
**LITIGATING TOGETHER:
SOCIAL, MORAL, AND LEGAL OBLIGATIONS**

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INTRODUCTION	88
I. NONCLASS AGGREGATION’S PREVALENCE AND PROBLEMS	94
A. <i>Aggregation Itself and the Litigation’s Maturity</i>	95
B. <i>Interrelationships Between Key Players</i>	97
1. Agency Problems	97
2. Group Problems.....	99
3. Competition Problems	100
II. COMMUNAL ENCUMBRANCES OF LITIGATING TOGETHER	103
III. A COOPERATIVE LITIGATION MODEL	111
A. <i>Rules and Tools</i>	112
1. Special Officer.....	113
2. Communication	117
B. <i>Sorting</i>	121
C. <i>Group Governance</i>	125
1. Tacit Coordination, Social Norms, and Moral Obligations	127
2. Intraclaimant-Governance Agreements	132
D. <i>When Social Glue Doesn’t Stick</i>	134
1. Carrots for Outliers.....	137
2. Sticks for Holdouts.....	138
3. Doors as Signals and Exit as a Safety Valve	142
IV. APPLICATIONS OF AND SPILLOVERS FROM LITIGATING TOGETHER	145
A. <i>The Economic Disjunction</i>	145
B. <i>Facilitating Process-Based Ends</i>	147
C. <i>Reconsidering Vioxx</i>	149
CONCLUSION.....	155

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In a post-Class Action Fairness Act world, the modern mass-tort class action is disappearing. Indeed, multi-district litigation and private aggregation through contracts with plaintiffs' law firms are the new mass-tort frontier. But something's amiss with this "nonclass aggregation." These new procedures involve a fundamentally different dynamic than class actions: plaintiffs have names, faces, and something deeply personal at stake. Their claims are independently economically viable, which gives them autonomy expectations about being able to control the course of their litigation. Yet, they participate in a familiar, collective effort to establish the defendant's liability. They litigate from both a personal and a collective standpoint.

Current scholarship overlooks this inter-personal dimension. It focuses instead on either touting the virtues of individual autonomy or streamlining mass litigation to maximize social welfare. Both approaches fail to solve the unique problems caused by these personal dimensions: temptations for plaintiffs to hold out and thus derail settlements demanding near unanimity, outliers who remain disengaged from the group but free-ride off of its efforts, and subgroups within the litigation whose members compete for resources and litigation dominance to the group's detriment. Accordingly, this Article has two principal objectives: one diagnostic, one prescriptive. The diagnosis is this: current procedures for handling nonclass aggregation miss the mark. Process is not just an exercise in autonomy or a handy crutch for enforcing substantive laws. Procedures can serve as a means for bringing plaintiffs together, plugging their individual stories into a collective narrative, making sense of that narrative as a community, reasoning together about the right thing to do, and pursuing that end collectively. Thus, the prescription is litigating together.

INTRODUCTION

The mass-tort class action as we know it is virtually extinct. Without it, lawyers are scrambling for new ways to achieve the finality that class actions once afforded. In its place, lawyers use multi-district litigation and design settlements that deter plaintiffs from opting out. But the very design features that create finality tend to strong-arm plaintiffs into accepting agreements that might not be in their best interests. Consider the recent Vioxx settlement that required plaintiffs' attorneys to recommend the deal to 100% of their clients and to withdraw from representing those clients who refused.¹ Many Vioxx

¹ Vioxx Settlement Agreement, § 1.2.8.1-2 (Nov. 9, 2007) (initial settlement agreement, Vioxx Prod. Liab. Litig., No. 05-01657 (E.D. La.)), available at <http://www.officialvioxxsettlement.com>. After some plaintiffs' attorneys contended the settlement conflicted with ethical rules, it was reinterpreted to mean that the attorneys should recommend the deal only if it was in the client's best interest. Cf. Alex Berenson, *Lawyers Seek to Alter Settlement Over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4 (discussing how the agreement prevented attorneys from offering the best independent judgment for each client).

plaintiffs had independently economically marketable cases with product-liability, personal-injury, and failure-to-warn claims. Yet, their attorneys and the system pooled them together through multi-district litigation to tell a collective, dismal story of product failure; benefit from joint discovery; and level the playing field against Merck. Nonclass aggregation like this forces mass-tort attorneys to confront the human element of litigation head-on. These plaintiffs have names and faces and concerns; these are not the absent class members of the past: they care and they're present.

Nonclass aggregation creates an uneasy union between the individual and the collective. On one hand, we're social creatures. But on the other, we are autonomous individuals who want to make our own decisions, direct the course of our lives, and, when necessary, initiate our own litigation – particularly when it involves something as deeply personal as our health or safety. Thus, we live our lives from two perspectives: the personal and the collective. We are independent and interdependent. Litigating together, like so many other activities, mixes personal goals and group efforts that ultimately lead to “us” pursuing “our” objective. But sometimes our personal ends mesh with others' ends and sometimes they don't. This Article explores the problems and complexity forged by this basic intersection of the personal and the collective in large-scale, nonclass aggregation.

Perhaps this complexity is so obvious that we need not say anymore about it. Aggregating claims means bringing together many people, players, and agents; it's thorny and people's motivations are complicated. Or maybe that complexity is easily suppressed by using external judicial and procedural coercion to stifle dissent. But once we recognize that mass-tort litigation is complex because it lumps together many people's distinct preferences, we begin to see that an externally coercive approach can cause problems of its own. Dissatisfied litigants and attorneys initiate collateral actions attacking the first action's procedures and fairness; in the wake of *Hansberry v. Lee*,² these actions raise issues of preclusion, due process, and adequate representation in other fora.³ These repeated challenges to the handling of large-scale litigation begin to chip away at the legal system's credibility and legitimacy, which ultimately makes peace and finality for defendants illusory.

So perhaps the answer lies in exploring this complexity. Understanding what makes aggregate litigation complex from a group-orientation perspective can help us formulate more realistic and useful propositions about how the

² 311 U.S. 32 (1940).

³ *Id.* at 40-44. *Epstein v. MCA, Inc.*, has, however, limited the availability of collateral attack in the class action context. 179 F.3d 641, 648 (9th Cir. 1999); see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1685-91 (2008) (“Evaluating interclass conflicts from the time of the class settlement, by contrast [to collateral attacks that take place afterwards], brings the adequacy analysis into line with the uncertainty that underlies all manner of settlement . . .”).

aggregation process should work. Of course, some existing theories already explain the basic interactions. For instance, game theory using prisoners' dilemmas helps us understand bilateral, strategic interactions. But our traditional analytic tools break down when many people interact – multiple claimants, attorneys, defendants, and judges. Unlike its bilateral plaintiff-versus-defendant counterpart, mass litigation is complex because of the number of principals and agents, their diversity, and their interdependence.⁴

Accordingly, in this Article, the third in a trilogy,⁵ I explore this interdependence in terms of social norms, moral duties, and legal obligations. In so doing, I have two principal objectives: one diagnostic, one prescriptive. The diagnosis is this: current procedures for handling nonclass aggregation miss the mark. Our conventional perspectives – individual autonomy and social-welfare maximization – fail to capture fully the interaction between the collective standpoint and the personal standpoint. Mass litigation is not just about a payday for attorneys, closure for defendants, or even compensation for plaintiffs. Procedural handling of mass litigation can serve as a means for

⁴ See J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. L. REV. 885, 889 (2008) (“Most actors in the legal system interact in this . . . context in which there are too many interacting agents to fit neatly into bilateral models”); see also JOHN H. MILLER & SCOTT E. PAGE, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE 221 (2007).

⁵ The first article in the trilogy is Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) [hereinafter *Procedural Justice*], which explains in depth the problems and risks presented by nonclass aggregation. It observes that systemic legitimacy and compliance with judicial decisions hinges on ensuring procedural justice, but that our current system for handling large-scale litigation fails to provide a number of key procedural justice components including the preference for adversarial litigation, participation opportunities, impartiality, and error correction. These institutional shortcomings are due in large part to the trade-offs inherent in large-scale litigation. Those trade-offs include that:

[L]itigation is no longer adversarial despite litigants' preferences, *but* effective individual litigation is too costly to pursue; aggregate settlements provide few participation opportunities for participation and no avenues for appeal or error correction despite potential conflicts, *but* without aggregate settlements, cost and delay could be staggering and the relief may come too late; mediators or special masters might afford claimants additional participatory opportunities, *but* process is then less adversarial and may suffer from legitimacy problems.

Id. at 46. The second article in the trilogy is Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2009) [hereinafter *Litigating Groups*]. A summary of the principal claims in the second Article is laid out in the text of this Article. I have also summarized those contentions in a short response to Judge Weinstein's article, Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1, 3, http://www.cardozolawreview.com/content/denovo/WEINSTEIN_2009_1.pdf. See Elizabeth Chamblee Burch, *A New Way Forward: A Response to Judge Weinstein*, 2009 CARDOZO L. REV. DE NOVO 168.

bringing plaintiffs together, plugging their individual stories into a collective narrative, making sense of that narrative as a community, reasoning together about the right thing to do, and pursuing that end with collective force.

By confronting and grappling with the transformative nature of social relationships, this Article's approach differs from those proposed by Professors Coffee,⁶ Erichson,⁷ Issacharoff,⁸ Nagareda,⁹ Redish,¹⁰ and Rosenberg,¹¹ yet each author might find some harmony between "litigating together" and the axioms of their theories.¹² In this Article's predecessor, *Litigating Groups*, I laid the theoretical groundwork for this approach by borrowing insights from social psychology, moral and political philosophy, and behavioral law and economics, and by bringing those notions of commitment, community, and groups to bear on nonclass aggregation.¹³ I argued that groups of plaintiffs may have or could be encouraged to develop organic or indigenous origins such that they form moral obligations to one another that are reinforced by social and personal norms.

My prescriptive objective is to enable plaintiffs to litigate together and self-govern through social norms and deliberative democracy ideals, such as arguing, bargaining, and voting. These features embody fair process and place plaintiffs in a better position to overcome standard collective-action problems. This Article translates the theoretical foundation laid in *Litigating Groups* into concrete, feasible procedures for litigating together. Although *Litigating Groups* maintained that plaintiffs who form groups will likely develop other-regarding preferences toward fellow group members, it did not: fully formulate procedures for promoting cooperation and group formation; decide when, whether, or how to impose sanctions when norms and moral obligations fail;

⁶ See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 380 (2000).

⁷ Howard Erichson has long discussed the problems inherent in nonclass aggregation. See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 526.

⁸ See, e.g., Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 809 (1997) [hereinafter Issacharoff, *Class Action Conflicts*]; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 337 (1999).

⁹ See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 269 (2007).

¹⁰ See, e.g., MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 20 (2009).

¹¹ See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 833-34 (2002).

¹² I explore this potential harmony in this Article's Conclusion.

¹³ *Litigating Groups*, supra note 5, at 20; see also Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 101 (forthcoming February 2011), available at <http://ssrn.com/abstract=1552462> [hereinafter *Group Consensus, Individual Consent*].

contemplate incentives to join the group; or determine when exiting the group is appropriate. Accordingly, this Article takes up those hard questions as well as the challenge of determining whether and how substantive and procedural law should enforce moral obligations once a certain level of moral interconnectedness exists.

This Article contends that process should enable plaintiffs amassed through nonclass aggregation to reason together about “the right thing to do” and to design a governance arrangement that embodies the plaintiffs’ shared conception of fairness. This normative position rests on the following three premises. First, cooperation increases with sociality, particularly when a group member is acting toward fellow group members.¹⁴ Because plaintiffs are often geographically disaggregated, they are unlikely to socialize or exhibit the fundamental attributes of a cohesive, local community such as social bonds, group activities, and communal attachment. They thus lose the benefits they would receive by cooperating – fewer holdouts, fewer informational asymmetries, fewer transaction costs, greater bargaining and litigating power, and greater ability to monitor their attorneys. Accordingly, judges should facilitate opportunities for aggregated plaintiffs to socialize, communicate, and form groups.

Second, plaintiffs who communicate with one another tend to promise each other that they will work together to achieve their joint ends. This means two things: (1) once a certain level of moral interconnectedness and group cohesion is present, a combination of social norms and contractual schemes might reinforce those obligations, and (2) for that to happen, the system must allow plaintiffs to self-govern, and it must be willing to respect (and sometimes enforce) the plaintiffs’ decisions.

Third, because the right to sue in tort is held individually, if a procedurally aggregated plaintiff wants no part in the group’s collective efforts, then she should be allowed to remain a distinct, autonomous agent. The group might try to entice these outliers into its ranks through the allure of sharing costs, overcoming informational asymmetries, and leveraging economies of scale to achieve substantive ends. But if a plaintiff wants to remain an outlier, that is her right. Plus, allowing outliers to stay outsiders serves an important error-correction function: outliers, like bona-fide objectors in class-action settlements, can provide a dissenting voice questioning the settlement’s substantive fairness.

To achieve these diagnostic and prescriptive aims, this Article rests on a few assumptions. I take a pluralistic perspective of the tort system’s nature and purpose and contend that the government has legitimate interest in promoting

¹⁴ Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 140 (2000) (“Those who believe others will cooperate in social dilemmas as more likely to cooperate themselves.”); Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, in *NORMS AND THE LAW* 13, 22-23 (John N. Drobak, ed. 2006).

discourse among plaintiffs about “the right thing to do,” though I make few claims about what the right thing is. Further, the judicial system’s principal goal is to promote justice by enforcing substantive rights and responsibilities. By simultaneously advancing their own litigation objectives, plaintiffs and defendants further this end. Moreover, I assume a prototypical aggregate lawsuit where many plaintiffs bring tort claims against a corporate defendant and specific causation issues, different state laws, or other manageability concerns preclude class certification.

This Article unfolds across four Parts. Part I explains the impetus for change. It examines the institutional backdrop of nonclass aggregation and the moving parts that make it so complex. These include the litigation’s maturity and the interactions between key players – plaintiffs, attorneys, defendants, and judges. The latter divides into agency problems (between the attorney and her clients), group problems (between plaintiffs), and competition problems (between plaintiffs’ attorneys).

Part II summarizes the moral, political, and legal philosophy that animates this project’s prescription of litigating together. When plaintiffs share their stories and communicate with one another about their litigation objectives, they may begin to see themselves as part of a community of sorts. As such, they regularly commit to cooperate. These commitments range from tacit agreements, to reciprocal understandings, to explicit promises, to formal contractual arrangements. Because these commitments follow from voluntary actions, they thus preserve the liberal ethos of consent, albeit in a loose way. And once plaintiffs make reciprocal promises and assurances to cooperate with each other, they incur communal obligations. They are thus no longer morally free to leave the group when doing so would violate their obligations of solidarity or membership.

Part III develops this prescription by sketching a model for cooperatively litigating together and considering possible objections based on feasibility, group polarization, and the potential for a passionate few to exploit the group. Using a special officer, facilitating communication, and promoting deliberative decision-making minimizes the informational asymmetries and helps overcome the collective-action problems that make plaintiffs poor monitors. Implementing these measures would enable plaintiffs litigating together to co-specify their ends, avoid bounded rationality, sort themselves into more cohesive groups, find creative solutions, and govern themselves. Depending on the group, self-governance might take place through social norms and social sanctions or through a formal, collective decision-making arrangement. Part III also injects a dose of realism into this archetype. It recognizes that we live within a heterogeneous population with myriad motivations and that increased group size negatively correlates with cooperation. Accordingly, it maps the theoretical and legal justification for binding diverse collective interests and suggests how we might use carrots (incentives to outliers to join the group),

sticks (sanctions for opportunistic holdouts), and doors (exit as a signaling function) to reinforce that bond.

Finally, Part IV concludes by illustrating how the spillovers from cooperatively litigating together alleviate the problems expounded in Part I. More specifically, it reconceptualizes how the Vioxx litigation would have been resolved under this new framework.

I. NONCLASS AGGREGATION'S PREVALENCE AND PROBLEMS

Nonclass aggregation is a shorthand term for claims that the Judicial Panel on Multidistrict Litigation aggregates for coordinated pretrial handling that are not certified as class actions. As used here, the term principally refers to typical mass-tort claims, such as personal-injury, product-liability, and failure-to-warn claims. The upshot of the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*¹⁵ and *Ortiz v. Fibreboard Corp.*,¹⁶ and of Congress passing the Class Action Fairness Act (CAFA),¹⁷ is that few mass-tort cases will proceed as certified class actions.

Recent empirical evidence tells us this much: the number of personal-injury and product-liability cases consolidated through multi-district litigation has increased, while the number of motions for class certification has decreased.¹⁸ Without the closure that a class settlement once delivered, attorneys on both sides of the aisle are turning to private contracts to achieve finality. Specifically, they are experimenting with a new breed of settlement terms to prevent plaintiffs from opting-out: walk-away provisions that allow the defendant to exit the litigation if fewer than a specified percentage of the claimants sign-on, liens on the defendant's assets in favor of the settling plaintiffs, and most-favored-nation provisions that give settling plaintiffs the equivalent of any benefits that others might achieve by opting out.¹⁹

What this means for plaintiffs is that, despite having an individual contractual relationship with their chosen attorney, the attorney typically

¹⁵ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (finding that attempted settlement of current and future asbestos-related claims does not satisfy Rule 23's class certification requirements).

¹⁶ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (“[T]he applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question . . .”).

¹⁷ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

¹⁸ Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 776 (2010).

¹⁹ For an overview of how these provisions exert ethical pressure on plaintiffs' counsel, see Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 982-1006 (2010).

represents hundreds of other nominally related clients.²⁰ It also means that attenuated attorney-client relationships inhibit a client's ability to monitor her case as she would in an individual lawsuit. In a certified class action, the judge would act as a surrogate by monitoring class counsel and ensuring that the settlement terms are fair.²¹ But as nonclass aggregation, these cases lack Rule 23's judicial oversight. In short, nonclass aggregation falls into a procedural no-man's-land. It presents collective-action and agency problems similar to those in class actions, but lacks both individual client monitors and Rule 23's judicial quality-control measures.²² The resulting problems divide into two moving parts: (1) the litigation's stage and maturity level, and (2) the interrelationships between the key players.

A. *Aggregation Itself and the Litigation's Maturity*

The first moving part involves the decision to aggregate and the litigation's maturity. Claim initiation, initial aggregation, post-aggregation, and settlement each present unique concerns. For instance, initiating a lawsuit raises questions about whether to litigate individually or collectively, which claims to bring, which attorney to hire, and how best to communicate and attain plaintiffs' litigation goals. Attorneys filing similar claims across the country signal aggregation potential. The Judicial Panel on Multi-District Litigation then decides whether and where to transfer nominally related cases.²³ This

²⁰ Plaintiffs might retain attorneys because of the attorneys' advertised expertise; a group of plaintiffs might seek collective representation (an "aggregate lawsuit"); plaintiffs' law firms may work together informally on similar cases (a "private aggregation"); or court-mandated multi-district transfer and consolidation might bring plaintiffs and their attorneys together ("administrative aggregation"). PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 (proposed final draft April 1, 2009).

²¹ See FED. R. CIV. P. 23(e), (g), (h).

²² There are a few notable exceptions. Both Judge Weinstein in the Zyprexa litigation and Judge Fallon in the Vioxx litigation have likened nonclass aggregation to class-action litigation, calling it a "quasi-class action." They thus use equitable authority to monitor the litigation. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) ("While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court."); *In re Vioxx Prod. Liab. Litig.*, 574 F. Supp. 2d 606, 611-12 (E.D. La. 2008) (comparing the case to *Zyprexa* and concluding that "the Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority . . ."); see also L. Elizabeth Chamblee [Burch], *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 241 (2004) ("[M]ultidistrict process should also permit judicial approval of settlements . . . [to] ensure that similarly situated individuals receive equal fairness protections regardless of how the courts aggregated the litigation.").

²³ 28 U.S.C. § 1407 (2006).

prompts questions about whose interests aggregation serves (courts, plaintiffs, defendants, or attorneys), whether aggregating has become so automatic that decision-makers no longer carefully evaluate the ends served, and whether aggregating ultimately promotes the normative ends of achieving justice, however defined.²⁴

Post-aggregation concerns might include continuing doubt about aggregating initially; whether and how aggregating affects substantive law; whether plaintiffs share desires, intentions, plans, or policies; whether plaintiffs recognize and profit from those shared traits; and whether plaintiffs' normative stories mesh or aggregating undermines their litigation ends. Next, when the defendant proposes a settlement, it raises both substantive fairness questions and procedural allocation concerns, including: whether the settlement is fair and fair to whom; whether it satisfies plaintiffs' substantive goals; whether individual objections should be sacrificed for the collective good; and what role the plaintiffs and their attorneys should play in designing and implementing collective decision-making procedures.

These concerns raise broader questions about the legitimacy of adjudication procedures during each stage. Procedural-justice research indicates that litigants prefer: (1) an adversarial system before an impartial decision-maker with error-correcting mechanisms such as new trials and appeals; (2) either well-established court rules or the ability to participate in designing dispute-resolution procedures; and (3) an opportunity to take part and be heard in the adjudicatory or deliberation process.²⁵ Yet, judicial handling of mass litigation is often at odds with these preferences.²⁶ Litigation is increasingly inquisitorial despite an adversarial veneer.²⁷ Compensation grids and confidential settlements have replaced traditional error-correction mechanisms.²⁸ Participation and voice opportunities wane as the number of litigants increase and attorneys find it increasingly taxing to communicate with their clients. Finally, judicial impartiality may be compromised by self-interest, demands for systemic efficiency, and the lack of quality information.²⁹

²⁴ For instance, institutional designers should reevaluate the imperative in the *Manual for Complex Litigation*, which states: "Pretrial proceedings in [related] cases should be coordinated or consolidated under Federal Rule of Civil Procedure 42(a), even if the cases are filed in more than one division of the court." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.123 (2004).

²⁵ *Procedural Justice*, *supra* note 5, at 29-43.

²⁶ *Id.* at 45.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 46; Issacharoff, *Class Action Conflicts*, *supra* note 8, at 829 (discussing how courts are overworked, have limited access to quality information, and strive to quickly clear their dockets); Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899, 968 (1996).

These findings lead to three principal risks. First, plaintiffs may view the process as illegitimate.³⁰ That typically means that they will express their dissatisfaction and disenchantment in a public way, through blogs or media outlets, or collaterally attacking the settlement by filing competing claims in other jurisdictions (usually state courts). This offsets some of the initial efficiency gains achieved by aggregating. Second, increasingly creative procedures such as bellwether trials and statistical sampling may make process less predictable and may make substantive liability more difficult to avoid through modifying one's behavior.³¹ Finally, both of the first two risks combine to corrode public support for the judicial system, which means that the system itself risks its legitimacy.³²

B. *Interrelationships Between Key Players*

The second moving part – the interdependence between key players – further complicates these timing and maturity questions. Key players include plaintiffs, defendants, their attorneys, and judges. Their interactions raise three principal issues for plaintiffs: agency problems arising between attorneys and their clients, group problems between plaintiffs and other plaintiffs, and competition problems between plaintiffs' attorneys.

1. Agency Problems

Agency problems in the lawyer-client relationship include: conflicts between the attorney's self-interest and the clients' best interest; how to effectively and ethically represent multiple clients when one client's best interest conflicts with the majority's best interest; and how to fairly allocate settlement proceeds among clients. Viewed as an adequate-representation problem, unresolved conflicts between principals – the clients – may undermine the adequacy of the agent's representation and thereby violate due process as well as the professional-conduct rules. Moreover, although aggregating clients makes litigation economically viable and more efficient, it makes effective client monitoring nearly impossible.

Large-scale litigation augments the fiduciary aspect of the typical lawyer-client agency relationship by making the attorney the financier. She is both an agent and a creditor; the litigation is a joint venture.³³ This tangled

³⁰ Burch, *Procedural Justice*, *supra* note 5, at 46.

³¹ *Id.*

³² *Id.*

³³ See Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 302-03 (2003) (positing that Coffee's argument applies with equal force to mass-tort representations because "[t]he plaintiffs' attorneys provide crucial financing"); *Kutak Symposium: Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 331, 340-41 (2000) (transcribed comments by Professor John C. Coffee, Jr.) (observing the same phenomenon in the class-action context). Yet, getting rid of the

relationship can motivate her to cherry-pick stronger cases for trial or settle on the cheap if it means she can take her contingency fee quickly and move on to other cases. Thus, in performing these dual rules, the attorney's loyalty divides not only between clients, but also between clients and self-interest.

Additional conflicts can arise over trial strategies, litigation goals, and when and how to settle. Even when overarching goals mesh, the means for achieving them may differ. Consider, for example, the Bendectin litigation.³⁴ After giving birth to a son with missing fingers and a shortened arm, Betty Mekdeci initiated the Bendectin litigation by contacting the "King of Torts," Melvin Belli.³⁵ Her case went to trial despite proof problems and the jury's verdict essentially amounted to a loss: \$20,000 to her, but nothing for her son.³⁶ Although the judge granted her a new trial, her lawyers wanted to postpone it and proceed with stronger cases first.³⁷ Mekdeci refused. Her lawyers then tried to withdraw, provoking the Eleventh Circuit to dub it an "extraordinary tale" of abandonment.³⁸ Belli claimed, "Mekdeci was too difficult to work with, that her case was not that strong, and that he was turning his attention to two hundred similar cases."³⁹

Mekdeci's story starkly illustrates the disconnect that can arise between agents and principles in mass litigation and, ultimately, the desire to connect with and help others with similar experiences. After the litigation ended, Mekdeci and her husband founded Birth Defect Research for Children, Inc. to provide "parents and expectant parents with information about birth defects and support services," administer a "parent-matching program that links families who have children with similar birth defects," and offer technical assistance in collecting and analyzing data from communities with an increase in birth defects.⁴⁰ Mekdeci's case also begs the question of whether the

contingency fee and attorney financing is not a realistic solution.

³⁴ Mekdeci v. Merrell Nat'l Lab., 711 F.2d 1510 (11th Cir. 1983).

³⁵ *Id.* at 1516; *see also* JOSEPH SANDERS, *BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* 6-7 (1998).

³⁶ MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* 131 (1996); SANDERS, *supra* note 35, at 2-15 (chronicling the Mekdeci's case, including the jury verdict that failed to provide damages to their son); Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 234-36 (1997) ("Given the huge out-of-pocket costs incurred by Mekdeci's Florida lawyers to take the case to trial – approximately \$150,000 – this outcome was extremely disappointing.").

³⁷ Marcus, *supra* note 36, at 236.

³⁸ *Mekdeci*, 711 F.2d at 1516.

³⁹ *Id.*

⁴⁰ BIRTH DEFECT RESEARCH FOR CHILDREN, INC., <http://www.birthdefects.org/story/> (last visited Oct. 25, 2010).

attorney can legitimately elevate the group's interests over the individual's.⁴¹ This litigation provoked Richard Marcus to observe that "Mekdeci's case provides some reason for feeling that client desires may legitimately be conditioned on the 'greater good' of the overall plaintiff group."⁴²

2. Group Problems

As Mekdeci's case suggests, multiple plaintiffs create additional problems. Group problems include: (1) outliers, those who do not join the group or consider themselves group members; (2) holdouts, those who join the group but want to exit or withhold consent to a settlement offer (for a myriad of legitimate and illegitimate reasons); and (3) plaintiffs'-side subgroup competition.

As to outliers, not all plaintiffs consider themselves group members. Some remain outside the group while others are "individuals-within-the-collective," who either compete with other litigants or want to maximize their own outcome without regard to others.⁴³ Without the opportunity to meet, collaborate, or share relevant experiences, plaintiffs may never form a group. Their individual interests may align and overlap, but they may not recognize it. Thus, meeting one another and discussing their goals and experiences stimulate group formation. With that opportunity, they might reconsider their initial decision to litigate on their own or collaborate for instrumental reasons if doing so maximizes their outcome.⁴⁴

The second problem – holdouts – is troubling only if we assume that a settlement offer is objectively fair to all involved. When defendants decide to settle, they want finality. They thus want to sweep as many plaintiffs as possible under the settlement rug. Thus enters the "holdout." When settlement offers are conditioned on unanimous or nearly unanimous consent or include walk-away provisions that allow the defendant to withdraw its offer if less than the requisite number of plaintiffs agrees, holdouts can withhold their consent

⁴¹ See Erichson, *supra* note 7, at 558-60.

⁴² Marcus, *supra* note 36, at 252.

⁴³ See Burch, *Litigating Groups*, *supra* note 5, at 33-34; see also Kwok Leung, Kwok-Kit Tong & E. Allan Lind, *Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions*, 3 J. PERSONALITY & SOC. PSYCHOL. 476, 476-77 (2007) (suggesting that individuals who do not identify with their own group will be less concerned about fairness to others). Group-oriented individuals and individuals-within-the-collective are best conceived not as a dichotomy, but as points along a spectrum of group cohesion. For more information about this spectrum, see Burch, *Procedural Justice*, *supra* note 5, at 15-24.

⁴⁴ See Erick van Dijk & David De Cremer, *Tacit Coordination and Social Dilemmas: On the Importance of Self-Interest and Fairness*, in SOCIAL PSYCHOLOGY AND ECONOMICS 141, 146-47 (David De Cremer et al. eds., 2006).

and demand a disproportionately high payoff. Enough holdouts could derail the whole settlement.

Holdouts and outliers who disagree with or are unconscious of the principal group may form their own groups.⁴⁵ Thus enters the third potential group problem: subgroup competition. Subgroups may unite over ideology and may compete with the principal plaintiff group or other subgroups for resources, dominance, and membership. Larger-sized groups tend to be less cooperative than smaller and mid-sized groups, which suggests that sizeable aggregations will encounter increased division.⁴⁶ Subgroup formation and competition are further complicated by blurred boundaries where some members are more prototypical than others and members belong to multiple groups.⁴⁷

3. Competition Problems

In a capitalistic society, we tend to think positively of competition, particularly competition between entrepreneurial plaintiffs' law firms. Generally speaking, competing attorneys reduce legal costs, increase access to the system, produce better quality legal arguments, spur innovation and creativity, and thereby further the ends of justice. Moreover, competition can undercut the possibility and appearance of collusion between plaintiffs' and defense counsel. The wrestling match over the lead-plaintiff position in securities class actions is a notable and visible example. Yet, there is a fine line between zealously advocating for one's clients and acting strategically to ensure a higher attorney's fee.

The continuum thus has two extremes. At one end, competition produces (for better or worse) overlapping actions, opt-outs, and collateral attacks pursued not for the client's best interest, but for a higher fee. At the other anti-competitive end, tacit agreements and negotiated fee-sharing arrangements that further plaintiffs' counsels' collective self-interest raise the question of collusion.⁴⁸ This arrangement between repeat players suggests that even separate representation for competing subgroups or subclasses may conveniently mask a fee-pooling arrangement if attorneys split fees contractually.⁴⁹ In a pre-negotiated fee-sharing arrangement, counsels'

⁴⁵ See *infra* Part III.B. for a discussion on how subgroup competition can benefit the overall group through diverse ideas subject to certain conditions.

⁴⁶ T.K. Ahn, R. Mark Isaac & Timothy C. Salmon, *Endogenous Group Formation*, 10 J. PUB. ECON. THEORY 171, 190-91 (2008).

⁴⁷ Burch, *Litigating Groups*, *supra* note 5, at 35-36.

⁴⁸ See Coffee, *supra* note 6, at 397-98 (suggesting that it is not "realistic to expect . . . separate law firms to bargain on behalf of their separate subclasses over the settlements' allocation when their own fees are pooled").

⁴⁹ See *id.* at 398 (expressing concerns that "plaintiffs' attorneys for different subclasses could by pooling their fees effectively cancel the incentives that the law means to create for them to zealously represent their clients"). Not all courts enforce this kind of agreement.

economic interests are tethered not to their clients but to one another. The pressure is toward consensus, not vigorous representation.⁵⁰

Table 1: Summary of the Moving Parts and Problems in Nonclass Aggregation

	Claim Initiation	Initial Aggregation	Post-Aggregation	Settlement Offer
Basic Questions	Whether to litigate individually or collectively? Is there a preexisting group? What are plaintiffs' litigation goals?	Whose interests does aggregation serve? Has the impulse to aggregate become so automatic that there is no longer careful evaluation of the ends achieved?	How might cooperation among plaintiffs further their goals? Are there reasons that litigants might desire to remain outside of the group?	To whom is it fair? Does it satisfy plaintiffs' goals? Is the proposed allocation fair? How should a group decide these questions?
Do group problems exist?	Perhaps, if the group predates the litigation.	Perhaps, if the group predates the litigation.	Group formation and cohesion begins here if the group did not predate litigation.	Yes, holdouts, outliers, and subgroups all exist here.
Do agency problems exist?	Depends on the number of similarly situated clients and the timing of retention. If aggregation is done through attorneys, then problems of deciding which claims to pursue can exist.	Yes, aggregating helps plaintiffs' attorneys recoup start-up costs.	Yes.	Yes, particularly prevalent in offers requiring unanimous or nearly unanimous consent.
Do competition problems exist?	Less likely. Competition between plaintiffs' attorneys may be beneficial here.	Less likely. Competition in general is probably still beneficial here.	Yes.	Yes.

See e.g., In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 222 (2d Cir. 1987) (holding that a consensual fee sharing arrangement between attorneys "places class counsel in a potentially conflicting position in relation to the interests of the class").

⁵⁰ *See Coffee, supra* note 6, at 398.

This Article focuses on the highlighted areas in the table above – problems with the group dynamic arising between plaintiffs during the post-aggregation and settlement stages. The idea is that litigating together, where plaintiffs cooperate and coordinate with one another, will generate positive externalities that also address the agency and competition problems that crop up throughout the litigation. But litigating together is not as simple as it sounds. Consider, for example, other coordination problems such as resource depletion and pollution: in the winter, we are asked to lower our thermostats to conserve fuel; as individuals, we suffer more from the cold without amassing our own fuel supply. But if we all kept our thermostats high, we could run out of fuel and freeze. Similarly, during summer ozone alerts, we are encouraged to car pool, ride bicycles, or walk. Yet, we are individually worse off for bicycling or walking in exhaust fumes and may find carpooling inconvenient.⁵¹ Social dilemmas like these have two defining properties: (1) the payoff to each individual for defecting rather than cooperating is greater, despite what other people might do, but (2) everyone is better off if each cooperates than if all act selfishly.⁵²

Plaintiffs in mass litigation face similar coordination problems. For example, when they discover that the defendant cannot afford to (or simply will not) fully compensate each of them and has conditioned a settlement offer on widespread acceptance, the payoff to the individual claimant for withholding consent and demanding a premium is greater. And, assuming the settlement is a fair one negotiated at arm's length, all plaintiffs are better off if each cooperates than if one holds out. In short, the more litigants pursue their private interest at the expense of the group's collective interest, the more the group falls short of achieving its collective goals.

To date, institutional players have tinkered with this payoff structure through carrots and sticks, which sounds attractive and simplistic until we realize what is actually taking place. Consider again the Vioxx settlement. Remember that each participating lawyer had to recommend the deal to 100% of her eligible clients and withdraw from representing anyone who refused.⁵³

⁵¹ These examples are based on similar examples by Robyn M. Dawes. See Robyn M. Dawes, *Social Dilemmas*, 31 ANN. REV. PSYCHOL. 169, 170 (1980).

⁵² *Id.*; van Dijk & De Cremer, *supra* note 44, at 141 (observing that social dilemmas result in “mixed-motive situations” in which individuals are better off if they pursue their own interests, while the entire group is better off if individuals pursue group interests); see also Michael Smithson & Margaret Foddy, *Theories and Strategies for the Study of Social Dilemmas*, in RESOLVING SOCIAL DILEMMAS 1-2 (Margaret Foddy et al. eds., 1999) (“[T]he reward or payoff to each individual for a selfish choice is higher than that for a cooperative one, regardless of what other people do; yet all individuals in the group receive a lower payoff if all defect than if all cooperate.”).

⁵³ Vioxx Settlement Agreement, *supra* note 1, § 1.2.8.1-2.

The settlement required at least 85% of claimants to consent or risk crippling the entire deal such that no one would get anything, including the plaintiffs' attorneys. Without this kind of coercion, it might seem like the only alternative is to deplete the common fund by paying off the would-be holdouts at the group's expense. But as the remainder of this Article explains, this is not the case; most people are moral and want to do what's right when they know about the others involved – they do not always act as “homo economicus,” purely economically motivated, self-interested individuals.⁵⁴

II. COMMUNAL ENCUMBRANCES OF LITIGATING TOGETHER

The problems in nonclass aggregation raise fundamental philosophical, psychological, political, and behavioral questions about whether we are destined to compete with one another for common goods or whether collaboration, community, cooperation, and other-regarding preferences might motivate us to work together. Thinking about these larger issues entails careful parsing of three central questions: (1) why do people litigate in the first place, (2) why should they want to litigate *together*, and (3) what obligations do they owe one another when they do so?

Plaintiffs litigate for various, potentially incompatible reasons. For instance, plaintiffs who want money might agree to a confidential settlement that would thwart the goals of those hoping to educate the public or reveal cover-ups. When asked, plaintiffs with tort claims such as medical injuries insist that they litigate on principle, not for the money.⁵⁵ As Tamara Relis describes the results of her study, “[p]laintiffs’ articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance, 18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.”⁵⁶ Plaintiffs’ extra-legal objectives included wanting the defendant to admit fault and responsibility, ensuring that the event would never happen again, revealing cover-ups, needing answers, wanting to punish or gain retribution, seeking an apology, desiring dignity and respect post-injury, and wanting to be heard.⁵⁷ Similarly, studying the victims of the

⁵⁴ See Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817, 818 (1999) (“Reality provides many examples indicating that people are more cooperative than is assumed in the standard self-interest model.”); Mizuho Shinada & Toshio Yamagishi, *Bringing Back Leviathan into Social Dilemmas*, in *NEW ISSUES AND PARADIGMS IN RESEARCH ON SOCIAL DILEMMAS* 93, 94 (Anders Biel et al. eds., 2008).

⁵⁵ Tamara Relis, “*It’s Not About the Money!*”: *A Theory of Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701, 721 (2007).

⁵⁶ *Id.* at 723 (emphasis omitted).

⁵⁷ *Id.* at 723 fig.4. Other studies confirm these results. See, e.g., Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151,

September 11 tragedy, Gillian Hadfield found that litigants wanted information about the facts and circumstances, to hold those responsible accountable, to have a public condemnation of wrongdoing, and to do something that would promote change.⁵⁸ In short, litigation to them meant “principled participation in a process that is constitutive of a community.”⁵⁹

This answers the question about why people litigate, but not why they do or should litigate together. Part I explained that some plaintiffs choose to litigate together by seeking collective representation while others are foisted on one another through administrative clustering. But once plaintiffs are procedurally aggregated, whether by choice or not, why should they then cooperate? The simple answer is that cooperation saves costs and increases plaintiffs’ bargaining power. But once plaintiffs are joined, they may not act in unison; groups are fragile, particularly when collective action is required. Consider, for instance, the parable of the deer and the rabbit, as Rousseau describes it:

When it came to tracking down a deer, everyone realized that he should remain dependable at his post; but if a hare happened to pass within reach of one of them, he undoubtedly would not have hesitated to run off after it and, after catching his prey, he would have troubled himself little about causing his companions to lose theirs.⁶⁰

Here, all hunters would prefer to eat venison, but they have to work cooperatively to kill a deer. Along the way, one might be tempted to defect and chase a rabbit, which would undermine the group’s collective efforts. Like

191 (Leon Lipson & Stanton Wheeler eds., 1986) (“Litigants vary in the extent to which they seek justice or moral vindication instead of, or in addition to, a satisfactory resolution of their immediate discomforts.”); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 30-31 (1983); Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992) (finding that litigation motives included desire for money, to reveal cover-ups, and to protect others); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 983-86 (1990) (finding that litigants’ satisfaction with the outcomes of their claims was largely determined by the litigants’ perceptions of procedural fairness and expectations); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1125 (2002).

⁵⁸ Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC’Y REV. 645, 649, 660-62 (2008).

⁵⁹ *Id.* at 649.

⁶⁰ JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY 57-58 (Franklin Philip trans., Patrick Coleman ed. 1994) (1754). For a modern-day take on the stag hunt, see BRIAN SKYRMS, THE STAG HUNT AND THE EVOLUTION OF SOCIAL STRUCTURE 1-13 (2004) (“[T]he stag hunt does not solve the problem of cooperation. It allows cooperation in equilibrium, but there is also the noncooperative equilibrium.”).

this stag hunt, plaintiffs litigating together might achieve a better result through their increased bargaining power.

When people litigate together, they intend to engage in joint activity with one another, the act of litigating.⁶¹ With that intention comes a host of roles and social norms that coordinate, structure, and guide the litigants' activity.⁶² People litigating simultaneously (but not together) lack the roles and social cues that might otherwise coordinate and direct their joint activity.⁶³ When the defendant proposes a settlement, a cacophony of goals then emerges and plaintiffs are more likely to object, dissent, or hold out.⁶⁴ Plaintiffs might want to pursue their own ends. Even seemingly compatible ends – to punish the defendant, for instance – might result in disunity. Punishing a corporate defendant financially might mean requesting punitive damages (a court-based remedy) or boycotting its products (social and market-based sanctions). Or punishing a defendant might mean forcing the defendant to admit fault or to change its corporate or regulatory practices. But without further specifying the end of punishment, deciding what to do and how to go about it will be too indefinite to be of much use.

Take, for instance, a non-legal analogy. In the 1970s and 1980s, the French government developed an idea for futuristic transportation, “Aramis.”⁶⁵ But Aramis was many things to many people; its economic and technical feasibility depended on what it was.⁶⁶ At times, it was to be an airport shuttle, a monorail, an urban network, a subway, a low-tech people mover, personalized point-to-point transportation, or a commuter train.⁶⁷ Without knowing what Aramis was, the instrumentalist means-end reasoning (is it economically and technically feasible?) failed.⁶⁸ And ultimately Aramis failed.⁶⁹ In many ways, mass-tort litigation – with many unique plaintiffs articulating independent ends about its purpose – is like Aramis.

Addressing and discussing litigants' ends early in the litigation, deciding what to do and how to go about it, can remove conflict. By specifying their

⁶¹ See Michael E. Bratman, *Modest Sociality and the Distinctiveness of Intention*, 144 PHIL. STUD. 149, 152 (2009).

⁶² See *id.* at 154.

⁶³ See *id.* at 153-54.

⁶⁴ For an excellent treatment of this issue in the class action context, see Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1188-89 (1982).

⁶⁵ See BRUNO LATOUR, ARAMIS, OR THE LOVE OF TECHNOLOGY ix-x (Catherine Porter trans., Harvard Univ. Press 1996); Elijah Millgram, *Specificationism*, in REASONING: STUDIES OF HUMAN INFERENCE AND ITS FOUNDATIONS 731, 731 (Jonathan E. Adler & Lance J. Rips eds., 2008).

⁶⁶ Millgram, *supra* note 65, at 743.

⁶⁷ *Id.* at 731-35.

⁶⁸ *Id.* at 735.

⁶⁹ *Id.* at 734.

ends together through practical reasoning, litigants may make those ends jointly achievable, introduce commensurability, and ease friction.⁷⁰ Alternatively, discussing goals could introduce conflict. Encouraging plaintiffs to think about, articulate, and specify ends may aggravate matters that might otherwise be non-issues. But even exhuming conflict has its benefits. It may lead, for instance, to alternative representation or sharpened legal arguments.

What then makes plaintiffs a group such that they incur moral responsibilities to one another? To be sure, plaintiffs do not form a group simply by filing nominally related claims against the same defendant. Rather, it is litigants' voluntary commitments and intentions concerning a shared endeavor that form the basis for group membership. In general, people form a relational community around a common history or interest and the group's members have a unified purpose, are connected and committed to one another, and rely on common norms to guide their behavior.⁷¹ *Litigating Groups* captured the spectrum of group cohesion by using the flexible, umbrella term "plural subject."⁷² Simply put, a plural subject is an instance where multiple individuals – several "I's" – become a single, plural subject – a "we."⁷³ As an umbrella term, what makes plaintiffs a plural subject can vary greatly: litigants might knowingly share similar desires, interests, intentions, goals, or commitments concerning the litigation; they might collectively participate in a litigation-related activity; or they might design a group policy concerning the litigation.⁷⁴

To capture when and how plural subjects incur associative, moral obligations to the group I posited two cases, the first of which was too vague in important ways.⁷⁵ It provided that when multiple litigants each intend to do something litigation-related, they are obligated to conduct that activity together.⁷⁶ The problem here is that plaintiffs litigating against the same defendant may have only that abstract intention in common; they may not

⁷⁰ *See id.* at 735.

⁷¹ *See* R. Scott Tindale et al., *Shared Cognition in Small Groups*, in BLACKWELL HANDBOOK ON SOCIAL PSYCHOLOGY: GROUP PROCESSES 5 (Michael A. Hogg & R. Scott Tindale eds., 2001); *Community*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/community> (last visited Nov. 14, 2010).

⁷² *Litigating Groups*, *supra* note 5, at 23-26. I borrow this term from Margaret Gilbert, but do not use it in exactly the same way that she does. MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 2-3 (2000) ("People form a plural subject, in my sense, when they are jointly committed to doing something as a body, in a broad sense of 'do.'").

⁷³ *Litigating Groups*, *supra* note 5, at 23-26.

⁷⁴ *Id.* at 24.

⁷⁵ *Id.* at 43-47.

⁷⁶ *Id.* at 43-45.

intend to litigate *together* at all.⁷⁷ Accounting for this shortcoming, the second case posited that once litigants voluntarily intend to do something litigation related and commit to doing that activity together through promises or assurances, they are obligated to fulfill that commitment so long as there are no exit conditions to the contrary.⁷⁸

Commitments may take many forms – tacit agreements, a series of reciprocal exchanges, explicit or implicit promises or assurances, or legal contracts. By jointly and voluntarily intending to do something litigation related (“X”) together, litigants will function in ways that promote and further that intention.⁷⁹ Of course, intending to “X” together might be just one litigation component, such as conducting discovery together, and may not extend to other litigation-related activities.⁸⁰ Yet, sharing intentions on some points frequently leads litigants to conform to a norm of compatibility and collaborate on other, related activities. There is thus some resistance to reconsideration and change.

Although I have described why people litigate, why they might want to litigate together, and what makes plaintiffs group members who might incur obligations to one another, I have said little about the content or origin of those obligations. It is beyond this Article’s scope to argue in detail about the origin or existence of communal obligations. Instead, I offer two sources for these obligations – one moral, one legal – and note that the obligations’ actual content largely depends on the group itself.⁸¹ First, I introduce some threads of political theory, particularly the communitarian critique of liberalism, which explain moral obligations in nonclass aggregation in a way that mere welfare maximization or individual autonomy cannot.⁸² Even though the term “communitarian” is convenient shorthand for some of the ideas I find important, it risks opening the door to a host of implications that have little to do with the relatively narrow points that I make here. Nevertheless, I find the term useful enough to depend on with that caveat in place. Second, I use class-

⁷⁷ *Id.* at 43.

⁷⁸ *Id.* at 45-47.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ For further reading and debate on the nature, existence, and scope of these obligations, see WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3rd ed., Univ. of Notre Dame Press 2007) (1981) (describing the moral culture of modernity through the concept of virtues); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

⁸² For a more detailed account of moral and political theory, see Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KANSAS L. REV. 889, 904-15 (2010).

action analogies to set forth a legal justification for binding nonclass plaintiffs when group cohesion truly exists.

In terms of moral and political philosophy, plaintiffs' voluntary commitments and decisions to associate with one another loosely preserve the fundamental tenets of self-determination and consent in liberal theory.⁸³ One might claim that this attribute makes these groups purely contractarian, but an exclusively liberal view ignores the complex psychological and social dynamics of groups as well as the transformative nature of social relationships. As a liberal account might explain it, if five plaintiffs promise to cooperate but each has very different ideas about what that means, then that disunity undermines either their initial consent or their subsequent obligation to fulfill that promise. But if, by associating and being in community with one another, plaintiffs incur additional obligations of solidarity or membership, then there is a thicker obligation that cannot be discounted so easily.⁸⁴

It is here that communitarianism plays a limited role. Once plaintiffs voluntarily associate with one another and commit to cooperate, the power of self-determination rests with the collective in a way that carries out members' communal interests and values, their obligations of solidarity. As Alasdair MacIntyre contends, we can answer the question, "What am I to do?" only if we can "answer the prior question 'Of what story or stories do I find myself a part?'"⁸⁵ In this way, communitarians challenge the liberal idea that we freely choose all of our obligations; instead, we incur certain communal encumbrances through our membership in particular communities.⁸⁶ Specifically, plaintiffs' individual circumstances are part of a larger, collective narrative: they do not choose to be injured, but when the same drug or product injures them and many others in similar ways, it changes the course of their lives, changes their life stories, and ties them together in ways that no one would ever choose. Yet, these shared experiences bring them together through litigation. As Michael Sandel explains, "obligations of solidarity or membership may claim us for reasons unrelated to a choice – reasons bound up with the narratives by which we interpret our lives and the communities we inhabit."⁸⁷

⁸³ See JOHN RAWLS, A THEORY OF JUSTICE 108-17 (1971) (explaining that obligations can arise through natural duties and voluntary acts, such as promises and agreements).

⁸⁴ MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 225 (2009) ("[O]bligations of solidarity, or membership . . . involve moral responsibilities we owe, not to rational beings as such, but to those with whom we share a certain history.").

⁸⁵ MACINTYRE, *supra* note 81, at 216.

⁸⁶ See *id.*; SANDEL, *supra* note 84, at 223-25 (describing the deficiencies of the liberal theory in accounting for obligations of solidarity); WALZER, *supra* note 81, at 62.

⁸⁷ SANDEL, *supra* note 84, at 241; see also RONALD DWORIN, LAW'S EMPIRE 195-202 (1986) ("[I]t is a history of events and acts that *attract* obligations, and we are rarely even aware that we are entering upon any special status as the story unfolds.").

The drawback from a liberal perspective is that litigants are not free to exit the group if doing so would violate their obligations of solidarity and loyalty. Conversely, the disjunction with communitarianism is that these obligations of solidarity arise only after plaintiffs have defined the membership by associating voluntarily. Thus, associative obligations can be captured, at least initially, through an ethic of consent.⁸⁸ Admittedly, as the latter half of this Article explores, these moral obligations do not translate easily into legal obligations.

Drawing class-action analogies does, however, bring us closer to a legal source for justifying the existence of communal obligations. As Steve Yeazell explains, the modern-day class action evolved from medieval guilds where all community members shared in the obligations, duties, and benefits of villeinage membership.⁸⁹ Group responsibility was a matter of fact, a custom without further explanation.⁹⁰ Yet, modern-day theorists, situated in a system founded on individual rights, feel compelled to explain it. David Rosenberg, for example, argues that litigants behind a Rawlsian veil of ignorance would agree *ex ante* to tie their fates together and preserve their collective welfare rather than incentivizing individuals to maximize their own tort gains at others' expense.⁹¹ Still, tort claims and the decision to sue at all are individually held rights. As Richard Nagareda reminds us, litigants "have a preexisting right to maximize their own individual gains" and these gains are independent.⁹²

To justify collective (sometimes mandatory) treatment of present-day class members, modern courts presume group cohesion. It is the same idea from medieval times that used to go without saying. But class-action attorneys – ranging from those bringing employment-discrimination claims to civil-rights actions to securities-fraud allegations – explicitly invoke a presumption of cohesion to justify using aggregate proof and to bind those within the class.⁹³ In the securities-fraud context, for instance, some courts permit a cohesive group of unrelated investors to serve as lead plaintiff if it best serves the class's

⁸⁸ SANDEL, *supra* note 84, at 241 ("We've been trying to figure out whether all our duties and obligations can be traced to an act of will or choice. I've argued that they cannot; obligations of solidarity or membership may claim us for reasons unrelated to a choice – reasons bound up with the narratives by which we interpret our lives and the communities we inhabit.").

⁸⁹ STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 42-52 (1987).

⁹⁰ *Id.* at 270-71.

⁹¹ Rosenberg, *supra* note 11, at 832.

⁹² NAGAREDA, *supra* note 9, at 119.

⁹³ See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 103-04 (2009) ("The implication invited by class counsel is that only by taking an aggregate, class-wide perspective does the wrong allegedly committed by the defendant come into focus.").

interest.⁹⁴ To evaluate cohesiveness, these courts examine factors such as: “(1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for cooperation; (4) the sophistication of its members; and (5) whether the members chose outside counsel, and not vice versa.”⁹⁵ Following these factors, courts have declined to appoint ad hoc groups that “coalesce” as the result of an eleventh-hour, lawyer-driven arrangement in favor of those who demonstrate an actual ability and desire to work together.⁹⁶

Presumed cohesion likewise explains Rule 23(b)(2) mandatory class actions. In these classes, judges determine whether the defendant has “acted or refused to act on grounds that apply generally to the class” such that the relief is appropriate for “the class as a whole.”⁹⁷ This language has led several courts and commentators to assume that if this is true, then actual group cohesion exists.⁹⁸ For example, the Fifth Circuit concluded that because of “the group nature of the harm alleged and the broad character of the relief sought,” the Rule 23(b)(2) “class is, by its very nature, assumed to be a homogenous and

⁹⁴ See, e.g., *In re McDermott Int’l, Inc. Sec. Litig.*, No. 08 Civ. 9943(DC), 2009 WL 579502, at *2-5 (S.D.N.Y. Mar. 6, 2009) (appointing family members as lead plaintiffs and not requiring them to proffer an evidentiary showing because they were presumably cohesive); *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008); *Freudenberg v. E*Trade Fin. Corp.*, Nos. 07 Civ. 8538, 07 Civ. 8808, 07 Civ. 9651, 07 Civ. 10400, 07 Civ. 10540, 2008 WL 2876373, at *4 (S.D.N.Y. July 16, 2008); *Reimer v. Ambac Fin. Group, Inc.*, No. 08 Civ. 411, 2008 WL 2073931, at *3 (S.D.N.Y. May 9, 2008); *In re Nature’s Sunshine Prods., Inc.*, No. 2:06-CV-267 TS, 2006 WL 2380965, at *1 (D. Utah Aug. 16, 2006) (appointing a group as lead plaintiff based on affidavits demonstrating their cooperative efforts); *In re Star Gas Sec. Litig.*, No. 3:04CV1766, 2005 WL 818617, at *4-5 (D. Conn. Apr. 8, 2005); *Constance Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 323 (S.D.N.Y. 2004).

⁹⁵ *Varghese*, 589 F. Supp. 2d at 392.

⁹⁶ See *McDermott Int’l*, 2009 WL 579502, at *2-5; *Varghese*, 589 F. Supp. 2d at 394. In *Varghese*, the court notes that the PLSLRA demonstrates a concern for lawyer-driven coalitions. *Id.* at 392.

⁹⁷ FED. R. CIV. P. 23(b)(2).

⁹⁸ See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (“In contrast, because of the group nature of harm alleged and the broad character of relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.”); *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1155 n.8, 1156-57 (11th Cir. 1983) (“At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness.” (citation omitted)); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 993-94 (5th Cir. 1981); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 437-38 (5th Cir. 1979); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 256 (3d Cir. 1975); see also FED. R. CIV. P. 23 advisory committee note, reprinted in 39 F.R.D. 69, 106 (1966) (“In the degree that there is cohesiveness or unity in the class and the representation is effective the need for notice to the class will tend toward a minimum.”).

cohesive group with few conflicting interests among its members.”⁹⁹ Likewise, the Third Circuit observes, “[t]he very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class.”¹⁰⁰

Naturally, this cohesion is often a convenient fiction. One need not delve too deeply to find fundamental disagreement over everything from the desired relief to the initial decision to sue.¹⁰¹ For instance, in *Walters v. Barry*,¹⁰² a case involving a Rule 23(b)(2) class, residents sued the District of Columbia and alleged that implementing a nighttime juvenile curfew violated their First, Fourth, and Fifth Amendment rights.¹⁰³ The court certified the class despite members’ vastly divergent opinions about whether keeping the curfew was a good idea.¹⁰⁴

Presuming that actual group cohesion exists in the Rule 23(b)(2) context prevents the instabilities, opt-outs, and holdouts that make the collective good tough to achieve in Rule 23(b)(3)’s opt-out class actions.¹⁰⁵ The important point for our purposes, however, is that if group cohesion in nonclass aggregation is real, regardless of whether it predates or postdates the decision to sue, then there is ample legal justification for limiting plaintiffs’ freedom to pursue their claims individually.¹⁰⁶ That is, when litigants form cohesive groups with communal bonds – when they litigate together, in other words – then it makes sense both morally and legally to allow them to collectively bind their litigation fates.

III. A COOPERATIVE LITIGATION MODEL

Discussing why people litigate, why they might find litigating together beneficial, and how they incur associative obligations encourages a shift in normative thought from a pure welfare-maximizing or individual-justice

⁹⁹ *Allison*, 151 F.3d at 413. The Eleventh Circuit similarly relied on a presumption of cohesion for 23(b)(2) groups. *Holmes*, 706 F.2d at 1155-56.

¹⁰⁰ *Wetzel*, 508 F.2d at 256.

¹⁰¹ See *Rhode*, *supra* note 64, at 1215-16.

¹⁰² 711 F. Supp. 1125 (D.D.C. 1989).

¹⁰³ *Id.* at 1130-32.

¹⁰⁴ *Id.* at 1131 (“[D]ifferences of opinion are unavoidable [but] diversity of opinion within a class does not defeat class certification.”).

¹⁰⁵ I thank David Marcus for this point.

¹⁰⁶ See, e.g., *Holmes v. Cont’l Can Co.*, 706 F.2d 1144, 1156 n.9 (11th Cir. 1983) (“There will be situations where the class is cohesive, or where the legal relationship of the members enable one or more to stand in judgment for all, and where the representatives are truly representative and faithful – a most important factor.” (citation omitted)); *Burch*, *supra* note 82, at 903 (reasoning that, because the ‘presumed cohesion’ of class action judgments binds absent litigants, cohesion in nonclass aggregate claims warrants limiting plaintiffs’ ability to pursue their own claims).

perspective to one that values intra-group relationships, commitments, and joint ends. Rather than adopting the familiar means-end, instrumental view of aggregating – that aggregating is a means to attain one’s private goals or ends – one might claim that aggregating allows plaintiffs to reason together about the right thing to do and pursue their communal values and goals together. As such, aggregating serves as a vehicle for litigants to specify and flesh out their abstract ends, to harness the moral force of commitments, to further communal interests, and ultimately to promote justice.

This process, not incidentally, has other positive spillovers that mitigate agency and group problems. For instance, a plaintiff group that has deliberated, specified, and settled on a particular end is in a better position to make key decisions about the litigation’s progress, to enumerate the best path for achieving that end, and to monitor the attorneys. But plaintiffs, like all actors engaged in a collective endeavor, face coordination problems. Thus, the following sections develop methods for overcoming those problems. By beginning with the basics – simple procedural tools such as using special officers and promoting communication between plaintiffs – the first section lays the groundwork. The second and third sections then use this groundwork to deconstruct and resolve problems with sorting nominally related plaintiffs into more cohesive groups, devise models for intra-plaintiff governance, and propose methods for reducing those governance schemes into contractual arrangements or social norms. The final section addresses potential obstacles and contemplates the use of incentives for outliers, sanctions for holdouts, and exit as a signaling function and safety valve when the social glue keeping plaintiffs together loses its stickiness.

A. *Rules and Tools*

Given the opportunity to communicate, socialize, and form bonds with each other, plaintiffs will tend to act in the group’s best interest even absent heavy doses of external coercion. Several variables promote sociality, including: (1) allowing people to speak with one another; (2) promoting group identity; (3) explaining the benefits of cooperation (i.e., the group loss that would result from a self-interested strategy); (4) relying on instructions from a democratic-style leader; and (5) determining whether plaintiffs believe that other plaintiffs will cooperate.¹⁰⁷ This section explores how judges can integrate these variables into mass litigation to promote cooperation. It explains two basic ideas in more detail. First, judges should appoint a special officer on the plaintiffs’ side only to help sort a splintered superordinate group (comprised of all plaintiffs) into more cohesive subgroups, mediate between feuding subgroups when appropriate, and guide plaintiffs in implementing deliberative

¹⁰⁷ Ostrom, *supra* note 14, at 140; Stout, *supra* note 14, at 22-23.

democracy ideals – bargaining, arguing, and voting. Second, special officers should facilitate communication and deliberation among plaintiffs.

1. Special Officer

Special officers are similar to, but distinct from, special masters.¹⁰⁸ By “special officer,” I rely on the American Law Institute’s definition, which describes a person “whose function is to review issues from the perspective of the class,” but import it into nonclass aggregation.¹⁰⁹ The same authority that permits judges to appoint special masters – Federal Rule of Civil Procedure Rule 53, Federal Rule of Evidence 706, and judges’ inherent equitable authority – also allows judges to hire special officers.¹¹⁰ For example, under Rule 53, a special master may handle pretrial matters that a district or magistrate judge cannot timely or efficiently address; most pretrial matters in mass litigation easily fit this bill.¹¹¹

Ideally, judges should appoint a special officer soon after aggregating to perform five key functions:

¹⁰⁸ A “special master” is someone who serves “as a neutral advisor to the court regarding the fairness of settlement and the adequacy of representation.” PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, § 3.09(a)(2). Judge Weinstein often calls special masters “settlement masters” to convey their role in settling the dispute. *See, e.g., In re N.Y. Cnty. DES Litig.*, 142 F.R.D. 58, 60 (E.D.N.Y. 1992) (“The powers of Settlement Master and Referee are for relevant purposes equivalent.”); *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735, 738-39 (E. & S. D.N.Y. 1990) (describing the obligation of settlement masters to have frank and confidential discussions with all plaintiffs).

¹⁰⁹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, § 3.09(a)(1), (2).

¹¹⁰ As for judges’ inherent equitable authority, see, for example, *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (“Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . [including] authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties . . .” (citation omitted)); *In re DES Cases*, 789 F. Supp. 552, 559 (E.D.N.Y. 1992); *In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. At 737; *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1450 (E.D.N.Y. 1985); *see also* JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 145 (1995) (asserting that courts define the functions of special masters expansively according to courts’ traditional equitable authority); *MANUAL FOR COMPLEX LITIGATION (FOURTH)*, *supra* note 24, § 21.632 (discussing the power of judges to appoint special masters in order to review the settlement’s terms and ensure fairness); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 302 (1991) (discussing the expansion of the role of special master based on a liberal reading of Rule 53 and courts’ equitable tradition). Using special masters is a long historical tradition that arose in the English Chancery. Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1321-22 (1975) (“The special master . . . grew out of early English chancery practice: it was not derived from the later system of masters at law who render pretrial assistance in civil matters.”).

¹¹¹ FED. R. CIV. P. 53(a)(1)(C).

- (1) help claimants specify, clarify, and prioritize their ends and values;
- (2) determine which ends, claims, and injuries are commensurate;
- (3) use that information to gauge whether to subgroup or disaggregate some plaintiffs to ensure adequate representation;
- (4) encourage problem-solving and collective decision-making about litigation strategy (perhaps through designing a collective governance agreement); and
- (5) eventually review settlement offers to provide an independent opinion about whether its terms and any subsequent allocation plan are substantively fair and reasonable.¹¹²

Because plaintiffs frequently lack knowledge about their behavior's externalities, their claims' strengths and weaknesses, and legal barriers to settlement, receiving feedback from the special officer and talking with one another helps plaintiffs act with increased rationality, develop alternatives, plan strategies, and monitor the litigation.

Using a special officer in this way is not entirely foreign. For example, in the Holocaust Victims' Assets Litigation, Judge Korman appointed a special master to propose an allocation plan.¹¹³ As Lead Settlement Counsel Burt Neuborne explained it, that decision:

was motivated by a desire to spare Holocaust survivors from being forced into an adversarial relationship that would have required them to squabble over a settlement fund. . . . It was hoped that a neutral Special Master, acting with the guidance of the affected community, could conduct a serious inquiry into the facts and law, and propose a plan of allocation and distribution that would do non-adversarial justice to the claims of all class members.¹¹⁴

In class actions, courts stress mediation's importance and appoint guardians ad litem to investigate the settlement's fairness.¹¹⁵ But unlike a guardian ad litem,

¹¹² See CHARLES E. LINDBLOM, *THE POLICY-MAKING PROCESS* 13 (1968) (presenting a model for rational decision-making). If plaintiffs' counsel is initially uncooperative, the judge might endow the special officer with access to discovery tools. *PRINCIPLES OF THE LAW OF AGGREGATE LITIG.*, *supra* note 20, § 3.09 cmt. (a)(1). Of course, the actual charge that the judge gives the special officer will vary depending on the litigation's circumstances, and this flexibility is necessary to allow the judge to tailor the procedures to the unique aspects of each case.

¹¹³ *In re Holocaust Victims Assets Litig.*, 424 F.3d 132, 137 (2d Cir. 2005).

¹¹⁴ *Id.*

¹¹⁵ See, e.g., *In re Asbestos Litig.*, 90 F.3d 963, 972 (5th Cir. 1996), *vacated and remanded on other grounds sub nom.* Amchem Prods., Inc., 521 U.S. 591 (1997) (vacating on Rule 23 grounds), *aff'd on remand*, 134 F.3d 668 (5th Cir. 1998) (affirming the earlier disposition and finding that the requirements of class certification were met), *rev'd on other grounds sub nom.* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing based on Rule

who paternalistically represents a child's best interests,¹¹⁶ or a mediator, who resolves disputes between plaintiffs and defendants, the special officer that I envision has a fiduciary obligation to plaintiffs and thus acts as a go-between, mediator, and facilitator only on the plaintiffs' side.¹¹⁷ This entails frank and confidential discussions that neither the defendant nor the court is privy to.¹¹⁸

Two clarifying points are in order. First, I am not suggesting that judges or special officers replace a plaintiff's individually chosen lawyer or change the attorneys' compensation terms. The special officer functions alongside plaintiffs' chosen counsel to monitor counsel, identify circumstances in which counsel is unable to represent all of her clients' interests, and aid in sorting plaintiffs with diverse ends, claims, and injuries into more cohesive groups.¹¹⁹ It stands to reason, however, that there is some cause for concern if an attorney represents plaintiffs across a range of disparate subgroups. Significant differences among subgroup interests may strain the attorney's loyalty and require informed consent or alternative counsel. Second, special officers should be part and parcel of a comprehensive judicial *adjudication* plan. By

23 class certification requirements); *see also* Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1092 (1995) (arguing that, ordinarily, a guardian would be required to protect the interests of unknowing plaintiffs); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1451 (2006) ("In other situations, courts have appointed guardians for class members at the moment of settlement to consider the value of the settlement to the class or some subset thereof.").

¹¹⁶ BLACK'S LAW DICTIONARY 774 (8th ed. 2004) (categorizing "guardian ad litem" as a subset of guardians).

¹¹⁷ *See* Kenneth R. Feinberg, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 FORDHAM URB. L.J. 785, 789-91 (2007). A longstanding debate exists between mediation purists and mediation pluralists. *See* James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 919 (1997); Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146-48 (2001). I adopt the pluralistic approach, which acknowledges that mediators both facilitate communication and evaluate the case itself. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996).

¹¹⁸ *See In re Joint E. & S. Dists. Asbestos Litig.*, 737 F. Supp. 735, 738-39 (E. & S. D.N.Y. 1990). The common-interest privilege preserves client confidentiality. *See* Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1001 (1995) ("Within the plaintiffs' network, the attorneys claim a 'common interest privilege' to protect confidential communications among the various plaintiffs' counsel in mass tort litigation.").

¹¹⁹ I discuss this process in more detail in Part III.B.

working on the plaintiffs' side only, the special officer maintains litigants' preference for adversarial litigation.¹²⁰

Two potential downsides to using special officers include their cost and the risk of the judge appearing partial to the plaintiffs. As to cost, people with the experience, legal knowledge, skill, creativity, and artistry to act as special officers – such as Ken Feinberg, Francis McGovern, and Burt Neuborne – are expensive. The three “settlement masters” in the Agent Orange litigation, for example, cost hundreds of thousands of dollars.¹²¹ But expense is relative and mass-tort litigation is a significant investment.¹²² As compared with our current system, where aggregating theoretically minimizes duplication, the cost structure must take into account collateral attacks, payoffs to holdouts, potentially inadequate representation, and the resulting ebb of judicial legitimacy. Thus, overall, special officers seem worth the cost.

As to the judge appearing partial to the plaintiffs by appointing someone to help organize them, it is a risk. Yet, judges regularly appoint special masters in class-action litigation to ensure that the settlement is fair to class members for precisely the same reason – concern that agency problems and conflicts of interest will thwart adequate representation.¹²³ These agency risks prompted Judge Posner to claim that the judge has a fiduciary duty to the class during settlement.¹²⁴ Similar appointments and associated risks in class actions diminish the appearance of judicial partiality in nonclass aggregation. Further, appointing a special officer levels the playing field by reducing the defendant's

¹²⁰ *Procedural Justice*, *supra* note 25, at 29-31; *see also* JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 104 (1975) (finding that subjects under various conditions all expressed a preference for adversary procedure); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXP. SOC. PSYCHOL. 13, 29 (1978) (reporting that an adversarial procedure is preferred because it provides for a “full presentation of all issues relevant to a particular dispute”).

¹²¹ Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 348 (1986).

¹²² *See infra* notes 255-257 and accompanying text (estimating that the initial Vioxx cases cost around \$1.5 million to develop).

¹²³ *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at §§ 3.02 cmt. a, 3.05 cmt. b, 3.09; MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 24, at § 21.632. As the American Law Institute recommends, the court may appoint a special officer, a guardian ad litem, a neutral or special master, or even its own expert to analyze the settlement's fairness. PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 3.09.

¹²⁴ *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002); *see also* Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1060-61 (2004).

ability to capitalize strategically on plaintiffs as uninformed, poor case monitors.

2. Communication

Special officers can also help foster plaintiff communication. Not surprisingly, numerous studies show that giving people the opportunity to interact positively influences their willingness to cooperate and their fairness perceptions.¹²⁵ Cooperating after communicating also illustrates the behavioral response to moral obligations of solidarity. Researchers have various theories about why this is: maybe discussion gives individuals more information about their choices, allows them to make explicit and implicit commitments to each other, or fosters a sense of group identity and community.¹²⁶ For instance, allowing group members to talk with each other leads many to mutually obligate themselves to cooperate and to predict – at rates significantly better than chance alone – whether others will also behave cooperatively.¹²⁷ The

¹²⁵ See, e.g., Wim B. G. Liebrand, *The Effect of Social Motives, Communication and Group Size on Behavior in an N-Person Multi-Stage Mixed-Motive Game*, 14 EUR. J. SOC. PSYCHOL. 239, 239 (1984); L. Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXP. SOC. PSYCHOL. 223, 237-38 (1983); J. Orbell et al., *The Limits of Multilateral Promising*, 100 ETHICS 616, 627 (1990); Ostrom, *supra* note 14, at 140; see also Elinor Ostrom & James Walker, *Neither Markets Nor States: Linking Transformation Processes in Collective Action Arenas*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 62 (Dennis C. Mueller ed., 1997) (reporting that when individuals are given the opportunity to interact, they adopt cooperative strategies that positively influence the outcome in many settings).

Irving Janis's now classic text, *Groupthink*, raises questions about the efficacy of what I am proposing. IRVING L. JANIS, VICTIMS OF GROUPTHINK 8-9 (1972) (discussing the detrimental effects of group cohesiveness on the decision-making process). Although his take still predominates popular notions about groups and remains compelling, research in the years since his publication has generated skepticism. See Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, in 37 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219, 245-47 (Mark P. Zanna ed., 2005) ("A review of the research and debate regarding Janis's groupthink model leads to the conclusion that after some 30 years of investigation, the evidence has largely failed to support the formulation's more ambitious and controversial predictions, specifically those linking certain antecedent conditions with groupthink phenomena."); Norbert L. Kerr & R. Scott Tinsdale, *Group Performance and Decision Making*, 55 ANN. REV. PSYCHOL. 623, 640 (2004). My proposal for including dissenting viewpoints further diminishes this risk.

¹²⁶ Peter Kollock, *Social Dilemmas: The Anatomy of Cooperation*, 24 ANN. REV. SOCIOL. 183, 194 (1998); David M. Messick & Marilynn B. Brewer, *Solving Social Dilemmas: A Review*, in 4 REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 11, 27 (L. Wheeler & P. Shaver eds., 1983) ("[C]ooperative solutions to social dilemmas may be facilitated by exploiting the constructive social ties and affiliative bonds arising from social group identity.").

¹²⁷ See Robert H. Frank et al., *The Evolution of One-Shot Cooperation: An Experiment*,

more plaintiffs use a reciprocal strategy – “I’ll cooperate if everyone else does too” – the more they follow through with their commitments.¹²⁸ Other studies demonstrate that individuals cooperate when they feel like they are part of a group.¹²⁹ We need not resolve this larger question about why people cooperate here since the key to each theory and, thus, to cooperative litigation, is plaintiff interaction.

Rules 16 and 26(f) already authorize the judge to promote dialogue among plaintiffs. Rule 16 requires pretrial conferences to discourage “wasteful pretrial activities” and to improve “the quality of the trial through more thorough preparation.”¹³⁰ To further these aims, the court may order parties or their representatives to attend pretrial conferences or be available by other means.¹³¹ Similarly, Rule 26(f) requires conferences about discovery and collaboration on discovery plans.¹³² Plus, judges regularly invoke their inherent equitable authority to manage mass litigation, and encouraging communication – like appointing a special officer – is well within that authority.¹³³

Communication among plaintiffs may yield a variety of benefits. It could create opportunities for social interactions, lead plaintiffs to share privately held information, encourage participants to justify their claims and ends, produce creative solutions, decrease the impact of bounded rationality, enhance deliberative democracy, and increase legitimacy.¹³⁴ Plaintiffs may use communication opportunities to devise a joint strategy, elicit promises to cooperate, and verbally sanction or encourage others.¹³⁵ Like negative advertising campaigns, plaintiffs have little incentive to emphasize the drawbacks of their own proposals, but those who disagree willingly expose those flaws, which may lead to a better or fairer outcome.¹³⁶ Moreover, giving

14 ETHOLOGY & SOCIOBIOLOGY 247, 255 (1993) (finding that predictions based on chance were more than seven percent less accurate than those made by communicative groups); Norbert L. Kerr & Cynthia M. Kaufman-Gilliland, *Communication, Commitment, and Cooperation in Social Dilemmas*, 66 J. PERSONALITY & SOC. PSYCHOL. 513, 525-26 (1994).

¹²⁸ S.S. Komorita et al., *Reciprocity and the Induction of Cooperation in Social Dilemmas*, 62 J. PERSONALITY & SOC. PSYCHOL. 607, 614-15 (1992).

¹²⁹ See, e.g., Robin Dawes, *Social Dilemmas, Economic Self-Interest, and Evolutionary Theory*, in FRONTIERS OF MATHEMATICAL PSYCHOLOGY: ESSAYS IN HONOR OF CLYDE COOMBS 53, 62 (Donald R. Brown & J.E. Keith Smith eds., 1991).

¹³⁰ FED. R. CIV. P. 16(a).

¹³¹ *Id.*

¹³² FED. R. CIV. P. 26(f).

¹³³ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. *supra* note 20, § 1.05 cmt. c.

¹³⁴ See James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44, 45 (Jon Elster ed. 1998).

¹³⁵ Ostrom, *supra* note 14, at 140.

¹³⁶ Jon Elster, *Introduction to DELIBERATIVE DEMOCRACY* 1, 12 (Jon Elster ed., 1998).

litigants a chance to consider their ends collaboratively may change, sharpen, and specify those ends in ways that mere procedural aggregation cannot. To borrow the words of Frank Michelman, the goal is to resolve normative plaintiffs'-side disputes "by conversation . . . and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit."¹³⁷

Accordingly, it would be more convenient to claim that plaintiffs benefit equally from telephone or Internet conversations and that interacting face-to-face is an outdated relic of the past. And there are a few studies on on-line communities such as MySpace and LiveJournal that demonstrate how these networks constitute cohesive groups and others that show no appreciable difference between computer-mediated communication and face-to-face interaction.¹³⁸ But still other studies indicate what seems intuitively correct – that there is something humanizing and thus more compelling about face-to-face interactions.¹³⁹ Consider, for instance, whether you would be more likely to buy cookies from a neighborhood Girl Scout at your front door or magazines from a telemarketer. I suspect that many of us would hang up on telemarketers and stockpile boxes of Thin Mints and Samoas. Face-to-face personal exchanges impart social cues – guilt, approval, and reciprocity – that other media lack.¹⁴⁰ Of course, once we meet each other, we tend to cultivate and maintain those relationships through other media such as e-mail, telephone calls, instant messaging, text messaging, Skype, Twitter, and Facebook.¹⁴¹

¹³⁷ Frank I. Michelman, *The Supreme Court, 1985 Term – Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986).

¹³⁸ See Kelly Bouas Henry, *Perceptions of Cooperation in a Longitudinal Social Dilemma*, 31 SMALL GRP. RES. 507, 518-19 (2000); M. Lea et al., *Knowing Me, Knowing You: Anonymity Effects on Social Identity Processes within Groups*, 27 PERSONALITY SOC. PSYCHOL. BULL. 526, 528 (2001); Gary Charness, Ernan Haruvy & Doron Sonsino, *Social Distance and Reciprocity: An Internet Experiment*, 63 J. ECON. BEHAV. & ORG. 88, 101 (2007); Lars Backstrom et al., *Group Formation in Large Social Networks: Membership, Growth, and Evolution*, THE TWELFTH ACM SIGKDD INTERNATIONAL CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING (2006), <http://delivery.acm.org/10.1145/1160000/1150412/p44backstrom.pdf?key1=1150412&key2=1624210921&coll=DL&dl=A CM&CFID=111637878&CFTOKEN=33799724> (last visited Oct. 31, 2010).

¹³⁹ Ostrom, *supra* note 14, at 140-41; see also NICHOLAS A. CHRISTAKIS & JAMES H. FOWLER, *CONNECTED* 286 (2009) (“[T]he spread of emotions seems to require face-to-face interaction. So while online connections increase the frequency of contact, it is not clear whether this has the same effect as being present in person.”).

¹⁴⁰ Elinor Ostrom et al., *Covenants With and Without a Sword: Self-Governance is Possible*, 86 AM. POL. SCI. REV. 404, 410 (1992).

¹⁴¹ Mass tort litigants already form connections with one another through these social networking sites. For examples, see the “Agent Orange Lawsuit Filed by Vietnamese Victims” Facebook group, “Equal Treatment for Non-US Viox Victims” Facebook group, which petitioned for compensation on behalf of British victims, and the “Merck Settlement Group” on Yahoo!’s groups page. *Agent Orange Lawsuit Filed by Vietnamese Victims*,

Although interacting personally is easier in cases with less geographic dispersion, creating a social network could be accomplished on a smaller scale through regionally held meetings where the special officer “rides the circuit.” For example, both Judge Weinstein in the Agent Orange litigation and Ken Feinberg in administering the September 11 Victim’s Compensation Fund did just that.¹⁴² In Agent Orange, Judge Weinstein traveled throughout the country, held an unparalleled number of fairness hearings, and listened to numerous class members’ comments.¹⁴³ Ken Feinberg followed suit by conducting scores of town-hall meetings in schools, community centers, and hotels from New York to California.¹⁴⁴ Non-legal examples include the 2008 presidential race, which relied heavily on a combination of the Internet, YouTube, mobile technology, grassroots level town-hall meetings, and community-based “house parties” to disseminate campaign information and mobilize support.¹⁴⁵ Similarly, activist Oscar Morales started a Facebook group to protest FARC’s (a Columbian military group) holding hostages and used online networks to organize real-world marches; his Facebook group led to 4.8 million people attending roughly four-hundred events on the same day throughout the world.¹⁴⁶

Technology has changed the way we interact with one another socially, but it has also provided a means for facilitating traditional face-to-face interaction.¹⁴⁷ Plaintiffs might use these new communication media to set up

FACEBOOK, <http://www.facebook.com/group.php?sid=0&gid=2619520859> (last visited Oct. 21, 2010); *Equal Treatment for Non-US Vioxx Victims*, FACEBOOK, <http://www.facebook.com/group.phpgid=8611202842> (last visited Oct. 31, 2010); *MerckSettlement*, YAHOO GROUPS, <http://groups.yahoo.com/group/MerckSettlement/> (last visited Oct. 21, 2010) (Yahoo Groups page dedicated to connecting potential Merck plaintiffs with one another).

¹⁴² KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11*, at 55-60 (2005).

¹⁴³ Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 357-58 (1986). Judge Weinstein did something similar in the DES cases. See Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1621 n.190 (1995). Although Judge Weinstein certified Agent Orange as a class action, there is ample reason after *Amchem*, *Ortiz*, and CAFA to believe that it could not be certified today. See NAGAREDA, *supra* note 9, at 74-75.

¹⁴⁴ FEINBERG, *supra* note 142, at 47-49.

¹⁴⁵ See, e.g., *About Organizing for America*, ORGANIZING FOR AMERICA, http://www.barackobama.com/learn/about_ofa.php (last visited Oct. 21, 2010). For more information about how the Obama campaign used YouTube to advertise and combat negative stories, see CHRISTAKIS & FOWLER, *supra* note 139, at 204-05.

¹⁴⁶ See CHRISTAKIS & FOWLER, *supra* note 139, at 205; L.A. Henao, *Columbians Tell FARC: “Enough’s Enough”*, CHRISTIAN SCI. MONITOR, Feb. 6, 2008, at 25.

¹⁴⁷ Burch, *supra* note 82, at 900 (citing a website for Navy Moms that provides “meeting kits” to facilitate local face-to-face gatherings).

regional face-to-face meetings, discuss key decisions, receive attorney updates and recent court documents, pose questions, tell their stories, and generally keep in touch with one another.¹⁴⁸ In short, this kind of technology makes it easier for geographically dispersed plaintiffs to coordinate initial meetings and, subsequently, to communicate, deliberate, and bargain with each other.

B. *Sorting*

Thus far, we have considered two tools for promoting cooperation – using special officers and encouraging plaintiffs to communicate with one another. But sometimes communicating and specifying goals can cause even the most robust group to splinter. Church denominations are prime examples; congregations divide over doctrine and the spin-off groups form churches of their own. People within these groups sort themselves based on ideology and social ties. But plaintiffs – at least currently – lack leadership as well as critical information about others’ ends, choice of law, evidentiary issues, and the science used to establish causation. Consequently, they cannot rationally self-sort or self-govern. The following two sections explain how the two procedural tools just discussed can lead to better sorting and thereby minimize inadequate representation, bolster procedural justice, and enable self-governance.

First, consider the sorting problem. Because Rules 42 and 20 insist only on a common question of law or fact, procedurally aggregated plaintiffs may have only nominally related claims.¹⁴⁹ Plus, attorneys tend to prefer lumping to sorting since, in general, representing more people leads to a higher fee and a greater ability to invest resources in the litigation. Sorting clients into more cohesive groups risks unearthing conflicts of interest, which may make joint representation openly problematic by jeopardizing adequate representation and due process. Ultimately, it may raise the need for informed consent or alternative representation.¹⁵⁰

Viewed as a product of sorting, subgroups might benefit litigants by reordering nominally aligned interests into more cohesive units, which would prevent quasi-private ordering from oppressing or disempowering certain

¹⁴⁸ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 1.05 cmt (i); Paulette Rogers, *My Story*, PLAINTIFF’S VIEW, <http://www.plaintiffsview.org/MyStoryPaulette.html> (last visited Nov. 3, 2010) (providing a forum for Vioxx plaintiffs to tell their stories). For a general description of the various ways that class-action plaintiffs can use and benefit from internet communications see Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 763-64 (2008).

¹⁴⁹ FED. R. CIV. P. 20(a)(2); FED. R. CIV. P. 42(a).

¹⁵⁰ See MODEL RULES PROF’L CONDUCT R. 1.7 cmts. 2-5 (describing how to identify and address a conflict of interest).

litigants.¹⁵¹ Consequently, encouraging plaintiffs (during their discussion) to associate with others who share their litigation goals, injuries, and claims can ameliorate significant conflicts of interest. Because plaintiffs usually lack the information and legal knowledge they need to evaluate their claims vis-à-vis others or to give informed consent to conflicts, the special officer is of particular use here. By working with all of the plaintiffs, special officers will have some idea about injury severity, causation problems, evidentiary gaps, and differences in substantive laws, which means that they can use sorting to minimize conflicts of interest. The optimal subgroup is one in which plaintiffs want to achieve roughly similar remedies and share similar factual and legal issues. Although identifying similar factual and legal issues is no easy task given the variation among state laws, one might begin by identifying what constitutes the “same issue” from a preclusion standpoint.¹⁵²

Admittedly, over-sorting is similarly problematic and can lead to highly factionalized entities that undermine both the litigation’s efficiency and the otherwise credible threat to defendants.¹⁵³ Consequently, sorting “should generally be used only to address conflicts on central issues or to facilitate the development of issues that, being unique to certain individuals, are unlikely to be addressed otherwise.”¹⁵⁴ The touchstone of sorting is thus to satisfy constitutional due process requirements.¹⁵⁵

¹⁵¹ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (explaining that a group cannot be said to adequately represent the class in litigating their interests simply because they are members of that class); PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 1.05(c)(8) (recommending that judges employ case-management techniques such as severance, subclassing, coordination, and consolidation to ensure adequate representation).

¹⁵² This inquiry might focus on similar substantive laws and common evidence. The Restatement suggests several factors to consider in deciding what constitutes the “same issue,” including:

Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1980); see also PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 2.01 (“Common issues are those legal or factual issues that are the same in functional content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in the litigation.”).

¹⁵³ John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 374-75 (2000) (discussing “Balkanization” of the class that results from requiring excessive subclassing).

¹⁵⁴ PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 1.05 cmt. k.

¹⁵⁵ See *Amchem Prods.*, 521 U.S. at 627 (recognizing the importance of identifying subgroups and ensuring they are adequately represented); *Kremer v. Chem. Constr. Co.* 456

This Article's focus on homogeneity and group cohesion within subgroups reflects this concern about adequate representation and due process. Yet, isolating homogeneous subgroups risks group polarization and could lack the benefits of diversity. As Howard Reingold's *Smart Mobs*,¹⁵⁶ Jim Surowiecki's *Wisdom of Crowds*,¹⁵⁷ and Scott Page's *The Difference*¹⁵⁸ have demonstrated through social science, groups of diverse people can make more accurate predictions, carry out tasks, solve problems, improve performance, and aggregate information better than non-diverse groups. These potential benefits are, however, subject to two critical caveats: (1) fighting over common resources – such as settlement funds – makes diverse groups less productive and (2) failing to communicate with one another undermines any benefit.¹⁵⁹ Consequently, to reap diversity's benefits in mass litigation, cohesive subgroups should communicate with other subgroups. And outliers – or as Cass Sunstein might label them, “dissenters,”¹⁶⁰ – should be permitted to remain outsiders.¹⁶¹ Just as law schools hire consultants from other law schools to make suggestions for improvement, diverse perspectives from other subgroup members and outliers can challenge the status quo and suggest new insights. These dissenting voices might come directly from plaintiffs or from their attorneys.

Another way to think about the value of diversity among the plaintiffs as a whole is through pluralism in political settings. Like political pluralism, conversation among plaintiffs within diverse subgroups can expose plaintiffs to multiple perspectives on remedies and new ideas. It can also lead to forceful advocacy that results in well-developed arguments, increased legitimacy, and dissenters who are ultimately more willing to accept the outcome.¹⁶² So some

U.S. 461, 462 (1982) (holding that due process requires plaintiffs be given a “full and fair opportunity to litigate”); *Hansberry*, 311 U.S. at 45 (explaining that nominal membership in a class does not ensure one's individual interests are adequately represented during litigation); Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1733-41 (2004); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 602-03 (1997).

¹⁵⁶ HOWARD REINGOLD, *SMART MOBS* 179 (2002) (“[A] diversity of cooperation thresholds among . . . individuals can tip a crowd into a sudden epidemic cooperation.”).

¹⁵⁷ JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 36 (2004) (stating that homogeneous groups present groupthink problems that more diverse groups do not).

¹⁵⁸ SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 155-58 (2007)

¹⁵⁹ *Id.*, at 335.

¹⁶⁰ CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 14 (2003) (explaining that even a single “dissenter” can have a huge impact that benefits everyone by breaking the barriers of groupthink).

¹⁶¹ See PAGE, *supra* note 158, at 343.

¹⁶² W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN*

conflict and dissonance is beneficial; it encourages novel solutions, diverse ideas, and innovative problem-solving.¹⁶³ As game theorists suggest, increased participation and bargaining – more “trades” – promotes more solutions.¹⁶⁴ Thus, the more initial disagreement about what is important, the appropriate remedy, legal strategies, and appropriate goals (publicity, education, compensation, and even public shaming), the better.

On the other hand, like pluralism, subgroups can lead to group polarization and manageability problems, which raises the question of when, whether, and how to unite divided subgroups (or at least reach a collective decision). In part, the answer lies in exposing these subgroups to one another and fostering deliberation among them.¹⁶⁵ And, in part, the answer requires identifying whether the conflict is one over outcomes (ends) or over how plaintiffs achieve what they want (means).

When the conflict is over litigation means, it is far less problematic and can, as noted, lead to better substantive outcomes through bargaining, deliberating, and ultimately – perhaps – voting. But when the disagreement is over ends and a settlement offer is conditioned on unanimous or nearly unanimous consent, then, at least currently, plaintiffs must reach some compromise before the superordinate group can move forward.¹⁶⁶ As I suggest shortly, it may also indicate that the system should allow subgroups with fundamentally inconsistent ends to exit the superordinate group and pursue separate litigation.¹⁶⁷ Viewing a disagreement over ends as an either-or proposition – a choice – is more problematic than framing it as a problem-solving or practical-reasoning challenge. For example, within a group of potential Gardasil plaintiffs, some might prefer to report adverse reactions to the FDA and encourage it to recall the vaccine, others might want to educate the public through media coverage, others might want to speak against mandating the vaccine in state legislative hearings, and still others might want compensation

THE AMERICAN ELECTORATE 126-27 (1986); Rhode, *supra* note 64, at 1222-23. For a general account of pluralism in the political process, see ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY V. CONTROL 31-54 (1982); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 23-24 (1967).

¹⁶³ Lisa Troyer & Reef Youngreen, *Conflict and Creativity in Groups*, 65 J. SOC. ISSUES 409, 413 (2009).

¹⁶⁴ See, e.g., HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 255 (1982).

¹⁶⁵ See generally CASS R. SUNSTEIN, WHY GROUPS GO TO EXTREMES (2008). Cf. CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 145-47 (2009) (arguing that checks and balances in partisan politics constrains group polarization and extreme movements).

¹⁶⁶ See PAGE, *supra* note 158, at 349.

¹⁶⁷ See *infra* Part III.D.3. Although I raise the issue here as a placeholder, this promises to be the main topic of a future article. Note, however, that allowing groups to splinter off into their own litigation may lose the benefits of diversity and may create a problem with inconsistent remedies.

for injuries. Bargaining and deliberating over these ends may ultimately result in a decision to litigate – a compromise of sorts.¹⁶⁸ These diverse ends might come up again if plaintiffs receive a settlement offer with a confidentiality provision. To find a solution that they might all agree to, again, plaintiffs would need to articulate their values, desires, and intentions. When consensus seems impossible, plaintiffs might prefer a collective decision-making procedure that, as discussed shortly, includes a democratic vote to aggregate preferences and put the matter to rest.¹⁶⁹

C. *Group Governance*

In raising the possibility of collective-governance procedures, I recognize both the potential for diverse, factionalized subgroups and the realistic concern that not all plaintiffs want litigation to become their life. In the latter sense, collaborative litigation becomes something of a nuisance, another distraction to squeeze into their already busy days. Plaintiffs may thus want a quicker resolution so that they can put that part of their lives behind them. Or, even if they want to participate, they may be physically or mentally unable to, as were some of the Zyprexa plaintiffs who suffered from serious psychotic disorders. This raises the question of whether face-to-face group discussion and deliberation should be optional and, if so, whether the enthusiasts who do participate will fairly represent the spectrum of interests that would otherwise emerge.

While it is surely right that not all plaintiffs want to interact regularly, I nevertheless suspect that many do since plaintiff groups already form on an ad hoc basis.¹⁷⁰ Remember that litigants in nonclass aggregation have retained an attorney to pursue claims related to their health and safety. Their claims are deeply personal and they might sue even absent collective litigation. Accordingly, litigants tend to expect the autonomous decision-making and voice opportunities that typically accompany their day in court.¹⁷¹

¹⁶⁸ See MICHAEL E. BRATMAN, *Shared Intention*, in *FACES OF INTENTION* 109, 116-22 (1999) (describing how participants can jointly agree on a course of action while having different reasons for doing so).

¹⁶⁹ See *infra* Part III.C.2.

¹⁷⁰ For example, veterans' groups organized Agent Orange litigants. Deborah R. Hensler & Mark A Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961, 1023 (1993). Groups such as the Asbestos Victims of America, the Dalkon Shield victims' organizations, and the Silicone Breast Implant organizations, also formed after the triggering event. *Id.* at 1024; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 *UTAH L. REV.* 863, 919-21 (2005) (discussing how these victim groups can both facilitate litigation and provide other assistance through emotional support, information, and media attention).

¹⁷¹ *Procedural Justice*, *supra* note 5, at 48-50 (explaining the day in court ideal as a willingness-to-accept problem).

Consequently, it seems that increased opportunities for group deliberation and decision-making might be a welcome change.

Although it should remain within the judge's discretion to mandate participation and interacting face-to-face (at least initially) is preferred,¹⁷² plaintiffs might devise a representative governance structure with voting mechanisms. That arrangement should, however, come only after initial meetings (that might be held regionally) and after plaintiffs, with the special officer's help, sort into groups with similar injuries and remedies.¹⁷³

Contending that litigants should have a hand in engineering their governance arrangements doesn't say much about how these arrangements might unfold, how litigants develop moral obligations and communal encumbrances in the process, or how they might transition from moral obligations to legal ones. In the course of forming groups, deliberating, and sorting, plaintiffs tend to develop other-regarding preferences, display concern and awareness for fellow group members, and make promises and commitments to one another.¹⁷⁴ There is ample intuitive and empirical evidence demonstrating that people act altruistically, follow social norms, listen to their moral conscience, and prefer fairness and reciprocity.¹⁷⁵ And the social and personal norms associated with keeping promises regularly compel people to follow through even in one-shot interactions where anonymity is assured and group exposure is minimal.¹⁷⁶

¹⁷² See ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* 171 (1994).

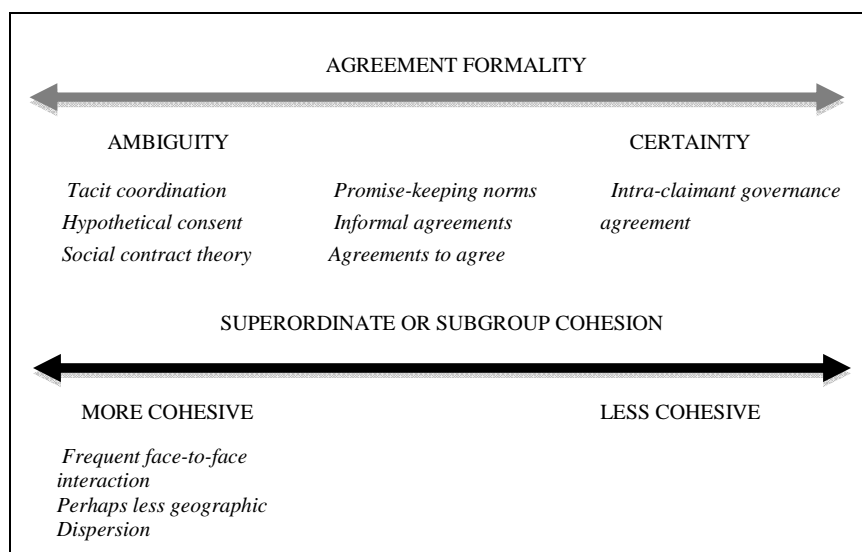
¹⁷³ This helps ensure adequate representation and maintains legitimacy if litigants choose a representative governance model instead of direct participation through deliberation.

¹⁷⁴ See Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 *SCIENCE* 1390, 1393 (1981); Nancy R. Buchan et al., *Let's Get Personal: An International Examination of the Influence of Communication, Culture and Social Distance on Other Regarding Preferences*, 60 *J. ECON. BEHAV. & ORG.* 373, 374-75 (2006); Joseph Henrich, *Cultural Group Selection, Coevolutionary Processes and Large-Scale Cooperation*, 53 *J. ECON. BEHAV. & ORG.* 3, 9-12 (2004) (explaining how reciprocity and punishment systems develop in group interaction); Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 *J. PERSONALITY & SOC. PSYCHOL.* 585, 586 (2004).

¹⁷⁵ See Dawes, *supra* note 51, at 176; Shinada & Yamagishi, *supra* note 54, at 94. See generally Mark Van Vugt et al., *Competitive Altruism: A Theory of Reputation-Based Cooperation in Groups*, in *THE OXFORD HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* 531 (R.I.M. Dunbar & Louise Barrett eds., 2007). Granted, not all other-regarding preferences are prosocial. Spite and punishment are common as well. But these also demonstrate that the *homo economicus* is not the correct model because people spend personal resources to punish, whereas no rational egoist would do so. See Ostrom, *supra* note 14, at 141.

¹⁷⁶ Kelly S. Bouras & S.S. Komorita, *Group Discussion and Cooperation in Social Dilemmas*, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 1144, 1144-50 (1996); N.L. Kerr et al., *That Still, Small Voice: Commitment to Cooperate as an Internalized Versus a Social Norm*, 23 *PERSONALITY & SOC. PSYCHOL. BULL.* 1300, 1300-11 (1997).

Plaintiffs who make reciprocal promises and assurances to cooperate with one another incur moral obligations that include obligations of solidarity.¹⁷⁷ Theoretically, these moral obligations might legally bind litigants, too. But discerning and enforcing moral interconnectedness requires a mind reader, not a judge. Although litigants become part of a group when they recognize interconnections, only some connections are obligations. Of those, only some are proportional and reciprocal.¹⁷⁸ Plus, promises and assurances may be implicit or tacit and may evolve through reciprocal exchanges. Thus, determining when litigants morally obligate themselves to one another from an outside perspective is a first-order question riddled with ambiguity. Accordingly, this section considers three broad types of agreement that may be placed roughly along a continuum from most to least ambiguous. As shown, these different types of agreements are more effective with certain group cohesion levels:



1. Tacit Coordination, Social Norms, and Moral Obligations

At the ambiguous extreme, Thomas Schelling has demonstrated that people coordinate tacitly even when they never meet each other. He asked participants in New York City who wanted to find one another, but had no prearranged plans, where and what time they would meet.¹⁷⁹ The majority said

¹⁷⁷ *Group Consensus, Individual Consent*, *supra* note 13 (manuscript at 15); SANDEL, *supra* note 84, at 223-25.

¹⁷⁸ My thanks to J.B. Ruhl for pointing this out to me.

¹⁷⁹ THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 56 (1980).

they would go to Grand Central Station at noon.¹⁸⁰ So sometimes when people mutually recognize a coordinating signal they will cooperate tacitly.¹⁸¹ Schelling suggests that the moral power of distributive-fairness norms provides a similar signal in complex-decision problems.¹⁸² The trouble is, plaintiffs may not have a common understanding of “what’s fair” when group members suffer assorted levels of harm, live in jurisdictions with disparate laws, and have stronger or weaker legal cases. Uncertainty comes not only in determining what’s fair, but also in ascertaining the number of group members and the potential settlement terms. Although desires to achieve distributive fairness (based on either true fairness concerns or instrumental motives¹⁸³) are well-documented behavioral determinants, it is impossible for plaintiffs to proportionately distribute resources when they lack this knowledge.¹⁸⁴

Between this extreme, which is too ambiguous to be legally binding, and the other extreme of a formal intraclaimant-governance agreement, exists a wide body of literature ranging from the social norms of promise-keeping, reciprocity, and fairness, to contracts as promises, informal contracts, and agreements to agree. This literature suggests that: (1) agreements may be self-enforcing even when they are not legally enforceable, (2) sometimes ambiguity is both deliberate and beneficial, and (3) incompletely specified agreements that make reciprocation possible may be more efficient than concrete, legally enforceable ones.

At the heart of the moral condition that I proposed for incurring an obligation lies the promise principle.¹⁸⁵ The principle is age old: people should keep their word. Indeed, as Charles Fried argues, that same principle comprises contract law’s moral foundation.¹⁸⁶ Even the Restatement (Second) of Contracts contends that a “contract is a promise or a set of promises for the

¹⁸⁰ *Id.* at 56-57.

¹⁸¹ *Id.* at 54.

¹⁸² *Id.* at 72-73.

¹⁸³ Fairness may be a means to an end for some rather than an end in and of itself. It may be a strategic consideration, as some behavioral economists contend. See, e.g., John H. Kagel et al., *Fairness in Ultimatum Games with Asymmetric Information and Asymmetric Payoffs*, 13 *GAMES & ECON. BEHAV.* 100, 100 (1996). The proselves may still desire distributive fairness because they may assume that unfair offers are likely to be rejected. See Rachel T.A. Croson, *Information in Ultimatum Games: An Experimental Study*, 30 *J. ECON. BEHAV. & ORG.* 197, 197-98 (1996); Madan M. Pillutla & J. Keith Murnighan, *Fairness in Bargaining*, 16 *SOC. JUST. RESEARCH* 241, 241-42 (2003); van Dijk & De Cremer, *supra* note 44, at 151.

¹⁸⁴ van Dijk & De Cremer, *supra* note 44, at 148-50; see also Fehr & Schmidt, *supra* note 54, at 817; David A. Schroeder et al., *Justice Within Social Dilemmas*, 7 *PERSONALITY & SOC. PSYCHOL. REV.* 374, 374 (2003).

¹⁸⁵ *Supra* notes 78-80 and accompanying text (describing this moral obligation).

¹⁸⁶ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981).

breach of which the law gives a remedy.”¹⁸⁷ Yet, promises may not be as explicit as saying “I promise” or “I agree”; instead, they may be inferred from intentional conduct or tacit agreements.¹⁸⁸ In agreements to agree, plaintiffs might openly acknowledge the agreement’s indefiniteness as well as their intention to continue negotiating, deliberating, or bargaining to reach further agreement.¹⁸⁹

This idea of adding flesh to the agreement later is inherent in Michael Bratman’s planning theory of practical reasoning.¹⁹⁰ That is, people are planners and their plans are often partial. Only later do they fill in their plans by specifying means, methods, and action.¹⁹¹ Their plans are also hierarchical: general plans necessarily contain preliminary steps and subplans to eventually attain one goal.¹⁹² For instance, plaintiffs might have overarching fixed ends (to prevail against the defendant), but must deliberate and bargain about how and whether to coordinate their activity, what that day-to-day activity should entail, and how to specify their shared ends in ways that eventually resist reconsideration and control conduct. Upon reaching rough consensus, they might clarify their coordination and commitment to a shared plan through common understanding.¹⁹³

The question is whether these rather nebulous ideas about bargaining and planning can bind plaintiffs legally or whether extra-legal understandings might sometimes prove self-enforcing. The latter notion insinuates that the liberal ethic of reciprocity, making and keeping promises, and communal obligations of solidarity may be all that is necessary. In fact, people routinely demonstrate a robust preference for keeping promises, fairness, and reciprocity.¹⁹⁴ As such, agreements are self-enforcing not only because of

¹⁸⁷ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁸⁸ *Id.* § 4. Even making an explicit promise may lead to disagreement about the exact nature of that promise and how to go about discharging that moral duty. See Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 376 n.238.

¹⁸⁹ Omri Ben-Shahar, “*Agreeing to Disagree*”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 395-396. This includes the obligation to bargain and negotiate in good faith. Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 679-81 (1969).

¹⁹⁰ See MICHAEL E. BRATMAN, *INTENTIONS, PLANS, AND PRACTICAL REASON* 29-30 (1987).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Bridgeman, *supra* note 188, at 374-75.

¹⁹⁴ See, e.g., Cristina Bicchieri & Azi Lev-On, *Computer-Mediated Communication and Cooperation in Social Dilemmas: An Experimental Analysis*, 6 POLITICS, PHIL. & ECON. 139, 142 (2007); Sanford L. Braver, *Social Contracts and the Provision of Public Goods*, in *SOCIAL DILEMMAS: PERSPECTIVES ON INDIVIDUALS AND GROUPS* 69, 70 (David A. Schroeder ed., 1995) (challenging the traditional economic assumption that individuals exclusively pursue their self-interests); Tore Ellingsen & Mangus Johannesson, *Promises, Threats and*

promise-keeping norms, but also because of extralegal enforcement mechanisms including reputational sanctions and reciprocity.¹⁹⁵

Granted, reputational sanctions in geographically dispersed litigation, where the plaintiffs are not repeat players, may be less effective than in cases such as environmental torts that involve pre-existing neighborhoods and communities. Yet, pre-existing groups may encounter different obstacles. For instance, where plaintiffs are also neighbors, their shared history may impact their willingness to collaborate. They might be socially ostracized, disputing over boundaries, or even friends. The group is not operating on a blank slate; litigating together is not a one-shot interaction. Instead, plaintiffs have extra-legal, interpersonal concerns.¹⁹⁶

Although geographically dispersed plaintiffs may care less about reputational sanctions, reciprocity still plays a vital role in self-enforcing agreements. Reciprocity differs from reputation in that it persists in one-shot interactions between complete strangers and is tethered neither to reputation nor future interaction.¹⁹⁷ “Reciprocity” characterizes a social preference for responding in kind to both altruism and hostility.¹⁹⁸ Put simply, it means that people treat others as others have treated them. This means that reciprocally

Fairness, 114 *ECON. J.* 397, 417 (2004) (“[F]airmindedness strengthens the credibility of promises”); Komorita, *supra* note 128, at 614-15 (concluding that reciprocal strategies induce cooperation); Ostrom, *supra* note 140, at 410; Christoph Vanberg, *Why Do People Keep Their Promises? An Experimental Test of Two Explanations*, 76 *ECONOMETRICA* 1467-80 (Nov. 2008), available at http://www.uibk.ac.at/economics/bbl/teaching_ws0809/vanberg_new.pdf.

¹⁹⁵ See Fehr & Schmidt, *supra* note 54, at 852; Ernst Fehr et al., *Reciprocity as a Contract Enforcement Device: Experimental Evidence*, 65 *ECONOMETRICA* 833, 833 (1997); Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 26 *J.L. & ECON.* 691, 699-703 (1983); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 *U. CHI. L. REV.* 133, 155 (1996); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 *COLUM. L. REV.* 1641, 1680-81 (2003). See generally DAVID HUME, *A TREATISE OF HUMAN NATURE* 541-46 (L. A. Selby-Bigge ed., 2d ed. 1978) (finding that promises are dependent on both moral obligations and government enforcement); Lester G. Telser, *A Theory of Self-Enforcing Agreements*, 53 *J. BUS.* 27, 37 (1980); *infra* notes 234-240 and accompanying text.

¹⁹⁶ See David De Cremer, *Respect and Cooperation in Social Dilemmas: The Importance of Feeling Included*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 1335, 1335 (2002); Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 482, 482 (1995).

¹⁹⁷ Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter – The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 *ECON. J.* C1, C3 (2002).

¹⁹⁸ See *id.*; S. S. Komorita et al., *Reciprocity and Cooperation in Social Dilemmas*, 35 *J. CONFLICT RESOL.* 494, 495 (1991).

fair plaintiffs will bear costs in order to keep their promises and achieve an equitable outcome, as well as to punish selfish behavior.¹⁹⁹

These self-enforcement mechanisms explain, in part, the general prevalence of agreements to agree as comforting arrangements despite judicial hesitance to enforce them. It also suggests that incompletely specified agreements that leave room for reciprocity ultimately might be more efficient than fully specified, legally enforceable ones. Given the strong evidence of self-enforcing reciprocity, some commentators have even claimed that creating opportunities for parties to exploit this tendency best serves the ends of fairness and efficiency.²⁰⁰ Others have proposed that partial agreements deserve partial legal enforcement when contractual incompleteness is a deliberate choice.²⁰¹

This suggests that backing an agreement with legally enforceable sanctions may actually diminish reciprocity and overall performance.²⁰² Put differently, the *ex ante* threat of legal sanctions may undermine voluntary cooperation where reciprocity and reputational sanctions would otherwise promote self-enforcement.²⁰³ Accordingly, pre-existing groups such as close-knit communities, neighborhood associations, and veterans' organizations might benefit more from self-enforcing, non-legal agreements than explicit contracts. Still, people develop social ties and attachments relatively quickly.²⁰⁴ Consequently, self-enforcing arrangements might benefit groups that form even after the litigation begins, such as the Asbestos Victims of America, the Dalkon Shield victims' organizations, the Merck Settlement Group, and the Silicone Breast Implant organizations.²⁰⁵

¹⁹⁹ See Scott, *supra* note 195, at 1677-78.

²⁰⁰ *Id.* at 1645.

²⁰¹ See, e.g., Ben-Shahar, *supra* note 189, at 389-90. Incomplete agreements are often filled using "reasonable hypothetical consent ('mimicking' or 'majoritarian' default rules). . . ." *Id.* at 390. But see Scott, *supra* note 195, at 1688-91 (arguing that courts "may actually undermine the very norms of fairness that the legal system seeks to advance" by gap-filling).

²⁰² See Scott, *supra* note 195, at 1689-90 (citing experiments by Fehr and Gächter, Ernst Fehr & Simon Gächter, *Do Incentive Contracts Undermine Voluntary Cooperation?* (Inst. for Empirical Research in Econ., Univ. of Zurich, Working Paper No. 34, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=313028).

²⁰³ Reciprocity and reputational concerns, along with trustworthiness, are most robust when people cooperate with one another over time in repeated interactions. See Frans van Dijk et al., *Social Ties in a Public Good Experiment*, 85 J. PUB. ECON. 275, 291-92 (2002).

²⁰⁴ See *id.*; see also Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 501 (1995).

²⁰⁵ Hensler & Peterson, *supra* note 170, at 1024; Stier, *supra* note 170, at 919-21.

2. Intraclaimant-Governance Agreements

If we assume that some people are selfish whereas others are fair-minded, that we will sometimes need more than social norms, or that some obligations might be non-proportional and non-reciprocal to the group as a whole, then we might prefer something more definite. But how much more definite? Generally, for an agreement to be legally enforceable, all parties must intend to be bound by it and agree to its material terms, those terms must be sufficiently definite, and the obligation must be mutual.²⁰⁶

This suggests a place at the other end of the extreme for a legally enforceable agreement. Claimants might use such an agreement to designate subgroup representatives, spell out a deliberative decision-making process, and bind plaintiffs through a vote. Deliberation and discussion are, however, necessary antecedents for procedural fairness.²⁰⁷ Ensuring procedural justice through both voice opportunities in shaping the agreement and input and review by the special officer makes it more likely that consenting plaintiffs will adhere to the agreement.²⁰⁸ Those preconditions also facilitate sorting, group formation, and communication. After that, subgroups and superordinate groups could memorialize their commitments to other subgroup members and other plaintiff groups in a legally recognizable way. Plaintiffs desiring what I call an “intraclaimant-governance agreement,” should do so only after hammering out its core details, consulting with their attorneys, and seeking input from the special officer. In short, vesting plaintiffs with this kind of decision-making authority requires highly informed consent.²⁰⁹

Majoritarian alternatives allow litigants to participate in decision-making either directly or through representatives who have clearly articulated fiduciary duties to the represented group.²¹⁰ A representative structure might include plaintiff delegates who, alongside attorneys on a plaintiff’s steering committee, present their “constituents” interests during plaintiff’s consortium meetings and ensure that the attorneys periodically update the group on significant developments.²¹¹ Fiduciary duties combined with the consent of the governed

²⁰⁶ See *Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1002 (D.C. 2008); 1 WILLISTON ON CONTRACTS (4TH) § 3:2.

²⁰⁷ See Musante et al., *supra* note 125, at 237-38; Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL., PUB. POLICY, & L. 211, 243 (2004).

²⁰⁸ See Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUMAN BEHAV. 313, 327-28 (1993).

²⁰⁹ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 3.17(b)(3), (4).

²¹⁰ See Rhode, *supra* note 64, at 1221-25; Shestowsky, *supra* note 207, at 233, 243 (observing that litigants prefer either well-established court rules or ex ante agreed on procedures).

²¹¹ For a general analysis of the costs and benefits of agency in the political context, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV.

legitimize this representative structure; but, as with any principal-agent relationship, they also create the risk of wayward agents.

Like the American Law Institute's alternative procedure for binding litigants,²¹² a formal intraclaimant-governance agreement would require that state legislatures amend Model Rule of Professional Conduct 1.8(g), the aggregate-settlement rule. That rule allows each client to consider her portion of the settlement pie in light of what others would receive and then individually decide to accept or reject the offer.²¹³ An intraclaimant-governance agreement would abrogate only an individual's ability to accept or reject her proceeds. In its place, after considering the entire allocation scheme (or the indivisible remedy), each plaintiff would vote to accept or reject the offer. The outcome would bind all voting plaintiffs regardless of how each voted individually. In the process of discussing and deliberating about how to vote, the group might also propose a counter-offer and specify its core terms. As further considered in the subsequent sections on sanctions and exit, the judge should respect and enforce this arrangement so long as it ensures adequate representation and is fair and reasonable.²¹⁴

Thus far, we have considered how encouraging plaintiffs to communicate can lead them to form groups and develop other-regarding preferences, how using a special officer can enhance the sorting process by filling in informational asymmetries and ensuring adequate representation, and how plaintiffs might then self-govern through various arrangements. These arrangements run the gamut from self-enforcing to formal intraclaimant-governance agreements. Fair procedures in both making and enforcing these agreements increase prosocial behavior, strengthen group commitment, discourage opting out or leaving the group, and enhance the group's authority and legitimacy.²¹⁵

1627 (1999).

²¹² PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, at § 3.17(b).

²¹³ Advanced waiver of conflicts of interest and full knowledge of others' settlement terms departs from standard practice under Model Rules of Professional Conduct 1.8(g). MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2003) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement . . ."); *cf.* *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 514-15 (N.J. 2006) (holding that New Jersey's Rule of Professional Conduct 1.8(g) "prohibits an attorney who represents more than one client from entering into an aggregate settlement of the clients' claims without each client consenting to the settlement after its terms are known"); *see also* Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 403-04 (2008) (examining walk-away provisions and holdout litigants in settlements).

²¹⁴ PRINCIPLES OF THE LAW OF AGGREGATE LITIG., *supra* note 20, §§ 1.05 (c)(1), 3.17(b); *see also infra* notes 247-253 and accompanying text (describing a limited fairness review procedure).

²¹⁵ TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE,

To harmonize the concepts of communication, sorting, and governance, consider a political analogy. In the political realm, healthcare reformers and scientists advocating stem-cell research might support the same presidential contender. Each group shares a common framework – campaigning and voting for a candidate – but does so for unique reasons.²¹⁶ Likewise, each plaintiff subgroup desires a roughly similar end – a judgment against the defendant – but may want different remedies. Once the president wins or a defendant offers to settle, various interest groups then jockey for their own agendas. Although the compatibility inherent in plaintiffs’ initial common framework might lead them to bargain, deliberate, and ultimately develop a shared policy to govern their subsequent deliberations, inter-group compatibility might prove difficult. Hence, as with voting in the political process, the superordinate plaintiff group may need a governance agreement that binds subgroups through a vote. This agreement could employ a weighted voting structure akin to that used by the Electoral College in selecting a President. There, the decennial census reapportions the number of electors allocated to each state.²¹⁷ Similarly, the plaintiffs with the strongest causation or most severe injuries could have a voting block that roughly correlates with their claims’ strength. This would alleviate some concern about a majority of weak claimants voting for and receiving a disproportionately large payout.

D. *When Social Glue Doesn’t Stick*

The previous sections sketched a blueprint for cooperatively litigating together by delineating the theory, methods, and objectives for mitigating the agency and group problems identified in Part I. As such, the blueprint represents an ideal based on realistic parameters. But many obstacles exist that make litigating together more arduous. Two sticking points come to mind: dissimilar personalities and larger group size.²¹⁸ Approaching group dynamics in nonclass aggregation holistically needs nuance and must assess how both

SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 79 (2000) (citing numerous studies supporting these conclusions).

²¹⁶ Michael E. Bratman, *Dynamics of Sociality*, 30 MIDWEST STUD. IN PHIL. 1, 4-5 (2006) (“Such sharing does not require commonality in each agent’s reasons for participating in the sharing We participate for different reasons, but our shared valuing nevertheless establishes a common framework.”).

²¹⁷ See *A Procedural Guide to the Electoral College*, U.S. ELECTORAL COLLEGE, http://www.archives.gov/federal-register/electoral-college/procedural_guide.html (“Each state’s allotment of electors is equal to the number of House members to which it is entitled plus two Senators.”). Another alternative might be a point system like that used for allocating kidneys in the United States. See H. PEYTON YOUNG, EQUITY: IN THEORY AND PRACTICE 27-31 (1994).

²¹⁸ Geographic dispersion similarly adds to the difficulty of cooperation. This topic has, however, already been discussed. See *supra* notes 141-148 and accompanying text.

group size and social and instrumental motivations affect cooperative behavior and moral obligations.²¹⁹ That some people act fair-mindedly and are concerned with equal treatment while others behave selfishly has important consequences for engineering and implementing a framework that diminishes group and agency problems.

Social preferences impact whether litigating together will result in cooperative gains or mutual frustration. In some sense, we are all Janus-faced – at various times we are self-regarding and other-regarding.²²⁰ We are not all homo economicus, nor are we all Mother Theresa; we are a heterogeneous bunch. As contemplated thus far, many of us are motivated by fairness, equal treatment, and reciprocity concerns. We give money to charities and are nice to strangers, but we are also quick to give disapproving glares when someone breaks ahead of us in line. We act with mixed motives that fluctuate depending on social cues and context.²²¹ For example, we all tend toward a norm of distributive fairness, but some of us are truly concerned about achieving fairness, whereas others tend to use the norm for strategic, instrumental reasons to maximize their own outcome.²²²

In addition to variations among social motivations, cooperation negatively correlates with group size.²²³ The larger the group the more anonymous its

²¹⁹ As Tom Tyler and David De Cremer describe: “Instrumental motivations reflect people’s desire to gain material resources and avoid material losses. Social motives, as discussed by psychologists, differ in that they are motivations that flow from within the person, leading to self-regulatory behaviors.” Tom R. Tyler & David De Cremer, *Cooperation in Groups*, in *SOCIAL PSYCHOLOGY AND ECONOMICS* 155, 157 (David De Cremer et al. eds., 2006).

²²⁰ Stout, *supra* note 14, at 22-23.

²²¹ Ostrom, *supra* note 14, at 148; *see also* Eric van Dijk et al., *Social Value Orientations and the Strategic Use of Fairness in Ultimatum Bargaining*, 40 *J. EXPER. SOC. PSYCHOL.* 697, 699 (2004) (classifying individuals into prosocial or proself categories based on six choices and excluding a number of individuals who could not be classified).

²²² *See* van Dijk & De Cremer, *supra* note 44, at 146-47; Paul A.M. Van Lange & D. Michael Kuhlman, *Social Value Orientations and Impressions of Partner’s Honesty and Intelligence: A Test of the Might Versus Morality Effect*, 67 *J. PERSONALITY & SOC. PSYCHOL.* 126, 127 (1994); *see also* Tommy Garling, *Value Priorities, Social Value Orientations and Cooperation in Social Dilemmas*, 38 *BRIT. J. SOC. PSYCHOL.* 397, 397-99 (1999) (finding a relationship between justice and social value orientations); Ostrom, *supra* note 14, at 138 (“A central finding is that the world contains multiple types of individuals, some more willing than others to initiate reciprocity to achieve the benefits of collective action.”).

²²³ *See* Phillip Bonacich et al., *Cooperation and Group Size in the N-Person Prisoner’s Dilemma*, 20 *J. CONFLICT RESOL.* 687, 687-705 (1976); Norbert L. Kerr & Steven E. Bruun, *Dispensability of Member Effort and Group Motivational Losses: Free-Rider Effects*, 44 *J. PERSONALITY & SOC. PSYCHOL.* 78, 78-94 (1983); Norbert L. Kerr, *Illusions of Efficacy: The Effects of Group Size on Perceived Efficacy in Social Dilemmas*, 25 *J. EXPER. SOC.*

members are to one another, the less they tend to develop other-regarding preferences, and the easier it becomes to defect discretely.²²⁴ Although organizational costs increase, even large-scale groups might cooperate if it is possible to reward cooperators and punish defectors.²²⁵ In 1965, Mancur Olson provocatively contended that “unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.”²²⁶ Yet, we see plenty of contrary examples where people elevate communal interests over their own: people volunteer, donate money to charities, help strangers in car accidents, and exhibit other altruistic behaviors.

So far, this Article has focused on factors that affect individuals’ behavior such as social norms, communication, trust in other group members, moral obligations, social values and responsibility, and in-group identity. In the course of litigating together, plaintiffs develop positive other-regarding preferences, act morally, follow through on their promises, and achieve their substantive ends through their joint power. They have opted to bind their fate with others; they have come to the table and collectively shared in the fruits and failings of their joint labor. But there are some leftovers, some discontents, some who partake of the benefits but then try to shirk the burdens.

Olson is thus at least partially right: some self-interested individuals are tempted to free ride in collective-action problems, including those inherent in large-scale litigation. Because we live within a heterogeneous population, self-interested litigants may cooperate only so long as it benefits them.²²⁷ Two mechanisms help lessen the negative externalities of this tendency: (1) as noted, sorting litigants into groups that share ends better aligns personal and collective interests and (2) sanctioning opportunistic defectors may decrease the individual rewards of defecting.²²⁸

Problems with holdouts and outliers can be mitigated or, ironically, exacerbated, to promote substantive and procedural justice through carrots, sticks, and doors. But first a brief caveat: remember that strategic self-

PSYCHOL. 287, 309 (1989).

²²⁴ Dawes, *supra* note 51, at 169; Kollock, *supra* note 126, at 201-02.

²²⁵ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-65 (1971); Dawes, *supra* note 51, at 169 (stating that individuals generally stand more to gain from defecting than cooperating in social dilemmas).

²²⁶ OLSON, *supra* note 225, at 2 (emphasis omitted).

²²⁷ See Ernst Fehr & Herbert Gintis, *Human Motivation and Social Cooperation: Experimental and Analytical Foundations*, 33 ANN. REV. SOCIOLOGY 43, 46 (2007).

²²⁸ *Id.* at 47-48 (finding that, in public-goods games, giving subjects an opportunity to punish other group members resulted in nearly all members cooperating and allocating to the public good, whereas, in the same experiment without the punishment mechanism, roughly fifty-five percent of the subjects contributed nothing).

interested plaintiffs are not the only ones who wish to defect or remain outside the group. Plaintiffs may refuse to join the group or want to leave for legitimate reasons. The money offered might not be enough to cover doctor's visits, hospital bills, or funeral expenses. Or they might prefer extra-legal objectives like educating the public or forcing defendants to change their marketing or labeling practices. The problem may thus be a function of improper sorting. Or, despite proper sorting, defendants may condition their offers on unanimous or nearly unanimous consent such that some subgroups must compromise.

This is the principal disparity between class litigation and nonclass litigation: in nonclass litigation, the plaintiffs care enough to hire their own attorneys. They are neither nameless nor faceless, but camouflaged in a sea of others with similar complaints. Granted, some will care more than others and the litigation may attract gadflies with little or no injury who want an easy paycheck. In the class context, on the other hand, class members may be oblivious to or ambivalent about the litigation. The point is that not all holdouts withhold consent for selfish, opportunistic, or illegitimate reasons. This fact matters when we consider incentives for attracting outliers into the group, the effects of informal and structural sanctions on illegitimate and opportunistic behavior, and the availability of exit opportunities.²²⁹

1. Carrots for Outliers

Consider first why carrots might appeal to outliers. As explained, courts and communities of plaintiffs cannot bind outliers through hypothetical consent or some metaphysical construction of political commitments. Because they have not joined the group, any presumed cohesion remains speculative and fictitious. Yet, outliers may not remain in the shadows forever. Rather, they might decide to join the community if it offers them incentives.²³⁰ Because these incentives are now well known, I'll mention them only briefly here. First, typical incentives include sharing information, splitting discovery costs, retaining expert witnesses, developing the science to prove causation, and orchestrating jury focus groups and mock trials.²³¹ Second, plaintiffs litigating collaboratively bring together various attorneys, each with talents and expertise that range from negotiating to trying cases. Third, plaintiffs may

²²⁹ See Messick & Brewer, *supra* note 126, at 11-44; Shinada & Yamagishi, *supra* note 54, at 95.

²³⁰ See, e.g., GREEN, *supra* note 36, at 240-41 (discussing the benefits of multidistrict consolidation, such as efficiency and sharing of resources).

²³¹ See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 388 (2000) (stating that attorneys litigating "similar claims against a common defendant . . . benefit greatly from teamwork"); Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 5 (1982); Stier, *supra* note 170, at 896-910.

benefit directly from the chance to discuss their experiences with one another, tell their stories, and express anger and grief.²³² Finally, and perhaps most importantly, litigating with other plaintiffs overcomes the David versus Goliath effect.

In sum, ample incentives already exist to entice outliers into the group's fold. But if, despite these incentives, outliers want no part of group membership, then the system should allow them to remain autonomous and stay outside the group. Neither the historical development of group litigation nor current class-action theory justifies binding them. After all, the right to sue for tort claims is held individually and obligations of solidarity or membership arise only after plaintiffs define the membership through their voluntary associations.²³³ As I explore below, allowing adamant outliers to remain autonomous provides an important check on substantive fairness. Dissenting, in essence, enables them to play the role an objector would in a class action.

2. Sticks for Holdouts

Sticks – internal social sanctions or external structural sanctions – diminish the strategic holdout problem. In particular, sanctions should be aimed at individuals who have joined the group, received its benefits, made promises to the group as a whole, but then act to its detriment by engaging in strategic, opportunistic behavior for selfish purposes.

Groups opting for self-enforcing arrangements tend to police them through internal, group-based social sanctions. Social sanctioning draws its force from moral obligations and social norms, thus the coercive aspect comes from group members themselves. For instance, the least cooperative member might be alienated, peer pressured, confronted, and gossiped about.²³⁴ Should a potential holdout act selfishly and threaten the group's welfare, that action

²³² See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 106 (1988) (reasoning that opportunity to express one's views is critical to procedural fairness perceptions).

²³³ This is the principal break from Michael Sandel's version of communitarianism. Plaintiffs' voluntary associations can be captured, at least initially, through the liberal ethic of consent. See SANDEL, *supra* note 84, at 241; Burch, *supra* note 82, at 907.

²³⁴ PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* 47 (1964); Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in *SOCIAL NORMS* 35, 37 (Michael Hechter & Karl-Dieter Opp eds., 2001); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 *NATURE* 137, 137-140 (2002) ("[C]ooperation flourishes if altruistic punishment is possible, and breaks down if it is ruled out."); Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 *AM. ECON. REV.* 980, 980-94 (2000); Sally Engle Merry, *Rethinking Gossip and Scandal*, in *TOWARD A GENERAL THEORY OF SOCIAL CONTROL* 271, 284-86 (Donald Black ed., 1984).

would invite spite, disapproval, and ostracism.²³⁵ Consider, for example, the extreme emotions that subjects demonstrate in a classic *experimental* social-dilemma setting:

Comments such as, “If you defect on the rest of us, you’re going to have to live with it the rest of your life,” were not at all uncommon. Nor was it unusual for people to wish to leave the experimental building by the back door, to claim that they did not wish to see the “sons of bitches” who doublecrossed them, to become extremely angry at other subjects, or to become tearful.²³⁶

As noted, group members regularly promise each other that they will cooperate.²³⁷ If close-knit group members contemplate violating these commitment norms or breaking their promises, then social sanctioning may effectively deter or punish them.²³⁸ Sanctioning changes the calculus, even for self-interested individuals. Rather than acting on a quick monetary cost-benefit analysis, they will have to factor in social costs, the lack of future reciprocity, and possible reputational damage.

Because social sanctions rely on our sociality, they tend to be less effective in groups that are loosely constituted or merely procedurally aggregated. Group solidarity is more likely in litigation with little geographic dispersion where plaintiffs interact face-to-face during both group discussion and everyday activities. Of course, large-scale litigation routinely takes years to resolve. So, even interacting during litigation allows plaintiffs to form groups, establish community norms, and chastise norm-violators.²³⁹ In short, the more cohesive the group, the more likely it is to self-regulate.²⁴⁰

Social sanctioning is less effective when communicated outside of face-to-face interaction.²⁴¹ Thus, in geographically dispersed, large-scale litigation,

²³⁵ Stout, *supra* note 14, at 31-32.

²³⁶ Robyn Dawes et al., *Behavior, Communication, and Assumptions About Other People’s Behavior in a Commons Dilemma Situation*, 35 J. PERSONALITY & SOC. PSYCHOL. 1, 7 (1977), reprinted in RATIONALITY AND SOCIAL RESPONSIBILITY: ESSAYS IN HONOR OF ROBYN MASON DAWES 345, 355 (2008).

²³⁷ See Norbert L. Kerr, *Anonymity and Social Control in Social Dilemmas*, in RESOLVING SOCIAL DILEMMAS 103, 105 (Margaret Foddy et al. eds., 1999).

²³⁸ See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 208-10, 225-29, 230-33 (1991).

²³⁹ OSTROM, *supra* note 172, at 171.

²⁴⁰ See Posner, *supra* note 195, at 155.

²⁴¹ See OSTROM, *supra* note 172, at 171; Dawes, *supra* note 236, at 1 (“Results showed defection significantly higher in the no-communication and irrelevant-communication conditions than in relevant-communication and relevant-communication plus roll call condition.”); Ostrom, *supra* note 140, at 410-11; Shinada & Yamagishi, *supra* note 54, at 110; Abigail Barr, *Social Dilemmas and Shame-Based Sanctions: Experimental Results from Rural Zimbabwe* 13-14 (Ctr. for the Study of African Econs., Working Paper No. 149,

where sustained face-to-face interaction is not feasible and there is less communication, higher levels of anonymity, and perhaps lower group solidarity, institutional sanctioning through the judicial system may be a better fit. To ensure that institutional sanctions are available, however, plaintiffs need a formal, intraclaimant-governance agreement. A sanctioning scenario might unfold like this: (1) defendant offers to settle, (2) the relevant plaintiffs' group or subgroup votes in accordance with their outlined agreement, (3) the vote garners the prescribed majority, and (4) dissatisfied minority members initiate other lawsuits to either attack the majority result directly or sue the defendant again.²⁴² The group's remedy is then to intervene in the collateral attack, sue for breach of contract, or request an injunction or a stay.

In general, people are more willing to establish and fund sanctioning systems in larger groups than smaller ones, and increased group size tends to positively correlate with cooperation when sanctioning opportunities exist.²⁴³ Yet, there are several potential drawbacks to institutional sanctioning: the time it takes to achieve initial agreement and to reduce that agreement to specific contractual terms; enforcement expense; and settlement delay. Plaintiffs could avoid some expense and delay by including an exclusive forum-selection clause that designates their current forum. This does not, however, avoid the cost of additional attorneys' fees, litigation expenses, and some settlement delay. These punishment costs may exceed any benefits gained from a cooperative boost.²⁴⁴ Moreover, recall that the threat of ex ante legal sanctions

2001), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1150&context=c-sae> (“[I]n those communities where individuals are more willing to criticise non-cooperators and less interested in criticising cooperators in order to save face, more cooperative outcomes result.”).

²⁴² As explored shortly, a limited judicial fairness review provides a legitimate outlet for minority dissenters to challenge the settlement. See *infra* notes 247-252 and accompanying text.

²⁴³ See, e.g., T. Yamagishi, *Group Size and the Provision of a Sanctioning System in a Social Dilemma*, in *SOCIAL DILEMMA: THEORETICAL ISSUES AND RESEARCH FINDINGS* 267, 267-87 (W.B.G. Liebrand et al. eds., 1992). Such studies are, however, conducted principally in public-goods dilemmas (as opposed to common-pool dilemmas) and thus employ a give frame rather than a take frame. Public-goods problems tend to trigger loss aversion and less cooperation than commons dilemmas (take frames), which more closely approximate the situation in large-scale litigation. In commons dilemmas, reward systems tend to elicit greater cooperation than sanctions. See Christopher McCusker & Peter J. Carnevale, *Framing in Resource Dilemmas: Loss Aversion and the Moderating Effects of Sanctions*, 61 *ORG. BEHAV. & HUM. DECISION PROCESSES* 190, 197-98 (1995). For an explanation of how non-class aggregation relates to common pool dilemmas, see *supra* notes 51-52 and accompanying text.

²⁴⁴ See, e.g., Olivier Bochet et al., *Communication and Punishment in Voluntary Contribution Experiments*, 60 *J. ECON. BEHAV. & ORG.* 11 (2006) (finding through experimentation that punishments increase contributions to public good but have little net

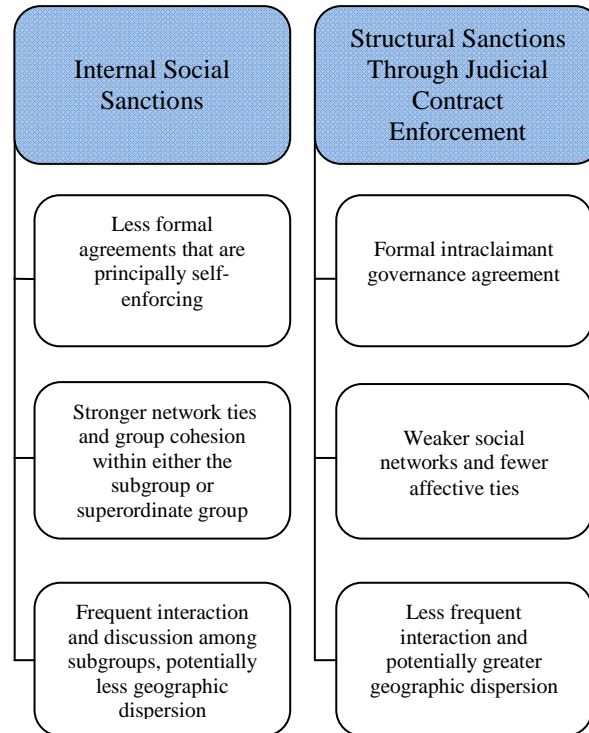
may undermine voluntary cooperation where reciprocity and reputational sanctions would otherwise encourage self-governance.²⁴⁵ Further, psychologists contend that structural sanctions have negative psychological effects, destroy intrinsic motivation for cooperation, lessen any sense of community, and decrease trust; thus, the more we use them, the more we need them.²⁴⁶ Yet, the less interaction plaintiffs have, the fewer their opportunities for social sanctioning and the greater the need for structural solutions.

In sum, the potential for informal, internal social sanctions and structural sanctions through judicial enforcement suggests two rough models:

effect on efficiency because of high costs).

²⁴⁵ Scott, *supra* note 195, at 1689-90 (citing Ernst Fehr & Gächter, *Do Incentive Contracts Undermine Voluntary Cooperation?* (Inst. for Empirical Res. in Econ., Univ. of Zurich, Working Paper No. 34, 2002), available at <http://www.iew.unizh.ch/wp/iewwp034.pdf> (suggesting “that explicit incentives may have costly side effects”); *supra* notes 194-195 and accompanying text.

²⁴⁶ Shinada & Yamagishi, *supra* note 54, at 112-13 (surveying a number of research experiments on “The Dark Side of Sanctions”). See generally MICHAEL TAYLOR, ANARCHY AND COOPERATION (1976) (examining the effects on public goods of strong centralized states as opposed to anarchy); Mark R. Lepper et al., *Undermining Children’s Intrinsic Interest with Extrinsic Reward: A Test of the “Overjustification” Hypothesis*, 28 J. PERSONALITY & SOC. PSYCHOL. 129 (1973).



At the risk of oversimplifying a spectrum of agreements and sanctions into a dichotomous relationship, these models illustrate two possibilities. First, where plaintiffs routinely interact face-to-face or stay in touch after meeting one another, either on a superordinate or subgroup level, less formal arrangements (such as agreements to agree and promises) may sufficiently glue the group together and deter strategic holdouts. The group self-polices through social sanctions. Second, where plaintiffs interact less and principally rely on designated representatives to act on their behalf, social sanctioning has less punitive force. Accordingly, these plaintiffs may prefer, in the long run, the hassle of expounding and engineering a formal intraclaimant-governance agreement that memorializes their rights and obligations to one another. If a plaintiff then breaches the agreement, the remaining group members have legal recourse through the judicial system.

3. Doors as Signals and Exit as a Safety Valve

Whether these sanctioning mechanisms should apply to plaintiffs who have acted in good faith but find that their litigation ends are incompatible with the group's litigation ends is a tougher question. Ideally, this should be part of the sorting process where plaintiffs specify their ends and align themselves with others whose ends and injuries mesh with their own. Once this occurs and

plaintiffs then agree to a collective decision-making arrangement, they should be compelled – through social or structural sanctions – to remain part of their group.

My principal interest here, however, is when the legal system should enforce plaintiffs' obligations, which means they must have an intraclaimant-governance agreement in place. In that case, if plaintiffs claim that the agreement is unfair, they are entitled to a limited judicial fairness review.²⁴⁷ Remember that plaintiffs haven't consented to a contract's actual substantive terms, but rather to a process that then binds them to the substantive terms. Because of this and because the government has a legitimate interest in refusing to enforce terms that are harmful or exploitative, judges should conduct a limited fairness review before enforcing an intraclaimant-governance agreement.²⁴⁸

To defer to plaintiffs' decision-making autonomy, this limited fairness review should proceed in two steps.²⁴⁹ First, the settlement proponents must prove that the process was fair. During this process-dependent check, the judge examines the process used to sort plaintiffs, ensures that plaintiffs gave fully informed consent to the agreement, and that the attorneys adequately represented plaintiffs.²⁵⁰ Put simply, the judge considers the agreement's voluntary character and whether plaintiffs freely consented to it. Once the proponents establish that the process was fair, this creates a rebuttable presumption that the agreement should be enforced. Second, the burden then shifts to the challengers to prove that the settlement's substantive terms are overtly unfair, such as settling a wrongful death claim for peanuts or vastly overcompensating weak claims.²⁵¹ Accordingly, the judge conducts a content-

²⁴⁷ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.18(a) (2010) ("Any claimant who is subject to a settlement . . . is entitled . . . to challenge the settlement on the grounds that the settlement . . . is not procedurally and substantively fair . . .").

²⁴⁸ See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 224 (2000) (arguing that the unconscionability doctrine is not paternalistic because the government has an interest in refusing to put its stamp of approval on an agreement that is "harmful, exploitative, or immoral").

²⁴⁹ For a detailed account of this fairness review, see *Group Consensus, Individual Consent*, *supra* note 13, at 22-25.

²⁵⁰ The American Law Institute suggests that judges consider:

[T]he timing of the agreement, the sophistication of the claimants, the information disclosed to the claimants, whether the terms of the settlement were reviewed by a neutral or special master as defined in § 3.09(a)(2), whether the claimants have some prior common relationship, and whether the claims of the claimants are similar.

PRINCIPLES OF THE LAW OF AGGREGATE LITIG., § 3.17(d) (2010). Section 3.18(a) also refers to section 3.17(d).

²⁵¹ The American Law Institute proposes that judges consider "the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and whether

dependent check with a light touch. In general, if the process is fair, then a vote's outcome is likely the product of community consensus about the right thing to do and the judge should take care not to second-guess those decisions.

If, however, the process-dependent check reveals tainted consent or some other process-based defect, then the burden remains with the settlement proponents to demonstrate substantive fairness. The judge would then conduct her content-dependent check of the settlement's substantive terms with increased rigor. What makes an agreement fair isn't just that plaintiffs voluntarily agree to the process that produces it, but that the process produces fair results. Thus, conducting a fairness review as a two-step inquiry maintains a delicate balance. On one hand, it prevents the judge from simply substituting her own judgment about "the right thing to do" for the group's, and thereby preserves the claims of the community and decision-making autonomy. On the other hand, it also promotes procedural fairness and maintains institutional integrity.

Even so, exit and rumblings about exit may perform an important signaling function.²⁵² Thus far, voice has taken center-stage. One complement to this system might be the ability to flee: to exit the process entirely by allowing the individual or subgroup to maintain an independent action. Yet, this option rarely exists in current practice because of both the central-planner model of aggregation, where litigation proceeds collectively, and settlements designed to deter opt outs.

Still, envision for a moment securities class actions where opting out has become de rigueur. There, more and more class members vote with their feet and thereby signal that the deal is unattractive.²⁵³ This observation suggests two thoughts, one applicable to this litigating-together approach, and one that may commend a drastic restructuring of present practice. First, the more modest thought: plaintiffs strongly desiring to exit their group or subgroups struggling to pull away from the superordinate group may signal a problem with substantive or procedural fairness. Investigating what caused the signal could trigger the special officer or judge to reevaluate a particular decision, further clarify or explain the bargaining and negotiating process that produced the decision, or sanction opportunistic or illegitimate behavior. The ambitious thought entails rethinking the central-planning model and all of its trappings – the All Writs Act, Anti-Injunction Act, preclusion doctrines, and abstention doctrines. Taking exit seriously means allowing plaintiffs with fundamental differences over which ends to pursue and how to pursue them either to avoid initial aggregation with disparate-minded plaintiffs or to exit aggregation when

particular claimants are disadvantaged by the settlement considered as a whole." *Id.* § 3.17(e).

²⁵² See Issacharoff, *Class Action Conflicts*, *supra* note 8, at 833.

²⁵³ John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice"*, 30 CARDOZO L. REV. 407, 425-29 (2008).

conflicts over significant issues or ends arise. Given its wide-ranging impact, I am content for now to raise this alternative as food for future thought.

IV. APPLICATIONS OF AND SPILLOVERS FROM LITIGATING TOGETHER

This final Part brings us full-circle to pull together some loose ends, underscore the real-world impact, and explain how the spillovers from enabling plaintiffs to specify and pursue their litigation objectives together diminish agency, group, and procedural-justice problems. Thus far, this Article has reframed a systemic dilemma to find a workable procedural framework that is tethered to its moorings in substantive law, morality, and procedural justice. What's left then is applying that framework pragmatically. Accordingly, this Part first considers an economic problem that hinders plaintiffs in pursuing their litigation goals, contemplates how litigating together impacts process-based ends, and applies this approach by considering how it might have worked in the Vioxx litigation.

A. *The Economic Disjunction*

First, consider a critical economic problem – that plaintiffs' attorneys have little incentive to bring claims on behalf of plaintiffs who want something other than monetary remedies. If the studies by Relis and Hadfield are right – that litigants aren't always in it just for the money but for extra-legal objectives like promoting change and accountability, educating the public, and receiving judgments of accountability and apologies²⁵⁴ – then we have a serious economic disjunction. Although plaintiffs' personal-injury and product-liability claims tend to be independently economically viable, the first few cases are extraordinarily expensive to litigate. One plaintiffs' lawyer estimated that initial cases cost between \$1 million and \$1.5 million to develop.²⁵⁵ But once the litigation machine is up and running, the attorneys turn their collective wisdom into trial packages so that others can litigate similar cases for around \$200,000.²⁵⁶ Attorneys have to recoup these costs somehow. Their current incentive is the contingency fee. After spending around \$100 million developing the Vioxx litigation and setting for \$4.85 billion, plaintiffs' lawyers received approximately \$1.5 billion in fees.²⁵⁷ What this means for plaintiffs, however, is that there is little room for them to litigate on principal. Even the

²⁵⁴ See Relis, *supra* note 55, at 744 (concluding that there is an “ideological dissonance that exists between how plaintiffs and the justice system, through its actors, view disputes”); Hadfield, *supra* note 58, at 649 (“[L]itigation represents more to some potential litigants than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community.”).

²⁵⁵ Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES, Nov. 17, 2007, at C1.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

purest-hearted attorney crusader may be hard pressed to justify spending that much money on principle.

The implications of this economic disjunction reach further than I can fully address in this Article, but I offer a few initial thoughts and requests for additional research. First, we need additional data. Relis studied medical injuries and Hadfield studied September 11 litigants.²⁵⁸ These studies replicate anecdotal evidence from Vioxx litigants, but further studies are needed. Second, we need to have frank conversations about whether judicially litigating mass-tort claims is the right way to regulate. Although I prefer a cadre of private attorneys' general to agency action or inaction, this debate continues, particularly in the preemption literature.²⁵⁹ Finally, if I am right about this – and many would disagree – then Congress should enact a fee-shifting statute akin to those in civil-rights litigation.²⁶⁰ These statutes require losing defendants to pay “reasonable” plaintiffs' attorneys' fees. They would thus incentivize attorneys to give voice to plaintiffs who see their litigation experience as one that furthers public discourse, educates the public, prompts corporate changes, and promotes communal civic values.²⁶¹

Still, even under current practice, this litigating-together approach prompts some changes in this direction. No longer can plaintiffs' attorneys act independently; by specifying their litigation aims and working collaboratively, plaintiffs have the ability to monitor their attorneys and see to it that their interests roughly align. And yet, this alternative offers attorneys peace of mind by lessening the ambiguity inherent in multiple-client representation, the potential for a legal malpractice claim, and the possible reputational harm from dissatisfied clients. If, as some suspect, conflicts of interest are “the greatest source of legal malpractice,”²⁶² then better sorting, a special officer's

²⁵⁸ See Hadfield, *supra* note 58; Relis, *supra* note 55. For references to other studies, see *supra* note 57 (listing articles studying plaintiffs' “extra-legal objectives”).

²⁵⁹ See generally Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517 (2008) (detailing the author's skepticism about corporate fear of regulating agencies).

²⁶⁰ I thank Richard Nagareda for pointing this out to me.

²⁶¹ For examples of civil rights statutes that require losing defendants to pay “reasonable” plaintiffs' attorneys fees, see the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); and the Americans with Disabilities Act, 42 U.S.C. § 12205. For examples of other statutes promoting the public interest that also permit fee-shifting, see the Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B), (g)(3)(B) (2006); the Government in the Sunshine Act, 5 U.S.C. § 552b(i); the Equal Access to Justice Act, 28 U.S.C. §§ 2412(b), 2412(d) (2006); and the Clean Air Act, 42 U.S.C. § 7607(f) (2006).

²⁶² Peter Szendro, *Legal Malpractice – Pitfalls and Solutions*, 609 PLI/LIT. 325, 330 (1999).

“blessing,” and truly informed consent through plaintiff education should alleviate both ambiguity and malpractice concerns.²⁶³

B. *Facilitating Process-Based Ends*

This litigating-together approach also impacts process. The process litigants use to achieve substantive justice is one way to specify abstract systemic ends as more concrete. Accordingly, I call these sub-ends “process-based ends,” because they potentially distort or further litigants’ substantive pursuits of justice. My particular concern is for two process-based ends: (1) procedural justice, defined as a fair means for applying legal norms and resolution procedures in a way that psychologically satisfies litigants;²⁶⁴ and (2) equitable allocation of divisible remedies (such as money) and majority consensus for relief that includes indivisible remedies (such as declaratory or injunctive relief).²⁶⁵

First, remember that procedural justice’s primary components include: the adversarial process; opportunities for voice and participation; impartial, nonbiased decision makers; and mechanisms for error correction, the use of precedent, and equitable error distribution.²⁶⁶ Yet, in mass litigation, the judge’s role tends to change from arbiter to inquisitor and she has ample self-interest in promoting settlement. Although settlement typically trades error-correction mechanisms for consent, the coercive aspects of tainted consent and fractured agency relationships in mass litigation corrupt this exchange.²⁶⁷ Finally, claimants vastly outnumber the judge, which makes voice and participation opportunities scarce. Because plaintiffs currently participate

²⁶³ See Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982) (“One of the most fertile sources of confusion has been the rules dealing with multiple representation of clients with conflicting interests.”); Szendro, *supra* note 262, at 330; *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1247 (1981) (“From 1908 to the present, the lawyer with conflicting interests has provided bench and bar with one of the toughest problems in legal ethics.”).

²⁶⁴ *Procedural Justice*, *supra* note 5, at 8; Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004). Most empirical studies on bipolar litigation demonstrate that cost and delay do not significantly affect litigants’ procedural fairness opinions. See Burch, *supra* note 25, at 34-35 (examining studies on the effect of cost and delay on litigants’ judgments of fairness).

²⁶⁵ As defined by the American Law Institute, divisible remedies “entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant,” whereas indivisible remedies are remedies where “the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.” PRINCIPLES OF THE LAW OF AGGREGATE LITIG., § 2.04(a), (b) (2010).

²⁶⁶ See *supra* note 25 and accompanying text.

²⁶⁷ See *Procedural Justice*, *supra* note 5, at 35-37.

through their attorneys, both communication and agency problems further plague these already limited opportunities.²⁶⁸

Second, trying to achieve equitable allocation for divisible remedies and consensus for indivisible ones raises other concerns.²⁶⁹ As detailed in Part I, these obstacles include standard agency and group problems. In particular, strategic holdouts and the temptation for attorneys to allocate resources based on their own self-interest (i.e., overpaying weak injuries to attract additional clients or paying less to those requiring a referral fee) afflict the allocation process.²⁷⁰

This Article's litigating-together approach promises to lessen the barriers to attaining these process-based ends and sits well (at least in most respects) with a pragmatic approach to mass torts. It arms plaintiffs with special officers, communication, proper sorting, deliberative decision-making, problem-solving opportunities, and collective decision-making arrangements. It also firmly ties these practices to the theoretical framework outlined in *Litigating Groups* and recounted here. To explain, consider how litigating together might change the Vioxx litigation. Recall that critics contended that the settlement was a product of tainted consent because it: (1) required each plaintiffs' attorney to recommend the deal to 100% of her clients and withdraw from representing those who refused, (2) allowed Merck to walk-away from the deal and pay no one (including plaintiffs' attorneys) without consent of 85% of the claimants, and (3) forced those who refused the deal to continue litigating before Judge Fallon (who pushed for a settlement from the beginning).²⁷¹ Admittedly, examining the Vioxx litigation requires a good bit of speculation and imagination because we lack the information that would emerge during plaintiffs' discussions. Moreover, it focuses on the meta-approach discussed here rather than delving into the specifics of establishing scientific causation, discovery, and negotiations. Nevertheless, it provides a concrete example of

²⁶⁸ See *id.* at 40 (“[T]he efficacy of counsel positively correlates with procedural fairness judgments.”); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988) (“Lawyers . . . do influence their clients to some extent, whether they want to or not.”); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997).

²⁶⁹ Although a group principally seeking an indivisible remedy is more likely to be certified as a Rule 23(b)(1) or 23(b)(2) class and thus less likely to fall within the realm of nonclass aggregation, litigants seeking divisible relief may also request an indivisible remedy.

²⁷⁰ See *Litigating Groups*, *supra* note 5, at 12-16; Paul H. Edelman, Richard A. Nagareda & Charles Silver, *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95, 100 (2006).

²⁷¹ Vioxx Settlement Agreement, *supra* note 1; see also Richard A. Nagareda, *Embedded Aggregation in Civil Litigation* 49-52 (Vanderbilt Univ. Law Sch., Working Paper No. 09-24, 2009), available at <http://ssrn.com/abstract=1506460> (examining the settlement of the Vioxx litigation using contracts with plaintiffs' law firms).

how litigating together might work in large-scale, geographically dispersed litigation.

C. *Reconsidering Vioxx*

Vioxx users alleged that the drug caused heart attacks, ischemic strokes, and sudden cardiac death and that Merck should have known about the drug's dangers and adequately warned them about its risks. Eventually, around forty-nine thousand plaintiffs sued, alleged myriad causes of action, and requested damages that ran the gamut from medical costs, to lost wages, to pain and suffering, to medical monitoring, to punitive damages. But the litigation started more modestly, with several thousand lawsuits consolidated through multi-district litigation before Judge Fallon.

After multi-district transfer, under this litigating-together approach several things should happen. First, Judge Fallon should request preliminary reports on the common issues as well as the principal legal and factual claims.²⁷² This provides some time for plaintiffs to file – and the Multi-District Litigation Panel to transfer – tag-along cases. Second, before appointing lead attorneys, Judge Fallon should appoint a special officer. Third, after notifying the attorneys and publicizing the meetings, the special officer would hold a series of regional meetings over several weeks with both plaintiffs and their attorneys.

Depending on the number of people present, these meetings might range from intimate gatherings to the large town-hall meetings seen in debates over health-care reform. The special officer should explain her role, introduce the attorneys present, and note the requested remedies and potential hurdles to liability (such as problems with general and specific causation). She should also explain that the meeting's purpose is to solicit feedback from claimants, ensure adequate representation, and help them sort into groups with others who share their aims and injuries. Plaintiffs should then be given some time to talk with one another and to collectively discuss their litigation objectives.

Discussion can foster a sense of community, particularly when it allows the plaintiffs to tell their stories, share their hardship, and talk about what should be done. Vioxx plaintiffs wanted to educate the public about problems with both Vioxx and other drugs, form alliances with consumer protection and health organizations to promote systemic change, receive compensation for their injuries, and have their injuries monitored through a medical monitoring

²⁷² It generally takes a while for the Multi-District Litigation Panel to pick a judge, transfer those cases to that judge, and for that judge to then request and receive preliminary reports, affiliated counsel and companies, pending motions, and summaries of similar litigation pending in state courts. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.61 (2004); see also *Current Developments*, MDL-1657 VIOXX PRODUCTS LIABILITY LITIGATION, <http://vioxx.laed.uscourts.gov/> (last updated Oct. 19, 2010) (providing a timeline with links to minute orders and current developments).

program.²⁷³ Because plaintiffs do not always know what is feasible or which remedies are available, the special officer should help them translate their overarching litigation aims into concrete, legal remedies. For instance, plaintiffs might express their desires for judgments of wrongdoing by requesting punitive damages and further their quest for public education by making discovery documents public.

This information-exchange does several things. It provides the information that everyone involved needs about preference intensities, injury variation, and litigation ends. This enables the claimants themselves to begin to self-sort, with oversight from the special officer and their attorneys. It also serves as a proxy for court-based participation.²⁷⁴ In this sense, process is justice.²⁷⁵ These voice opportunities help assuage concerns about individual dignity, transparency (at least from within the litigation itself), and participation.²⁷⁶ Plaintiffs will have more information about the litigation process, the decisions being made on their behalf, and the legal strength of their claims. Discussing which ends to pursue and further specifying those ends together as legal remedies allows: (1) plaintiffs to associate with like-minded others who share claims and ends and (2) plaintiffs, their attorneys, and the special officer to determine collaboratively whether the attorney can continue to adequately represent them. Cohesive groups empowered with this information can better monitor the attorneys, which mitigates most attorney-client agency problems.

After their attorneys and the special officer help sort Vioxx plaintiffs into categories based on their desired remedies, injuries, or other central issues that pose unique dividing lines,²⁷⁷ several things might follow. First, plaintiffs with related aims and injuries might file a single complaint to avoid the complications that an overarching consolidated complaint would create. Second, to help ensure adequate representation, Judge Fallon should appoint lead plaintiffs' attorneys based on these categories. Third, those attorneys and the special officer should design and implement means for plaintiffs to

²⁷³ See, e.g., Alex Berenson, *In First of Many Vioxx Cases, a Texas Widow Prepares to Take the Stand*, N.Y. TIMES, July 13, 2005, at C1; Gardiner Harris, *F.D.A. Official Admits 'Lapses' on Vioxx*, N.Y. TIMES, Mar. 2, 2005, at A15; E-mail from Al Pennington, Moderator of the Merck Settlement Grp., to Elizabeth Chamblee Burch, Assistant Professor of Law, Fla. State Univ. Coll. of Law (Oct. 20, 2008, 01:22 AM) (on file with author).

²⁷⁴ See TYLER & BLADER, *supra* note 215, at 79, 85-86.

²⁷⁵ See Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 39 (2002).

²⁷⁶ See Musante et al., *supra* note 125, at 223, 237-38 ("Regardless of role in a dispute, the opportunity to exercise control through the selection of a decision rule (no matter what the rule) resulted in enhanced evaluations of all aspects of the trial experience.").

²⁷⁷ For example, in the Vioxx litigation, plaintiffs attempted to certify a nationwide class or, alternatively, state-specific class actions.

communicate with each other within their category, across categories, and with their attorneys. Options include modern technology, such as discussion groups through Yahoo or Google, Facebook groups, or traditional face-to-face meetings. Using these means, plaintiffs within the categories might nominate and select plaintiff representatives to accompany the appointed attorneys. This makes genuine participation in collective decision-making feasible.²⁷⁸

Given their size and geographic dispersion, an intraclaimant-governance agreement would likely be the best option. Plaintiffs could either discuss this possibility after sorting themselves into more cohesive groups during their initial regional meeting or wait until they have selected representatives. Although the agreement should ultimately be a product of bargaining, arguing, and deliberating between the plaintiffs, where attorneys then draft the agreement's core components, here are a few design options that they might consider along with the benefits and drawbacks:

Design Option 1 – Overarching Agreement with a Simple-Majority Vote:

To simplify the numbers, let's assume there are 100 claimants rather than 49,000. Say that plaintiffs agree that 30 of them have strong claims – severe injuries with few genetic predispositions or complicating factors that could make causation difficult. All 100 agree to a simple majoritarian voting procedure that requires a 51% majority without any discussion.

This design has a very real potential to disadvantage those with the strongest claims and the most litigating power. Fifty-one of the weaker claimants could vote to accept a settlement offer that overcompensated them and vastly discounted the stronger claims. In fact, something similar happened in Combustion Engineering's asbestos-related reorganization plan.²⁷⁹ Under § 524(g) of the Bankruptcy Code, a seventy-five percent majority vote could bind all present and future asbestos claims, regardless of which plaintiffs' firm represented them, and thus deliver the finality needed to obtain future business funding.²⁸⁰ Leaving nothing to chance, the company hired Joseph Rice, a prominent asbestos plaintiffs' attorney, to garner the requisite votes.²⁸¹ To put the matter indelicately, the voting pool was diluted with weak claims to gerrymander the requisite vote at the expense of future claimants and people with serious injuries.²⁸²

²⁷⁸ On the problem of deliberative economy, see John S. Dryzek, *Legitimacy and Economy in Deliberative Democracy*, 29 POL. THEORY 651 (2001).

²⁷⁹ *In re Combustion Eng'g*, 391 F.3d 190, 203-08 (3d Cir. 2004).

²⁸⁰ 11 U.S.C. § 524(g) (2006); NAGAREDA, *supra* note 9, at 168-73.

²⁸¹ NAGAREDA, *supra* note 9, at 169.

²⁸² *Id.* at 170-73 (“[A] voting majority can be made to consist of non-malignant claimants whose interests may be adverse to those claimants with more severe injuries.” (quoting *Combustion Eng'g*, 391 F.3d at 244)).

Better, fairer designs exist. The Vioxx plaintiffs created a credible threat to Merck in part through sheer numbers and in part through strong claims. Thus, plaintiffs could tinker with their settlement design by combining one or more variables: (1) the required majority (say, seventy-five percent instead of fifty-one percent), (2) weighting votes (proportional voting based on claim strength), and (3) deliberating before voting.

If approximately forty percent of litigants are principally concerned with extra-legal objectives like educating the public and wanting to prevent future calamities, and their subgroup's litigating power is strong enough, they might prefer to go their separate ways. Yet, current aggregation and settlement practices impede that option. These subgroups thus face three key decisions: (1) how to make decisions within their subgroup, (2) how to bargain and negotiate with other subgroups or the superordinate group to effectuate their litigation ends, and (3) how to allocate authority among the various groups and negotiate with one another when confronted with a decision that affects them all (such as a settlement offer).

Design Option 2 – Agreements Governing Each Subgroup: Each subgroup might design its own collective governance arrangement. Under the current system, however, this poses a few problems. First, the economic disjunction lessens the possibility that attorneys will represent plaintiffs suing purely on principle unless that principle translates into punitive damages. Second, the central-planning model makes maintaining truly separate litigation unfeasible. Third, isolation from other groups can lead to group polarization. And finally, the defendant can offer to settle on whatever terms it wishes, which may cut across any pre-existing lines. This means that each group will ultimately have to determine whether to accept or reject the offer, but may lack the benefit of deliberation across subgroups. On the positive side, if a subgroup is strong enough, it may be able to bargain with the defendant independently and thus enable those litigants to pursue their desired litigation ends. Because their claims are not certified as a class action, a subsequent settlement would not preclude (or further) others' litigation aims.

Design Option 3 – Deliberation followed by Overarching Supermajority Vote: Assume the same thirty people have strong claims, but the group designs its governance agreement so that it requires deliberation among and between subgroups (here, just the two – the thirty stronger claims and the seventy weaker ones). In addition, the settlement must be approved by a seventy-five percent overarching supermajority.

Design Option 4 – Deliberation Followed by Overarching Vote with Weighted Voting Blocks: For instance, suppose that the 30 stronger claims are roughly twice as strong as the weak ones (in terms of being able to prove specific causation and having severe injuries) and that they

collectively decide to roughly correlate voting strength to claim strength, 2:1.²⁸³ This makes a purely self-interested vote in the group of 100 claimants 60 to 70. Add to that any one of the following changes likely under this new approach – positive other-regarding preferences, people making and keeping promises to one another, or the near universal norm in favor of distributive fairness – and the likelihood of voting in favor of a settlement with inequitable allocation diminishes.²⁸⁴

Assume that Merck offers to settle for a lump sum of money so long as eighty-five percent of the claimants sign-on, but does not admit to any wrongdoing and demands that any documents that emerged during discovery be kept confidential. As you might imagine, the public-minded plaintiffs who want change and apologies are outraged. And they are not anomalies. For instance, a woman paralyzed in a rollover accident demanded that Ford and Firestone broadcast a videotaped apology to settle; Paula Jones demanded but never received an apology from President Clinton; and Toyota has preemptively apologized in recalling more than 8 million vehicles.²⁸⁵ In deliberating (as in the third and fourth design options), this group might appeal to the common good by saying, “We’ve got to send Merck a message that it can’t push products like this into the market again,” “The FDA rushed to approve Vioxx and without public disclosure of Merck’s documents, there’s little likelihood for systemic change,” or “Merck has to admit to what it did wrong.” With equal conviction, others may appeal to their growing financial difficulties. Take Paulette Rogers, for example. She had a heart attack after taking Vioxx and said “When I returned to work my boss said they didn’t need me anymore and was afraid the stress of the job might hurt me. . . . During that time we lost the new truck, I couldn’t go camping because of my mental state, and we almost lost our home.”²⁸⁶

This kind of split is hardly unusual; the question is how process can fairly raise and resolve these disagreements. As in the third and fourth design options, plaintiff groups might adopt some form of majoritarian or proportional

²⁸³ Another alternative might be a point system like that used for allocating kidneys in the United States. See YOUNG, *supra* note 217, at 27-31.

²⁸⁴ People may invoke distributive fairness norms for different reasons. As Eric van Dijk and David De Cremer explain, “fair offers do not necessarily reflect a true concern for fairness, but might also reflect an instrumental concern because bargainers may fear that unfair offers are likely to be rejected” van Dijk & De Cremer, *supra* note 44, at 146. They note further that research shows that some are truly concerned about fairness, whereas, others use fairness instrumentally. *Id.*; see also van Dijk, *supra* note 221, at 704.

²⁸⁵ O’Hara & Yarn, *supra* note 57, at 1125; Hiroko Tabuchi & Bill Vlasic, *Toyota’s Top Executive Under Rising Pressure*, N.Y. TIMES, Feb. 6, 2010, at B1 (reporting on Akio Toyoda’s apology for the Fall 2009 Toyota vehicle recall).

²⁸⁶ Paulette Rogers, *My Story*, PLAINTIFFS VIEW, <http://www.plaintiffsvie.org/MyStoryPaulette.html> (last visited Nov. 3, 2010).

voting both for their subgroup and for making overarching decisions. With the special officer's help, they might bargain, deliberate, and ultimately collaborate with other plaintiffs' groups to co-specify their ends. Litigating together is partial here: plaintiffs participate for different background reasons, but share a common framework – wanting to hold the defendant accountable. Communicating their reasons for litigating – needing to pay hospital bills, seeking retribution, helping others – might ultimately lead them to a mutually acceptable alternative.²⁸⁷ For example, initially adding a claim for punitive damages might satisfy both those wanting compensation and those wanting to prevent future harm. Punitive damages are thus one way to further specify ends in a way that allows both groups to work together. This process enables plaintiffs to attach various weights and intensities to the ends and means most important to them and then to collectively consider this previously private, nuanced information. When group members understand and trust that they want roughly the same ends (prevailing against the defendant), they are less likely to strategically misrepresent their preferences.

Even if it proves impossible to satisfy everyone, the process of bargaining and deliberating makes it possible for plaintiffs to reason together about “the right thing to do” and about what's best for the “common good.” What the common good is, is for the Vioxx plaintiffs to determine and pursue together. The procedures that they implement will be the products of their community consensus and will help further their substantive aims. The concerns that emerge will inform both their decision to accept a settlement offer and, if not dictated by the settlement's terms, how to allocate any settlement funds among them. Remember that most people want to do “what's fair,” but in asymmetric dilemmas – where some are entitled to more than others – they lack critical decision-making information. Information changes that equation. Consequently, if Vioxx plaintiffs have formed a group and agreed to deliberate and then be bound by a vote, they can take others' needs and preferences into account.

But these tools still lack the error-correction mechanisms of both traditional bipolar litigation (motions for a new trial, renewed motions for judgment as a matter of law, and appeals) and class-action litigation (objections, judicial determination of the settlement's fairness, and objector's appeals). This is where outliers and limited judicial review play a potentially invaluable role. First, as litigants outside of the group – and there are bound to be a few – outliers provide a check on the settlement's fairness through the voice of dissent.²⁸⁸ Because outliers are not part of the group, they feel little or no obligation to the group as a whole and may not “go along to get along.”

²⁸⁷ See MICHAEL E. BRATMAN, *Shared Valuing and Frameworks for Practical Reasoning*, in *STRUCTURES OF AGENCY* 283, 303 (2007).

²⁸⁸ See SUNSTEIN, *supra* note 160, at 6 (“Much of the time, dissenters benefit others, while conformists benefit themselves.”).

Rather, as devil's advocates, outliers raise potential deficiencies to the special officer, judge, group, and attorneys.²⁸⁹ Second, if Vioxx challengers contend that the settlement is unfair, then Judge Fallon would review the settlement's fairness in a limited way. As suggested, he would first conduct a process-dependent check, which looks for process-based defects such as tainted consent. Depending on this result, he would then conduct a content-dependent check of the settlement's substantive terms with more or less rigor.²⁹⁰ If the process is flawed, then he would scrutinize the settlement's substance more intensely. And if process is the product of an autonomous agent's freely given and fully informed consent, then he should conduct this content-dependent review with a light touch.

CONCLUSION

As British social philosopher Stuart Hampshire surmised, we will never agree on substantive good in our modern, pluralistic society, but "fairness in procedure is an invariable value, a constant in human nature. . . . [T]here is everywhere a well-recognized need for procedures for conflict resolution, which can replace brute force and domination and tyranny."²⁹¹ Admittedly, no approach – including "litigating together" – is flawless; involving plaintiffs in decision-making is thorny and deliberation is messy and time-consuming. Nor is "litigating together" as clean or efficient as letting plaintiffs' attorneys work as puppeteers behind the scenes to reach a silent accord with the defendant. But it is more transparent and legitimate. It furthers litigants' faith in the judicial system and makes it less likely that they will collaterally attack the result or feel that they can morally rationalize disobedience.

To explain why this approach is better than our current practices in a way that is consistent with the axioms of those promoting either welfare maximization or individual justice, it (1) is efficient and promotes deterrence and (2) maintains fidelity to the roots of individual consent. For example, when social norms and other-regarding preferences influence litigant behavior, these internalized behaviors require less judicial coercion and involvement.²⁹²

As to how this approach might promote instrumental tort-law objectives such as achieving optimal deterrence, I can offer only a few speculations. First take David Rosenberg's view – that plaintiffs' attorneys have less incentive to invest in a tort's merits than do defendants – and recast it slightly: plaintiffs' attorneys have less incentive to invest in a tort's merits because they prefer a

²⁸⁹ See Rubenstein, *supra* note 115, at 1453-56 (advocating for court-appointed attorneys to argue against class action settlements).

²⁹⁰ *Group Consensus, Individual Consent*, *supra* note 13, at 22-25.

²⁹¹ STUART HAMPSHIRE, JUSTICE IS CONFLICT 4-5 (2000).

²⁹² Most scholars regard a social norm "as a rule governing an individual's behavior that is diffusely enforced by third parties other than state agents by means of social sanctions." Ellickson, *supra* note 234, at 35.

quick settlement and assume that a monetary payoff will satisfy their clients. Distilled, this means that plaintiffs' attorneys lack optimal incentives because of agency problems. If we alleviate these agency problems with client monitoring and clients insist that "It's not about the money!"²⁹³ then the attorneys lack authority to exchange their client's rights for a hasty settlement without regard to the merits. On the flip side, clients who litigate purely on principle might still lead to sub-optimal deterrence. If they want to bleed a drug company until it can barely afford to manufacture pharmaceuticals, then the utilitarian cost-benefit analysis is similarly problematic. But here enters the special officer as the voice of reason, as a leader, as someone who has the plaintiffs' interests at heart but the bigger picture in mind.

Take now the other classical view, that of the individual autonomist. If we define autonomy as an individual's ability to make choices for herself about her legal rights, such as when, where, and whether to sue; how to conduct the litigation; and whether to settle, then we see that neither this litigating-together approach nor current handling procedures preserve autonomy in its purest form.²⁹⁴ That is, because of the resources needed to develop a mass-tort case, only the richest could avoid amassing by plaintiffs' attorneys and even then, they would likely face procedural lumping. But if we focus on informed consent, this alternative approach avoids the paternalism inherent in class-action litigation and preserves consent in its purest form. Plaintiffs still decide when and whether to sue individually and whether they will join the group or remain outliers. If they join the group, then they can participate through discussion, problem-solving, and collective decision-making. They consent to a process. Even if they decide to exchange their individual right to accept or reject their portion of the settlement for a vote under an intraclassant-governance agreement, they do so only after informed consent and after determining that the exchange best promotes their ends.

Most importantly, however, is what's different about this litigating-together approach. It claims that we cannot achieve justice solely through maximizing welfare or ensuring that plaintiffs have free choice. Instead, plaintiffs reason together about the right thing to do. Banding together enables plaintiffs to do something that they couldn't do, or at least may not be able to do as successfully, alone: pursue and enforce their substantive rights. When that process brings plaintiffs together, gives voice to their stories, weaves those stories into a larger narrative, and enables them to make sense of that narrative as part of a broader community that collectively pursues its communal values,

²⁹³ Relis, *supra* note 55, at 701.

²⁹⁴ Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750 (2002); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1574 (2007) ("Government imposed paternalism should be no less acceptable when it comes to the individual's ability to resort to the judicial process . . .").

we begin to see that process can be about so much more than welfare maximization or individual autonomy.