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## LITIGATING GROUPS

*Elizabeth Chamblee Burch\**

### ABSTRACT

*Large-scale litigation, such as the Vioxx, Zyprexa, and asbestos cases, breeds conflict. Conflicts arise between attorneys and their clients (agency problems), plaintiffs and other plaintiffs (group problems), and plaintiffs' attorneys and other plaintiffs' attorneys (competition problems). Although judges regularly refuse to certify these cases as class actions, they still proceed en masse to achieve economies of scale and present a credible threat to defendants. Assuming that coordinating and consolidating large-scale litigation is systemically desirable, this Article explores a new approach to removing the group and agency problems that increase aggregate litigation's costs and undermine its normative goals such as fairness, compensation, and deterrence.*

*Unlike traditional scholarship that emphasizes individual autonomy or welfare maximization, this Article borrows from the literature of moral and political philosophy as well as social psychology to analyze group dynamics within nonclass aggregation. It requires us to view plaintiffs within large-scale litigation as a community of sorts and to recognize that sometimes a litigant incurs obligations simply by virtue of being a group member, whether chosen or not and whether welfare-maximizing or not. Moreover, empirical studies demonstrate that once people consider themselves part of a group, they exhibit other-regarding preferences—trust, reciproc-*

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\* Assistant Professor, Florida State University College of Law. For invaluable comments on earlier drafts and/or thought-provoking discussions, I am indebted to Curtis Bridgeman, Thomas Burch, Robin Craig, Brannon Denning, Sam Issacharoff, David Marcus, Dan Markel, Richard Nagareda, J.B. Ruhl, Tony Sebok, Peggy Torrey, Lesley Wexler, Manuel Utset, Ben Zipursky, and participants at Law and Society's Access to Justice Panel and Vanderbilt University School of Law's Roundtable on Mass Settlements via Contract with Plaintiffs' Law Firms. Special thanks to Al Pennington and numerous members of the Merck Settlement Group for their willingness to correspond with me and for their thoughtful insights about the Vioxx settlement.

*ity, and altruism—toward other members. Cohesive group members are more likely to cooperate with one another and care about the collective outcome, and less likely to exit the group when doing so benefits the individual rather than the group. In the face of hard cases, of instability and disunity, plaintiffs who have made promises and assurances to one another can invoke social norms of promise-keeping, social agglomeration, compatibility, and the desire for means-end coherence to achieve consensus, mitigate client-client conflicts, and restore the tether between clients and their attorneys. Thus, using groups to overcome the problems in nonclass aggregation not only makes sense from a group responsibility perspective, but it may also harmonize with wealth maximization and individual autonomy goals.*

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## INTRODUCTION

Group dynamics fundamentally change mass litigation. But few, if any, attempts have been made to harness the power of groups for the good of the litigants. The reason, in part, is that scholars tend to approach the judicial handling of large-scale litigation—class actions, mass torts, non-class aggregation—and the problems it engenders based on one of two

perspectives. One camp includes those who want to use aggregation procedures to regulate conduct efficiently and deter wrongdoing in order to maximize social welfare; the other privileges individual autonomy and consent over the general welfare, aiming to afford individual justice to victims through their own day in court.<sup>1</sup> Nearly all theoretical scholarship on large-scale litigation invokes one or both of these two principles—welfare maximization or individual autonomy. Relying principally on these two perspectives, however, leads us to many of the same arguments. Not surprisingly then, perennial problems—imperfect agency, conflicts of interest, holdouts, and settlement misallocation—persist today. This Article seeks a new route, one that may meld or disrupt these existing factions on different points, but ushers in a new way of thinking about the plaintiffs within large-scale litigation by focusing on group dynamics.

An alternative emphasis on groups, one that borrows from moral and political philosophy as well as cognitive social psychology, can change the terms of this debate and mitigate aggregation's age-old dilemmas. But it requires us to view plaintiffs within large-scale litigation as a community of sorts and to recognize that sometimes obligations follow simply by virtue of being a group member, whether chosen or not.

To explain, until a few decades ago, political philosophy divided along roughly the same lines as class action scholarship. Utilitarians such as Jeremy Bentham and John Stuart Mill promoted welfare maximization,

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1. For examples of those who tend to emphasize individual autonomy, see Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1 (1990); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989). Echoes of autonomy exist in Supreme Court opinions as well. *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) (discussing the idea of one's own day in court), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (discussing class members' rights to notice and opt out).

For examples of those adopting a collective or efficiency-based approach, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996) [hereinafter *Individual Justice*]; David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989).

Still others have recommendations for mitigating between these two camps to protect both individual and group interests. See Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995); Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991). Many of these demarcations come from David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914–16 nn.3–4 (1998).

pronouncing, “justice . . . *is* whatever utility requires.”<sup>2</sup> Other theorists dating back to the classical social-contract model, such as Hobbes, Locke, and Rousseau, tended toward autonomy, pressing for some notion of individual consent to bind people through a social contract theory of political obligation.<sup>3</sup> John Rawls then built on these ideas to construct a political philosophy based on individual autonomy.

But after John Rawls—and in some ways because of Rawls—things began to change. A third lens for political philosophy emerged. Michael Sandel famously argued that we have obligations simply by virtue of being members of a community, regardless of whether we consented to being part of that community or whether recognizing those obligations maximized welfare.<sup>4</sup> In addition to Sandel, Charles Taylor, Michael Walzer, and Alasdair MacIntyre emphasized human association as a source of self-identity and the building block of society.<sup>5</sup> By now, political philosophers have developed a sophisticated literature on what constitutes a political community, the qualifications for community membership, and the moral consequences that flow from such membership.

Bringing this literature to bear on mass litigation suggests an unconventional source of litigant obligations apart from privileging autonomy or maximizing welfare. The alternative is based instead on inclusion within the relevant community. Once we consider what constitutes a community within large-scale litigation, social psychology offers a growing empirical literature on group norms, collective decision-making, and cooperation. When people conceive of themselves as group members, they demonstrate other-regarding preferences. They tend to change their views of distributive and procedural justice such that they are no longer principally concerned with their own outcome, but with equity for the collective group. Group membership fundamentally changes the litigation calculus in beneficial ways—litigants feel obligated to one another. To capitalize on those other-regarding preferences, social psychology also recommends techniques to foster group formation and increase cohesion and stability.

To make concrete these abstract ideas, consider two familiar examples. The first is a family. Simply by virtue of being related, many would

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2. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 5 n.1 (1982). Mill states this proposition less succinctly. JOHN STUART MILL, *UTILITARIANISM* 59 (George Sher, 2d ed., Hackett Publishing Co., Inc. 2001) (1861) (“While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality.”).

3. Although Hobbes and Rousseau are not universally regarded as autonomists in the Kantian sense, I categorize them as autonomy theorists since the point of the social contract is that it bases political obligation on some notion of individual consent.

4. SANDEL, *supra* note 2, at 1–14.

5. ADRIAN LITTLE, *THE POLITICS OF COMMUNITY* 19 (2002). Although these scholars have become known as “communitarians,” most eschew that label. Sandel, in particular, seems to see himself as reviving civic republicanism.

agree that we have obligations to our parents even though we had no part in selecting them. The second example comes from tort law. Generally, we have no duty to rescue one another. But, if you are in the middle of a multicar pileup (through no fault of your own), and you inadvertently put someone else in peril, then you have an obligation to help her.<sup>6</sup> You have not consented to being a son or daughter or part of a car accident in any meaningful way; nevertheless, you incur certain obligations simply by being part of that “community.”<sup>7</sup> To be sure, claiming that communities give rise to obligations says nothing about the nature of those obligations. A duty to rescue in tort law might simply require you to call for help, not to endanger your own life in a heroic rescue. But the point for now is that mere membership in a group, whether chosen or not and whether welfare-enhancing or not, can sometimes give rise to obligations.<sup>8</sup>

This Article has two objectives. First, I argue that scholars, judges, and practitioners who are either thinking about or engaged in large-scale litigation—be it class actions, mass torts, or other nonclass aggregation—should seriously consider this alternative source of obligation. Although I focus here on nonclass aggregation, the general insights about community, commitments, and groups apply to other forms of aggregation as well. Aggregation involves cases where many people are injured in comparable ways by the same product, drug, or chemical; the same defendant; or who share some other common denominator. Thus, plaintiffs can be loosely construed as a community, not just a collection of individuals. To use a term first coined by Margaret Gilbert, these individuals constitute a “plural subject.”<sup>9</sup> Characterizing litigants in this way forces us to contemplate the possibility that the content of their rights and duties may not depend only on what maximizes the general welfare or what preserves their individual autonomy, but what follows from their membership in that group.

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6. See RESTATEMENT (THIRD) OF TORTS § 40 cmt. d (Tentative Draft No. 4, April 1, 2004) (“For example, an automobile driver who collides with another (negligently or non-negligently) has a duty to use reasonable care to prevent further harm to the other.”); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1709–10 (2002); John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 747 (2001); cf. *Fuentes v. Reilly*, 590 F.2d 509, 513 (3d Cir. 1979); *Brooks v. E. J. Willig Truck Transp. Co.*, 255 P.2d 802, 808–09 (Cal. 1953); RESTATEMENT (SECOND) OF TORTS § 322 (1965) (“If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.”). I am indebted to Curtis Bridgemen for suggesting this example.

7. I use the terms “community” and “group” in their colloquial sense and often use them interchangeably. To be sure, a community would technically be one type of group, and groups themselves may form within plural communities.

8. Granted, utilitarians might fairly claim that these duties are justified because they maximize welfare. My objective here, however, is to say simply that a moral duty arises from the fact of membership in a community, regardless of whether that duty also happens to increase welfare.

9. MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY* 3 (2000); see also Shapiro, *supra* note 1, *passim* (reasoning that a class action is more than an aggregation of its individual members).

Still, even if I am right about this broad idea, two daunting questions remain: What constitutes a litigation community, and what obligations flow from membership in that community? The most I can do in this regard is hint at some answers by drawing from the literature of philosophy and social psychology. Unsurprisingly, there are many types of communities and the nature and obligations depend heavily on the community itself.

My second objective is to demonstrate more concretely how group-based obligations and empirical studies on groups should inform the way we approach nonclass aggregation. Nonclass aggregation means mass joiner actions—such as the Vioxx, Zyprexa, and asbestos cases—that encompass claims held by multiple plaintiffs who each have a contractual relationship with their attorney. These claims cannot be certified as a class action either because individual issues predominate or a class action would be unmanageable.<sup>10</sup> Even though the nature of personal injury and product liability claims might compel litigants to initiate these claims individually, because the costs of effectively developing and litigating such claims is so high, aggregation helps effectuate substantive goals and creates a credible threat to defendants.

Three related notions underlie this second objective. First, I rely on the literature from moral and political philosophy to define and explain how litigants within nonclass aggregation form a community and to suggest the obligations that flow from that community. Second, empirical findings from social psychology demonstrate that once people perceive one another as group members, they tend to fundamentally change their ideas about justice: they care not just about their own outcomes but about the group's collective welfare. They are more likely to cooperate and less likely to defect. Thus, moving beyond a reductionist theory—the idea that a group is simply an aggregate of individuals—and making a serious inquiry into “groups” provides clues about alleviating aggregation's quintessential dilemmas of attorney–client conflicts, client–client conflicts, allocation problems, the lack of voice opportunities, and even the so-called “holdout problem.” Third, social psychology also suggests methods for fostering group cohesion. Put differently, after recognizing that group members incur moral obligations to one another and that membership both increases cooperation and changes decision-making about dilemmas, we should explore how the legal system can encourage those prosocial behaviors.

To accomplish these two objectives, this Article is divided into three parts and rests on several assumptions.<sup>11</sup> Throughout this Article, I take

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10. For a detailed definition of nonclass aggregation, see *infra* pp. 9–12.

11. These assumptions build on my previous scholarship in this area and permit me to develop a framework for this new approach. See Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) [hereinafter Burch, *Procedural Justice*]; L. Elizabeth

for granted a prototypical aggregate lawsuit: many plaintiffs (who may be geographically dispersed) bring tort claims with sometimes difficult causation issues against a large corporate defendant and request damages and possibly other relief. Changes in this base assumption, such as territorial proximity, make group formation and cohesion simpler. I further assume that a settlement offer is fair, though that assumption and its definition are heavily disputed in real-world cases. Finally, this Article brackets, for now, first-order questions about the nature and purpose of the tort system and assumes a pluralist perspective.

Part I explains the occurrence and prevalence of nonclass aggregation and highlights the conflicts that process engenders. Conflicts surface between attorneys and their clients and between plaintiffs and other plaintiffs over when and how to settle, litigation goals, and how to allocate the settlement proceeds. The defendant's desire for complete peace exacerbates the holdout problem, where some plaintiffs demand premiums for their consent and thus threaten to derail the settlement. Disunity emerges as the common thread; promoting harmony and cooperation—unity in other words—mitigates the discord. Plus, a unified group is in a better position to perform the oversight functions that protect clients in traditional bipolar litigation, such as monitoring the litigation's progress and holding the attorney accountable.

Part II lays the theoretical foundation for the proposed alternative: a novel claimant-centered approach founded on groups and social norms. Accordingly, Part II undertakes the task of defining and explaining how aggregate litigants can be considered a community. Using illustrations from Agent Orange, Vioxx, the Buffalo Creek Disaster, and the Holocaust litigation, this section introduces the “plural subject” concept as an umbrella term and develops its stronger subsets—shared cooperative activity and shared group policies. It then questions whether large-scale litigation, such as Vioxx, could constitute a singular group. It concludes that the possibility exists, but that relying on superficial unifying features as the social glue may prove too thin to endure in the face of hard cases. Dispersion due to instability and shallow cohesion may cause splintering and subgrouping.

Part III builds on this theory of groups within nonclass aggregation to mitigate some of the problems raised in Part I, including holdouts, group outliers, and subgroup competition. First, it posits that obligations follow from being a plural subject and evaluates when members are morally obligated to one another not to opt out of the litigation. When litigants jointly and voluntarily intend to perform all or some litigation tasks together and

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Chamblee [Burch], *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 160 (2004).



commit to doing so through promises and assurances, they are morally obligated to act in accordance with those intentions.<sup>12</sup> Thus, it is the promises and assurances—the commitment—made in the execution and etiology of group development that obligates. This Subpart does not take a position on how substantive law should enforce those moral obligations; instead, the second Subpart of Part III suggests methods for cultivating group cohesion in mass litigation through cooperation. Cooperation challenges the purported need for externally coercive mechanisms to obligate and restrain litigants. That is, once we recognize that plural subjects incur moral obligations to one another and that membership both increases cooperation and changes decision-making about dilemmas, systemically encouraging those prosocial behaviors helps alleviate problems caused by outliers and holdouts. Finally, the last Subpart proposes methods for reducing competition between subgroups by using a special officer or mediator to make salient the collective membership category and deemphasize factional allegiance.

In short, this Article posits that cohesive groups provide a more durable solution to the challenges inherent in collective litigation: the client-client conflicts, allocation issues, and holdout problems. In the face of hard cases, of instability and disunity, a group that has made promises and assurances to one another can invoke social norms of promise-keeping, social agglomeration, compatibility, and the desire for means-end coherence to achieve consensus. Thus, by focusing on group cohesion and the obligations that follow from group membership, this alternative reallocates power to the claimants themselves. Make no mistake: this new approach fundamentally modifies the attorney's role. Unlike most scholarship on this topic—including most prominently the American Law Institute's Principles of the Law of Aggregate Litigation—this Article does not concede that the attorney rightly acts as the fulcrum in aggregate litigation.<sup>13</sup> Instead, the power imbalance between dispersed claimants and their attorney causes many of the conflicts in nonclass aggregation. Strengthening group cohesion restores the tether between the group and its agent and better situates the group to monitor the litigation.

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12. This idea is distinct from a contract because mere promises are not legally enforceable. See *infra* notes 182–183 and accompanying text. For more on how contracts might reinforce this notion of obligation, see *infra* note 224 and accompanying text.

13. The dominant paradigm emphasizes the principal-agent problem and accepts the attorney-agent as the litigation architect and director. This prevailing approach is seen most recently in the American Law Institute's current project on the Principles of the Law of Aggregate Litigation. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (Proposed Final Draft 2009). My intent is not to downplay the importance of that invaluable project, but to challenge some of its principal assumptions.

## I. HAZARDS OF NONCLASS AGGREGATION

One way to think about the problems occurring in nonclass aggregation is to characterize aggregate settlements as a social dilemma, specifically a common pool dilemma. In social dilemmas, the payoff to each individual for defecting rather than cooperating is greater, but everyone is better off if each cooperates than if all act selfishly.<sup>14</sup> Consider, for example, an individual plaintiff's inherent conflict with the group's collective interests. A plaintiff who defects by demanding a premium for her consent rather than cooperating with other litigants receives a higher payout.<sup>15</sup> And, assuming the settlement offer is fair, all plaintiffs are better off if each cooperates than if one holds out. Enough holdouts could derail an offer contingent on a certain percentage of acceptances and no one would receive anything. In short, the more litigants who choose to pursue their private interests at the expense of the group's collective interests, the more the group falls short of achieving its collective goals.

Initiating litigation, even aggregate litigation, frequently presents no explicit social dilemma because litigants assume, correctly or not, that the defendant has abundant resources to fully compensate each individual. But at some point, typically once the defendant makes a settlement offer, the common pool's limits become apparent. While distributive justice concerns prevail until this triggering event occurs, once plaintiffs realize that not everyone will actualize the full value of their losses, procedural justice concerns shift to the forefront.<sup>16</sup> If claimants initiated individual lawsuits, then each might push to obtain the biggest possible portion of the settlement's proceeds. Clearly, it would be better for all involved to show a little restraint or work in unison, so that no one deserving compensation is left with nothing. But, if no one else is going to restrain herself, then there is little incentive to be the one who does.

This Part highlights the conflicts and dilemmas that arise in deciding when and whether to settle as well as in allocating settlement proceeds among the plaintiffs. It begins with the context leading to aggregate settlements and then explains how that context breeds conflict—conflict between clients and between clients and their attorneys. Those conflicts are

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14. Robyn M. Dawes, *Social Dilemmas*, 31 ANN. REV. PSYCHOL. 169, 170 (1980); see also Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968) (explaining the tragedy of freedom in a commons); Elinor Ostrom, *Engaging Impossibilities and Possibilities*, in 2 ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN 522, 525–28 (Kaushik Basu & Ravi Kambur eds., 2009), available at <http://ssrn.com/abstract=1304701>.

15. If litigants' primary objective is injunctive or declaratory relief, then the group is far more likely to be certified as a Rule 23(b)(2) class action. Consequently, my concern here is with litigants who seek damages, but cannot be certified as a class under Rule 23(b)(3).

16. David A. Schroeder et al., *A Recursive Model for Changing Justice Concerns in Social Dilemmas*, in NEW ISSUES AND PARADIGMS IN RESEARCH ON SOCIAL DILEMMAS 142, 143–44 (Anders Biel et al. eds., 2008).

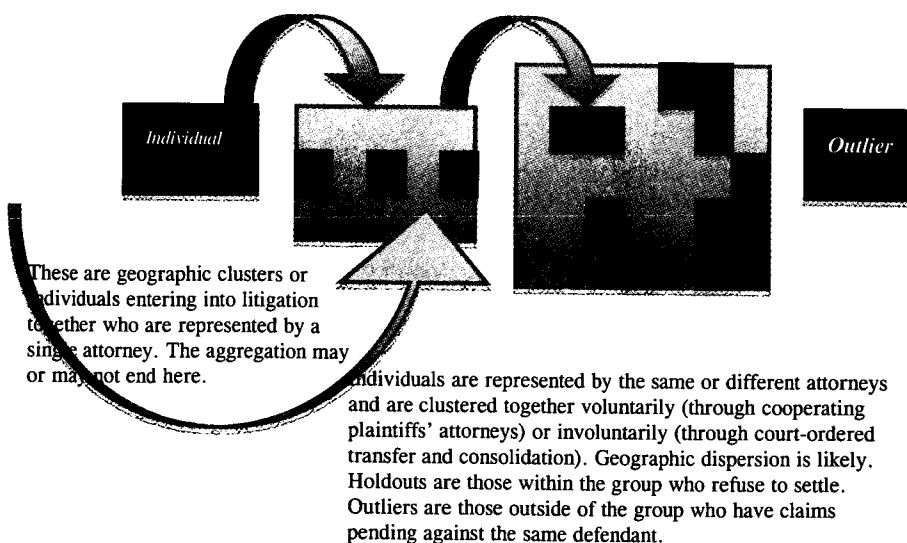
most pronounced in determining whether to accept a settlement offer and, once accepted, in allocating funds among claimants.

### A. Conflicts

Nonclass aggregation can occur in any number of ways: some plaintiffs may purposefully enter into contingency-fee agreements with specific attorneys who represent similar plaintiffs; others might be grouped through coercive court-mandated consolidation and transfer procedures such as multidistrict transfer, joinder under Rule 20, and consolidation under Rule 42.<sup>17</sup> Other litigants may first form a group and then seek collective representation. Still others may join the litigation post-aggregation after hearing about it in the news or through attorney advertising.<sup>18</sup> Thus, a single lawyer or firm may represent multiple claimants in a single case, or might coordinate individually filed actions. To illustrate:

Clusters within Nonclass Aggregation:

Figure 1:



17. 28 U.S.C. § 1407 (2000) (multidistrict transfer); FED. R. CIV. P. 20 (permissive party joinder); FED. R. CIV. P. 42(a) (consolidation).

18. See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 304 (1996); Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 1-3 (1982). In aggregate litigation, the attorney is often the catalyst in motivating group membership and in defining group goals. See Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 432-33 (1999); Rheingold, *supra*, at 2. Richard Nagareda provides a helpful overview of the client recruitment process in his book, *Mass Torts in a World of Settlement*. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 16-18 (2007).

Despite their potential magnitude, aggregate settlements generally go unnoticed for several reasons. Unlike class actions, which require court approval and fairness hearings that are open to the public, the federal rules require no special judicial oversight of nonclass aggregation.<sup>19</sup> Aggregate settlements thus generate few judicial opinions. Plus, though the issues raised in mass torts routinely bear on public health and safety, these settlements may include confidentiality provisions, which further insulate them from scrutiny by judges, the academy, and the public.

Settlements advantage those most familiar with the process, the repeat players: plaintiffs' attorneys and defense attorneys as well as judges.<sup>20</sup> The economics of mass tort litigation dictates that plaintiffs' attorneys collect a sizeable inventory of claimants through advertisements or referrals to present a credible threat to defendants, streamline information collection and communication, and reduce litigation and expert witness costs per claimant.<sup>21</sup> Collective litigation likewise advantages defendants by making peace available through a broadly inclusive resolution—settlement.

Take the Vioxx settlement, for instance. By including an 85% walk-away provision, Merck contained its liability and reassured investors; its stock rose sharply after settling although the overall market went down that day.<sup>22</sup> Plaintiffs' counsel benefitted from a payday after expending significant monetary resources, received increased publicity, and could then pursue other cases.<sup>23</sup> Judge Fallon, who indicated early in the litigation that he intended to encourage settlement despite Merck's initial refusal, decreased his docket's congestion significantly, bolstered his reputation with the Multidistrict Litigation Panel, and surely experienced some personal satisfaction over engineering the agreement.<sup>24</sup> In contrast to these victories, the Vioxx deal mandated that each participating attorney recommend the settlement to 100% of her eligible clients, regardless of the client's best inter-

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19. See *U.S. v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980) (“[B]ecause the parties are free at any time to agree to a resolution of the dispute by private contractual agreement, and to dismiss the lawsuit by stipulation . . . the trial court plays no role in overseeing or approving any settlement proposals.”); see also FED. R. CIV. P. 41 (permitting a lawsuit to be dismissed at any time if all of the parties consent).

20. I have previously explored this point at length and thus simply summarize it here. Chamblee [Burch], *supra* note 11, at 160; see also Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1577–90 (2004) (observing the emergence of repeat players).

21. See NAGAREDA, *supra* note 17, at 13–14; Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1774–75 (2005); Resnik et al., *supra* note 18, at 313.

22. Posting of Howard M. Erichson to Mass Tort Litigation Blog, *The Vioxx Settlement*, [http://lawprofessors.typepad.com/mass\\_tort\\_litigation/2007/11/the-vioxx-settl.html](http://lawprofessors.typepad.com/mass_tort_litigation/2007/11/the-vioxx-settl.html) (Nov. 10, 2007).

23. Amir Efrati et al., *Vioxx Settlement's Next Big Question: How to Split it Up?*, WALL ST. J., Nov. 12, 2007, at B1 (noting that one plaintiff's attorney invested \$300,000 in the litigation, “a significant outlay . . . for a firm of 10 partners”); Erichson, *supra* note 22.

24. See Erichson, *supra* note 22; Jef Feeley & Leslie Snadowsky, *Merck Vioxx Judge Threatens to End Suit Consolidation*, BLOOMBERG, Jan. 5, 2006.

ests, and then withdraw from representing those who refused the deal.<sup>25</sup> The bottom line is this: claimants often bear the tax for what has become standard practice in nonclass aggregation.

Individual plaintiffs within collective representation have little substantive input or authority over how their attorney handles the case.<sup>26</sup> Plus, the attorney works to achieve the best result for the whole group.<sup>27</sup> Thus, although the typical solution to shirking is monitoring, because these attorney-client relationships are often attenuated, clients tend to be ineffective monitors. As a result, conflicts arise between attorneys and their clients and between plaintiffs and other plaintiffs over trial strategies, litigation goals, and degrees of harm.<sup>28</sup>

One recent study interviewing both plaintiffs' attorneys and plaintiffs found a fundamental disparity in litigation goals: attorneys assumed money was the primary litigation objective, whereas plaintiffs wanted to be heard, to be respected post-injury, to reveal cover-ups, and to prevent injury to others.<sup>29</sup> Even when overarching goals mesh, the strategy for attaining those goals may differ. For instance, in representing an inventory of claimants and selecting some for trial, an attorney will likely pick the strongest cases in hopes that early victories for a few will benefit others.<sup>30</sup> Winning early cases increases settlement pressure on the defendant, but it also

25. Vioxx Prod. Liab. Litig., MDL-1657, No. 05-01657 para. 1.2.8.1 (E.D. La. 2007) (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). Several plaintiffs' lawyers subsequently filed an emergency motion requesting to keep some of their clients outside the settlement and noting that the settlement conflicted with ethical rules. Alex Berenson, *Lawyers Seek To Alter Settlement Over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4. The settlement agreement was then reinterpreted to mean that plaintiffs' attorneys would only recommend it to a client if it was in the client's best interest.

26. A similar disconnect occurs in the corporate context between managers and shareholders. See Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 555-56 (1995).

27. Burch, *supra* note 11, at 3. See also Chamblee [Burch], *supra* note 11, at 159; Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 525-26 (2003); *Individual Justice*, *supra* note 1, at 210.

28. The Model Rules of Professional Conduct outline conflicts of interests between current clients: "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2007).

29. Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 721-25 (2007); see also Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1362-63 (1992); Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1369-70 (2003) (discussing this phenomenon as "projection bias").

30. Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 306-07 (2003); see also Erichson, *supra* note 27, at 559-60. The strongest cases are not necessarily the most deserving of a large payout. That is, others may have injuries that are more serious, but causation issues may complicate the case.

facilitates a lottery of sorts: a win may yield a significant payout for those chosen for trial, yet make the remaining clients only relatively better off.<sup>31</sup>

These contradictory motivations also affect the decision to settle. For example, suppose a defendant offers to settle a case for nominal value either before a complaint is ever filed or soon thereafter. The clients may not be inclined to take it, particularly if they want to reveal cover-ups and prevent others from injury. They might desire institutional reforms or product recalls that only discovery and publicity produce. Or maybe they think that additional work would lead to a better monetary result. But the lawyer might see the settlement as more attractive, particularly if she is working on a contingency fee. She would receive roughly one-third of the settlement value rather quickly and could then move on to other cases. Granted, additional work could lead to a larger pay out for the attorney as well. Still, it involves further risks and only marginal increases for the attorney, thereby misaligning client and attorney interests.<sup>32</sup> This conflict arises because of the attorney's dual role: she is not simply acting as the client's agent, she is financing the litigation, making her a creditor and the litigation a joint venture.<sup>33</sup> Agency rules address the former relationship, the agency itself, but ignore and even eschew the other roles.<sup>34</sup>

Ethical rules attempt to curb this conflict by giving clients the authority to settle and to reject offers for less than what they want.<sup>35</sup> But there are additional concerns when agents represent more than one principal, particularly when those principals have competing interests. Benefitting one client might prove detrimental to another. Model Rule of Professional Conduct 1.8(g) nominally addresses the problem by requiring a lawyer representing two or more clients to first obtain informed consent and to then disclose the existence and nature of both the claims and the values received by the others participating in the settlement.<sup>36</sup> Put differently, this rule purports to guard against agent disincentives and misallocation problems by giving plaintiffs the right to reject their settlement offer and to insist on either a higher payout or a trial.<sup>37</sup> This assumes, however, that plaintiffs know the value of their claim vis-à-vis the other claims as well as

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31. Silver, *supra* note 30, at 306–07.

32. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 190 (1987).

33. 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); see also Silver, *supra* note 30, at 303 (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.

34. Silver, *supra* note 30, at 303.

35. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007).

36. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2007).

37. Paul H. Edelman, Richard A. Nagareda & Charles Silver, *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95, 100 (2006).

the discount factor for litigating en masse.<sup>38</sup> Otherwise, they would make an uninformed decision. And recent empirical work demonstrates that lay-people generally follow their attorney's advice on when to settle and what to accept, which further limits this "solution's" efficacy.<sup>39</sup>

### B. Allocation Issues

Plaintiffs' attorneys likewise have myriad incentives to misallocate settlement proceeds among clients.<sup>40</sup> For instance, a lawyer might have to pay referral fees for some claimants but none for others, or she might have repeat business with particular clients and want to further that relationship.<sup>41</sup> To illustrate, after receiving a settlement offer in the Fen-phen litigation, one plaintiffs' law firm sued the firm to which it referred clients. The referring firm alleged that the receiving firm intentionally allocated more money to its direct clients than to the referred clients in order to pay fewer referral fees.<sup>42</sup> Whether the client had been referred to the law firm, as opposed to retaining the firm directly, determined the size of the client's payout.<sup>43</sup> Misallocation might also arise when an attorney aims to enhance her reputation with potential clients in a specialty area. She thus has incentives to overpay weak injuries—which are more prevalent—and underpay severe ones, a criticism commonly leveled at asbestos attorneys.<sup>44</sup>

As noted, the traditional answer to these conundrums is to give claimants the power to settle.<sup>45</sup> This control forces both plaintiffs' attorneys and defendants to care about the settlement amount and its allocation.<sup>46</sup> When defendants decide to settle, they almost uniformly desire global resolution.

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38. *Id.* at 108.

39. See Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 285 (2007); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 291–97, 318–19 (1999).

40. John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1542 (1998).

41. Edelman et al., *supra* note 37, at 99; see also Coffee, *supra* note 40, at 1545–46.

42. *In re New York Diet Drug Litig.*, 850 N.Y.S.2d 408, 408 (N.Y. App. Div. 2008); Parker & Waichman v. Napoli, 815 N.Y.S.2d 71, 72–73 (N.Y. App. Div. 2006); see also Edelman et al., *supra* note 37, at 99. These claims were eventually dismissed. Parker & Waichman v. Napoli, 858 N.Y.S.2d 156 (N.Y. App. Div. 2008).

43. Anthony Lin, *Trial Ordered Over Firm's Role in 'Fen-Phen' Pact*, N.Y. LAW JOURNAL, Mar. 28, 2007, at 2. The parties disagreed about whether the settlement was a lump sum aggregate settlement. *Id.*

44. Edelman et al., *supra* note 37, at 100.

45. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (2000).

46. Edelman et al., *supra* note 37, at 100–01.

By design, they thus want to include as many plaintiffs as possible. Embedding walk-away provisions within the settlement offer allows defendants to exit the arrangement if less than the requisite number of claimants—often approximately 85%—agrees.<sup>47</sup> In theory, this sounds reasonable. That may not be the case, however, in practice.

To further encourage agreement, defendants might add most-favored-nation provisions and liens on their assets in favor of settlement participants. Most-favored-nation provisions assure those remaining in the settlement that they will not be worse off for so doing by guaranteeing that those opting out will not receive a more generous offer.<sup>48</sup> Thus, although individuals could decline the offer, they would need extreme risk tolerance; they must effectively choose between guaranteed benefits or litigating their claims until judgment. Further, even a claimant with a successful judgment, one higher than the settlement offer, would have to stand in line behind settlement participants if the agreement included a lien on defendant's assets.<sup>49</sup> Accordingly, risk preferences must account not only for trial or continued litigation, but also for the possibility of fewer assets from which to collect.<sup>50</sup> Even people with strong cases are more likely to settle on the cheap if they need funds immediately, either because of lower socioeconomic status or because the injury has decreased their life expectancies.<sup>51</sup> In short, through aggregate settlement design, repeat plaintiffs' and defense attorneys have constructed something akin to a Rule 23(b)(3) opt-out class action, but without the judicial protections afforded to certified class actions.<sup>52</sup>

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47. See Erichson, *supra* note 21, at 1793–94.

48. See James M. Anderson, *Understanding Mass Tort Defendant Incentives for Confidential Settlements: Lessons from Bayer's Cerivastatin Litigation Strategy*, 18–19 (RAND Institute for Civil Justice, Working Paper No. 617, Sept. 2008), available at [http://www.rand.org/pubs/working\\_papers/2008/RAND\\_WR617.pdf](http://www.rand.org/pubs/working_papers/2008/RAND_WR617.pdf) (last visited Oct. 27, 2009).

49. See *In re Inter-op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 354 (N.D. Ohio 2001). Granted, as Richard Nagareda has pointed out to me, this is quite rare. It is the threat itself (as opposed to the trigger) that is effective in deterring opt outs. See Kathryn E. Spier, *The Use of "Most-Favored-Nation" Clauses in Settlement of Litigation*, 34 RAND J. ECON. 78, 80 (2003).

50. *Inter-op Hip Prosthesis Liab. Litig.*, 204 F.R.D. at 354 (upholding as fair and reasonable a 23(b)(3) class action settlement agreement with a most-favored-nation provision as well as a provision that created a lien on the defendants' assets in favor of settlement participants). As Dickie Scruggs, who designed the settlement, describes, "if anybody opts out, they [sic] still have to try their case, win their case, win their appeal, and then there would be no assets to satisfy their judgment, because they are all pledged to the class." Jess Bravin, *Sulzer Medica Reaches Novel Class-Action Pact*, WALL ST. J., Aug. 16, 2001, at A3. On appeal, the Sixth Circuit expressed doubts about the settlement's legitimacy and the attorneys ultimately removed the lien and increased the assets available to the class. RICHARD A. NAGAREDA, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 491 (forthcoming 2009).

51. Edelman et al., *supra* note 37, at 100; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

52. Judicial protections include those in Rule 23: that the judge will appoint class counsel, approve a settlement's fairness, and approve the class attorney's fee. FED. R. CIV. P. 23.



Settlement agreements requiring nearly unanimous consent, whether through walk-away percentages, liens on defendant's assets, or most-favored-nation provisions, pressure claimants to accept the terms. But lump-sum settlements conditioned on nearly unanimous claimant consent go further. By "lump-sum" settlements, I mean instances in which the defendant approaches plaintiffs' counsel and offers a sum of money to settle all cases without regard to how it is apportioned.<sup>53</sup> They create an ultimatum game: if a claimant rejects (or enough claimants reject) the settlement, then no one receives anything. This entices certain plaintiffs to withhold consent, or "hold out," until they receive a disproportionately higher payout.

At the risk of oversimplifying multifaceted obstacles, one way to summarize the holdout problem, client-client conflicts, attorney-client conflicts, and allocation issues is as a single concept: disunity. Granted, friction exists between multiple plaintiffs'-side entities, but even those are not so diverse. Disunity arises between three factions: attorneys and their clients (agency problems), plaintiffs and other plaintiffs (group problems), and plaintiffs' attorneys and other plaintiffs' attorneys (competition problems). This Article focuses on problems with the group dynamic, specifically conflicts between plaintiffs created by holdouts and outliers, those outside the group. Yet, addressing group problems diminishes the agency problem and, less directly, the competition problem. Once formed, cohesive groups are more likely to be able to negotiate with their attorneys and request pertinent information about their cases, perform their traditional litigation monitoring function, and navigate client-based conflicts. Assuming that coordinating and consolidating large-scale litigation is systemically desirable, then we should explore ways to remove obstacles that increase its costs and undermine normative goals such as fairness, compensation, and deterrence. That endeavor has traditionally involved tinkering with consent and external coercion. Yet, moral obligations and group cohesiveness might affect cooperation such that intragroup pressures and norms make external coercion less necessary.

## II. FROM MEDIEVAL GROUPS TO FACEBOOK FRIENDS

Simply put, group members have inclusionary and exclusionary concerns, and legal procedures should consider and capitalize on these group dynamics. Empirical studies from social psychology, behavioral economics, and even evolutionary biology demonstrate that once people consider themselves part of a group, they change their behaviors and motives as well as their views about procedural and distributive justice; their identity

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53. Erichson, *supra* note 21, at 1787-88.

and welfare become intertwined with the group's identity and welfare.<sup>54</sup> Alternatively, people perceiving the aggregate simply as a collection of individuals tend to promote their own private interest.<sup>55</sup>

Group members exhibit other-regarding preferences—trust, reciprocity, and altruism—toward other members.<sup>56</sup> Their fairness considerations change based on whether the situation involves another group member (inclusionary concerns) or individuals outside the group (exclusionary concerns).<sup>57</sup> Cohesive group members are more likely to cooperate with one another and care about the collective outcome, and less likely to exit the group when doing so benefits the individual rather than the group.<sup>58</sup> These theory-based insights suggest that group membership plays a pivotal role in attitude changes, particularly when group identity is salient and relevant to the attitudinal issue.<sup>59</sup> Shared histories, implicit feedback, and trust, for example, offer insights about whether individuals will cooperate or defect.

Thus, this Part evaluates what constitutes a litigation group, what makes an agglomeration of plaintiffs into a community, and how litigation groups might be more cohesive. Analyzing plaintiffs in these terms helps predict whether they will consent to a settlement that is in the group's best interests, hold out for a higher individual payoff, or build consensus to reject a settlement failing to meet the group's litigation goals. Then, as the last Part of this Article explores, one way to model these concerns for fairness and other-regarding preferences is by positing that group members

54. Nancy R. Buchan et al., *Let's Get Personal: An International Examination of the Influence of Communication, Culture and Social Distance on Other Regarding Preferences*, 60 J. ECON. BEHAV. & ORG. 373, 374–75 (2006); Joseph Henrich, *Cultural Group Selection, Coevolutionary Processes and Large-Scale Cooperation*, 53 J. ECON. BEHAV. & ORG. 3 (2004); Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 J. PERSONALITY & SOC. PSYCHOL. 585, 586 (2004); Kelly S. Bouas & S.S. Komorita, *Group Discussion and Cooperation in Social Dilemmas*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1144, 1145 (1996); Norbert L. Kerr & Cynthia M. Kaufman-Gilliland, *Communication, Commitment, and Cooperation in Social Dilemmas*, 66 J. PERSONALITY & SOC. PSYCHOL. 513, 526–27 (1994); Robert Boyd & Peter J. Richerson, *Cultural Transmission and the Evolution of Cooperative Behavior*, 10 HUM. ECOLOGY 325 (1982); Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390, 1390–91 (1981).

55. Arjaan P. Wit & Norbert L. Kerr, *"Me Versus Just Us Versus Us All" Categorization and Cooperation in Nested Social Dilemmas*, 83 J. PERSONALITY & SOC. PSYCHOL. 616, 617 (2002).

56. See Buchan et al., *supra* note 54, at 374–75 (reviewing the literature on other-regarding preferences). One need not limit this inquiry into groups to moral and political philosophy, social psychology, or even behavioral law and economics. The intersection of law and evolutionary biology also demonstrates that cooperation allows humans and nonhumans to compete more effectively for resources and changes group dynamics when repeat players are involved. See, e.g., Axelrod & Hamilton, *supra* note 54, at 1390; Boyd & Richerson, *supra* note 54, at 325; Henrich, *supra* note 54, at 3–4.

57. Tom R. Tyler & E. Allan Lind, *Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?*, 46 J. SOC. ISSUES 83, 84–86 (1990).

58. Leigh Thompson, Laura J. Kray & E. Allan Lind, *Cohesion and Respect: An Examination of Group Decision Making in Social and Escalation Dilemmas*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 289, 291–93 (1998); Van Vugt & Hart, *supra* note 54, at 587.

59. Joel Cooper, Kimberly A. Kelly & Kimberlee Weaver, *Attitudes, Norms, and Social Groups*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES 259, 260 (Michael A. Hogg & R. Scott Tindale eds., 2001).

have a sense of obligation toward other group members. Consequently, if group members exhibit these concerns and the concerns can be characterized as a feeling of obligation, then it follows that we should harness these tendencies by crafting laws and procedures that foster group cohesion. In short, using groups to overcome the problems in nonclass aggregation not only makes sense from a group responsibility perspective, but may also harmonize with wealth maximization and individual autonomy goals.

### *A. Group Formation*

Social psychologists have developed several theories about how groups form and what makes them cohesive. Described as a “basic bond” or “uniting force,” group cohesiveness has been defined in many ways over the years.<sup>60</sup> Most definitions contain ideas about commitment, consensus, attraction among group members, connectedness, working toward a common goal, unity of purpose, and placing significance in common norms.<sup>61</sup> Variables catalyzing group cohesion include: physical and social immediacy; homogeneity through shared experiences, organizations, or historic events; and unity or overlap in goals, values, and intentions.<sup>62</sup> On the other hand, variables destabilizing group cohesion include: competition, low levels of claim and damage homogeneity, weak collective intentions, few shared life-defining experiences, greater geographic dispersion, and incompatible litigation goals.<sup>63</sup> Accordingly, group formation and group cohesion is multidimensional and context dependent.<sup>64</sup>

Relying on this broad definition of group cohesion, this Subpart first considers a few types of everyday groups and traces collective litigation’s historic roots back to traditional communities. It then delves into what constitutes a group within nonclass aggregation and what characteristics make some groups more cohesive than others.

#### *1. Everyday Groups*

Before entering the aggregate litigation morass, consider a few intuitive everyday examples of varying group cohesion: families, friends, colleagues, neighborhoods, and cities. Close-knit groups, such as long-term friends, tend to cooperate more with one another than less cohesive

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60. Albert A. Cota et al., *The Structure of Group Cohesion*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 572, 574, 577 (1995).

61. *Id.* at 574.

62. See R. Scott Tindale et al., *Shared Cognition in Small Groups*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES, *supra* note 59, at 5.

63. *Id.*

64. T.K. Ahn, R. Mark Isaac & Timothy C. Salmon, *Endogenous Group Formation*, 10 J. PUB. ECON. THEORY 171, 172 (2008).

groups, such as unacquainted individuals.<sup>65</sup> Groups of friends are highly cohesive; they have voluntarily chosen friendship and share backgrounds and experiences. That they feel obligations and commitments to one another comes as no surprise. We could say the same about families; no one chooses their relatives, but most would feel some obligation toward them.

Groups extend beyond families and friends. Georg Simmel suggests that social groups include a wide array: "Sociation . . . ranges all the way from the momentary getting together for a walk to founding a family . . . from the temporary aggregation of hotel guests to the intimate bonds of a medieval guild."<sup>66</sup> In his now classic text, Stephen Yeazell traces the modern-day class action back to medieval guilds where people within rural villages, groups of villeins who "tithed" by collectively self-policing for the King ("frankpledge tithings"), and religious parishes comprised "'the community of the vill.'"<sup>67</sup> Community members, as defined geographically, each shared in the duties, privileges, and obligations of villeinage membership.<sup>68</sup> Describing this communalism in 1911, Paul Vinogradoff explained that all community members were jointly liable for any duty that might principally be assigned to just one of them.<sup>69</sup> Accordingly, manor courts routinely imposed collective liability on villages for collective obligations, often regardless of who was individually responsible for trampling peas or bad plowing.<sup>70</sup>

On the other hand, those living in medieval towns voluntarily formed highly cohesive merchant guilds, craft guilds, and boroughs through social bonds.<sup>71</sup> This sociability might be seen either as voluntary cooperation that parlayed into economic success and mutual advantage or a necessary evil given that strangers might treat them as one another's sureties regardless.<sup>72</sup> As phrased by Robert Bone, "Obligation and privilege attached to the group *qua* group, with the group allocating the burdens and benefits among its members. Moreover, each group member was individually liable for the entire group obligation and had to resort to internal group mechanisms to spread the burden."<sup>73</sup>

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65. Thompson et al., *supra* note 58, at 289.

66. MARGARET GILBERT, *Societies, Membership, and Obligation*, in A THEORY OF POLITICAL OBLIGATION 91, 97 (2006) (quoting Georg Simmel).

67. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 41-48 (1987).

68. *Id.* at 42-52; see also Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 219 (1990). I thank Richard Nagareda for reminding me of this point and credit him with subtiding Part II.

69. YEAZELL, *supra* note 67, at 48 (quoting PAUL VINOGRADOFF, THE GROWTH OF THE MANOR 318-19 (rev. 2d ed. MacMillan 1911) (1905)).

70. *Id.* at 50-51.

71. *Id.* at 42-44, 58-60.

72. *Id.* at 60.

73. Bone, *supra* note 68, at 220.

Unlike medieval communities, plaintiffs within nonclass aggregation often lack the interpersonal relationships and geographic proximity that gave rise to medieval communal obligations. Accordingly, what modern day obligations do we owe to individuals we have never met? We might owe them nothing. Nevertheless, as shown, examples exist to the contrary. Recall the example where a car hits you from behind, forcing you to then run into the car in front of you, which injures that person. You may have a duty to rescue that person by virtue of your involvement in an accident that put her in peril.<sup>74</sup> You certainly did not *choose* to be involved in an accident, but now you are all in the accident together and obligations flow from that circumstance. Or consider the creation of a limited fund or employment discrimination class action.<sup>75</sup> You might prefer to litigate by yourself; you might recover even more, but that option has been restricted by practical necessity. Now you are part of a collective that includes everyone else with similar claims against the company. Like villeinage membership, procedural rules dictate that you litigate together; you have no option to opt out.<sup>76</sup> Some federal courts even *require* litigants to bring pattern-or-practice discrimination cases as class actions.<sup>77</sup> Thus, choice is not the only mechanism for becoming a group member nor is it the only way we incur obligations to one another.

## 2. Modern Litigation Groups

Moral and political philosophers writing about shared action and shared agency reframe coercion and consent into notions about obligation, intention, and community.<sup>78</sup> When individuals jointly commit to litigate together, for example, or when they engage in shared activity or create a group policy, they can simultaneously incur moral obligations to one another not to opt out of their shared endeavor. Translated into traditional Rule 23(b)(3) class action jargon, they have remained in. But not all litigants intend to be part of the group. This Subpart thus engages these philosophical underpinnings to explore a few types of groups and communities that give rise to interpersonal obligations in nonclass aggregation. It is beyond this Article's scope to argue in any depth the origins and existence

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74. See RESTATEMENT (THIRD) OF TORTS § 37 cmt. d (2005); *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, 337 (Ind. 1942).

75. See FED. R. CIV. P. 23(b)(1), (2).

76. See FED. R. CIV. P. 23(c)(2), (3).

77. *E.g.*, *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866–67 n.6 (7th Cir. 1985); *accord Celestine v. Petroleous de Venezuela SA*, 266 F.3d 343, 355 (5th Cir. 2001). The rationale is that injunctive relief is indivisible, thus any litigation inherently affects the group and should be pursued as group litigation. See *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004).

78. See *supra* notes 1–4 and accompanying text.

of such obligations—others have persuasively covered that ground far better than I can do here. Instead, I introduce these ideas in a basic way and depend on their intuitive appeal, while providing additional sources for the interested reader.

Before delving into the specifics of groups within nonclass aggregation, it is worth distinguishing how class litigation fits into the bigger picture. In certified class actions, the judge has made a legal determination—usually under Rule 23(b)(3) in mass torts—that the group is sufficiently cohesive to be treated as an entity for litigation purposes. In so ruling, the judge certifies that common issues predominate over individual ones, someone with injuries typical of the class adequately represents its members, the attorney is sufficiently knowledgeable and well-funded to pursue the class's interests, class members are too numerous to join, and the class is manageable.<sup>79</sup> Once certified, the "client" is the class, the entity itself.<sup>80</sup> As David Shapiro describes, the individual class member "must tie his fortunes to those of the group with respect to the litigation, its progress, and its outcome."<sup>81</sup> In that sense, the class is somewhat analogous to a private association such as a corporation or trade union.<sup>82</sup> This suggests that a class, by virtue of its certification (and subclassing), might have an ontological status that is more than the aggregate of its individual class members.

To explain, consider these two examples. First, two individuals dance by a window to warn a third that the police are coming for her. Both intend to warn and are each morally culpable for their collective action.<sup>83</sup> Contrast that example with a large corporation that has general will.<sup>84</sup> The corporation's long-term interests are more than a sum its officers', directors', or even shareholders' desires and beliefs.<sup>85</sup> In fact, those interests might even conflict.<sup>86</sup> The corporation takes on a life of its own. The dancing individuals are involved in a simple collective and are thus ontologically distinct from a corporate entity.<sup>87</sup> The class action is more akin to a corporation than the dancers. Although categorizing the class in this way raises a constellation of questions about whether the complex intentions of

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79. FED. R. CIV. P. 23(a), (b)(3).

80. Shapiro, *supra* note 1, at 919; see also Edward H. Cooper, *Rule 23: Challenges to the Rule-making Process*, 71 N.Y.U. L. REV. 13, 26 (1996).

81. Shapiro, *supra* note 1, at 919.

82. *Id.* at 921.

83. Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUD. PHIL. 16, 16–17 (2006); see generally Christopher Kutz, *Acting Together*, 61 PHIL. & PHENOMENOLOGICAL RES. 1, 2 (2006) (noting that the challenge of collective action is "bridging the gap between the statements true of the group and the statements true of its members").

84. McKenna, *supra* note 83, at 18–19.

85. *Id.*

86. *Id.* at 19.

87. *Id.*

individual class members are reducible to a shared intention of the collective, they are outside this Article's scope.<sup>88</sup>

Nonclass aggregation, the subject of this piece, falls somewhere between these two examples, but the collection of plaintiffs is not as easily identifiable as an entity. This group of litigants is more ephemeral than institutional; litigants' overlapping participatory intentions distinguish the members as opposed to a class certification definition.<sup>89</sup> If class certification has been proposed, the judge has denied it, thereby indicating that the class is unmanageable or not all injuries are sufficiently similar. But this does not mean that plaintiffs will not litigate en masse or that the court will not coordinate and consolidate for its own purposes.

Litigants in nonclass aggregation form a social group of sorts, but one that is perhaps more temporary and ad hoc when compared with conventional groups such as friends and families.<sup>90</sup> Some litigation groups are more immediately cohesive than others, such as territory-based communities experiencing the effects of toxic torts or single-incident mass accidents. But communities can form despite geographic distance, particularly if there is a significant common experience, a social network, or a shared emotional connection.<sup>91</sup>

Labor unions, veterans' groups, community organizations, and homeowner's associations are classic examples of preexisting groups. For in-

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88. Michael McKenna's work on agent meaning theory would be a good start. *Id.* at 16. See also Denis G. Arnold, *Corporate Moral Agency*, 30 MIDWEST STUD. PHIL. 279 (1996); John Searle, *Collective Intentions and Actions*, in INTENTIONS IN COMMUNICATION 401, 401-06 (P.R. Cohen et al. eds., 1990). This notion about the reducible intent of the collective as either an aggregation of individual intent or some superordinate entity intent might also have interesting implications for punitive damages literature. For work on the entity theory of class actions, see Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1060 (2002); Shapiro, *supra* note 1, at 919. For a strong dissent claiming that the class is far more than an agglomeration of its members, see Redish & Larsen, *supra* note 1, at 1587-97.

89. See Kutz, *supra* note 83, at 28 ("Ephemeral groups are groups whose identity as a group consists just in the fact that a set of persons is acting jointly with overlapping participatory intentions. . . . Institutional groups, by contrast, have identity criteria that do not wholly consist in the presence of overlapping participatory intentions.").

90. See MARGARET GILBERT, *Societies as Plural Subjects*, in A THEORY OF POLITICAL OBLIGATION, *supra* note 66, at 165 ("[I]t is common to take those who act together as constituting a social group, and [I] have argued that such people constitute a plural subject in my sense."); E.T. Hiller, *The Community as a Social Group*, 6 AM. SOC. REV. 189, 189 (1941) ("In briefest terms, we may say that a social group comprises persons acting with reference to given aims, in the prosecution of which an integration of roles and an ordering of social relations come into play.").

91. See David W. McMillan & David M. Chavis, *Sense of Community: A Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 7, 8, 13-14 (1986) ("A shared emotional connection is based, in part, on a shared history. It is not necessary that group members have participated in the history in order to share it, but they must identify with it."). Some literature suggests that even minimal contact is unnecessary. Rather, the "minimal (sufficient) condition for psychological group formation is the recognition and acceptance of some self-defining social categorization." Cristina Bicchieri, *Covenants without Swords: Group Identity, Norms, and Communication in Social Dilemmas*, 24 RATIONALITY & SOC. 192, 206 (2002). Thus, "[s]ocial interaction, common fate, proximity, similarity, common goals or shared threats are not necessary for group formation, even if they usually increase the cohesiveness of an existing group." *Id.*

stance, unions played a central role in initiating early asbestos litigation by screening members for respiratory illnesses and referring them to attorneys.<sup>92</sup> Similarly, veterans' groups organized Agent Orange litigants and warned Vietnam veterans of possible exposure risks.<sup>93</sup> Other groups form after the triggering event, such as the Asbestos Victims of America, the Dalkon Shield victims' organizations, and the Silicone Breast Implant organizations.<sup>94</sup> Likewise, the Buffalo Creek Citizens Committee formed two weeks after the flood, elected representatives, and sought legal counsel.<sup>95</sup>

The Internet further facilitates interaction opportunities. For example, after Merck proposed a Vioxx settlement, plaintiffs formed a members-only group, the "Merck Settlement Group," on Yahoo!'s groups page to discuss the offer.<sup>96</sup> In the two months after the offer, there were 3,498 messages posted, with 12,445 messages posted from November 2007 through October 2008.<sup>97</sup> The group's purpose and the members' intent was "to give plaintiffs a place where they could share their stories, study the settlement and just vent if that is what they needed."<sup>98</sup> Similar groups formed on Facebook, such as the "Equal Treatment for Non-US Vioxx Victims" group, which petitioned for compensation on behalf of British victims,<sup>99</sup> and the "Agent Orange Lawsuit Filed by Vietnamese Victims" group, created as a "common interest—beliefs & causes" organization.<sup>100</sup> In short, groups routinely form before litigation to initiate claims and because of the litigation itself.

### *i. Plural Subjects*

Thus far, the main point is that mere membership in a group, whether chosen or not, and whether welfare enhancing or not, can sometimes give rise to obligations. As observed, many types of communities exist and the obligations flowing from those communities depend a great deal on the community itself. This Subpart considers what constitutes a community of

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92. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1023 (1993).

93. *Id.*

94. *Id.* at 1024; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 919–21.

95. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* 6–7 (1976).

96. Merck Settlement Group page, <http://groups.yahoo.com/group/MerckSettlement/>.

97. *Id.*

98. E-mail from Al Pennington, Moderator of the Merck Settlement Group, to Elizabeth Chamblee Burch, Assistant Professor of Law, Florida State University College of Law (Oct. 18, 2008, 14:22 EST) (on file with author).

99. Facebook, Equal Treatment for Non-US Vioxx Victims, <http://www.facebook.com/group.php?sid=7eef156f24dacee8951038d54df30e2e&gid=8611202842>.

100. Facebook, Agent Orange Lawsuit Filed by Vietnamese Victims, <http://www.facebook.com/group.php?sid=0&gid=2619520859>.



plaintiffs by invoking a flexible phrasing: “plural subject.”<sup>101</sup> “Plural subject” is an umbrella term that most broadly refers to those instances where multiple individuals—a set of “I’s”—becomes a single, plural subject—a “we.”<sup>102</sup> What makes them a plural subject varies greatly from shared desires, interests, and circumstances, to shared intent concerning a shared activity, to joint commitments, to actually developing a shared group policy, to using that policy to govern subsequent collective deliberations.<sup>103</sup> Plural subjects occur in all kinds of everyday situations. They also commonly occur in mass litigation, where injuries and wrongdoings bring people together. My concern here, however, is on a particular subset of plural subjects, those found within nonclass aggregation.

Plural subjects include individuals collectively participating in a joint activity, who intend that certain plans should come to fruition, or who share a commitment.<sup>104</sup> For instance, litigants might be jointly committed to establishing causation, or might share other commitments, beliefs, values, or emotions.<sup>105</sup> Individuals might share a commitment to seeing the defendant brought to justice or they might all believe in product recall, retribution, institutional reform, or even apology seeking. Take, for ex-

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101. I borrow this term from Margaret Gilbert, but I do not attach the same meaning to it that she does. GILBERT, *supra* note 9, at 3.

102. As a powerful example, consider Ken Feinberg’s words about California families experiencing the effects of September 11: “It was as if the families had chosen to deal with the 9/11 tragedy by suppressing individual protestations of life’s unfairness and joining together. ‘We’ replaced ‘I.’ ‘We have questions for you, Mr. Feinberg,’ they said. ‘And we grieve together.’” KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 60 (2005).

103. MICHAEL E. BRATMAN, *Shared Valuing and Frameworks*, in STRUCTURES OF AGENCY 283, 285–86 (Michael E. Bratman ed., 2007).

104. See Michael E. Bratman, *Dynamics of Sociality*, 30 MIDWEST STUD. PHIL. 1, 2 (2006) [hereinafter Bratman, *Dynamics*]; Raimo Tuomela, *Joint Intention, We-Mode and I-Mode*, 30 MIDWEST STUD. PHIL. 35, 35 (2006); see MICHAEL E. BRATMAN, *Shared Intention and Mutual Obligation*, in FACES OF INTENTION 130, 130–31 (1999) [hereinafter BRATMAN, *Shared Intention*]. Bratman uses the term “plans” in a technical sense. MICHAEL E. BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 2–3 (1987) [hereinafter BRATMAN, INTENTION]. Although my use of the term here does not conflict with his definition, I use it in its colloquial sense.

105. See Margaret Gilbert, *Who’s to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 MIDWEST STUD. PHIL. 94, 100 (2006) [hereinafter Gilbert, *Collective Moral Responsibility*]; see also MICHAEL E. BRATMAN, *Shared Cooperative Activity*, in FACES OF INTENTION, *supra* note 104, at 93, 94; MARGARET GILBERT, *Joint Commitment and Obligation*, in A THEORY OF POLITICAL OBLIGATION, *supra* note 66, at 125, 136–37 [hereinafter GILBERT, *Joint Commitment and Obligation*]; Craig D. Parks, *The Predictive Ability of Social Values in Resource Dilemmas and Public Goods Games*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 431, 436 (1994) (finding that social values predict behavior in resource dilemma situations).

The idea, as I use it here, is similar to but by no means synonymous with Margaret Gilbert’s “joint commitment,” and Michael Bratman’s “shared intention.” GILBERT, *Joint Commitment and Obligation*, *supra*, at 134 (“A joint commitment is a kind of commitment of the will.”); Michael Bratman, *Shared Intention*, 104 ETHICS 97 (1993) [hereinafter Bratman, *Shared*]; Gilbert, *Collective Moral Responsibility*, *supra*, at 100–01; see also Raimo Tuomela, *We Will Do It: An Analysis of Group-Intentions*, 51 PHIL. & PHENOMENOLOGICAL RESEARCH 249, 249–77 (1991).

ample, the Merck Settlement Group, formed in response to the Vioxx litigation. The group's moderator explains its objective:

In the first months, we were all united in our efforts to study and understand the settlement. As we began to see the inequities in the settlement, we all agreed that we needed to bring these inequities to the attention of the public in order to get [its] support to stop the settlement and get other plaintiffs to reject the settlement. We all agreed that we had to hit all the blogs we could find and talk with anyone in the media who would listen.<sup>106</sup>

Unlike the Merck Settlement Group, it may be that not all litigants know the precise nature of the goal so long as they are ready to commit to it once it becomes more specific.<sup>107</sup> For instance, a group of us may go to the movies together every weekend but take turns picking the movie. Although I do not expressly commit to seeing that particular movie, I have expressed a willingness to see whatever movie is chosen. That choice is thus the specific mechanism for triggering the action. Thus, litigants may all commit to prevailing against a particular defendant and may have indicated that together they will execute whatever litigation strategy their attorney suggests. They are jointly committed to a plan but may not know the particulars.

The group may be attractive to its members for highly diverse reasons.<sup>108</sup> Accordingly, joint commitments do not mandate shared reasons or desires. In fact, they do not even necessitate agreement that the shared activity is superior to its alternatives.<sup>109</sup> For instance, within a group of potential toxic tort litigants, some might suggest involving the Environmental Protection Agency, whereas others prefer self-help remedies. Deciding to litigate is therefore a product of bargaining and compromise.

Because the individuals have overlapping intentions, desires, and aspirations, those communal features serve as a backdrop for bargaining about how to achieve the activity or object. This accounts for the plurality of goals within aggregate litigation and allows litigants within the collective to be richly textured and to modify, change, fulfill, or rethink particular

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106. E-mail from Al Pennington, Moderator of the Merck Settlement Group, to Elizabeth Chamblee Burch, Assistant Professor of Law, Florida State University College of Law (Oct. 20, 2008, 01:22 EST) (on file with author).

107. GILBERT, *Joint Commitment and Obligation*, *supra* note 105, at 140–41.

108. Neal Gross & William E. Martin, *On Group Cohesiveness*, 57 AM. J. SOC. 546, 547 (1952) (emphasizing the strength of relational bonds between and among group members under varying conditions should define group cohesiveness).

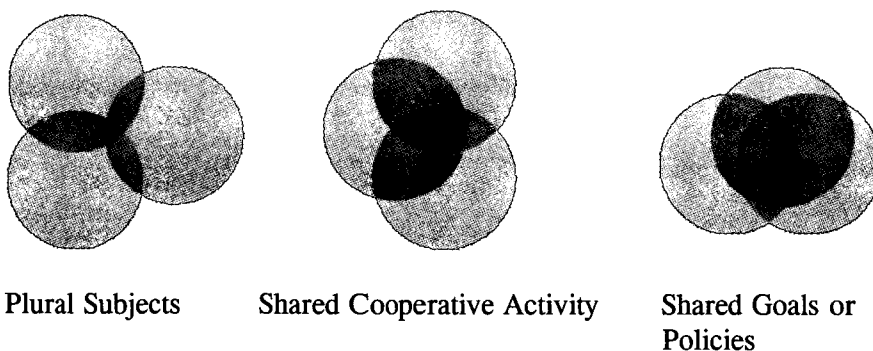
109. See BRATMAN, *supra* note 103, at 292.

positions.<sup>110</sup> Similarly, it allows an individual litigant to desire that a group of litigants perform some or all litigation-related activities together.<sup>111</sup>

Once individuals share ideas, activities, and intentions, they may make commitments to one another and develop norms for stabilizing and directing their future collective endeavors.<sup>112</sup> Assuming these associations are not merely short-term and nonconsequential, these commitments and norms—both societal norms and the group's norms—may include a moral obligation to one another not to opt out of the venture.<sup>113</sup>

The following diagrams provide a basic illustration of a plural subject and its more cohesive subsets of shared cooperative activity and shared goals or policies.<sup>114</sup> The overlapping areas demonstrate the degree of shared desires, intentions, aspirations, or values.

Figure 2:



## ii. *Shared Cooperative Activity*

Once committed, sometimes people within plural subjects use reasoning and bargaining to pressure one another to agree about how to accomplish their shared end.<sup>115</sup> That end might be something general, such as

110. See Gilbert, *Collective Moral Responsibility*, *supra* note 105, at 102.

111. See MICHAEL E. BRATMAN, *I Intend that We J*, in *FACES OF INTENTION*, *supra* note 104, at 142, 144–45.

112. MICHAEL E. BRATMAN, *Shared Intention*, in *FACES OF INTENTION*, *supra* note 104, at 109, 121 (“Much of our relevant planning may occur after we have arrived at our shared intention.”); Bratman, *Dynamics*, *supra* note 104, at 6.

113. MARGARET GILBERT, *What is it for Us to Intend?*, in *SOCIALITY AND RESPONSIBILITY*, *supra* note 9, at 14, 16–17; Bratman, *Dynamics*, *supra* note 104, at 1, 6–7. I explain the circumstances that might constitute a moral obligation in Part III.B.1.

114. I thank Manuel Utset for this idea.

115. See BRATMAN, *supra* note 103, at 292; see also Gary E. Bolton et al., *How Communication Links Influence Coalition Bargaining: A Laboratory Investigation*, 49 *MGMT. SCI.* 583, 583–85, 596 (2003).

prevailing against the defendant, where litigants have not fleshed out their strategy or agreed on an overarching policy.<sup>116</sup> One way to harmonize plans about achieving that end is to encourage cooperative activity. If litigation is a shared cooperative activity, then litigants will tend to be mutually responsive to each other, committed to litigating together, and will support one another in their shared efforts.<sup>117</sup> Granted, there will be degrees of helpfulness, but even those who are less helpful do not destroy the basic case of cooperative activity so long as they are minimally cooperative, noncoercive, and noncompetitive.<sup>118</sup>

Take, for instance, a counterexample. Trichloroethylene spills around a tannery and contaminates the city's groundwater; litigation ensues. You plan to move away and want compensatory damages for your property's diminished value and punitive damages for the company's wrongdoing. I want to stay and think I might lose my tannery job if the company has to pay excessive damages, but I do want the site cleaned up. We both know this about one another and that neither is willing to compromise. The litigation is not a shared cooperative activity; we both have plans concerning the litigation, but those plans are not compatible.

Still, to require that we agree on a strategy or remedy to have a shared cooperative activity is too strong a requirement.<sup>119</sup> It may be that our plans dovetail on certain issues, but neither of us is willing to compromise to maintain the compatibility.<sup>120</sup> If, for instance, you want to hire a cutting-edge environmental expert and I want to keep litigation costs manageable, we might find an expert that satisfies both of us. Our activity could be cooperative on this point even though our overall plans differ.<sup>121</sup>

Examples abound where litigants sue the same defendant without intending to do so cooperatively. The Vietnam veterans' organizations, including Agent Orange Victims International, Citizen Soldier, and Vietnam Veterans of America, offer an apt example. Described as "very effective in small groups but not really capable of large-scale organization," the groups divided ideologically.<sup>122</sup> This division resulted in fractured organizational and litigation efforts.<sup>123</sup> Peter Schuck indicates that each group "differed from one another in terms of their leadership, competition for the veterans' allegiance, geographical bases, political strategies, and views

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116. See BRATMAN, *supra* note 112, at 121 ("For you and I to have a shared intention to *J* we need not *already* have arrived at subplans that mesh."); BRATMAN, *supra* note 103, at 292.

117. See MICHAEL E. BRATMAN, *Shared Cooperative Activity*, in *FACES OF INTENTION*, *supra* note 104, at 94–95.

118. *Id.* at 104.

119. *Id.* at 98–99.

120. *Id.*

121. See *id.* at 98.

122. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 25–26 (1986).

123. *Id.* at 26.

on the war.”<sup>124</sup> Their objectives and intentions clashed. Although the members within the organizations might have shared commitments, intentions, and goals, those goals conflicted and competed with other organizations.

Giving litigants an opportunity to cooperate with one another and to reach agreement at least with respect to particular litigation activities, such as establishing causation, can strengthen group cohesion. This might be accomplished, for example, through judicially required plaintiffs-side mediation or group meetings conducted by a special officer.<sup>125</sup> As litigants cooperate on a particular activity, they might also decide to collaborate on other litigation matters. Litigants might discover that group cohesiveness and their normative story go hand in hand. Thus, by helping litigants figure out what their ends are, and shifting from amorphous intentions to practical goals, plaintiffs may realize that litigating in a group could lead to a better result for them than striking out on their own.

### *iii. Shared Goals or Policies*

Shared policies and goals help group members navigate disagreements and frame individual deliberations, thereby bolstering consistency, coherency, and stability.<sup>126</sup> Consensus among members about policies, values, and ideals is a primary component of group cohesion.<sup>127</sup> By providing a background framework for deliberation, shared policies help litigants navigate points that might otherwise cause the group to disband, such as settlement offers. Shared policies might overlap with or lead to shared values, which foster and reinforce the belief that together the group can advance its common needs, priorities, and goals.<sup>128</sup> Still, a shared policy need not be the exclusive policy. Claimants may value other objectives so long as the shared policy defines the group and centers claimants’ associated activities.

To illustrate, consider policies within the following examples from *A Civil Action*, the Vioxx litigation, and the Holocaust litigation. Anne Anderson in *A Civil Action* had a strong preference for apology-seeking and public disclosure. She thought that W.R. Grace should apologize for contaminating the water in Woburn, Massachusetts, for causing her son’s leukemia, and ultimately for his death.<sup>129</sup> When faced with a settlement

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124. *Id.* at 76.

125. Part III begins to explore these ideas.

126. BRATMAN, *supra* note 103, at 303.

127. Cota et al., *supra* note 60, at 577. “There is a significant positive relationship between cohesiveness and a community’s influence on its members to conform. Thus, both conformity and community influence on members indicate the strength of the bond.” McMillan & Chavis, *supra* note 91, at 12.

128. McMillan & Chavis, *supra* note 91, at 13.

129. JONATHAN HARR, *A CIVIL ACTION* 452 (1995). For additional information on attempts to encourage apologies by excluding them as evidentiary admissions, see Jonathan R. Cohen, *Legislating*

offer that could divide the group of eight families, the group fell back on this shared policy:

[I]t was [Richard] Toomey who spoke most forcefully. "A settlement is one thing," he said, "but I'm not willing to throw out the verdict in order to settle. They're guilty of polluting. My child died from their stupidity. I didn't get into this for the money. I got into this because I want to find them guilty for what they did. I want the world to know that."

Most seemed to agree with this. Pasquale Zona said, "A settlement without disclosure is no settlement at all."

. . . .

It was Patricia Kane who, near the end, seemed to speak for everyone. "I think we'd all love to settle as long as we don't have to compromise the verdict," she said. "I don't think it's a matter of money. But we all want the jury's verdict to stand against Grace."<sup>130</sup>

Similarly, the Merck Settlement Group formed to create a public forum for voice opportunities and to educate litigants about Merck's offer to settle the Vioxx litigation. The group's founder and moderator writes:

I started a group whose mission is to try to educate people currently involved in the settlement about what to expect from Merck, and from their own lawyers. We are also trying to help people who are just now being injured by other drugs. We are currently planning to set up a website that we hope will attract more attention than these private groups. On this web site, we will post peoples['] stories about their experiences with Merck, the Settlement[,], and their lawyers. We will try to make people aware of the different attorney fees, so they can shop around and not get stuck with some unethical lawyer charging 40% plus expenses. We will make them aware of the subrogation issues. We will let them know that subrogation liens can be negotiated down. We will give them links to different support groups and sources of medical and legal information. We want to form alliances with other organizations who are trying to change the system and protect our

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*Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819 (2002); Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003).

130. HARR, *supra* note 129, at 442-44.

right to a jury trial, or if, as is the case with Vioxx, a jury trial i[s] not practical, then at least have some safe guards set in place to ensure that the final settlement is equitable for all plaintiffs.<sup>131</sup>

Likewise, Roman Kent, who represented Holocaust survivors in the German Foundation Initiative, observed a myriad of competing outside interests—from class action attorneys to German businesses—while negotiating with the German government and German industry for compensation.<sup>132</sup> With the approval of the survivors on the negotiating team, Kent set forth two nonnegotiable conditions:

1. There must be a full and sincere apology on the part of German government and German industry for the crimes they committed during the Holocaust.
2. Slave and forced laborers will be referred to only by name; under no circumstances will they be denoted by numbers as we were referred to in the concentration camps.<sup>133</sup>

These conditions guided Kent's negotiations on behalf of Jewish slave labor. Each survivor on the negotiating team intended to give weight to those conditions in their shared deliberations and mutually depended on others to do the same.<sup>134</sup> But, these overarching conditions extended only to Kent's particular subgroup and did little to alleviate the factions existing between that group and Eastern European countries. Those countries negotiated on behalf of forced laborers whereas Kent's group represented slave laborers.<sup>135</sup> Accordingly, conflict arose when it came time to allocate money between the two.<sup>136</sup> Despite the existence of a common foe—Germany and German industry—factions formed within the large plurality in part because the entire group did not share a common policy covering or guiding allocation principles.<sup>137</sup>

In sum, individuals might share intentions about a particular action where they bargain or negotiate about the best means to accomplish an

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131. E-mail from Al Pennington, Moderator of the Merck Settlement Group, to Elizabeth Chamblee Burch, Assistant Professor of Law, Florida State University College of Law (Oct. 20, 2008, 01:22 EST) (on file with author).

132. Roman Kent, *It's Not about the Money: A Survivor's Perspective on the German Foundation Initiative*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 205, 205–07 (Michael J. Bazylar & Roger P. Alford eds., 2006).

133. *Id.* at 207. The point here is not to say that Germany or German businesses might refuse to include these conditions in any settlement agreement, but that groups develop these types of governing guidelines routinely to help direct bargaining.

134. See BRATMAN, *supra* note 103, at 304.

135. Kent, *supra* note 132, at 206.

136. *Id.* at 207.

137. Subgroups and group dispersion is discussed below. *Infra* Part II.B and Part III.C.

end. In so doing, they commit to accomplish that end together. But these individuals might have different ideas about what weight or significance to afford to particular rationales when facing litigation decisions, thereby causing the group to splinter. It is equally possible, however, that groups will remain cohesive despite hard decisions if they engage in shared cooperative activities or have analogous policies about the significance or weight to attach to a particular consideration. These groups would be more cohesive. Still, these rough notations about group structuring represent a range of interconnected human activities with varying degrees of overlap and flexibility. As explored in Part III, the voluntary commitments and intentions considered here form the basis for creating obligations to other group members. Of course, because every group is different, the nature and content of an obligation is highly context dependent.

### 3. Large-Scale Groups

Thus far, the implicit focus has been on smaller groups and subgroups within litigation. But, theoretically, people in larger groups who engage in common enterprises could also be plural subjects.<sup>138</sup> Extending these ideas beyond personal face-to-face interactions and smaller groups (like the eight families within *A Civil Action*) to larger ones (such as Vioxx) raises the question of whether it is possible to share intentions without actually knowing that you are doing so. For instance, could 49,000 Vioxx litigants share intentions or would their individual intentions merely overlap? That is, are litigants merely an aggregate of individuals, or are they a social group? It is possible for litigants in large-scale collective litigation to form a social group, perhaps even one that shares ideas, intentions, goals, and policies. It is equally plausible, however, that the group identity will exist at such an abstract level that it is too shallow, unstable, or fragile to hold in the face of hard cases, such as agreeing on a compensation grid.

Construing aggregate litigants as social groups, and social groups as plural subjects, and plural subject theory as a theory of political obligation may extend the analogy too far.<sup>139</sup> Yet, the large-scale nature of some mass torts, such as Vioxx, Agent Orange, and asbestos, shares key characteristics with plural societies: smaller plural subjects exist within the mem-

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138. MARGARET GILBERT, *supra* note 90, at 180; Kutz, *supra* note 83, at 2 (“Highly interdependent cooperative activity does play an important role in our social lives. But so do the pedestrian but nonetheless genuine forms of collective action that we see in broader or more attenuated social contexts, such as voting, working in large organizations, supplying capital for risky ventures—collective acts typical of the consolidated yet simultaneously highly individualized circumstances of modernity.”).

139. Admittedly, recasting aggregation in terms of political statehood is an imperfect analogy; litigation is temporary and lacks the long-term gains that government affords. See Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 68. Still, many prominent authors have aptly made this analogy. *E.g.*, Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 337–40.



bership; not all members know one another, making the groups impersonal and anonymous; and members develop hierarchical structures.<sup>140</sup> Initiating litigation after the Buffalo Creek disaster explicitly mirrored a polity in some respects. The community came together to elect a committee and a chairman and the chairman then selected and recommended legal counsel.<sup>141</sup> Moreover, the American Law Institute has proposed that collective decision-making by a majority vote of the claimants should bind all claimants.<sup>142</sup> This means that broad agreement can be used to “cram down the claims” despite minority dissent, much like a democratic majority.<sup>143</sup>

One difficulty with large-scale groups, as in the Vioxx litigation, is that it is unlikely that everyone within that group knows one another. But people need not expressly know one another to form a social group.<sup>144</sup> Claimants in large-scale litigation might still comprise a social group based upon fundamental features of inclusiveness, despite impersonality and anonymity. Large-scale mass torts are inclusive in the sense that smaller subgroups form within the aggregation. For instance, the moderator of the Merck Settlement Group writes:

The group has resulted in about four spin off groups that consist of people who want to take some form of action to try to help other people who are in, or soon will be in the same situation. We have two groups whose goal is to take legal action to force Merck and/or the system to change the current settlement to be more equitable. We have another group that is working with people who have been (and are still being) injured by prescription drugs. It is the goal of this last group to let people know what we have learned about the legal system and what they may expect if they decide to take their cases to court.<sup>145</sup>

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140. See GILBERT, *supra* note 90, at 173–80.

141. STERN, *supra* note 95, at 6–9.

142. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (Prelim. Draft No. 5, 2008); e.g., *In re Combustion Eng'g*, 391 F.3d 190, 245 (3d Cir. 2004); see also 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2000) (providing for a 75% approval requirement in the asbestos bankruptcies).

143. Samuel Issacharoff, *Private Claims, Aggregate Rights*, SUP. CT. REV. (forthcoming 2009) (manuscript at 24), available at <http://ssrn.com/abstract=1289505>; See Issacharoff, *supra* note 139, 337–40.

144. For example, studies have been performed on online communities such as MySpace and LiveJournal that demonstrate how these networks attract members, growth, and change within the community. See Lars Backstrom et al., *Group Formation in Large Social Networks: Membership, Growth, and Evolution*, International Conference on Knowledge Discovery and Data Mining (2006), available at <http://portal.acm.org/citation.cfm?id=1150402.1150412> (last visited Nov. 5, 2009).

145. E-mail from Al Pennington, Moderator of the Merck Settlement Group, to Elizabeth Chamblee Burch, Assistant Professor of Law, Florida State University College of Law (Oct. 18, 2008, 14:22 EST) (on file with author).

In addition to including subgroups, a large social group is usually impersonal. The members may not know one another but may have limited contact through message boards, attorneys, or e-mails. Or they may be completely anonymous to each other. For aggregate litigants to form a plural subject when they do not know one another, they must demonstrate a readiness to be intentionally committed to the others, known or unknown, on the plaintiffs' side of the litigation—the members. Thus, each litigant manifests a quasi-readiness to share in an action such that they are all ready under the proper circumstances.<sup>146</sup> For instance, a settlement offer might be a catalyst: if group members generally agreed that they would settle only if the offer included withdrawing the offending drug from the market and the offer lacked such a provision, then all would be ready to reject the offer. This intention is commonly known among them in a very abstract way.<sup>147</sup>

These groups fluctuate significantly throughout the litigation, coalesce during certain litigation points, such as proving common causation, and might even splinter into other interest subgroups. So even though an overarching common knowledge provides the glue to characterize litigants within large-scale litigation as a social group, that glue is not necessarily durable. Put differently, a group that shares only an intention to litigate will ordinarily lack the depth, stability, and specificity to direct action in the face of hard cases. This point becomes clearer by emphasizing that plural subjects can exist with regard to smaller matters within the litigation. Although it might be helpful conceptually for these beliefs and intentions to apply to the litigation as a whole (in some respects), it is less plausible though not impossible. More likely, particular subgroups will coalesce and develop a shared policy, or plaintiffs as a whole will jointly value, believe, or intend something with regard to a particular issue within the litigation.

### *B. Group Instability*

As the Merck Settlement Group demonstrates, group cohesion may fall prey to disruptive forces. It might be that the relative interdependence was not present to begin with, that this interdependence did not bring to bear a mutual obligation of the sort that prevents litigants from opting out, or the initial shared framework was too shallow to sustain shared agency when divisive issues arose. Outliers with similar claims against the same defen-

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146. MARGARET GILBERT, *Social Groups: A Simmelian View*, in ON SOCIAL FACTS 146, 204–05 (1989). Christopher Kutz offers a less metaphysically obscure account than Gilbert by positing, “jointly intentional action is fundamentally the action of individuals who intend to play a part in producing a group outcome.” Kutz, *supra* note 83, at 16. Despite his minimalist account, he acknowledges that further conditions are necessary for groups to intentionally engage in a joint activity. *Id.* at 16–17. His account has not been extended to ideas about obligation, thus it is not discussed at length here.

147. GILBERT, *supra* note 90, at 177 (defining common knowledge and using it in a similar way).

dant may refuse to join the group (and rightly so if the proposed settlement treats them unfairly). Or group members might all agree to rescind their commitment and forgo their common goals.<sup>148</sup> It might even be that coming together forces an otherwise innocuous issue to the surface, causing the group to splinter. Whatever the cause, groups may fragment or never form at all. This Subpart briefly introduces these problems.

Not all litigants within large-scale litigation consider themselves group members; some are outliers. As I have indicated elsewhere, “individuals-within-the-collective” tend to perceive litigation goals from a self-interested vantage point and have their own prior intentions, aspirations, desires, and plans about the litigation.<sup>149</sup> Yet they might reconsider or amend their strategy when their initial reasons for initiating solo litigation are either no longer in force or no longer sufficiently justify the original plan.<sup>150</sup> For example, the individual-within-the-collective might be aggregated involuntarily through a multidistrict transfer and consolidation under Rule 42, but eventually might determine that joinder is worth the cost of autonomy because it helps her establish a credible threat.<sup>151</sup> But she might not.

Alternatively, even when individuals do not commit to litigate together, they may have egocentric interests that align, overlap, and coalesce, such as establishing causation and maximizing the total recovery.<sup>152</sup> To illustrate, again consider going to a movie. We might both want to see the same movie, either for similar or different reasons. That does not mean that we want to see the movie *together*. We might not even know one another. If neither of us knows that the other is going to the movie, if it is a coincidence in other words, we do not plan to see the movie together.<sup>153</sup> The same idea holds true for plaintiffs. Common knowledge is the catalyst. Individuals with “egocentric overlap” share partial litigation unity, but

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148. GILBERT, *Joint Commitment and Obligation*, *supra* note 105, at 142–43.

149. Burch, *supra* note 11, at 20–24; *see also* BRATMAN, *supra* note 103, at 284–85; Kwok Leung, Kwok-Kit Tong, & E. Allan Lind, *Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions*, 3 J. PERSONALITY & SOC. PSYCHOL. 476, 477 (2007); Tuomela, *supra* note 104, at 37–38. For more on intentions and plans of individual agents, *see* BRATMAN, *supra* note 103, at 14–49.

150. *See* BRATMAN, *supra* note 103, at 289.

151. 28 U.S.C. § 1407 (2000) (multidistrict litigation transfer); FED. R. CIV. P. 42(a). In single event accidents where more than 75 people died at a discrete location, consolidation might also be accomplished through the Multiparty Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369. These individuals have been called “kidnapped riders.” *See* Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 821–22 (1995).

152. I have previously defined what I mean by “egocentric overlap.” Burch, *supra* note 11, at 16–17.

153. *See* Bratman, *Shared*, *supra* note 105, at 98; Kutz, *supra* note 83, at 5 (“Jointly acting individuals do not merely act in parallel: each responds to what the others do and plan to do.”); Raimo Tuomela & Kaarlo Miller, *We-Intentions*, 53 PHIL. STUD. 367, 375 (1988).

because they do not realize they want the same things, problems of knowledge, stability, and depth can arise.<sup>154</sup>

Different still, the court may subdivide a large litigation group based on similar circumstances. For instance, in the Zyprexa litigation, the magistrate court judge partitioned the plaintiffs into thirty subgroups by multiplying three treatment groups by ten different medications.<sup>155</sup> This division could cut across lines of previous alliances and spur new groups.

Suffice it to say that there are multiple reasons that the individuals within aggregate litigation would not consider themselves group members. Although they might not categorize themselves as members of an overarching litigation group, they might connect with a subset of litigants sharing the same values, commitments, or beliefs. Group theory has progressed away from Aristotelian notions about “all or none” group structures and toward belief clusters that form around prototypes of salient attributes.<sup>156</sup> This facilitates the development of subgroups, which may compete with the overarching plaintiff group or with one another.<sup>157</sup>

Because of its size, subgroup formation is inherently more likely in large-scale litigation. The Vioxx litigation is a clear example. The Merck Settlement Group, a subgroup of roughly 500 of some 49,000 Vioxx plaintiffs, experienced initial homogeneity, dissonance, and subsequent reordering:

In the first months, we were all united in our efforts to study and understand the [Vioxx] settlement. . . . As time went on, some of us wanted to continue to fight the settlement in the courts. Others began to realize that the settlement was not only the product of Merck’s legal department, but was also a fulfillment of the agenda that had been set in motion by the Bush administration. These different attitudes led to a split in the group and the formation of three other groups.<sup>158</sup>

If subgroups form, they will likely have blurred boundaries with some group members being more prototypical than others. Members may belong

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154. Bratman, *Dynamics*, *supra* note 104, at 5.

155. *In re Zyprexa Prods. Liab. Litig.*, 04-MD-1596, 2008 WL 4890588, at \*2 (E.D.N.Y. Oct. 27, 2008).

156. Fabio Lorenzi-Cioldi & Alain Clémence, *Group Processes and the Construction of Social Representations*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES *supra* note 59, at 311, 321; Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION (E. Rosch & B.B. Lloyd eds., 1981).

157. See Michael A. Hogg, *Social Categorization, Depersonalization, and Group Behavior*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES, *supra* note 59, at 56, 71.

158. E-mail from Al Pennington, Moderator of the Merck Settlement Group, to Elizabeth Chamblee Burch, Assistant Professor of Law, Florida State University College of Law (Oct. 20, 2008, 01:22 EST) (on file with author).

to multiple subgroups. This leaves open the very real likelihood of disunity, dispersion, and competition.

### III. MITIGATING DISUNITY, MITIGATING DILEMMAS

Thus far, this Article has considered the challenges that nonclass aggregation presents, claimed that plaintiffs can form a plural subject by sharing values, intentions, beliefs, desires, or goals, and observed that despite those shared traits, group dispersion and instability may result. It has also contended that certain obligations may follow from that group membership. This Part considers the content of those obligations and suggests methods for strengthening group cohesion.

Recall that there are many types of plural subjects and that the nature and content of the duties and obligations that flow from membership in that group depend largely on the group itself. For instance, in the tort example concerning the car accident, the duty to rescue may be as simple as calling for help. At the other extreme, in formal contracts, the parties cannot unilaterally rescind their agreement. They must fulfill the obligations specified in the contract or risk breaching the agreement. In between these extremes lie class actions under Rule 23(b)(1) and 23(b)(2). Class members cannot opt out of their shared endeavor because doing so might lead to inconsistent results or deplete the common fund such that some deserving claimants would receive nothing.<sup>159</sup> As the Fifth Circuit has noted, there is a “presumption of cohesiveness” that necessitates “enhanced procedural safeguards to protect the individual rights of class members.”<sup>160</sup> Even less obligatorily, class members in a Rule 23(b)(3) class have an opportunity to opt out of membership.<sup>161</sup> They incur obligations to one another only if they remain in the class.

But what about plaintiffs involved in nonclass aggregation—what are their obligations to one another? On one hand, like parties to a contract, they signed up to litigate with a particular attorney, filed a complaint, and thereby “opted in.” On the other hand, as pointed out in Part I, it is not entirely clear what they have signed up for or what conflicts might arise during litigation. So it may be that people signed onto a blank slate and committed to something vague, such as suing a defendant, but did not make any commitments to other plaintiffs.

This final Part explores this ambiguity and assesses the following questions: (1) what to do with the holdouts, the dissenters, those who join the group but then want to exit; (2) what to do with the outliers, those who

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159. FED. R. CIV. P. 23(b)(1), (2), 23(c)(2), (3); see also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998).

160. *Allison*, 151 F.3d at 413.

161. FED. R. CIV. P. 23(c).

have never joined the group or considered themselves group members; and (3) how to mitigate competition among subgroups. In framing the questions this way, I assume (for now) that unity and group cohesion is a desirable goal because people become concerned for others in the group rather than just themselves. Accordingly, I leave open the question of whether non-competition and collaboration might create negative externalities, such as bringing less information to light, subverting minority dissent, or sharpening the ultimate legal arguments.

As to the holdouts, perhaps the offered settlement does not satisfy their litigation goals. For example, the offered settlement may deny responsibility and maintain confidentiality contrary to one's valuing transparency and public awareness. Or maybe the settlement amount is insufficient to cover hospital bills and doctors' visits. Or the value of telling one's story before a judge in a public hearing is more important than sweeping the incident under the rug and accepting a payoff.

Whatever the reason for holding out, these individuals might not be able to maintain their dissenting position in the face of strong encouragement and pressure from the group, through conflict resolution or reframing. The more controversial issues are whether holdouts and outliers *must* become or remain group members, whether they are morally or politically obligated to participate in and assent to the settlement, and whether the judge or the group should be able to sanction them in some way. These are not just philosophical questions—they fundamentally affect individuals' legal rights and daily lives. Even from the perspective of a moral obligation, an outlier, the individual who lacks the requisite desire and intention to commit to the group, cannot have her feet held to the fire; the others have no right to enforce a commitment that never was.<sup>162</sup>

This Part thus advances three arguments to address holdouts, outliers, and subgroup competition. First, it posits that moral obligations follow from being a plural subject. This addresses the problem of group members leaving the group or withholding consent to derail a fair settlement by insisting on more for themselves. The Part begins by proposing a counterexample: an aggregation, without more, that is constructed solely through externally coercive measures, such as procedural rules or legal agreements. While these methods might prove useful as a means for bringing people together, those individuals lack the communal aspect that fosters moral obligations. Instead, obligations in nonclass aggregation follow when litigants jointly and voluntarily commit to perform some or all litigation activities together. But that commitment need not be as explicit as

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162. See MARGARET GILBERT, *Summary and Prospect*, in A THEORY OF POLITICAL OBLIGATION, *supra* note 66, at 296 ("The parties to the joint commitment cannot allege that they have a right of joint commitment to a hold-out's conformity to it. They must find a moral argument that entitles them to pressure him to act accordingly.").

saying, “I promise to litigate with you.” Rather, it might be implicit or tacit. Regardless, the coercive component is no longer external. Instead, individuals feel internal pressure and group pressure to honor their commitments.

The second normative idea focuses on fostering group cohesion in mass litigation. This addresses the outliers and intragroup instability by promoting cooperation through group deliberation and social norms. Recall the earlier findings from cognitive social psychology that once people view one another as group members, they tend to fundamentally change their ideas about justice. They care not only about their own outcome but also about the group’s collective welfare. Once we recognize that plural subjects incur moral obligations to one another, and that membership both increases cooperation and changes decision-making about dilemmas, we want the judicial system to encourage those prosocial behaviors. In so doing, the group might both attract outliers into its membership and discourage its current members from acting to the group’s detriment.

Finally, the last Subpart draws on empirical studies from social psychology to suggest methods for alleviating competition between subgroups. It raises the possibility of using a special officer or mediator to act as a go-between. If appropriate, the officer or mediator could then employ goal transformation techniques to make the overarching “plaintiff” membership category salient. Accordingly, the last Subpart previews that possibility and recommends directions for future research.

### *A. Obligations*

Underlying the discussion on plural subjects is the basic notion that obligations can come from membership in a group. The question becomes at what point—socially, morally, and philosophically—does group membership obligate the individuals contained within it? Put differently, when does being a plural subject require something of its members? Clearer cases include those where the group’s members provide mutual assurances, or promises, such that the parties’ relationship bears out the obligation. Less clear is whether claimants in nonclass aggregation are obligated to one another as *de facto* members of that assembly. By *members*, I do not simply mean those who have filed their own claim against what turns out to be the same defendant without any common knowledge of other litigants’ existence. Rather, litigants must be more than imputed members that lack reciprocity or any relationship with one another.

#### *1. External Coercion*

Before delving into group obligations, it is helpful to reevaluate the current methods for forced aggregation and “cohesion.” One can envision

at least three types of coercion that might arise in the mass tort context.<sup>163</sup> To illustrate, consider these scenarios. First, the attorney, Ann, convinces Bob and Cathy to enter into an agreement with one another and perhaps many others as part of Ann's retainer agreement. The agreement waives client-client conflicts so Ann can represent them both. In one sense then, this consent undermines any suggestion that agreement was coerced. But if Ann is the only attorney with the resources to bring the case, and the option is collective litigation or no litigation, a hint of coercion is present. Second, and slightly different, Ann and Defendant enter into settlement negotiations. Ann tells Bob and Cathy (and others that she represents) that they must accept the settlement offer or she can no longer represent them. Again, this might be seen as consent in one respect but coercive in the sense that Bob and Cathy's alternative options are severely limited. Third, the judge might order transfer and consolidation of Bob and Cathy's case with many other similar cases pending in a different district, thereby undermining Ann's strategic forum selection and ability to best position her clients.<sup>164</sup>

Focus on the first scenario. Contracts, at least in theory, provide a convenient solution to holdouts and misallocation: they give everyone involved a way to limit their options if others will limit theirs too, thereby allowing each to enjoy cooperative gains. Consent might then suffice as a private arrangement that, in the words of Sam Issacharoff, "overcome[s] the disfunctionality of the formal procedural system."<sup>165</sup> Contracts thus seemingly make it rational for claimants to cooperate rather than defect.

Using contractual agreements, however, raises concerns about whether consent can actually be informed and, as in the second scenario, whether counsel's uniform recommendations are in each client's best interest. Intra-claimant governance agreements—where plaintiffs contractually agree to majority rule—are predicated on the notion of informed consent.<sup>166</sup> But

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163. Coercion is, of course, a loaded term with many different meanings. See Robert Nozick, *Coercion*, in *SOCRATIC PUZZLES* 15, 22 (1969). I use it here in its colloquial sense.

164. Transfer might be accomplished under the multidistrict litigation statute, 28 U.S.C. § 1407 (2006), or the transfer statutes, 28 U.S.C. § 1404(a) (2006), 28 U.S.C. § 1406 (2006), while consolidation could be accomplished under Federal Rule of Civil Procedure 42(a).

165. See Issacharoff, *supra* note 143, at 219.

166. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (April 7, 2008 Draft). 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 RULES OF PROF'L CONDUCT R. 1.8(g) (2004); *Tax Auth., 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). But see Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 769-70 (1997) (arguing that the aggregate settlement rule should be amended to permit consent by majority rule). Recent drafts of this proposal temper the coercive aspect with independent review and fairness approval as well as disclosing all material element of the settlement to the claimants. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(e) (November 2008 draft). The draft does not specify who the independent reviewer is.



the American Law Institute proposes that litigants enter into these waivers at the *outset* of litigation as part of the attorney's retainer agreement.<sup>167</sup> Most instances of disunity—be it conflicts between the attorney and the client, feuding clients, or holdouts—arise after initiating litigation. Consequently, informed consent at this early phase does not necessarily translate into informed consent throughout the litigation. Plus, the initial decision to sign an agreement may effectively be a Hobson's choice: the choice is not between collective litigation or individual litigation but, because of its expense, between collective litigation and no litigation.<sup>168</sup> This suggests that an intraclient governance agreement could be quasi-coercive.

Now along with the first scenario, consider the second, where Ann encourages Bob and Cathy to consent to the settlement offer or she will have to withdraw from representing them. We could debate the ethics of the arrangement, as some have done well already,<sup>169</sup> or we could point to the standard literature on coerced agreements and obligations, which posits that they are not binding.<sup>170</sup> But first evaluate an example from a different context: Bob lives in a rural state where the only industry in town is a poultry farm. He does not particularly relish plucking chickens, but he works for the poultry farm because he has few other options.<sup>171</sup> His limited options do not undermine his agreement to work for the farm.<sup>172</sup> Ann's threat to withdraw from representing Bob and Cathy, where few other attorneys could represent them, is similar. Agreeing to a coercive settlement offer does not necessarily undermine consent. In one respect, the question becomes when does consent negate coercion? Although this question is of interest, the debate that it engenders, one over the false dichotomy between consent and coercion, has been well traveled by political and legal philosophers writing about social contract theory and hypothetical consent.<sup>173</sup>

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167. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (April 7, 2008 draft).

168. Burch, *supra* note 11, at 20.

169. See Benjamin C. Zipursky, The Vioxx Settlement Agreement and Some Problems in Legal Ethics (Jan. 19, 2009) (unpublished manuscript, on file with author).

170. E.g., L.C. Becker, *Hard Choices are Not Enough*, 67 VA. L. REV. 97, 100 (1981); H. Beran, *In Defense of the Consent Theory of Political Obligation and Authority*, 87 ETHICS 267 (1977); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 126 (1981); A.J. Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 812, 816 (1984).

171. This is based on a similar example by Margaret Gilbert. See MARGARET GILBERT, *Objections to Actual Contract Theory*, in A THEORY OF POLITICAL OBLIGATION, *supra* note 66, at 80 [hereinafter GILBERT, *Objections*].

172. This idea is mirrored in contract doctrine on duress. If the duress is not caused by the other party to the contract, then the party under duress must still fulfill her contractual obligations so long as the other party acted in good faith and had no reason to know of her duress. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

173. E.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690); JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC (1960); see also Hanna Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990 (1965); Hanna Pitkin, *Obligation and Consent—II*, 60 AM. POL. SCI. REV. 39 (1966).

Instead of heading down that path, contemplate these examples along with the third scenario posed at the outset, where the judge transfers and consolidates Bob and Cathy's case with many others like it. Each scenario—the intraclaimant governance agreement, the withdrawal, and the judicial maneuvering—seeks a mechanism to legitimize its coercive aspect. People might fairly characterize that mechanism's legitimacy differently. That difference largely depends on whether the person aims to maximize welfare through governance arrangements, or to privilege consent since these situations occur in the bowels of private ordering. But an alternative exists.

## 2. Intragroup Obligations

Instead of asking how to legitimize an externally coercive force through a falsely constructed community (intraclaimant agreements, threats of withdrawal, or judicial coercion), imagine judicial procedures and attorneys representing many clients in a novel way, as a means for convening litigants. And further envision that, as in medieval guilds, the legitimizing force is the social glue within the plural subject. Put differently, what if in lieu of external coercion we relied on internal group coercion, on the moral obligations that individuals incur and the norms that they adhere to in the course of social agglomeration?

For instance, contrast an assembly constructed and bound through a formal agreement with an actual group that evolves organically through relationships, commonalities, social networks, intentions, and assurances. The constructed assembly—without more—lacks community and the individuals retain their self-interest. But members of an organically evolved group may have moral obligations to one another, obligations to treat one another fairly, to keep their promises, and to conform to other community norms.

One might contend that individuals who intend to do the same thing (whether they intend to do it together or not), whether it is litigating, going to the movies, or walking, obligates everyone with that intention to perform that action together. Should one's actions fail to conform, the others can demand action or admonish the rebel.<sup>174</sup> According to this view, parties who intend to achieve an end, whether their interests simply happen to overlap or they intended to achieve that end together, have rights and obligations to each other.<sup>175</sup> If one holds out or wants to exit the

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174. See generally GILBERT, *Joint Commitment and Obligation*, *supra* note 105, at 147–48 (discussing a different idea about joint commitments, not simply overlapping intentions); GILBERT, *Objections*, *supra* note 171, at 53–54 (same).

175. See generally GILBERT, *Joint Commitment and Obligation*, *supra* note 105, at 149, 155, 161 (discussing a similar idea from the perspective of commitments); GILBERT, *Objections*, *supra* note 171, at 56–57.

group, the others have reason to complain even though there was no intention to perform that activity *together* at all.

If this seems conceptually unsound and inane, consider a Rule 23(b)(1) limited fund class action or an equitable class action certified under Rule 23(b)(2). Neither procedural grouping permits those within its ranks to opt out; there is no choice at all about the matter, whether one intends to litigate or not.<sup>176</sup> Cohesiveness is presumed, thereby eliminating the possibility of holdouts and outliers that make achieving the collective good in Rule 23(b)(3) and nonclass aggregation difficult.<sup>177</sup> Plus, in pattern-or-practice employment cases, the defendant employer creates a preexisting community—its employees.<sup>178</sup> That grouping then frames the class definition and the litigation's preclusive effects. Similarly, in a limited fund class action, the group consists of a community of victims wronged by the same organization. The rationale for requiring these litigants to litigate together is that multiple judges might reach inconsistent conclusions about equitable decrees, or litigants might deplete a limited fund before others could bring their claims.<sup>179</sup> But in rejecting a motion for class certification, the judge has ruled that these dangers are not present. Thus, by definition, nonclass aggregation cannot invoke these justifications to define its membership and prevent plaintiffs from opting out. Accordingly, this view of obligation seems too strong for nonclass aggregation.

One might also adopt a softer form of obligation, one that is grounded in collective planning and anchors commitments through norms of stability. Planning a group activity demands some stability, frequently garnered through social pressure. Without stability, a group's members are less reliable, externalizing noncompliance costs on other members.<sup>180</sup> Rescinding promises or changing plans thus violates these stabilizing norms. Therefore, obligations arise "because shared intentions normally involve, both in their etiology and in their execution, associated assurances, intentionally induced reliance, and/or promises. Such assurances (and the like) typically induce relevant moral obligations of one to the other."<sup>181</sup> So, it is

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176. FED. R. CIV. P. 23(b)(1), (b)(2), (c).

177. One might easily question the accuracy of this presumption. For instance, in the school desegregation cases, clients often conflicted over bussing issues; some parents did not want their children bussed to poor schools with a tradition of violence, whereas others thought desegregation was critical at all costs. Both groups were often lumped together into a Rule 23(b)(2) class. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482 (1976).

178. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 84 (2005) (describing the workplace as a community that forges lasting bonds through somewhat involuntary workplace interactions).

179. FED. R. CIV. P. 23(b)(1), (b)(2).

180. See BRATMAN, *Shared Intention*, *supra* note 104, at 110.

181. Michael E. Bratman, *Shared Agency*, in *PHILOSOPHY OF THE SOCIAL SCIENCES: PHILOSOPHICAL THEORY AND SCIENTIFIC PRACTICE* (Chris Mantzavinos, ed., forthcoming 2009) (manuscript at 17), available at [http://philosophy.stanford.edu/download/18458/Bratman\\_SharedAgency\\_6\\_08.pdf](http://philosophy.stanford.edu/download/18458/Bratman_SharedAgency_6_08.pdf).

the promises and assurances that may arise in conjunction with planning a group activity that obligate, not a coincidental decision to litigate. The oversimplified difference is between saying: “I intend” versus “I promise.”<sup>182</sup> Promises and mutual assurances include a moral standard that requires fulfillment.<sup>183</sup> But promises need not be as explicit as saying, “I promise.” Rather, as the law of evidence illustrates, agreement might be tacit or implicit depending on the context.<sup>184</sup>

Of course, sometimes we might embed an exit mechanism within our assurances.<sup>185</sup> You might say at the outset, “We will litigate together, but I reserve the right to change my mind and you can too.” Thus, to obligate, these promises and assurances must not place conditions to the contrary.<sup>186</sup>

From this discussion, we might draw one of several conclusions about whether an obligation exists in nonclass aggregation:

*Case 1:* When many litigants each intend to X, they are obligated to one another to fulfill that intention together.

*Illustration 1.a:* Pyrotechnics ignite a fire in a nightclub killing 100 and injuring 200. Plaintiffs file both joint and individual claims. Eventually, however, over 200 plaintiffs subscribe to a Master Complaint, which lists each litigant individually but seeks damages for negligence on behalf of all plaintiffs against several defendants. The Master Complaint requests certain damages in death cases and other damages for personal injuries.<sup>187</sup>

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182. See David Velleman, *How to Share an Intention*, 57 PHIL. & PHENOMENOLOGICAL RES. 29, 44 (1997) (“The utterance of ‘I promise’ commits the speaker by placing him under a socially defined obligation. But intentions are psychological rather than social commitments. An utterance of ‘I intend’ must commit the speaker in the sense of making him psychologically committed to action.”). The idea of a promise as an obligation similarly comports with H.L.A. Hart’s “most obvious cases” of an obligation. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 179, 183 (1955).

183. Of course, this moral duty is different from a legal duty. Although these moral standards influenced contract law, promises in and of themselves are not legally enforceable. See generally HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 1.2 (2008); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296 (1986) (“A moral obligation that is not also a valid legal obligation can only be legitimately secured by voluntary means. That is, one may have a moral obligation to do something, but unless there is also a valid legal obligation, one cannot legitimately be forced by another to do it.”).

184. See FED. R. EVID. 801(d)(2)(B) (adoptive admissions).

185. BRATMAN, *INTENTION*, *supra* note 104, at 133.

186. *Id.* at 138–39; see also Joseph Raz, *Voluntary Obligations and Normative Powers*, in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 72, 99 (1972); Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFFAIRS 199, 208 (1990).

187. This example is based on the 2003 fire that broke out at The Station, a Rhode Island nightclub, during a concert given by the hard rock band Great White. The rough illustration does not implicate all the facts of that case, but the Master Complaint and the court’s intermittent decisions are available. Complaint, *Gray v. Derderian*, 2006 WL 820151 (D.R.I. 2006) (No. 04-312); *Gray v. Derderian*, 400 F. Supp. 2d 415, 419–20 (D.R.I. 2005). Courts generally cite Federal Rule of Civil Procedure 42(a) as authorizing master complaints. *E.g.*, *Katz v. Realty Equities Corp. of N.Y.*, 521 F.2d 1354 (2d Cir. 1975); *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141 (E.D. La. 2002). A master

*Illustration 1.b:* Diet drugs cause heart problems of varying degrees in users across the country. Some litigants retain the same attorney and initiate group litigation, others sue individually, but each litigant intends to sue the drug's manufacturer.

Case 1 is problematic both practically and theoretically. If all litigants initiate litigation against a particular defendant, as in Illustration 1.b, they may have only an intention to litigate in common, particularly if applied to large-scale litigation. There may be no joint commitment at all. Simply intending to litigate against the same defendant might be nothing more than mere egocentric overlap.<sup>188</sup> It would be a bit like saying that because 49,000 Vioxx plaintiffs each initiate litigation against Merck, they jointly commit to suing Merck as a body.<sup>189</sup> That is not the case; initiating lawsuits—without more—does not evince any intention to be committed to one another.

Even assuming a shared intent is present at some level, as in Illustration 1.a., litigants may not have coordinated plans about how to fulfill that intent. Filing a master complaint has several implications. Most often, it means that the judge ordered plaintiffs to file the joint complaint or risk dismissal (a semi-coercive element), and plaintiffs obliged. Still, plaintiffs generally retain the right to control their cases individually because a master complaint is not given the same effect as an ordinary complaint; it is simply a procedural device.<sup>190</sup> Consequently, there is some deliberate ambiguity here as well.

Although individuals may each intend to sue the same defendant, they might do so for different reasons and have contrasting objectives in mind. Plaintiffs in Illustration 1.a might each believe that defendants should be held liable for the nightclub fire, but their rationales might differ or they might believe that certain defendants are more culpable than others. Put another way, when confronted with a new issue, such as whether to accept or reject a settlement offer or its compensation plan, litigants in Illustration 1.a might divide. They each intend to litigate and perhaps this intention is more specific than most, but that does not mean that they share an

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complaint does not “merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. at 141 (quoting 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2382 at 255 (1971)). Thus, courts use the device to achieve economy and efficiency. Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 597–98 (1991).

188. For a definition of egocentric overlap, see *supra* note 11.

189. Plaintiffs also filed a master complaint in the Vioxx litigation. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 453 (E.D. La. 2006).

190. *Id.* at 454; *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. at 141–43; Murphy, *supra* note 187, at 601–02. *But see In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001) *rev'd in part*, 288 F.3d 1012 (7th Cir. 2002) (using the Master Complaint as well as the parties' agreement as a justification to apply the choice-of-law rules of its own forum).

overarching policy or strategy. The intent, in this sense, is attenuated or partial. Without promises, norms, and values as social glue, an intention is not a commitment; the “group” is just as likely to fracture as it is to coalesce when divisive issues arise.

One might also propose a third reading, based on Illustration 1.b, the diet drug litigation. Illustration 1.b might be viewed as nonobligatory since opting out of the endeavor in light of new developments could constitute either mutual rescission or fulfillment. That is, even if the claim is that abstract intentions obligate litigants to one another, those intentions do not dictate further cooperation; intentions can be singular and abstract, they do not mandate shared reasons. Stated simply, by litigating together initially, plaintiffs have fulfilled their obligation—they initiated litigation together and that was all they required of one another. The obligation is satisfied. To continue to develop policies and goals would then be a new commitment. An initial commitment might well lead to further related commitments, but one cannot say that, without more, litigants must coordinate plans or policies.

As explored shortly, bringing litigants together to deliberate and discuss their plans, goals, intentions, and desires facilitates an opportunity to commit to one another and devise cooperative strategies and stabilizing norms. Commitments, cooperation, and norms thereby deepen group cohesion. But it assumes too much to contend that merely by intending to sue the same defendant or being required to subscribe to a master complaint—before discovery, before potential intraclient conflicts come to light, and most significantly, before group norms evolve—plaintiffs obligate themselves to one another. Consequently, suffice it to say that Case 1 is too ambiguous in important ways to morally obligate the plaintiffs.

*Case 2:* Litigants jointly and voluntarily intending X, who commit to one another through promises or assurances, are obligated to act in accordance with that intention provided no exit conditions to the contrary exist.

*Illustration 2:* An attorney represents 100 plaintiffs in litigation against a drug manufacturer. All claimants jointly and voluntarily commit to suing the manufacturer. Although their injuries vary, after discussion, the clients agree that they want (1) the drug recalled from the market, (2) to educate the public about its potential effects, and (3) to receive compensation for their injuries. During the discussion, they promise and assure one another that they will not settle for less, at least not without majority consensus.

This is one—though not the only—basic framework for a cohesive group, where group membership morally binds its members. To explain,

by jointly and voluntarily intending to X, litigants each have intentions in favor of the designated activity and will thus function together in ways that promote and further that intention.<sup>191</sup> They might coalesce over certain litigation components—causation, fault, or basic liability—but not others. The danger in attenuated unity is that the framework might be too fragile to hold. That initial harmony, however, may lead to collaboration on other matters.

Sharing intentions regularly leads participants to conform to a norm of compatibility and to develop cooperative strategies through bargaining or adjusting.<sup>192</sup> Yet, litigants need not share background reasons for participating in the litigation. Although the shared policies in Illustration 2 further stabilize the group's commitment, the litigants might nevertheless have different motivations: vengeance, apology-seeking, or public education might underlie the commitment framework. In this sense, the shared intent would be partial but would still form a collective framework.<sup>193</sup> Although Case 2 includes a voluntary component, this component might still be satisfied after judicial transfer and consolidation or after an attorney retains multiple clients, so long as it is the litigants' intent to engage in a shared endeavor that catalyzes the relationship, not a third party's will.

Because intentions demand means–end coherence and include at least some degree of resistance to reconsideration and change, people who share intentions and desires regularly develop norms of consistency, agglomeration, and stability.<sup>194</sup> Once established, these norms guide behavior and, when violated, others may appeal to the norm in their reasoning. But the shared intention is not the binding force; it is the promises and assurances—the commitment—made in the execution and etiology of group development that morally obligate. Social norms about keeping and fulfilling promises further reinforce the obligation while stabilizing the intention.

Notice that this case excludes individuals-within-the-collective and those with only egocentric overlap. By definition, individuals within these categories have either distinctly eschewed shared agency, remained agnostic, or are simply ignorant of others involved. They are outside the group as I have defined it. Thus, binding them through notions of shared agency and obligating them to a cadre of disaggregated individuals has no moral force. There is no agency, no group, and no commitment. This does not mean that they can never incur obligations to one another. On the contrary, exposure, cooperation, and deliberation could catalyze commitments.

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191. See Bratman, *supra* note 181, at 14.

192. *Id.* at 8.

193. *Id.* at 16.

194. *Id.* at 4–5.

These cases illustrate when litigants are morally obligated to one another to carry out the group's intentional activity. Case 2 does not conclude *how* substantive laws should reinforce these obligations. It explains when group members *ought* to be obligated to one another. It might be, as explored below, that judicially created opportunities for people to come together, explore commonalities, and ultimately make promises and assurances to one another would be enough. Or, it might be that the law should bind individuals together once they are morally obligated to one another and a certain level of moral interconnectedness exists. This Article focuses on the first possibility—creating opportunities for plaintiffs to morally obligate themselves to one another—but does not intend to foreclose the possibility of using law in this way.

An interesting observation, which is outside this Article's purview, is that there are instances in which the law compels more than what morality and practicality—through the construction of norms and plans—require. For example, contract law does not enforce mere promises.<sup>195</sup> But in some respects, procedure has done what substantive law has not. Judge Weinstein, for example, strongly—arguably coercively—encouraged plaintiffs to agree to the Zyprexa settlement and thereby accomplished unity through back-end consent.<sup>196</sup> It stands to reason that legal and moral obligations are not congruent. For present purposes, however, I return to the idea that under the circumstances just described, group members within nonclass aggregation are morally obligated to one another to fulfill their commitments.

### *B. Cooperative Alternatives*

So far, this Article has sketched a novel claimant-centered approach to “groups” within nonclass aggregation and taken a normative position on when membership ought to obligate those within its ranks. But the artificial cleanness of this theoretical position becomes apparent when translated into reality. Problems of pinpointing litigants’ fluctuating mindsets and intentions, of pigeonholing litigants at all, and of enforcing amorphous commitments all arise. Perhaps these problems raise the question of why it

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195. See *supra* note 172.

196. Judge Weinstein ordered all plaintiffs to file their claims by a certain date to fulfill the settlement's 86% participation rate and thereby prevent Eli Lilly from walking away. To further induce claimants, he held:

Any plaintiff who fails to comply—either by submitting an inadequately supported claim, or by failing to submit necessary documents—will be deemed to have abandoned the claim; the complaint will be dismissed with prejudice and the case reinstated only upon submission of affidavits showing good cause for the delay and a substantial basis for the renewed claim.

*In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 270 (E.D.N.Y. 2006). Peter Schuck describes this same pressure in Judge Weinstein's handling of the Agent Orange litigation. SCHUCK, *supra* note 122, at 143–67.



matters that the approach is right if it is not easily translatable, if it at first seems impracticable or even improbable. Consider two points in response. First, if the theory itself is neglected or assumed, there is little hope of stumbling upon appropriate practices. Second, as I have explored elsewhere in detail, voluntary compliance with the law hinges on systemic legitimacy.<sup>197</sup> This legitimacy requires reasoned justifications and transparent process. So it is plausible that one might agree on the theoretical framework for generating obligations and perhaps upon when internal coercion is appropriate, but disagree with implementation methods. The techniques that follow are thus preliminary observations that will inevitably require some adjustment.<sup>198</sup> Nevertheless, they can ignite the debate and begin constructing a psychological foundation for fostering cooperation among plaintiffs.

This Subpart considers how the system might foster group cohesion, thereby enticing outliers into its ranks and making holdouts less likely. Specifically, it explains the social psychology underlying group identity and offers a few nascent proposals for moving from theory to practice.<sup>199</sup> These include shifting plaintiffs' attorneys' role from litigation architects to facilitators, using special officers to promote goal identification and mediate differences among subgroup members on the plaintiffs' side, and using intraclaimant governance agreements to memorialize those goals and outline group decision-making procedures.

### 1. Group Deliberation

One of the most robust findings in the social psychology literature is that when a group discusses a dilemma, they are substantially more likely to cooperate with one another.<sup>200</sup> Discussion increases cooperation by eliciting social norms (such as promise-keeping, compatibility, social agglomeration, nonabandonment, and means-end coherence) and provides a platform for a leader (an attorney or special officer, perhaps) to lend salience to the relevant norm.<sup>201</sup> When people face a new situation, such as litiga-

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197. Burch, *supra* note 11, at 6–11; Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2533–36 (2007); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 106–11 (2008).

198. For instance, this claimant-centered view may affect the apportioning of attorneys' fees. Given space constraints, however, I leave these issues for future work.

199. As Richard Nagareda points out, the bigger question is how the law might create incentives for plaintiffs' attorneys to facilitate cooperation. Although this Article is able only to touch on these ideas due to space constraints, I intend to fully address this question and develop these ideas in future work.

200. E.g., Bicchieri, *supra* note 91, at 193; Peter Kollock, *Social Dilemmas: The Anatomy of Cooperation*, 24 ANN. REV. SOC. 183, 194 (1998); Wim B. G. Liebrand, *The Effect of Social Motives, Communication and Group Size on Behaviour in an N-person Multi-stage Mixed-motive Game*, 14 EUR. J. SOC. PSYCHOL. 239, 251–52 (1984).

201. Bicchieri, *supra* note 91, at 193, 220; Bratman, *supra* note 181, at 8–10. The psychology literature on social dilemmas divides over these two theories, with some positing that discussing the

tion, they frequently rely on each other for interpretation clues and schema suggestions to make the peculiar familiar and relevant.<sup>202</sup> Invoking social norms satisfies this desire for familiarity.

When group members discuss a problem, they are increasingly likely to polarize and conform to the polarized norm if: (1) they categorize themselves as a member of the plaintiff group (or subgroup); and (2) there are prototypical characteristics, behaviors, and group norms that distinguish that group from others.<sup>203</sup> This latter criterion might be either differentiating the plaintiffs' group from the defendant, or one plaintiff group from another based on overarching objectives or injuries. Each criterion defines one group in contrast to another within the specific litigation context. Leaders thus become instrumental. They interpret and translate the situation as well as invoke the appropriate social norm: cooperating is "the right thing to do," one should "stick to their promises," or "we should defect and opt out."<sup>204</sup> These norms then become the group norm, increasing the group's cohesiveness.

The norm invoked depends on the stage of group cohesion: if the group is in its formative stage, then individuals must develop their joint goals and commitments through discussion. They might decide, as in Illustration 2, on an overarching litigation policy of seeking drug recall and patient education (as well as compensation). If so, then they will likely elicit the requisite mutual assurances and promises from one another to sustain and fulfill those goals. Once this occurs, members can appeal to norms of compatibility, social agglomeration, promise-keeping, and the desire for means-end coherence and consistency in subsequent discussions. These norms rationally pressure litigants to take whatever steps necessary to further their role in the group's joint activity.<sup>205</sup> Thus, norms and intentional interconnection are the social glue keeping the group together even absent a legally binding contractual agreement.<sup>206</sup>

Leaders enhance their influence and further promote cooperation by ensuring procedural fairness.<sup>207</sup> Prototypical group members—those who

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dilemma enhances group identity, while others argue that discussing the dilemma elicits social norms. For citations to the former theory, see Robyn Dawes, John M. Orbell & Alphons van de Kragt, *Not Me or Thee But We: The Importance of Group Identity in Eliciting Cooperation in Dilemma Situations: Experimental Manipulations*, 68 ACTA PSYCHOLOGICA 83, 83-97 (1988). For citations to the latter theory, see Bicchieri, *supra* note 91.

202. See Bicchieri, *supra* note 91, at 220-21.

203. Cooper, Kelly & Weaver, *supra* note 59, at 260. Margaret Gilbert argues that three characteristics are necessary for a social group: "intentionality of membership, unity, and consciousness of unity." MARGARET GILBERT, *Social Groups: Starting Small*, in A POLITICAL THEORY OF OBLIGATION, *supra* note 66, at 96.

204. Bicchieri, *supra* note 91, at 193.

205. See Bratman, *supra* note 181, at 10.

206. See *id.* at 15.

207. David De Cremer & Daan van Knippenberg, *How Do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858, 859 (2002).

are central to the group—care more about justice, and hence more about allocation issues, than do marginal members or individuals-within-the-collective.<sup>208</sup> The defining characteristic for achieving fairness among group members is the procedure used to allocate; group members perceive procedures as manifestations of the group's underlying values.<sup>209</sup> Thus, how a procedure treats any given member indicates that person's status within the group. Fair procedures increase prosocial behavior, strengthen group commitment, discourage opting out or leaving the group, and enhance the group's authority and legitimacy.<sup>210</sup> In short, if the group agrees on (and develops) fair procedures for decision-making, members are more likely to cooperate and agree on allocating resources, resolving conflicts, and addressing other group problems.<sup>211</sup> Studies about allocating goods, for instance, indicate that giving participants an opportunity to voice their opinions about the allocation process fosters belonging and cooperation.<sup>212</sup>

Framing similarly affects cooperation in common-pool dilemmas by changing the reference point. For instance, suggesting that participants were taking something (“doing bad”) belonging to the group encouraged more cooperation than simply suggesting that participants were “not doing good,” since doing harm is a greater moral fault.<sup>213</sup> Similar empirical studies found that people with more prosocial orientations, those placing greater value in the collective, cooperate more if the potential outcome is framed as a loss.<sup>214</sup> Those with less social tendencies, who place greater weight on their own outcomes, cooperate more if the outcome is framed in terms of a gain.<sup>215</sup> Generally translated into group-oriented mindsets, this

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208. Tyler & Lind, *supra* note 57, at 93–94. I have defined the term “individual-within-the-collective” in a previous article. Burch, *supra* note 11, at 20–24.

209. Tyler & Lind, *supra* note 57, at 87. Tyler and Lind note that social exchange models and group-value models differ over the best way to promote intergroup cooperation. Social exchange models focus on building group interdependence and convincing the group members that both groups contribute to the common good. Group-value theory, on the other hand, posits that conflict can be diminished by convincing members of both groups that they all belong to an overarching social category. *Id.* at 92.

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

211. *Id.* at 77; Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVES 137, 148 (2000).

212. David De Cremer & Tom R. Tyler, *Managing Group Behavior: The Interplay Between Procedural Justice, Sense of Self, and Cooperation*, 37 ADVANCES EXPER. SOC. PSYCHOL. 151, 181 (2005).

213. Eric van Dijk & Henk Wilke, *Is it Mine or is it Ours?: Framing Property Rights and Decision Making in Social Dilemmas*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 195, 195–209 (1997); see also Nobert L. Kerr & Ernest S. Park, *Group Performance in Collaborative and Social Dilemma Tasks: Progress and Prospects*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES, *supra* note 59, at 107, 118.

214. Carsten K. W. de Dreu & Christopher McCusker, *Gain-Loss Frames and Cooperation in Two-Person Social Dilemmas: A Transformational Analysis*, 72 J. PERSONALITY & SOC. PSYCHOL. 1093, 1093–1106 (1997).

215. *Id.* at 1–11; see also Kerr & Park, *supra* note 213, at 116.

suggests that those functioning predominately as prosocial, group-oriented individuals, such as those jointly committed, are more likely to cooperate when an undesirable result (rejecting a fair settlement) is framed as a loss. Individuals-within-the-collective, on the other hand, may cooperate more if the desired choice is framed as a gain.

## 2. *Mutual Assurances*

Beyond surface-level framing effects, mutual assurances that group members will remain faithful to their obligations similarly enhance group stability.<sup>216</sup> Mutual assurances might precede and define joint commitments, as when neighbors join together to litigate groundwater contamination, or the litigation itself might bring people together and lead to a commitment.<sup>217</sup> Most evidence suggests that increased cooperation correlates with commitments and promises made during group discussion.<sup>218</sup> Moreover, discussing the dilemma itself raises concern and awareness for fellow group members; the personal norms associated with promising tend to compel people to follow through with their commitments regardless of whether others will find out.<sup>219</sup>

Perhaps surprisingly, this phenomenon persists in one-shot interactions where group exposure is minimal. This is usually the case in large-scale litigation. With discussion and group interaction, commitments and promises made in one-shot interactions, even where anonymity is assured, are not just “cheap talk.”<sup>220</sup> Even though temptation to defect is great, the default presumption in newly formed groups is toward cooperation and trust, not betrayal.<sup>221</sup> This result, seen in empirical studies on both large

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216. See BRATMAN, *Shared Intention*, *supra* note 104, at 139; Bratman, *Dynamics*, *supra* note 104, at 10–11.

217. Bratman, *supra* note 104, at 10–11; MARGARET GILBERT, *Reconsidering Actual Contract Theory*, in A POLITICAL THEORY OF OBLIGATION, *supra* note 66, at 217 (“[M]aking an agreement is a way of producing a joint commitment. It implies, further, that the obligations to which agreements give rise are (at least) obligations of joint commitment.”).

218. Kelly S. Bouas & Samuel S. Komorita, *Group Discussion and Cooperation in Social Dilemmas*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1144–50 (1996); Norbert L. Kerr & Cindi M. Kaufman-Gilliland, *Communication, Commitment, and Cooperation in Social Dilemmas*, 48 J. PERSONALITY & SOC. PSYCHOL. 349–63 (1994).

219. Bouas & Komorita, *supra* note 218, at 1144–50; Norbert L. Kerr et al., *That Still, Small Voice: Commitment to Cooperate as an Internalized Versus a Social Norm*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1300, 1300–11 (1997).

220. I intend “cheap talk” in the psychological and philosophical sense as opposed to the economic sense. For an overview of the distinction, see David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC’Y 58, 87 (1995).

221. Bicchieri, *supra* note 91, at 203–04. Bicchieri’s rationale is that “interpreting a situation as ‘us’ versus ‘them’, as it frequently occurs even in the minimal group paradigm . . . , may activate interactive schemata that contain norms such as ‘take care of one’s own’, which could explain the preferential treatment accorded to ingroup members.” *Id.* at 218 (emphasis omitted).

and small groups, is most likely the result of exchanging promises.<sup>222</sup> Promise keeping triggers an injunctive default norm: one has a moral obligation to follow through with commitments.<sup>223</sup>

Still, binding pledges to cooperate—such as a contract—further enhance cooperation.<sup>224</sup> This suggests a place for an intraclaimant governance agreement, but not as part of an ex ante retainer-based contract. Rather, it should memorialize promises elicited as the result of communication, compromise, and assurances, not impose obligations based on an externally constructed assembly. This necessitates further research on how sanctions and punishment might affect cooperation and compliance.<sup>225</sup> As a preliminary example, however, in the related context of securities class actions, some courts permit groups of unrelated investors to join together to become the lead plaintiff. To do so, the group must establish that it can function cohesively and effectively, produce plans for cooperation, and “evince[] an ability (and a desire) to work collectively to manage the litigation.”<sup>226</sup> If the group successfully demonstrates these cooperative aspects to the court, then the court formally allows the group to represent the class.

Approaching hard cases within a group will be less polarizing if the shared framework is deepened. For instance, if all litigants agree in advance about a shared policy—to have the offending product recalled, for example—the question of whether to accept a settlement that contains a confidentiality provision and allows continued product marketing will be less divisive. So long as deliberation and consensus defined product recall

222. *Id.*

223. *Id.* at 215. Some suggest that this might also be the result of consensus building, but other research demonstrates that consensus alone does not increase cooperation. *Id.*

224. Xiao-ping Chen & S.S. Komorita, *The Effects of Communication and Commitment in a Public Goods Social Dilemma*, 60 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 367, 367–86 (1994).

225. For preliminary sources that develop this aspect, see James Andreoni, William Harbaugh & Lise Vesterlund, *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 AM. ECON. REV. 893, 893–902 (2003); Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390, 1390–96 (1981); Olivier Bochet, Talbot Page & Louis Putterman, *Communication and Punishment in Voluntary Contribution Experiments*, 60 J. ECON. BEHAV. & ORG. 11, 11–26 (2006); Ernst Fehr & Urs Fischbacher, *Third-party Punishment and Social Norms*, 25 EVOLUTION & HUM. BEHAV. 63, 63–87 (2004); Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 980–94 (2000); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137–40 (2002); Ernst Fehr, Urs Fischbacher & Simon Gächter, *Strong Reciprocity, Human Cooperation and the Enforcement of Social Norms*, 13 HUM. NATURE 1, 1–25 (2002).

226. *Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 392 (S.D.N.Y. 2008) (quoting *Reimer v. Ambac Fin. Group, Inc.*, 2008 WL 2073931, at \*3 (S.D.N.Y. May 9, 2008)); see also *Freudenberg v. E-Trade Fin. Corp.*, 2008 WL 2876373, at \*4 (S.D.N.Y. July 16, 2008); *In re Nature's Sunshine Prods., Inc.*, 2006 WL 2380965, at \*1 (D. Utah Aug. 16, 2006) (submitting affidavits to confirm the group's cooperative efforts).

as the goal that mattered, mutual assurances could foster obligations to follow that policy.<sup>227</sup>

On the other hand, if you and I enter into litigation and you want to ensure that the defendant recalls its product, but I want the maximum amount of money to compensate me for my hospital bills, then we might both seek to deepen our shared understanding to better weigh the policies underlying our deliberation. Although you might not care about money and I might be principally concerned with compensation, we might reach some alternative understanding that we would both agree to a settlement with compensation and no product recall, but also no confidentiality.<sup>228</sup> This creates the possibility that the relevant federal or state agency would reconsider the product's consumer safety. So, we are leaving open the relative weight to attach to each reason such that we might reach agreement.<sup>229</sup>

It is through deliberation and assurances that litigants with individual-within-the-collective mindsets or egocentric overlap might gain common knowledge, deepen sharing, and generate reciprocal obligations.<sup>230</sup> Accordingly, even when cooperation is not present initially, litigants can generate shared agency through mutually assuring one another that they will not opt out.<sup>231</sup> They need not converge their normative beliefs or judgments, which in many cases might prove impossible. Rather, litigants giving shared weight to inherently different goals might still achieve consensus and satisfaction with the litigation's outcome. Consequently, increasing group stability through shared or alternative weighting allows for plurality within litigation groups. We should thus consider how the judicial system might facilitate discussion among plaintiffs and how we might incentivize plaintiffs' attorneys to create these opportunities for their clients.

### *C. Minimizing Subgroup Competition*

Bringing litigants together could exacerbate conflicts that might not have arisen otherwise. As mentioned, the overarching group might share an interest in establishing causation against the defendant but might polarize over the appropriate remedy. The subgroup leader might then invoke an exit-based norm. Thus, at some point, competing groups in large-scale litigation either need to connect or the litigation clusters need to be small-

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227. See BRATMAN, *supra* note 103, at 285; Bratman, *Dynamics*, *supra* note 104, at 10–11.

228. See Bratman, *Dynamics*, *supra* note 104, at 11–12 (providing a similar contextual example concerning painting a house for different reasons).

229. *Id.*

230. *Id.* at 9–12.

231. *Id.* at 12. See generally JOHN RAWLS, COLLECTED PAPERS 473–96 (Samuel Freeman ed., 1999) (discussing pluralism).

er.<sup>232</sup> Although I have raised the possibility of smaller litigation clusters—polycentric litigation—briefly elsewhere and find it worth further consideration,<sup>233</sup> because polycentric litigation necessitates rethinking preclusion doctrines and use of the All Writs Act, I focus here on ways to bring large groups together.<sup>234</sup> Otherwise, factional groups like the veterans’ organizations in Agent Orange or country-specific Holocaust survivors may compete with one another. Plus, the potential for “holdouts” to derail a fair settlement persists when litigants feel that exit mechanisms best serve their subgroup.

In contexts where litigants regard the aggregate principally as two or more subgroups, they tend to promote their subgroup’s interest over both their private interest and the interests of those in the aggregate who are nonsubgroup members.<sup>235</sup> This kind of competition is common. Think of departments competing for university resources or student organizations competing for members and funding. Just as departments and students vie to control common resources, subgroups within large-scale aggregation vie for more compensation or to pursue different litigation goals. Thus, one option is to encourage litigants to reconceptualize the aggregate as one superordinate group.<sup>236</sup> This makes litigants more concerned with the collective interest rather than their own individual interests or their relative subgroup’s interest.<sup>237</sup>

One way to achieve this goal transformation is to use a democratic-style leader who acts as a mediator between competing plaintiffs’ fac-

232. A substantial body of research from psychology and behavioral economics suggests that group size substantially affects cooperation and other-regarding preferences: the larger the group, the less its members cooperate. *E.g.*, Dale O. Stahl & Ernan Haruvy, *Other-Regarding Preferences: Egalitarian Warm Glow, Empathy, and Group Size*, 61 J. ECON. BEHAV. & ORG. 20, 33 (2006).

233. Burch, *supra* note 11, at 55.

234. Note, however, that most empirical work demonstrates that larger groups tend to be less cooperative than smaller or mid-sized groups. *See* Ahn, Isaac & Salmon, *supra* note 64, at 190–91. As I have noted, there is further need to consider when and how group sanctions should be imposed. *Supra* note 225. Because sanctions are heavily tied into group size, I have opted to develop that aspect in future work to keep the size of this Article manageable. For preliminary sources on this link, see Marco Casari, *On the Design of Peer Punishment Experiments*, 8 EXPERIMENTAL ECON. 107 (2005); Mizuho Shinada & Toshio Yamagishi, *Bringing Back Leviathan into Social Dilemmas*, in NEW ISSUES AND PARADIGMS IN RESEARCH ON SOCIAL DILEMMAS, *supra* note 16, at 93, 104–06; Toshio Yamagishi, *Group Size and the Provision of a Sanctioning System in a Social Dilemma*, in SOCIAL DILEMMAS AND COOPERATION, 311, 311–26 (U. Schulz, W. Albers & U. Mueller eds., 1994).

235. Wit & Kerr, *supra* note 55, at 617.

236. This assumes that reconceptualization is what we want to happen systemically, although reasonable people could disagree on this point. If there is good reason for subgroup disputes (i.e., they want to achieve fundamentally different goals), then we should consider maintaining smaller litigation clusters, thereby allowing litigants to pursue alternative objectives. Granted, those objectives and the results might conflict, and defendants could encounter problems with preclusion. But if permitting litigants to pursue different goals is important enough (and I think it is, depending on the case), then we ought to take on this evaluative task and determine whether smaller clusters are worthwhile.

237. Wit & Kerr, *supra* note 55, at 617–18. Granted, strong leadership that is not in favor of achieving overarching cooperation could be more polarizing. Thus, the leader in this situation should be more akin to a mediator than someone who might advocate only for particular interests.

tions.<sup>238</sup> Viewing attorneys as facilitators and leaders in group litigation as opposed to litigation architects might prove problematic given the conflicts that frequently arise between attorneys and their clients.<sup>239</sup> Further, plaintiffs' lawyers might try to manipulate the structure and communication within groups to best serve their own financial interests. Thus, one alternative is to use a "special officer" or outside mediator to advance discussion and cooperation by making a collective membership category salient.<sup>240</sup>

Salient social categorization has the potential to change litigants' goals by minimizing distinctions between subgroups and private interests and giving greater weight to superordinate group membership and collective outcomes.<sup>241</sup> For instance, subtly linking all litigants' fates could change the litigation dynamic from competing subgroups—us versus them—to a superordinate schema of being "in [it] together."<sup>242</sup> Promoting overarching similarities—salient social categorization—and thereby strengthening group identity may also lead group members to expect others to act cooperatively.<sup>243</sup> Because cooperation is a dominant social norm, absent past interactions to the contrary, members expect cooperation.<sup>244</sup> That expectation then pressures individuals to reciprocate cooperative behaviors. Thus,

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238. Empirical data demonstrates that group members facing a common resource dilemma, as opposed to a public good dilemma, are less reluctant to give up decisional freedom to a leader. Eric van Dijk, Henk Wilke & Arjaan Wit, *Preferences for Leadership in Social Dilemmas: Public Good Dilemmas Versus Common Resource Dilemmas*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 170, 175 (2003). As noted in Part I, mass torts are more akin to common pool dilemmas. Moreover, litigation group members are likely to be more receptive to democratic-style leader, where the leader involves members in the decision-making process. See Tom R. Tyler & Peter DeGoey, *Collective Restraints in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSYCHOL. 482, 482–84 (1995); Mark Van Vugt et al., *Autocratic Leadership in Social Dilemmas: A Threat to Group Stability*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 1, 2–3 (2004).

239. See *supra* Part I.

240. The ALI mentions use of a "special officer" in its draft. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.02 cmt. a, § 3.09 cmt. a (November 2008 draft). The meaning attributed to "special officer" by the ALI is synonymous with my use of the term here. Other scholars have also suggested the use of a mediator or special master for large-scale litigation. See, e.g., Carrie Menkel-Meadow, *Taking the Mass out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513 (1998); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS. 61, 72 (1990); Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1378 (2005); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003).

241. See David De Cremer & Mark Van Vugt, *Social Identification Effects in Social Dilemmas: A Transformation of Motives*, 29 EUR. J. SOC. PSYCHOL. 871, 886–90 (1999); Wit & Kerr, *supra* note 55, at 619.

242. See Gary Bornstein & Meyrav Ben-Yossef, *Cooperation in Intergroup and Single-Group Social Dilemmas*, 30 J. EXPERIMENTAL SOC. PSYCHOL. 52, 65 (1994); Wit & Kerr, *supra* note 55, at 632.

243. See David De Cremer & Eric van Dijk, *Reactions to Group Success and Failure as a Function of Identification Level: A Test of the Goal-Transformation Hypothesis in Social Dilemmas*, 38 J. SOC. PSYCHOL. 435, 440 (2002).

244. See Wit & Kerr, *supra* note 55, at 619.



emphasizing the superordinate group's collective fate may increase plaintiffs' concern for other plaintiffs and increase individuals' willingness to cooperate by enhancing their expectations that others will act similarly.

To implement this idea, special officers could promote cooperation through intragroup discussion and deliberation. Deliberation could mitigate mass tort dilemmas by: (1) providing claimants with information that is frequently missing when deciding whether to settle—such as the strength of their claim vis-à-vis that of others as well as information about other subgroups; and (2) increasing cooperation.<sup>245</sup> The special officer could catalyze the discussion and suggest particular strategies that chart a middle course. Agreeing on litigation goals or at least jointly developing procedures for collective decision-making could mitigate many of the intraclient conflicts that plague aggregate litigation.

Discussion similarly facilitates opportunities for litigants to strengthen their group cohesion, develop relationships with one another, and, accordingly, to shift their concerns from their individual welfare to the group's welfare. To put the matter concretely, if nightclub fire victims are trying to design or modify a compensation grid, they might assign additional value to particular claims after interacting with other group members; those suffering from general emotional distress or minor physical injuries might allocate additional compensation to those grieving the loss of their loved one or suffering from severe disfigurement. Bringing litigants together in this way humanizes the process by giving them an opportunity to meet each other, as well as see and better understand other positions.

Granted, this method is particularly ripe for small-scale litigation. Geographic dispersion in large-scale aggregation makes discussion and group formation more difficult.<sup>246</sup> Still, as the Merck Settlement Group demonstrates, groups already form outside of territory-based communities through the Internet even within litigation like Vioxx. So, while it may be true that immediately masterminding one overarching group is implausible, consensus building by emphasizing superordinate characteristics is not completely unrealistic. Special officers might conduct regional discussions

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245. Mediation has the potential to change group dynamics. *See generally* Kees van de Bos & E. Allan Lind, *The Psychology of Own Versus Others' Treatment: Self-Oriented and Other-Oriented Effects on Perceptions of Procedural Justice*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1324, 1331–33 (2001) (“Although it may be the case that we are sometimes insensitive to the injustices of others in many real-world settings, the findings that are reported here show that that insensitivity is not insurmountable.”); Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 428 (1989). As but one example of using mediation, consider Ken Feinberg and David I. Shapiro's role in shaping and negotiating the Agent Orange Settlement in the face of fractured plaintiffs' organization. As a mediator who describes his talent as getting “a diverse group of people to march in the same direction,” Shapiro was perfectly suited for his purpose of “get[ting] a deal done.” SCHUCK, *supra* note 122, at 145–46.

246. Temporal dispersion is trickier than geographic distance, but is mitigated by nonclass aggregation's scope. By definition, nonclass aggregation binds only present litigants and not those that might litigate in the future (as a class action does).

or use technology, such as discussion boards and chat functions, to facilitate interaction.<sup>247</sup>

For instance, Ken Feinberg, who acted as the special master in the September 11 Compensation Fund, conducted nearly endless town hall meetings with claimants at schools, community centers, and hotels, providing them with an opportunity to tell their story and give their own account of how that day changed their lives.<sup>248</sup> Traveling across the country from New York to California, he met with groups small and large ranging from suburban widows, to six hundred Cantor Fitzgerald families, to families of foreign workers, to firefighters.<sup>249</sup> He credits this aspect of the process as “the essential reason that the program was so successful.”<sup>250</sup> And the nearly unprecedented 97% participation rate tends to reinforce this claim.<sup>251</sup>

This Part has raised and explored some of the psychological theories that encourage cooperation among those within the group, including designing just procedures, facilitating deliberation, reframing the divisive issue, and eliciting promises. Claimants might implement these theories themselves; more likely, however, an attorney or special officer could use these techniques to reframe the alienating issue and promote discussion among plaintiffs.<sup>252</sup> Consequently, we should consider designing and instituting judicial procedures that promote group deliberation and decision-making. Suffice it to say for now that methods exist for encouraging cooperation for sizeable litigation, but they necessitate far more consideration. For now, the point is to emphasize the crucial importance of group dynamics: determining what constitutes a litigation group and what obligations follow from its membership can alleviate some of the challenges that non-class aggregation presents.

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247. Further research is needed on whether litigants require face-to-face interactions for cohesive groups to form in litigation. For some initial research on Internet groups, see *supra* note 144 and accompanying text. Some studies have demonstrated other-regarding preferences even despite the “social distance inherent [in] Internet interaction.” Gary Charness, Ernan Haruvy & Doron Sonsino, *Social Distance and Reciprocity: An Internet Experiment*, 63 J. ECON. BEHAV. & ORG. 88, 88–90 (2007). Absent conclusive evidence on that point, additional questions remain about the cost-effectiveness of this proposal.

248. FEINBERG, *supra* note 102, at 47–55.

249. *Id.* at 55–57.

250. Kenneth R. Feinberg, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 FORDHAM URB. L.J. 785, 789 (2007); see also FEINBERG, *supra* note 102, at 164 (“I believe [the fund] can fairly be considered the valedictorian of all compensation programs, public or private.”).

251. FEINBERG, *supra* note 102, at 161.

252. Many of the ideas about groups and joint intent could equally apply to groups of plaintiff’s attorneys, who frequently litigate mass torts together. See Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 122–24 (1968); Rheingold, *supra* note 18, at 1. The predominate problem in this grouping, however, is that while the attorneys themselves might be unified, their clients might not be.

## CONCLUSION

Appreciating that plaintiffs often form social communities, and that members within those communities might have moral obligations to one another, adds a new dimension to the longstanding debates over judicial handling of mass torts. This Article makes two important claims to address dilemmas caused by nonclass aggregation. First, a group within aggregate litigation is one in which litigants jointly and voluntarily commit to “X,” where “X” might be anything from litigating together, to establishing causation, to having the product recalled, to recovering damages, to conducting discovery, to educating the public. Second, cultivating cooperation by promoting discussion could catalyze group formation and deepen shared commitments. Once litigants are committed to doing something together, they might buttress that commitment by making mutual assurances and promises to one another. Debating strategies about how to achieve “X” and compromising could then lead to shared cooperative activity and group policies. Fostering group deliberation and commitment similarly elicits and forms social norms such as promise keeping, the desire for means–end coherence, compatibility, and the tendency toward social agglomeration.

From these observations, four points follow. First, recasting mass-tort litigation as claimant-centered rather than attorney-centered destabilizes informational asymmetries that typically favor attorneys and disadvantage plaintiffs. Members within a cohesive group are in a better position to overcome these asymmetries, to negotiate with their attorneys, to monitor the litigation, and to provide informed consent than those in a disaggregated group. Second, instituting fair procedures for group deliberation, collective decision-making, and allocation could provide participation opportunities that court-based litigation typically lacks. Empirical studies demonstrate that people are more satisfied with their outcome if they participated in the process or agreed *ex ante* on allocation procedures. Fair procedures similarly promote cooperation by reaffirming members’ social status within the group. Third, one of the most robust findings in social psychology is that when individuals see themselves as group members, their concerns shift away from self-interested outcomes toward obtaining equity for the collective group. This makes holdouts and opt outs less likely. Finally, the promises elicited in the course of a shared endeavor likewise engender moral obligations not to opt out of that endeavor. Members might then memorialize those obligations, policies, or decision-making procedures in an intraclaimant governance agreement.

As always, the devil is in the details. This Article has concentrated on communities and groups within aggregation as a source of obligation and only briefly mentioned implementing the theory through attorneys or special officers. The dirty work of justifying it, creating feasible procedures,

actualizing cooperation, incentivizing both plaintiffs and their attorneys to discuss dilemmas, designing and deciding on how and when to impose sanctions, and determining when and how to account for exit contingencies remains. And the current nature of mass torts, where attorneys act as architects, designing and structuring lawsuits, is at odds with claimant-centered litigation.

Although this shift from attorney-centered to claimant-centered and from attorney-as-architect to attorney-as-facilitator is not meant to undermine the attorney's position as a private attorney general, it does change the litigation equation in important ways. It suggests a proactive role that empowers claimants by building consensus and establishing litigation goals collaboratively. It similarly encourages attorneys to identify potential conflicts and group instability early in the litigation and, accordingly, to plan exit contingencies when they cannot overcome group disunity or ethical conflicts through framing, cooperation, and discussion. Though much research remains, this Article enlists other disciplines to analyze the dilemmas embedded within mass torts and advance the debate beyond the conventional camps of utilitarians and autonomy theorists. It promotes resolution of client-based conflicts by appreciating the importance of social groups, understanding how they work, responding to their normative demands, and harnessing their power to advance a cooperative alternative to external coercion.

