Litigating Together: Social, Moral, and Legal Obligations

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LITIGATING TOGETHER:
SOCIAL, MORAL, AND LEGAL OBLIGATIONS

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Abstract

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 isn’t 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.

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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, they use multi-district litigation and design settlements that deter plaintiffs from opting out. But the very design features that yield 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 plaintiffs had independently

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\(^1\) Vioxx Prod. Liab. Litig., MDL-1657, No. 05-01657 para. 1.2.8.1 (E.D. La.) (initial settlement agreement), available at [http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf). After some plaintiffs’ attorneys contended the settlement
economically marketable claims—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 hand, 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, 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, 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*, they raise issues of preclusion, due process, and adequate representation in other fora. 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. What is it that makes groups litigating together—either by choice or procedural coercion—so complex and hard to predict? Might understanding group dynamics make it 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. Alex Berenson, *Some Lawyers Seek Changes in Vioxx Settlement*, N.Y. TIMES, Dec. 21, 2007.  

2 311 U.S. 32 (1940). *Epstein v. MCA, Inc.*, has, however, limited the availability of collateral attack in the class action context. 179 F.3d 641 (9th Cir. 1999); see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1685-91 (2008).
possible for policymakers, institutional designers, judges, and—most importantly—plaintiffs to capitalize on internal group coercion and employ social norms and moral obligations in a way that makes external coercion less necessary? I have to believe that it would. Understanding what makes aggregate litigation complex from a group-orientation perspective can help us formulate more realistic and useful propositions about how the 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. 3

Accordingly, in this Article, 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 isn’t just about a payday for attorneys, closure for defendants, or even compensation for plaintiffs. And process isn’t just a handy crutch for enforcing substantive laws. Procedural handling of mass litigation can serve as a means for bringing plaintiffs together, plugging their individual stories into 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, 4 Erichson, 5 Issacharoff, 6 Nagareda, 7 Redish, 8 and Rosenberg, 9 yet they

5 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. CHICAGO LEGAL F. 519.
8 See, e.g., Martin H. Redish, Wholesale Justice (2009).
each might find some harmony between “litigating together” and the axioms of their theories.\textsuperscript{10} In this Article’s predecessor, \textit{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 bringing those notions of commitment, community, and groups to bear on nonclass aggregation.\textsuperscript{11} 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 \textit{Litigating Groups} into concrete, feasible procedures for litigating together. Although \textit{Litigating Groups} maintained that plaintiffs who form groups will likely develop other-regarding preferences toward their 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; 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’s roadmap follows from its normative position: 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 their shared conception of fairness. This normative position rests on the following three premises. First, cooperation increases with sociality, particularly when a group member acts toward fellow group members.\textsuperscript{12} 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

\begin{itemize}
\item[I.10] I explore this potential harmony in this Article’s conclusion.
\end{itemize}
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'll 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 be willing to respect (and sometimes enforce) those 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's 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 adopts a pluralistic perspective of the tort system's nature and purpose and contends that the government has legitimate interest in promoting 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 informational asymmetries, which make plaintiffs poor monitors because they focus principally on their own self-interest. These steps 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

Before delving into the specifics of why nonclass aggregation is unprincipled and problematic, we need to define it. Nonclass aggregation is a shorthand term for claims that the Judicial Panel on Multi-District 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 and Ortiz and of Congress passing the Class Action Fairness Act 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.\textsuperscript{14} Without the closure that a class settlement once delivered, attorneys on both sides of the aisle are turning to private contracts for 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.\textsuperscript{15}

What this means for plaintiffs is that, despite having an individual contractual relationship with their chosen attorney, the attorney typically represents hundreds of other nominally related clients.\textsuperscript{16} 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.\textsuperscript{17} 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.\textsuperscript{18} The resulting problems divide into two moving parts: (1) the litigation’s stage and maturity level; and (2) the interrelationships between the key players.

\textsuperscript{14} Thomas E. Willging & Emery G. Lee, III, From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz, KANSAS L. REV. (forthcoming, 2010) (manuscript at 34) (on file with author).

\textsuperscript{15} For an overview of how these provisions exert ethical pressure on plaintiffs’ counsel, see Howard M. Erichson, The Trouble with All-or-Nothing Settlements, KANSAS L. REV. (forthcoming 2010), available at http://ssrn.com/abstract-1499537.

\textsuperscript{16} Plaintiffs might retain attorneys because of their 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”). AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (proposed final draft April 1, 2009).

\textsuperscript{17} See Fed. R. Civ. P. 23 (e), (g), (h).

\textsuperscript{18} 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); In re Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606, 611-12 (E.D. La. 2008); L. Elizabeth Chamblee [Burch], Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements, 65 LA. L. REV. 157, 241 (2004).
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.\(^\text{19}\) This 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 it ultimately promotes the normative ends of achieving justice, however defined.\(^\text{20}\)

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; should individual objections be sacrificed for the collective good; and what role should plaintiffs and their attorneys 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.\(^\text{21}\) Yet, judicial handling of mass litigation is often at odds with these preferences. Litigation is increasingly inquisitorial despite an adversarial veneer. Compensation grids and confidential settlements have replaced traditional error-correction mechanisms. Participation and voice


\(^{20}\) 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 § 10.123 (4th ed. 2004).

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.\textsuperscript{22}

These findings lead to three principal risks. First, plaintiffs may view the process as illegitimate.\textsuperscript{23} 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 make process less predictable, impact and sometimes pervert substantive liability, and thereby make it increasingly onerous for defendants to modify their behavior and avoid litigation.\textsuperscript{24} 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.\textsuperscript{25}

\textbf{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 provoke 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. \textit{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

\textsuperscript{22} Id. at 45-46; Issacharoff, \textit{supra} note 6, at 829; Richard A. Nagareda, \textit{Turning From Tort to Administration}, 94 Mich. L. Rev. 899, 968 (1996).
\textsuperscript{23} Burch, \textit{supra} note 21, at 46.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
agent and a creditor; the litigation is a joint venture.\textsuperscript{26} This tangled 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. 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.\textsuperscript{27} 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.\textsuperscript{28} Although the judge granted her a new trial, her lawyers wanted to postpone it and proceed with stronger cases first.\textsuperscript{29} Mekdeci refused. Her lawyers then tried to withdraw, provoking the Eleventh Circuit to dub it an “extraordinary tale” of abandonment.\textsuperscript{30} 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.”\textsuperscript{31}

Mekdeci’s story starkly illustrates the disconnect that can arise between agents and principles in mass litigation and, ultimately, the desire to connect with others who have similar experiences. After the litigation ended, Mekdeci and her husband founded Birth Defect Research for Children, Inc. to provide “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

\textsuperscript{26} See John C. Coffee, Jr., Professional Responsibility and the Corporate Lawyer, 13 GEO. J. LEGAL ETHICS 331, 340-41 (2000) (observing the same phenomenon in the class-action context); Charles Silver, Merging Roles: Mass Tort Lawyers as Agents and Trustees, 31 PEPP. L. REV. 301, 302 (2003) (positing that Coffee’s argument applies with equal force to mass-tort representations because “[t]he plaintiffs’ attorneys provide crucial financing”). Yet, getting rid of the contingency fee and attorney financing is not a realistic solution.

\textsuperscript{27} Mekdeci v. Merrell Nat’l Lab., 711 F.2d 1510, 1516 (11th Cir. 1983); JOSEPH SANDERS, BENDECTIN ON TRIAL 6-7 (1998);.

\textsuperscript{28} MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 131 (1996); Richard L. Marcus, Reexamining the Bendectin Litigation Story, 83 IOWA L. REV. 231, 234-36 (1997); see also SANDERS, supra note 27, at 2-15.

\textsuperscript{29} Marcus, supra note 28, at 234-35 (noting that her attorneys spent some $150,000 on the case).

\textsuperscript{30} Mekdeci, 711 F.2d at 1516.

\textsuperscript{31} Id.
communities with an increase in birth defects.\textsuperscript{32} Mekdeci’s case also begs the question of whether the attorney can legitimately elevate the group’s interests over the individual’s.\textsuperscript{33} This litigation provoked Richard Marcus to observe, “Mekdeci’s case provides some reason for feeling that client desires may legitimately be conditioned on the ‘greater good’ of the overall plaintiff group.”\textsuperscript{34}

2. Group Problems

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.\textsuperscript{35} 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.\textsuperscript{36}

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 peace and 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 withhold their consent and demand a disproportionately high payoff. Enough holdouts could derail the whole settlement.

\textsuperscript{33} Erichson, \textit{supra} note 5, at 559-60.
\textsuperscript{34} Marcus, \textit{supra} note 28, at 252-53.
\textsuperscript{35} See Litigating Groups, \textit{supra} note 11, at 20-24; see also Kwok Leung, Kwok-Kit Tong, & E. Allan Lind, \textit{Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions}, \textit{3 J. PERSONALITY & SOC. PSYCHOLOGY} \textit{476}, 476-77 (2007). 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, \textit{supra} note 21, at 15-24.
\textsuperscript{36} See Eric van Dijk & David De Cremer, \textit{Tacit Coordination and Social Dilemmas: On the Importance of Self-Interest and Fairness}, \textit{in SOCIAL PSYCHOLOGY AND ECONOMICS} \textit{141}, 146-47 (David De Cremer et al., eds (2006)).
Holdouts and outliers who disagree with or are unconscious of the principal group may form their own groups. 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. Subgroup formation and competition are further complicated by blurred boundaries where some members are more prototypical than others and members belong to multiple groups.

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. 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. In a pre-negotiated fee-sharing arrangement, counsels’ economic interests are tethered not to their clients but to one another. The pressure is toward consensus, not vigorous representation.

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37 As Part III.B. explores, subgroup competition can benefit the overall group through diverse ideas subject to certain conditions.
39 Litigating Groups, supra note 11, at 35-36.
40 See Coffee, supra note 4, at 397-98 (discussing holdouts in the class-action context).
41 See id. at 435-36. Not all courts enforce this kind of agreement. E.g., In re Agent Orange Prod. Liab. Litig., 818 F.2d 216, 222 (2d Cir. 1987).
42 See Coffee, supra note 4, at 435-36.
This Article focuses on the highlighted areas, problems with the group dynamic—those 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 isn’t as simple as it sounds. Consider, for example, other coordination problems such as resource depletion and pollution: in the winter, we’re 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’re 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.\(^{43}\) 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.\(^{44}\)

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 arms’ 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’s 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.\(^{45}\) 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’re educated about the others involved—they do not always

\(^{43}\) These examples are based on similar examples by Robyn M. Dawes. Robyn M. Dawes, Social Dilemmas, 31 ANN. REV. PSYCHOL. 169, 170 (1980).

\(^{44}\) Id.; van Dijk & De Cremer, supra note 36, at 141; see also M. Smithson & M. Foddy, Theories and Strategies for the Study of Social Dilemmas, in RESOLVING SOCIAL DILEMMAS 1-2 (M. 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.”).

act as “homo economicus,” purely economically motivated, self-interested individuals.\(^{46}\)

II. COMMUNAL ENCUMBRANCES OF LITIGATING TOGETHER

The problems in nonclass aggregation raise fundamental philosophical, psychological, political, and behavioral questions about whether we’re 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.\(^{47}\) 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.”\(^{48}\) 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.\(^{49}\) Similarly, studying the victims of the September 11 tragedy, Gillian


\(^{48}\) Id. at 723.

\(^{49}\) Id. at 722-23 & fig. 4. Other studies confirm these results. See, e.g., Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151, 191 (Leon et al., eds., 1986); 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); Hazel Genn, *Access to Just Settlements: The Case of Medical Negligence*, in *REFORM OF CIVIL PROCEDURE: ESSAYS ON “ACCESS TO JUSTICE”* (A. Zuckerman & R. Cranston eds., 1995); Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361, 1367 (1992) (finding that litigation motives included wanting to reveal cover-ups and protect others as well as desiring
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.\textsuperscript{50} In short, litigation to them meant “principled participation in a process that is constitutive of a community.”\textsuperscript{51}

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 they are procedurally aggregated, whether chosen 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:

Was a deer to be taken? Everyone saw that to succeed he must faithfully stand to his post; but suppose a hare to have slipped by within reach of any one of them, it is not to be doubted but he pursued it without scruple, and when he had seized his prey never reproached himself with having made his companions miss theirs.\textsuperscript{52}

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 undermines the group’s collective efforts. Like 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.\textsuperscript{53} With that intention comes a host of roles and social norms that coordinate, structure, and guide their activity.\textsuperscript{54} People litigating simultaneously (but not together) lack the roles and social cues that might


\textsuperscript{51} Id. at 662-63.

\textsuperscript{52} \textit{Jean-Jacques Rousseau, Discourse on the Origin of Inequality} 63 (Filiquarian Publishing 2007) (1754). For a modern-day take on the stag hunt, see \textit{Brian Skyrms, The Stag Hunt and the Evolution of Social Structure} (2003).


\textsuperscript{54} See id. at 154.
otherwise coordinate and direct their joint activity.55 When the defendant proposes a settlement, a cacophony of goals then emerges and plaintiffs are more likely to object, dissent, or hold out.56 They might want to pursue their own end. 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 it 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 is too indefinite to be of much use.

Take, for instance, a nonlegal analogy. In the 1970s and 1980s, the French government developed an idea for futuristic transportation, “Aramis.”57 But Aramis was many things to many people; its economic and technical feasibility depended on what it was. 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.58 Without knowing what Aramis was, the instrumentalist means-end reasoning (is it economically and technically feasible?) failed. And Aramis failed. 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. Co-specifying ends through practical reasoning may make them jointly achievable, introduce commensurability, and ease friction.59 Alternatively, it 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

55 Id. at 153.
56 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 (1982).
58 Millgram, supra note 57, at 743-45.
59 See id. at 736.
norms to guide their behavior. Litigating Groups captured the spectrum of group cohesion by using the flexible, umbrella term “plural subject.” Simply put, a plural subject is an instance where multiple individuals—several “I’s”—become a single, plural subject—a “we.” 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.

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. It provided that when multiple litigants each intend to do something litigation-related, they are obligated to conduct that activity together. The problem here is that plaintiffs litigating against the same defendant may have only that abstract intention in common; they may not intend to litigate together at all. 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. 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. 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. 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 a group such that they might incur

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61 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 3 (2000).

62 Litigating Groups, supra note 11, at 23-26.

63 Id. at 24.

64 Id. at 43-45.

65 Id. at 45-47.

66 Id.

67 Id.
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 obligation’s actual content largely depends on the group itself. 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. 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 it useful enough to depend on with that caveat in place. Second, I use class-action analogies to set forth a legal justification for binding nonclass plaintiffs when group cohesion is real.

In terms of moral and political philosophy, plaintiffs’ voluntarily issued commitments and their decision to associate with one another loosely preserves the fundamental tenets of self-determination and consent in liberal theory. 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 have 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 they incur additional obligations of solidarity or membership, then there is a thicker obligation that cannot be discounted so easily.

It is here that communitarianism plays a limited role. Once plaintiffs voluntarily associate with one another and make commitments 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

68 For further reading and debate on the nature, existence, and scope of these obligations, see, for example, WILL KYMILICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989); ALASDAIR MACINTYRE, AFTER VIRTUE (1989); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998); CHARLES TAYLOR, THE NATURE AND SCOPE OF DISTRIBUTIVE JUSTICE, IN PHILOSOPHY AND THE HUMAN SCIENCES, PHILOSOPHICAL PAPERS, Vol. 2 (1985); MICHAEL WALZER, SPHERES OF JUSTICE (1983).
69 I provide a more detailed account of the moral and political theory in Elizabeth Chamblee Burch, Symposium, AGGREGATION, COMMUNITY, AND THE LINE BETWEEN, KANSAS L. REV. (forthcoming, 2010).
70 See JOHN RAWLS, A THEORY OF JUSTICE 108-17 (1971) (explaining that obligations can arise through voluntary acts, such as promises and agreements, and natural duties).
71 MICHAEL J. SANDEL, JUSTICE 225 (2009)
myself a part?" 72 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. 73 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 story, 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.” 74

The drawback from a liberal perspective is that litigants are not free to exit the group if doing so would violate those obligations. 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. 75 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 Stephen 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. 76 Group responsibility was a matter of fact, something that simply was, a custom without further explanation. 77 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 the others’ expense. 78 Still, tort claims and the decision to sue at all are individually

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72 MACINTYRE, supra note 68, at 201.
74 SANDEL, supra note 71, at 241; see also RONALD DWORKIN, LAW’S EMPIRE 195-202 (1993).
75 SANDEL, supra note 71, 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.”).
76 STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 42-52 (1987).
77 Id. at 270-71.
78 Rosenberg, supra note 9, at 832.
held rights. As Richard Nagareda reminds us, litigants “have a preexisting right to maximize their own individual tort gains” and these gains are independent. 79

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. 80 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 interest. 81 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.” 82 Following these factors, courts have declined to appoint ad hoc groups who “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. 83

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.” 84 This language has led several courts and commentators to assume that if this is true, then actual group cohesion exists. 85

79 Nagareda, supra note 7, at 119.


82 Varghese, 589 F. Supp. 2d at 392.

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


85 See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998); Holmes v. Continental Can Co., 706 F.3d 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.”); Penson v. Terminal Transport Co., Inc., 634 F.2d 989, 999-94 (5th Cir. 1981); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir. 1974); Johnson v. Gen. Motors Corp., 598 F.2d 320, 437-38 (5th
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 cohesive group with few conflicting interests among its members.”

Likewise, the Third Circuit observes, “The very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class.”

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. For instance, in Walters v. Barry, a Rule 23(b)(2) class, the ACLU sued the District of Columbia and alleged that implementing a nighttime juvenile curfew violated residents’ First, Fourth, and Fifth Amendment rights. The court certified the class despite members’ vastly divergent opinions about whether keeping the curfew was a good idea.

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. 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. 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 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 to this account 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. This section explores how judges can integrate these variables into mass litigation to promote cooperation. It explains in more two basic ideas. 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 democracy ideals—bargaining,

93 Stout, supra note 12 at 22-23; Ostrom, supra note 12, at 140.
arguing, and voting. Second, they should facilitate communication and deliberation among plaintiffs.

1. Special Officer

Special officers are similar to, but distinct from, special masters. 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” and “to advocate on behalf of the class,” but import it into nonclass aggregation.

The same authority that permits judges to appoint special masters—Rule 53, Federal Rule of Evidence 706, and judges’ inherent equitable authority—also allows them to hire special officers. 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.

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

(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;

A “special master” is someone who serves “as a neutral advisor to the court regarding the fairness of settlement and the adequacy of representation.” American Law Institute, supra note 16, at § 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 DES Cases, 789 F. Supp. 552 (E.D.N.Y. 1992); In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1396, 1450 (E.D.N.Y. 1985).

American Law Institute, supra note 16, at § 3.09(a)(1), (2).


(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.98

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 them act with increased rationality, develop alternatives, plan strategies, and monitor the litigation.99

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. As Special Master 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.100

In class actions, courts stress mediation’s importance and appoint guardians ad litem to investigate the settlement’s fairness.101 But unlike a guardian ad litem,

98 See generally CHARLES E. LINDBLOM, THE POLICY-MAKING PROCESS 13 (1968). If plaintiffs’ counsel is initially uncooperative, the judge might endow the special officer with access to discovery tools. AMERICAN LAW INSTITUTE, supra note 16, at § 3.09(a)(1), 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.


100 In re Holocaust Victims Assets Litig., 424 F.3d 132, 137 (2d Cir. 2005); see also Linda S. Mullenix, Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation, 32 WILLIAM & MARY L. REV. 475, 540-45 (1991) (describing the use of special masters in the asbestos litigation).

101 See, e.g., In re Asbestos Litig., 90 F.3d 963, 972 (5th Cir. 1996), vacated and remanded on other grounds, 521 U.S. 591 (1997), aff’d on remand, 134 F.3d 668 (5th Cir. 1998), rev’d on other grounds, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (appointing Professor Eric Green as a guardian for future claimants); see also Susan P. Koniak, Feasting While the Widows Weep: Georgene
who paternalistically represents a child’s best interests,\(^{102}\) 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.\(^{103}\) This entails frank and confidential discussions that neither the defendant nor the court is privy to.\(^{104}\)

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 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 to aid in sorting plaintiffs with diverse ends, claims, and injuries into more cohesive groups.\(^{105}\) 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 working on the plaintiffs’ side only, the special officer maintains litigants’ preference for adversarial litigation between plaintiffs and defendant.\(^{106}\)

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

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\(^{102}\) BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “guardian ad litem” as a subset of guardian).


\(^{105}\) I discuss this process in more detail in Part III.B.

\(^{106}\) Burch, supra note 21, at 29-31; \textit{see also} JOHN THIBAULT & LAURENS WALKER, \textit{PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS} 104 (1975); Pauline Houlden et al., \textit{Preference for Modes of Dispute Resolution as a Function of Process and Decision Control}, 14 J. EXPER. SOC. PSYCHOL. 13, 29 (1978).
officers—such as Ken Feinberg, Francis McGovern, and Burt Neuborne—are expensive. For example, the three “settlement masters” in the Agent Orange litigation cost hundreds of thousands of dollars. But expense is relative and mass-tort litigation is a significant investment. 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. These agency risks prompted Judge Posner to claim that the judge has a fiduciary duty to the class during settlement. Similar risks and appointments in class actions diminish the appearance of judicial partiality in nonclass aggregation. That appointing a special officer further levels the playing field by reducing the defendant’s ability to capitalize strategically on plaintiffs as uninformed, poor case monitors seems, all things considered, beneficial as well.

2. Communication

Special officers can also help foster plaintiff communication. Not surprisingly, giving people the opportunity to interact positively influences their willingness to cooperate and their fairness perceptions across a wide range of studies. It also illustrates the behavioral response to moral obligations of

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108 See infra notes 236-238 and accompanying text (estimating that the initial Vioxx cases cost around $1.5 million to develop).
109 See AMERICAN LAW INSTITUTE, supra note 16, at §§ 3.02 cmt. a, 3.05 cmt. b, 3.09; MANUAL FOR COMPLEX LITIGATION, supra note 20, 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. AMERICAN LAW INSTITUTE, supra note 16, at § 3.09.
111 See, e.g., WBG Liebrand, The Effect of Social Motives, Communication and Group Size on Behavior in an N-Person Multi-stage Mixed-motive Game, 14 UR. J. SOC. PSYCHOL. 239 (1984); L. Musante et al., The Effects of Control on Perceived Fairness of Procedures and Outcomes, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223, 237-38 (1983); J. Orbell et al., The Limits of Multilateral Promising, 100 ETHICS 616 (1990); Ostrom, supra note 12, at 140; see also Elinor Ostrom & James Walker, Neither Markets Nor States: Linking Transformation Processes in Collective Action
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.\footnote{Peter Kollock, Social Dilemmas: The Anatomy of Cooperation, 24 ANN. REV. SOCIOL. 183, 194 (1998); DM Messick & MB Brewer, Solving Social Dilemmas, in REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 11 (L. Wheeler & P. Shaver, eds. 1983).} 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.\footnote{See Robert H. Frank et al., The Evolution of One-Shot Cooperation: An Experiment, ETHOLOGY & SOCIOBIOLOGY, July 14, 1993, at 247; Norbert L. Kerr & Cynthia M. Kaufman-Gilliland, Communication, Commitment, and Cooperation in Social Dilemmas, 66 J. PERSONALITY & SOC. PSYCHOL. 525-26 (1994).} The more plaintiffs use a reciprocal strategy—“I’ll cooperate if everyone else does too”—the more they follow through with their commitments.\footnote{S.S. Komorita et al., Reciprocity and the Induction of Cooperation in Social Dilemmas, 62 J. PERSONALITY & SOC. PSYCHOL. 607, 614-15 (1992).} Other studies demonstrate that individuals cooperate when they feel like they are part of a group.\footnote{See, e.g., Robin Dawes, Social Dilemmas, Economic Self-Interest, and Evolutionary Theory, in FRONTIERS OF MATHEMATICAL PSYCHOLOGY: ESSAYS IN HONOR OF CLYDE COOMBS 35 (1991).} We need not resolve this larger question about why people cooperate here since the key to each theory and, thus, to cooperative litigation, is to encourage 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 preparation.”\footnote{Fed. R. Civ. P. 16(a).} To further these aims, the court may order parties or their representatives to attend pretrial conferences or be available by other means.\footnote{Fed. R. Civ. P. 16(a).} Similarly, Rule 26(f)
requires conferences about discovery and collaboration on discovery plans.\textsuperscript{118} 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.\textsuperscript{119}

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.\textsuperscript{120} Plaintiffs may use communication opportunities to devise a joint strategy, elicit promises to cooperate, and verbally sanction or encourage others.\textsuperscript{121} 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.\textsuperscript{122} Moreover, giving 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.”\textsuperscript{123}

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.\textsuperscript{124} But still other studies indicate what seems intuitively correct—that there is something humanizing and thus more compelling about face-to-face

\textsuperscript{118} Fed. R. Civ. P. 26(f).
\textsuperscript{119} See American Law Institute, supra note 16, at § 1.05 cmt. c.
\textsuperscript{120} See James D. Fearon, Deliberation as Discussion, in Deliberative Democracy 44, 45 (Jon Elster, ed. 1998).
\textsuperscript{121} Ostrom, supra note 12, at 140.
\textsuperscript{122} Jon Elster, Introduction, Deliberative Democracy 12 (Jon Elster, ed. 1998).
interactions. 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. 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, Skype, Twitter, and Facebook.

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. In Agent Orange, Judge Weinstein traveled throughout the country, held an unparalleled number of fairness hearings, and listened to numerous class members’ comments. Ken Feinberg followed suit by conducting scores of town-hall meetings in schools, community centers, and hotels from New York to California. Nonlegal examples include the 2008 presidential race, which relied

125 Ostrom, supra note 12, 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. In contrast, . . . frequency of contact is not as important for the spread of social norms.”).

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

127 Mass tort litigants already form connections with one another through these social networking sites. For examples, see “Equal Treatment for Non-US Vioxx Victims” Facebook group, which petitioned for compensation on behalf of British victims, the “Agent Orange Lawsuit Filed by Vietnamese Victims” Facebook group, and the “Merk Settlement Group” on Yahoo!’s groups page. Facebook, Equal Treatment for Non-US Vioxx Victims, http://www.facebook.com/groupphp?sid=7eef156f24daee8951038d54df30e2e&gid=8611202842; Facebook, Agent Orange Lawsuit Filed by Vietnamese Victims, http://www.facebook.com/group.php?gid=2619520859; Merck Settlement Group page, http://groups.yahoo.com/group/MerkSettlement/.


130 FEINBERG, supra note 128, at 47-49.
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.\textsuperscript{131} 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.\textsuperscript{132}

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.\textsuperscript{133} Plaintiffs might use these new communication media to set up 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.\textsuperscript{134} 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.

\subsection*{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.

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\item \textsuperscript{131} See, \textit{e.g.}, Organizing for America, \url{http://www.barackobama.com/learn/about_ofa.php} (last visited Aug. 28, 2009); see also \textsc{Christakis} \& \textsc{Fowler}, \textit{supra} note 125, at 204-05.
\item \textsuperscript{132} See \textsc{Christakis} \& \textsc{Fowler}, \textit{supra} note 125, at 204-05; L.A. Henao, \textit{Columbians Tell FARC: “Enough’s Enough”—In a March Organized on Facebook, Hundreds of Thousands Protested Against the Leftist Rebel Group Monday}, \textsc{Christian Science Monitor}, Feb. 6, 2008.
\item \textsuperscript{133} Burch, \textit{supra} note 69.
\item \textsuperscript{134} See, \textit{e.g.}, Plaintiff’s View, My Story, \url{http://www.plaintiffsview.org/MyStoryPaulette.html} (providing a forum for Vioxx plaintiffs to tell their stories) (last visited February 21, 2010); see generally \textsc{American Law Institute}, \textit{supra} note 16, at § 1.05 cmt (i); Robert H. Klonoff et al., \textit{Making Class Actions Work: The Untapped Potential of the Internet}, 69 \textsc{U. Pitt. L. Rev.} 727, 763-64 (2008).
\end{itemize}
\end{footnotesize}
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. 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.

Viewed as a product of sorting, subgroups might benefit litigants by reordering nominally aligned interests into more cohesive units and thereby ensure that quasi-private ordering will not oppress or disempower certain litigants. 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.

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135  FED. R. CIV. P. 20; FED. R. CIV. P. 42(a).
136  See MODEL R. PROF’L CONDUCT 1.7 cmts. 2-5.
137  See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997); Hansberry v. Lee, 311 U.S. 32 (1940); AMERICAN LAW INSTITUTE, supra note 16, at § 1.05(8) (recommending that judges employ case-management techniques such as severance, subclassing, coordination, and consolidation to ensure adequate representation).
138  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?
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. 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.” The touchstone of sorting is thus to satisfy constitutional due process requirements, like ensuring adequate representation.

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 myopia and could lack the benefits of diversity. As Howard Reingold’s *Smart Mobs*, Jim Surowiecki’s *Wisdom of Crowds*, and Scott Page’s *The Difference* 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. 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”—should be permitted to remain outsiders. 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.\textsuperscript{146} So some conflict and dissonance is beneficial; it encourages novel solutions, diverse ideas, and innovative problem-solving.\textsuperscript{147} As game theorists suggest, increased participation and bargaining, more “trades,” promotes more solutions.\textsuperscript{148} 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.\textsuperscript{149} 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.\textsuperscript{150} As suggested shortly, it may also indicate that the system should allow subgroups with fundamentally inconsistent ends to exit the superordinate group and pursue separate litigation.\textsuperscript{151} Viewing a


\textsuperscript{147} Lisa Troyer & Reef Youn.green, Conflict and Creativity in Groups, 65 J. Soc. Issues 409, 413 (2009).

\textsuperscript{148} See, e.g., Howard Raiffa, The Art and Science of Negotiation (1982).

\textsuperscript{149} See generally Cass R. Sunstein, Why Groups Go to Extremes (2008) (contending that deliberation among groups with diverse opinions prevents extremism); Cass R. Sunstein, Going to Extremes: How Like Minds Unite and Divide 145-147 (2009) (arguing that checks and balances in partisan politics constrains group polarization and extreme movements).

\textsuperscript{150} See Page, supra note 142, at 349.

\textsuperscript{151} See 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.
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 for injuries. Bargaining and deliberating over these ends may ultimately result in a decision to litigate—a compromise of sorts. 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.

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. 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. So litigants tend to expect autonomous decision-making and voice opportunities that typically

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152 See Michael E. Bratman, Shared Intention, in Faces of Intention, 121, 144-45 (1999).

153 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 also form after the triggering event such as the Asbestos Victims of America, the Dalkon Shield victims’ organizations, and the Silicone Breast Implant organizations. Id. at 1024; Byron G. Stier, Resolving the Class Action Crisis: Mass Tort Litigation as Network, 2005 Utah L. Rev. 863, 919-21.
accompany their day in court. Accordingly, 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, 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.

Thinking about governance structures at this meta-level and contending that litigants should have a hand in engineering them 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, discussing dilemmas, 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. 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. And the social and personal norms associated with keeping promises regularly

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154 Burch, supra note 21, at 48-50 (explaining the day in court ideal as a willingness-to-accept problem).

155 See Ostrom, supra note 99, at 193 (“The inability to communicate on a repeated basis, however, limited the durability of [subjects’] agreements.”).

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


158 See Dawes, supra note 43, at 175-76; Shinada & Yamagishi, supra note 46, 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, 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. Ostrom, supra note 12, at 141.
compel people to follow through even in one-shot interactions where anonymity is assured and group exposure is minimal.\textsuperscript{159}

Plaintiffs who make reciprocal promises and assurances to cooperate with one another incur moral obligations that include obligations of solidarity.\textsuperscript{160} 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.\textsuperscript{161} 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 types are more effective with certain group cohesion levels:

<table>
<thead>
<tr>
<th>Agreement Formality</th>
<th>Ambiguity</th>
<th>Certainty</th>
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<tbody>
<tr>
<td>tacit coordination</td>
<td>promise-keeping norms</td>
<td>intra-claimant</td>
</tr>
<tr>
<td>hypothetical consent</td>
<td>informal agreements</td>
<td>governance agreement</td>
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<tr>
<td>social contract theory</td>
<td>agreements to agree</td>
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Superordinate or Subgroup Cohesion

<table>
<thead>
<tr>
<th>More Cohesive</th>
<th>Less Cohesive</th>
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</thead>
<tbody>
<tr>
<td>frequent face-to-face interaction</td>
<td>perhaps less geographic dispersion</td>
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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

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\item\textsuperscript{159} Bouas & Komorita, \textit{supra} note 157, at 1144-50; N.L. Kerr et al., \textit{That Still, Small Voice: Commitment to Cooperate as an Internalized Versus a Social Norm}, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1300-11 (1997).
\item\textsuperscript{160} \textit{Group Consensus, Individual Consent, supra} note 11, manuscript at 15; SANDEL, \textit{supra} note 71, at 223-25.
\item\textsuperscript{161} My thanks to J.B. Ruhl for pointing this out to me.
\end{itemize}
in New York City who wanted to find one another but had no prearranged plans where and what time they would meet. The majority said they would go to Grand Central Station at noon. So sometimes when people mutually recognize a coordinating signal they will cooperate tacitly.

Schelling suggests that the moral power of distributive-fairness norms provide a similar signal in complex-decision problems. 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 motives) are well-documented behavioral determinants, it is impossible for plaintiffs to proportionately distribute resources when they lack this knowledge.

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. These literatures suggest 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. The principle is age old: people should keep their word. Indeed, as Charles Fried argues, that same principle comprises

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163 Id. at 56-57.
164 Id. at 54.
165 Id. at 72-73.
166 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., J.H. Kagel et al, Fairness in Ultimatum Games with Asymmetric Information and Asymmetric Payoffs, 13 GAMES & ECON. BEHAV. 100 (1996). The proselfs may still desire distributive fairness because they may assume that unfair offers are likely to be rejected. R.T.A. Croson, Information on Ultimatum Games: An Experimental Study, 30 J. ECON. BEHAV. & ORG. 197, 197-98 (1996); M.M. Pillutla & J.K. Murnighan, Fairness in Bargaining, 16 SOC. JUST. RES. 241, 241-42 (2003); van Dijk & De Cremer, supra note 36, at 151.
167 van Dijk & De Cremer, supra note 36, at 148-50; see also Fehr & Schmidt, supra note 46, at 817; D. A. Schroeder et al, Justice within Social Dilemmas, 7 PERSONALITY & SOC. PSYCHOL. REV. 374 (2003).
168 Supra notes 65-67 and accompanying text (describing this moral obligation).
contract law’s moral foundation.\textsuperscript{169} Even the Restatement (Second) of Contracts contends that a “contract is a promise or a set of promises for the breach of which the law gives a remedy.”\textsuperscript{170} 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.\textsuperscript{171} 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.\textsuperscript{172}

This idea of adding flesh to the agreement later is inherent in Michael Bratman’s planning theory of practical reasoning. 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.\textsuperscript{173} Their plans are also hierarchical: general plans necessarily contain preliminary steps and subplans to eventually attain one goal.\textsuperscript{174} For instance, plaintiffs might have over-arching 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.\textsuperscript{175}

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.\textsuperscript{176} As such,
agreements are self-enforcing not only because of promise-keeping norms, but also because of extralegal enforcement mechanisms including reputational sanctions and reciprocity.\textsuperscript{177}

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.\textsuperscript{178}

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. “Reciprocity” characterizes a social preference for responding in kind to both altruism and hostility.\textsuperscript{179} Put simply, it means that people treat others as others have treated them. This means that reciprocally fair plaintiffs will bear costs to keep their promises and achieve an equitable outcome as well as to punish selfish behavior.\textsuperscript{180}

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. Others have proposed that partial agreements deserve partial legal enforcement when contractual incompleteness is a deliberate choice.

This suggests that backing an agreement with legally enforceable sanctions may actually diminish reciprocity and overall performance. Put differently, the ex ante threat of legal sanctions may undermine voluntary cooperation where reciprocity and reputational sanctions would otherwise promote self-enforcement. So 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. 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.

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.

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181 Id. at 1645.
182 See, e.g., Ben-Shahar, supra note 172, 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 177, at 1688-89.
183 Scott, supra note 177, at 1689-90 (citing experiments by Fehr and Gachter).
184 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).
186 Hensler & Peterson, supra note 153, at 1024; Stier, supra note 153, at 919-21; Merck Settlement Group page, http://groups.yahoo.com/group/MerckSettlement/.
187 Eastbanc, Inc. v. Georgetown Park Assoc. II, L.P., 940 A. 2d 996, 1002 (D.D.C. 2008); WILLISTON ON CONTRACTS (4TH) § 3:2; see also RESTATEMENT (FIRST) OF CONTRACTS § 19 (“The requirements of the law for the formation of an informal contract are: (a) A promisor and a promisee each of whom has legal capacity to act as such in the proposed contract; (b) a manifestation of assent by the parties who form the contract to the...
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. Ensuring procedural justice through both voice opportunities in shaping the agreement and input and review by the special officer makes it more likely consenting plaintiffs will adhere to the agreement. 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.

Majoritarian alternatives allow litigants to participate in decision-making either directly or through representatives who have clearly articulated fiduciary duties to the represented group. 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 updates the group on significant developments. Fiduciary duties combined with the consent of the governed legitimate 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, a formal intraclaimant-governance agreement would require that state legislatures amend Model Rule of Professional Conduct 1.8(g), the aggregate-

188 See Musante et al., supra note 111, at 237-38; Shestowsky, supra note 191, at 243.
189 See generally Dean G. Pruitt et al., Long-Term Success in Mediation, 17 LAW & HUMAN BEHAV. 313, 327-28 (1993) (finding that the process of mediation and problem-solving is critical for long-term compliance with mediation agreements).
190 See generally AMERICAN LAW INSTITUTE, supra note 16, at § 3.17(b)(3), (4) (specifying requirements for informed consent).
192 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. 1627 (1999).
193 AMERICAN LAW INSTITUTE, supra note 16, at § 3.17(b).
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.\textsuperscript{194} 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 shortly in the 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.\textsuperscript{195}

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.\textsuperscript{196}

To harmonize the concepts of communication, sorting, and governance, consider a political analogy. In politics, scientists advocating stem-cell research and health-care reformers might support the same presidential contender. Each group shares a common framework—campaigning and voting for a candidate—but does so for unique reasons.\textsuperscript{197} 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 agenda. Although the compatibility inherent in

\textsuperscript{194} Advanced waiver of conflicts of interest and full knowledge of others’ settlement terms departs from standard practice under Model Rule of Professional Conduct 1.8(g). Model Rule of Prof’l Conduct 1.8(g); The Tax Authority, Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006); Nancy J. Moore, The American Law Institute’s 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).

\textsuperscript{195} AMERICAN LAW INSTITUTE, supra note 16, at ¶ 1.05 (c)(1); 3.17(b).

\textsuperscript{196} TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 79 (2000) (citing numerous studies supporting these conclusions).

\textsuperscript{197} Michael E. Bratman, Dynamics of Sociality, 30 MIDWEST STUDIES IN PHILOSOPHY 1, 4-5 (2006) (“Such sharing does not require commonality in each agent’s reason’s for participating in the sharing. . . . We participate for different reasons, but our shared valuing nevertheless establishes a common framework.”).
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. 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. Approaching group dynamics in nonclass aggregation holistically needs nuance and must assess how both group size and social and instrumental motivations affect cooperative behavior and moral obligations. 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. We are not all homo


199 Geographic dispersion similarly adds to the difficulty of cooperation. It has, however, already been discussed. See supra notes 127-134 and accompanying text.

200 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).

201 Stout, supra note 12 at 22-23.
economicus, nor are we all Mother Theresa; we’re 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’re 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. 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.

In addition to variations among social motivations, cooperation negatively correlates with group size. The larger the group the more anonymous its members are to one another, the less they tend to develop other-regarding preferences, and the easier it becomes to defect discretely. Although organizational costs increase, even large-scale groups might cooperate if it is possible to reward cooperators and punish defectors. 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.” 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’ve 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. 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.

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-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 attorney. 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, not all holdouts withhold consent for selfish, opportunistic, or illegitimate reasons. This matters as we consider incentives for attracting outliers into the group, the effects of informal and structural sanctions

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209 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 55% of the subjects contributed nothing).
on illegitimate and opportunistic behavior, and the availability of exit opportunities.\[^{210}\]

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.\[^{211}\] Because these incentives are well-known in the literature, 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.\[^{212}\] Second, plaintiffs litigating collaboratively bring together various attorneys, each with talents and expertise that range from negotiating to trying cases. Third, plaintiffs may benefit directly from the chance to discuss their experiences with one another, tell their stories, and express anger and grief.\[^{213}\] 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.\[^{214}\] As explored 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.

\[^{210}\] See Messick & Brewer, supra note 112, at 11-44; Shinada & Yamagishi, supra note 46, at 95.


\[^{214}\] 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 71, at 241; Burch, supra note 69.
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. Should a potential holdout act selfishly and threaten the group’s welfare, that action would invite spite, disapproval, and ostracism. 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 participants, or to become tearful.

As noted, group members regularly promise each other that they will cooperate. If close-knit group members contemplate violating these commitment norms or breaking their promises, then social sanctioning may effectively deter or punish them. Sanctioning changes the calculus, even for self-interested individuals.

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216 Stout, supra note 12, at 31-32.


218 See Norbert L. Kerr, Anonymity and Social Control in Social Dilemmas, in Resolving Social Dilemmas 103, 105 (Margaret Foddy et al., eds 1999).

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, members to establish community norms, and opportunities for members to chastise norm-violators. In short, the more cohesive the group, the more likely it is to self-regulate.

Social sanctioning is less effective when communicated outside of face-to-face interaction. Thus, in geographically dispersed, large-scale litigation 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: defendant offers to settle, the relevant plaintiffs’ group or subgroup votes in accordance with their outlined agreement, the vote garners the prescribed majority, and dissatisfied minority members initiate other lawsuits to either attack the majority result directly or sue the defendant again. The group’s remedy is then to intervene in the collateral attack, sue for breach of contract, or request an injunction or 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. Yet, there are

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220 Ostrom, supra note 99, at 171.
221 See Posner, supra note 177, at 155.
222 See Ostrom, supra note 99, at 171; A. Barr, Social Dilemmas and Shame-Based Sanctions: Experimental Results from Rural Zimbabwe 16-17 (Centre for the Study of African Econ. Working Paper Series No. 149), available at http://www.bepress.com/cgi/viewcontent.cgi?article=1150&context=csae; Robyn Dawes et al., Behavior, Communication, and Assumptions about Other People’s Behavior in a Commons Dilemma Situation, 35 J. Personality & Soc. Psychol. 1 (1977); Ostrom, supra note 126, at 404; Shinada & Yamagishi, supra note 46, at 110.
223 As explored shortly, a limited judicial fairness review provides a legitimate outlet for minority dissenter to challenge the settlement. See infra notes 228-233 and accompanying text.
224 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
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.\footnote{Moreover, recall that the threat of ex ante legal sanctions may undermine voluntary cooperation where reciprocity and reputational sanctions would otherwise encourage self-governance.\footnote{Further, psychologists contend that structural sanctions have negative psychological effects, destroy intrinsic motivation for cooperation, lessen any sense of community, decrease trust, and thus, the more we use them, the more we need them.\footnote{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:

\begin{quote}
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, \textit{Framing in Resource Dilemmas: Loss Aversion and the Moderating Effects of Sanctions}, 61 \textsc{Org. Behavior & Human Decision Processes} 190, 197-98 (1995). For an explanation of how non-class aggregation relates to common pool dilemmas, see supra notes 43-44 and accompanying text.\footnote{See, e.g., O. Bochet et al., \textit{Communication and Punishment in Voluntary Contribution Experiments}, 60 \textsc{J. Econ. Behav. \& Org.} 11 (2006);}\footnote{Scott, \textit{supra} note 177, at 1689-90 (citing experiments by Fehr and Gachter); \textit{supra} notes 176-177 and accompanying text.}\footnote{Shinada \& Yamagishi, \textit{supra} note 46, at 112-13; see generally M. Taylor, \textit{Anarchy and Cooperation} (1976); M.R. Lepper et al, \textit{Undermining Children’s Intrinsic Interest with Extrinsic Reward: A Test of the Overjustification Hypothesis}, 29 \textsc{J. Personality \& Soc. Psychol.} 129 (1998).}
\end{quote}
At the risk of oversimplifying a spectrum of agreements and sanctions into a dichotomous relationship, these models illustrate two possibilities. First, where plaintiffs rountinely 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 their obligations, which means that plaintiffs 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. Remember that plaintiffs haven’t consented 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.

To defer to plaintiffs’ decision-making autonomy, this limited fairness review should proceed in two steps. 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. 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. Accordingly, the judge conducts a content-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.

228 See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.18 (Final Report, 2010) (on file with author).

229 See Seana Valentine Shiffrin, Paternalism, Unconscionability Doctrine, and Accommodation, 29 PHIL. & PUBLIC AFFAIRS 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”).

230 For a detailed account of this fairness review, see Group Consensus, Individual Consent, supra note 11, manuscript at 22-25.

231 The American Law Institute suggests that judges consider:

the 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 LITIGATION, § 3.17(e) (Final Report, 2010) (section 3.18(a) refers to section 3.17(e)) (on file with author).

232 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 particular claimants are disadvantaged by the settlement considered as a whole.” Id. at §§ 3.17(e), 3.18(a).
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 a 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. 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. 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 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.

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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 done at least part of what legal theory is meant to do in that it has reframed a systemic dilemma to find a workable solution and articulated a procedural framework that’s 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 apologies—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 the initial Vioxx cases cost between $1 million and $1.5 million to develop. 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. Attorneys have to recoup these costs somehow. And their current incentive for doing so 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. What this means for plaintiffs, however, is that there is little room or incentive for them to litigate on principal. Even the 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 here are a few initial thoughts and requests for additional research. First, we need additional data. Relis studied medical injuries

235 See Relis, supra note 47, at 363; Hadfield, supra note 50, at 649.
237 Id.
238 Id.
and Hadfield studied September 11 litigants. 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. 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. 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.

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 then better sorting, a special officer’s “blessing,” and truly informed consent through plaintiff education should alleviate both ambiguity and malpractice concerns.

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239 Relis, supra note 47, at 363; Hadfield, supra note 50, at 649. For references to other studies, see supra note 49.
241 I thank Richard Nagareda for pointing this out to me.
243 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.”); Peter Szendro, Legal Malpractice-Pitfalls and Solutions, 609 PLI/LIT. 325, 330 (1999); 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
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 into more concrete ones. Accordingly, I call these sub-ends “process-based ends,” because they potentially distort or further litigants’ substantive pursuit 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; 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).

First, remember that procedural justice’s primary components include adversarial process; opportunities for voice and participation; impartial, nonbiased decision makers; and mechanisms for error correction, the use of precedent, and equitable error distribution. Yet, in mass litigation, the judges’ 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. Finally, claimants vastly outnumber the judge, which makes voice and participation opportunities scarce. Because plaintiffs currently participate through their attorneys, both communication and agency problems further plague these already limited opportunities.

with conflicting interests has provided bench and bar with one of the toughest problems in legal ethics.”

244 Burch, supra note 21, at 8; Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 238 (2002). Most empirical studies on bipolar litigation demonstrate that cost and delay do not significantly affect litigants’ procedural fairness opinions. Burch, supra note 21, at 34-35.

245 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 or relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.” AMERICAN LAW INSTITUTE, supra note 16, at § 2.04 (a), (b).

246 Supra notes 23-25 and accompanying text.

247 Burch, supra note 21, at 35-37.

Second, trying to achieve equitable allocation for divisible remedies and consensus for indivisible ones raises other concerns. 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.

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, discursive decision-making, problem-solving opportunities, and collective decision-making arrangements. And it tethers these practices firmly to the theoretical framework outlined in Litigating Groups and recounted here. To explain, consider the following illustration that considers how litigating together might change the Vioxx litigation. Recall that critics contended that the settlement was a product of tainted consent because it: required each plaintiffs’ attorney to recommend the deal to 100% of her clients and withdraw from representing those who refused, allowed Merck to walk-away from the deal and pay no one (including plaintiffs’ attorneys) without consent of 85% of the claimants, and forced those who refused the deal to continue litigating before Judge Fallon who pushed for a settlement from the beginning. Admittedly, this requires a good bit of speculation and imagination; 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 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’ve 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

249 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.


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. 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 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 discuss collectively their litigation objectives and injuries.

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 program. Because plaintiffs do not always know what’s feasible or which remedies are available, the special officer should help them translate their

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252 It generally takes awhile for this the Multi-District Litigation Panel to pick a judge, transfer those cases to that judge, and for the judge to then request and receive preliminary reports, affiliated counsel and companies, pending motions, and summaries of similar litigation pending in state court. MANUAL FOR COMPLEX LITIGATION, supra note 20, at § 22.61; see also MDL-1657 Vioxx Products Liability Litigation Current Developments, http://vioxx.laed.uscourts.gov/ (last visited Feb. 14, 2010) (providing a timeline with links to minute orders and current developments).

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. In this sense, process is justice. These voice opportunities help assuage concerns about individual dignity, transparency (at least from within the litigation itself), and participation. Plaintiffs 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 the Vioxx plaintiffs, with oversight and aid from their attorneys and the special officer, sort into categories based on their desired remedies, injuries, or other central issues that pose unique dividing lines, 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 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 even regular 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.

254 See TYLER & BLADER, supra note 196, at 79, 85-86.
256 See Musante et al., supra note 111, at 223, 237-38.
257 For example, in the Vioxx litigation, Plaintiffs attempted to certify a nationwide class or, alternatively, state-specific class actions.
258 On the problem of deliberative economy, see John S. Dryzek, Legitimacy and Economy in Deliberative Democracy, 29 POL. THEORY 651, 651-52 (2002).
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 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.259 Under § 524g 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.260 Leaving nothing to chance, the company hired Joseph Rice, a prominent asbestos plaintiffs’ attorney to garner the requisite votes.261 To put the matter indelicately, the voting pool was diluted with weak claims to gerrymander the requisite vote at the expense of people with serious injuries and future claimants.262

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, 75% instead of 51%), (2) weighted voting (proportional voting based on claim strength), and (3) deliberation before voting.

If approximately 40% 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

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259 *In re Combustion Eng’g*, 391 F.3d 190 (3d Cir. 2004).
260 NAGAREDA, supra note 7, at 168-73.
261 Id. at 169.
262 Id. at 170-73.
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 30 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 30 stronger claims and the
70 weaker ones) and then the settlement must be approved by a 75%
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. 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

263 Another alternative might be a point system like that used for allocating kidneys in
distributive fairness—and the likelihood of voting in favor of a settlement with inequitable allocation diminishes.\textsuperscript{264}

Assume that Merck offers to settle for a lump sum of money so long as 85\% 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.\textsuperscript{265} 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. After taking Vioxx, she had a heart attack, and says, “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.”\textsuperscript{266}

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 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

\textsuperscript{264} 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, \textit{supra} note 36, at 146. They note further that research shows that some are truly concerned about fairness, whereas, others use it instrumentally. \textit{Id.; see also} van Dijk, \textit{supra} note 202, at 697.

\textsuperscript{265} O’Hara & Yarn, \textit{supra} note 49, at 1125; \textit{Apologetic Toyota Looking to Outside Quality Input}, N.Y. TIMES, Feb. 5, 2010.

\textsuperscript{266} Plaintiff’s View, My Story, \url{http://www.plaintiffsview.org/MyStoryPaulette.html} (last visited, Feb. 14, 2010).
others—might ultimately lead them to a mutually acceptable alternative.\footnote{See Michael E. Bratman, Shared Valuing and Frameworks, in Structures of Agency 283, 303 (Michael E. Bratman ed., 2007).} 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 consider collectively 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.\footnote{See Sunstein, supra note 245.} 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.” Rather, as devil’s advocates, outliers raise potential deficiencies to the special officer, judge, group, and attorneys.\footnote{See Rubenstein, supra note 101, at 1453-55.} 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. 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 . . . there is everywhere a well-recognized need for procedures for conflict resolution, which can replace brute force and domination and tyranny.” Admittedly, no approach—including “litigating together”—is flawless. Involving plaintiffs in decision-making is thorny; deliberation is messy and time-consuming. Neither is 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.

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 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, “It’s not about the money,” 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

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270 Group Consensus, Individual Consent, supra note 11, at 22-25.
271 STUART HAMPShIRE, JUSTICE IS CONFLICT 4-5 (2000).
272 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 215, at 35.
273 Relis, supra note 47, at 701.
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. 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 intraclaimant-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, we begin to see that process can be about so much more than welfare maximization or individual autonomy.

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