from the old idea that only class actions in which the members shared a property interest were "true" class actions; the others being spurious. The jural relations excused any notice requirement.

One problem with the "jural relations" justification for lack of notice in (b)(1) and (b)(2) actions is that it is historically inaccurate. As Professor Chafee noted, shared property interests were never necessary for class actions in England. The older English cases involve controversies about tithes, milling, charging tolls for markets, and fishing rights; rights enjoyed or duties owed by a class of persons such as all miners in the parish or residents of a district. There was no necessity for the class member to share ownership of property.[127] Another problem is that conceptually both the (b)(2) and (b)(3) classes are equivalent. They both consist of class members that are victims of a mass tort. Both (b)(2) and (b)(3) classes involve "a single act by the class opponent simultaneously affecting the interests of all class members."[128] Any explanation based on the presence or absence of jural relations breaks down.

The Advisory Committee states that notice is needed less when the class is cohesive.[129] Cohesiveness can be seen to be a reflection of the racial, sexual or similar make-up of the class.[130] This definition is

126. 3B MOORE'S FEDERAL PRACTICE ¶23.08, at 23-2505-11 (2d ed. 1980).

127. *See* CHAFEE, *supra* note 68, at 216; *Marcin, supra* note 73.

128. 3B MOORE'S FEDERAL PRACTICE ¶23.10(1), at 23-2761 n.2 (2d ed. 1980).

129. Advisory Committee, *Proposed Amendments To Rules Of Civil Procedure For The United States District Courts*, 39 F.R.D. 73, 106 (1966).

130. *See* Johnson v. Gen. Motors Corp., 598 F.2d at 437.

both racist and sexist: how can one assume that all members of a class will think alike because they are of the same race or sex? A (b)(2) class may contain members desiring different results than the class representative. In *Griffin v. Burns*,[131] for example, certain absentee voters sued as a class to have their votes counted in a party primary election. If their votes were counted, one Lloyd Griffin would win. The court upheld the certification of the class under (b)(2) to include those absentees who had not voted for Griffin.

Professor Yeazell stated that many class members in school integration suits actually may prefer some other remedy besides integration. Furthermore, it would seem that some (b)(3) classes are also cohesive in the sense that the parties want the same thing. The plaintiffs in a mass tort action may be in more agreement about what they want, to get as much money as possible, than the plaintiffs in a complicated school desegregation case.[132]

The distinction between monetary and equitable relief is also questionable. Given the merger of law and equity, there is no justification for any contemporary distinction between the two types of relief, other than the historical existence of the separate systems of law and equity. Moreover, as we have seen, the line separating (b)(1), (b)(2), and (b)(3) actions has been completely blurred. Actions under (b)(1) and (b)(2) often include monetary claims, and (b)(3) actions can ask for injunctive relief. Because of the breakdown of any line separating (b)(1), (b)(2), and (b)(3) class actions, the Fifth Circuit in *Johnson* decided to separate the classes on the basis of equitable versus monetary relief.[133]

In any case, the traditional justifications for the differing requirements of notice do not hold up under examination. This conclusion is not new. It parallels the conclusions of Kalven and Rosenfield in 1941[134] and Chafee in 1948,[135] that there was no meaningful distinction between the true, hybrid, and spurious categories. Today, given the common practice of appending damage claims to (b)(2) actions,[136] there again seems little conceptual or practical difference between the categories.

There may be a difference, however, if we look at the class action as a political and administrative process. If the problem is perceived as one of tension between the general right of individual notice and the practical administrative necessity of binding the class, more

131. 570 F.2d 1065 (1st Cir. 1978).

132. *Yeazell, supra* note 11, at 1112-13.

133. 598 F.2d 432, 437-38.

134. *Kalven, supra* note 69.

135. CHAFEE, *supra* note 68.

136. *See* Smalls, *Class Actions Under Title VII: Some Current Procedural Problems*, 25 AM. U. L. REV. 821, 843 (1976).

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meaningful notice guidelines may develop. Under this perception, there is a real difference between equity and law, and between social and traditional forms of litigation. Because an injunction by definition must be based on a continuing or a prospective tort, a class action is necessary to avoid inconsistent adjudications.[137] A party cannot be given inconsistent commands entered in different lawsuits under penalty of contempt. In granting retrospective relief, awarding damages to only some victims of a mass tort and not others may nonetheless appear inconsistent. It does not, however, cause the defendant any problem in complying with the verdicts.

Another element is the right to a jury trial, which freezes into our law a continuing distinction between law and equity.[138] One has the right to an irrational, inconsistent jury verdict that should not be taken away. The distinction between equitable and monetary relief made by the court in *Johnson* may make sense in this context. In seeking equitable relief there is no right to a jury trial. The *Johnson* court, therefore, may be correct in arguing that the line should be drawn between prospective relief (injunction) and retrospective relief (damages), rather than between (b)(1), (b)(2), and (b)(3) actions.

Where a court acts legislatively, curing a prospective problem, notice becomes less important. In most cases notice would be superfluous; a member of the class has to be bound by the judicial allocation of the competing social values regardless of his individual preferences. The prison is closed or the busing plan implemented regardless of any individual class member's wishes.

Professor Yeazell's explanation of the lack of notice under (b)(1) and (b)(2) is that lack of notice in those class modes is a political device that enables the court to achieve a politicial adjudication that can structurally reform an institution:

> By keeping the inquiry into interest abstract, by dispensing with notice and consent as a prerequisite to class certification, Rule 23 permits such suits to proceed, permits the rearrangement of social institutions . . . .
>
> By dispensing with the inquiry into individual desire that might reveal fragmented classes in Rule 23(b)(2) situations, the Rule permits the assertion of claims by sizeable groups seeking redress of social wrongs.[139]

By ignoring notice requirements in *Yamasaki*, the Supreme Court tacitly agreed with the proposition that no notice need be given in (b)(1) and (b)(2) classes. In cases raising issues of notice, as well as issues of personal and subject matter jurisdiction, the Court has been

137. *See* 3B MOORE'S FEDERAL PRACTICE ¶23.11, at 23-2801-02 (2d ed. 1980).

138. U.S. CONST. amend. VII.

139. *Yeazell, supra* note 11, at 1114.

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willing to disregard those issues in order to approve the class action mechanism as a solution for social problems.

IV. ESCAPE CLAUSES

If a procedure is established in which a district court can bind members of a class on a nationwide basis, it follows that there must be some means of allowing individual members to escape the effects of such a decree if an injustice would otherwise result. Our procedural system has at least four means of permitting the individual to avoid the binding effect of a class judgment: (1) the opt out provision for members of (b)(3) classes;[140] (2) the necessity of adequate representation in the plaintiff class action of class members to be bound by the judgment;[141] (3) the doctrine that individual claims are outside the class decree;[142] and (4) the doctrine that a change in the underlying law can cause a decree not to be modified.[143]

A. *The (b)(3) Opt Out*

Rule 23 provides members of a (b)(3) class with the right to exclude themselves from the operation of the class decree.[144] If one does not opt out, however, one will be bound by the decree.[145] There are no rights to opt out of (b)(1) or (b)(2) classes.[146]

The reasons for granting an opt out right in (b)(3) suits, but not for (b)(1) or (b)(2) actions, are incompletely expressed in the Rule's history. The reasons parallel the explanations for the differing requirements of notice discussed above. The Advisory Committee states that in (b)(3) actions

> the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.[147]

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140. FED. R. CIV. P. 23(c)(2).
141. Hansberry v. Lee, 311 U.S. 32 (1940).
142. Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979).
143. Montana v. United States, 440 U.S. 147, 161-62 (1979).
144. FED. R. CIV. P. 23(c)(2).
145. *See* In re National Student Marketing Litigation v. Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976); In re Four Seasons Securities Laws Litigation, 502 F.2d 834 (10th Cir. 1975). The prior law was that one would be bound in a spurious lawsuit only if one affirmatively opted in. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1968).
146. Parties can agree, however, for an opt out right in a (b)(2) class. *See* Penson v. Terminal Transfer Co., 49 U.S.L.W. 2515 (U.S. Feb. 17, 1981) No. (_____).
147. Advisory Committee, *Proposed Amendments To Rules Of Civil Procedure For The United States District Courts*, 39 F.R.D. 73, 104-05 (1966).

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However, in many (b)(2) actions a party may have a similarly strong individual interest, such as an interest in whether to be bused or to be granted parole. The explanation by the Advisory Committee for granting an opt out provision to (b)(3) class members without considering the individual interests of (b)(2) class members appears to be ill-considered.

Professor Moore sees the (b)(3) class as lacking jural relations since it is a descendant of the old spurious class action. Because there was no jural relation between the members of the class under the spurious category, the suit was only an invitation to joinder.[148] As stated above, the analysis of class actions on the basis of jural relations is historically inaccurate and analytically nonsensical. Moreover, the historical explanation of jural relations does not explain the failure to give an opt out right to the (b)(2) class. Under the (b)(2) category, the class members are victims of a single unconstitutional tort rather than possessors of a property right.[149]

The (b)(1), (b)(2), and (b)(3) division can be justified on pragmatic grounds. The reason opt out rights cannot be given in (b)(1) and (b)(2) suits is that such rights would not make sense. Exclusion of a class member from a city-wide busing decree or a decree

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148. The lineal descendant of the spurious class action under original Rule 23 is the (b)(3) type of class suit under revised Rule 23. We have previously discussed the mod, mod (b)(3) class action; and herein we discuss its much more conservative ancestor.

> The spurious class suit was a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warranted its use by persons desiring to clean up a litigious situation. While a purist might not like to have the third type of class action termed spurious, this label served to direct attention to the practical realities of litigation. The character of the right sought to be enforced for or against the class was "(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."
>
> There was no jural relationship between the members of the class; unlike, for example, the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liability of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance.

3B MOORE'S FEDERAL PRACTICE ¶23.10(1), at 23-2601-03 (2d ed. 1980) (footnotes omitted).

149. *Id.* at 23-2761 n.2.

changing conditions at a penitentiary is as absurd as opting out of a legislative enactment.[150]

The system may also be distinguishing between equitable and legal relief. In a (b)(3) suit, where monetary relief is sought, one has a right to a jury, while in actions seeking equitable relief, one has no such right.[151] The opt out right, then, protects the individual's right to an individual jury determination. In this respect *Johnson v. General Motors Corp.*[152] is correct in distinguishing between equitable and monetary relief. A person cannot receive individual relief in a suit seeking a restructuring of employment practices at a General Motors plant but one may receive an individual jury verdict for damages suffered. The seventh amendment indicates that a person has a right to seek individual monetary relief in front of a jury. Opt out rights thus should be granted for individuals seeking compensatory damages.

B. *Prior Inadequate or Unfair Representation*

An individual may collaterally attack[153] prior litigation on the grounds that representation by the main party of the individual's interest was inadequate or that due process was lacking. Present law is unclear on the exact scope of collateral review,[154] but many courts have held parties not bound by prior decrees on the grounds of inadequate or unfair representation.[155] Direct review is also

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150. Like class redefinition, the grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment. Thus, the distinction Rule 23 draws between (b)(1) and (b)(2) classes, whose members have no right to exclude themselves, and (b)(3) classes, whose members may opt out, has at least some practical justification. Most (b)(1) and (b)(2) classes are suing for relief which cannot be readily limited to only some class members. For example, all individuals who seek to claim from a common fund are affected by a court's allocation of the fund regardless of whether they have excluded themselves from the suit. Similarly, all individuals burdened by an unconstitutional statute are affected, even if they have opted out of class litigation, if the statue is invalidated. Rule 23(b)(3) class suits, by contrast, are generally brought to recover money damages, relief which may be awarded in a manner which distinguishes among individual class members, and which therefore maybe shaped to respect the rights of individuals who have excluded themselves from a lawsuit.

Developments, supra note 109, at 1487-88 (footnotes omitted).

151. U.S. CONST. amend. VII.

152. 598 F.2d 432 (5th Cir. 1979).

153. Hansberry v. Lee, 311 U.S. at 42.

154. *See Collateral Attack, supra* note 68.

155. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Research

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permitted.[156] The judiciary's extreme sensitivity to the adequacy of representation helps to insure that the issues in the prior litigation have been adequately argued.

The *General Motors Engine Interchange*[157] case is an example of this sensitivity. The trial judge in that case approved a subclass settlement covering those who had purchased Oldsmobiles with Chevrolet engines before April 11, 1977. The settlement offered each member of the subclass $200 plus a 36-month or 36,000-mile warranty on the power train. In return, each purchaser was required to sign a release of all state and federal claims concerning the substitution. The Seventh Circuit held that the approval of the subclass settlement was immediately appealable as a collateral order and that the irregular conduct of the settlement negotiations required reversal of the approval by the lower court. Of special importance was the court of appeal's ruling that the settlement negotiations themselves must be open to discovery in order to better determine their fairness and adequacy. In reviewing the substantive fairness of the settlement, the court found that the settlement's "take it-or-leave it" nature was fundamentally unfair.[158]

A court's thorough examination of the substantive and procedural aspects of the representation of the class ensures fairness. However, it is a fairness removed from individual choice. The representative first makes the settlement and the court then reviews it. If both the representative and the court find the settlement to be fair, it may be enforced over an individual's objection.[159] The courts' shift from reliance upon the use of notice to insistence upon adequate representation indicates the modern concept that it is fair to bind parties to the results obtained by their representatives.

C. *Individual Claims*

Precedent exists for holding that individual claims which do not fit within the scope of class relief are not barred by the res judicata effect of the class judgment. Frequently in prison litigation, a situation arises where a lawsuit is filed challenging general prison conditions. An individual prisoner may have been severely injured by a

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Corp. v. Edward J. Funk and Sons Co., Inc., 15 F.R. SERV. 2d 580 (N.D. Ind. 1971).

156. *See, e.g.*, In re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972).

157. 594 F.2d 1106 (7th Cir. 1979).

158. Purchasers who did not accept the settlement would have their federal claims dismissed. *Id.* at 1133-37.

159. *Id.* at 1134.

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guard, but the class suit does not ask for any individual monetary relief for such an injury. If the class suit is successful in obtaining an injunction against the unconstitutional conditions, including the brutality of prison officials, an argument can be made that the individual prisoner's claims are barred in any subsequent action. Two courts have rejected this argument, finding that the class action seeks only to solve the prison conditions experienced by the prisoners as a group.[160] Professor Chafee came to the same conclusion: "[The decree] binds only [the individuals] as to the general right. . . ."[161]

The distinction between group and individual rights dates back to the 1737 case of *Mayor of York v. Pilkington*,[162] which tried the rights of the plaintiffs who claimed fishing rights on the River Ouse against several defendants. The defendants demurred on the ground that each defendant claimed distinct fishing rights. The Chancellor ruled that the defendants could try their individual rights after the general right was adjudicated, "but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established. The defendants may take advantage of their several exemptions, for distinct rights."[163]

A recent case, *Dickersen v. United States Steel Corp.*,[164] puts forth a clear theoretical distinction between the individual claim and the class claim. The court points out that the class claim seeks different redress for a different injury than does the individual claim. The class claims are not "a mere aggregation of individual claims" but rather are based on statistical evidence showing the existence of a pattern or practice of discrimination. A finding that there is no "class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discriminations occurred. . . ."[165] Therefore, the class decision could not bar class members in their individual claims.

A class action is thus able to adjudicate the general rights of the class while allowing subsequent determination of individual claims. The *Dickersen* court explained that the adjudication of class rights is a different lawsuit involving different elements of proof from an individual action.

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160. Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979) *modified en banc*, 636 F.2d 1364 (5th Cir. 1981); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).

161. CHAFEE, *supra* note 68, at 211.

162. 25 Eng. Rep. 946 (Ch. 1737).

163. *Id.* at 947.

164. 582 F.2d 827 (3d Cir. 1978).

165. *Id.* at 830-31.

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D. *A Change in Constitutional Circumstances*

Another problem with binding members of a class to a decree is that the decree itself may have become outmoded by time. For example, what would happen if in the future the right to a hearing in all situations similar to *Yamasaki* became firmly fixed? Is a recipient still bound by the decree, even though *nonclass* members are enjoying hearings in all similar situations? There are indications in legal doctrine that the recipient would not be bound. Professor Kaplan describes this problem and concludes that such a person would not be bound:

> It was suggested that (b)(2) might have awkward consequences in civil rights cases. Suppose an action for a Negro class which is lost on the merits at the trial level; the decision is wrong but for lack of funds appeal is not taken, or the decision was correct at the time but the law later veers. If the judgment in the decided case is given binding effect, as the new rule contemplates but does not prescribe, . . . has not a curiously blighted legal area been created? We need not shrink from the consequences in particular cases of our general analysis of the problem of class suits. Nevertheless, it is fair to point out that there is precedent for limiting res judicata effects of litigation when the legal ambience has changed, as in the well-known tax case of Commissioner v. Sunnen, 333 U.S. 591, 599-603 (1948). . . . Judge Wisdom, in a desegregation matter, disposed of a plea of res judicata based on a defendant's judgment in a prior class action in a state court by invoking the reasoning of the *Sunnen* case.[166]

The Supreme Court, in discussing the collateral estoppel effect of a state judgment on a federal right in *Montana v. United States*,[167] stated that although a state court can determine an individual's federal right, it would be unfair to do so if the legal ambience had changed. This language is directly relevant in allowing escape from a class decree if the law has changed.[168]

Together these escape clauses provide for a means of fairly adjudicating the member's class rights while allowing individual treatment of individual claims and subsequent modifications where the legal environment has changed.

V. CONCLUSION

In the relatively short time since the adoption of Rule 23, the

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166. Kaplan, *Continuing Work Of The Civil Committee: 1966 Amendments Of The Federal Rules Of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 n.128 (1967).

167. 440 U.S. 147, 161-62 (1979).

168. Compare the questions of modifying the decree where the defendant requests the change, *see, e.g.*, U.S. v. Georgia Power Co., 634 F.2d 926 (5th Cir. 1981).

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judiciary has fashioned a mechanism for political adjudication that is able to determine group rights while allowing a measure of fairness for individual concerns. The courts created this new procedural mode without any explicit basis in theory. The nationwide class suit thus exists without courts being overly concerned about notice or personal jurisdiction.

The lack of any explicit theory gives rise to uncertainty. Just one example is the controversy as to the necessity of notice, as exemplified in *Johnson v. General Motors Corp.*,[169] which leaves the parties insecure as to the effect of the decree. This vacillation between requiring notice and not requiring it is symptomatic of a failure to arrive at a coherent scheme for class actions. The thesis of this article is that class actions can significantly affect the individual member of the class as well as the defendant. Perceived in this light, courts may ultimately determine the real issues involved in a class action. On the other hand, a formalistic approach that concentrates on the language of Rule 23 leads to such unreasoned results as the dichotomy in Rule 23 between (b)(1), (b)(2) classes and (b)(3) classes. This dichotomy breaks down in practice since (b)(1) and (b)(2) lawsuits now grant damage relief and the (b)(3) action often includes a claim for injunctive relief.[170]

Taking the problem of notice as an example of what should be done to protect the class members while still allowing the class action to go forward, it appears that a redrafting of Rule 23 could lead to greater certainty and due process. The substitution of a flexible notice system for the current rigid requirement of notice for (b)(3) actions would solve the problems raised by *Eisen*. The problem of notice in (b)(1) and (b)(2) classes is a serious one, not answered by unreasoned recitations of "no notice is required in (b)(1) and (b)(2) actions." Not requiring notice certainly contradicts basic considerations of due process. Those who wish to participate in a process that will affect their rights should have an opportunity to do so. Paradoxically, *Yamasaki* was a case in which no notice was given but which ruled an agency procedure unconstitutional because of lack of notice. As we have seen, the traditional justifications for not giving notice in (b)(1) and (b)(2) actions cannot be justified logically or historically.

Some type of notice allowing individual intervention and participation in actions seeking injunctive relief should be given.[171] In actions seeking monetary relief, notice and the right to opt out should be given where practical. Where the amounts sought are so

169. 598 F.2d 432 (5th Cir.), *reh. denied* 605 F.2d 554 (1979).

170. *See, e.g., Antidiscrimination Class Actions, supra* note 79, at 876 n.46.

171. The problem of intervention in class actions is a complex one. *See Problems of Intervention in Public Law Litigation: A Symposium*, 13 U.C. DAVIS L. REV. 211 (1980).

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small as to negate any substantial interest by the individual in seeking individual compensatory relief, notice is dispensable. A discretionary notice system tailored around such variables as the cost of notice, the interests at stake, and the benefits of intervention could be devised.[172] A redrafting of Rule 23 could end some of the Rule's inconsistencies and provide clearer rules for the class action. A redraft also would enhance the new procedural mode that the courts have crafted in response to social demands.

The problem is greater than maintaining an efficient formal notice system. The courts need guidance as to the scope of participation of individuals affected by the class action while allowing the action to proceed. The concerns of this article have surfaced in recent discussion of a class action brought by Vietnam veterans against the manufacturers of the herbicide, Agent Orange.[173] A recent article[174] states that the action and a similar action against the Veterans Administration is causing problems because of the lack of integration of the lawsuits with any larger strategy to change the operation of the Veterans Administration. Furthermore, the class action "binds all veterans in the class—all Vietnam veterans. If the plaintiffs win, all win; if they lose, all lose."[175] Because these actions are so important and potentially harmful to the veterans who make up the class, the article advocates the appointment of an executive committee that would be chosen by various veteran's groups. The case exemplifies the political nature of class action and the necessity of allowing some participation of class members in a process that adjudicates their rights.[176]

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172. Such a flexible notice system has been proposed many times, *see, e.g.*, *Notice In Rule 23(b)(2) Class Actions*, *supra* note 122 at 1258-59; *Hinds, supra* note 115, at 800-07; *Constitutional and Statutory Requirements, supra* note 115, at 573-74 n.28; *Wolfson, supra* note 63; *Antidiscrimination Class Action, supra* note 79, at 876-90. *See* Ellison v. Rockhill Printing & Finishing Co., 64 F.R.D. 415 (D.S.C. 1974) (an employment discrimination suit, where notice was given in newspaper and by posting in each of defendant's plants).

173. In re Agent Orange Products Liability Litigation, 475 F. Supp. 928 (E.D.N.Y. 1979).

174. National Veterans Law Center, *Agent Orange Products Liability Litigation*, 14 CLEARINGHOUSE REV. 1256 (April, 1981).

175. *Id.* at 1257.

176. *Id.* at 1258.