The Elusive Value: Protecting Privacy During Class Action Discovery

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INTRODUCTION

When hundreds of Californians complained to Pioneer Electronics about malfunctioning DVD players, they had no reason to expect the company would provide their names, addresses, phone numbers, and complaints to an outside party. But that is exactly what happened. In January 2007, before the trial court had decided whether to grant class action status to the lawsuit, the California Supreme Court upheld an order requiring Pioneer to provide the contact information of consumers not opting out to attorneys representing Patrick Olmstead, who had filed a class action lawsuit against the company.[1] The court's ruling was surprising not only because of California's constitutional guarantee of privacy,[2] but also because it goes beyond the normal scope of precertification class action discovery.[3]

The ruling in *Pioneer Electronics (USA), Inc. v. Superior Court* deviates from the general privacy principles that courts often apply during class action discovery, and it is significant because it came from the highest court of the nation's

1. Pioneer Elecs. (USA), Inc. v. Superior Court, 150 P.3d 198, 207 (Cal. 2007) (stating that in a precertification discovery ruling, complaining customers "had no reasonable expectation of any greater degree of privacy," so trial court properly ordered disclosure of their names and contact information unless they opted out by responding to notice mailed to them).

2. CAL. CONST. art. I, § 1 (providing that "inalienable rights" include privacy). California courts have long restricted discovery based on this right, applying strict scrutiny to discovery requests that could invade an individual's privacy. *See* Dominick C. Capozzola, *Discovering Privacy: Because the Right to Privacy Is Guaranteed by the California Constitution, It Can Trump Statutory Limitations on Objections to Discovery Demands*, 26 L.A. LAW. 28, 28 (2003) (reviewing case law to determine that the state constitution requires the government to "meet the 'strict scrutiny' standard before an invasion of privacy will be permitted").

3. *See infra* section I.A.

most populous state.[4] It was also handed down as some other courts have loosened their privacy standards during class action discovery.[5] The *Pioneer Electronics* opinion illustrates the substantial difficulties that state and federal courts face when considering the privacy of absent class members during discovery. It also demonstrates the lack of clarity courts have when determining the relationship between absent class members and class representatives.

Privacy is an elusive value in American law. It is the driving motive behind many court opinions, statutes, and discovery rules, but it often is unstated. Courts lack clear privacy guidelines, particularly when it comes to discovery disputes. In traditional civil litigation, plaintiffs understand that by filing a lawsuit, they open themselves up to the possibility of significant discovery.[6] But privacy presents a particularly unique problem during the discovery stage of class action lawsuits. Some of the most crucial information involves thousands or millions of potential class members who have no involvement in the case and did not choose to be represented by plaintiffs' attorneys. They often have no idea the litigation is even occurring. Before certifying a class, courts theoretically should not consider the plaintiffs and their attorneys to have a special relationship with absent class members.[7] Courts usually are reluctant to allow access to information about the absent class members unless they are convinced that the information is indispensable.[8] Precertification discovery is ordinarily more narrowly limited to information that helps determine whether the plaintiffs meet the requirements necessary for a judge to certify a lawsuit as a class action.[9] Discovery after certification generally is broader and related to the merits of the claim, as the plaintiffs' lawyers are then representing the absent

4. Because it comes from the state's highest court, the decision has set a precedent that has been followed by lower courts in the months since it was released. *See* Belaire-West Landscape, Inc. v. Superior Court, 57 Cal. Rptr. 3d 197, 203 (Cal. Ct. App. 2007) (allowing disclosure of contact information of absent class members in precertification discovery in wage and hour lawsuit); Swissport Corp. v. Superior Court, No. B194691, 2007 Cal. App. Unpub. LEXIS 2854, at *5 (Cal. Ct. App. Apr. 9, 2007) ("[O]pt-out notice is sufficient to protect the privacy of the employees whose information is sought . . . . ").

5. See *infra* Part III for a discussion of these cases.

6. *See* FED. R. CIV. P. 26 (requiring parties to a lawsuit to make initial disclosures and hold conferences to schedule further discovery).

7. Although this proposition is consistent with Federal Rule of Civil Procedure 23, which governs class action lawsuits, it is not always honored in practice, as Part III will demonstrate.

8. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.14 (2004) [hereinafter MANUAL FOR COMPLEX LITIGATION (FOURTH)] ("Discovery of unnamed members of a proposed class requires a demonstration of need."). Although the Manual for Complex Litigation is not binding law, it is edited by a panel of federal judges, and courts generally follow and cite to its procedures for class action litigation. *See, e.g.*, Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (citing to the Manual regarding discovery in an antitrust class action lawsuit).

9. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 8 (stating that precertification discovery is used to determine whether plaintiffs meet the class certification standards of Federal Rules of Civil Procedure 23(a) and 23(b), and it "tests whether the claims and defenses are susceptible to class-wide proof").

class members.[10] Some courts have gone beyond these boundaries, as was seen in *Pioneer Electronics* and other class action discovery decisions.

The recent security breaches at data brokers, which exposed many Americans to the possibility of identity theft,[11] make it imperative to examine situations in which individuals' personal information is distributed to third parties. As privacy becomes an increasing concern in society,[12] and as class action discovery becomes more complex and voluminous because of the massive amounts of discoverable data stored on computers,[13] it is vital for courts to have a set of standards by which they balance the need for information about putative class members against the privacy interests of those individuals. This Note explores the balance between potential class members' need for privacy and the courts' need to determine whether plaintiffs' claims fulfill the requirements necessary for class certification.[14] To be sure, many court opinions regarding class action discovery, including some discussed in this Note, strike the proper balance between privacy and discovery needs. But there have been enough departures from privacy values, such as *Pioneer Electronics*, that it is necessary to suggest privacy guidelines that courts should consider during class action discovery.

Part I of this Note describes the unique mechanics of class action litigation. It then describes the general rules that guide courts in discovery, both before and after classes are certified.

Part II explores a patchwork of court opinions, statutes, and legal scholarship and identifies implicit privacy values. This Note analyzes two common concerns: the more traditional individual property right in personal information and the more contemporary concern about identity theft.

Part III examines some class action discovery opinions that have adhered to these privacy values, as well as the growing body of cases that have deviated from the general rule of privacy protection. It then discusses the implications for the privacy of absent class members. The deviations from recognized privacy

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10. *See id.* ("Courts often bifurcate discovery between certification issues and those related to the merits of the allegations."). Part III will question whether this assumption is appropriate under Federal Rule of Civil Procedure 23 and federal case law, and it will attempt to strike an appropriate balance between merits discovery and the privacy interests of class members after class certification.

11. *See* NATHAN BROOKS, CONG. RESEARCH SERV., DATA BROKERS: BACKGROUND AND INDUSTRY OVERVIEW 1 (2005), *available at* http://assets.opencrs.com/rpts/RS22137_20050505.pdf (describing security breaches at two data brokers—ChoicePoint and LexisNexis—and the fear that these breaches would cause identity theft); *see also* Press Release, Fed. Trade Comm'n, ChoicePoint Settles Data Security Breach Charges; To Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress (Jan. 26, 2006), *available at* http://www.ftc.gov/opa/2006/01/choicepoint.shtm (stating that at least 800 cases of identity theft came after the data breach).

12. A Zogby Interactive poll of 6703 adults in March 2007 found that ninety-one percent of respondents "said they are concerned that their identity might be stolen and used to make unauthorized purchases." Zogby Int'l, Zogby Poll: Most Americans Worry About Identity Theft, http://www.zogby.com/NEWS/ReadNews.dbm?ID=1275 (last visited Apr. 21, 2008).

13. On December 1, 2006, many of the Federal Rules of Civil Procedure were amended to allow a greater amount of electronic discovery. A complete list of these amendments is available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

14. *See* FED. R. CIV. P. 23.

values are significant enough to call for a set of privacy best practices to guide courts and litigators during class action discovery.

Part IV provides those best practices, drawing on the privacy values articulated in Part II. This Note proposes a set of guidelines for precertification and postcertification discovery. Courts should apply heightened scrutiny to any requests for identifying or personal information about absent class members, and they should apply that standard equally to discovery requests from plaintiffs and from defendants. In addition to heightened scrutiny, this Note recommends that if courts determine that personal or identifying information is necessary, they should consider technology, protective orders,[15] and business arrangements that would minimize the invasion of absent class members' privacy. This Note also recommends best practices for postcertification discovery of absent class members. Notices should inform class members about the nature of the information that may be provided to named plaintiffs. Adherence to a uniform set of best practices would ensure fairness for plaintiffs, defendants, and absent class members.

I. CLASS ACTION LAWSUITS AND DISCOVERY

A. THE CLASS ACTION PROCESS

Before examining the privacy rights of absent class members, it is useful to briefly explain the stages of class action litigation and the general procedures for class action discovery.

The class action process allows plaintiffs to sue on behalf of a larger group of individuals who have suffered similar harms.[16] The plaintiffs bringing the suit are known as the class representatives, and the people the plaintiffs seek to represent are known as absent class members. In federal courts, class action litigation is governed by Federal Rule of Civil Procedure 23.[17] In 2005, Congress passed the Class Action Fairness Act, which changes subject matter jurisdiction rules for class actions to make it easier to bring class action lawsuits

15. *See, e.g.*, Babbitt v. Albertson's Inc., No. C-92-1883 SBA, 1992 U.S. Dist. LEXIS 19091, at *14 (N.D. Cal. Dec. 1, 1992) (granting precertification discovery of personal information of absent class members, including Social Security numbers, subject to use of protective order).

16. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 8, § 21 ("Class actions range from claims involving very small individual recoveries . . . that would otherwise likely not be litigated because no individual has a stake sufficient to justify individual litigation, to claims in which individual damages are high but the volume of claims creates advantages in group resolution.").

17. Class action lawsuits filed in state courts follow state civil procedure rules, but they largely reflect the model set forth in the Federal Rules. *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 593 (2006) ("[T]here is little empirical evidence supporting the belief that state and federal courts differ generally in their treatment of class actions . . . . "). Because of the procedural similarities between federal class actions and state class actions, this Part describes the litigation using the Federal Rules as a model.

in federal courts.[18]

For plaintiffs to represent a larger group of absent members, a court first must certify the class. A court will certify the class if the plaintiffs meet the prerequisites set forth in Federal Rules of Civil Procedure 23(a) and 23(b). Under 23(a), plaintiffs must demonstrate four conditions: that the number of class members is so great that joining all claims[19] would be "impracticable";[20] commonality of "questions of law or fact" among the class members;[21] typicality of the named plaintiffs' "claims or defenses" as compared to those of the rest of the class members;[22] and that the representatives would "adequately protect the interests of the class."[23] In addition to meeting all four requirements of 23(a), the plaintiffs must demonstrate that the claim is one of four types listed in 23(b): a dispute in which separate claims would possibly create "inconsistent or varying adjudications";[24] a dispute in which separate claims would "be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interest";[25] a claim in which the goal is declaratory or injunctive relief;[26] or a dispute in which "questions of law or fact common to class members predominate" and "class action is superior to other available methods."[27]

The Supreme Court in *Eisen v. Carlisle & Jacquelin* set the guidelines for a bifurcated class action system; it held that before certification, the court should be concerned only with whether the 23(a) and 23(b) requirements are met and not with the merits of the case.[28] Under this bifurcated system, there are two general stages: precertification and postcertification.

In the precertification stage, the court decides whether to allow the plaintiffs

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18. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

19. *See* FED. R. CIV. P. 20(a)(1) (allowing plaintiffs to join their claims if "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and if "any question of law or fact common to all plaintiffs will arise in the action").

20. FED. R. CIV. P. 23(a)(1).

21. FED. R. CIV. P. 23(a)(2).

22. FED. R. CIV. P. 23(a)(3).

23. FED. R. CIV. P. 23(a)(4).

24. FED. R. CIV. P. 23(b)(1)(A).

25. FED. R. CIV. P. 23(b)(1)(B).

26. FED. R. CIV. P. 23(b)(2).

27. FED. R. CIV. P. 23(b)(3).

28. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). But as some commentators have pointed out, sometimes issues regarding the merits of a case are related to issues that determine the certification requirements, such as typicality. *See* Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 65 (2004) ("[*Eisen*] did not prohibit inquiries at certification that overlapped merits issues when the purpose of the preliminary inquiry was to evaluate compliance with Rule 23.").

to represent the interests of the absent class members.[29] This is a crucial stage. If the court denies certification, the plaintiffs' case may not move forward, because the court will not let the plaintiffs represent the larger class. Certification is such an important obstacle for the plaintiffs to overcome that soon after a class is certified, defendants face increased pressure to settle.[30] If the court decides to certify the class and the defendants do not settle, the case moves into postcertification. For cases certified under Federal Rule of Civil Procedure 23(b)(3), the class members must be notified of the lawsuit and provided an opportunity to opt out.[31] In cases certified under 23(b)(1) and 23(b)(2), the court may order notice but is not required to do so.[32] Once the dispute moves into the postcertification stage, the case becomes more similar to a typical civil lawsuit, in which the court examines the merits of the claims.[33]

B. DISCOVERY PROCEDURES FOR CLASS ACTION LAWSUITS

Federal Rule of Civil Procedure 26 generally governs the scope of discovery in civil litigation: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ."[34] But discovery in a class action lawsuit is unique, because it follows the two-stage system described in section I.A.[35] Unfortunately, the Federal Rules of Civil Procedure do not provide a single set of discovery rules for class actions; instead, lawyers must look to scattered court opinions, off-point civil procedure rules, and secondary sources such as the Manual for Complex Litigation. This section discusses the general guidelines for class action discovery that can be found in those sources.

1. Precertification Discovery

Determining whether the plaintiffs have met the requirements of Federal

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29. FED. R. CIV. P. 23(c)(1)(A) (stating that after a class action suit is filed, "the court must determine by order whether to certify the action as a class action").

30. *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61 (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf (stating that "the certification decision can be expected to have a direct impact on settlement, just as a ruling on summary judgment or an arbitration award might have").

31. FED. R. CIV. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances").

32. FED. R. CIV. P. 23(c)(2)(A).

33. *See* Fireside Bank v. Superior Court, 155 P.3d 268, 271 (Cal. 2007) ("The virtue of this sequence is that it promotes judicial efficiency, by postponing merits rulings until such time as all parties may be bound, and fairness, by ensuring that parties bear equally the benefits and burdens of favorable and unfavorable merits rulings.").

34. FED. R. CIV. P. 26(b)(1).

35. *See* MICHAEL C. SMITH, O'CONNOR'S FEDERAL RULES: CIVIL TRIALS 307 (2006) ("The court may allow discovery and conduct hearings on the issue of class certification, as well as decide whether discovery on the merits should proceed, before determining whether to certify the class.").

Rules 23(a) and 23(b) requires precertification discovery.[36] In the precertification phase, the court's inquiry is generally limited to determining whether the plaintiffs have met the 23(a) and 23(b) requirements for class certification, while postcertification litigation focuses on the merits of the plaintiffs' claims.[37] While acknowledging that there is not always a "bright line" between information that helps determine whether a court should certify a class and information that gets at the merits of a case,[38] the Manual for Complex Litigation states that merits discovery "may ultimately be unnecessary" in the precertification phase.[39] The Manual raises an important point about the difficulty in distinguishing between certification and merits: sometimes it is impossible to place the information in only one of two categories.[40]

For parties to receive identifying information about absent class members during precertification discovery, they face the burden of "a demonstration of need."[41] Courts hesitate to grant these requests "unless the defendant shows a particularized need for the information."[42] Plaintiffs frequently request information from absent class members, and they often face the same privacy restrictions. The U.S. District Court for the Northern District of California in *Palmer v. Stassinos*, for example, stated that precertification discovery of any information related to absent class members may be permissible if it "would lead to additional, discoverable evidence relevant to the class certification issues."[43]

Courts also strive to ensure that precertification discovery is not a thinly disguised tool for lawyers to search for an adequate class representative. There should be a named plaintiff who meets the qualifications to be a member of the class before even considering motions for discovery of information about the

36. *See, e.g.*, Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 (2d Cir. 1978) (holding that "[t]he court should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues").

37. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974).

38. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 8.

39. *Id.*

40. *Id.* ("Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.").

41. *Id.*

42. JEROLD S. SOLOVY ET AL., MOORE'S FEDERAL PRACTICE—CIVIL § 23.85 n.4 (citing M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D. Mass. 1984) (permitting discovery from class members that is "relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties"); Nash v. City of Oakwood, 90 F.R.D. 633, 636–37 (S.D. Ohio 1981) (holding that precertification discovery about class members "should be directed to, and thereby limited, as much as possible, to determining the maintainability of this cause as a class action")).

43. Palmer v. Stassinos, No. 5:04-cv-3026 RMW (RS), 2005 U.S. Dist. LEXIS 41270, at *12–13 (N.D. Cal. May 18, 2005) (distinguishing plaintiff's request for discovery from the reason for discovery approved in *Babbitt v. Albertson's Inc.*, No. C-92-1883 SBA (PJH), 1992 U.S. Dist. LEXIS 19091 (N.D. Cal. Dec. 1, 1992)).

absent class members.[44]

When information appears to be necessary to resolve a certification issue, courts often use protective orders and redaction to protect the privacy of absent class members. For example, in *Landry v. Union Planters Corp.*, a class action suit against a mortgage company, the U.S. District Court for the Eastern District of Louisiana allowed plaintiffs to have information on the mortgage structures of putative class members to establish the certification requirements of Rule 23(a).[45] But it only would allow disclosure of "blind" or "aggregate" data that did not contain information that would reveal the identity of the absent class members.[46]

The legislative history of the Class Action Fairness Act of 2005 suggests some limits on precertification discovery of information regarding absent class members.[47] In the Senate Judiciary Committee's report accompanying the bill, legislators described "limited discovery" that might help resolve issues such as citizenship and amount in controversy that are necessary for a ruling on personal jurisdiction and subject-matter jurisdiction.[48] At that stage of discovery, the committee wrote, "it would in most cases be improper for plaintiffs to request a list of all class members (or detailed information that would allow the construction of such a list), in many instances a massive, burdensome undertaking that will not be necessary unless a proposed class is certified."[49]

2. Postcertification Discovery

Unlike in the precertification stage, the court after certification operates under the assumption that the class members are now being represented as plaintiffs and therefore should be treated as such during discovery. But this assumption is debatable and requires some examination. In 1940, the Court in *Hansberry v. Lee* held that for a judgment to apply to absent class members, they must have been "adequately represented."[50] Patrick Woolley used that holding as a starting point to argue that adequate representation means that "every class member whose whereabouts or identity can be reasonably ascertained has a constitution-

44. *See* First Am. Title Ins. Co. v. Superior Court, 53 Cal. Rptr. 3d 734, 744 (Cal. Ct. App. 2007) (denying discovery to plaintiff who does not belong to the class, stating that "the potential abuse of the class action procedure is overwhelming").

45. Landry v. Union Planters Corp., No. 02-3617 Section 'C' (3), 2003 U.S. Dist. LEXIS 10553, at *6–7, *24–25 (E.D. La. June 9, 2003).

46. *Id.* at *25.

47. *See, e.g.*, Rippee v. Boston Mkt. Corp., 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005) (citing the Class Action Fairness Act's legislative history in the denial of a request for contact information of absent members during precertification discovery).

48. S. REP. NO. 109-14, at 44 (2005).

49. *Id.*

50. Hansberry v. Lee, 311 U.S. 32, 42–43 (1940) (holding 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").

ally protected right to prosecute his cause of action."[51] Woolley argues that means they should be able to participate in discovery.[52] Extending Woolley's argument, it would violate due process principles to subject absent class members to discovery if they are not actively involved in the process, including having the ability to discover information from the other parties.

Absent class members are generally treated as one party, represented by the named plaintiffs.[53] Therefore, the Manual suggests that courts, to varying degrees, allow parties to request information from absent class members after certification.[54] The Manual says courts set restrictions on postcertification discovery to ensure that it has a "legitimate purpose," but they do not "forbid it altogether."[55] In postcertification discovery, courts first attempt to ensure the information about class members could not be obtained outside of the postcertification class action discovery process.[56] According to the Manual, some courts do not treat absent class members as "parties for the purpose of discovery by interrogatories, but [absent class members] may be required to respond to a questionnaire approved by the court."[57]

The most significant difference between precertification discovery and postcertification discovery, at least in those cases maintained under Federal Rule 23(b)(3), is the requirement of providing the "best notice that is practicable under the circumstances."[58] In *Oppenheimer Fund, Inc. v. Sanders*,[59] the Court ruled that Federal Rule of Civil Procedure 23(d)'s class action provisions,[60] "not the discovery rules," govern notice in class action litigation and are "the appropriate source of authority" for requiring defendants to provide information for class action notice.[61]

In addition to discovery for purposes of serving notice, parties likely will seek information about absent class members to support their arguments about the merits of the case. Unlike precertification discovery, in which the discovery opinions mainly have focused on the plaintiffs' right to obtain information about absent class members, some opinions dealing with postcertification discovery

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51. Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573 (1997).

52. *Id.* at 604 ("This right includes, of course, the right to take motions, take discovery and participate in the actual trial.").

53. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998) ("[T]he notion of the class as entity should prevail over more individually oriented notions of aggregate litigation . . . .").

54. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 8, § 21.41.

55. *Id.*

56. *Id.* ("[A] judge should inquire whether the information sought from absent class members is available from other sources and whether the proposed discovery will require class members to obtain personal legal counsel or technical advice from an expert . . . ." (footnote omitted)).

57. *Id.* (footnote omitted).

58. FED. R. CIV. P. 23(c)(2)(B).

59. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

60. FED. R. CIV. P. 23(d).

61. *Oppenheimer Fund*, 437 U.S. at 350 ("The critical point is that the information is sought to facilitate the sending of notice rather than to define or clarify issues in the case.").

highlight defendants' requests for information about absent class members.[62] This may be the case because once the class is certified, absent class members, at least in theory, are considered to be adversaries of the defendants. Some courts have found that defendants are entitled to information about absent class members only when they cannot receive similar data from the class representatives.[63] When absent class members do not opt out when notified of the suit, courts may be less sympathetic to their privacy than in precertification discovery: if information cannot be obtained elsewhere, some courts may order absent class members to provide it.[64]

The unique structure of class action litigation presents challenges to courts when they are attempting to consider the privacy rights of absent class members. But before examining such decisions, the next Part will explain general privacy values that should guide the courts in their discovery rulings.

II. RIGHT TO PRIVACY

The right to privacy is enigmatic. But an examination of the common law, constitutional principles, federal statutes, and influential scholarship about privacy indicates that information often sought about absent class members—including names, addresses, Social Security numbers, and financial data—is considered to be personal information deserving at least some privacy protection.

Two general reasons for privacy are reflected in a review of statutes, court opinions, and legal scholarship: 1) individuals' desires to prevent others from learning information they view as a form of personal property they should have some control over, and 2) a concern about information dissemination causing identity theft. Both reasons are grounded in legal precedent and provide a foundation for privacy guidelines during discovery.

A. PRIVACY AS A RIGHT TO CONTROL PERSONAL INFORMATION

Samuel D. Warren and Louis D. Brandeis first widely articulated common-law privacy rights in their 1890 *Harvard Law Review* article *The Right to Privacy*.[65] Warren and Brandeis reviewed British and United States common

62. *See, e.g.*, Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 698–99 (S.D.N.Y. 1975) (defendant association in antitrust class action seeking responses to interrogatories regarding absent plaintiff class members).

63. *See, e.g.*, Long v. Trans World Airlines, Inc., 761 F. Supp. 1320, 1333 (N.D. Ill. 1991) (granting discovery of random sampling of information about absent class members).

64. *See* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) ("[S]uch discovery is available, at least when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties."); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1006 (7th Cir. 1971) (ordering absent class members to answer interrogatories during postcertification discovery because "absent members of a class who receive notice of the pendency of the class suit may be subjected to the party discovery procedures").

65. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

law and determined that the longstanding right to property "has grown to comprise every form of possession—intangible, as well as tangible."[66] Warren and Brandeis argued that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."[67] They articulated the individual "right to be let alone."[68] The Restatement (Second) of Torts recognizes this common-law right to privacy.[69] "[P]rivacy is invaded" by "unreasonable intrusion upon the seclusion of another,"[70] "appropriation of the other's name or likeness,"[71] "unreasonable publicity given to the other's private life,"[72] or "publicity that unreasonably places the other in a false light before the public."[73]

Although the United States Constitution does not explicitly guarantee privacy, the Supreme Court has found privacy values implied in the Bill of Rights. The First Amendment, the Court has ruled, protects the right of an individual to possess and view pornography in private.[74] The Court has also found that the Fourth Amendment's guarantee against unreasonable searches and seizures is a guarantee of at least some privacy rights.[75] The Court has written that various constitutional provisions "have penumbras, formed by emanations from those guarantees that help give them life and substance," recognizing the "penumbral rights of 'privacy and repose.'"[76]

Statutes and scholarly writings, however, provide better guidance about privacy values in U.S. law. The definition of what personal information should be considered private has expanded in recent decades. Among the most prominent advocates of a broader privacy definition has been legal philosopher W.A. Parent. In *Privacy, Morality, and the Law*, Parent defined privacy as "the condition of not having undocumented personal knowledge about one possessed by others."[77] Parent defined "personal information" as "facts which most persons in a given society choose not to reveal about themselves . . . or . . . facts about which a particular individual is acutely sensitive and which he therefore

66. *Id.* at 193.
67. *Id.* at 198.
68. *Id.* at 195 (internal quotation marks omitted).
69. RESTATEMENT (SECOND) OF TORTS § 652A (1977).
70. *Id.* § 652A(2)(a); *see also id.* § 652B.
71. *Id.* § 652A(2)(b); *see also id.* § 652C.
72. *Id.* § 652A(2)(c); *see also id.* § 652D.
73. *Id.* § 652A(2)(d); *see also id.* § 652E.
74. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (recognizing defendant's "right to satisfy his intellectual and emotional needs in the privacy of his own home").
75. *See* Harris v. United States, 331 U.S. 145, 150 (1947) (stating that "the rights of privacy and personal security protected by the Fourth Amendment ' . . . are to be regarded as of the very essence of constitutional liberty'" (quoting Gouled v. United States, 255 U.S. 298, 304 (1921))).
76. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (reversing conviction of doctor convicted for providing birth control, and holding that the "[v]arious guarantees create zones of privacy"). The Court recognized such penumbras in the First Amendment, the Third Amendment, the Fourth Amendment, the Fifth Amendment's guarantee against self-incrimination, and the Ninth Amendment. *Id.*
77. W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 269 (1983).

does not choose to reveal about himself."[78] Under Parent's definition, rather than having a bright-line, objective definition of privacy, the concept hinges on a more subjective standard that depends on the individual's preferences for use of the personal information. For example, Parent wrote that most do not care if their height "is widely known. But there are a few persons who are extremely sensitive about their height . . . . They might take extreme measures to ensure that other people not find it out. For such individuals height is a very personal matter."[79] This hypothetical demonstrates the difficulty of creating categorical privacy rules.

Building on Parent's definition, Judith Wagner DeCew wrote that the "realm of the private [is] whatever is not, according to a reasonable person in normal circumstances, the legitimate concern of others."[80] DeCew takes a more objective approach but arrives at a similar end: an expansive idea of what should be valued as private information. Ruth Gavison advanced a similarly wide definition by arguing that a "loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him."[81] Parent, DeCew, and Gavison have taken the reasons for privacy articulated by Brandeis and Warren and upgraded them for modern concerns about the spread of information with the rise of technology. They recognize the more immediate need for individuals to possess and control their personal information. Commentators have taken such broad definitions and argued that in the information age, privacy has become a new form of personal property. Paul M. Schwartz recently wrote that "[p]ersonal information is an important currency in the new millennium."[82]

Those broad privacy values are captured by a wide range of federal statutes concerning financial information, Social Security numbers, medical history, and other data that individuals would consider to be personal.[83] An examination of these laws finds that Congress has found a privacy value not just in information traditionally considered private such as medical records, but also in basic

78. *Id.* at 270.

79. *Id.*

80. JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 62 (1997).

81. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE. L.J. 421, 428 (1980).

82. Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2056 (2004).

83. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (2000) (regulating federal government's disclosure of individuals' personal information such as medical, criminal, and employment history); Fair Credit Reporting Act, 15 U.S.C. §§ 1681–81u (2000) (regulating privacy of consumer credit information in an attempt to prevent identity theft); Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–06 (2000) (regulating the online collection of personal information from children); Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 (2000) (providing consumers with various privacy rights concerning the information disclosed to banks and other financial institutions); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2000) (prohibiting the disclosure of a consumer's video rental information without the consumer's consent); Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–25 (2000) (regulating the disclosure of vehicle records by state agencies); Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (1996)) (regulating the disclosure and use of medical records).

identifying information such as names, addresses, and Social Security numbers. For example, in response to concerns about companies selling information gathered about children online,[84] Congress passed the Children's Online Privacy Protection Act of 1998 (COPPA), which prohibits websites from collecting children's personal information—including names, addresses, e-mail addresses, and Social Security numbers—without "verifiable parental consent," and it also requires websites aimed at children to post privacy policies.[85] Violating the law does not require a combination of various pieces of data or particularly sensitive information such as financial information; collection of any such basic information about children without the consent of their parents is a per se violation of the law. Similarly, the Gramm-Leach-Bliley Act's provisions on financial privacy broadly protect customers' "nonpublic personal information."[86] At first glance, that might appear to include only information such as bank statements, not basic information such as names and addresses, since those often are available in the phone book. But in the regulations implementing the Gramm-Leach-Bliley Act, the Securities and Exchange Commission defined "nonpublic personal information" as including public information that "is disclosed in a manner that indicates the individual is or has been your consumer."[87] Therefore, if a bank releases a list containing only names of customers, it would violate the Gramm-Leach-Bliley Act's privacy protections, even if the names in other contexts would have been available publicly. What is prohibited is the disclosure that those people are customers of a particular bank.

Such statutes and regulations demonstrate that providing even just names and addresses can reveal more than just names and addresses. This is particularly true in discovery, when such information is being requested in a particular context, such as a consumer lawsuit or employment litigation. In *Pioneer Electronics*, for example, providing the names and addresses of the consumers in the context of that case demonstrated that they were complaining consumers. Therefore, releasing individuals' identities—even without additional information—can reveal characteristics they might prefer to have kept private. Considering Parent's definition of private data as information that people "choose not to reveal about themselves,"[88] many people would "choose not to reveal" information sought in class action discovery, whether it be where they have worked, what they have purchased, or whether they were among a group of people who were searched at an airport.[89] All of this information can be gleaned by

84. ELEC. PRIVACY INFO. CTR., THE CHILDREN'S ONLINE PRIVACY PROTECTION ACT, http://epic.org/privacy/kids (last visited Mar. 26, 2008).

85. 15 U.S.C. § 6502(b)(1)(A) (2000).

86. *Id.* § 6801(a).

87. 17 C.F.R. § 248.3(t)(2)(i) (2008).

88. Parent, *supra* note 77, at 270.

89. *See, e.g.*, Anderson v. Cornejo, No. 97 C 7556, 2001 U.S. Dist. LEXIS 2330, at *24 (N.D. Ill. Mar. 6, 2001) (allowing postcertification class action discovery of names and addresses of women searched at O'Hare International Airport).

requesting a list of names and addresses, and nothing more.

These values have been reflected in non-class action discovery opinions. Federal Rule of Civil Procedure 26 has been interpreted generally to allow parties wide latitude in their search for evidence.[90] The Federal Rules regarding discovery do not explicitly mention privacy, and privacy was barely addressed in the 2006 amendments to the discovery rules.[91] But privacy has long been a consideration in court decisions on discovery requests. Courts are cautious when handling requests for a wide variety of private information, ranging simply from names and addresses to medical and financial records.[92] Although the approaches in the case law vary, courts tend to perform rough balancing tests to weigh the extent of the intrusion upon privacy against the importance and essentiality of the information in resolving the claims.

B. IDENTITY THEFT DRIVES PRIVACY CONCERNS

Social Security numbers, names, and addresses are commonly requested in class action discovery.[93] Release of Social Security numbers, particularly when combined with names and addresses, can violate many privacy principles recognized by Congress and legal scholars,[94] and it raises concerns about the potential of identity theft. When Social Security was first created, the accompanying numbers were "never designed to be a universal identifier for American citizens," and some were concerned that they were an error-prone and insecure way of identifying people.[95] But by the 1960s, various federal agencies were

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90. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (explaining that discovery rules are "to be accorded a broad and liberal treatment"); *see also* Nat'l Org. for Women, Inc. v. Minn. Mining & Mfg. Co., 73 F.R.D. 467, 472 (D. Minn. 1977) (allowing discovery of employment-related information in a case involving claims of gender discrimination, and citing *Hickman* for the point that Rule 26(b)'s scope "is to be liberally construed").

91. For a summary of the amendments, see Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, LAW PRAC. TODAY, Aug. 2006, *available at* http://www.abanet.org/lpm/lpt/articles/tch08061.shtml.

92. *See, e.g.*, Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (denying discovery request for individual tax returns, citing "a public policy against unnecessary public disclosure"); Stabilus, Div. of Fichtel & Sachs Indus., Inc. v. Haynsworth, Baldwin, Johnson & Greaves, P.A., 144 F.R.D. 258, 267 (E.D. Pa. 1992) (declining defendant company's discovery request for plaintiff's employment records, citing confidentiality and burden); Piscitelli v. Univ. Adjustment Servs., C.A. No. B-82-592, 1985 U.S. Dist. LEXIS 23033, at *1 (D. Conn. Jan. 29, 1985) (holding that "interests in privacy" require a protective order for medical records in discovery request); Richland Wholesale Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 40 F.R.D. 480, 483 (D.S.C. 1966) (requiring a "compelling need" for the discovery of financial records); Wiesenberger v. W. E. Hutton & Co., 35 F.R.D. 556, 557–58 (S.D.N.Y. 1964) (denying request for certain financial information requested in discovery).

93. Part III discusses cases in which courts in precertification discovery have ordered the production of the Social Security numbers of absent class members, even though not essential to resolving certification issues.

94. *See* Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 358 (2006) (describing recent breaches of personal information at data brokers that make it "imperative to have a discussion of concrete legislative solutions to privacy problems").

95. SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 20 (2000).

frequently using the Social Security number for identification purposes.[96] And credit bureaus soon began using Social Security numbers to compile detailed information about consumers in credit reports.[97] In 1971, Congress responded to concerns about people who had not received jobs or credit lines because of errors in credit reports by passing the Fair Credit Reporting Act (FCRA), which allows Americans to see their credit reports.[98] In 2003, Congress amended the Act to allow consumers, when requesting copies of their credit reports under FCRA, to request credit reporting agencies to redact the first five digits of their Social Security numbers from the reports.[99] The Privacy Act of 1974 prevents the government from distributing personal information without an individual's consent.[100] It prohibits linking any information about an individual's "education, financial transactions, medical history, and criminal or employment history" with the individual's "name, or the identifying number, symbol, or other identifying particular assigned to the individual."[101] It was passed in part due to concerns in Congress about the Social Security number being "one of the most serious manifestations of privacy concerns in the Nation."[102] Congress passed the Gramm-Leach-Bliley Act to regulate the financial industry, and it included provisions that restrict the dissemination of personal information by banks and insurers to third parties.[103]

Despite the legal protections, many decades-old concerns about the widespread use of Social Security numbers continue to cause large problems for Americans. The Social Security Administration's Inspector General's office says that it receives about 10,000 annual complaints about improper use of Social Security numbers.[104] The national reliance on the nine-digit number makes it easy for identity thieves to use another person's personal information to obtain lines of credit.[105] In its 2007 report, the President's Identity Theft Task Force

96. *Id.* at 20–21 ("Certainly the government couldn't use names; more than one person can have the same name; spellings are easily changed by accident or on purpose; and names were too unwieldy for the computers of the time.").

97. *Id.* at 21–22.

98. *Id.* at 23.

99. 15 U.S.C. § 1681g(a)(1)(A) (2005).

100. 5 U.S.C. § 552(a) (2000).

101. *Id.* § 552(a)(4).

102. S. REP. NO. 93-1183, at 29 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6916, 6944 ("The concern goes both to the development of one common number to label a person throughout society and to the fact that the symbol most in demand is the Social Security number, the key to one government dossier.").

103. 15 U.S.C. § 6801 (2000) ("It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information.").

104. *See Protecting the Privacy of the Social Security Number from Identity Theft: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 110th Cong. (2007) [hereinafter *Privacy Hearing*] (statement of Patrick O'Carroll, Inspector General, Social Security Administration), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6145.

105. *Privacy Hearing*, *supra* note 104 (statement of Joel Winston, Associate Director, Division of Privacy and Identity Protection, Federal Trade Commission) (describing the two main forms of identity

called the Social Security number "the most valuable commodity for an identity thief."[106] A 2007 national poll conducted by Consumers Union found that eighty-nine percent of respondents support regulations on Social Security number usage.[107] Some privacy scholars have argued for additional protections for this data, asserting that the Fair Credit Reporting Act and Privacy Act do not provide the necessary protections for names, contact information, Social Security numbers, and other personal information.[108] In 2007, the House Ways and Means Committee approved the Social Security Number Privacy and Identity Theft Prevention Act,[109] which would prohibit federal, state, and local governments from selling Social Security numbers and would regulate the use of Social Security numbers in the private sector.[110]

This Part has demonstrated that although privacy has many definitions, there are basic values that run through many statutes and court opinions. The next Part examines how courts have adhered—and failed to adhere—to those values during class action discovery.

III. STRAYING FROM PRIVACY PROTECTION

Although many courts place significant priority on the privacy of absent class members during discovery, others have minimized such privacy rights. There has been enough variance that it is necessary to examine class action discovery opinions in the context of the privacy values outlined in the preceding section. This Part reviews opinions from both federal and state courts and argues that some demonstrate the need for a uniform set of best practices. The current guidelines examined in section I.B are not enough. Applying the privacy values set forth in Part II, both as they relate to a property right in personal information and to preventing identity theft, it becomes apparent that some cases have impermissibly and unnecessarily granted access to absent class members' personal information.

Because many of these court opinions were rulings on discovery motions rather than merits dispositions, they often were unreported and are available only via electronic sources. Although they are unpublished and thus not binding

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theft—"existing account fraud" and "new account fraud"—and stating that Social Security numbers "are valuable to identity thieves in committing both types of identity theft"), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=6146.

106. PRESIDENT'S IDENTITY THEFT TASK FORCE, COMBATING IDENTITY THEFT: A STRATEGIC PLAN 4 (2007), *available at* http://www.idtheft.gov/reports/StrategicPlan.pdf.

107. Press Release, Consumers Union, Consumer Reports Poll: 89 Percent of Americans Want Lawmakers to Restrict the Use of Social Security Numbers (Sept. 6, 2007), *available at* http://www.consumersunion.org/pub/core_financial_services/004860.html.

108. *See* Solove & Hoofnagle, *supra* note 94, at 364 (stating that the Fair Credit Reporting Act and Privacy Act "do not adequately address the activities of the database industry").

109. H.R. 3046, 110th Cong. (2007).

110. *Id.* When discussing the bill on the House floor last year, Representative Sam Johnson said, "It is long past time for Congress to act to help stop the widespread use of Social Security numbers, help prevent ID theft, and further protect American's [sic] privacy." 153 CONG. REC. E1531 (2007).

precedent, they provide the clearest picture as to how courts apply privacy values to class action discovery.

A. PRECERTIFICATION CLASS ACTION DISCOVERY DECISIONS AND PRIVACY

The most common flaw in some precertification discovery decisions is the unstated assumption that the plaintiffs' lawyers are entitled to information about absent class members because they represent the class. While this may at least be theoretically true during postcertification discovery, it surely is not the case in the precertification stage. The plaintiffs and their attorneys are acting alone, seeking to eventually represent the class. But until the court certifies the class, they have no special relationship with the absent class members. The plaintiffs should have no more entitlement to class members' information than the defendants.

A positive example of valuing privacy during precertification discovery can be seen in *Bryant v. City of New York*, in which eight plaintiffs had filed a class action suit against New York City because they were among about 115 protesters arrested at a public demonstration.[111] During precertification discovery, the plaintiffs requested the identities of the other 107 people who had been arrested.[112] The U.S. District Court for the Southern District of New York said that even if this information is not considered "privileged," it is "sensitive."[113] The court agreed with the city's argument that it might "upset" the absent class members "particularly if [the arrest] information were to come to the attention of their family, friends, employers or co-workers."[114] Finding no compelling need for the information to justify such privacy intrusion, the court declined to compel the disclosure of the arrestees' identities.[115] The *Bryant* case is particularly important because it reveals the wide range of information that people may consider to be personal and private. Although many of the cases cited in this Note deal with financial or medical records, revealing something as basic as a name or address also may impinge upon some individuals' definition of privacy. Rather than provide lists of identifying information, some courts attempt to release only aggregate information that might help resolve certification questions.[116]

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111. Bryant v. City of New York, 99 Civ. 11237 (LMM) (DFE), 2000 U.S. Dist. LEXIS 18548, at *1–2 (S.D.N.Y. Dec. 27, 2000). Many of the court files for the arrests had been sealed, hence the need to request identities during discovery. *Id.* at *2.

112. *Id.*

113. *Id.* at *3–4 (stating that when courts are deciding whether to limit discovery, they should consider the "adverse consequences of disclosure of sensitive, albeit unprivileged, material" (quoting Johnson v. Nyack Hosp., 169 F.R.D. 550, 562 (S.D.N.Y. 1996))).

114. *Id*. at *4.

115. *Id.* at *9. Judge Douglas Eaton did, however, write that if the plaintiffs' counsel could "justify the burden," he "might write a letter to each of the 107" people inviting them to provide relevant evidence. *Id.* at *5–6.

116. *See, e.g.*, Robbins v. NCO Fin. Sys., Inc., No. 2:06 CV 116, 2006 U.S. Dist. LEXIS 89962, at *14–15 (N.D. Ind. Dec. 12, 2006) (rejecting plaintiff's precertification discovery request for contact

But courts do not apply such protections consistently. Even in the Southern District of New York, where Magistrate Judge Douglas F. Eaton issued the *Bryant* opinion, another of the court's judges failed to apply similar privacy protections six years later. In *MacNamara v. City of New York*, Magistrate Judge James C. Francis ordered New York City during precertification discovery to provide plaintiffs' attorneys with information about 1,800 protesters who were arrested at the 2004 Republican National Convention.[117] Francis granted this request based on the plaintiffs' broad assertion that this would help determine whether the plaintiffs satisfied the class certification requirements, but the court's opinion did not specify which requirements it would help the court evaluate.[118] The court differentiated *MacNamara* from *Bryant* only in that the plaintiffs' attorneys in *MacNamara* were not seeking to use the data to contact class members.[119]

And courts have ordered the production of more than just names. For example, in *Babbitt v. Albertson's, Inc.*, plaintiffs' lawyers during the precertification discovery phase were granted access to copies of discrimination complaints that employees filed with government agencies against Albertson's and to the "names, addresses, telephone numbers and social security numbers" of every person who had been employed by the grocery store chain from 1985 to 1992.[120] While aggregate data about the employees, including demographic information, might have been useful in resolving class certification issues,[121] the court did not provide any reasons for ordering the production of Social Security numbers. Additionally, the court in its analysis did not adequately consider that many employees would not have reasonably expected that complaints about discrimination that they had filed with federal or state agencies would end up in the hands of a plaintiffs' lawyer.

In *Zapata v. IBP, Inc*., plaintiffs sought the employee files, including electronically stored data and medical reports, about employees at two plants during precertification in an employment discrimination lawsuit.[122] Plaintiffs wanted the data to "develop statistical evidence that the claims of the plaintiffs are common to and typical of the potential claims of other Mexicans and Mexican-

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information and "complete file, including computer information," but allowing disclosure of the "number of individuals" who might be members of the class).

117. MacNamara v. City of New York, No. 04Civ.9612(KMK)(JCF), 2006 WL 3298911, at *16 (S.D.N.Y. Nov. 13, 2006).

118. *Id.* at *4.

119. *Id.*

120. Babbitt v. Albertson's, Inc., No. C-92-1833, 1992 U.S. Dist. LEXIS 19091, at *15–17 (N.D. Cal. Dec. 1, 1992). While the *Babbitt* court's use of protective orders is a necessary step toward privacy protection that is absent from many precertification discovery rulings, the court still failed to justify how these materials were necessary to resolve questions about certifying a class.

121. Even if this information might be useful, the court could provide it using "blind" data, redacting personally identifiable information altogether, such as in *Landry v. Union Planters Corp.*, No. 02-3617, 2003 U.S. Dist. LEXIS 10553, at *24–25 (E.D. La. June 6, 2003).

122. Zapata v. IBP, Inc., No: 93-2366-EEO, 1994 U.S. Dist. LEXIS 16285, at *6–7 (D. Kan. Nov. 10, 1994).

Americans who may be class members."[123] The U.S. District Court for the District of Kansas granted this request, including records of salaried employees who would not be part of the class, finding that "plaintiffs may use such information to show whether defendant has unfairly assigned, transferred or promoted to salaried positions persons who are not Mexican or Mexican-American."[124] While much of that information would deal with the merits of the plaintiffs' claims, the court stated that "discovery pertinent to certification may well overlap with discovery upon the merits."[125] Although the court claimed that the information would help determine commonality and typicality for class certification, there are much less intrusive ways to determine those requirements, such as interrogatories requesting statistical data. And because the claims were from hourly employees, providing the information about salaried employees as well was overbroad. The court failed to consider the very serious privacy objections that many employees likely would have had. The court also should have considered the use of protective orders and a neutral third party to handle the information.

Notwithstanding these other examples, the *Pioneer Electronics* case perhaps represents the most significant recent deviation from the general protection of privacy in class action cases. But to fully understand the importance of *Pioneer Electronics*, it is useful to first examine a similar class action lawsuit that moved through the California court system at the same time. In *Best Buy Stores, L.P. v. Superior Court*, an attorney had filed a class action lawsuit in state court against Best Buy, claiming that it "charged an illegal 'restocking fee.'"[126] The California Court of Appeal allowed the disclosure of contact information of potential class members to serve as representatives, but the disclosure was made to an outside party, which sent an opt-in notice to the customers.[127] If the consumers did not receive or respond to the notice, their information would not be shared with the attorney. If the consumers responded and stated that they wanted to share their information, then their information would be provided to the attorney.[128] This "opt-in" system places greater safeguards on privacy rights than the "opt-out" system, in which individuals receive notice that their information will be provided unless they say that they do not want the information shared. The *Best Buy* opt-in system ensures that if information is provided, it is with the consent of the individual.[129]

The California Supreme Court, however, ignored that innovative solution in *Pioneer Electronics*. In that dispute, consumer Patrick Olmstead sought to

123. *Id.* at *7.

124. *Id.* at *8.

125. *Id.* at *4.

126. Best Buy Stores, L.P. v. Superior Court, 137 Cal. Rptr. 3d 575, 577 (Cal. Ct. App. 2006).

127. *Id.* at 580. The trial court would not allow the attorney, Mark Boling, to also act as class representative. *Id.* at 577.

128. *Id.* at 580.

129. For a more detailed comparison of opt-in and opt-out systems, see *infra* section IV.A.4.

recover damages for consumers who, like him, had purchased allegedly malfunctioning DVD players made by Pioneer Electronics.[130] Olmstead sought the names and contact information of the 700 to 800 customers who had complained to Pioneer Electronics about its DVD players.[131] The trial court ordered Pioneer Electronics to notify those customers that if they did not respond to a notice mailed to them and opt out of the information sharing, their contact data would be shared with the plaintiff's lawyers.[132] The intermediate appeals court vacated that decision, holding that potential class members must state that they want their information to be disclosed.[133] This decision came shortly before the Court of Appeal issued its *Best Buy* decision, and the method of notification would have been similar to that in *Best Buy*—absent class members would receive opt-in notices, allowing them to choose whether to provide their personal information to the plaintiffs.[134] The intermediate appeals court in *Pioneer Electronics* held that under California's constitution, "adequate steps to assure actual notice is a prerequisite to an assumed waiver of the consumer's right of privacy."[135] Disclosure of a consumer's "name, address, telephone number, fax number, and e-mail address implicates this privacy interest,"[136] the court wrote, reflecting the objective privacy values advanced by DeCew in Part II of this Note. These customers had not chosen to have such information provided to others; they were under the impression that they were communicating only with the company. If they had wanted to contact a lawyer, they would have done so.

On appeal, the California Supreme Court used a vague "balancing test" to determine that the plaintiffs' need to contact potential class members must take priority over the absent class members' privacy rights.[137] The court's decision replaced the intermediate appellate court's more restrictive "opt-in" requirement with an "opt-out" system, in which the plaintiffs would receive the contact information for all of the putative class members that did not respond to a letter and opt out. The California Supreme Court in *Pioneer Electronics* said disclosure would give plaintiffs the ability to "contact these customers and learn of their experiences."[138] But the court failed to state exactly how this information would lead to resolution of the class certification requirements. The experiences of absent class members may have helped resolve issues of the merits of the

130. Pioneer Elecs. (USA), Inc. v. Superior Court, 27 Cal. Rptr. 3d 17, 20 (Cal. Ct. App. 2005).

131. *Id.*

132. *Id.* at 21.

133. *Id.* at 26–27 ("The requirement of actual notification and an affirmative reply as requisites to disclosure of personal identifying information is not burdensome. But they are essential to protection of the privacy interests safeguarded by the right to privacy.").

134. *Id.*

135. *Id.* at 20.

136. *Id.* at 24.

137. Pioneer Elecs. (USA), Inc. v. Superior Court, 150 P.3d 198, 206 (Cal. 2007) (holding that the customers in the class "had no reasonable expectation of any greater degree of privacy, and no serious invasion of their privacy interests would be threatened by requiring them affirmatively to object to disclosure").

138. *Id.*

claim, but that is an issue reserved for postcertification discovery. And unlike *Best Buy*, the court in *Pioneer Electronics* did not impose any safeguards on the information about putative class members. The court rejected the intermediate court's opt-in system, reasoning that "Pioneer would possess a significant advantage if it could retain [the consumer lists] for its own exclusive use."[139] And the court assumed that information about consumer purchases should not receive the same protection as other information, such as medical records.[140]

The *Pioneer Electronics* decision is particularly noteworthy because the California Supreme Court made subjective value judgments about privacy preferences without providing any evidence to support such preferences.[141] The court implied that individuals do not have the same "expectation of privacy" for information regarding their consumption habits as they do for medical data.[142] But as Part II demonstrated, common-law, constitutional, and statutory privacy protections cover many types of information. They are not limited narrowly to the areas that only facially appear to be private, such as medical data. The *Best Buy* decision came much closer to placing the proper priority on putative class members' privacy because their consumer information would only be given to plaintiffs' attorneys if they affirmatively chose to provide it. It could be argued that the customers in *Pioneer Electronics* had less of a privacy expectation because they had chosen to complain to the company, while the *Best Buy* plaintiffs requested information about customers regardless of whether they had complained. But that distinction is not very persuasive under an objective standard. Customers complaining to a company about a problem should not reasonably be expected to think that would cause their personal information to end up in the hands of plaintiffs' attorneys.

Pioneer Electronics already has been extended far beyond consumers who have filed complaints about companies. It quickly has caused California's lower courts to be more relaxed with personal information of putative absent class members in employment class action lawsuits. A few months after the California Supreme Court's *Pioneer Electronics* ruling, the California Court of Appeal cited *Pioneer Electronics* as justification for allowing plaintiffs' attorneys in a wage-and-hour lawsuit access to data on any employees who did not opt out.[143] The California Court of Appeal also cited *Pioneer Electronics* when it held that "an opt-out notice is sufficient to protect the privacy" of putative class members

139. *Id.*

140. *Id.* at 205 ("[T]he proposed disclosure was not 'particularly sensitive,' as it involved disclosing neither one's personal medical history or current medical condition nor details regarding one's personal finances or other financial information, but merely called for disclosure of contact information already voluntarily disclosed to Pioneer.").

141. *See id.*

142. *See id.*

143. Belaire-West Landscape, Inc. v. Superior Court, 57 Cal. Rptr. 3d 197, 201 (Cal. Ct. App. 2007) (citing *Pioneer Electronics* in determining that the requested information during precertification discovery was not "particularly sensitive").

in a wage-and-hour class action lawsuit.[144]

B. POSTCERTIFICATION DISCOVERY DECISIONS AND PRIVACY

Some courts have deviated significantly from the general privacy protections during postcertification stages. Although plaintiffs have a better claim of a relationship with absent class members during postcertification discovery, as discussed in Part I, it still is important for courts to consider the privacy rights of absent class members.

As in the precertification stage, courts have given plaintiffs' attorneys wide-ranging access to personnel files. For example, in *Orlowski v. Dominick's Finer Foods, Inc.*, a gender discrimination suit, the U.S. District Court for the Northern District of Illinois ordered 1,000 employee files at a retailing chain to be given to plaintiffs' lawyers during postcertification discovery, without any opt-in or opt-out rights.[145] The requested documents included not only names, but also "disciplinary reports, credit reports, and medical information."[146] The defendant employer argued that in addition to overstepping general privacy rights, the discovery was barred by the Illinois Personnel Record Review Act.[147] But the court quickly dismissed concerns about the state law, saying the Supremacy Clause would shield the employer from any liability because it would be complying with a federal discovery order.[148]

In *Rees v. Souza's Milk Transportation, Co.*, the U.S. District Court for the Eastern District of California ordered an employer to provide the Social Security numbers of absent class members during postcertification discovery.[149] The court determined that this was necessary so that eleven putative class members could be provided notice, although it did not adequately discuss or weigh the privacy concerns associated with distributing Social Security numbers.[150]

The next year, in *Gieseke v. First Horizon Home Loan Corp.*, the U.S. District Court for Kansas cited *Rees* when it allowed the disclosure of some class members' Social Security numbers to plaintiffs during postcertification discovery in a class action suit by employees seeking overtime pay.[151] Like

144. Swissport Corp. v. Superior Court, No. B194691, 2007 Cal. App. Unpub. LEXIS 2854, at *5 (Cal. Ct. App. Apr. 7, 2007) (applying the *Pioneer Electronics* analysis to allow an opt-out precertification discovery system).

145. Orlowski v. Dominick's Finer Foods, Inc., No. 95 C 1666, 1998 U.S. Dist. LEXIS 526, at *6 (N.D. Ill. Jan. 16, 1998) (stating that the defendant company did not convince the court that there is "a constitutional right to privacy in an employee's personnel file").

146. *Id.* at *3. The court granted requests for all information but the medical reports, which the court stated "d[id] not appear to be relevant." *Id.* at *6.

147. *Id.* at *2; *see also* 820 ILL. COMP. STAT. ANN. 40/12(c)–(d) (West 1993).

148. *Orlowski*, 1998 U.S. Dist. LEXIS 526, at *5.

149. Rees v. Souza's Milk Transp., Co., No. 1:05-cv-00297 AWI TAG, 2006 U.S. Dist. LEXIS 84514, at *6–7 (E.D. Cal. Nov. 8, 2006).

150. *See id.* The court did require a protective order, *id.* at *6, which is one positive step toward privacy protection.

151. Gieseke v. First Horizon Home Loan Corp., No. 04-2511-CM-GLR, 2007 U.S. Dist. LEXIS 9217, at *7–8, *14 (D. Kan. Feb. 7, 2007) (determining during postcertification discovery that

Rees, *Gieseke* was a class action lawsuit brought under the Fair Labor Standards Act.[152] While class members in Fair Labor Standards Act class action suits face the unique statutory requirement of opting in to become members of the lawsuits,[153] both *Rees and Gieseke* should have considered the use of a neutral third party, as provided in *Best Buy*, which would have minimized the intrusion upon the absent class members' privacy while serving them with adequate notice. The Fair Labor Standards Act's provisions governing collective actions do not require Social Security number usage.[154]

Courts also have allowed the disclosure of a wide range of consumer information in consumer class action law suits. In *Upshaw v. Georgia (GA) Catalog Sales, Inc.*, the United States District Court for the Middle District of Georgia certified a class action lawsuit against a payday loan company.[155] The plaintiffs had claimed that the business used fraudulent and deceptive marketing tactics.[156] The plaintiffs estimated that there were "hundreds, possibly thousands," of class members.[157] In the order certifying the class, the court directed the defendant company to supply plaintiffs' lawyers with "the last known addresses, telephone numbers, and social security numbers of all class members."[158] Because the class was certified under Federal Rule of Civil Procedure 23(b)(3),[159] contacting the absent class members was necessary to fulfill the notice requirement. But such contact could have been made through a neutral third party. This would have prevented the possibility of plaintiffs' lawyers attempting to fish for better class representatives. But no such restrictions were placed on the use of the data. And the court did not state why it was ordering the defendant to provide absent class members' Social Security numbers. It is difficult to see how Social Security numbers would help plaintiffs' attorneys provide the requisite notice to absent class members. As discussed in Part II, Social Security numbers often are used for identity theft, and individuals often place a high priority on protecting that information. Reasonable consumers or employees would not expect their Social Security numbers to be freely shared among parties in a legal dispute that only tangentially involves them.

Although courts operate under an illusion of the absent class members being represented by the plaintiffs' attorneys and class representatives after class certification is granted, many of the absent class members are either unaware of

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"[p]laintiffs' need for the social security numbers of the putative collective class members whose notices have been returned undeliverable outweighs the privacy interests of these members in keeping that information confidential").

152. *Id.* at *2–3. Like *Rees*, *Gieseke* also required use of a protective order. *Id.* at *15.

153. *See* 29 U.S.C. § 216(b) (2000) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party . . . .").

154. *See id.*

155. Upshaw v. Georgia (GA) Catalog Sales, Inc., 206 F.R.D. 694, 696 (M.D. Ga. 2002).

156. *Id.* at 697.

157. *Id.* at 698.

158. *Id.* at 702.

159. *See id.*

the class action or disinterested. Therefore, it is appropriate for the court to protect their personal information more than it protects that of the class representatives, who have affirmatively sought to be involved in the litigation.

IV. PROPOSED PRIVACY GUIDELINES FOR CLASS ACTION DISCOVERY

As discussed in Part II, the legal system values privacy, and such values extend into discovery in class action litigation. Unfortunately, the patchwork of privacy protections leads to confusion for courts. Such troubles were apparent in many of the cases described in Part III. The courts did not have clear standards to guide them in considering the privacy of absent class members who often had no idea that the litigation was even taking place. Therefore, it is essential for courts to follow basic guidelines when ruling on such requests. Because there is not a single legal definition of "privacy," this Note incorporates the general privacy values identified in Part II and proposes a set of best practices for courts to consider when ruling on class action discovery requests.

A. PROPOSED BEST PRACTICES FOR PRECERTIFICATION DISCOVERY

1. Courts Should Not Make Categorical Judgments as to What Information Is Considered "Personal"

Pioneer Electronics and other court opinions suggest that greater protection be given for more "sensitive" data such as medical records and less be given for information such as names, addresses, and Social Security numbers.[160] In fact, *Pioneer Electronics* implies that the courts are capable of subjectively determining whether the personal information should receive protection. But this becomes a dangerous task for a court to perform. By using a sliding scale as to what is considered "private information," a court imposes a wide range of value judgments with little legal precedent. As the *Bryant* court pointed out, even disclosure of names could be considered a serious privacy invasion.[161] Part II discussed the wide range of data that policymakers and legal scholars value as private. It is more consistent with their definitions of private information to consider not the type of information, but the expectation an individual would have in a given case.[162] Even a few data points—names, addresses, and Social Security numbers—could lead to massive problems of identity theft if the data is not properly protected. And individuals also may face great embarrassment if

160. *See* Pioneer Elecs. (USA), Inc. v. Superior Court, 150 P.3d 198, 200 (Cal. 2007) (stating that the consumer complaint information was not "particularly sensitive" because it "involved disclosing neither one's personal medical history or current medical condition nor details regarding one's personal finances or other financial information").

161. Bryant v. City of New York, No. 99 Civ. 11237 (LMM) (DFE), 2000 U.S. Dist. LEXIS 18548, at *9 (S.D.N.Y. Dec. 27, 2000) (finding that the disclosure of the names of 107 absent class members who were arrested would be "a burden on [their] privacy interests").

162. *See, e.g.*, Gavison, *supra* note 81, at 471 (concluding that "[t]he functions of a general commitment to the value of privacy as a part of the law are varied, and cannot be reduced to the amount of protection actually given to that value in the legal system").

their names and addresses are released in the context of certain discovery requests.

Courts first must look to the existing privacy statutes cited in Part II of this Note. But in many cases, a statute does not govern the personal information, so there is not a per se rule prohibiting the disclosure. If a law does not explicitly protect the personal information, the court should then consider whether people would have a reasonable expectation of the data in question staying private and not ending up in the hands of plaintiffs' lawyers. This definition should be the default standard in evaluating whether to provide information about absent class members. Courts should consider prohibiting sharing of a wide range of information, including names, addresses, phone numbers, Social Security numbers, employment records, medical histories, and other data. This provides an objective standard for the courts to use, rather than applying a normative and subjective determination that would be more likely to vary by court.

Such a standard also alleviates concerns about plaintiffs' attorneys not being able to obtain information about putative class members that already is public knowledge. For example, if plaintiffs are seeking to file a class action lawsuit against a municipal police department on behalf of people who were arrested at a political rally, and if the names of everyone who was arrested had been published in a newspaper or even in a publicly available police report, then the arrestees have no reasonable expectation that their identities would stay private.[163]

2. Courts Should Apply the Same Discovery Standards to Defendants' Counsel as They Do to Plaintiffs' Counsel

Many of the opinions regarding precertification discovery deal with requests by plaintiffs' attorneys for information about absent class members, so it is difficult to determine how courts would treat similar requests from defendants. It is possible that such requests are less frequent because the defendants often are the ones who possess the information.[164]

But discovery requests regarding absent class members are not always directed toward the defendants. Often, outside parties such as law enforcement agencies, hospitals, and credit bureaus have relevant information about absent class members. In such cases, plaintiffs' attorneys should not be any more entitled than defendants' attorneys to receive the information. As long as the information helps resolve issues surrounding class certification under Rules 23(a) and 23(b), both parties have an equal interest in obtaining the information

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163. This is consistent with W.A. Parent's definition of privacy: "What belongs to the public domain cannot without glaring paradox be called private; consequently it should not be incorporated within our concept of privacy." *See* Parent, *supra* note 77, at 271.

164. In *Pioneer Electronics*, one reason the court cited for providing plaintiffs' attorneys with the names of the customers was that if it did not, "Pioneer would possess a significant advantage if it could retain for its own exclusive use and benefit the contact information of those customers who complained regarding its product." *Pioneer Elecs.*, 150 P.3d at 206.

to craft their respective arguments about class certification. The right "to be let alone"[165] articulated by Warren and Brandeis should apply equally to plaintiffs' and defendants' lawyers; neither of them has a relationship with the class members, so neither has greater right to such an intrusion.

3. Any Information Provided About Absent Class Members Must Be Substantially Related to Class Certification

One significant flaw in the cases that stray from general privacy principles during precertification discovery is that they were not closely related to resolving issues of whether the claims satisfied the Rule 23(a) prerequisites and fit into one of the Rule 23(b) categories. For example, *Best Buy* granted access to consumer information for the purpose of allowing plaintiffs' attorneys to find someone to serve as class representative.[166]

Courts must always use the *Eisen* rule in the precertification stage: courts should only be concerned with whether the plaintiffs meet the Rule 23 requirements.[167] Therefore, precertification discovery should be substantially related to one of the factors the court considers when ruling on class certification, such as typicality or numerosity.

The "substantially related" requirement is a middle ground between having no requirement for relation to class certification and requiring the information to be strictly necessary for the resolution.[168] It is difficult, at the outset of a class action case, to know whether the information is absolutely necessary for resolution of class certification issues. But the constitutional value of privacy requires more than just a rational basis test. Therefore, an intermediate level of scrutiny should apply. This language is derived from the constitutional test, but the proposal is grounded not just in the Constitution. Instead, it is based on the privacy values seen in the statutes and court opinions reviewed in Part II of this Note. The statutes all require a strong reason for any governmental action that infringes upon an individual's privacy right, yet they tend to make reasonable accommodations when such infringement is necessary. Also, the discovery opinions not related to class actions that were highlighted in Part II demonstrated such rough balancing tests,[169] weighing the need for discovery against the intrusion upon privacy. Just as the class action rules do not explicitly mention privacy, neither does the general discovery rule in Federal Rule of Civil Procedure 26. Yet these opinions placed substantial value on privacy while considering discovery requests under the Rule.

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165. Warren & Brandeis, *supra* note 65, at 195.

166. Best Buy Stores, L.P. v. Superior Court, 137 Cal. Rptr. 3d 575, 580 (Cal. Ct. App. 2006).

167. See *supra* section I.A. for a discussion of the bifurcated class action system under *Eisen*.

168. "Substantially related" is a component of intermediate scrutiny used in various forms of constitutional analysis in which courts are reluctant to apply the restrictive strict scrutiny but also believe the government action deserves more than the very permissive rational basis. Unlike strict scrutiny, government actions often survive intermediate scrutiny. Intermediate scrutiny has been used in analyses of gender discrimination, *see* Craig v. Boren, 429 U.S. 190, 197 (1976), and of content-neutral regulations with an incidental effect on speech, *see* United States v. O'Brien, 391 U.S. 367, 377 (1968).

169. *See supra* note 92 and accompanying text.

Applying this standard to precertification class action discovery, consider a request by plaintiffs' attorneys for the Social Security numbers of 1,000 absent class members in a race discrimination case against their employer. It would be difficult for the plaintiffs' attorneys to demonstrate how Social Security numbers are necessary to resolve class certification issues in an employment discrimination case.[170] Social Security numbers do not help the court determine whether the class representatives' claims are typical of the entire class. Nor do they help determine whether there is a commonality, numerosity, or adequacy of representation. In contrast, plaintiffs would stand a better chance by requesting a breakdown of the racial composition of the workforce, because that could help determine whether the class representatives' claims are typical of the class as a whole.

4. Disclosure of Information About Absent Class Members Should Be Narrow, with Identifying Information Redacted if Possible

Unless identifying information is necessary for resolution of the class certification issue, it should be removed from the materials provided during precertification discovery. This minimizes the invasion of the absent class members' privacy and addresses the valid concerns about identity theft that underlie many of the privacy laws and theories described in Part II. The recent security breaches at data brokers demonstrate that when personally identifiable information is distributed, there is always a risk of it being intercepted by identity thieves. And one would expect data brokers such as ChoicePoint to have even greater expertise in protecting personally identifiable information than an average plaintiff-side class action law firm.

In the employment class action hypothetical presented just above, the plaintiffs requested and received the breakdown of the racial composition of the workforce. This might be perfectly appropriate and necessary for resolution of the typicality requirement. But it would be difficult to imagine why such demographic information would need to be accompanied by a list of the employees' names, addresses, and Social Security numbers. The use of "blind" data, as demonstrated in the *Landry* opinion,[171] is a perfectly appropriate method of providing necessary data while at the same time minimizing the intrusion upon the privacy rights of absent class members.

Interrogatories may serve as an alternative.[172] Instead of requesting every employee file to determine the percentage of underrepresented minorities who work at a company, that information could be obtained just as easily through an interrogatory

170. In fact, it is difficult to see how Social Security numbers would even be useful in resolving the merits of such claims in postcertification discovery.

171. Landry v. Union Planters Corp., No. 02-3617, 2003 U.S. Dist. LEXIS 10553, at *22 (E.D. La. June 6, 2003) ("The customer's privacy is protected by the provision of 'blind' information with all personal identifiers redacted.").

172. FED. R. CIV. P. 33 (allowing one party to serve up to twenty-five interrogatories to another party).

requesting a breakdown of such information. That would provide the court with the same information and avoid violations of absent class members' privacy.

Also, at every juncture possible, courts should limit the use of personal data using protective orders.[173] This is not a complete solution to the problem, and recent data security breaches have demonstrated that the best way to protect personal information is to not provide it to outside parties. But that option may not be practicable. If the court deems private information to be essential to resolving class certification issues, it should limit its use only to that purpose.

To prevent the "fishing expedition[s]" that the California Court of Appeal has raised concerns about,[174] courts should prevent plaintiffs and their attorneys from using the information to contact absent class members to seek better class representatives. On occasion, contacting absent class members may be necessary to gather evidence to resolve a dispute about one of the class certification requirements under Rule 23(a) or 23(b), but such contact should only occur when there is no other way of resolving the issue.

When such contact is deemed necessary, courts should also attempt to use the innovative method developed by the *Best Buy* court: initially providing the contact information to an outside, neutral party, which then contacts the absent class members and provides them with the option to have their information forwarded to the plaintiffs' attorneys.[175] Opt-in notices are generally more privacy-friendly than opt-out notices, because they give individuals the final say as to whether their information will be shared. With an opt-out notice, an individual may either not see the notice or not have the time to opt out. But opt-in ensures that the individual consents to the information sharing. While the difference between opt-in and opt-out may sound minor, it is quite significant: opt-in notices are generally considered to provide greater protections for individual privacy. For example, in comments to the U.S. Department of Treasury during a 2002 rulemaking process regarding financial privacy opt-out notices, thirty-seven state attorneys general wrote that "consumers have been greatly confused by the dense information in the notices, which require a high education level to comprehend."[176] Opt-out notices will work only if consumers read

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173. Federal Rule of Civil Procedure 26(c) provides that anyone from whom discoverable information has been requested may ask for a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c). Protective orders prevent the information from being part of the public record. The Supreme Court has held that the First Amendment does not limit the judiciary's ability to grant protective orders. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (finding that a protective order does not receive "exacting First Amendment scrutiny"). For a discussion of protective orders and an argument for courts to use them during discovery, see Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 777 (2005).

174. First Am. Title Ins. Co. v. Superior Court, 53 Cal. Rptr. 3d 734, 744–45 (Cal. Ct. App. 2007) (refusing to grant plaintiffs' discovery request for information about absent class member because named plaintiff was not a class member).

175. Best Buy Stores, L.P. v. Superior Court, 137 Cal. Rptr. 3d 575, 580 (Cal. Ct. App. 2006).

176. Letter from the Nat'l Ass'n. of Atty's Gen. to the Office of Thrift Supervision (May 1, 2002), *available at* http://www.ots.treas.gov/docs/9/95421.pdf.

the notices and take time to respond to them. The opt-in requirement ensures that the consumers truly wish to have their information disclosed.[177]

B. PROPOSED BEST PRACTICES FOR POSTCERTIFICATION DISCOVERY

While more information about absent class members may inevitably need to be disclosed during postcertification discovery, particularly when it comes to the notice requirement for class actions certified under Rule 23(b)(3), courts should still adhere to a set of uniform best practices to minimize the invasion upon privacy of absent class members. Although plaintiffs' lawyers may consider themselves to be representatives of the absent class, in many cases classes are in the tens of thousands and dispersed nationally. Even with the best practicable notice, many of these class members will have no idea that they are being represented in a class action lawsuit. Therefore, it is appropriate for courts to consider their privacy interests as well.

1. Information Obtained During Postcertification Discovery Must Be Substantially Related to the Merits of the Case

Just as section IV.A proposed heightened scrutiny for information about absent class members in precertification discovery, this Part proposes the same level of scrutiny for requests in the postcertification discovery stage. But in the postcertification stage, instead of requiring the information to be substantially related to issues of class certification, the requested information should be substantially related to resolving the merits of the case, following the long-established bifurcated system of class action litigation.[178]

The postcertification class action stage admittedly differs from precertification in that plaintiffs may need certain information to provide notice to absent class members.[179] But discovery should be limited only to the information necessary to contact absent class members. Courts should not provide access to data such as Social Security numbers unless they are essential for a party to provide notice to classes that have been certified under Federal Rule of Civil Procedure 23(b)(3). And in classes certified under Rules 23(b)(1) and 23(b)(2), notice will not be required unless the judge orders it, so it is even less likely that personal information will be needed in those cases.

When notice is required, courts should consider providing it through a neutral third party. Plaintiffs' counsel often already contract with firms that specialize in providing effective and clearly written notice to absent class members.[180]

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177. *See* ARI SCHWARTZ & PAULA J. BRUENING, CTR. FOR DEMOCRACY AND TECH., ON CONSENT, CHOICE, AND CHECK BOXES: SORTING OUT THE OPT-IN V. OPT-OUT DEBATE, http://www.cdt.org/publications/optin-optout.shtml (last visited Mar. 26, 2008) (arguing that "the worst opt-out mechanisms place too heavy a burden on the individual").

178. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

179. FED. R. CIV. P. 23(c)(2)(B).

180. Class action notification firms often use sophisticated marketing techniques to attempt to reach the widest audience possible and ensure it understands the content of the notice by using plain

Therefore, there already is a supply of such firms. A third party under a protective order could provide adequate notice while alleviating any concerns that the plaintiffs' counsel would use the contact information for something other than notice.

2. Class Certification Notices Should Describe How Class Members' Information May Be Shared During Discovery

Companies often develop privacy policies that explain to consumers when their personal information may be shared with outside parties.[181] And the Children's Online Privacy Protection Act recognized the value of such policies by requiring that websites targeted at children provide privacy policies.[182] This Note proposes that absent class members be notified when their information is shared during postcertification discovery. If additional information will be shared unless they opt out, in the Rule 23(b)(3) context, they should be able to weigh that privacy consideration when determining whether to remain a member of the class. This would not be an administrative burden, because absent class members often receive individualized notice anyway. But privacy warnings have not traditionally been included on class certification notices.[183]

Critics may argue that such a warning would encourage individuals to opt out of a class action, particularly if they could thereby prevent additional information, such as their medical records or employee files, from being shared with plaintiffs and defendants. This is a valid point, but it would be disingenuous and misleading to not inform an absent class member of the information sharing. Just as individuals will consider whether they want to forfeit their right to sue in exchange for the potential payoff of a class settlement or verdict, they also have the right to consider whether they will allow their personal information to be exchanged in postcertification discovery.[184]

Privacy is increasingly viewed as a commodity.[185] Just as absent class members may determine whether they want to opt out of a class action in order to preserve their right to sue, they also should be entitled to opt out of a class action to protect their valuable personal information.

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language. *See generally* Todd B. Hilsee et al., *Do You Really Want Me To Know My Rights? The Ethics Behind Due Process in Class Action Notices Is More than Just Plain Language: A Desire To Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359 (2005) (noting that principals of Hilsoft Notifications, one of the nation's most prominent class action notification firms, explain the theory behind providing clear, plain-language notices).

181. For details about what companies include in their privacy policies, see TRUSTe, Your Online Privacy Policy, http://www.truste.org/pdf/WriteAGreatPrivacyPolicy.pdf (last visited Mar. 26, 2008).

182. 15 U.S.C. § 6502(b)(1)(A)(i) (2000).

183. The Federal Judicial Center's "illustrative" examples of plain-language class notices do not include any mentions of privacy concerns. *See* Federal Judicial Center's "Illustrative" Forms of Class Action Notices, http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376 (last visited Mar. 26, 2008).

184. This analogy is particularly appropriate as privacy is considered a new form of personal property. *See supra* note 82 and accompanying text.

185. *See supra* note 82 and accompanying text.

3. Absent Class Members Should Not Be Held to the Same Discovery Standards as Class Representatives

Even if they do not opt out of being class members, it is inappropriate to treat absent class members as plaintiffs for discovery purposes. While it is completely appropriate and necessary for class representatives to be subject to the same discovery requirements as plaintiffs in non-class litigation, absent class members should not face the same stringent burden. As the federal court for the Southern District of New York correctly noted in *Redmond v. Moody's Investor Service*, absent class members should not be deposed unless such information cannot adequately be obtained from the class representatives or through other discovery means, such as interrogatories.[186] Along those lines, absent class members also should not be required to turn over additional information, such as financial records or medical documents, when similar sample information could be obtained from the class representatives.

It may be necessary to obtain some general information about the absent class members to ensure that the claims of the representatives do not differ from those of absent class members, but this discovery should be limited and held to a high standard. While absent class members are likely to have fewer privacy protections in the postcertification stage, the court still should consider the distinction between absent class members and class representatives. When it is necessary to collect aggregate information about the entire class, the court should consider the use of third parties to compile the data.

4. Defendants and Plaintiffs Should Have Equal Access to Information

Similar to the suggestion for the precertification stage, this Note proposes that during postcertification discovery, defendants be entitled the same access to information about absent class members that plaintiffs have. While both sides should be subjected to the requirements that the information be relevant to resolving the merits of the case and that providing the information would not violate constitutional or statutory privacy protections, one side should not have greater information access than the other.

Because unnamed class members theoretically are adversaries of defendants in the postcertification stage, there will be a tension between defendants' needs to resolve the merits of the case and absent class members' privacy. The current doctrine strikes an appropriate balance: information from absent class members is only sought if it is not available from class representatives.

One criticism of this proposal is that it could prevent plaintiffs' counsel from having discussions with class members that are necessary for litigating the claims. This Note proposes that this standard only be applied to discoverable

186. *See* Redmond v. Moody's Investor Serv., No. 92 Civ. 9161, 1995 WL 276150, at *2 (S.D.N.Y. May 10, 1995) (denying part of a defendant's request to depose absent class members because defendant "has not identified any such class member whose knowledge about classwide issues is superior to that of the named plaintiffs").

documents, interrogatories, and other private information about the absent class members. Some argue that plaintiffs' counsel, after certification, may need to have privileged discussions with class members. This Note does not suggest that defendants have access to these conversations. After certification, there is a much stronger argument that plaintiffs' counsel have a special relationship with absent class members who have not opted out. But defendants should have access to material that is obtained from absent class members during discovery.

CONCLUSION

Warren and Brandeis first articulated the right "to be let alone" in response to concerns about gossip in the media, not about the privacy rights of absent class members.[187] In fact, their seminal article was published more than seventy-five years before the adoption of Federal Rule of Civil Procedure 23, which set the guidelines for modern class action lawsuits. But the broad values they articulated, which have been extended by other scholars, courts, and Congress, can be applied to a wide range of situations, including discovery. This has become even more vital as identity theft becomes a great concern.

Despite the value that our legal system has placed on privacy since 1890, confusion remains. The intermediate court's opinion in *Pioneer Electronics* so adamantly argues for protection of the personal information of absent class members that it looks like it could have been written by Warren and Brandeis.[188] But less than two years later, the California Supreme Court swiftly removed those safeguards, while arguing that it was abiding by the same privacy principles. The contrast between the two opinions demonstrates the lack of clarity that courts have regarding privacy. Courts, policymakers, and scholars have struggled for centuries to articulate general privacy values. While they have arrived at many compelling definitions, there has never been a consensus. Privacy is a concept that means many things to many people, as seen in Part II. So there has been little effort to provide concrete guidelines for courts in discovery, particularly in the unique class action context. This Note attempts to strike the proper balance between the need for information in class action litigation and the privacy rights of absent class members. The best practices suggested in this Note are standards rather than bright-line rules—a reflection of the murkiness of how the American legal system defines and values privacy. Hopefully, these guidelines can help lawyers and courts strike the proper balance between privacy and discovery needs within the confines of current statutes and procedural rules.

187. Warren & Brandeis, *supra* note 65, at 195.

188. In fact, the court cited their 1890 article in allowing absent class members to control their personal information. Pioneer Elecs. (USA), Inc. v. Superior Court, 27 Cal. Rptr. 3d 17, 23 (Cal. Ct. App. 2005).