

Group Consensus, Individual Consent

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ABSTRACT

Despite a rise in the number of personal injury and product liability cases consolidated through multidistrict litigation, a decline in class certification motions, and several newsworthy nonclass settlements, such as the \$4.85 billion Vioxx settlement and estimated \$1.2 billion Zyprexa settlements, little ink has been spilled on nonclass aggregation's unique issues. Sections 3.17 and 3.18 of the American Law Institute's Principles of the Law of Aggregate Litigation are a noteworthy exception. This Article uses those principles as a lens for exploring thematic questions about the value of pluralism, group cohesion, governance, procedural justice, and legitimacy in nonclass aggregation.

INTRODUCTION

The term “aggregate litigation” usually brings to mind visions of class actions filled with nameless, faceless, absent class members. But it also covers another set of tools that bring plaintiffs together—joinder under Rule 20,¹ consolidation under Rule 42,² and multidistrict transfer and coordinated handling under § 1407.³ These plaintiffs have names, faces, individually retained attorneys, and something personal at stake. They bring product liability, failure-to-warn, and personal injury claims over heart attacks, strokes, and death—bodily injuries that change their lives physically and emotionally. Their complaints tell stories that are distinctively individual but similarly telling; together, they paint a grim picture of product failure. Although plaintiffs have voice and autonomy concerns and their claims are often individually marketable, their attorneys and the judicial system aggregate them to tell a collective story, promote judicial efficiency, avoid inconsistent judgments, achieve cost-effective discovery, enjoy cooperative gains from coordinated strategy, and further level the

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¹ FED. R. CIV. P. 20.

² FED. R. CIV. P. 42.

³ 28 U.S.C. § 1407 (2006).

playing field between individuals and corporate defendants. On the one hand, the individual may be enveloped within the aggregate and lose the ability to speak for herself; on the other, the collective voice is far more powerful than hers alone.

To date, little ink has been spilled on the individual's role as a named plaintiff within the collective and the unique issues of nonclass aggregation. Sections 3.17 and 3.18 of the American Law Institute's ("ALI") *Principles of the Law of Aggregate Litigation*⁴—the subject of this symposium—are a noteworthy exception. The ALI's project comes at a critical time: the number of personal injury and product liability cases consolidated through multidistrict litigation is on the rise, class certification motions are in decline, and there have been several newsworthy nonclass settlements, such as the \$4.85 billion Vioxx settlement and the estimated \$1.2 billion Zyprexa settlements.⁵ This Article evaluates sections 3.17 and 3.18 in procedural justice terms and, in so doing, considers how to strike the right balance between the individual and the collective when designing process for nonclass aggregation.

Section 3.17(b) increases transparency and legitimacy by bringing aggregate settlements into the light and pulling them away from the silent accords of the past. Accordingly, its recommendations for majority voting and section 3.18's safety valve of limited judicial review have much to commend. To explain, section 3.17(b) is an alternative to the aggregate settlement rule, which allows each claimant to review her portion of the settlement vis-à-vis others' portions and then accept or reject the settlement offer.⁶ This new provision exchanges consent

⁴ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 3.17–.18 (2010).

⁵ *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); Alex Berenson, *Lilly Settles with 18,000 over Zyprexa*, N.Y. TIMES, Jan. 5, 2007, at C1; OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com/> (last visited Nov. 14, 2010) (sponsored by the Vioxx MDL Plaintiffs' Steering Committee). For the most recent empirical study of multidistrict litigation in comparison with class actions, see Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 806 (2010) ("Though the number of [personal injury products liability] class action lawsuits has shifted very little, the percentage in which a party files a motion to certify a class that a court grants for litigation purposes appears to have shrunk markedly. And, while the shift in class certification was taking place, the [Judicial Panel on Multidistrict Litigation] began transferring products-liability litigations to single courts for consolidated management at a higher rate, and the number of products-liability consolidated cases expanded.").

⁶ MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2008) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client."). Every state has enacted some version of this aggregate settlement rule. See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. a (2010).

to a settlement for consent to a process that then leads to a binding settlement. It thus limits individual decisionmaking autonomy but, in exchange, promises to alleviate the holdout problem. The holdout problem arises when defendants condition settlement on nearly unanimous consent—through walkaway provisions, liens on defendants' assets, or most-favored-nation provisions—and each plaintiff individually decides whether to accept the offer.⁷ Defendants' desire for complete finality tempts some claimants to withhold their consent, or "hold out," which threatens to derail the entire deal unless those claimants receive a disproportionately high payoff.⁸

To preempt this veto opportunity, section 3.17(b) allows plaintiffs to bind themselves in advance to a supermajority vote. In its final, enacted form, this alternative has several design features that potentially enhance procedural fairness, such as:

- requiring informed consent before entering into a governance agreement;
- enabling claimants to engineer the procedures for both approving a settlement offer and allocating the settlement proceeds;⁹
- suggesting that a neutral third party review the settlement terms; and
- ensuring that claimants can judicially challenge the settlement's fairness and reasonableness (as well as compliance with the procedures set out in sections 3.17(b)–(e)).¹⁰

These procedures have the potential not only to make process transparent, but also to mend the deficiencies in current practice. Presently, plaintiffs in nonclass aggregation have few opportunities for

7 For an overview of how these provisions exert ethical pressure on plaintiffs' counsel, see Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 980 (2010).

8 See Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 8–9 (2009) [hereinafter Burch, *Litigating Groups*]; Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1185 (2010); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767 (1997).

9 Empirical studies have shown that allowing people to participate in designing process ex ante (in this case, before a settlement offer) enhances their judgment about procedural fairness and the substantive outcome. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 102–03 (1988); Elizabeth Chamblee Burch, *Procedural Justice in Non-class Aggregation*, 44 WAKE FOREST L. REV. 1, 38 (2009) [hereinafter Burch, *Procedural Justice*]; Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223, 237–38 (1983); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 233, 243 (2004).

10 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 3.17(b)–(e), 3.18 (2010).

participation, voice, and control.¹¹ Plus, settlement eviscerates traditional error-correction mechanisms, and the settlement's timing—typically when money is on the table for plaintiffs' attorneys—may lead to heavyhanded tactics to achieve consent. Section 3.17(b)'s alternative makes voice and participation possible for plaintiffs, and section 3.18 promises to correct egregious fairness errors through judicial review.

What section 3.17(b) lacks, however, is a prophylactic structural mechanism to prevent plaintiffs' attorneys from manipulating it to their advantage and, perhaps, to their clients' detriment. Although 3.17(b) leaves open the possibility that claimants can design their own governance arrangement, it also permits attorneys to embed a waiver of the aggregate settlement rule in their retainer agreement. With an aptly planned client base, an attorney could easily predict a supermajority vote in favor of a settlement and could promise as much in negotiations with the defendant. Granted, *ex post* scrutiny through a fairness review does provide a failsafe measure. But we should be equally concerned that plaintiffs freely arrive at fair arrangements, not just that the arrangement itself is fair. In short, while section 3.17(b)'s core components sketch a blueprint for aggregate settlements, they leave some significant details to the imagination (and, perhaps, manipulation) of plaintiffs' attorneys. This Article likewise envisions these details, but does so from a procedural justice standpoint. It frames ideal practices that harmonize with the language in sections 3.17(b) and 3.18 but push further to ensure participation, voice, and control opportunities for plaintiffs.

Accordingly, my normative claim is that process should foster opportunities for plaintiffs in the aggregate to form groups and to play a significant role in group governance. More specifically, we should read section 3.17(b) as allowing plaintiffs to engineer and implement their own intraclaimant governance procedures, rather than arming plaintiffs' attorneys with an additional tool to deliver finality to defendants when it does not serve their clients' best interests. Once plaintiffs have the procedural opportunity to communicate with one another and form groups, they may also benefit from the secondary effects of group formation: group members may incur moral obligations to one another and exhibit positive other-regarding preferences, such as altruism and reciprocity. As a descriptive matter, this normative theory about how we ought to design process (and, by implica-

¹¹ Burch, *Procedural Justice*, *supra* note 9, at 37–43.

tion, about how current process fails) helps explain why plaintiffs may feel dissatisfied with current procedures and—depending upon how it is implemented—with section 3.17(b).¹² As a corollary, changing process to allocate more control to plaintiffs means they will likely feel that the process was procedurally fair.

This Article thus construes the language in section 3.17(b) to promote procedural fairness. In popular parlance, this reading reinstates the plaintiff as the star by returning decisionmaking control to her, but also requires her to share the stage—and control—with others like her. Realistically, lawyers drive multidistrict litigation. But for them to advocate for their clients, they need to understand what their clients want. And for clients to know what they want, which ends they can pursue, and which means are feasible, they need information from both their attorneys and other plaintiffs. When functioning properly, this feedback loop among clients, their attorneys, and other plaintiffs tethers attorneys' choices to their clients' desires, legitimizes any plaintiff-based governance arrangement, and gives that arrangement the coercive power needed to achieve finality.

Part I begins with a familiar tale about fully informed consent and the claims of autonomy that animate it in current practice under the aggregate settlement rule. After exploring how the present dealmaking process taints consent, it turns to the ALI proposal and explains how plaintiffs' attorneys might also manipulate section 3.17(b)'s advanced waiver to their advantage and to their clients' detriment. Part II lays the groundwork for avoiding attorney overreaching by reconceiving the individual plaintiff's relationship with the collective group in communitarian terms. Voluntarily consenting to a governance agreement is one way, but not the only way, for plaintiffs to incur obligations to each other. Thus, this Part explains how, in the course of litigating together, plaintiffs might incur obligations of solidarity or loyalty that morally bind even those who insist on the aggregate settlement rule. To be sure, a moral obligation differs from a legal one, but may influence behavior in similar ways.¹³ In explaining these obliga-

¹² See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 9 (1995) ("Many people, particularly those caught up in mass cases, feel alienated and dehumanized when dealing with our institutions. Their participation in the system is too often, from their view, ineffective. They are items, things, rather than persons. . . . [T]hey are anonymous recipients of a form of justice they do not understand—players in a kind of lottery of awards and rejections from our system of law.").

¹³ Although I have introduced and explored these ideas in considerable detail elsewhere, my aim here is to assess how they fit within section 3.17(b)'s framework and alleviate the potential for attorney manipulation. I have written a series of articles addressing both the problems in

tions, this Part draws from moral philosophy in a limited way and thus risks introducing a flood of implications and criticisms that have little to do with the relatively narrow points made here. Even so, I find certain loaded terms (like communitarian) useful shorthand and rely on them with that caveat in place.

Part III envisions section 3.17(b) as a plaintiff-centered model and suggests that plaintiff participation in group governance might serve as a proxy for direct judicial interaction and a palliative for the loss of individual autonomy. Plaintiffs should collectively deliberate over the litigation's aims and ends, decide which ends to pursue, and determine whether to pursue those ends together. Encouraging plaintiffs to communicate with one another in engineering a governance agreement performs three important functions: (1) it legitimizes the process by allowing plaintiffs to participate; (2) it fosters a sense of community and enables plaintiffs to develop other-regarding preferences; and (3) it makes it more likely that plaintiffs will abide by the group's decision because it is a product of community consensus. This is not to say that discourse delivers a fairytale ending—it may cause factions and bring to light conflicts that might otherwise remain nonissues. Still, conflict can produce creative solutions, can encourage plaintiffs to express preferences in weak or strong form, and may ultimately lead to a compromise.

Part IV concedes, however, that plaintiffs who reach group consensus or who bind themselves through a vote might make unjust decisions. The Article concludes by linking section 3.18's limited judicial review to procedural fairness and the notions of individual autonomy and consent explored in Part I. Informed consent to fair collective process should affect the scope and intensity of a subsequent fairness challenge. Accordingly, fairness reviews should contain both a process-dependent check, which examines the nature of the procedures used to garner consent and bind claimants, and a content-dependent check, which objectively evaluates the settlement's substantive terms.

nonclass aggregation and the solution of "litigating together." Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889 (2010) [hereinafter Burch, *Aggregation, Community, and the Line Between*] (considering the political theory underlying moral obligations, including how these obligations fit within the liberal and communitarian traditions); Burch, *Litigating Groups*, *supra* note 8 (developing the theory of moral obligations between plaintiffs who litigate together); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. (forthcoming 2011) [hereinafter Burch, *Litigating Together*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577073 (translating the theory developed in "Litigating Groups" into practice); Burch, *Procedural Justice*, *supra* note 9 (explaining the problems and risks presented by nonclass aggregation in procedural fairness terms).

The process-dependent check always comes first: The more informed plaintiffs are before agreeing to a settlement and the fairer the procedures are that they have agreed to, the lesser the need for a rigorous content-dependent check. Conversely, the less informed plaintiffs are before they agree and the fewer structural safeguards the agreement contains, the greater the need for a rigorous content-dependent check.

I. THE LIMITS OF CONSENT AND AUTONOMY

A. *Consent in Current Practice*

Consent is both the lynchpin of section 3.17(b) and the mechanism by which defendants currently achieve finality in mass litigation. But what informed consent means, when it morally obligates, how paternalistic courts and attorneys should be in ensuring it, and how it affects fairness and preclusion are constantly debated.¹⁴ Oversimplified, these debates question whether consent tainted by undue pressure or lack of information can create an obligation.

Some claim that consent obligates only when it is the product of a well-informed person's free choice.¹⁵ Just because someone agrees to something does not mean that the agreement is fair or that her consent obligates her when it is not. Others claim that justice means respecting people's freely made choices, whatever they are and regardless of whether they are fair, so long as those choices do not impinge on others' rights.¹⁶ Further muddying this consent-obligation debate is consent's tangled relationship with autonomy. Though often thought of simultaneously, the two are separate constructs. We might say, for instance, that in the procedural context, an autonomous individual freely chooses when and how to exercise her legal rights—deciding to sue, requesting a particular remedy, overseeing the conduct of the litigation, and deciding whether and under what terms to set-

¹⁴ For example, debates within the annual ALI meetings have led to several iterations of section 3.17(b).

¹⁵ John Rawls, for example, believes that we could be bound by both natural duties and voluntarily incurred obligations, but that those obligations must be construed against a backdrop of preexisting morality. JOHN RAWLS, A THEORY OF JUSTICE 343 (1971) ("Acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations. It is generally agreed that extorted promises are void *ab initio*."); see also MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 109–11 (2d ed. 1998).

¹⁶ See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 478–79 (1980) (discussing the difficulty of determining when circumstances might render a promise involuntary).

tle.¹⁷ Consent to a contractual arrangement, as a voluntary act, expresses individual autonomy.

Consider, for example, the heated debate over the \$4.85 billion Vioxx deal.¹⁸ The settlement offer required each participating plaintiffs' attorney to recommend the deal to 100% of her clients and to withdraw from representing those who declined.¹⁹ Without the individual consent of 85% of the claimants, Merck could walk away and would compensate neither the plaintiffs' nor their attorneys.²⁰ Plaintiffs who refused the deal would continue to litigate before Judge Fallon, who stated his preference for settlement from the beginning.²¹

To legitimize the deal, plaintiffs needed to consent to the settlement offer, but critics claimed that their consent was coerced.²² The offer was like *The Godfather's* Don Corleone—"I'll make him an offer he can't refuse"²³—and thus consent created no moral obligation.²⁴ Critics also intuitively appealed to fairness principles—even if plaintiffs voluntarily consent to something, the thing agreed to must also be just.²⁵ As one Vioxx claimant explained:

¹⁷ See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750 (2002); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1574 (2007).

¹⁸ For information on the Vioxx settlement, including the estimated \$4.85 billion payout, see OFFICIAL VIOXX SETTLEMENT, *supra* note 5.

¹⁹ Settlement Agreement at 5–6, Vioxx Prod. Liab. Litig., No. 05–01657 (E.D. La. Nov. 9, 2007), available at http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf. After some plaintiffs' attorneys contended the settlement conflicted with ethical rules, it was reinterpreted to mean that the attorneys should recommend the deal only if it was in the client's best interest. See Alex Berenson, *Lawyers Seek to Alter Settlement over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4.

²⁰ Settlement Agreement, *supra* note 19, at 41.

²¹ See Jef Feeley & Leslie Snadowsky, *Merck Vioxx Judge Threatens to End Suit Consolidation*, BLOOMBERG, Jan. 5, 2006; cf. Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of the Courts*, 54 LAW & CONTEMP. PROBS. 227, 230 (1991) ("Faced with mass tort litigation, judges are not simply neutral arbiters; rather, they have strong personal incentives to speed the judicial process, save costs and labor, and reduce redundancy."); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 361–62 (1986) ("Judges, like other people, do not like to invest a great deal in a project without receiving the anticipated return.").

²² See, e.g., Burch, *Litigating Groups*, *supra* note 8, at 36–37; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301 (2011); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1155–56 (2010).

²³ THE GODFATHER (Paramount Pictures 1972).

²⁴ See MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 142–43 (2009).

²⁵ See RAWLS, *supra* note 15, at 343–45; Erichson & Zipursky, *supra* note 22, at 301–11; cf. CHARLES FRIED, CONTRACT AS PROMISE 15–17, 97–98 (1981).

A settlement like the on going Merck/Vioxx settlement would appear to be the answer to mas[s] tort cases like these, but there must be safeguards in place to insure [sic] a fair and equitable settlement for both plaintiffs and defendants. Currently, no such safeguards exist. Those plaintiff[s] who signed on to the Vioxx settlement . . . were given little or no choice but to accept the settlement and were required to sign forms releasing Merck of all liability with Merck admitting to no wrong doing . . .²⁶

Merck's need for finality, plus money on the table for plaintiffs' attorneys, plus the aggregate settlement rule's demand for individual consent, compelled consent and thus raised fairness concerns.

Think, for instance, about another expression of consent—a promise. Rawls claims that for a promise to bind, “one must be fully conscious, in a rational frame of mind, and know the meaning of the operative words, their use in making promises, and so on.”²⁷ Further, a promise does not obligate if it is not “spoken freely or voluntarily,” if the promisor is “subject to threats or coercion,” or if the promisor lacks “a reasonably fair bargaining position.”²⁸ If promises or other forms of consent legitimize the deal, but are somehow tainted, then the deal is likewise sullied with the tinge of illegitimacy. Accordingly, the Vioxx settlement designers risked post-“consent” noncompliance—plaintiffs could question the settlement as a legitimate binding authority and morally rationalize disobedience.

B. The Potential for Manipulating Consent Under Section 3.17(b)

To avoid similar quandaries, section 3.17(b) shores up the gaps left by the aggregate settlement rule's patchwork approach—namely, that in attempting to comply with the Rule, consent may inevitably seem coerced because of the deal's timing and the push for consensus.²⁹ Consequently, section 3.17(b) requires informed consent before a plaintiff enters into a governance agreement.³⁰ What makes consent informed depends on the information revealed and the client's capacity for comprehending that information.³¹ Given the abundance of le-

²⁶ *About Us*, PLAINTIFFS VIEW, <http://plaintiffsview.org/aboutus.html> (last visited Nov. 14, 2010); see also Al Pennington, *My Story*, <http://plaintiffsview.org/MystoryAl.html> (last visited Nov. 14, 2010).

²⁷ RAWLS, *supra* note 15, at 345.

²⁸ *Id.*

²⁹ See Nagareda, *supra* note 22, at 1161 (pinpointing the timing of consent—when money was on the table for attorneys and their clients—as the principal problem with the Vioxx deal).

³⁰ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (2010).

³¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmts. c(i), d (2000)

gal and ethical commentary on informed consent, my focus here is on two underdeveloped aspects that affect procedural justice: consent's timing and the disconnect between what plaintiffs and their attorneys want from the litigation.

Regarding timing, section 3.17(b)'s earlier versions suggested embedding a waiver of the aggregate settlement rule in the lawyer or law firm's retainer agreement, thereby making it a lawyer-client rather than a client-client agreement.³² The current version's language softens this suggestion, but leaves open the possibility, noting that "[t]he agreement among the claimants may occur at the time the lawyer-client relationship is formed or thereafter"³³ Subsequent commentary clarifies that clients may "enter into agreements with other clients at any time," but cautions that lawyer-client agreements "must be reasonably informed" and plaintiffs "are likely to have more information about the benefits and risks associated with group-wide voting arrangements after some litigation has occurred than at the time of formation of the lawyer-client relationship."³⁴

Section 3.17(b) is loosely modeled after § 524(g) of the Bankruptcy Code, which binds all asbestos claimants in the class covered by the trust so long as seventy-five percent vote in favor of the plan.³⁵ To understand why including a waiver in the attorney-client retainer agreement might lead to attorney overreaching, consider an example from that context: to ensure approval of Combustion Engineering's prepackaged bankruptcy plan, its parent company, ABB Limited, hired prominent asbestos plaintiffs' attorney Joseph Rice to configure the asbestos claimants in a way that made the required vote a foregone conclusion.³⁶ But garnering the requisite votes meant flooding the voting pool with people who had weaker claims and were willing to vote for the plan.³⁷ As one commentator describes the claims valuation and voting process, "[A]n unimpaired claimant who may have

(discussing the role of client sophistication in informed consent); MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (1983).

³² PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(c) (Discussion Draft No. 2, 2007) ("[E]ach claimant may consent, in a writing signed by each claimant, to such collective decision-making either as part of the lawyer or law firm's retainer agreement or at any other point during the course of the litigation."); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(c) (Preliminary Draft No. 5, 2008) (same).

³³ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b)(2) (2010).

³⁴ *Id.* § 3.17 cmt. d; see also Burch, *Litigating Groups*, *supra* note 8, at 39–40.

³⁵ 11 U.S.C. § 524(g) (2006); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. c (2010).

³⁶ RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 169 (2007).

³⁷ *Id.* at 170–73.

no asbestos-related illness recognized by medical science, has the same one vote as does a mesothelioma claimant with a claim value in excess of one million dollars.”³⁸ Diluting the pool with weaker claims undervalued and thus worked to the detriment of claimants with stronger claims and serious injuries as well as future claimants.³⁹ Consequently, given this precedent, it is conceivable that plaintiffs’ attorneys might act strategically under section 3.17(b) in ways that grossly undervalue the strongest claims. As Judge Weinstein observed after handling the Agent Orange, asbestos, and DES cases, most mass tort lawyers have been “focused on getting cash for the individual client, obtaining a large fee, and closing the file as quickly and with as little effort as possible.”⁴⁰

Moreover, what plaintiffs want is not always what their attorneys want for them. Recent research on medical injuries and the September 11th Victim’s Compensation Fund reveals that many people litigate on principle—not for money.⁴¹ In her study of the September 11th litigants, Gillian Hadfield found that “litigation represents more to some potential litigants than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community.”⁴² Tamara Relis puts it bluntly: “It’s not about the money!”⁴³ Instead, litigants want information about the facts, accountability, judgments of wrongdoing, and to do something that promotes change.⁴⁴ September 11th litigants, for instance, conceived of themselves as members of a broader American community and framed their decision to litigate as one that promoted shared civic values.⁴⁵

If Hadfield and Relis are right—that many litigants are not in it for the money, but for extralegal objectives—then we are faced with

³⁸ Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 866 (2005).

³⁹ NAGAREDA, *supra* note 36, at 172–73.

⁴⁰ WEINSTEIN, *supra* note 12, at 49–50.

⁴¹ See Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC’Y REV. 645, 649, 661–62 (2008); Tamara Relis, “It’s Not About the Money!”: A Theory on Misconceptions of the Plaintiffs’ Litigation Aims, 68 U. PITT L. REV. 341, 363 (2006) (“Plaintiffs’ articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance, 18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.”).

⁴² Hadfield, *supra* note 41, at 649.

⁴³ Relis, *supra* note 41, at 341.

⁴⁴ Hadfield, *supra* note 41, at 662–63; see also WEINSTEIN, *supra* note 12, at 8–9.

⁴⁵ Hadfield, *supra* note 41, at 672.

two additional conundrums: one economic and one rights-based. The economic disjunction is that even though many plaintiffs' personal injury claims are independently economically viable, they are remarkably expensive to litigate effectively. After litigating a few of them, however, the necessary apparatus is in place and attorneys can recoup their investment costs by litigating similar cases. Plaintiffs' attorneys typically take these cases on a contingency fee. There is thus little room or incentive for them to litigate on principle.⁴⁶ The rights-based disjunction is that aggregating plaintiffs through multidistrict litigation and imposing section 3.17(b)'s majority voting rule on them may impair their practical ability to pursue their assorted litigation objectives. This interferes with their right to sue in tort, at least insofar as the law provides for their desired remedy.⁴⁷ My focus is on this latter, rights-based disjunction.⁴⁸

As Karl Llewellyn interprets Max Weber's formulation, "a right . . . exists *to the extent that* a likelihood exists that *A* can induce a court to squeeze, out of *B*, *A*'s damages."⁴⁹ Llewellyn explains that a right "becomes what can be done about the situation" and thus "includes all procedural limitations on what can be done"⁵⁰ At the core of plaintiffs' complaints about the current process is the feeling

⁴⁶ As I have discussed elsewhere, this suggests that when plaintiffs want extralegal relief, we should consider a fee-shifting statute akin to those in civil rights legislation. I thank Richard Nagareda for suggesting this to me. For examples of civil rights statutes that require losing defendants to pay "reasonable" plaintiffs' attorneys fees, see the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006), the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006). For examples of other statutes promoting the public interest that also permit fee shifting, see the Privacy Act of 1974, 5 U.S.C. § 552a(g)(2)(B), (g)(3)(B) (2006), the Government in the Sunshine Act, 5 U.S.C. § 552b(i) (2006), the Equal Access to Justice Act, 28 U.S.C. § 2412(b), (d)(1)(A) (2006), and the Clean Air Act, 42 U.S.C. § 7607(f) (2006).

⁴⁷ See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1183 (1982) ("A fundamental premise of American adjudicative structures is that clients, not their counsel, define litigation objectives."). The right to sue in tort is a property interest protected by the Due Process Clause. As defined by Karl Llewellyn, "rights" are "statements of likelihood that in a given situation a certain type of court action loomed in the offing." Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930).

⁴⁸ For more information on the economic disjunction, see Burch, *Litigating Together*, *supra* note 13.

⁴⁹ Llewellyn, *supra* note 47, at 448. I realize this statement is controversial in many circles. My point is to underscore the necessity of process in enforcing legislatively defined substantive rights.

⁵⁰ *Id.*; see also David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1979 (2008) ("Guided by Llewellyn's insight, I maintain that a rigid boundary between substance and procedure for the purpose of identifying the components of a right to sue does not exist *if* a right to sue is that which entitles its holder to attempt to require her adversary to conform to a

that it marginalizes their preferences and desires. Section 3.17(b)'s voting procedures may exacerbate this complaint by allowing an aptly manipulated supermajority to stifle others' preferences. If nothing else, Hadfield and Relis have demonstrated that not everyone litigates for money and that plaintiffs' desired remedies vary. Consequently, the combination of a defendant offering to settle for a sum of money and plaintiffs' attorneys working on a contingency fee tends to shoe-horn plaintiffs into accepting money even when they set out to accomplish something quite different. Admittedly, sometimes money is the only realistic remedy available. The tort system cannot change the past, undo death, or prevent previous injuries. At its best, it compensates for tragedies and prevents future ones.

At the heart of this rights-based disjunction is a striking contrast between nonclass aggregation and class actions. Unlike most class members, plaintiffs have personal goals, but they also participate in a collective effort to establish the defendant's liability. That independence and interdependence raises familiar class action concerns, such as collective action and attorney-client agency problems.⁵¹ But the personal stakes, individual involvement, and group dynamics in non-class aggregation raise due process expectations, such as the opportunity to participate and be heard.⁵² This is where the potential disconnect between procedural fairness and section 3.17(b) arises and could affect plaintiffs' pursuit of substantive tort remedies. The remainder of this Article circumvents this potential disconnect by reconceiving the individual's relationship with the collective and making voice and participation opportunities available within the collective decisionmaking process.

II. RETHINKING THE INDIVIDUAL'S RELATIONSHIP WITH THE COLLECTIVE

Oversimplified, most scholarship in the complex litigation field focuses either on nonclass aggregation's collective aspect by designing process to maximize social welfare, or its individual aspect by promoting individual autonomy. Through discussion and compromise, section 3.17(b) contains strands of both schools of thought. For instance, earlier versions of the ALI project contained a controversial judicial override provision that would have allowed plaintiffs' attorneys to pe-

particular duty. Defined accordingly, a right to sue is abstract and meaningless in any real-world sense if no procedural avenue exists for its attempted vindication.").

⁵¹ See Burch, *Litigating Together*, *supra* note 13 (manuscript at 8).

⁵² *Id.*; Silver & Baker, *supra* note 8, at 755–67.

tition the court to force plaintiffs to accept a settlement over plaintiffs' affirmative dissent even without a governance arrangement under section 3.17(b).⁵³ Likewise, earlier drafts of section 3.17(b) focused principally on achieving finality and efficiency by making it easier for clients to waive their right to consent to a settlement *ex ante* and harder to challenge a nonclass aggregate settlement collaterally.⁵⁴ The final draft, however, balances these efficiencies by strengthening the consent-based mechanisms. It specifies disclosure requirements for informed decisionmaking, adds that enforceability of the agreement depends on both procedural fairness and substantive fairness, and gives plaintiffs' attorneys the burden of ensuring that all of the procedural fairness requirements are met.⁵⁵ In short, section 3.17(b) is the product of compromise between the push for individual autonomy and the palpable need for efficiency and finality.

This Part introduces a third perspective into the debate over social welfare maximization versus individual free choice and offers an alternative way of thinking about the individual's relationship with the collective. By conceiving plaintiffs as a community of sorts rather than an either-or dichotomy, the focus shifts to the interpersonal, communitarian dimension. Approaching the problems in nonclass aggregation through the lens of interpersonal group dynamics offers fresh insights from social psychology and moral philosophy that help balance the uneasy union between the individual and the collective. In particular, this perspective suggests that (1) process can give rise to moral obligations, including associative obligations of solidarity or loyalty, that help balance the tension between the collective and the individual; and (2) allowing plaintiffs to participate in decisionmaking and group governance can alleviate section 3.17(b)'s potential procedural justice problems.

A. *Associative Obligations of Solidarity or Loyalty*

If given the chance to talk things over with each other, plaintiffs may encounter a source of obligation apart from contractual consent. Because agreements draw their moral force from both autonomy and reciprocity, an obligation can be both thicker and thinner than consent alone. As Michael Sandel explains it:

⁵³ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.19 (Discussion Draft 2006); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.19 (Tentative Draft No. 1, 2008).

⁵⁴ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b), (d) (Discussion Draft 2006).

⁵⁵ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b)(1)–(2), (b)(4), (d)–(f) (2010).

[A]ctual contracts carry moral weight insofar as they realize two ideals—autonomy and reciprocity.

As voluntary acts, contracts express our autonomy; the obligations they create carry weight because they are self-imposed—we take them freely upon ourselves. As instruments of mutual benefit, contracts draw on the ideal of reciprocity; the obligation to fulfill them arises from the obligation to repay others for the benefits they provide us. . . . And sometimes we can be obligated to repay a benefit simply on grounds of reciprocity, even in the absence of a contract.⁵⁶

Likewise, claimants might incur moral obligations to one another even absent a legally enforceable contract. When informed consent includes communicating with each other and making public (at least to other claimants) their aims, desires, and intentions toward the litigation, plaintiffs can freely choose to pursue those ends together. This means that reciprocity and obligations of solidarity might glue the group together even absent formal, contractual consent.

Philosophers differ greatly on whether we have obligations of solidarity to one another and, if so, when we incur them. John Rawls, for example, claims that only natural duties and voluntary consent morally obligate us.⁵⁷ Robert Nozick argues that all valid obligations must be consensual, but distinguishes between coercive and noncoercive influences.⁵⁸ Communitarians, such as Michael Sandel, Charles Taylor, Michael Walzer, and Alasdair MacIntyre, challenge the liberal idea that we freely choose all of our obligations and argue instead that we can incur unchosen communal encumbrances—obligations of solidarity and loyalty—from our membership in a particular community.⁵⁹ MacIntyre claims that, as storytellers, we can answer the question, “[w]hat am I to do?” only if we can “answer the prior question ‘[o]f what story or stories do I find myself a part?’”⁶⁰

⁵⁶ SANDEL, *supra* note 24, at 144–45.

⁵⁷ See RAWLS, *supra* note 15, at 178, 333–50 (noting the need for altruism and reciprocity, but observing that “affection and ties of sentiment” are “not demanded as a matter of justice”).

⁵⁸ See generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

⁵⁹ See ALASDAIR MACINTYRE, *AFTER VIRTUE* 220 (2d ed. 1984); SANDEL, *supra* note 24, at 223–25; CHARLES TAYLOR, *SOURCES OF THE SELF* 36 (1989); MICHAEL WALZER, *SPHERES OF JUSTICE* 64 (1983). Although these scholars have become known as communitarians, most dislike that label. Sandel, in particular, sees himself as reviving civic republicanism. See, e.g., MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

⁶⁰ MACINTYRE, *supra* note 59, at 216 (internal quotation marks omitted).

Similarly, the circumstances leading up to litigation, and thus litigation itself, belong to a larger narrative: they are part and parcel of plaintiffs' shared, collective story. No one chooses to be injured by a drug or product. But when the same drug or same product injures people in comparable ways, it changes them, changes their stories, and ties them together in a way that they never chose nor would ever choose. It becomes part of their identity. As Sandel puts it, "obligations of solidarity or membership may claim us for reasons unrelated to a choice—reasons bound up with the narratives by which we interpret our lives and the communities we inhabit."⁶¹ Our communities fluctuate and span far beyond geographic proximity.⁶² For example, the women involved in the DES litigation had little physical interaction, but nevertheless formed a community based on their shared suffering from reproductive organ problems.⁶³

These notions about incurring moral obligations through reciprocity or membership within a community are not simply philosophical daydreams. Studies from behavioral law and economics, social psychology, and evolutionary biology have repeatedly documented other-regarding preferences for fellow group members and reciprocal behaviors.⁶⁴ Anecdotal evidence suggests that other-regarding preferences occur in the mass litigation context as well. Consider the gender discrimination lawsuit against State Farm in the early 1990s: The win-

⁶¹ SANDEL, *supra* note 24, at 241; *see also* RONALD DWORKIN, *LAW'S EMPIRE* 195–202 (1986). Dworkin's larger project aims to join liberalism and community by arguing that liberalism is the best way to understand our political community. *See generally* Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479 (1989).

⁶² *See* Geoffrey C. Hazard, Jr., *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721, 737–38 (1988); Philip Selznick, *The Idea of Communitarian Morality*, 75 CALIF. L. REV. 445, 449 (1987) (“[A community] is a comprehensive framework for social life. . . . [A]lthough in a genuine community there must be a minimum of integration, including shared symbolic experience, we also expect to find relatively self-regulating activities, groups, and institutions. . . . The individual is bound into a community by way of participation in more limited, more person-centered groups.” (emphasis omitted)).

⁶³ *See* WEINSTEIN, *supra* note 12, at 47.

⁶⁴ *See, e.g.*, Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390 (1981); Kelly S. Bouras & S. S. Komorita, *Group Discussion and Cooperation in Social Dilemmas*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 1144, 1145 (1996); Robert Boyd & Peter J. Richerson, *Cultural Transmission and the Evolution of Cooperative Behavior*, 10 HUM. ECOLOGY 325 (1982); Ernst Fehr et al., *Reciprocity as a Contract Enforcement Device: Experimental Evidence*, 65 ECONOMETRICA 833 (1997); Ernst Fehr et al., *Strong Reciprocity, Human Cooperation and the Enforcement of Social Norms*, 13 HUM. NATURE 1, 20 (2002); Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817, 818 (1999); S. S. Komorita et al., *Reciprocity and Cooperation in Social Dilemmas*, 35 J. CONFLICT RESOL. 494, 495 (1991); Mark Van Vugt & Claire M. Hart, *Social Identity as Social Glue: The Origins of Group Loyalty*, 86 J. PERSONALITY & SOC. PSYCHOL. 585, 586 (2004).

ning plaintiffs created a special fund for thirty-seven women who lost their lawsuits against State Farm and paved the way for the eventual settlement.⁶⁵ Gloria Scott, one of the winning plaintiffs, started the fund by pledging \$5000 of her own settlement proceeds to compensate the losing plaintiffs and explained, "It had been their experiences, their witnesses, their time, their effort and trauma—along with those receiving favorable decisions—that put pressure on State Farm"⁶⁶

Likewise, communal notions of solidarity or loyalty arise among plaintiffs during the litigation process, albeit currently only on an ad hoc basis. For instance, in the Stringfellow Acid Pits toxic tort litigation that took place in Glen Avon, California, the Concerned Neighbors in Action formed through a coalition of groups, such as the PTA, Junior Women's Club, Babysitting Cooperative, and Little League organizations.⁶⁷ Eventually, "[f]our thousand people bound together for nearly two decades" to create "a kind of community, one that is very modern and American—built not upon tribal identification or religious tenets or a credo of common virtue but upon shared victimization."⁶⁸ The litigation arose from a rock quarry that was turned into a dumping ground for toxic chemicals.⁶⁹ The myriad of substances affected surrounding residents in different ways. Nevertheless, the plaintiffs created a formal governance structure for themselves. Reporter Jack Hitt describes this structure as follows:

Despite [the plaintiffs'] lack of common ailments or history, they still had to devise a way to speak with one voice. So they wrote a full constitution, complete with checks and balances. The charter is divided into six articles—only one fewer than the U.S. Constitution. Article II delimits the powers of the Steering Committee and enumerates the duties of the Business, Property, Health, and Guardian ad Litem subcommittees. There are definitions of a quorum,

⁶⁵ Philip Hager, *State Farm to Pay Women \$157 Million for Job Bias*, L.A. TIMES, Apr. 29, 1992, at A1; Carol Ness, *Largest Sex Bias Suit Ever Is Settled: State Farm to Pay \$157 Million to California Women for Refusing to Hire Them as Agents*, S.F. EXAM'R, Apr. 28, 1992, at A1. I thank Judith Resnik for pointing this out to me.

⁶⁶ Hager, *supra* note 65.

⁶⁷ Jack Hitt, *Toxic Dreams: A California Town Finds Meaning in an Acid Pit*, HARPER'S MAG., July 1995, at 57, 61–62. The hazardous waste cleanup is ongoing. For the latest information, see DEP'T OF TOXIC SUBSTANCES CONTROL, CAL. ENVTL. PROT. AGENCY, MARCH 2010 FACT SHEET: PROGRESS UPDATE ON ZONE 4 PERCHLORATE CLEANUP, available at http://www.dtsc.ca.gov/SiteCleanup/Projects/upload/Stringfellow_FS_Update_0329100.pdf. I thank Richard Marcus for pointing this out to me.

⁶⁸ Hitt, *supra* note 67, at 58.

⁶⁹ *Id.* at 57–58.

methods for the conduct of business, and bylaws regarding the election of officers. Article VI details the proceedings for impeachment.⁷⁰

The plaintiffs even developed constitutional procedures for approving a settlement offer, which included using a separate judge to decide whether the offer was fair.⁷¹

In short, process that brings plaintiffs together can foster a community ethos and thereby encourage the development of communal and legal obligations. Giving plaintiffs more control recognizes that questions about justice and rights are inextricably intertwined with substantive moral questions.⁷² Decisions about which remedies to pursue and how to allocate monetary settlements require plaintiffs to reason together; they cannot do justice among themselves simply by maximizing utility or ensuring informed consent.

B. Circumstances and Conditions for a Community of Plaintiffs

Thus far, I have claimed that we should read section 3.17(b)'s procedures to promote procedural fairness by fostering opportunities for plaintiffs to communicate and play a more significant role in group governance. From that central claim, I have also implied that, first, plaintiffs may incur obligations to one another by voluntarily consenting to a governance agreement. If this is the case, then they are entitled to information from each other that helps them decide whether a collective litigation endeavor is a good idea. Second, plaintiffs' moral obligations to one another are not limited to those incurred through contractual consent.⁷³ Still, claimants do not incur obligations of solidarity or loyalty through procedural happenstance, such as by filing nominally similar claims against the same defendant.⁷⁴ Although one might define the narrative community in this way, the construct is too thin to translate into a moral demand.

⁷⁰ *Id.* at 61.

⁷¹ *Id.*

⁷² *See id.* Most people tend to follow norms of distributive fairness. *See* Rachel T.A. Croson, *Information in Ultimatum Games: An Experimental Study*, 30 J. ECON. BEHAV. & ORG. 197, 197–98 (1996); Erick van Dijk & David De Cremer, *Tacit Coordination and Social Dilemmas: On the Importance of Self-Interest and Fairness*, in SOCIAL PSYCHOLOGY AND ECONOMICS 141, 148–50 (David De Cremer et al. eds., 2006); Madan M. Pillutla & J. Keith Murnighan, *Fairness in Bargaining*, 16 Soc. JUST. RES. 241, 241–42 (2003).

⁷³ *See* DWORKIN, *supra* note 61, at 195–202.

⁷⁴ For a detailed treatment of what makes a “group” in aggregate litigation and when obligations attach, see Burch, *Litigating Groups*, *supra* note 8, at 38–47.

Instead, plaintiffs incur associative obligations in a more voluntary, liberal sense. The basic idea is this: Once plaintiffs begin communicating and sharing their experiences with one another, they may see themselves as a community of sorts and decide to cooperate with each other.⁷⁵ Their cooperative commitments might range from tacit agreements; to norms of reciprocity that evolve through a series of associative choices; to saying, “I promise”; to consenting to a formal agreement.⁷⁶ But they obligate themselves voluntarily. This community construct preserves the liberal ethos of consent, albeit in a loose way. The communitarian aspect is that once claimants make these promises and assurances to one another, they are not free to leave the group when doing so would violate their obligations of solidarity or loyalty.⁷⁷ Thus, at least in the moral sense, the power of self-determination rests with the collective group in a way that furthers the group’s communal interests and values, not the individuals’ egoistic ends.⁷⁸

Accordingly, plaintiffs might incur moral obligations to one another apart from the legal obligations they incur through informed consent to a governance agreement. As they discuss their ends with one another, further specify those ends into concrete actions, sort themselves into more cohesive groups with like-minded others, and debate the process by which they will ultimately bind themselves, plaintiffs may feel obligated to look out for other group members’ best interests.⁷⁹ Thus, even those who ultimately opt for the aggregate settlement rule may feel the moral pull of obligations of solidarity or loyalty and adjust their behavior accordingly.⁸⁰

⁷⁵ I have explored these basic ideas in more detail elsewhere. See *id.*; Burch, *Litigating Together*, *supra* note 13 (manuscript at 28–29).

⁷⁶ See DWORKIN, *supra* note 61, at 197 (“The connection we recognize between communal obligation and choice is much more complex and more a matter of degree that varies from one form of communal association to another.”).

⁷⁷ To be clear, my claim is that these communal obligations morally, not legally, bind plaintiffs. Thus, communal obligations would not be subject to judicial enforcement.

⁷⁸ This differs from an individualistic account in that cooperation is not governed solely by self-interest. One might, however, reconcile it with Rawls’s sentimental conception of community. In this sense, community is partially contained within the feelings, emotions, and sentiments of those who are pursuing some end together. See RAWLS, *supra* note 15, at 177–78; SANDEL, *supra* note 15, at 148–49, 173 (“For a society to be a community in this strong sense, community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants’ plans of life.”).

⁷⁹ See *supra* note 64.

⁸⁰ Even if plaintiffs do not develop other-regarding preferences, they may still frame their reasoning as an appeal to the good of the group. As James Fearon elaborates,

To be sure, a moral obligation differs significantly from a legal one and can exist absent legal consent. My claim is not that these moral obligations should give rise to judicial enforcement as a contractual obligation would. Nevertheless, the behavioral tugs from social norms with moral weight, such as keeping promises, reciprocity, and feelings of group solidarity, may influence plaintiffs' cooperative tendencies even absent a legally enforceable arrangement. What this means for the ALI project is that participation and discussion may lessen the concern over a two-track system, where attorneys represent some claimants under the aggregate settlement rule and others governed by an agreement. Plaintiffs who feel like they are "in it together" and part of a collective venture may conform to a norm of compatibility and establish cooperative strategies even absent a collective agreement.⁸¹ These plaintiffs are less likely to act strategically by holding out and more likely to promote the group's best interests. Further, if a claimant's consent to the group's agreement is somehow tainted, obligations of solidarity that further communal claims and values may still exist. Consequently, we ought to design process in ways that facilitate plaintiff interaction and control. The remainder of this Article explains how section 3.17(b) can accomplish this goal.

III. SECTION 3.17(B) AS A PLAINTIFF-CENTRIC MODEL

To increase plaintiffs' participation opportunities, diminish the potential for plaintiffs to hold out, structurally inhibit the prospect of attorney manipulation, and lessen the possibility of tainted consent, plaintiffs should have a greater say in and control over the process. It is, after all, the plaintiffs' claim and, because plaintiffs bring "individual" lawsuits, or at least file complaints that list them by name, they have expectations about their day in court.⁸² This means that they have process-based concerns, such as desires for participation and voice.⁸³ For instance, Judge Weinstein noted after sitting down with

[E]ven majorities commonly justify their actions in terms of the general public good rather than the narrow interest of the voting majority. . . . I would conjecture that often what is most important is the desire not to appear selfish or self-interested. There is something embarrassing or even shameful about statements like "We don't care what anyone else gets; we just want more for ourselves."

James D. Fearon, *Deliberation as Discussion*, in *DELIBERATIVE DEMOCRACY* 44, 54 (Jon Elster ed., 1998) (emphasis omitted).

⁸¹ See Burch, *Litigating Groups*, *supra* note 8, at 43–44.

⁸² See Burch, *Procedural Justice*, *supra* note 9, at 48–49.

⁸³ Voice and participation opportunities are critical components of procedural justice. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 133 (2003); E. Allen Lind et al., *Voice, Control & Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PER-

the DES claimants, “The ability to address the court, with a reporter present, seemed to provide a catharsis for those who believed themselves harmed by DES.”⁸⁴ Yet, plaintiffs’ expectations for traditional participation often prove impossible in the mass tort context. Participating in group governance, however, may provide a feasible proxy for direct judicial interaction.⁸⁵

Accordingly, section 3.17(b) should be read as encouraging attorneys to assist claimants in designing their own post-aggregation governance agreement. An agreement between plaintiffs lessens the potential for attorney overreaching, but it also means that plaintiffs need ample opportunity to communicate with one another.⁸⁶ That is, before they can decide on the voting procedures and contractual terms that will control their litigation endeavor, a plaintiff must ask and answer the question, what do I hope to achieve by litigating, and are my goals compatible with others’ goals such that we can pursue them collectively?

Plaintiffs’ litigation aims, how they intend to further specify those aims as day-to-day plans, the variations in their injuries, the relative difficulties in proving causation, and the relevant laws that will govern them should all be part of section 3.17(b)’s informed consent calculus. Discussing these topics enables plaintiffs to decide whether they can best achieve their aims through a cooperative venture or an independent one.⁸⁷ In this way, discussion fosters informed consent. It reveals private information, allows claimants to express the nuances and intensities of their preferences, and may shape, change, and solidify those preferences.⁸⁸ Further, agreements among plaintiffs have the potential to govern all or nearly all plaintiffs, whereas agreements embedded within the attorney’s retainer agreement cover only a subset of plaintiffs.

SONALITY & SOC. PSYCHOL. 952 (1990); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 (1996) (“[T]ort litigants share judicial and legal theorists’ beliefs that process matters.”).

⁸⁴ WEINSTEIN, *supra* note 12, at 13.

⁸⁵ Burch, *Procedural Justice*, *supra* note 9, at 19.

⁸⁶ This lessens the potential that an agreement would not express true client preferences as Professor Moore suggests might occur if the agreement is signed early in the litigation or solely at the behest of the attorney. Nancy J. Moore, *The American Law Institute’s Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 415 (2008).

⁸⁷ See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 137 (1996).

⁸⁸ See generally JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1 (2000); Fearon, *supra* note 80, at 45–46.

If plaintiffs are to feel a sense of solidarity with one another, they must also have a hand in sorting themselves into groups. In a principle that otherwise has the potential for claimants to self-govern, section 3.17(b)'s provision allowing the defendant to categorize claimants through its settlement terms is out of step. It gives the defendant a trump card—a defendant can strategically redefine groups to guarantee that its offer receives a supermajority vote.⁸⁹ Granted, defendants may offer to settle on whatever terms they deem appropriate. But if plaintiffs sorted themselves into categories based on group cohesion and adequate representation, then a defendant who offers to settle by cutting across these lines may risk a successful fairness challenge under section 3.18.

Given section 3.17(b)'s overall tenor, plaintiff-centered procedures avoid this disconnect. In particular, process should encourage claimants to identify and further specify their ends collaboratively and then—with help from their attorneys and a neutral third party—divide into subgroups based on commonalities.⁹⁰ To be sure, the relevant commonalities and categories will vary from case to case, but they depend on desired remedies, shared histories, claim strength (in terms of causation), and state substantive laws. To avoid balkanization, however, there must be some boundaries. As section 1.05 recognizes in the class context, categories should be limited “to address conflicts on central issues or to facilitate the development of issues that, being unique to certain individuals, are unlikely to be addressed otherwise.”⁹¹ As in class litigation, remedies play an important role in this grouping process. Therefore, ascertaining what plaintiffs want from the litigation and helping them sort accordingly is crucial for avoiding inadequate representation and pursuing plaintiffs' substantive rights.

To see how these changes might work, consider an example using current process, and then imagine how procedures might facilitate the pursuit of substantive rights and remedies under section 3.17(b). As-

⁸⁹ It also makes it possible for the defendant to define the category of claimants in a way that guarantees that a settlement offer will obtain the requisite supermajority. This means that a majority of claimants with weaker legal claims, when lumped together with stronger claims, could cram the settlement down on those with serious injuries and fewer causation problems. See Moore, *supra* note 86, at 410–11. But if plaintiffs categorize themselves and engineer their own agreement, they might decide on weighted voting, where those with stronger claims have a vote that counts as more than a single vote.

⁹⁰ See Burch, *Litigating Together*, *supra* note 13 (manuscript at 25–28) (discussing the role of a “special officer” as a third-party neutral).

⁹¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. k (2010).

sume that Drug Company produces a diabetes drug, Drug-D, which users believe contributed to severe liver problems and even death. Potential plaintiffs want different things: some think the FDA rushed to approve Drug-D and want to improve the integrity and rigor of the drug testing process; some want money to cover hospital bills, associated medical expenses, and pain and suffering; others want the company to withdraw Drug-D from the market; others want information about why and where things went wrong; and still others want apologies and acknowledgement of harm.⁹² Assume further that eventually they each decide to sue Drug Company and that the Multidistrict Litigation Panel aggregates their claims and the claims of others like them before a single federal judge. Under our current system, we might see something akin to the Vioxx settlement,⁹³ where Drug Company offers to settle for a rough sum if enough plaintiffs sign up. But the problem now becomes apparent: What some of them want is not money. Yet, they have only two options—they must either consent or withhold their consent in hopes of an alternative offer or the ability to pursue individual litigation. Recall, too, that their practical ability to pursue individual litigation is limited, at best, by a judge whose stated goal is to promote settlement and, at worst, by an attorney who has urged them to accept the deal and threatened to withdraw from representing them.

Now consider how section 3.17(b) might change the Drug-D outcome through arguing, bargaining, and voting. In Llewellyn's words, it changes "what can be done about the situation" and loosens the strictures of our current procedures.⁹⁴ This Part explores the implications of the normative claim that process should provide opportunities for plaintiffs to communicate and form groups. If plaintiffs are given the opportunity to talk about how to divide themselves into categories as well as the contents of a governance agreement—including the required voting supermajority and any argument that should precede a vote—then that dialogue can: (1) legitimize the process through plain-

⁹² As Erin O'Hara and Douglas Yarn explain:

[P]eople often value apology more than monetary compensation. Ford and Firestone had to broadcast a videotaped apology on national television to reach a settlement with a [woman] paralyzed by an accident caused by a roll-over of a Ford Explorer with defective Firestone tires. In the face of several attractive monetary offers, Paula Jones demanded—but never received—an apology from President Clinton as a condition of settlement.

Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1125 (2002) (citation omitted).

⁹³ See *supra* notes 18–26 and accompanying text.

⁹⁴ See *supra* notes 49–50 and accompanying text.

tiff participation, (2) foster a feeling of community and the development of other-regarding preferences, and (3) make it more likely that plaintiffs will abide by the group's decision because it is a product of community consensus.⁹⁵

First, deliberation increases the legitimacy of the process and the outcome by allowing plaintiffs to participate.⁹⁶ When plaintiffs commit to coordinating their litigation activities, group norms and social norms often provide the background framework for making decisions. The group establishes its norms through dialogue and deliberation, which, in turn, form the basis for the decision's legitimacy.⁹⁷ When diverse plaintiffs each talk about what they want and specify plans for accomplishing their ends, the process of articulating and explaining those preferences to each other pushes them to justify, question, and (sometimes) reconsider their preferences. Ultimately, discussing their ends may transform their preferences or lead them to alternatives that satisfy diverse preferences.⁹⁸ At the least, communicating gives those affected by the putative harm a chance to "play[] some role in the process."⁹⁹

Returning to our Drug-D example, plaintiffs who want to improve the integrity and rigor of the drug testing process or to educate the public might explain their desires by appealing to the common good.¹⁰⁰ They might say: "We have got to prevent Drug Company

⁹⁵ But see Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 12 (2006) (arguing that expertise systems provide a better result than using deliberation "as a palliative to decisionmaking").

⁹⁶ See John S. Dryzek, *Legitimacy and Economy in Deliberative Democracy*, 29 POL. THEORY 651, 651–52 (2001) ("[O]utcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question."); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 277–82 (2002); Axel Tschentscher, *Deliberation as a Discursive Feature of Contemporary Theories of Democracy: Comment on John S. Dryzek*, in DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY 72, 72–73 (Anne Van Aaken et al. eds., 2004); cf. JEREMY WALDRON, *LAW AND DISAGREEMENT* 70 (1999) (arguing that deliberations are the task of modern legislatures and play a role in the legitimacy of legislation as a source of law).

⁹⁷ See MICHAEL E. BRATMAN, *STRUCTURES OF AGENCY* 291–95 (2007) ("Demands for coherence and consistency on the intentions of each of the individuals then require each to seek consistency and coherence in the overall package of subplans of both. . . . These pressures toward meshing subplans will help shape the reasoning and bargaining of each in the pursuit of the shared activity.").

⁹⁸ See WEINSTEIN, *supra* note 12, at 47; Samuel Issacharoff, *Democracy and Collective Decision Making*, 6 INT'L J. CONST. L. 231, 256–57 (2008).

⁹⁹ WEINSTEIN, *supra* note 12, at 47.

¹⁰⁰ See generally Resnik et al., *supra* note 83, at 381 ("If judges and lawyers are rational actors, however, they have strong incentives to conceive of litigation as multipurposed, to believe that some fundamental form of governance is enacted by adjudicatory modes of dispute

from rushing products like Drug-D onto the market again,” “Drug Company must be held publicly accountable,” or “Without public disclosure, Drug Company may never withdraw Drug-D from the market.” Others might claim: “That is all well and good, but lofty ideals don’t pay my medical bills,” or “I would gladly trade my due process rights to make ends meet—I haven’t been able to work with these health problems.” Alternatives and compromises could emerge. The result might be a happy medium along the lines of the Minnesota tobacco settlement, where plaintiffs receive less compensation, but ensure that the discovery documents are publicly available and thus media-accessible.¹⁰¹ Either way, after deliberation, a vote generally puts the matter to rest.

Second, when claimants communicate, they tend to develop a sense of community and positive other-regarding preferences.¹⁰² Their shared histories and desires for justice give them common ground. Committing to a shared endeavor—prevailing against the defendant—forms the framework, the backdrop, for coordinating their future activities and the basis for obligations of solidarity or loyalty.¹⁰³ And although plaintiffs act autonomously when deliberating over categories and articulating their litigation preferences, once they decide to pursue an endeavor together, that commitment morally obligates them to one another. What their obligations entail or what the “common good” is, is for the group to reason together and to pursue together.¹⁰⁴ In this way, justice for plaintiffs is not about imposing “the” right way to allocate settlement funds.¹⁰⁵ Rather, it is about allowing plaintiffs to determine how to value things—where those things in-

resolution, and therefore to be wary of principal-agent analogies that are not enriched with relationship, voice, expression, and human dignity.”).

¹⁰¹ See Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2097–98 (2004) (quoting interviews with Minnesota tobacco lawyers and activists on the importance of publically disclosing the tobacco discovery documents).

¹⁰² See Leigh Thompson et al., *Cohesion and Respect: An Examination of Group Decision Making in Social and Escalation Dilemmas*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 289, 291–92 (1998). See generally Fearon, *supra* note 80, at 53–54, 60–63; *supra* note 64. Groups who discuss a dilemma with each other are substantially more likely to cooperate to reach an acceptable outcome. See 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). Plus, discussion increases cooperation by eliciting social norms. See Robyn M. Dawes et al., *Not Me or Thee but We: The Importance of Group Identity in Eliciting Cooperation in Dilemma Situations*, 68 ACTA PSYCHOLOGICA 83 (1988).

¹⁰³ See generally BRATMAN, *supra* note 97, at 303.

¹⁰⁴ See SANDEL, *supra* note 24, at 260–63.

¹⁰⁵ See *id.* at 261.

clude what can be done about the situation, what remedies to pursue, and ultimately how to distribute any settlement proceeds among them.¹⁰⁶

Naturally, disagreements will arise and deliberating may cause groups to polarize. This raises the need for an environment hospitable to disagreements as well as discussion and reasoning within and among claimant categories.¹⁰⁷ That is, for claimant-based governance to function, its structure must accommodate pluralism in plaintiffs' values, beliefs, and preferences.¹⁰⁸ Plaintiffs might, for example, share a background participatory intention to hold the defendant accountable but may differ over how that intention should translate into a remedy. Yet, their preferences need not align perfectly. In fact, singlemindedness may prove detrimental to finding an alternative, creative solution.

Accordingly, as applied to our Drug-D example, plaintiffs who want to pursue different aims (public education, compensation, accountability, or change) may appeal to competing values of justice and equality. Articulating persuasive reasons means that most will justify their claims in terms of what is best for the common good, not by appealing to pure self-interest. The hope, of course, is that robust engagement and discourse will allow plaintiffs to give weight to and articulate their preferences and, in so doing, lead to a mutually acceptable alternative. But when consensus proves impossible, voting exists to aggregate preferences and bind claimants.¹⁰⁹

Finally, having a say in categorizing themselves, the agreement's contents, and whether to accept a settlement may make it more likely

¹⁰⁶ See *id.*

¹⁰⁷ On the benefits for diversity in decisionmaking, and hence the need for discussion not only among categories but also across them, see generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* (2002); CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003); JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

¹⁰⁸ My interpretation of section 3.17 has strands of both pluralism and consensus and relies sometimes on communitarianism and other times on the need for diversity (particularly as an antidote to group polarization). For one perspective on reconciling the two general perspectives on some points, see John S. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 AM. J. POL. SCI. 634 (2006).

¹⁰⁹ Even so, how we tolerate and encourage pluralism within the coherent whole raises a related question about when and whether plaintiffs who fundamentally disagree with the litigation's eventual course should be permitted to exit. Although I find the question worth considering further, exit's wide-ranging impact on preclusion doctrines, the All-Writs Act, and abstention doctrines require me to leave the topic for another day.

that the group will abide by the vote's outcome.¹¹⁰ Put simply, the process and the outcome are products of the community's reasoned deliberation. Allowing plaintiffs to engineer their own decisionmaking arrangement ensures that the agreement is unilaterally acceptable within the relevant plaintiff community.¹¹¹ Although tied heavily to legitimacy, this final observation links plaintiffs' *ex ante* consent to their *ex post* behavior. Because the vote is unlikely to be unanimous, collectively designing a governance arrangement and individually consenting to that agreement gives the vote its coercive power.

Under section 3.17(b), eventually, the Drug-D plaintiffs will conclude their deliberation through preference aggregation. The supermajority vote binds plaintiffs and authorizes the judicial system—through plaintiffs' consent to the governance agreement—to compel compliance.¹¹² Although "coercion" is a slippery term, one might say that claimants' *ex ante* informed consent negates *ex post* claims of coercion. Consent legitimizes the vote. Consequently, if a supermajority of Drug-D plaintiffs vote to accept Drug Company's offer of less compensation and nonconfidentiality, then those who wanted more money or institutional change are less likely to collaterally attack the result or bring fairness challenges. So long as the disappointed plaintiffs perceive the decisionmaking process as fair, they are more likely to abide by the outcome even though they would have preferred a different result.¹¹³

Granted, depending on the number of plaintiffs and their geographic dispersion, genuine participation in collective decisionmaking by any more than a small, localized group may seem impractical. Still, plaintiffs might address this problem through one of two means, or a combination of both.

First, as they did in the Stringfellow Acid Pits litigation,¹¹⁴ plaintiffs might appoint representatives to act on the group's behalf "by receiving communications and overseeing the day-to-day conduct of

¹¹⁰ See Fearon, *supra* note 80, at 55–58.

¹¹¹ *Id.* at 56–58.

¹¹² Some political theorists who advocate deliberative democracy disfavor this emphasis on voting and would promote collective choice through reasoned agreement instead. See, e.g., DRYZEK, *supra* note 88, at 47. To others, like Joshua Cohen, voting is a second-best solution but an important failsafe when consensus proves impossible. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 159, 163 (Robert E. Goodin & Philip Pettit eds., 2d ed. 2006) ("Even under ideal conditions there is no promise that consensual reasons will be forthcoming. If they are not, then deliberation concludes with voting, subject to some form of majority rule.").

¹¹³ LIND & TYLER, *supra* note 9, at 81–83, 210–11.

¹¹⁴ See *supra* note 67.

the lawsuit.”¹¹⁵ So long as these delegates faithfully represent their group’s views and communicate regularly with other members, those members will tend to regard both the process (including their participation through voting) and the outcome as legitimately binding.¹¹⁶ The drawback is that this still requires plaintiffs to discuss their ends and injuries in order to form cohesive groups.

Second, to make initial communication feasible, plaintiffs’ attorneys and a neutral third party might hold regional gatherings. At town hall meetings, plaintiffs could see one another in person and talk about their injuries and experiences, deliberate and bargain with one another about which ends to pursue, and ultimately either agree to pursue particular remedies or categorize themselves accordingly.¹¹⁷ After these meetings, group members could continue their conversations and initiate new conversations with members across the country through modern communication media like discussion boards, Skype, Facebook, Google Groups, or Yahoo! Groups.¹¹⁸ Likewise, attorneys could use technology to disseminate information and solicit feedback about key decisions.

Still, there is conflicting wisdom about the value of group deliberation. Some prominent political theorists, social scientists, and legal academics claim, as I have here, that the process of participating, deliberating, and ultimately voting has intrinsic value, legitimizes process, and may transform preferences.¹¹⁹ Their thinking is, in part, that

¹¹⁵ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) cmt. c(2) (2010); *see also id.* § 3.17(b)(1) (“Claimants may exercise their collective decisionmaking power to approve a settlement through the selection of an independent agent other than counsel.”).

¹¹⁶ *See Solum, supra* note 96, at 279–80.

¹¹⁷ Even though plaintiffs will have already filed their complaints, Rule 15 permits liberal amendments “when justice so requires.” FED. R. CIV. P. 15(a). For the interested reader, I have elaborated on these ideas of using representatives, special officers, regional meetings, and modern media elsewhere. *See, e.g., Burch, Aggregation, Community, and the Line Between, supra* note 13, at 899–902 (discussing technology); Burch, *Litigating Together, supra* note 13. I have also noted that if the categories of claimants truly want to pursue disparate and fundamentally incompatible ends, then we may need to consider either certifying a Rule 23(b)(2) class if injunctive or declaratory judgments would subject the defendant to incompatible judgments or disaggregating into smaller litigation groups. *See id.* (manuscript at 22–23).

¹¹⁸ *See, e.g., Burch, Aggregation, Community, and the Line Between, supra* note 13, at 899–900; Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 763–64 (2008).

¹¹⁹ *See, e.g., DWORKIN, supra* note 61; JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991); PAGE, *supra* note 107; RAWLS, *supra* note 15, at 358–59; RHEINGOLD, *supra* note 107; SUROWIECKI, *supra* note 107; Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* (Jon Elster ed., 1998); Dryzek, *supra* note 96, at 652; David M. Estlund, *Who’s Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEX. L. REV. 1437 (1993); Solum,

group discussion produces better outcomes when people present and deliberate over competing views.¹²⁰ On the other hand, other scholars contend that group preferences are fickle and that the self-interest of a passionate few can exploit and manipulate the group.¹²¹ At its worst, deliberating might polarize the group and cause its members to gravitate toward extreme views.¹²² My claim differs slightly from the former camp. Although deliberation may produce better settlements in mass torts, I have no comparative data. Instead, my claim is that encouraging plaintiffs to communicate with one another and to participate in collective decisionmaking alleviates potential procedural justice problems with section 3.17(b) and bolsters the legitimacy of the process and the outcome.

To be sure, my claim is not that this bottom-up, plaintiff-centric model is without flaws or risks. But we can curtail those risks with two checks that minimize the potential for group polarization and extremism on the one hand, and promote information exchange, creativity, and participation on the other. First, as described already, categories of claimants must deliberate not only within their group, but also with other plaintiff groups.¹²³ Because the overarching plaintiffs' group in large-scale litigation with geographic dispersion is likely to be heterogeneous, plaintiffs' communal ties are less social and more focused on a common task—prevailing against the defendant. Cross-pollination between groups exposes plaintiffs to competing views about the common good and undermines the efforts of a passionate few to manipulate the group. Second, remember that some plaintiffs will choose not to join a group at all and will opt instead for the aggregate settlement rule. Although some would-be outliers will feel behavioral tugs from social norms and may develop other-regarding

supra note 96, at 277–82; Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics*, 23 POL. THEORY 563 (1995).

¹²⁰ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 73 (2000) (describing the ideal of “deliberative democracy” but arguing that such an ideal is not empirically confirmed).

¹²¹ See Issacharoff, *supra* note 98, at 257–58 (describing the challenges of collective decisionmaking as well as Kenneth Arrow's work on cycling); see also, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1970); McCubbins & Rodriguez, *supra* note 95.

¹²² See Sunstein, *supra* note 120, at 74–75. As Sunstein explains, the Internet may serve “as a breeding ground for extremism” if the discussion group allows participants to post anonymously. *Id.* at 101.

¹²³ See SUNSTEIN, *supra* note 107, at 134 (observing that depolarization occurs where equally opposed subgroups are put together and that “the group judgment will move toward the middle”).

preferences from participating in initial discussions, others will want nothing to do with the group at all. Even though this raises some concern about potential free riders, outliers can play an important role as dissenters or “devil’s advocates.”¹²⁴ Outliers—as such—are not part of the group’s deliberations, but the defendant’s preference for finality means that it will likely try to include them under the settlement umbrella. Consequently, outliers’ objections should be made public to other plaintiffs to give them a better sense of diverse viewpoints and prevent group polarization.

Although these measures are not perfect, when combined with section 3.18’s safety valve of limited judicial review, they give section 3.17(b) the potential to promote broader principles of procedural justice through participation and deliberation. Plus, because plaintiffs take center stage and have access to the information they need to make informed decisions, they are better positioned to monitor the litigation. This mitigates the attorney-client agency problems (conflicts of interest, collusion, loyalty, and allocation issues) that aggregate settlements typically cause and lessens the potential for tainted consent.¹²⁵

IV. CONFLICTS WITH JUSTICE: FAIRNESS CHALLENGES UNDER SECTION 3.18

Still, even communities of plaintiffs who reach group consensus after deliberating may make unjust decisions. Potential injustice from a legally enforceable governance agreement may result from process-based or substantive defects. Process-based defects include plaintiffs’ allegations that their initial consent was somehow tainted, such as by undue pressure or inadequate information, that they were miscategorized and thus inadequately represented, or, despite proper sorting, that representation was still inadequate. Put simply, process-based defects focus on the conditions under which plaintiffs made and carried out the agreement.¹²⁶ Substantive defects, on the other hand,

¹²⁴ See CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 210–11 (2006).

¹²⁵ See Erichson, *supra* note 7, at 982–83.

¹²⁶ This inquiry is analogous to procedural unconscionability in contract law. See U.C.C. § 2-302 (2005); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170–73 (9th Cir. 2003) (distinguishing between procedural and substantive unconscionability and suggesting a sliding-scale approach); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (“Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.”).

invoke broader fairness principles to challenge the settlement, such as claims that a settlement unduly favors plaintiffs with weak claims and settles strong ones for pennies.¹²⁷ Although the two inquiries are related—when claimants freely consent to an agreement after full disclosure, the results are more likely to be fair—they are distinct.¹²⁸

Before analyzing how we might interpret section 3.18's judicial fairness review in a way that is consistent with the ideals of community discourse, first consider it on its face. It makes two important advances to curb potential injustice. First, it implicitly asks the question: "[I]s it fair, what [these claimants] have agreed to?"¹²⁹ In posing this question, section 3.18 recognizes that what makes an agreement fair is not just that plaintiffs voluntarily agree to it; rather, contracts are reciprocal, mutually beneficial arrangements that incorporate fairness as an antecedent moral requirement.¹³⁰ Governance agreements bind plaintiffs not just because they shoulder them voluntarily, but because they produce fair results. In this regard, the ALI proposes that judges consider "the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and whether particular claimants are disadvantaged by the settlement considered as a whole."¹³¹ Even so, what is fair in any given situation is a product of deliberating over the right thing to do. But for now, what is important is that this limited judicial review serves as an error-correction mechanism—a critical aspect of procedural justice that aggregate settlements typically lack.¹³²

Second, section 3.18 is concerned with fair process; it permits claimants to challenge a settlement that fails to comply with subsections 3.17(b) through (e), which require informed consent and emphasize the need for procedural fairness. Accordingly, judges examine

¹²⁷ See *In re Combustion Eng'g*, 391 F.3d 190, 239 (3d Cir. 2004) (referring to the Bankruptcy Code's policy of "equality of distribution among creditors" and requiring "similar treatment to similarly situated claims"). This inquiry is somewhat akin to substantive unconscionability in contract doctrine, that is, the notion that certain contractual terms are so one-sided under the circumstances that they "shock the conscience." *Ingle*, 328 F.3d at 1172; see also *Harris*, 183 F.3d at 181 (explaining that "[s]ubstantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side").

¹²⁸ See SANDEL, *supra* note 15, at 106.

¹²⁹ *Id.* at 112; see also PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.18(a) (2010); RAWLS, *supra* note 15, at 345–47.

¹³⁰ See SANDEL, *supra* note 15, at 106–07.

¹³¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(e) (2010) (incorporated by reference in § 3.18(a)); see *infra* note 138.

¹³² Burch, *Procedural Justice*, *supra* note 9, at 35–37.

the transaction's voluntary character and whether plaintiffs freely consented to the agreement from an autonomy standpoint. They focus on factors that undermine freely given consent, such as unequal bargaining positions, coercion, lack of information, or mistakes about the value of the rights being exchanged.¹³³

On their face, these checks are straightforward applications of Rawls's imperfect procedural justice, divorced from notions of community consensus. Criminal trials, for instance, are another example of imperfect procedural justice; a perfectly conducted trial might find someone guilty who is actually innocent.¹³⁴ Pure procedural justice, on the other hand, means that if process is fair, then it will likewise yield the correct result. Rawls's example here is gambling: if the betting procedure is fair and untainted by cheating, then the cash payout is likewise fair.¹³⁵ Were governance agreements cases of pure procedural justice, we could assume that the outcome must be just if it is the product of consent. Or, as Rawls puts it, "there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed."¹³⁶ As section 3.18 concedes, we cannot assume that a governance arrangement is fair just because plaintiffs consented to it.

But informed consent to a process carries with it a moral obligation that cannot be so easily or so completely disregarded. To give autonomously and freely made decisions their proper weight, judges should conduct section 3.18's limited review in two steps. First comes the process-dependent check; here, judges look for process-based defects, such as tainted consent. Second, the content-dependent check objectively evaluates the settlement's substantive fairness. The level of deference given to a settlement approved under section 3.17(b) depends on the process-dependent check's outcome. For example, if a group of sophisticated plaintiffs consents to a governance agreement after full disclosure of all the relevant information, engages in a robust

¹³³ The ALI suggests that judges consider:

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

PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(d) (2010) (incorporated by reference in § 3.18(a)).

¹³⁴ RAWLS, *supra* note 15, at 85–86.

¹³⁵ *Id.* at 86.

¹³⁶ *Id.*

discussion over the ends and means to pursue, categorizes itself into cohesive subgroups with adequate representation, and has a neutral third party advise them, then there is less need for a rigorous content-dependent check. Put differently, if the process itself is fair, then its substantive outcome is the result of the group's reasoned deliberation over the common good. Rather than substituting her own judgment about the right thing to do for the group's, the judge should conduct the content-dependent check with a light touch and an eye toward correcting overt injustice.

We might think of these two steps in terms of burdens of proof. As section 3.17(f) explains, the claimants' lawyer bears responsibility for complying with section 3.17(b) and thus for making the settlement stick.¹³⁷ Once a claimant challenges a settlement's fairness, the settlement proponents must demonstrate that the process used to categorize plaintiffs, to agree to the governance terms, and to vote on the settlement was fair and reasonable. Establishing that the process was fair shifts the burden of proof to the challengers. They must prove that, given the facts and circumstances (including costs, risks, chance of success, and delay), the settlement's substantive terms are overtly unfair.¹³⁸ When plaintiffs freely agree to be bound by a vote and thereby incur self-imposed obligations, the arrangement's moral force depends heavily on plaintiffs' autonomy and voluntary consent. Second-guessing that consent and imposing principles of justice that differ from those reached through deliberation should not be taken lightly. Accordingly, the content-dependent inquiry remains as a safety valve, but the challengers bear the burden of demonstrating overriding substantive unfairness, such as settling strong claims for pennies on the dollar.¹³⁹

¹³⁷ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(f) (2010).

¹³⁸ Section 3.18 refers back to section 3.17(e), which makes "whether the claimants are treated equitably (relative to each other) based on their facts and circumstances" a substantive consideration. *Id.* § 3.17(e). I am not sure that this interpersonal concern is necessarily a substantive one. For example, if one of the Drug-D claimants feels that she has a good claim (strong causation evidence and suffered a heart attack) and that this claim is worth far more than what the defendant offers, that is a matter of alleged substantive unfairness. If, on the other hand, she has to take the offer because her attorney forces her to sign the settlement at gunpoint, then that is a matter of procedural unfairness. But if she acknowledges that she receives the going market rate for a heart attack (assuming it could be established), but objects that others are receiving more for similar injuries, it is not obvious to me whether this is a complaint about substantive or procedural unfairness.

¹³⁹ See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1893–97 (2002) (explaining the problems created when "like cases" are not "treated alike"). For one view of how equality and community might intertwine, see DWORKIN, *supra* note 61, at 200–01 ("[Communities] may be structured, even hierarchical, in the way a family is,

Conversely, we are likewise concerned that plaintiffs freely arrive at fair arrangements, not just that the arrangements are fair. As Sandel explains, “What makes a transaction free is not that it ended fairly; being treated fairly neither makes us free nor entails that we are free.”¹⁴⁰ So in this transaction of rights, where claimants exchange settlement autonomy for collective representation and increased bargaining power, substantive fairness is not a stand-in for consent. As a contrast, consider bipolar plaintiff-versus-defendant litigation. When a plaintiff settles, her consent legitimizes the deal. Many an attorney has pled with a client to take a settlement offer because it is the best she can get, only to have the client refuse and insist on trial. The offer’s substantive fairness does not override a lack of consent in either traditional or aggregate litigation. But consent in aggregate litigation is consent to the process, not the settlement offer.

Unfortunately, these transactions are rarely so black-and-white as consent or no consent. Consequently, if the process-dependent check reveals hints of coercion or tainted consent, the judge’s content-dependent check must be increasingly rigorous. Although substantive fairness cannot override a complete lack of consent to process, it might allay procedural fairness concerns in the face of tainted or coerced consent. The content-dependent check provides the error-correction function (and thus the procedural fairness) that the initial decision lacked. And where the initial process was deficient, this judicial surrogate permits dissatisfied claimants to voice their opinions through limited judicial review.

Some might claim that even this modest fairness review insults autonomous agents. In contract law, for instance, some scholars have argued that the unconscionability doctrine paternalistically unravels agreements entered into voluntarily.¹⁴¹ But unlike contracts where parties consent to the substantive terms, these plaintiffs consent to a process that then yields binding substantive terms. In any majority vote, a minority may find the settlement proposal distasteful for some reason. When they claim that the settlement’s terms are unduly harsh and unfair to them—settling a wrongful death claim for peanuts, for example—then there is cause for concern. Moreover, there is further cause for concern when the government puts its stamp of approval on

but the structure and hierarchy must reflect the group’s assumption that its roles and rules are equally in the interests of all, that no one’s life is more important than anyone else’s.”).

¹⁴⁰ SANDEL, *supra* note 15, at 106 (emphasis omitted).

¹⁴¹ See, e.g., FRIED, *supra* note 25, at 104–06; Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1071–76 (1977).

this transaction through judicial enforcement. As Seana Shiffrin explains, a court's "refusal to enforce need not represent an effort to supplant the judgment or action of the contracting parties," but "may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action."¹⁴² Put differently, just because plaintiffs have the right to form these agreements does not mean that the government should assist them in carrying them out if the terms are unduly harsh.¹⁴³ Consequently, conducting section 3.18's judicial fairness review as a two-step process maintains a delicate balance: it preserves the claims of the community and decisionmaking autonomy on the one hand, while promoting both procedural fairness and institutional integrity on the other.

CONCLUSION

Sections 3.17(b) and 3.18 make some scholars nervous because they substitute individual consent to a settlement for individual consent to a process. Yet, they hold tremendous promise as an alternative to current practice under the aggregate settlement rule. When process is coercive or consent is tainted, as is often the case currently, those flaws undermine systemic legitimacy and can affect subsequent compliance with the outcome. Process itself plays a vital function; it is not simply a handy tool for enforcing substantive laws. To be sure, process should enable the enforcement of substantive laws. But it can do so much more. As I have explored in this Article, it can serve as a means for bringing plaintiffs together, plugging their stories into a larger narrative, making sense of that narrative as part of a community, deliberating about the role that litigation should play, and encouraging plaintiffs to reason together about the right thing to do.

For this to happen, however, legislatures who enact section 3.17(b) and the judges and attorneys who implement it need to give plaintiffs the autonomy, information, and discussion opportunities necessary to engineer their own rules, form their own groups (with some oversight), and collectively determine the process they will use to bind themselves to one another. Returning authority and control to plaintiffs is not without its inefficiencies or frustrations. It is not as streamlined as embedding an attorney-engineered arrangement within the attorney-client retainer agreement. Deliberation is messy, and questions about pluralism, group cohesion, group polarization, and

¹⁴² Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 224 (2000).

¹⁴³ See *id.*

participation are thorny. But the more plaintiffs participate in the process, the less likely they are to challenge the settlement's fairness and reasonableness, and the more likely they are to abide by the vote's outcome because it embodies their shared conceptions of fairness.¹⁴⁴ And, ultimately, that process furthers substantive justice.

¹⁴⁴ See Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITERATURE 75 (1998).