IS IT TIME FOR THE END OF TYPICALITY?

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with a Preface by Scott Dodson[*]

PREFACE

Kristin MacDonnell's terrific paper argues for the interment of the typicality requirement of Rule 23(a)(3). Her argument proceeds by developing two propositions. First, the typicality requirement has lost independent significance in light of the recent tightening of other class-certification requirements, especially by *Wal-Mart Stores, Inc. v. Dukes*, which has given real teeth to the commonality requirement of Rule 23(a)(2), and *Amchem Products, Inc. v. Windsor*, which bolstered Rule 23(a)(4)'s adequacy requirement. Second, the typicality requirement, because it floats between commonality and adequacy, has tended to cause substantial confusion in cases and commentary, even prompting courts to merge typicality with either commonality or adequacy. To alleviate the confusion, Ms. MacDonnell argues that typicality should be removed from Rule 23(a), and she offers language for doing so. Her article is particularly timely in light of the renewed focus on class actions by both the Supreme Court and the Rules Committee.

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INTRODUCTION

Changes to Rule 23, the Federal Rule governing class actions, have generally tracked new developments in multi-party litigation. For example, the perception of class actions as a lucrative tool for

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plaintiffs' attorneys – unexpected in 1966, when the first major changes to Rule 23 were made – led the Rules Committee to adopt a number of amendments in 2003 that increased judicial oversight of class action litigation.[1] The Rules Committee continues to refine how Rule 23 governs the complex creature that is the class action. It is currently considering two proposed changes to Rule 23: the first would amend Rule 23(e)(2) to eliminate releases for future conduct in the settlement of class actions;[2] the second involves a number of changes to the standards governing "no injury" cases, certification standards for issue classes, and notice requirements.[3]

Despite the Committee's willingness to adapt Rule 23 to new practical realities, the four "threshold requirements" to class certification, set forth in Rule 23(a), have remained inviolate since 1966. Granted, courts have taken a renewed interest in the Rule 23(a) requirements following the Supreme Court's prescription in *Wal-Mart Stores, Inc. v. Dukes* that a class may be certified only when "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[4] But so far, that judicial attention has not translated into a rule change. As courts attempt to sort out the proper criteria for each of the threshold requirements, a puzzling question persists: what is the unique role of Rule 23(a)(3)'s typicality requirement? How is it different from commonality or adequacy of representation? Courts and scholars have been confused by this question since 1966.[5]

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[1] *See, e.g.*, FED. R. CIV. P. 23(c) (giving courts managerial authority over class actions with respect to timing of certification, notice to class members in mandatory actions, and the ability to create subclasses); FED. R. CIV. P. 23(e) (giving courts authority over settlement and voluntary dismissal of certified class actions); FED. R. CIV. P. 23(g) (requiring courts to appoint class counsel after certification).

[2] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, ADMIN. OFFICE OF THE U.S. COURTS, CIVIL RULES SUGGESTIONS DOCKET NO. 14-CV-A, *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/cv-suggestions-2014/ 14-CV-A-suggestion.pdf, *archived at* perma.cc/9VLJ-GFUL.

[3] *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, ADMIN. OFFICE OF THE UNITED STATES COURTS, CIVIL RULES SUGGESTIONS DOCKET NO. 14-CV-F, *available at* www.uscourts.gov/uscourts/RulesAndPolicies/rules/cv-suggestions-2014/14-CV-F-suggestion.pdf, *archived at* perma.cc/Y939-BRKC.

[4] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (internal quotation marks omitted).

[5] *See, e.g.*, White v. Gates Rubber Co., 53 F.R.D. 412, 414-15 (D. Colo. 1971) (discussing different judicial approaches to typicality and finding each insufficient); ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL § 3.6A (4th ed. 2012) ("Courts have thus struggled to interpret the typicality requirement, resulting in confusion and a lack of consensus."); *see also* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH.

The lack of consensus among the courts as to the meaning of typicality, and the concomitant lack of effectiveness of the requirement, suggests that typicality is unnecessary in modern procedural practice. This is so for several reasons.

First, the history of the rule suggests that the 1966 Rules Committee did not carefully examine the justification for the requirement before including it in Rule 23(a). Without a clear rationale, typicality operates at a superficial level, ensuring that the class "looks" cohesive by insisting that the legal claims of the representative resemble those of the class.

Second, typicality does not appear to do much to ensure effective class representation, especially compared to commonality, adequacy of representation, and the requirement of a definable class. These other Rule 23(a) requirements more practically address the due process concerns underlying the threshold requirements and have received more attention – and therefore have been better developed – by courts in recent years.

Third, typicality is obsolete in light of a reality already addressed by the Rules Committee: that it is class counsel who spur and direct class action litigation and, as such, require more judicial oversight.[6] The formal requirement that class representatives' claims be typical is less important when one acknowledges that class counsel – not the class members themselves – are in need of judicial supervision.

Finally, typicality leads to confusion: confusion as to why the Rules Committee adopted it, confusion as to what independent territory it occupies in Rule 23(a), and confusion as to how its satisfaction should be determined. Confusion is not inherently bad. But when confusion is provoked by a superfluous appendage to the rule, it becomes harmful.

This paper proceeds in four parts. Part I explores the 1966 introduction of typicality and the other Rule 23(a) requirements, and outlines the subsequent attempts by courts and scholars to divine a purpose for typicality. Part II illustrates the superfluity of typicality in light of the other

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J.L. REFORM 1097, 1103 (2013) (describing the typicality requirement as "mystifying").

[6] *See* FED. R. CIV. P. 23(g) (requiring district courts to appoint class counsel and providing a framework for assessing the appropriateness of class counsel applicants); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3-4 (1991) ("The absence of client monitoring raises the specter that the entrepreneurial attorney will serve her own interest at the expense of the client.").

threshold requirements and recent trends in class action litigation. Part III discusses the harmful effects of the confusion caused by typicality, using a recent case as an example. Part IV is a call to action that encourages the Rules Committee to excise the requirement and adopt a new, functional test that combines the values of typicality with the requirement that representation be adequate.

I. ORIGINAL PURPOSE OF TYPICALITY

The Rules Committee introduced typicality, along with the other Rule 23(a) threshold requirements, to the class action rule in 1966, as part of the most comprehensive reform to Rule 23 since its 1938 inception. Although the objectives behind the new 23(a) threshold requirements were certain enough – courts needed a way to achieve efficiency while protecting the due process rights of absent class members[7] – the Committee offered little explanation as to the values that supported the four requirements. Nowhere was judicial uncertainty about the 23(a) requirements stronger than with typicality, decried as "a thorn in the side of courts and attorneys who deal with class actions."[8] One of the first Supreme Court decisions to discuss the newly amended Rule 23 failed to discuss the element at all.[9] Perhaps the Rules Committee added typicality with the intention of reinforcing the other Rule 23(a) requirements. Perhaps it envisioned an independent purpose for the requirement; if so, the Committee left it up to the courts to divine that purpose. Perhaps, though, as I argue in this paper, its addition was an attempt to legitimize the entire concept of representative litigation as a preclusive device at a time when that idea was new and on uncertain ground. Assuming that is true, typicality is no longer needed in modern practice, in which the preclusive effect of class actions is widely accepted.[10]

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[7] *See* Bone, *supra* note 5, at 1103 (noting that the 1966 Committee "had to face squarely the due process and fairness-to-absentee issues that the 1938 Committee had dodged").

[8] Wilson v. Anderson Greenwood & Co., No. 76-H-2086, 1979 WL 247, at *2 (S.D. Tex. June 7, 1979).

[9] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[10] *See, e.g.*, Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

Recent courts have sought to carve out a distinct role for typicality, but with little practical effect. Without a clear original purpose or subsequent utility, the persistence of the typicality requirement is merely a source of confusion and wasted effort for litigants and the courts.

A. The 1966 Amendments

Confusion surrounding the typicality requirement likely originates from the uncertain reasons for its inclusion in Rule 23. When the 1966 Rules Committee introduced the provision, it offered no context or instruction apart from the text of the rule itself: "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class."[11] The Rule provides a formal limitation as to *what* must be typical: the claims or defenses of the class. But the Committee gave no guidance as to how typicality was to be assessed, what function it served, or what values supported it. While the general purpose of the 1966 amendments was clear – make the Rule more practically useful – determining how the typicality requirement advanced that purpose has proved elusive.

Typicality was introduced as part of the overhaul of Rule 23 from a highly formal, rights-based classification system[12] to a pragmatic, functional tool that corresponded to the real-world circumstances that called for representative mass litigation in the first place.[13] The old Rule 23 did not envision the class action as a preclusive device whose primary purpose was to achieve judicial efficiency.[14] Instead, the class action was an equitable

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[11] FED. R. CIV. P. 23(a)(3).

[12] The original Rule 23(a) provided only a classification system. It authorized a class action when "the character of the right" was (1) "joint, or common, or secondary;" (2) "several, and the object of the action [was] the adjudication of claims which do or may affect specific property;" or (3) "several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought." FED. R. CIV. P. 23(a) (1938) (repealed 1966), *reprinted in* 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23App.01 (Daniel R. Coquillette et al. eds., 3d ed. 2014).

[13] *See, e.g.*, Benjamin Kaplan, *A Prefatory Note*, 10 BOS. C. INDUS. & COM. L. REV. 497, 497 (1968):

> The reform of Rule 23 was intended to shake the law of class actions free of abstract categories contrived from such bloodless words as "joint," "common," and "several," and to rebuild that law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties.

[14] Although preclusion and efficiency concerns were not at the forefront of the 1938 rule, class actions still had some binding effect. That effect depended on which rights-based category the action fit into. Actions involving joint or common rights bound everyone in the class. Actions involving several rights and specific property bound class members only with respect to the property at issue.

invention of necessity, designed "so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights."[15] This old conception of the class action had a narrow purpose: to allow a lawsuit to continue without joining necessary parties.[16] This limited view of the device allowed the 1938 drafters to mostly avoid the due process and fairness-to-absentee concerns that would become the focus of the 1966 amendments.

Concrete policy concerns, rather than the abstract rights described in the 1938 version of the rule, undergirded the 1966 revisions.[17] Efficiency and decisional consistency were at the forefront of the values underlying the Rule 23 changes. These policy goals were illustrated by, for example, the addition of Rules 23(b)(2) and 23(b)(3), which respectively authorized class actions for cases in which injunctive relief would be impossible or far more difficult for courts to grant in individual litigation, or in which common questions of law or fact united the class members.[18] These amendments evinced a new conception of the class action device, one that acknowledged the class action as not simply an alternative to joinder, but a device that improved efficiency by both allowing aggregation of related claims and giving broad preclusive effect to aggregated judgments.

It was in light of these efficiency considerations that the idea of threshold requirements for class certification arose.[19] If judgments in class actions were to be given preclusive effect, courts needed a way to accurately define the class and identify its members, who would be bound by the judgment. The Rules Committee recognized that under this new regime, district courts would have to supervise class litigation in order to protect the interests of absent class members.[20] Rule 23(a) provided part of the framework for that supervision.

Finally, actions involving several rights and common questions bound only those who chose to intervene. *See* James Wm. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 555-63 (1938).

[15] Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).

[16] *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 242-45 (1990).

[17] Bone, *supra* note 5, at 1102.

[18] FED. R. CIV. P. 23(b)(2)-(3); *see also* Bone *supra* note 5, at 1102 (describing how each of the new 23(b) subdivisions served specific policy goals).

[19] *See* Bone, *supra* note 5, at 1103.

[20] *See id.* ("[The Committee] also responded [to due process concerns] by assigning responsibility to the district judge to look out for the interests of absent class members.").

Rule 23(a) sets forth four threshold requirements that a party moving for class certification must satisfy in order to maintain a class action. First, the class must be "so numerous that joinder of all members is impracticable."[21] Second, there must be "questions of law or fact common to the class."[22] Third, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class."[23] Fourth and finally, the court must determine that "the representative parties will fairly and adequately protect the interests of the class."[24] These requirements are colloquially referred to as numerosity, commonality, typicality, and adequacy of representation.[25] Rule 23(a)'s four requirements direct the court to consider efficiency and due process concerns at an early stage by determining whether a class action is an expedient and fair way to adjudicate a mass dispute.

From the outset, some of these new requirements made more sense than others. Out of the four, Rule 23(a)(4)'s adequacy of representation requirement appears to have been the most intentional. The rule was a direct response to the Supreme Court's decision in *Hansberry v. Lee*, in which the Court held that due process of law is satisfied only if the interests of absentee class members are adequately represented.[26] Rule 23(a)(1)'s numerosity requirement served a practical purpose and merely made explicit an implicit requirement of class action practice: that a class must be comprised of a sufficient number of individuals such that the more simple joinder device is impracticable.

But the other Rule 23(a) additions did not have such clear functions. Those other additions – Rule 23(a)(2)'s commonality requirement and Rule 23(a)(3)'s typicality requirement – appear to have been added without much thought as to what they meant or how their presence was to be determined. These elements also appear redundant. As Professor Bone notes, the requirements of each 23(b) subdivision already guarantee a common question – and 23(b)(3) explicitly requires one – so the addition

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[21] FED. R. CIV. P. 23(a)(1).
[22] FED. R. CIV. P. 23(a)(2).
[23] FED. R. CIV. P. 23(a)(3).
[24] FED. R. CIV. P. 23(a)(4).
[25] *See* WILLIAM RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:1 (5th ed. 2014).
[26] 311 U.S. 32, 42-43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .").

of a common question as a threshold requirement seems unnecessary.[27] The typicality requirement also seems unnecessary given the more intentional inclusion of 23(a)(4)'s adequacy of representation.[28]

Surely, the addition of the typicality requirement was part of the Committee's concern for the due process rights of absent class members. But there is no evidence that the Committee thought rigorously about how the requirement would address that concern. Professor Bone hypothesizes that the typicality requirement was rooted in the Committee's assumption that a class had to exhibit internal "homogeneity," "solidarity," or "cohesion," in addition to adequate representation, in order to fairly bind absent class members.[29] As typicality is a proxy for cohesion, perhaps the Committee added Rule 23(a)(3) to ensure that a class explicitly satisfied the previously assumed cohesion requirement. But this explanation does little to increase the utility of the requirement because neither the language of 23(a)(3) nor the Committee's understanding of "cohesion" was set forth in functional terms.[30] Rather, by restricting typicality to the similarity of legal claims, the Committee couched the requirement in the old formalism that characterized the pre-1966 Rule 23. Perhaps the Committee recognized the redundancy of the typicality requirement and so restricted the element to legal claims or defenses. If typicality could be established by some other standard – such as class members having suffered a similar injury – it would be so obviously duplicative of the commonality requirement as to be meaningless.

The Committee's reasons for adding typicality were more likely about appearance than substance. A typicality requirement lent legitimacy to the unsettling concept of mass litigation that could potentially preclude the related legal claims of thousands of people.[31] The preclusive nature of class

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[27] Bone, *supra* note 5, at 1103 n.28.

[28] *Id.*

[29] *Id.* at 1104 (quoting FED. R. CIV. P. 23 advisory committee's note, subdivision (b)(3) (1966) (internal quotation marks omitted); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 380 (1967)).

[30] Indeed, Professor Bone notes that although the Committee may have considered "cohesion" a requirement for a class action, that principle is at odds with Rule 23(b)(1) limited fund actions, which "inherently pit[] one class member against the others" as they compete for shares of a limited fund. Bone, *supra* note 5, at 1104 n.34.

[31] *See* RUBENSTEIN, *supra* note 25, § 3:28 (describing how typicality "mirrors the requirement that a political representative be a member of the polity she is elected to represent," and noting that this "may add a degree of legitimacy to the representation").

actions was at odds with "the usual rule that litigation is conducted by and on behalf of the individual named parties only."[32] By requiring that the class representative possess claims similar to those of the class, typicality ensured that a class appeared cohesive and well suited to have its claims adjudicated en masse. Despite the salutary effect of this appearance, the resulting confusion surrounding typicality underscored its lack of independent substantive relevance. Whatever typicality's meaning, the 1966 Rules Committee left it to the courts to divine.

B. Judicial and Scholarly Developments

Early courts concluded that the typicality requirement was intended to reinforce the other Rule 23(a) requirements[33] – the implication being that it had no independent meaning. In an early treatise, Professor Moore even went so far as to conclude that "there appears to be little or no need for this [typicality] clause, since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23."[34] But more recently, and guided by the canon of interpretation that portions of a statute should not be rendered meaningless,[35] scholars and courts have sought to carve out a distinct role for typicality.

In a leading modern treatise, Professor Rubenstein maintains that typicality "harnesses selfishness as a means to accomplish altruistic ends."[36] A plaintiff is bound to pursue her own self-interest in litigation, even if she purports to represent others. By insisting that her claims align with those of the class, typicality ensures that the plaintiff's pursuit of her self-interest also advances the interests of absent class members. This is not precisely the same as adequacy of representation. Though both typicality and adequacy of representation are rooted in the due process rights of unnamed

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[32] Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979).

[33] *See, e.g.*, Rosado v. Wyman, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970) ("[T]he typical representative element in Rule 23(a)(3) is designed to buttress the fair representation requirement in Rule 23(a)(4).").

[34] Wilcox v. Petit, 117 F.R.D. 314, 317-18 (D. Maine 1987) (quoting 3B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 23.06-2 (2d ed. 1987)).

[35] *See, e.g.*, Rake v. Wade, 508 U.S. 464, 471 (1993) ("We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid denying effect to a part of a statute, we accord significance and effect to every word." (internal quotation marks and citations omitted)).

[36] RUBENSTEIN, *supra* note 25, § 3:28.

class members, they tackle the issue differently. Rule 23(a)(4)'s adequacy requirement addresses due process concerns directly by inquiring whether the representative has conflicts of interest with class members and is able to pursue the litigation with enthusiasm and knowledge.[37] The typicality requirement, on the other hand, addresses due process concerns indirectly by relying on the "inherent logic" that a class will necessarily benefit from the representative's pursuit of her own claims if her claims are sufficiently similar to those of the class.[38]

These theoretical differences are of limited utility to the courts, who must devise functional tests to determine whether typicality is satisfied. The tests that have emerged tend to be functionally similar to either commonality or adequacy of representation, or both. For example, the Ninth Circuit says that "[t]he test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."[39] Other circuit courts employ similar tests.[40] It is hard to see how tests such as the Ninth Circuit's address problems that the commonality requirement – especially in the more exacting form demanded after *Dukes*[41] – or the adequacy requirement do not already cover. Indeed, where typicality has been invoked as a bar to class certification, the same outcome would have been the likely result under a commonality, adequacy of representation, or Rule 23(b)(3) predominance analysis.[42]

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[37] *See id.*; Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 314 (5th Cir. 2007) (stating that the inquiry into adequacy of the proposed class representative examines both "the class representatives' willingness and ability to serve" and "conflicts of interest between the named plaintiffs and the class they seek to represent" (citation omitted)). It also bears mentioning that 23(a)(4) is a basis for assessing adequacy of class counsel; now that inquiry is also encompassed in Rule 23(g).

[38] *See* RUBENSTEIN, *supra* note 25, § 3:28.

[39] Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 2008)) (internal quotation marks omitted).

[40] Beck v. Maximus, Inc., 457 F.3d 291, 295-96 (3d Cir. 2006); Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001); James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001); Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir. 1977).

[41] *Dukes*'s stringent commonality standard requires the plaintiff to demonstrate that class members have "suffered the same injury," that class claims "depend upon a common contention," and that the common contention be of a nature that is "capable of classwide resolution." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541,at 2551 (2011).

[42] *See, e.g.*, Retired Chi. Police Ass'n v. City of Chicago, 7 F.3d 584, 596-99 (7th Cir. 1993) (affirming the lower court's holding that a class action was barred on the basis of both the typicality and

In sum, the 1966 amendments did little to explain the reasons behind the typicality requirement or the goals that it was meant to serve. Subsequent scholarly and judicial attempts to divine a meaning for typicality have been fruitful only to the extent that conceptual distinctions have emerged. These distinctions are of little practical import because other, better-developed aspects of Rule 23 practice address the due process concerns that underlie the requirement of typicality. It seems time, then, to examine the superfluity of typicality and consider its abolition.

II. THE CURRENT SUPERFLUITY OF TYPICALITY

The persistence of typicality in modern practice is unnecessary for three primary reasons. First, it is unclear whether the typicality requirement actually promotes effective litigation. Second, other threshold requirements of Rule 23(a) more effectively address the concerns that underlie typicality. Third and finally, typicality is obsolete in light of two modern trends in class action practice that have received recent attention from the Rules Committee: (1) the fact that most class actions, as with individual litigation, settle; and (2) that it is class counsel, not class members themselves, who spur and direct class litigation and therefore require more judicial oversight. This section addresses each of these problems in turn.

A. The Dubious Effectiveness of Typicality

By requiring that the class representative possess claims that are typical of the class, the typicality requirement assumes that the individual best suited to represent the class is the one who is most similar to the rest of the class members. But it is not necessarily true – in either history or in litigation – that the best advocate for a group is one of its own members. As Professor Rubenstein aptly notes in illustrating this point, wealthy individuals have championed the rights of the poor; men the rights of women; whites the rights of blacks.[43] This is true not only of social movements.

adequacy requirements); *see generally* RUBENSTEIN, *supra* note 25, §§ 3:31-32 (discussing overlap of typicality with commonality and adequacy of representation).

[43] RUBENSTEIN, *supra* note 25, § 3:28 ("Senator Edward Kennedy, for instance, was a well-known advocate for the poor although hailing from a wealthy family; John Stuart Mill, a famous male feminist; a white man, William Lloyd Garrison, a leading American proponent of the abolition of African slavery in the United States.").

Effective, enthusiastic proponents for any cause – especially in the relatively impersonal context of litigation – need not be the ones who are most "typical" of group members. For example, in litigation involving trusts, the actions of the trustee as to the trust will bind beneficiaries. But courts do not preliminarily inquire as to whether the trustee and the beneficiaries share the same legal interests.[44] Indeed, the very concept of legal representation assumes that the best advocate for an injured person is not necessarily someone who has experienced the injury firsthand. It therefore seems an arbitrary and untrue assumption that the best measure of effectiveness of a group representative is her "typicality."

Moreover, the concerns that likely undergirded the Rules Committee's addition of typicality are no longer at issue in modern practice. As discussed above, typicality lent legitimacy to the general idea of representative litigation, but appeared to have little practical purpose. Numerosity and commonality, by ensuring that the class contained a sufficient number of connected individuals, advanced judicial economy. Adequacy of representation, especially with its connection to the *Hansberry* case, explicitly ensured that class members were accorded due process. Only typicality appeared to be without a functional home, tacked on as an extension of adequacy to assure class members that their leader was "one of them," despite the fact that their claims were being aggregated and adjudicated together in the name of efficiency.

Now, however, the idea of the class action as an efficiency device is well established in American jurisprudence[45] and no longer needs symbolic reinforcement of its legitimacy. Furthermore, the modern reality is that most potential class members have only an attenuated interest in the outcome of the litigation – indeed, potential members may not even realize that the harm giving rise to the claims has occurred.[46] The idea that such a disjointed group requires a leader to champion its interests manifests a rather romanticized notion of representative litigation that is at odds with

[44] Geoffrey C. Hazard et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1856 (1998) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 311 (1950)).
[45] *E.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 402 (2010) (stating that Rule 23 is "designed to further procedural fairness and efficiency").
[46] *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 413 (2014) (summarizing critiques of the class action device and noting that "in many cases class members may not even know that they have been harmed, may not care about minor injuries, and may be entirely disinterested in pursuing litigation").

reality.[47] Instead, the class representative should be the individual (from among those who have suffered the same harm as the rest of the class members, criteria addressed in Rule 23(a)(2)'s commonality requirement) who is most knowledgeable, capable, and available – criteria addressed in Rule 23(a)(4)'s adequacy of representation requirement.

A final illustration of the doubtful effectiveness of typicality lies in the method by which the most typical representative is selected. If typicality truly were an important indicator of the effectiveness of a putative representative, one would think that the representative would be elected by the class members or appointed by the court. But this is not how it works. Instead, the class representative is simply the person – almost always selected by the plaintiffs' attorney – who files a complaint and moves for class certification. The court only assesses this selection after the fact, on the motion for class certification. In practice, then, the typicality requirement works not as a way of ensuring the most effective representative, but as a "check [on] counsel's zeal by forcing them to find a class member to represent the class prior to bringing suit to redress an alleged wrong."[48] It is true that class counsel, and not class members themselves, usually initiate class litigation.[49] The selection of counsel, therefore, requires more judicial oversight than the selection of a class representative. But typicality is not the way to accomplish this oversight. Other, more effective checks built into Rule 23 directly address that problem. For example, courts have long used Rule 23(a)(4)'s adequacy requirement to ensure not only the adequacy of class representatives, but also the adequacy of class counsel.[50] And Rule 23(g), added in 2003, more explicitly directs the trial court to ensure that class counsel will "fairly and adequately represent the interests of the class."[51]

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[47] *See* RUBENSTEIN, *supra* note 25, § 3:28 (noting that, in practice, "it is class counsel, not class representatives, who generally direct class actions, and they typically select the class's representatives rather than the class's representatives seeking them out.").

[48] *Id.*

[49] *See, e.g.*, New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 313 (3d Cir. 2007) (quoting Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) (internal quotation marks omitted) ("Experience teaches that it is counsel for the class representative, and not the named parties, who direct and manage these actions."); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998) ("[C]lass representatives often are recruited by class counsel, play no client role whatsoever, and – when deposed to test the adequacy of representation – commonly show no understanding of their litigation.").

[50] RUBENSTEIN, *supra* note 25, § 3:52.

[51] FED. R. CIV. P. 23(g).

It is unclear, therefore, what role typicality plays in ensuring effective class litigation. The only unique role that might have existed for the requirement in 1966 – legitimizing class litigation by requiring the representative to be a "leader" of the group – has become obsolete in the current legal landscape. As discussed further below, there is no longer any need to subscribe to the fiction that the best representative is the one most typical of the class. Other, more developed aspects of Rule 23 ensure that the class representative – the named class member acting through counsel – zealously pursues the class's interests such that a binding, preclusive judgment comports with due process.

B. Other Threshold Requirements

Early courts struggled with the typicality requirement. Some treated it as synonymous with the commonality requirement.[52] Others saw it as synonymous with the adequacy of representation requirement.[53] Still others attempted to give it an independent meaning by finding that it required an absence of any conflict between the interests of the plaintiff and others in the class[54] – but of course, as noted by one court,[55] this interpretation is essentially the same as the adequacy of representation requirement. In more recent years, courts have assessed typicality by inquiring whether the named representative suffered the same type of injury or was subjected to the same type of conduct by the defendant.[56] These formulations, howev-

[52] *See, e.g.*, Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 247 (D. Conn. 1970) (finding typicality not satisfied because of the unique factual and legal nature of plaintiff's claims).

[53] *See, e.g.*, Brown v. Weinberger, 417 F. Supp. 1215, 1218 (D.D.C. 1976) (granting class certification because, among other things, "there [were] no apparent substantial conflicts of interest or legal positions to be advanced within the class," and not discussing typicality at all); Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970) (finding there was "no doubt" that typicality was satisfied, but discussing only adequacy of representation).

[54] *See, e.g.*, Mersay v. First Republic Corp. of Am., 43 F.R.D. 465, 468-69 (S.D.N.Y. 1968) (finding the class representative's claims to be typical because "his interests [were] not antagonistic to those of the class"); Cannon v. Tex. Gulf Sulphur Co., 47 F.R.D. 60, 63 (S.D.N.Y. 1969) (citing *Mersay* for the idea that "representatives must not have interests antagonistic to or in conflict with those they seek to represent.").

[55] White v. Gates Rubber Co., 53 F.R.D. 412, 414-15 (1971).

[56] *See, e.g.*, Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1175 (9th Cir. 2010) ("The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.") (quoting Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 2010)).

er, essentially boil down to the same inquiry as commonality, especially as that requirement was formulated in *Dukes*.[57] Thus, with adequacy of representation, commonality, and the requirement of a definable class covering much of the same ground as typicality, typicality appears to have little independent meaning.

1. *Falcon* and the Early Erosion of Typicality

An early hint of typicality's lack of independent utility came in the Supreme Court's 1982 decision in *General Telephone Co. of the Southwest v. Falcon*, in which the Court reversed a certification order concerning a class of Mexican-Americans claiming employment discrimination.[58] The class representative in *Falcon* was a Mexican-American who was allegedly denied a promotion on the basis of race.[59] He sought to represent a class of other Mexican-Americans who had been or might be denied either employment or promotion because of the employer's discriminatory practices.[60] The Court held that the named representative's claims were atypical because his claims only involved the denial of promotion, and that the district court erred in "fail[ing] to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)."[61] In making this determination, the Court acknowledged that "the commonality and typicality requirements of Rule 23(a) tend to merge," and that, "[t]hose requirements [] also tend to merge with the adequacy-of-representation requirement."[62]

Falcon was hardly a direct blow to typicality. Although the Court blended the typicality and commonality analyses, it focused more heavily on typicality, even appearing to treat commonality as if it were an initial

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[57] *See supra* note 41.
[58] 457 U.S. 147, 150-51, 161 (1982).
[59] *Id.* at 149.
[60] *Id.* at 150-1.
[61] *Id.* at 160.
[62] *Id.* at 157 n.13:

> [B]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement . . . .

step in assessing typicality.[63] And lower courts treated *Falcon* as a directive regarding typicality.[64] Still, the long-term effect of *Falcon* on the decline of typicality's importance was substantial. As Professor Spencer maintains, "the shadow of the typicality concern [in *Falcon*] permitted the freestanding commonality requirement to be subsumed and enlarged simultaneously."[65] *Falcon* provided the language of commonality that Justice Scalia would eventually seize on in *Dukes* to strengthen the commonality requirement in such a way that it overshadowed the typicality requirement.[66] The Court's acknowledgment in *Falcon* – and, later, *Amchem Products, Inc. v. Windsor*[67] – that the Rule 23(a) requirements merge paved the way for the gradual erosion of typicality through the enlargement of other Rule 23(a) threshold requirements. In the modern procedural landscape, the development of adequacy of representation, commonality, and even the "unspoken" requirement of a definable class far outpace typicality. These trends suggest that typicality lacks independent meaning.

2. Overlap with Adequacy of Representation

The adequacy of representation requirement contained in Rule 23(a)(4) insists that representative parties "fairly and adequately protect the inter-

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[63] *See id.* at 158-59 ("Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner . . . ."); *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 468-9 (2013) (stating that *Falcon* "treated commonality as if it were merely instrumental to determining typicality").

[64] *See, e.g.*, Wakefield v. Monsanto Co., 120 F.R.D. 112, 116 (E.D. Mo. 1988) ("[C]onsistent with the Supreme Court's opinion in *Falcon*, the typicality requirement is not always satisfied by suits alleging broad-based racial discrimination.").

[65] Spencer, *supra* note 63, at 468.

[66] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) (quoting *Falcon*, 457 U.S. at 157-58) (internal quotation marks omitted):

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.

For a more thorough history of how the commonality requirement came to be infused with the "same injury" requirement, see Spencer, *supra* note 63, at 464-68.

[67] 521 U.S. 591, 626 n.20 (1997).

ests of the class."[68] The touchstone of the adequacy inquiry is whether the representative has an irreconcilable conflict of interest or is otherwise incompetent to represent the class.[69] Typicality overlaps with adequacy in that both inquiries require the court to consider the due process implications of allowing a class representative to press claims that are not the same as – or in conflict with – the claims of class members. Many courts address the typicality and adequacy of representation together because of their related nature.[70] But even when courts address the two inquiries separately and invoke typicality as a bar to class certification, the same outcome would occur under an adequacy of representation analysis.

A Seventh Circuit case, *Retired Chicago Police Association v. City of Chicago*, illustrates this overlap.[71] In the case, an association of retired Chicago police officers ("RCPA") and other municipal pension-fund groups sued the city alleging due process and equal protection violations when the city entered settlement agreements that altered the terms of the groups' health care coverage.[72] The plaintiffs also alleged breach of contract and estoppel claims based on the City's promise that they would have lifetime health coverage at unchanged rates.[73] The district court determined that the class – composed of the RCPA and three other pension-fund groups – satisfied numerosity and commonality, but not typicality or adequacy of representation.[74] On appeal, the Seventh Circuit agreed, stating with regard to the breach of contract and reliance claims that "[i]t is not known whether the communications allegedly made by the City and the Funds to *each group of city employees* regarding the health care plan were identical."[75] Accordingly, RCPA's claims were not typical "[b]ecause the RCPA [did] not include

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[68] FED. R. CIV. P. 23(a)(4).

[69] RUBENSTEIN, *supra* note 25, § 3:58.

[70] *See, e.g.*, *In re* Credit Suisse-AOL Sec. Litig., 253 F.R.D. 17, 22-23 (D. Mass. 2008) (stating that the "primary focus of the typicality analysis is the functional question of whether the putative class representative can fairly and adequately pursue the interests of the absent class members without being sidetracked by her own particular concerns" and that, as a result, typicality and adequacy can be "addressed jointly" (internal citations and quotations omitted)); *In re* BP, PLC Sec. Litig., 758 F. Supp. 2d 428, 437-39 (S.D. Tex. 2010) (considering typicality and adequacy together given the relatedness of the inquiries).

[71] 7 F.3d 584 (7th Cir. 1993).

[72] *Id.* at 589-90.

[73] *Id.*

[74] *Id.* at 596.

[75] *Id.* at 597 (emphasis in original).

individuals from all of the fund groups and there [was] no indication that each of the groups was treated identically."[76]

But the court then went on to assess the adequacy of representation, and for largely the same reasons determined that it had not been met. Supporting its conclusion, the court noted that individuals who had actually benefitted from the City's settlement were included in the putative class, and that RCPA's executive secretary had a conflict of interest because of his participation in and approval of the disputed settlements.[77] Though the court discussed typicality and adequacy of representation separately, the substance of its analysis belied the distinction between the two. For instance, the court's finding that "the scope of the proposed RCPA class was not restricted to those members whose premiums had increased under the City's health care plan"[78] applied to its assessment of inadequacy of representation, but just as easily could have been the basis for a denial of certification due to lack of typicality.[79]

It could be that the overlap between typicality and adequacy of representation evinces only what Professor Rubenstein calls a "stylistic [preference] regarding the structure of the opinion or order."[80] But the substance of the courts' reasoning – as illustrated by the RCPA case, in which the inquiries were stylistically separate – suggests a more serious underlying problem: the two inquiries are the same.

In a more recent case, *Schlaud v. Snyder*, the Sixth Circuit made this substantive overlap apparent by analyzing only the adequacy of representation requirement but stating that its analysis "could also be expressed in terms of commonality or typicality."[81] In *Schlaud*, a class of home childcare providers sued their union for violation of their First Amendment rights to free association by compelling the collection of dues in support of the union.[82]

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[76] *Id.*
[77] *Id.* at 598.
[78] *Id.*
[79] *See* Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (finding typicality lacking in another ERISA case because "the named plaintiffs could not advance the interests of the entire early retiree class").
[80] RUBENSTEIN, *supra* note 25, § 3:32.
[81] 717 F.3d 451, 457 n.4 (6th Cir. 2013), *vacated & remanded on other grounds*, 134 S. Ct. 2899 (2014) (mem.). In support of this statement, the Court cited *Amchem* and *Falcon* and their statement that the adequacy, commonality, and typicality requirements "tend to merge." *Id.*
[82] *Id.* at 455.

The district court denied certification of the class, which the plaintiffs' complaint defined as all individuals who were home childcare providers in the state of Michigan and had any union dues or fees deducted from the subsidy paid to them by the state.[83] The Sixth Circuit agreed with the lower court that there was a conflict of interest between the named representatives – who opposed union representation – and over 4,000 individuals in the proposed class who had voted in favor of the collective bargaining agreement and the dues deduction.[84] The lower court also found the class representatives inadequate when the plaintiffs tried to refine the class definition to include only childcare providers who had union dues collected *and* who had neither voted for the union nor signed authorization cards.[85] The Sixth Circuit agreed with the district court that it could not "simply assume that non-voting providers are hostile to [u]nion representation."[86] Adequacy of representation was the only Rule 23(a) requirement addressed by the Sixth Circuit's opinion, but the court noted that its adequacy analysis "could also be expressed in terms of [either] commonality or typicality."[87] It is unclear whether the Sixth Circuit meant that the tests for typicality, commonality, and adequacy are identical, although that is what the footnote seems to suggest. Earlier decisions from the circuit envisioned a unique role for typicality.[88] But, as with other formulations, the practical effect of any distinction is limited and attempts to devise a unique role for typicality tend to collapse into other, better-defined requirements like commonality and adequacy. The *Schlaud* decision's seemingly innocuous footnote could very well portend the end of typicality.

3. Overlap with Commonality

Typicality also overlaps with Rule 23(a)(2)'s commonality requirement, which mandates that there exist "questions of law or fact common to the

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[83] *Id.*
[84] *Id.* at 458.
[85] *Id.* at 456.
[86] *Id.* at 456, 459.
[87] *Id.* at 457 n.4.
[88] *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996) (issuing a writ of mandamus directing the district court to decertify a class for, among other reasons, failing to engage in a sufficiently rigorous inquiry into the existence of typicality even though each of the named plaintiffs had used a different model of the product at issue and complained of different injuries).

class."[89] Both inquiries require a court to determine whether the class representative's case shares meaningful similarities with that of the class members. As with adequacy, some courts jointly discuss the typicality and commonality requirements because they are so similar.[90] A prisoners' rights case, *Hassine v. Jeffes*, exemplifies this approach.[91] In that case, the Third Circuit discussed commonality and typicality under a single heading, concluding that the class representatives' allegations of double-bunking, water leaking, and food poisoning meant that the prisoners "demonstrated the commonality of their claims with the claims of the class that they sought to represent."[92] Having determined that their claims were united by a common question of law or fact, the court deemed the typicality requirement also satisfied.[93] Other courts have done the same.[94]

As with adequacy, scholars and courts can devise theoretical distinctions between typicality and commonality. For one, the commonality standard is broad and looks to the interrelatedness of the class as a whole. Its requirements, at least historically, were minimally stringent and easily met in that only a single common question of law or fact was needed to unite class members' claims.[95] The typicality standard, on the other hand, is narrow, concerning itself only with the relatedness of the class representative to the class as a whole. Perhaps, then, because typicality is a "slightly more exacting screen than [commonality],"[96] there is a unique role for the typicality requirement. Surely there are situations in which commonality is satisfied but typicality is not. The *RCPA* case discussed above is one such example. There, the groups shared common questions of law or fact, but the representative's claims were not typical of the class's. But considering commonality and adequacy together, it is hard to see what ground typicality covers that those two do not. If commonality

[89] FED. R. CIV. P. 23(a)(2).
[90] RUBENSTEIN, *supra* note 25, § 3:31.
[91] 846 F.2d 169 (3d Cir. 1988).
[92] *Id.* at 177-78.
[93] *See id.*
[94] *E.g.*, Ginardi v. Frontier Gas Servs., LLC, No. 4:11-cv-00420-BRW, 2012 WL 1377052, at *2-3 (E.D. Ark. Apr. 19, 2012); Holman v. Macon Cnty., No. 2:10-00036, 2011 WL 252969, at *4-5 (M.D. Tenn. Jan. 26, 2011); Susan J. v. Riley, 254 F.R.D. 439, 459-61 (M.D. Ala. 2008).
[95] *See, e.g.*, J.B. *ex rel.* Hart v. Valdez, 186 F.3d 1280, 1299 (10th Cir. 1999) (quoting Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)) ("Because the [commonality] requirement may be satisfied by a single common issue, it is easily met.").
[96] RUBENSTEIN, *supra* note 25, § 3:31.

ensures that there are meaningful common questions among all class members, then it is necessarily true that any class representative chosen from that class will share at least some of the concerns of the class – and likely possess similar claims and defenses as class members. And if, in the absence of the typicality requirement, there were any doubt that a class representative would press for claims not shared by the rest of the class, then as in *RCPA* or *Schlaud*, the adequacy of representation requirement and its concerns regarding conflicts of interest would bar that individual from continuing as the representative. Taking commonality and adequacy together, then, it appears that the typicality occupies no independent territory and exists as merely a superfluous appendage to Rule 23.

This is especially true in light of the Supreme Court's tightening of the commonality standard in *Wal-Mart Stores, Inc. v. Dukes*.[97] Prior to *Dukes*, federal courts characterized the necessary showing for commonality as "minimal."[98] The common questions needed to be germane and to advance the litigation and little more.[99] With this permissive, broad standard governing commonality, typicality – a more exacting standard – made much more sense as an independent requirement. Now, however, *Dukes* mandates a far more stringent commonality showing. *Dukes*' new commonality standard is threefold. First, the plaintiff class members must "have suffered the same injury."[100] Second, the common question must be "central to the validity of each one of the claims."[101] Third, the determination of the common question must resolve a central issue "in one stroke" by "generat[ing] common answers apt to drive the resolution of the litigation."[102]

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[97] 131 S. Ct. 2541, 2550-52 (2011).

[98] *See* Lewis Tree Serv., Inc. v. Lucent Techs., Inc., 211 F.R.D. 228, 231-32 (S.D.N.Y. 2002) ("[T]he commonality requirement of Rule 23(a)(2) is usually a minimal burden for a party to shoulder . . . ."); *see also* Mullen v. Treasure Chest Casino LLC, 186 F.3d 620, 625 (5th Cir. 1999) ("The test for commonality is not demanding . . . .").

[99] Sprague v. Gen. Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998) (en banc) ("It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation.").

[100] *Dukes*, 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)) (internal quotation marks omitted).

[101] *Id.*

[102] *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Regardless of how one views the validity of these new requirements,[103] it is clear that they go much farther than the earlier conception of commonality in demanding a common question. Far from the minimal, permissive standard of yesterday, the new *Dukes* standard, by requiring a central common question that will drive the resolution of the litigation, provides the "exacting screen" that was previously the domain of typicality. After *Dukes*, not just any common question of fact will do. For example, in *M.D. ex rel. Stukenberg v. Perry*, the Fifth Circuit vacated the district court's certification of a class of children in long-term foster care who sued three Texas officials for systemic deficiencies in the administration of conservatorships.[104] The district court found that the common question of fact was "whether Defendants failed to maintain a caseworker staff of sufficient size and capacity to perform properly."[105] But the Fifth Circuit reversed this determination because it "contained no reference to any of the three causes of action advanced on behalf of the proposed class."[106]

After *Dukes*, then, the commonality requirement is far more substantial than before. There must be a nexus between the common question and the causes of action alleged by the class members, and that nexus must further "drive the resolution of the litigation." With such an exacting screen for commonality, it is now far more likely that the 23(a)(2) requirement alone will ensure that a class representative advances the claims of the class. After *Dukes*, plaintiff classes are also likely to be smaller to ensure that they meet the more stringent requirement. This trend further guarantees that a class representative does not impermissibly purport to represent sprawling, disparate claims.

4. The Requirement of a Definable Class

Although not an explicit Rule 23(a) threshold requirement, the implicit requirement of a definable class further serves the same values as typicality. Courts have justified this judicially created requirement as inherent in the

[103] *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 776 (2013) ("The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2). Nothing in the text of Rule 23(a)(2), or in the Advisory Committee Notes thereto, requires that the common question be central to the outcome.").

[104] 675 F.3d 832, 835, 849 (5th Cir. 2012).

[105] *Id.* at 841 (quoting M.D. v. Perry, no. c-11-84, 2011 WL 2173673, at *5 (S.D. Tex. June 2, 2011) (internal quotation marks omitted).

[106] *Id.*

structure of Rule 23 and therefore an "axiomatic" part of class certification.[107] Although relatively few cases turned on the adequacy of the class definition prior to 2000,[108] since then, a significant number of courts have invoked it as part of the reason for denying class certification.[109] These courts tend to reject broad, sweeping class definitions, such as the one proposed in *Brazil v. Dell, Inc.*: "California persons or entities who purchased Dell computer products that [defendant] falsely advertised."[110]

Though not all circuits follow this trend,[111] those that do often meld the analysis of a definable class with the requirements of Rule 23(a), including typicality. For example, in *Romberio v. Unumprovident Corp.*, the Sixth Circuit reversed the district court's grant of class certification of a Rule 23(b)(2) ERISA class defined as "those plan participants and beneficiaries whose long-term disability benefits were denied or terminated after being subjected to any of the practices alleged in the [c]omplaint."[112] The court rejected the class definition as indefinite and requiring "individualized fact-finding."[113] These same concerns meant that "the typicality premise [was] lacking" because "it [could not] be said that a class member who prove[d] his own claim would necessarily [have] prove[n] the claims of other class members."[114]

The additional standard of definability, then, works in tandem with commonality to ensure that the class is tightly defined and closely related.

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[107] *See, e.g.*, Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) ("[I]t is axiomatic that for a class action to be certified a 'class' must exist."); *see also* DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) ("It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.").

[108] *See, e.g.*, 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1760 (3d ed. 2011) (noting the "liberal judicial attitude toward defining the class" and that "it normally is not essential to delimit its membership with a high degree of precision at the class-certification stage").

[109] *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-94 (3d Cir. 2012); Williams v. Oberon Media, Inc., 468 F. App'x 768, 770 (9th Cir. 2012); Romberio v. Unumprovident Corp., 385 F. App'x 423, 430-31 (6th Cir. 2009).

[110] 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008). The court rejected the class definition as an impermissible fail-safe class – that is, a class defined in terms of the defendant's liability. *Id.*

[111] *See, e.g.*, Rodriguez v. Countrywide Home Loans, Inc., 695 F.3d 360, 370 (5th Cir. 2012) (rejecting the fail-safe class prohibition and holding that a class is appropriately defined where the class members "are linked by [a] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership").

[112] 385 F. App'x 423, 430-31 (6th Cir. 2009) (internal quotation marks omitted).

[113] *See id.* (finding that the only way to determine whether a given class member's claims were improperly denied was "to engage in individualized fact-finding," and that "the need for such individualized fact-finding [made] the district court's class definition unsatisfactory").

[114] *Id.* at 431-32.

Often, and as in *Romberio*, definability underscores the typicality requirement and addresses many of the same concerns. The recent tendency of district courts to bolster definability – and not typicality – further illustrates the waning significance of the latter.

C. Recent Trends

Two major trends have emerged in class action practice since the Rule 23 amendments in 1966. These trends illustrate the most pressing concerns regarding class action litigation, and the responses to them further illustrate the obsolescence of typicality as a way of ensuring that the due process rights of unnamed class members are protected.

The first trend is the tendency of most class actions to settle. Often, as in *Amchem Products, Inc. v. Windsor*, plaintiffs and defendants will approach the court jointly with a settlement plan prior to class certification.[115] While such settlements may be beneficial in that they reduce overall costs, they risk compromising the claims of absent class members, who do not participate in settlement negotiations. Class action settlements present unique issues of collusion and conflicts of interest. As Professor Klonoff points out, "it is not uncommon for class counsel and defense counsel to join forces in support of a settlement in the face of strong objections by intervening class members."[116]

Before *Amchem*, there was a question as to whether the Rule 23(a) requirements needed to be met for a settlement-only class. *Amchem* answered that question in the affirmative, holding that the requirements of Rule 23 – including 23(a) – "demand undiluted, even heightened, attention in the settlement context."[117] The Rules Committee corroborated this ruling a few years later in 2003 by amending Rule 23(e) to strengthen the process by which trial judges review and accept settlement plans. The amendments set forth a complex scheme for effecting notice to class members, and, among other things, authorize the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion in 23(b)(3) classes.[118]

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[115] 521 U.S. 591, 601-02 (1997).
[116] KLONOFF, *supra* note 5, § 9:1.
[117] *Amchem*, 521 U.S. at 620.
[118] FED. R. CIV. P. 23(e).

Notably, courts and the Rules Committee could have looked to typicality to address some of the class action settlement concerns. They could have required deeper scrutiny of the class representative to ensure that her claims were sufficiently typical to warrant her presence at the negotiating table on behalf of the rest of the class. But courts and the Rules Committee overlooked this possibility, instead choosing to address class action settlement concerns independently. While there may be disagreement about the wisdom of this result, the outcome illustrates the declining relevance of typicality in addressing modern class action concerns.

The second major trend in class litigation is district courts' tendency to require a heightened showing of the Rule 23(a) requirements at the certification stage – a trend that became law with *Dukes*[119] and, later, *Comcast Corp. v. Behrend*.[120] This trend is related to the first one in that the requirement of a heightened showing at the certification stage is, in major part, intended to alleviate the pressure on defendants to settle that comes with the specter of class certification.[121]

Undergirding both of these trends is a distrust of plaintiffs' attorneys, who have been widely criticized as "entrepreneurial"[122] and as abusing the class action device for their own gain.[123] But to the extent that courts have tightened up Rule 23(a) requirements in order to alleviate this pressure on defendants to settle, the typicality requirement does very little work. The requirement is premised on the antiquated notion that it is the named plaintiffs – not their attorneys – who initiate class action lawsuits and who therefore require judicial oversight. As discussed earlier, that notion is almost entirely fictitious.[124] Typicality, then, seeks to control a nonexistent problem.

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[119] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

[120] 133 S. Ct. 1426, 1432 (2013).

[121] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 n.8 (3d Cir. 2001)) (internal quotation marks omitted) ("[T]he potential for unwarranted settlement pressure is a factor we weigh in our certification calculus.").

[122] Macey & Miller, *supra* note 6, at 3-4.

[123] *See, e.g.*, S. REP. 109-14, at 14 ("The first such abuse involves settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves."). The report goes on to outline numerous abuses of the class action device in which most of the settlement proceeds went to class counsel. *Id.* at 15-20.

[124] *See supra* Part II.A.

While courts responded to this mistrust of plaintiffs' attorneys by gradually increasing the plaintiffs' burden at the certification stage, the Rules Committee responded in 2003 by adding a new subdivision, 23(g), which requires the trial judge to appoint class counsel following certification.[125] The Advisory Committee notes to Rule 23(g) recognized that prior to 2003, Rule 23(a)(4) required an inquiry into the appropriateness of class counsel alongside the inquiry as to the adequacy of the class representative.[126] But the new Rule 23(g) set up a framework dedicated solely to evaluating class counsel – leaving Rule 23(a)(4) to govern only the appropriateness of the class representative.[127] With Rule 23(g) now providing a framework for evaluating class counsel, there is more conceptual room for 23(a)(4) to address all aspects of the class representative – including whether her claims are "typical." This makes historic and practical sense. As courts have bolstered commonality and honored adequacy's historic mooring in *Hansberry*, typicality has shrunk in importance. To the extent that the typicality of the class representative's claims is even an important metric, it should be added as a secondary concern under the 23(a)(4) analysis.

III. THE HARMFUL EFFECTS OF THE PERSISTENCE OF TYPICALITY

If typicality still served the same purpose that it did shortly after the 1966 amendments – as a mere reinforcement of commonality and adequacy – its continued presence in Rule 23 might not be problematic. After all, reinforcement is justifiable and desirable in the law. But after *Dukes*, *Amchem*, and the 2003 amendments to Rule 23, the rest of Rule 23(a) no longer needs reinforcing. Typicality, then, persists as a superfluous element that requires unnecessary attention and briefing.

Moreover, retaining typicality only leads to confusion. A recent case from the Northern District of California – a rare instance of a court invok-

[125] FED. R. CIV. P. 23(g).

[126] FED. R. CIV. P. 23 advisory committee's note (2003) ("Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4).").

[127] *See id.* ("Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision.").

ing typicality as the sole reason for denying class certification – illustrates the unnecessary confusion that the typicality requirement can cause.

In *Major v. Ocean Spray Cranberries, Inc.*, the named plaintiff, Noelle Major, filed a putative class action against defendant Ocean Spray, claiming that Ocean Spray had sold drink products that "[were] improperly labeled so as to amount to misbranding and deception."[128] The class to be certified was defined as all individuals in the state of California who had purchased any of four categories of Ocean Spray products within the last four years.[129] The district court denied the motion for certification because the class included purchasers of Ocean Spray products that Major herself had never purchased, thereby rendering Major's claims atypical of those of the class.[130]

After this decision, Major filed a second motion for class certification, seeking to cure the typicality defect by restricting the allegations regarding defective labels to Ocean Spray's 100% Juice blends.[131] Ocean Spray's brief in opposition to the second motion dedicated nearly ten pages to discrediting Major's claims that she relied on statements in Ocean Spray's claims on its labels.

Ocean Spray maintained that Major did not meet the typicality burden because she could not show that she was misled by the allegedly defective labels, nor could she show that the Ocean Spray products indeed had added sugar.[132] Ocean Spray also discussed ascertainability alongside the typicality requirement, describing the implicit requirement as "an integral part of typicality, predominance and manageability."[133] It cited as proof of lack of ascertainability that Major had "no documentary evidence that she ever purchased any Ocean Spray 100% Juice product."[134] This statement would easily fit into a commonality or adequacy analysis. And because those elements have clearer, better-defined standards, they are better grounds than typicality to defeat class certification in this case.

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[128] No. 5:12-CV-03067 EJD, 2013 WL 2558125, at *1 (N.D. Cal. June 10, 2013).
[129] *Id.* at *2.
[130] *Id.* at *4.
[131] Plaintiff's Second Motion for Class Certification, for Appointment of Class Representative, and for Appointment of Class Counsel at 1, Major v. Ocean Spray Cranberries, Inc., No. 5:12-CV-03067 EJD (N.D. Cal. Nov. 1, 2014).
[132] *See* Defendant Ocean Spray's Opposition to Plaintiff's Second Motion to Certify Class at 2-9, Major v. Ocean Spray Cranberries, Inc., No. 5:12-CV-03067 EJD (N.D. Cal. Jan. 3, 2014).
[133] *Id.* at 9.
[134] *Id.*

The briefing from both sides evinces confusion surrounding the distinctions among commonality, typicality, and the requirement of a definable class. Major's brief, for example, repeats much of the same analysis in its typicality section as in its commonality and adequacy sections. It states, for instance, that typicality is satisfied because the determination of whether the single label at issue was lawful or unlawful "unquestionably" makes plaintiff typical of all class members.[135] In her brief's commonality section, Major similarly maintains that "the question of unlawfulness is a common question."[136] She uses this same conclusion to argue that "the claims of the class members and the class representatives are reasonably co-extensive," and that, as a result, "there is no conflict" that would defeat adequacy of representation.[137]

Ultimately, the court did not reach the issue of typicality on Major's second motion because it granted Ocean Spray's motion to dismiss on the issues that Major sought to be certified for class treatment.[138] Major's motion for class certification was therefore rendered moot.[139]

Without assessing the merits of either position, the parties' briefing illustrates the confusion that occurs because of the overlap between typicality the other Rule 23 threshold requirements. The briefing shows that the concerns typicality is supposed to address are already covered by the more exacting post-*Dukes* commonality screen and by the lack of conflicts of interest required under the adequacy analysis. The requirement of an ascertainable class provides additional protection. Of course, *Major* is an isolated example, but it is indicative of the current state of the typicality requirement.

If typicality is duplicative of other Rule 23 requirements, why should it be the one to be jettisoned, rather than commonality, adequacy, or definability? As shown in this paper, those other requirements – with the exception of definability – have been more consistently defined across the circuits and have a firmer historical basis in the Rule. Typicality differs

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[135] Plaintiff's Second Motion For Class Certification, For Appointment of Class Representative, and For Appointment of Class Counsel, *supra* note 126, at 9.
[136] *Id.* at 7 (internal quotation marks omitted).
[137] *Id.* at 11 (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).
[138] *See* Major v. Ocean Spray Cranberries, Inc., No. 5:12-CV-03067 EJD, 2015 WL 859491, at *6 (N.D. Cal. Feb. 26, 2015).
[139] *Id.*

from commonality. The former contemplates the interrelatedness and relevance of the representative's claims compared to those of the class, while the latter considers the class as a whole and requires just one common question that will advance the litigation. Typicality also differs from adequacy of representation. The former takes a mechanical approach to ensuring due process by requiring that the legal claims or defenses are sufficiently similar; the latter take a more nuanced approach by examining the capacity, knowledge, enthusiasm, and potential conflicts of the class representative. But typicality does not differ from what happens when a court puts commonality and adequacy together. If the underlying value of typicality is to ensure that "the interests of the named representative[s] align[] with [those] of the class,"[140] the better-established requirements of commonality and adequacy fully address that concern. At this point in the development of Rule 23, it would be preferable for the Rules Committee to relieve courts and parties of the necessity of contorting and repeating facts to satisfy the now-obsolete typicality requirement. While reinforcement is justifiable, duplication and confusion are not.

IV. PROPOSALS FOR CHANGE

For the foregoing reasons, a Rule change is in order. The Rules Committee first needs to recognize the superfluity of typicality. Looking to cases such as *Falcon*, *Dukes*, and *Amchem*, the Committee should acknowledge that the Supreme Court has determined that the Rule 23(a)(2)–(4) requirements "merge," and that they therefore do not necessarily warrant discrete, individualized attention in every case. Lower court decisions have followed this prescription and do not always consider each of the Rule 23(a) requirements separately.[141] Those that do tend to display repetition and confusion,[142] suggesting that there is a duplicative element in Rule 23(a). Unlike commonality, which enforces the basic requirement that the class members are united by some shared question, and unlike

[140] *E.g.*, Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

[141] *See, e.g.*, *In re* Monster Worldwide, Inc. Sec. Litig., 251 F.R.D. 132, 134 (S.D.N.Y. 2008) (addressing the typicality and adequacy inquiries together, and noting that defendants contested both requirements on the same grounds).

[142] *See, e.g.*, *In re* Sanofi-Aventis Sec. Litig., 293 F.R.D. 449, 454-55 (S.D.N.Y. 2013) (discussing typicality and adequacy together and acknowledging that the two inquiries overlap).

adequacy, which protects the due process rights of unnamed class members, typicality does not have a firm historic or practical basis. Some courts tack it on to the commonality inquiry, others to adequacy of representation. Few discuss it separately or invoke it as the sole reason for denying class certification. These judicial trends suggest the waning significance of typicality and militate in favor of the Committee excising it as a standalone Rule 23(a) requirement.

Because Rule 23(g) is now entirely dedicated to the assessment of class counsel, the Committee should also clarify that Rule 23(a)(4) applies only to the appropriateness of the class representative.[143] The Committee should direct the courts, in line with its stated intentions in the 2003 amendments, to assess adequacy of counsel only under Rule 23(g).[144] This shift would provide the Committee with a prime opportunity to clarify the requirements of Rule 23(a). Given the superfluity of Rule 23(a)(3)'s typicality requirement, the Committee should blend Rule 23(a)(3) and Rule 23(a)(4) into one requirement that addresses all issues regarding the appropriateness of the named plaintiff to represent the class. This includes the inquiry as to whether the named plaintiff suffered the same injury or was subject to the same course of conduct as the unnamed class members (previously a typicality concern that overlapped significantly with commonality). It also includes inquiries as to conflicts of interest between the named plaintiff and the class members (traditionally an adequacy inquiry). It may include an inquiry as to whether the named plaintiff possesses the same legal claims or defenses as those of the class (previously a typicality inquiry). But the new rule should jettison the formal requirement that the named plaintiff's claims or defenses typify those of class members. Instead, the rule should align itself with the rest of Rule 23 and seek to adopt a

[143] Many courts still assess the adequacy of class counsel under Rule 23(a)(4). *See, e.g.*, *id.* at 454. But this is arguably not aligned with the Rules Committee's intentions as stated in the Advisory Committee's notes: "Rule 23(a)(4) will continue to call for scrutiny of the class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision." FED. R. CIV. P. 23(g) advisory committee's note (2003). The only circuit court to directly address this issue has said that continuing to analyze class counsel under Rule 23(a)(4) is incorrect. *See* Sheinberg v. Sorensen, 606 F.3d 130, 132-33 (3d Cir. 2010) (stating that although class counsel adequacy was "traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4)," it is now "governed by Rule 23(g)," and admonishing the district court for failing to apply that section).

[144] *Contra Sanofi-Aventis*, 293 F.R.D. at 454.

practical test that embodies the functional due process purposes behind the threshold requirements. The amended Rule 23 could look something like this:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> 1. the class is so numerous that joinder of all members is impracticable;
> 2. there are questions of law or fact common to the class; and
> 3. the named parties' interests are sufficiently representative of those of the class that the interests of unnamed class members will be fairly and adequately protected.

In using the broader term "interests," a term already found in Rule 23(a)(4), this revision establishes a more functional standard that recognizes that the similarity of the representative's claims is not necessarily the best measure of her effectiveness. The revision would also sanction the trend of many courts to collapse the adequacy and typicality inquiries into one[145] and eliminate the confusion that can result from courts trying to separate the two.

This revision will not solve all the problems outlined in this paper. Most likely, even the revised rule would overlap with commonality and the implicit requirement of a definable class. But it would be a step in the right direction and a move toward increasing the clarity and functionality of Rule 23(a). If the Rules Committee is to continue to meaningfully respond to the shifting realities of legal practice, this revision is necessary.

CONCLUSION

With the Rules Committee already considering changes to Rule 23, it is time to revisit the four threshold requirements to ensure that each of them is serving a clear purpose. Upon close scrutiny, which this paper sought to provide, the Rule 23(a)(3) requirement of typicality appears to do little to advance the major goals of class action litigation: efficiency and fairness. With a bolstered commonality requirement, a historic and comprehensive adequacy of representation requirement, and the im-

[145] *Id.* at 454; *In re* BP, SLC Sec. Litig., 758 F. Supp. 2d 428, 437-39 (S.D. Tex. 2010); *Monster Worldwide, Inc.*, 251 F.R.D. at 134.

plied requirement of a definable class, there is little room for typicality to meaningfully contribute to the class certification decision. Its superfluity is underscored by recent cases that either combine the requirement with others or manifest confusion when attempting to define an independent role for it. Typicality, then, means little in modern practice and only leads to confusion. The Rules Committee should recognize its superfluity and ultimately excise the requirement. Such action would greatly improve the clarity of Rule 23.

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