
ARTICLES

CLASS ACTION SILENCE

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INTRODUCTION	1782
I. SILENCE	1783
II. VOICE AND CONTROL: CLASS VERSUS NON-CLASS LITIGATION	1787
III. SILENCE AND THE STAGES OF A CLASS ACTION LAWSUIT	1789
A. <i>Silence and the Initial Filing of Class Litigation: Structural Silence</i>	1790
B. <i>Silence Even in the Face of Notice: Structural, Communicative, and Expectational Silence</i>	1791
1. Individualized notice—or not	1793
2. Receipt—or not	1794
3. Opening the envelope—or not	1794
4. Understanding the notice’s contents—or not	1795
5. Intentionally responding to the notice—or not	1796
C. <i>Silence and the Path to Resolution: Communicative and Expectational Silence</i>	1797
IV. COMPOUNDED CONTINGENCIES: THE ILLICIT USE OF SILENCE	1799
V. A PROPOSAL REGARDING CLASS ACTION SILENCE	1803
CONCLUSION	1807

A number of law review articles have noted the issues inherent in treating class members’ failure to opt out as consent to the court’s personal jurisdiction or as agreement to a proposed class settlement. Missing from the existing analyses, however, is the “big picture”—the reality that class action silence is layered, resulting in silence that is repeatedly and inappropriately compounded. At each and every step in class action litigation, absent class members are not just expected, but effectively encouraged, to remain silent. Moreover, at every step, courts interpret class members’ silence as consent. The ultimate result is a “piling on” of consents: the expected and encouraged silence is deemed to constitute consent to the filing of the class suit and consent to personal jurisdiction and consent to be bound to any resulting class

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judgment and consent to the proposed class settlement and approval of the proposed settlement's terms and conditions. Yet this compounded effect occurs under highly ambiguous circumstances, where arguably the most sensible interpretation of class members' silence is not consent, but confusion. The multiple and contradictory meanings of silence render it unreasonable to equate the failure to opt out with consent. The fallacy of repeatedly ascribing consent to highly ambiguous silence should be recognized as a due process danger that potentially can deprive class members of property rights and their day in court.

INTRODUCTION

This Article's title, "Class Action Silence," may strike some readers as an oxymoron because the common understanding of class actions suggests a cacophony of sound. Class actions typically involve large numbers of class members—mounting into the hundreds, thousands, or even millions.¹ Certainly noise surrounds class actions—in the form of countless newspaper and television reports, court cases, legislation, law review articles, commentaries, websites, and radio talk shows that feed the casting of class actions—on one side as emblematic of the need for tort reform, and on the other as a necessary means of bringing wrongdoing defendants to justice.

Despite the exterior noise, this Article is premised on the unusual silence within class actions—a silence so inherent to, and pervasive within, class actions as to render some widely accepted practices highly questionable. Tracing a class action lawsuit from its initiation through its development and resolution, and examining the roles of class representatives, class members, counsel, and decision-makers, this Article analyzes class action silence and its impact on the legitimacy of the class action device.

Law review articles have explored issues resulting from equating a class member's failure to opt out of class litigation as constituting consent to the court's personal jurisdiction.² A number of law review articles have noted

¹ MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 1 (2009) ("A small number of active class representatives may litigate on behalf of hundreds, thousands, or even millions of absent class members.").

² See, e.g., Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 89 (2003) [hereinafter *Transnational Class Actions*] (concluding an opt-in procedure eliminates the problem of "fictitious consent" and thereby binds non-U.S. claimants to U.S. court judgments); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 *U. PA. L. REV.* 2035, 2101 (2008) ("[W]e have abandoned the fiction that opt-out notice generally provokes any meaningful expression of autonomous consent, and instead have recognized a form of constructive consent as the basis of a state court's power to entertain a nationwide class action.").

issues inherent in treating the failure to opt out as agreement with a proposed class settlement.³ Missing from the existing analyses, however, is the “big picture”—the reality that class action silence is layered, resulting in silence that is repeatedly and inappropriately compounded. At each and every step in class action litigation, absent class members are not just expected, but effectively encouraged, to remain silent. Moreover, at every step, courts interpret class members’ silence as consent. The ultimate result is a “piling on” of consents: the expected and encouraged silence is deemed to constitute consent to the filing of the class suit *and* consent to personal jurisdiction *and* consent to be bound to any resulting class judgment *and* consent to relinquish any potential claim against the defendant *and* consent to the proposed class settlement *and* approval of the proposed settlement’s terms and conditions. Yet this compounded effect occurs under highly ambiguous circumstances where the most sensible interpretation of class members’ silence is confusion, not consent.

This Article begins by examining the phenomenon of silence and interdisciplinary silence research in Part I. Part II contrasts class actions with traditional non-class litigation and the correspondingly differing roles of silence. Part III analyzes the stages of a class action lawsuit and how silence is a prominent feature of each stage. Finally, Part IV proposes recognition of the fallacy of equating silence with consent in current class action practice, the impropriety of permitting the practice of “compounded consent” to continue, and potential alternative procedures that would avoid these problematic issues.

I. SILENCE

We are all familiar with the general idea of silence, and perhaps this familiarity is part of the reason why, historically, researchers have largely overlooked it.⁴ However, silence’s familiarity masks its complexity. Contrary

³ See, e.g., Bassett, *Transnational Class Actions*, *supra* note 2, at 85 (discussing consent and waiver issues related to non-U.S. class members and their failure to opt out); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 906 (remarking that class members can “unwittingly become bound by an agreement they would not have chosen”); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 96-97, 98-101, 105-07 (2007) (arguing that time constraints, delayed notice, and other administrative hurdles limit a class member’s ability to influence a proposed settlement).

⁴ See Richard L. Johannesen, *The Functions of Silence: A Plea for Communication Research*, 38 WESTERN SPEECH 25, 33 (1974) (acknowledging “the relatively small body of focused speculation and empirical research on the functions of silence”); Joost A. M. Meerloo, *The Strategy of Silence*, 2 COMMUNICATION 69, 69 (1975) (“Silence is a neglected aspect of the study of communication.”); Muriel Saville-Troike, *The Place of Silence in an Integrated Theory of Communication*, in PERSPECTIVES ON SILENCE 3, 3 (Deborah Tannen & Muriel Saville-Troike eds., 1985) (“Within linguistics, silence has traditionally been ignored except for its boundary-marking function, delimiting the beginning and end of utterances.”); *Introduction to PERSPECTIVES ON SILENCE*, *supra*, at xi (describing silence as “a relatively

to the premises of early studies, silence is not merely an absence of sound.⁵ Silence is a multifaceted concept: there are different types of silence,⁶ and each of these different types may serve different functions. Each of these different functions, in turn, may have many meanings,⁷ and each of these different meanings, in turn, may have contextual variations.⁸ For example, one type of

neglected component of human communication” and stating that “the study of communication has focused on talk to the relative exclusion of silence”).

⁵ BERNARD P. DAUENHAUER, SILENCE 4 (1980) (“[S]ilence is neither muteness nor mere absence of audible sound.”); MAX PICARD, THE WORLD OF SILENCE 17 (Stanley Godwin trans., 2002) (“Silence is nothing merely negative; it is not the mere absence of speech. It is a positive, a complete world in itself.”); William J. Samarin, *Language of Silence*, 12 PRACTICAL ANTHROPOLOGY 115, 115 (1965) (“[S]ilence is not just the absence of a significant piece of behavior. It is not just emptiness. Silence can have meaning. Like the zero in mathematics, it is an absence with a function.”); see Ron Scollon, *The Machine Stops: Silence in the Metaphor of Malfunction*, in PERSPECTIVES ON SILENCE, *supra* note 4, at 21, 21 (“Studies of communication have tended to look at silence as absence—as absence of sound and therefore as absence of communication.”); Michal Ephratt, *The Functions of Silence*, 40 J. PRAGMATICS 1909, 1910 (2008) (observing that silence in studies from the 1970s “was treated as absence: absence of speech, and absence of meaning and intention”).

⁶ Most silence research, whether from the psychological, philosophical, or communication disciplines, logically focuses on communicative silence. See DAUENHAUER, *supra* note 5, at 78 (“Any formulation of the sense of silence obviously occurs within the domain of discourse”) (philosophy); John J. Cook, *Silence in Psychotherapy*, 11 J. COUNSELING PSYCHOL. 42, 46 (1964) (concluding that more silences characterized successful psychotherapy) (psychology); Johannesen, *supra* note 4, at 25 (surveying “some of the research and speculation on the role of silence in human communication”) (communications). However, there are also other types of silence. See PICARD, *supra* note 5, at 122 (discussing “the silence of death”); *id.* at 138-39 (“The things of nature are filled with silence. They are like great reserves of silence. . . . The mountain, the lake, the fields, the sky—they all seem to be waiting for a sign to empty their silence on to the things of noise in the cities of men.”); Samarin, *supra* note 5, at 115 (“Not all silence carries a message.”).

⁷ See CHERYL GLENN, UNSPOKEN: A RHETORIC OF SILENCE 18 (2004) (“[T]he functions of silence are diverse, as multifarious as the motives for silence. The functions and the motives for silence are inextricably linked, for silence can be used to threaten, show respect, demonstrate a language inadequacy, emphasize the spoken, connect, judge, or activate—just like speech.”).

⁸ Such contextual variations include cultural differences. See, e.g., *id.* at 15 (“[S]ilence takes many forms and serves many functions, particularly as those functions vary from culture to culture.”); ADAM JAWORSKI, THE POWER OF SILENCE 22 (1993) (observing “[c]ross-cultural differences in the use and valuation of silence”); Wong Ngan Ling, *Communicative Functions and Meanings of Silence*, 3 J. TAGEN BUNKA 125, 126 (2003), available at <http://www.lang.nagoya-u.ac.jp/bugai/kokugen/tagen/tagenbunka/vol3/wong3.pdf>, available at <http://perma.cc/H95Z-GXTH> (“As cultural attitude plays a marked role in interpreting and assessing what has been said and been left unsaid, misjudging someone’s use of silence can take place in many contexts and on many levels.”); Samarin, *supra* note 5, at 116 (“Once we grant that silence during periods of linguistic interaction can have meaning, we must assume that there are cross-cultural differences.”); see also GLENN, *supra* note 7, at 23-28

silence is communicative silence. Within communicative silence, researchers have identified at least five functions⁹ and more than twenty meanings,¹⁰ before even attempting to address contextual variations.¹¹

(discussing the silencing of women and other disenfranchised groups).

⁹ See J. Vernon Jensen, *Communicative Functions of Silence*, 30 ETC.: A REVIEW OF GENERAL SEMANTICS 249, 256 (1973) (proposing five functions of silence: (1) linkage (bonding people or separating them), (2) affecting (to heal or to wound), (3) revelation (making something known or hiding something), (4) judgment (assent/favor or dissent/disfavor), (5) activating (thoughtfulness or mental inactivity)).

¹⁰ (1) The person lacks sufficient information to talk on the topic. (2) The person feels no sense of urgency about talking. (3) The person is carefully pondering exactly what to say next. (4) The silence may simply reflect the person's normal rate of thinking. (5) The person is avoiding discussion of a controversial or sensitive issue out of fear. (6) The silence expresses agreement. (7) The silence expressed disagreement. (8) The person is doubtful or indecisive. (9) The person is bored. (10) The person is uncertain of someone else's meaning. (11) The person is in awe, or raptly attentive, or emotionally overcome. (12) The person is daydreaming or preoccupied with other matters. (13) The person's silence is a means of punishing others, of annihilating others symbolically by excluding them from verbal communication. (14) The person's silence marks a characteristic personality disturbance. (15) The person feels inarticulate despite a desire to communicate; perhaps the topic lends itself more to intuitive sensing than to verbal discussion. (16) The person's silence reflects concern for not saying anything to hurt another person. (17) The person is daydreaming or preoccupied with other matters. (18) The person uses silence to enhance his own isolation, independence, and sense of self-uniqueness. (19) The silence marks sulking anger. (20) The person's silence reflects empathic exchange, the companionship of shared mood or insight.

Johannesen, *supra* note 4, at 29-30.

¹¹ See, e.g., JAWORSKI, *supra* note 8, at 45 (observing that silence "is a fuzzy concept, whose prototypical meaning varies from community to community . . . [and] across cultures"); Nadine Bienefeld & Gudela Grote, *Silence That May Kill: When Aircrew Members Don't Speak Up and Why*, 2 AVIATION PSYCHOL. & APPLIED HUMAN FACTORS 1, 4 (2012) (proposing particularized purposes of silence in the specific context of aviation crew members); Ephratt, *supra* note 5, at 1930-31 (observing that "[s]ilence in interrogation and court may be interpreted in different ways" and providing examples); Ze'ev Frankel et al., *Assessing Silent Processes in Psychotherapy*, 16 PSYCHOTHERAPY RES. 627, 635 (2006) (concluding that "silences come in a variety of types that can be meaningfully and reliably differentiated and used to assess clients' therapy processes during psychotherapy sessions"); Perry Gilmore, *Silence and Sulking: Emotional Displays in the Classroom*, in PERSPECTIVES ON SILENCE, *supra* note 4, at 139, 143-59 (addressing particularized purposes of silence by teachers and students in classroom interactions); Frances J. Milliken, Elizabeth W. Morrison & Patricia F. Hewlin, *An Exploratory Study of Employee Silence*, 40 J. MGMT. STUD. 1453, 1462 (2003) (addressing particularized purposes of silence in the specific context of employment, and proposing eight reasons for an employee who fails to communicate issues to an employer: (1) status differences, (2) fear of damaging relationships, (3) feelings of futility, (4) lack of experience in current position, (5) concerns about negative impact on others, (6) poor relationship with supervisor, (7) fear of punishment, and (8) fear of being labeled or viewed negatively); see generally Thomas J. Bruneau, *Communicative Silences: Forms and Functions*, 23 J. COMM. 17, 41 (1973) (describing "places of silence," including "[c]hurches, courtrooms, schools, libraries, hospitals, funeral homes, battle sites, insane

Accordingly, it would be tedious and perhaps impossible to list the many meanings of silence. However, a particularly salient and significant trait of silence is its potential to reflect not just multiple, but contradictory, meanings.¹² A few examples may help to illustrate the problem:

Silence may reflect agreement	Silence may reflect disagreement
Silence may reflect comfort or camaraderie	Silence may reflect discomfort or fear
Silence may reflect respect	Silence may reflect disrespect
Silence may reflect intense concentration	Silence may reflect apathy or distraction
Silence may reflect approval	Silence may reflect disapproval
Silence may reflect politeness	Silence may reflect rudeness
Silence may reflect an attempt to encourage the speaker to continue	Silence may reflect an attempt to discourage the speaker from continuing
Silence may reflect an attempt to connect	Silence may reflect an attempt to disengage

In light of the many divergent and contradictory meanings of silence, one might think that the law would take pains to examine silence with great care on a case-by-case basis. Yet within the legal sphere, discussions of silence generally tend to occur in only two contexts: the constitutional right to remain

asylums, and prisons”).

¹² JAWORSKI, *supra* note 8, at 24 (observing that silence “has many faces” and “is probably the most ambiguous of all linguistic forms. It is also ambiguous axiologically; it does both good and bad in communication.”); *id.* at 69 (“[A]mbivalence regarding the nature of silence is demonstrated in English by two common expressions attributing to silence two extremely different qualities: ‘Silence is golden’ and ‘Silence is deadly’”); Takie S. Lebra, *The Cultural Significance of Silence in Japanese Communication*, 6 MULTILINGUA 343, 350 (1987) (“[S]ilence is not only polysemic but symbolic of logically opposite meanings or emotions.”); Mario Perniola, *Silence, the Utmost in Ambiguity*, COMP. LITERATURE & CULTURE, Dec. 2010, at 2 (2010), available at <http://docs.lib.purdue.edu/cleweb/vol12/iss4/2>, archived at <http://perma.cc/JX7W-LQRZ> (“[A]mbiguity is at its most intense not in words, nor in action, but in silence.”); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 9 (1995) (observing that “silence can often be quite ambiguous”).

silent in criminal cases¹³ and silence as assent in civil cases.¹⁴

With this introduction to silence, I now turn to the general topic of class actions. The next section contrasts class actions and traditional non-class lawsuits, highlighting the differences in procedures and the use of silence.

II. VOICE AND CONTROL: CLASS VERSUS NON-CLASS LITIGATION

In thinking about traditional non-class civil litigation, we tend to assume an individual who, believing she has been aggrieved, retains an attorney to help her pursue a remedy against one or more appropriate defendants. In such a scenario, the plaintiff typically has full voice and full control, meaning that she has the ability to articulate the course of action she wishes to pursue and the power to discharge an attorney who fails to follow her instructions.¹⁵ Exceptions to this traditional prototype—situations where the plaintiff may lack full voice or full control—are accorded protections in the Model Rules of Professional Conduct to confer full (or at least fuller) voice and control on the plaintiff. Such protective provisions arise, for example, when a third party is paying the client's attorney's fees.¹⁶ Third-party payors exist in a number of different contexts, such as parent-child, employer-employee, and insurer-insured.¹⁷ Despite the frequency of this occurrence, the Model Rules protect the client's voice and control by prohibiting an attorney from accepting compensation from a third party unless the attorney obtains the client's informed consent, protects the client's confidential information, does not permit any interference with the attorney-client relationship, and maintains independent professional judgment.¹⁸

Silence exists in the traditional non-class prototype, but it is usually transitory and brief. For example, either the client or the attorney may briefly

¹³ U.S. CONST. amend. V (providing that no person "shall be compelled in any criminal case to be a witness against himself"); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent . . .").

¹⁴ See Tiersma, *supra* note 12, at 1 (observing that "[m]any are familiar with [the] adage" of silence as consent); Comment, *When Silence Gives Consent*, 29 YALE L.J. 441, 441 (1920) (referring to the maxim "silence gives consent"). Despite this maxim, "this is not a rule of law." 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 3.18, at 402 (Joseph M. Perillo ed., 1993).

¹⁵ In traditional civil litigation, when a plaintiff sues a defendant, the plaintiff selects an attorney or elects to proceed in pro se. In either instance, the plaintiff has directly chosen her representative—either the lawyer she picked, or herself. Due to the directness and intentionality of that choice, we have little pause about ascribing a form of agency to the attorney-client relationship. . . . If the client is unhappy with how the lawyer is handling the representation, in most instances the client can fire that lawyer and hire another.

Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079, 1100-01 [hereinafter *Just Go Away*].

¹⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2013).

¹⁷ See *id.* R. 1.8(f) cmt. 11.

¹⁸ *Id.* R. 1.8(f).

be out of touch due to the demands of another matter. However, silence that is more sustained, or that occurs repeatedly, is detrimental. Attorney silence may inspire reactions ranging from disgust to frustration to annoyance to anger.¹⁹ Absent a good explanation for the silence, the attorney-client relationship is likely to be terminated. Client silence may inspire the same range of reactions and the same ultimate outcome. The underlying interpretations of the silence may differ—the client may interpret attorney silence as rudeness or failure to work on the case; the attorney may interpret client silence as evasiveness of a deceptive nature or failure to understand a matter's significance. But in both instances, silence has the potential to injure or even destroy the attorney-client relationship or the litigation in its entirety.

In contrast to traditional non-class lawsuits, class actions are a form of representative litigation,²⁰ in which one or more individuals are named as plaintiffs and serve as the legal representatives for the remaining unnamed class members.²¹ Two requirements attempt to ensure that the named plaintiff is representative of the class as a whole: the class representative's claims or defenses must be "typical of the claims or defenses of the class" as a whole,²² and the class representative must "fairly and adequately protect the interests of the class."²³ The former requirement, referred to as "typicality," assumes that when the class representative and class members are similarly situated, they will share the same interests and desired outcomes.²⁴ The latter requirement, referred to as "adequacy of representation," is a due process prerequisite to a binding class judgment²⁵ and generally focuses on the avoidance of potential

¹⁹ See *In re Disciplinary Action Against Shaughnessy*, 467 N.W.2d 620, 621 (Minn. 1991) ("[A] lawyer's failure to communicate with the client and misrepresentations regarding the status of a pending case are intensely frustrating to the client, reflect adversely on the bar, and are destructive of public confidence in the legal profession.").

²⁰ See Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1430 ("[T]he representative nature of class actions is both central to the class action concept and rises to a constitutional dimension.").

²¹ See BLACK'S LAW DICTIONARY 304 (9th ed. 2009) (defining "class action").

²² FED. R. CIV. P. 23(a)(3).

²³ *Id.* 23(a)(4).

²⁴ See *Wiener v. Dannon Co.*, 255 F.R.D. 658, 665 (C.D. Cal. 2009) (finding that typicality was not satisfied because the class representative had not purchased two of the products, and therefore lacked the "incentive" to prove the alleged deception with respect to those two products); see also Debra Lyn Bassett, *When Reform Is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 952 (2004) ("[I]n looking out for her own interests, the representative will also benefit others with the same interests . . .").

²⁵ See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (finding a lack of due process due to inadequacy of representation); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 383 (1998) ("Adequacy of representation is the touchstone of due process . . ."); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong With Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 15 n.48 (1995) (noting that adequacy of representation is "required by the Due Process Clause of the

conflicts of interest.²⁶

Class litigation affords class members little voice and even less control. Actual silence, in fact, is expected in class litigation. Unlike traditional litigation, which begins with an aggrieved party retaining a lawyer to pursue a remedy, many class actions begin with the actions of an attorney: a lawyer finds a matter amenable to class treatment, locates an appropriate class representative, and drafts a class action complaint, all on the behalf of an unnamed group of others.²⁷ These unnamed class members, for whose benefit the class action lawsuit ostensibly is being pursued, invariably are silent—and are appropriately referred to as “absent” class members. The absent class members had no say as to which lawyer would represent them, no say in the selection of the class representative, and indeed, no say as to whether they even wanted someone to pursue this claim on their behalf.

Silence is not just expected in class litigation—silence is required in order for the class action to function effectively. If hundreds of class members all sought to participate actively in a pending class action, class counsel would be overwhelmed by the necessary communications alone, and if numerous class members sought to make appearances through individual counsel or to request discovery, the court would be overwhelmed. But despite the need for a certain degree of silence, class actions currently are structured to maintain greater silence from absent class members than is necessary. Even more problematic is that the silence that is required of absent class members and enforced through class action procedures is ascribed a particular and specific meaning: that of consent.²⁸ The next section explores the stages of a class action lawsuit, illustrates the pervasive nature of silence within each stage, and analyzes the repeated assumption of class members’ silence as constituting consent.

III. SILENCE AND THE STAGES OF A CLASS ACTION LAWSUIT

As this section explains, silence is a hallmark of class actions, and the many vast silences in class actions repeatedly—and mistakenly—are interpreted as constituting assent. I posit that there are three general types of silence in class actions: (1) structural silence, meaning silence that is inherent in the class action device due to procedures, whether prescribed by Federal Rule of Civil Procedure 23 or simply part of federal court practices or procedures more

Constitution”).

²⁶ Conflicts of interest are the most common reason that class representatives are found inadequate. See Robert H. Klonoff, *The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 687 (finding that when courts found class representatives inadequate over a 10-year period, more than half were based on conflicts of interest).

²⁷ See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth*, 155 U. PA. L. REV. 103, 135 (2006) (“[T]he overwhelming majority of consumer class actions are lawyer-initiated and lawyer-driven: the claims are developed by lawyers who then present the litigation opportunity to individuals or entities with standing to sue.”).

²⁸ See *supra* note 14; *infra* Part III.

generally; (2) communicative silence, meaning individual responses to a stimulus, such as notice; and (3) expectational silence, meaning situations where a response technically is invited, but no actual reaction is anticipated because the expected and/or encouraged response is silence. Problems arise when a particular meaning is ascribed to silence in the class action context—especially when the ascribed meaning is that of consent. This Part examines the stages of a class action lawsuit and the significance of silence in each.

A. *Silence and the Initial Filing of Class Litigation: Structural Silence*

Although a class action is designated as such at the time of filing and is treated as such unless the court subsequently denies class certification, absent class members are not entitled to notice of the action's pendency until the class is certified.²⁹ Without formal notice of the lawsuit, unless there has been some sort of publicity regarding the filing of the class action, absent class members typically will be unaware of the pending lawsuit—which, as a practical matter, ensures their continuing silence.³⁰

An issue that arises early in any lawsuit is whether the court has personal jurisdiction over the parties. Personal jurisdiction over defendants is evaluated in the same manner in class actions as it is in non-class litigation. But personal jurisdiction faces a different analysis with respect to plaintiffs.

In non-class litigation, personal jurisdiction over the plaintiff is resolved through a perfunctory application of the doctrine of consent: by electing to sue the defendant in that particular forum, the plaintiff thereby is deemed to have consented to the court's power to issue a judgment that will bind her.³¹ In a class action, however, the absent class members make no affirmative, purposeful election to sue in a particular location; they typically do not know that a class action has been filed at all, much less have any voice in selecting the forum.³² Nevertheless, personal jurisdiction over absent class members, like personal jurisdiction over plaintiffs in non-class litigation, is premised on consent.³³ Recognizing the reality that absent class members are unaware of

²⁹ See *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 812 (5th Cir. 1982) (“Rule 23 requires a district court to give notice to absent class members of developments in the suit in only two situations. The first is when the court certifies a class . . .”).

³⁰ See *REDISH*, *supra* note 1, at 14 (“The so-called class itself is all but comatose. Many class members are likely not even aware that they are plaintiffs in a major legal action . . .”); Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 389 (2002) (“Unnamed class members may have never met class counsel; they may have no idea that a lawsuit has been filed or that such a lawsuit was even contemplated; they may have no idea they are potential members of a class . . .”).

³¹ See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780-81 (1983) (upholding the plaintiff's choice of forum on a consent theory, despite the plaintiff's lack of any connection to the forum state).

³² See Mohsen Manesh, *The New Class Action Rule*, 18 GEO. J. LEGAL ETHICS 923, 925 (2005).

³³ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (“Any plaintiff may

the class action's pendency, consent is not applied immediately and perfunctorily; rather, consent to personal jurisdiction is tied to a class member's failure to opt out of the litigation³⁴—an option explained and explored in the next section.

B. *Silence Even in the Face of Notice: Structural, Communicative, and Expectational Silence*

At “an early practicable time,” the trial judge is required to review the lawsuit to ensure that it is appropriate for class action treatment.³⁵ This court review is called a motion for class certification.³⁶ Granting the motion signifies that the court has concluded that the lawsuit satisfies the four prerequisites³⁷ and at least one of the types³⁸ mandated by Rule 23. Absent class members are silent at the class certification stage due to structural silence: they are not notified of the certification hearing, and accordingly, they generally still have no idea that the class action is pending.³⁹

Rule 23 authorizes four types of class actions, which are named after their authorizing provision within the rule: (b)(1)(A) class actions,⁴⁰ (b)(1)(B) class actions, (b)(2) class actions, and (b)(3) class actions. If the judge certifies the

consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be [for a class action plaintiff.]” (citation omitted); Bassett, *Transnational Class Actions*, *supra* note 2, at 59-60 (“[T]he [*Phillips Petroleum Co. v. Shutts*] decision essentially premised personal jurisdiction upon the consent of class members—the corollary of plaintiff consent in traditional non-class lawsuits.”).

³⁴ See *Shutts*, 472 U.S. at 813-14 (finding that absent plaintiff class members are “presumed to consent” to personal jurisdiction if they do not opt out of the class).

³⁵ FED. R. CIV. P. 23(c)(1).

³⁶ See *id.* 23 advisory comm. note (2003).

³⁷ *Id.* 23(a)(1)-(4) (numerosity, typicality, commonality, and adequacy).

³⁸ *Id.* 23(b)(1)-(3); see *infra* note 40 and accompanying text.

³⁹ See Manesh, *supra* note 32, at 925 (“Most class members first learn about the class action only after the court certifies the class.”).

⁴⁰ A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

FED. R. CIV. P. 23(b)(1)-(3).

class pursuant to Rule 23(b)(3)—which is the most common type of class action—the absent class members will, finally, be entitled to notice that the class action is pending.⁴¹ However, if the judge certifies the class pursuant to Rule 23(b)(1)(A), (b)(1)(B), or (b)(2), the judge has the authority to require notice to the absent class members,⁴² but in practice that option rarely is invoked⁴³—virtually guaranteeing continued silence, again due to the inherent structure and procedure of class actions. Moreover, even in (b)(3) class actions, silence generally continues.⁴⁴

A class action certified under (b)(3) requires “the best notice that is practicable under the circumstances” to the class members. In contrast to a Fair Labor Standards Act class action which, by statute, requires class members affirmatively to opt into the lawsuit,⁴⁵ a (b)(3) class action operates on an opt-out basis, meaning that everyone who comes within the class definition is presumed to wish to participate in the lawsuit unless they take affirmative steps to exclude themselves from the litigation.⁴⁶ At first glance, one might assume that instituting participation as the default would confer voice to class members, thus eradicating their silence. Instead, however, both the nature and the contingencies of the class action notice largely lead to continued silence of both a communicative and expectational nature.

Class action notices implicate issues of silence in several respects. First, in terms of communicative silence, perils lurk for both class counsel and defense counsel in creating effective informational notice because, paradoxically, the very success of the class action depends on continued silence. Class members who elect to opt out of the class action are not bound by the result of the class litigation and may file their own individual lawsuits, which has the potential to affect the existing lawsuit in four ways: (1) if a significant number of class members opt out, the class might no longer satisfy the numerosity prerequisite,

⁴¹ *Id.* 23(c)(2)(B) (“For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances . . .”).

⁴² *Id.* 23(c)(2)(A) (“For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.”).

⁴³ *See id.* 23 advisory comm. note (2003) (“The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care.”); WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 8:3 (5th ed. & 2014 supplement) (explaining that the Advisory Committee’s note “directs courts to provide certification notice in (b)(1) and (b)(2) cases sparingly” and that “most courts require notice [in (b)(1) and (b)(2) class actions] only in exceptional circumstances”).

⁴⁴ *See infra* notes 64-65 and accompanying text (observing that most class members will do nothing upon receipt of opt-out notice).

⁴⁵ “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b) (2012).

⁴⁶ FED. R. CIV. P. 23(c)(2)(B)(v) (requiring that the notice provided to (b)(3) class members state “that the court will exclude from the class any member who requests exclusion”).

which would result in decertification of the class;⁴⁷ (2) a significant number of opt-outs suggests that the class action may be flawed in some other manner, such as a preference for individual control, which again would result in decertification of the class;⁴⁸ (3) class counsel's fees are tied to the result achieved for the class, so class counsel is motivated to minimize the number of opt-outs to maximize class counsel's recovery; and (4) it is in defense counsel's interest to encompass as many class members as possible in order to bind them by the class action judgment and thereby avoid additional individual litigation. Accordingly, defense counsel is motivated to minimize the number of opt-outs as well. In other words, the hoped-for response to the class action notice is communicative silence, and that communicative silence is facilitated by the structural silence built into class actions. Communicative silence also is the practical result of contingencies in the class action notice process.

Contingencies in class action notice abound: (1) notice may be individualized in some instances; individualized notice may not be possible in other instances; (2) even if the notice is individualized, the recipient may (or may not) actually receive the notice; (3) even if the recipient actually receives the notice, the recipient may (or may not) open the envelope; (4) even if the recipient opens the envelope, the recipient may (or may not) read and understand the notice; and (5) even if the recipient reads and understands the notice, the recipient may (or may not) intentionally respond to the notice. I will examine each of these contingencies in turn.

1. Individualized notice—or not

Rule 23 requires certification notice to include “individual notice to all members who can be identified through reasonable effort.”⁴⁹ However, the nature of some class actions precludes individualized notice. For example, in class actions involving small-value purchases, there may be no list of purchasers' names and addresses from which individual notices can be generated; some form of publication notice may instead be “the best notice that is practicable under [those] circumstances.”⁵⁰

⁴⁷ *Id.* 23(a)(1) (“One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable . . .”).

⁴⁸ *Id.* 23(b)(3) (“A class action may be maintained if Rule 23(a) is satisfied and if . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual matters, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”).

⁴⁹ *Id.* 23(c)(2)(B).

⁵⁰ *Id.*

Publication in magazines, newspapers, or trade journals may be necessary if individual class members are not identifiable after reasonable effort or as a supplement to other notice efforts. For example, if no records were kept of sales of an allegedly defective product from retailers to consumers, publication notice may be necessary.

The likelihood that a class member will read a class action notice is heightened when the notice is mailed directly to the class member individually rather than published in a newspaper or magazine (to which the class member might not subscribe and might not see) or posted on the Internet (which the class member will not see unless she happens to visit the specific notice website). The Supreme Court has noted the likely futility of publication notice:

It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when . . . the notice . . . does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.⁵¹

2. Receipt—or not

As is true in traditional non-class litigation, effective notice requires the sender to follow the required procedures; actual receipt is not a prerequisite.⁵² Accordingly, a class member might not receive the class action notice for any of the reasons causing lack of actual receipt of any other kind of postal mail: a clerical error in the recipient's address; postal misdelivery; the recipient recently moved; or the recipient (or someone else in the recipient's household) intercepts, misplaces, or inadvertently destroys the notice.

3. Opening the envelope—or not

In traditional litigation, notice often is accomplished through a process server, which helps to impress upon the recipient the importance of the served document. However, individualized class action notices are sent by postal mail and tend to resemble junk mail.⁵³ Accordingly, class action notices are

⁵¹ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

⁵² See *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (finding notice effective even though the brokerage firm delayed mailing the notice until after the opt-out deadline had expired).

⁵³ See Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1185 (1998) (referring to class action notices as “look[ing] like a slightly unusual piece of junk mail” (quoting Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking*, 39 ARIZ. L. REV. 461, 468 (1997))); Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373, 407 (2007) (stating that class members may mistake notice for junk mail); Wolff, *supra* note 2, at 2089 (“[T]he mailing in a small-stakes class action is unlikely to be any more salient than the ubiquitous junk-mail

susceptible to being discarded immediately without being opened or read.

4. Understanding the notice's contents—or not

Even if the recipient opens the envelope, the notice is likely to be “overwhelming, intimidating, and incomprehensible to many, perhaps most, of its recipients.”⁵⁴ Criticism of class action notices has long existed,⁵⁵ and the combination of legal jargon and inadequate information resulted in a 2003 amendment to Rule 23 requiring that the notice provide basic information about the class action “clearly and concisely . . . in plain, easily understood language.”⁵⁶ Unfortunately, well-intentioned efforts to improve class action notices have been less successful than anticipated, and serious problems with class action notices continue.⁵⁷ For example, the Federal Judicial Center posts sample class action notices on its website.⁵⁸ These sample notices contain boldface headings and a table of contents, and they attempt to use clear language. Yet the sample notice for an employment discrimination class action is eight pages long—seemingly a bit lengthy for a notice that is supposed to be concise.⁵⁹

Making the notice understandable potentially implicates other concerns beyond the need for “plain language,” depending on the intended recipients. Some recipients may have reading comprehension issues due to, for example, lack of education, disabilities, language barriers,⁶⁰ or cultural/societal

marketing materials that we all receive regularly, dressing commercial solicitations up as checks, ‘urgent notices,’ or opportunities for unlikely sweepstakes jackpots.”)

⁵⁴ Bassett, *Transnational Class Actions*, *supra* note 2, at 64.

⁵⁵ See, e.g., Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 22 (1986) (“Much of what lawyers write, . . . including many class action notices, is incomprehensible to average citizens.”); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 855 (1997) (“In the set of class actions the [Federal Judicial Center] *Class Action Study* considered . . . the notices that were provided often lacked important information and were jargon-filled . . .”).

⁵⁶ FED. R. CIV. P. 23(c)(2)(B).

⁵⁷ See Shannon R. Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. LITIG. 53, 54 (2010) (reviewing more than 500 class action notices created after the 2003 amendments to Rule 23 and observing “the continuing problems with poorly worded and poorly designed notices”).

⁵⁸ *The Federal Judicial Center's “Illustrative” Forms of Class Action Notices*, FED. JUD. CENTER, <http://www.fjc.gov/public/home.nsf>, archived at <http://perma.cc/WWV4-R3QY> (last visited Sept. 28, 2014).

⁵⁹ See FED. R. CIV. P. 23(c)(2)(B).

⁶⁰ See Bassett, *Transnational Class Actions*, *supra* note 2, at 65-66 (“Language issues can arise when a non-English speaker receives a class action notice printed in English. Language issues can also arise even when the class action notice is printed in the . . . claimant’s native language.”); *id.* at 66 (“As anyone who has ever tried to translate a document from a foreign language knows, a literal word-by-word, or even sentence-by-sentence, translation of a foreign document will at best confuse . . . and at worst produce

differences.⁶¹

We have now moved through four contingencies, and potential class members likely have been lost at each step. But even assuming that each of these four contingencies is resolved in the affirmative, one important contingency still remains.

5. Intentionally responding to the notice—or not

Assuming that the class action notice is individualized rather than a form of publication notice; that the identified recipient actually receives the notice; that the recipient opens the notice; and that the recipient reads and understands the notice, the final contingency is whether the recipient responds to the notice in an intentional manner—either by making an intentional choice to remain in the lawsuit or by electing to opt out.

Rule 23 requires the notice of a (b)(3) class action to explain that the class member may ask to be excluded from the suit, which is called opting out.⁶² Typically, information explaining how one may opt out appears toward the end of the notice and requires the class member to send a letter requesting exclusion to the court by a specific date. Sometimes the notice will include an opt-out form;⁶³ other times only the court address is provided. Expecting a class member to take affirmative steps to opt out is largely unrealistic—the more natural and human response is simply to do nothing.

Faced with a piece of paper they do not understand, the vast majority of the recipients are not going to consult an attorney for advice. Nor are they going to take the time and effort to draft a letter opting out of the litigation. They are simply going to set the notice aside or throw it away without realizing the consequences of their inaction.⁶⁴

Indeed, silence prevails—fewer than one percent of class members elect to opt out;⁶⁵ the median percentage of opt-outs is a mere 0.1%.⁶⁶ The small

nonsense.” (quoting James A. Fanto, *The Absence of Cross-Cultural Communication*, 17 NW. J. INT’L L. & BUS. 119, 186 (1996)).

⁶¹ See *id.* (“Unfamiliarity with the legal system generally, and with class actions in particular, can . . . interfere with . . . comprehension of the class action notice. Class actions exist in few jurisdictions outside the United States . . .”).

⁶² FED. R. CIV. P. 23(c)(2)(B)(v) (“The notice must clearly and concisely state in plain, easily understood language . . . that the court will exclude from the class any member who requests exclusion . . .”).

⁶³ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2004) (“A simple and clear form for opting out is often included with the notice.”).

⁶⁴ Bassett, *Transnational Class Actions*, *supra* note 2, at 65.

⁶⁵ Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation*, 57 VAND. L. REV. 1529, 1532 (2004).

⁶⁶ *Id.* at 1546; see also THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMEC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10 (1996) (“Across all four districts, the median percentage of members who opted out of a settlement was

number of opt-outs helps to ensure the class action's continued viability, to enhance class counsel's fee, and to reduce the potential number of additional individual lawsuits. But the silence comes at a cost, because it is treated as communicative when it actually is expectational: the number of opt-outs often has little, if any, impact on the court's evaluation of the class lawsuit. Judges typically interpret a lack of opt-outs as indicating class members' approval while simultaneously declining to interpret opt-outs as dissatisfaction.⁶⁷ This phenomenon becomes clearer as we explore the path to resolution, typically resulting in the class action's settlement.

C. *Silence and the Path to Resolution: Communicative and Expectational Silence*

After a class is certified, discovery typically follows. Generally, discovery of absent class members is disfavored and requires advance court approval,⁶⁸ and thus class members' silence usually continues during any pretrial discovery due to structural silence. At the conclusion of discovery, most class actions settle—as is true of most civil litigation generally.⁶⁹ Settlement of the claims of a certified class requires a fairness hearing and court approval, as well as “reasonable” notice to the class members regarding the proposed settlement,⁷⁰ yet the settlement notice again typically results in silence.

“Reasonable” notice of the proposed settlement might, or might not, be individualized notice, with all of the accompanying concomitant hazards explored above. Rule 23 authorizes, but does not require, settlement notices to provide a second opportunity for a (b)(3) class member to opt out;⁷¹ indeed, most courts have not elected to provide a second opt-out. Absent the second opt-out opportunity, the only manner in which a class member may respond to a settlement notice is through the process of lodging an objection to the

either 0.1% or 0.2% of the total membership of the class . . .”).

⁶⁷ Leslie, *supra* note 3, at 121-22 (observing both that “judges do not interpret opt-outs as objections” and that “courts may treat a low number of opt-outs as demonstrating class support”).

⁶⁸ See, e.g., *McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008); *Collins v. Int'l Dairy Queen*, 190 F.R.D. 629, 631 (M.D. Ga. 1999); *Transamerican Ref. Corp. v. Dravo Corp.*, 139 F.R.D. 619, 621-22 (S.D. Tex. 1991). This applies only to the absent class members; the named class representatives are subject to discovery in the same manner as a party in non-class litigation.

⁶⁹ See Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994) (acknowledging that “settlement is the most frequent disposition of civil cases”).

⁷⁰ FED. R. CIV. P. 23(e).

⁷¹ See *id.* 23(e)(4) (“If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”).

proposed settlement.⁷²

Just as opting out is effectively discouraged, so is objecting to a proposed settlement. By definition, the existence of a proposed settlement that has been submitted for court approval indicates that both class counsel and defense counsel are promoting the settlement and thus have no motivation to encourage objections. Moreover, the content of the settlement notice—or, more specifically, the content missing from the notice—often contributes to the silence. Of particular note, the settlement notice generally is not required to inform class members of the specific amount of their individual recovery under the proposed settlement.

[T]he contents of the [settlement] notice often fail to provide sufficient information to allow the class members to make informed decisions about whether to challenge the proposed settlement. . . . [I]n deciding whether to object to a proposed settlement, the single most important fact that the average class member needs to know is how much she will receive under the settlement plan. Yet, despite Rule 23(e)'s requirement of notice to the class, courts generally do not interpret the rule to require that the notice inform the class members what their individual recovery will be. . . .⁷³

In addition to the lack of motivation to object due to insufficient information to evaluate the proposed settlement, even a class member who is inclined to object may be deterred by a short time period in which to object, the potential expense of objecting, and the likely futility of objecting to the proposed settlement.⁷⁴ Not surprisingly, objectors—like opt-outs—are few.⁷⁵ Yet again, a lack of objectors causes no alarm due to expectational silence. Expectational silence is particularly powerful in the context of class settlement objectors because courts have treated the entire range of objections—from no objectors to large numbers of objectors—as endorsements of proposed settlements. “[C]ourts interpret class member silence as overwhelming support for proposed settlements,”⁷⁶ and also tend to “reject[] class member objections by reasoning that the ‘settlement is virtually always a compromise,’ implying that some class members are simply unwilling to compromise and would object to any settlement.”⁷⁷ So strong is the expectational silence in class actions that

⁷² See *id.* 23(e)(5).

⁷³ Leslie, *supra* note 3, at 92-93; see Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 428 (“There is simply no reason to think that the small stakes class member will possess either the information or the incentive needed to evaluate the . . . adequacy of a proposed settlement.”).

⁷⁴ Leslie, *supra* note 3, at 96-97, 98-101, 105-07 (analyzing reasons a class member might not object despite an inclination to do so).

⁷⁵ See Eisenberg & Miller, *supra* note 65, at 1549 (“Only in commercial cases does the objection rate rise to nontrivial levels No other case type displays a mean objection rate of even 5 percent of class members. Like opt-outs, objectors are rare”).

⁷⁶ Leslie, *supra* note 3, at 88-89.

⁷⁷ *Id.* at 108 (quoting *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 179

courts even tend to ignore objections raised by class representatives.⁷⁸

These five contingencies reflect various “bumps in the road” that can cause a class member to fail to opt out for reasons other than her intentional consent to participate in the class action litigation. These contingencies are well known, yet nevertheless, as analyzed in the next section, courts routinely ascribe a specific meaning—that of consent—to class members’ failure to opt out.

IV. COMPOUNDED CONTINGENCIES: THE ILLICIT USE OF SILENCE

“[B]ecause the concept of consent is a communicative one, we must always seek the most plausible interpretation of the conduct of the parties within the relevant community of discourse.”⁷⁹ In class actions, however, no such attempt is undertaken to ascertain “the most plausible interpretation” of a class member’s conduct. Indeed, when class members do not opt out, the failure is treated as an affirmative, intentional choice to communicate consent. Worse, it is treated as multiple, compounded consents: consent to the court’s personal jurisdiction, consent to participate in the suit, and—if the notice is serving as both certification notice and settlement notice—consent to the settlement terms. In theory, there might be circumstances where a single action could convey multiple forms of consent simultaneously, but the practical realities of class action notices cannot carry that weight.

Equating silence with consent is simply a legal fiction. Ascribing any meaning to silence in response to publication notice is untenable; the shortcomings of publication notice are well documented.⁸⁰ But even when class members are identifiable, such that individualized notice is available, ascribing consent to class members’ silence is untenable due to the number of contingencies.

As representative lawsuits, class actions rely heavily on the fair and adequate representation of the class representative and class counsel for their constitutionality. But while constitutionally necessary, the fact that class representatives and class counsel are fair and adequate is not constitutionally sufficient.⁸¹ Rather, the Supreme Court has explained, class actions are accorded four minimal due process protections: notice, an opportunity to be heard, an opportunity to opt out, and adequate representation of the class

(E.D. Pa. 2000)).

⁷⁸ *Id.* at 109 (“Courts routinely ignore objections when the class representatives oppose the proposed settlement.”).

⁷⁹ Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 862 (1992).

⁸⁰ *See, e.g.,* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) (“It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts.”).

⁸¹ *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (outlining minimum procedural due process requirements for absent class members); Bassett, *Transnational Class Actions*, *supra* note 2, at 49 (“[A]dequate representation alone will not always satisfy due process . . .”).

members' interests.⁸² Of note, however, is the fact that the Court's discussion of these factors was in the context of personal jurisdiction⁸³ and resulted in the Court's holding that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."⁸⁴ However, the Court did not examine the alternative reasons for a class member's failure to opt out, nor did the Court examine the layering of silence that its decision implicitly condoned.

Thus, the entire foundation of the building-blocks approach to consent in class actions is shaky, as recognized by a number of commentators who have challenged the premise of class members' purported consent to personal jurisdiction by virtue of their failure to opt out.⁸⁵ As one commentator summarized the problem:

The [*Shutts*] Court assumes, in other words, that it is generally appropriate to treat the notice and opt-out procedure as one that elicits a meaningful expression of simple consent from class members ("unwilling to execute an 'opt out' form") or, at least, as one that generally causes the class member to become engaged with the proceedings in a sufficiently active manner that it is appropriate to treat a failure to respond as a waiver of objections and, hence, as procedural consent ("presumed to consent to being a member of the class by his failure to do so"). As a purely descriptive matter, these assumptions are simply untenable.⁸⁶

Piling additional "consents" atop that of personal jurisdiction does not shore up this shaky foundation, but instead further undermines it, causing it to topple.

Ultimately, the problem with current class action practices is that the meaning ascribed to class members' silence is too attenuated. The effect is a

⁸² *Id.* at 812.

⁸³ See Wolff, *supra* note 2, at 2082 ("The [*Shutts*] Court emphasized throughout the opinion that its due process analysis was aimed specifically at assessing the extent of a state court's power to exercise jurisdiction over out-of-state class members. It framed the due process issue as one of personal jurisdiction in its introductory section, identified consent as the theory of jurisdiction that it would analyze in the section devoted to the issue, and then proceeded to conduct most of its analysis exclusively with reference to its personal jurisdiction precedents.").

Id.

⁸⁴ *Shutts*, 472 U.S. at 811.

⁸⁵ See, e.g., 3 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 13.37 (3d ed. 1992) ("[The] suggest[ion] that the failure of class members to opt out of the suit equals consent to jurisdiction . . . does not withstand analysis."); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 766 n.3 (1998) ("*Shutts* . . . discussed the opt out requirement in a situation where there was no basis for personal jurisdiction over absent class members and construed a failure to opt out of a class suit as consent to personal jurisdiction.").

⁸⁶ Wolff, *supra* note 2, at 2088 (alteration in original) (quoting *Shutts*, 472 U.S. at 813).

house of cards: the foundation is a less than optimal notice, which might or might not have been received and understood, and to which the most likely response is to ignore and discard it. Layered atop this shaky foundation, the law takes this silence and perversely interprets it as affirmative consent to personal jurisdiction, *and* interest in pursuing the class action litigation, *and* approval of the proposed settlement's terms and conditions, *and* a willingness to be bound by the class suit's outcome. This approach makes things easy for counsel and the court because silence is built into the system structurally and becomes a self-fulfilling prophecy—and that silence is then used to justify the necessary prerequisites to confirm the final outcome. But the group to whom a duty is owed is that of the absent class members—and the tiered, compounded consents cannot be justified as benefiting the class members unless it is assumed that class actions always benefit the absent class members, which is a demonstrably erroneous premise.

The willingness to give affirmative meanings to a highly ambiguous lack of reaction under circumstances involving multiple contingencies is unheard of in any other area of the law.⁸⁷ Only two circumstances—defaults and contractual silence—bear some analogy, and both are distinctively different. In the first analogy, that of defaults, the failure to respond to a lawsuit permits a court to enter a default judgment so long as the defaulting party was properly served.⁸⁸ However, before the defaulting party's silence will be deemed to connote consent, the moving party has to demonstrate that service was in fact accomplished, and notice in a traditional lawsuit requires service of the summons and complaint, which do not look like postcards nor resemble junk mail.⁸⁹ Moreover, court procedures permit default judgments to be set aside with relative ease—procedures that are not available to class members.⁹⁰

The second analogy is contractual silence, in which silence occasionally is construed as assent. “In general, the courts have held that the maxim ‘silence gives consent’ is not a part of the law of contract.”⁹¹ And this makes sense—contracts generally require a meeting of the minds, an agreement.⁹² However,

⁸⁷ [I]f one deems the right not to be forced to be included in a litigation in which one does not have full control over the conduct of one's own action to be a significant constitutional right, then the [class action] opt-out procedure must be seen as a form of waiver of that right. In virtually no other context may constitutional rights be formally waived by such total passivity on the part of the rightholder when the rightholder has himself neither brought an action nor been made a defendant in an action.

REDISH, *supra* note 1, at 175. *See also* Leslie, *supra* note 3, at 118 (“It is particularly surprising that trial judges interpret silence as endorsement in the context of proposed settlements to class action litigation when silence carries no such significance in other areas of law.”).

⁸⁸ *See* FED. R. CIV. P. 55.

⁸⁹ *See id.*; *id.* 5.

⁹⁰ *See id.* 55(c); *id.* 60(b).

⁹¹ *When Silence Gives Consent*, *supra* note 14, at 441; *see* Leslie, *supra* note 3, at 118 (discussing “the general rule [of contract law] that silence is not acceptance”).

⁹² *See* Barnett, *supra* note 79, at 841 (observing that “freedom to contract permits

“under certain circumstances, . . . a duty is imposed upon the offeree either to accept or reject the offer, and his silence or inaction will be tantamount to acceptance.”⁹³ Certainly it would be appropriate to find consent when the parties previously agreed that silence would constitute assent, and occasionally reliance factors or reasonable expectations have justified a finding of consent.⁹⁴ However, current class action practice poses an unusual dilemma. Absent class members have not solicited the lawsuit, and unlike, for example, a situation involving a buyer and seller in which silence may be interpreted as consent, there is no prior relationship between class counsel and the absent class members. Absent class members have made no solicitation, have entered into no prior agreement authorizing their failure to opt out to be treated as assent, and have not done anything that could be considered as encouraging class counsel to rely on their silence.

In particular, “the offeror cannot by his own act put the offeree in the position where he must speak or by his silence create a contractual obligation.”⁹⁵ Yet this describes quite accurately the position of the absent class member—the offer (either the class action lawsuit in the certification context or the proposed settlement in the settlement context) has come out of nowhere, and the offerors (counsel and the court, who are strangers to the absent class member) have announced that silence will operate as acceptance of that offer.⁹⁶

Thus, the problematic aspect of compounded contingencies is not the infinitesimal number of opt-outs; it is the unjustified assumptions that are

consensual transfers”).

⁹³ Note, *Contracts—Silence as Acceptance*, 25 VA. L. REV. 372, 372 (1939) (quoting 1 WILLISTON, CONTRACTS § 91 (rev. ed. 1936)); see Leslie, *supra* note 3, at 118 (“Although contract law provides exceptions to the general rule that silence is not acceptance, none of them apply to silent class members.”); Warren A. Seavey, *Ratification by Silence*, 103 U. PA. L. REV. 30, 33 (1954) (“[I]n most of the cases where ratification has been found, not only was the prior act done by one who was an agent, and in many cases one who may have been authorized, but also there was something received by the principal or there were elements of estoppel which would support the result . . .”).

⁹⁴ [A duty may be imposed on an offeree] where, because of previous dealings between the parties, the offeror has a right to consider his offer accepted unless a rejection is forthcoming. And where the offeree or his agent solicits the offer, a rejection within a reasonable time is necessary to prevent the formation of a contract. Where the offeror acts to his detriment in reasonable reliance on the offeree’s conduct, the offeree’s inaction will be deemed an acceptance after he has remained silent for an unreasonable length of time.

Contracts—Silence as Acceptance, *supra* note 93, at 372 (citations omitted).

⁹⁵ Note, *Silence as Acceptance in the Formation of Contracts*, 33 HARV. L. REV. 595, 596-97 (1920); see *When Silence Gives Consent*, *supra* note 14, at 441 (“It has been held that silence will not operate as the acceptance of an offer even though the offeror expressly states that it shall so operate.”).

⁹⁶ Barnett, *supra* note 79, at 827 (“[T]he presence of consent to be legally bound is essential to justify the legal enforcement of any default rules.”).

drawn from those opt-outs.⁹⁷ The failure to opt out is deemed to denote consent to personal jurisdiction, consent to be bound by any judgment in the case, consent to give up any potential claim against the defendant, consent to the proposed settlement, and approval of the settlement's terms and conditions. In light of the contingencies that may have rendered a class member's silence something other than consent, the failure to opt out cannot bear the weight of the numerous consents ascribed to the class member's silence. The next section proposes a different approach to class action silence.

V. A PROPOSAL REGARDING CLASS ACTION SILENCE

As noted above, three types of silence exist in class actions: structural silence, communicative silence, and expectational silence.⁹⁸ Unfortunately, although structural and expectational silence are commonplace in class actions, communicative silence is not. Yet class actions treat all silences as intentional communicative silence—specifically, silence is treated as affirmative consent. Moreover, this assumption is compounded several times over. Silence (the failure to opt out) is treated as consent to the court's jurisdiction, consent to participation in the class lawsuit, consent to the settlement and approval of the settlement's terms and conditions, and consent to be bound by the outcome of the case.

The multiple and contradictory meanings of silence, together with the unusual number of contingencies, render it unreasonable to equate the failure to opt out with consent.⁹⁹ The fallacy of repeatedly ascribing consent to highly ambiguous silence should be recognized—and should be treated not as an innocuous legal fiction,¹⁰⁰ but as a due process danger that potentially can deprive class members of property rights and their day in court.¹⁰¹ Recognition

⁹⁷ See Eisenberg & Miller, *supra* note 65, at 1561 (“[Our results] undermine the idea that absent class members may be taken to consent to the court’s jurisdiction over their person by virtue of their failure to opt out of the action. The overwhelming inaction displayed by class members in the reported cases suggests that a class member’s failure to opt out should not readily be equated to an affirmative consent to jurisdiction. Common sense indicates that apathy, not decision, is the basis for inaction.”).

⁹⁸ See *supra* Part III.

⁹⁹ Debra Lyn Bassett, *Implied “Consent” to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619, 638 (“The notion of failing to opt out as constituting consent is largely fictitious.”).

¹⁰⁰ See Leslie, *supra* note 3, at 119 (opining that the practice of “reading significance into [class members’] inaction” is based on “protecting the efficiency of the class action vehicle”); Wolff, *supra* note 2, at 2092 (arguing that “consent” to personal jurisdiction in the class action context “is a form of constructive consent motivated by substantive policy concerns, rather than a description of actual autonomous choices that class members are likely to make”).

¹⁰¹ Bassett, *Just Go Away*, *supra* note 15, at 1111 (“[I]f the unnamed class members were adequately represented by the class representatives and class counsel, the class judgment will both bind the class members and preclude them from filing subsequent lawsuits

of this danger is constitutionally demanded, and there are several potential alternative procedures that would avoid these problems.

The most direct remedy for the issues arising from compounded silence/consent is actual, rather than fictitious, consent. Fortunately, and interestingly, actual consent is surprisingly easy to achieve in the class action context. In fact, actual consent was the original class action norm,¹⁰² and continues to be the requirement in actions under the Fair Labor Standards Act¹⁰³ and the Age Discrimination in Employment Act.¹⁰⁴ Actual consent is achieved by changing the current opt-out procedure to one that requires class members to opt in.

An opt-out system differs from an opt-in system in its treatment of absent class members' inertia. Under an opt-out system, absent class members are presumed to be part of the class, while under an opt-in system, they are presumed to have elected not to participate in the class litigation absent their affirmative act to include themselves. . . . No category of class action under the current federal rule provides for an opt-in procedure.¹⁰⁵

Numerous commentators have expressed support for returning to the opt-in procedure,¹⁰⁶ and it is notable that the European Union (which generally has

involving the same claims.”); see REDISH, *supra* note 1, at 1 (“If [the class] representatives fail, the claims of the absent class members will be legally obliterated by the doctrine of res judicata, just as are those of their class representatives.”).

¹⁰² See Bassett, *Transnational Class Actions*, *supra* note 2, at 87 (“The opting in procedure is not unknown to the class action process. Prior to 1966, in non-mandatory class actions, class members could only participate in the class litigation if they affirmatively opted into the lawsuit.”); John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 U. KAN. L. REV. 255, 256 (1985) (“[P]ermissive class members prior to 1966 had the duty affirmatively to ‘opt in.’”). Although some commentators expressed support for the 1966 change to an opt-out procedure, others were less enthusiastic. Compare Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1223 (1966) (“The mere fact that an absent member must now take the initiative to exclude himself, rather than being excluded unless he opts into the litigation, will result in a much greater range of effectiveness for class actions.”), with Committee on Federal Rules of Civil Procedure, Judicial Conference – Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 76 (1965) (expressing disapproval of the change to an opt-out procedure and stating, “The Committee feels strongly that it is undesirable . . . to bind persons who have not chosen to make themselves parties to a litigation.”).

¹⁰³ 29 U.S.C. § 216(b) (2012) (“No employee shall be a party plaintiff to any [employment class] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

¹⁰⁴ See *id.* § 626.

¹⁰⁵ REDISH, *supra* note 1, at 92.

¹⁰⁶ See, e.g., *id.* at 169 (“[A] process that requires absent claimants to affirmatively opt into a class proceeding is preferable to an opt-out procedure, purely as a matter of democratic theory.”); Bassett, *Just Go Away*, *supra* note 15, at 1118 (“The solution is opt-in

been resistant to class actions) has recently been willing to consider authorizing the class action device—so long as an opt-in approach is adopted.¹⁰⁷ Requiring class members to opt into the class litigation affords other benefits and alleviates other concerns, including potential due process¹⁰⁸ and preclusion concerns.¹⁰⁹

The most commonly expressed objection to an opt-in approach again involves class members' inertia¹¹⁰—but it is an inertia that operates in the opposite direction from the inertia exhibited in an opt-out context. Under an opt-in system, if potential class members do not affirmatively opt into the class litigation, they are not participants in the suit, which reduces the ultimate number of class members.¹¹¹ As noted previously, a smaller number of

participation.”); Bassett, *Transnational Class Actions*, *supra* note 2, at 87 (arguing for an opt-in procedure for foreign claimants); Bronsteen, *supra* note 3, at 903 (proposing that “class settlements include only those who . . . opt[] in”); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 935 (1998) (suggesting that Rule 23(b)(3) “classes . . . be limited to members who affirmatively opt in”); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1612 (2007) (“[A] process that requires absent claimants to affirmatively opt into a class proceeding is preferable to an opt-out procedure, purely as a matter of democratic theory.”).

¹⁰⁷ See European Commission, Commission Recommendation C(2013) 3539/3 1, 8, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, available at <http://perma.cc/W8UN-7U4Q> (“The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle).”).

¹⁰⁸ See REDISH, *supra* note 1, at 231 (suggesting that “the existing opt-out structure for (b)(3) classes . . . violate[s] due process . . . except in situations in which the individual claims, though sufficiently large to reasonably justify the filing of a claim form as part of a settlement or judicial award, would be insufficiently large to justify individual suit”); Bassett, *Just Go Away*, *supra* note 15, at 1125-26.

¹⁰⁹ See Bassett, *Just Go Away*, *supra* note 15, at 1125-26 (“The lack of a direct relationship between absent class members and the named class representatives, combined with the use of an opt-out procedure, which provides an insufficient indication of class members’ actual consent to be bound by the class litigation, takes class actions outside the bounds of every other preclusion exception . . .”).

¹¹⁰ See Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 146 (2001) (“Returning to an opt-in requirement for damage class actions would leave in place a vehicle for collective litigation, but the vehicle would be substantially underpowered in comparison to the current model.”).

¹¹¹ See Bronsteen, *supra* note 3, at 906 (opining that an “opt-in rule would drastically reduce the number of class members in any settlement”); Thomas M. Byrne, *Class Actions*, 59 MERCER L. REV. 1117, 1134 (2008) (“The effect of the difference [between an opt-in and opt-out approach] is to reduce the size of collective actions because, for a variety of reasons, many eligible class members elect not to opt in.”); Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 FORDHAM URB. L.J. 373, 387 (2008) (“[I]ndividuals typically do not respond to notices of collective action by taking affirmative steps to opt-in or opt-out of class action lawsuits. This means that an opt-in rule . . . tends to produce low participation rates while an

claimants potentially can undermine the effectiveness of a class action by having an impact on the satisfaction of the numerosity and superiority requirements, the size of the class recovery, the amount of class counsel's attorney's fees, and defendants' willingness to settle.¹¹² Accordingly, support for an opt-in procedure sometimes has been done in a moderated fashion, calling for opt-in where claims are large enough to justify an individual lawsuit but still permitting an opt-out procedure where claims are not large enough to sustain an individual suit.¹¹³

These concerns about the procedural effectiveness of class actions have been allowed to outweigh competing concerns about due process. It seems curious to reject a solution that would employ actual consent and would eliminate any due process concerns without even attempting to find an implementation method that would maximize participation. A return to an opt-in approach might well inspire creativity because class counsel's fee is determined by examining the benefit achieved for the class—and thus, unlike the current opt-out procedure, counsel would be highly motivated to provide effective notice. Accordingly, opt-in class action notices might routinely employ postage-paid postcard-type reply cards for individualized notices and a well-advertised website for non-individualized notices, perhaps even offering an online opt-in option. The ability to contact large groups of people at low or no cost through social media and the Internet are options that did not exist during the previous tenure of the opt-in approach.

Short of returning to an opt-in approach as the default procedure in class actions, the adoption of three additional practices would mitigate some of the existing flaws resulting from the compounding of interpreting silence as consent. The first practice would require courts specifically to examine every class action lawsuit for the propriety of employing an opt-in approach, and if an opt-in approach is rejected, would require a specific and detailed judicial finding and explanation why an opt-in approach cannot work in that instance. The second practice would require, in any class action where the court has rejected an opt-in approach, that the court expressly recognize the deficiencies of the opt-out approach and accordingly provide a specific and detailed judicial finding that the class action lawsuit is believed likely to provide a specific and concrete benefit to the class members of a magnitude that warrants depriving those class members of any individual claims they might have against the defendant. Finally, the third practice would require courts to recognize expressly and specifically any instance where absent class members' silence is being interpreted as consent, and would require a rigorous analysis of why that meaning is legitimate—including the taking of expert testimony to aid in determining the legitimacy of that interpretation.

opt-out rule tends to produce high participation rates relative to potential class size.”).

¹¹² See *supra* notes 47-48 and accompanying text.

¹¹³ See, e.g., REDISH, *supra* note 1, at 175.

CONCLUSION

Supporters of the current opt-out approach employed in class actions have defended the approach as facilitating the adjudication of small-value claims and deterring defendant misconduct. However, the opt-out procedure also creates a layering of repeated and inappropriately compounded interpretations of silence as consent. In light of the evolution of class actions to include situations where the benefit to class members is highly questionable, a return to the original opt-in approach is more consistent with due process.