
PROCEDURAL JUSTICE IN NONCLASS AGGREGATION

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Nonclass aggregate litigation is risky for plaintiffs: it falls into the gray area between individual litigation and certified class actions. Although scholars have formulated procedural protections for both extremes, the unique danger and allure posed by nonclass aggregation has been undertheorized, leaving mass tort claimants with inadequate safeguards. When hallmark features of mass torts include attenuated attorney-client relationships, numerous litigants, and the demise of adversarial legalism, the attorney-client relationship itself becomes another bargaining chip in the exchange of rights. This Article takes the initial steps toward advancing a cohesive theory of procedural justice in nonclass aggregation by exposing the problem itself, discerning the principal disparities between litigant preference and mass tort practice, and identifying the main obstacles to implementing procedural preferences. In so doing, it observes that procedural justice is context-dependent and thus a matter of perspective. Claimants' perspectives and procedural preferences vary depending on whether they view themselves as part of a group or a collective. Accordingly, this Article introduces a continuum for evaluating group cohesion and designates two new points along that continuum—"individuals-within-the-collective" and "group-oriented-individuals." It concludes by sketching some preliminary observations about tailoring the process to meet the needs of these different plaintiffs and the inherent barriers to implementing procedural justice.

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INTRODUCTION

First, we made sure that every single eligible claimant had an opportunity to come see me, vent, and have a personalized, customized hearing—due process. . . . I expected inefficiency, delay, controversy, no checks going out, public dissatisfaction. All of those obstacles in my mind prompted me to ask when we were drafting the guidelines, “Do we really want to give people in grief, so soon after the triggering event, an opportunity to be heard?” So we thought about it. We concluded (thank goodness), “Yes. Let’s overcome whatever presumptions or assumptions we have about the problems associated with hearings and give everybody in grief an opportunity, if they so desire, voluntarily to come and see us. Maybe that will help the bona fides of the program.” Did it help? Of course, it turned out to be the essential reason that the program was so successful.

Kenneth R. Feinberg on the September 11 Fund¹

In many ways, the September 11 Victim Compensation Fund is an anomaly, doling out individualized process in the face of a mass disaster. In most mass tort litigation, procedural justice has been haphazard and ad hoc at best. Instead of taking the realities of mass torts into account, courts assume that adversarial legalism and conventional norms, such as monitoring attorney conduct, continue to ensure procedural justice. They do not. Procedures designed for bipolar “plaintiff versus defendant” litigation cannot handle the demise of adversarial litigation, the volume of claims and litigants, the attenuated attorney-client relationships, and the resulting agency problems presented by mass torts. And yet, because institutional legitimacy and voluntary compliance with judicial decisions hinge on procedural justice, retrofitting the judicial infrastructure is crucial.

Part of the problem is that our system assumes a false dichotomy in modeling process: either individuals institute litigation on their own behalf or class representatives initiate litigation on behalf of a class. But nonclass aggregation, the principal means for resolving mass torts today, has been overlooked and undertheorized. The Class Action Fairness Act (CAFA) makes mass torts more difficult to certify, making transfer, joinder, and consolidation the chosen alternatives.² In passing CAFA, Congress intended to create federal jurisdiction over claims affecting the national market, but intentionally declined to enact a federal choice-of-law scheme.³ The

1. Kenneth R. Feinberg, Keynote Address, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 *FORDHAM URB. L.J.* 785, 789 (2007).

2. Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 *CARDOZO L. REV.* 2517, 2531 (2008).

3. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a), (b), 119

effect is mismatched. CAFA generates a federal forum for putative class actions of national importance, but courts must then decline certification because applying numerous state laws makes the putative class unmanageable under Rule 23(b)(3).⁴ The bottom line is this: fewer mass tort claims proceed as certified class actions and more continue as nonclass aggregate litigation, if they proceed at all.⁵

The problem has multiplied, but the system remains static by assuming a business-as-usual attitude that individuals within collective litigation can protect themselves.⁶ But the disparity lies with the very definition of nonclass aggregate litigation. By “nonclass aggregate litigation,” I mean cases with several discerning characteristics: scale economies make effective representation possible, both the lawsuits and the plaintiffs may be dispersed temporally and geographically, the predominance of individual issues precludes class certification, and the types of harm and merits of the claims may vary. Furthermore, attorneys represent numerous plaintiffs, but lack a significant lawyer-client relationship with each. The individual plaintiffs thus have little substantive input or authority over how the attorney handles the case. As a result of these circumstances, the attorney must direct her loyalty to obtaining the best result for the collective group.⁷ In short, I use the

Stat. 4, 5 (codified in scattered sections of 28 U.S.C.); see David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1296 (2007). A number of proposals for applying uniform laws to class actions exist. See, e.g., THE AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT § 6.01 cmt. f (Proposed Final Draft 1993) (recommending that courts apply the law of defendant’s principal place of business).

4. See Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 871.

5. In cases removed to federal court and remanded to state court, state courts denied certification twelve percent of the time as opposed to federal courts, which denied certification twenty-seven percent of the time. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 635 tbl.11 (2006). When federal courts decline class certification, the action often proceeds as aggregate litigation. One study suggests that of the actions not certified, roughly forty-one percent end in nonclass settlement. *Id.* at 636 tbl.12. The economic viability of these actions dictates that they likely proceed as aggregate litigation, rather than individual litigation. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1773 (2005).

6. L. Elizabeth Chamblee [Burch], *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 159 (2004).

7. *Id.*; Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 525–26; David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 214 (1996). In short, many mass tort litigants would bring their claim on their own except that the

term to mean mass joinder actions that encompass claims held by multiple plaintiffs who have contractual relationships with their attorneys.⁸ Although I am principally concerned with mass adjudication, my observations about groups and individuals may also shed light on small-scale aggregate litigation. As distinguished from class actions, nonclass aggregate litigation involves present claimants, does not bind absent litigants in the most conventional sense of the word, and is afforded none of the judicial quality control measures in Rule 23 that cushion and protect class members.⁹

Take the initial Vioxx settlement, for example. The deal required each participating lawyer to recommend the settlement to one hundred percent of her eligible clients, regardless of the client's best interests, and to then *withdraw from representing* any client who refused the deal.¹⁰ Add to that the eighty-five percent walkaway provision—which allowed the defendants to withdraw without enough participation and to thus indefinitely postpone plaintiffs' attorneys' payday—and the danger and allure of nonclass aggregation emerges.¹¹ That is what's at stake: even the lawyer-client relationship becomes part and parcel of the bargaining process. Process itself becomes coercive and illegitimate. But because settlement is in the best interests of all the repeat players, no one wants to blow the proverbial whistle.¹² Moreover, the attorney-agency relationship is the only means for converting an abstract, substantive right into a real, marketable one. Thus, the very agency that makes a right real and economically viable (through aggregation and bundling) is the same one that undermines key components of procedural justice, such as participation and adversarial litigation.

costs of mounting a sophisticated case would be prohibitively expensive. Others may actually initiate their own case but are forced into informal or involuntary aggregation through, for example, multidistrict litigation.

8. See THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (Tentative Draft No. 1, 2008).

9. By judicial quality control measures, I mean the judicial checks contained in Federal Rule of Civil Procedure 23. The judge must appoint class counsel, approve settlement or dismissal, and award attorneys' fees. FED. R. CIV. P. 23.

10. Settlement Agreement, § 1.2.8.1, *In re VIOXX Prods. Liab. Litig.*, No. 1657 (E.D. La. Nov. 9, 2007), available at http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf. Several plaintiffs' lawyers subsequently filed an emergency motion requesting to keep some of their clients outside the settlement and noting that the settlement conflicted with ethical rules. Alex Berenson, *Some Lawyers Seek Changes in Vioxx Settlement*, N.Y. TIMES, Dec. 21, 2007, at C4, available at <http://www.nytimes.com/2007/12/21/business/21vioxx.html>. The settlement agreement was then reinterpreted to mean that plaintiffs' lawyers would only recommend it to a client if it was in the client's best interest.

11. Berenson, *supra* note 10, at C4.

12. See *infra* notes 297–302 and accompanying text (defining the particular interests of repeat players such as plaintiffs, defense attorneys, and judges).

Despite the increase in nonclass aggregation and the dilemmas it creates, few scholars have addressed the topic.¹³ This Article begins filling the gap. It advances the ball by exposing the procedural injustice in aggregate adjudication, discerning the principal disparities between litigant preference and mass tort practice, and analyzing the main obstacles to implementing procedural preferences. In so doing, however, I take for granted a conventional, litigation-based paradigm, as opposed to an administrative or governance-based system.¹⁴ This choice is not intended to eschew governance-based approaches, but to both reflect current practice and abstain—at this early stage—from paradigm shifting and alternative framing.¹⁵

The analysis proceeds in three parts. Part I establishes procedural justice's significance by observing its symbiotic relationship with institutional legitimacy and voluntary compliance. Publicly justifying opinions and maintaining transparency in adjudication strengthens legitimacy and builds a "reservoir of support."¹⁶ This reservoir preserves judicial legitimacy when it is needed most: in the face of controversial opinions and liberalized procedures such as bifurcation, centralization, consolidation,

13. Procedural justice and class action scholarship have likewise assumed this false dichotomy. Social psychologists have focused on procedural justice in individual disputes, whereas class action scholars, frequently viewing the class as an entity, have theorized both due process concerns and adequate representation in class litigation. *E.g.*, E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 50–53 (1989) [hereinafter LIND ET AL., PERCEPTION OF JUSTICE]; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1 (1993); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998).

14. *E.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT ix–x (2007) (advocating a governance-based view of mass torts as opposed to a litigation-based view).

15. Perceiving mass torts as a governance problem rather than a litigation problem, particularly in settlement design, would necessitate a paradigm shift and alternative framing. Thus, analogies to modern government, politics, and administrative agencies would replace litigation analogies. Mixing both empirical studies from social psychology and insights from legal prescriptions facilitate my observations in this piece. Several prominent scholars have encouraged the use of social psychology in legal analysis. *E.g.*, Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671 (2002); Samuel Issacharoff, *The Difficult Path from Observation to Prescription*, 77 N.Y.U. L. REV. 36 (2002).

16. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 889–90 (1997) [hereinafter Tyler, *Citizen Discontent*].

statistical sampling, and bellwether trials.

Part II canvasses key procedural justice components, such as preferences for adversarial litigation, participation, impartiality, and error correction. It begins, however, with a critical preliminary observation: procedural justice is context-dependent and thus a matter of perspective. Mass tort plaintiffs' perspectives and procedural preferences differ based on whether they view themselves as part of a group or a collective.¹⁷ This Part thus introduces a continuum for evaluating group cohesion and designates two new points along that continuum—"individuals-within-the-collective" and "group-oriented-individuals." After introducing these concepts, Part II outlines prototypical procedural justice variables, noting along the way disparities between practice and archetype. It similarly observes that certain components, such as participation, may be satisfied through alternative means if group-oriented individuals are highly cohesive. By and large, values underlying these variables often create friction with one another and, more significantly, conflict with systemic goals in aggregate litigation.¹⁸

Accordingly, Part III uses these observations to trace some preliminary avenues of inquiry for implementing procedural justice as well as to identify principal sticking points in this endeavor. It posits that individuals-within-the-collective are more likely to view their day in court as a willingness-to-accept problem and that, if possible, they may benefit from increased group cohesion and reorientation through mediation. Furthermore, even group-oriented individuals become more heterogeneous as group size increases.¹⁹ Thus, facilitating smaller litigation groups while maintaining a credible threat to defendants may optimize both procedural justice and aggregation's benefits.

I. LEGITIMACY, COMPLIANCE, AND PROCESS

Mass tort litigation's sheer volume strains judicial handling procedures and demands creative solutions. Thus enters the rise of statistical sampling, averaging, aggressive mediation, bellwether trials, bifurcated and trifurcated trials, and settlement agreements devised to deter opt-outs and ensure finality.²⁰ However, with this

17. See Parts II.A.1, II.A.2.

18. See Part II.B.

19. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–65 (16th ed. 1995).

20. *E.g.*, FED. R. CIV. P. 42(a); see also Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *JUDICATURE* 22, 25–26 (1989); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 *OHIO ST. J. ON DISP. RESOL.* 1, 20–21 (1996). For more information on bellwether trials, see Alexandra D. Lahav, *Bellwether Trials*, 76 *GEO. WASH. L. REV.* 576 (2008).

creativity comes a corresponding fairness concern: are these procedures fair, satisfying, and just?²¹ At the heart of most fairness theories lie distilled due process notions about notice and opportunity to be heard.²² But to accommodate mass litigation, these fundamental concepts have been stretched and shoehorned into a makeshift process—the September 11 Victim Compensation Fund, for instance—that bears little resemblance to its bipolar litigation counterpart.²³

Unfair procedures have been labeled “the single most important source of popular dissatisfaction with the American legal system.”²⁴ Empirical studies demonstrate that people’s perceptions about both procedural fairness and process satisfaction significantly impact their opinion of legitimate power and legal authority, sometimes even more so than case outcome.²⁵ This is not to say that procedural justice is the only thing that matters in litigation; rather, it is an integral component of fairness that influences even distributive

21. Some judges have observed that litigation volume is “not an excuse for deemphasizing procedural fairness.” Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 16 (2007–2008), available at <http://nasje.org/news/newsletter0704/R4-ProceduralFairness.pdf> (“All judges face real-world pressures. For many judges, volume creates pressure to move cases in assembly-line fashion—a method that obviously lacks in opportunities for the people involved in that proceeding to feel that they were listened to and treated with respect.”).

22. See generally *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (outlining general due process rights in class litigation); *Hansberry v. Lee*, 311 U.S. 32 (1940) (requiring adequate representation).

23. See Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2001); see also *In re Sept. 11 Litig.*, 567 F. Supp. 2d 611 (S.D.N.Y. 2008). Abram Chayes first used the term “bipolar,” noting that in bipolar litigation, “[l]itigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

24. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 517 (2003).

25. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at v (“Although winners were more satisfied with their experiences than losers, the litigants’ satisfaction with their experiences had less to do with actual case outcomes, costs, and delay than with how the litigants’ experiences with the system compared with their expectations.”); 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.”); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 68 (Joseph Sanders & V. Lee Hamilton eds., 2001) (“While lawyers and judges often think that people’s reactions to their experiences are driven by whether or not they ‘win’ their case, that position is not supported by empirical research on disputing.”); Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51, 69–70 (1984).

justice judgments.²⁶ As defined by social psychologists, procedural justice, as opposed to distributive justice, is the belief that the dispute resolution process is fair and satisfying in and of itself.²⁷ More specifically, as Lawrence Solum defines the term, “procedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and the legislative processes by which social benefits and burdens are divided.”²⁸ So procedural justice has both an objective and a subjective component: it is a fair means for applying legal norms and resolution procedures to particular cases that is, in turn, psychologically satisfying to the participants. This section explains why continually reassessing procedural justice is critical, particularly where innovative process is encouraged.

Legal systems that thwart litigants’ preferences will have trouble compelling adherence to their judgments, promoting voluntary compliance, and maintaining public confidence.²⁹ If the public considers a particular law or judicial opinion illegitimate, it can morally rationalize disobedience.³⁰ Moreover, absent voluntary compliance, authorities face costly enforcement and monitoring problems.³¹ A society where citizens feel morally obligated to obey the law is better off than one in which laws originate from illegitimate institutions.³² Legitimacy and compliance have a co-dependent relationship: compliance is based on trusting authorities and, in turn, if authorities are legitimate and trustworthy, then people believe that their long-term interests are best served by complying.³³

26. Jane Giacobbe-Miller, *A Test of the Group Values and Control Models of Procedural Justice from the Competing Perspectives of Labor and Management*, 48 PERSONNEL PSYCHOL. 115, 116 (1995).

27. *Id.*; Charles W. Mueller & Miriam J. Landsman, *Legitimacy and Justice Perceptions*, 67 SOC. PSYCHOL. Q. 189, 198 (2004); Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402 (1979).

28. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004).

29. Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1849 (1997); Tyler, *Citizen Discontent*, *supra* note 16, at 873 (“The legal system has at best limited ability to compel people to obey the law and is heavily dependent on widespread voluntary cooperation with judicial directives.”); *see also* Floyd Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148, 159 (1987) (noting that perceiving a decision as unfair is economically inefficient because of compliance costs).

30. *See* Tyler, *Citizen Discontent*, *supra* note 16, at 874.

31. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376 (2006) [hereinafter Tyler, *Psychological Perspectives*]; Tyler & Lind, *supra* note 25, at 66.

32. Solum, *supra* note 28, at 278.

33. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 172 (1990) [hereinafter TYLER, OBEY THE LAW]; Burke & Leben, *supra* note 21, at 7; Mueller & Landsman, *supra* note 27, at 198.

This theory suggests that institutional legitimacy creates a “reservoir of support” that helps ensure compliance and endorsement even when instituting creative procedures, relying on nontraditional remedies, and handing down controversial decisions.³⁴ Having a reservoir of support means that even though citizens might disagree with certain decisions or specific policies, they uphold, trust, and obey the institution itself.³⁵ To illustrate, consider studies conducted after *Bush v. Gore* and *Roe v. Wade*, which suggest that the Supreme Court benefited significantly from its public perception as a just, impartial, and competent institution.³⁶ Similar research on emerging governments confirms this theory: when legitimate authorities issue unpopular decisions, those decisions generate less friction and fewer debilitating consequences.³⁷ Gaining greater acceptance for mass tort opinions thus depends on plaintiffs, defendants, and the public perceiving the process of reaching those opinions as fair and the authority as legitimate.³⁸

These questions about legitimacy, compliance, and procedural fairness equally implicate and plague the bargaining process informally adopted by the repeat players within aggregate litigation.³⁹ Contracts govern many facets of mass torts: settlements, intra-client governance agreements, and attorney-referral arrangements.⁴⁰ Although representation agreements

34. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64 (1988); Tyler, *Psychological Perspectives*, *supra* note 31, at 381.

35. Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 *POL. RES. Q.* 333, 334 (2001).

36. James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 *BRIT. J. POL. SCI.* 535, 555 (2003). Other decisions in which the Court has couched its opinion in terms that are legalistic and independent from political influence include *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *DUKE L.J.* 703, 731, 783 (1994).

37. James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 *J. POL.* 1, 1–3 (2003); Tyler, *Psychological Perspectives*, *supra* note 31, at 381.

38. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 *STAN. L. REV.* 1361, 1378 (2005) (“Another critical aspect for achieving legitimacy is defining the problem or audience that will make the dispositive determination of success or failure. . . . Who, indeed, are the players in the ‘legitimacy game,’ and what type of resistance will be created?”); Tyler & Lind, *supra* note 25, at 70–71.

39. Judith Resnik, *Procedure as Contract*, 80 *NOTRE DAME L. REV.* 593, 598 (2005).

40. By “intra-client governance agreements,” I mean to include the American Law Institute’s proposal in section 3.17(b) that “an individual claimant may agree in advance to be bound in a proposed settlement by the collective decisionmaking of 75 percent of the claimants represented by one

require informed consent, when representation hinges on signing an intra-client governance document—one that prematurely waives future client-client and perhaps attorney-client conflicts—it raises questions about legitimacy and fairness in bargaining positions.⁴¹ Similar questions exist when the judge’s role shifts from “judging” to facilitating and encouraging settlement, as did Judge Weinstein’s role in the Agent Orange litigation.⁴² As one commentator describes, Judge Weinstein called all of the lawyers to the courthouse the weekend before trial for an around-the-clock settlement negotiation, told defendants that he was adopting plaintiffs’ theory of the case, and finally forced a settlement at 3:00 a.m. the morning of trial.⁴³ These resulting settlements, as Sam Issacharoff observes, occur “in a far-flung, decentralized, and under-the-radar world.”⁴⁴ In this light, David Marcus introduces the primary paradox: “what confers on private lawyers the institutional authority legitimately to engage in this form of law reform?”⁴⁵ Thus, the informal, privatized governance in nonclass aggregate settlements is subject to criticisms of illegitimacy, particularly when the claimants’ interests conflict.⁴⁶

lawyer or law firm who are covered by the proposed settlement” THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (Tentative Draft No. 1, 2008).

41. MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983) (requiring informed consent). See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATION, AND OTHER MULTIPARTY DEVICES* 61–66 (1995) (describing the types of conflict that can arise).

42. Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267, 1269–70 (1987) (reviewing PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987)); see, e.g., *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001) (“The district courts in this circuit have crowded dockets, and . . . work very hard to keep their heads above water. To that end, district judges are wise to encourage settlements and to poke and prod reluctant parties to compromise, especially when their differences are not great and/or their claims or defenses are not airtight.”); *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 572 (7th Cir. 1995); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 911–12 (1991) (encouraging settlement as a federal policy); see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.13 (2004); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1810–11 (2006) (“If a court viewed the defendants as impediments to settlement, it would not be unusual for a court to set large numbers of cases for trial at the same time, even empanelling multiple juries for a single trial.”).

43. Marcus, *supra* note 42, at 1274; see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 160–61 (1987).

44. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1575 (2004).

45. David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1959 (2008); see also NAGAREDA, *supra* note 14, at 62–63.

46. Burch, *supra* note 2, at 2522–25. For example, Paul Rheingold describes plaintiffs’ attorneys forming a voluntary group to work out a schedule of settlements and to devise a comprehensive compensation scheme. Here the

Even affording claimants maximum procedural fairness does little to promote legitimacy if conducted in secret. Procedures must both *be* fair and *appear* fair.⁴⁷ This avoids Marxist false consciousness and prevents abuse through the trappings of procedural fairness.⁴⁸ Because voluntary compliance and institutional legitimacy depend on procedural justice, ignoring litigants' preferences in favor of systemic preferences—such as efficiency—impacts more than just the disputants. Without procedural fairness in nonclass aggregation, the judiciary risks illegitimacy and faces increased costs from compelling compliance; the causal effects of unfair process are ubiquitous. Consequently, gaining and maintaining legitimacy and compliance in the face of controversial mass tort decisions necessitates a fair, transparent dispute resolution process replete with publically justified opinions and open access. Simply put, we cannot afford to ignore procedural justice in mass torts—the system itself depends on aptly identifying procedural imparities and taking measures to preserve and implement fair process.

II. PROCEDURAL JUSTICE: PARADIGMATIC VS. PRAGMATIC

Procedural justice's meaning is context-dependent; it changes in relation to litigants' experience with the legal system.⁴⁹ Most

private attorney is "identifying the various kinds of injuries, then placing the cases into those pigeonholes." Paul D. Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, A.B.A. SEC. LITIG., Spring 1977, at 18, 20. Granted, conflict-free representation during aggregate settlements may ignore inherent practical demands. Marcus, *supra* note 45 (manuscript at 27–28). But claimants are more likely to view those settlements as legitimate if authorities and agents follow fair procedures. Tyler, *Psychological Perspectives*, *supra* note 31, at 382.

47. LIND & TYLER, *supra* note 34, at 63. In *Marshall v. Jerrico, Inc.*, Justice Marshall commented on neutrality's importance as "preserv[ing] both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951)); see also *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). See generally MICHAEL D. BAYLES, *PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS* 19 (1990) ("That procedural justice requires an impartial decisionmaker is almost universally recognized.").

48. LIND & TYLER, *supra* note 34, at 76.

49. See TYLER, *OBEY THE LAW*, *supra* note 33, at 143; Bruce Dyer, *Determining the Content of Procedural Fairness*, 19 *MONASH U. L. REV.* 165, 165–66, 170 (1993); R.A. Macdonald, *A Theory of Procedural Fairness*, in 1 *WINDSOR YEARBOOK OF ACCESS TO JUSTICE* 3, 33 (1981) ("[P]rocedural fairness requires more than positivistic adherence to a finite set of pre-existing rules . . ."); David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 *U. KAN. L. REV.* 1, 28 (2008). Granted, litigants' contextual experiences and impressions are not limited to those formed from the legal system. For the purposes of this Article, however, I am concerned primarily with the context surrounding the filing of a lawsuit and

procedural justice literature focuses on interpersonal, individual reactions to decision-making procedures.⁵⁰ These reactions are informative to the extent that each individual within the litigation is principally concerned with her own outcome and the process by which it was obtained. But mass tort litigation impacts more than just parties to the lawsuit; it has quasi-public components. Thus, while procedural justice in collective litigation matters significantly to the individuals within that collective, it also impacts the public. These spillovers into public policy and social issues involve different dynamics than those involved in individual judgments.⁵¹ In this sense, evaluating procedural justice for mass tort claimants must contemplate justice from at least three perspectives: the individual-within-the-collective, the group-oriented-individual, and the public.⁵²

A. *Procedural Fairness as a Matter of Perspective*

Consider the composition and cohesion of various mass tort claimants. For instance, ground water contamination cases affecting claimants' neighborhoods and communities differ significantly from Vioxx cases with geographically dispersed litigants who are unlikely to meet one another. Litigation encompassing neighborhoods and communities—preexisting groups—requires intra-group procedural justice as well as court-based justice. Although typical examples of preexisting groups bring toxic torts and mass accidents to mind, groups can form with shared commitment despite geographic distance. For instance, Agent Orange litigants shared the Vietnam experience and may have identified with one another before the litigation.⁵³ The litigation itself served both a compensatory and a cathartic function, providing veterans with a forum in which to voice their experiences.⁵⁴ Consider also the group identification of those affected by systemic human rights violations, such as families of victims who disappeared, were summarily executed, or personally

the litigants' subsequent experiences with the justice system.

50. Kwok Leung et al., *Realpolitik Versus Fair Process: Moderating Effects of Group Identification on Acceptance of Political Decisions*, 92 J. PERSONALITY & SOC. PSYCHOL. 476, 476 (2007).

51. See *id.* at 476–77; *infra* notes 107–120 and accompanying text (explaining aggregate litigation's spillovers into public policy).

52. I have omitted defendants from this range of perspectives to focus upon claimants within the mass tort spectrum. Procedural justice is, of course, crucial for defendants and significantly impacts their subsequent compliance with the ultimate decision or settlement. For definitions of “individuals-within-the-collective” and “group-oriented individuals,” see Part II.A.1 and Part II.A.2.

53. The Agent Orange litigation probably would not have been certified as a class post-*Amchem*. See NAGAREDA, *supra* note 14, at 74–75 (“[T]here is ample reason to doubt, in retrospect, the propriety of the class certification in the Agent Orange litigation.”).

54. See *infra* notes 200–22 and accompanying text.

tortured during the Marcos regime in the Philippines.⁵⁵ Similarly, Holocaust victims united through litigation against Swiss banks that misappropriated the financial assets of thousands of Jews during the Nazi regime.⁵⁶ Other times, the litigation itself can bring groups together. For example, Deborah Hensler suggests that breast implant plaintiffs often create support networks that facilitate information sharing and networking.⁵⁷ Social psychology research suggests that these group identifications strongly affect people, even when their commonalities are minimal.⁵⁸ Granted, the more cohesive (or the less personal) the group's goal, the more likely the litigation will be taken out of the realm of nonclass aggregation (the subject of this Article) and certified as a class.

Still, my objective is not to examine class litigation. Rather, the focus here is on a theoretical understanding of groups within nonclass aggregation. The task of practical implementation, feasibility, and justification of fit remain. This section thus explores whether, and when, group participation might serve as a proxy for an individual's need to have a voice. That possibility hinges on the strength of group cohesion. For example, an individual whose only group connection is through the attorney, where the attorney acts as the hub conjoining various claimants, might be less likely to identify with or commit to that group.⁵⁹

55. See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Elizabeth Cabraser describes using aggregate litigation to seek justice for this group of litigants as well as Holocaust victims. Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2211–12 (2004).

56. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 143 (E.D.N.Y. 2000). I do not mean to suggest that these victims fall into a neat, tidy group. Rather, they were quite disparate in kind: they spoke over thirty languages, resided in over fifty countries, and included five plaintiff classes. Cabraser, *supra* note 55, at 2212–13. Yet, as described by Israel Singer, the Executive Director of the Conference on Jewish Material Claims Against Germany, they were unified through a common goal:

I ask you to consider one fact and one fact above all. As a result of this case [*In re Holocaust Victim Assets Litigation*], 5.4 million names of persons who died in the Holocaust came to light, names of the people, the places which they were killed in. This has changed history, because people can no longer claim that people didn't die. Holocaust revisionists can no longer claim that people didn't pass from the scene. . . . We did that as a result of the efforts of this trial, which turned out to be a settlement, because we found those names as a result of the fact that we wanted to know which people had accounts.

Id. at 2216 (citation omitted).

57. Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1626 n.210 (1995); see also Stier, *supra* note 4, at 919–21.

58. LIND & TYLER, *supra* note 34, at 230.

59. See generally Margaret Gilbert, *Rationality in Collective Action*, 36 PHIL. SOC. SCI. 3, 15 (2006) (noting the coordination problem in collective action); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation*,

Another way of conceptualizing this idea is not in terms of individual versus group but as variables along a fluid continuum.⁶⁰ Though we often draw sharp lines when contemplating individual versus class litigation, no lines exist. Instead, there are various degrees of interpenetration and cohesion—multiple issues within litigation create harmony or conflict. So consider first the extremes. At one end of the continuum lies individual litigation, where each individual pursues exclusively her own goals. At the other end, beyond even class litigation, lies pure group cohesion where the group obtains and maintains perfect consensus.⁶¹

Between those extremes, this continuum recognizes that claimants' perspectives vary by group formation, solidarity, and homogeneity; the mass tort's maturity level; the timing and method of aggregation; and how and when claimants secure representation. Aggregation and representation may occur in any number of ways: some claimants may enter into contingency-fee agreements with specific attorneys who represent similar claimants—the aggregation here may occur either purposefully through the attorney or through coercive court-mandated consolidation procedures.⁶² Others may first form an interest group and then seek collective representation.⁶³ Still, others may join the litigation post-aggregation after hearing about it in the news or through attorney advertising.⁶⁴ For ease of reference, I will identify two points within

Prior-Action Depositions and Practice-Sensitive Procedure, 63 *FORDHAM L. REV.* 989, 1007 (1995) (“The tightness of the [plaintiffs’ group] hub allows for coherent planning, but precludes detailed control of individual cases.”); Resnik et al., *supra* note 25, at 299 (“Whenever aggregation occurs, a question emerges about which lawyers shall act on behalf of the group. But when the very existence of a lawsuit is itself predicated on the creation of an aggregate (the classic example being the class action), the assumptions are that one set of lawyers represents (or creates) the class . . .”).

60. Richard Nagareda designs a similar continuum in his casebook on aggregate litigation. RICHARD A. NAGAREDA, *THE LAW OF AGGREGATE LITIGATION: CLASS ACTIONS AND OTHER MULTIPLE-CLAIMANT LAWSUITS* (forthcoming 2009) (manuscript at 17, on file with author); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 *U. CHI. L. REV.* 603, 631 fig.1 (2008).

61. See JOHN W. THIBAUT & HAROLD H. KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* 256–57 (Transaction Publishers 1986) (1959). Thibaut and Kelley define “group goal” as “a certain state of a particular task that the members regard as yielding them, in one way or another, favorable outcomes.” *Id.* at 264.

62. See Resnik et al., *supra* note 25, at 304; Paul D. Rheingold, *The Development of Litigation Groups*, 6 *AM. J. TRIAL ADVOC.* 1, 1–3 (1982).

63. See Stier, *supra* note 4, at 919.

64. See Resnik et al., *supra* note 25, at 304. In aggregate litigation, the attorney is often the catalyst in motivating group membership and in defining group goals. See Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 *VAL. U. L. REV.* 413, 432–33 (1999) (suggesting that most mass tort attorneys conceive the litigation and then find clients as opposed to individually-injured plaintiffs seeking representation); Rheingold, *supra* note 62, at 2 (“[T]o succeed, groups need a

allegations, mature mass torts may have already resolved collective issues. The focus then shifts toward making, implementing, and enforcing a compensation grid. Immature mass torts, on the other hand, require plaintiffs' attorneys to develop "generic assets" concerning either legal or factual matters that transfer easily to similar cases.⁷⁰ These assets might include establishing manufacturers' legal duties, employing causation evidence experts, and conducting discovery—all of which necessitate significant resource capital.⁷¹ Generally speaking, attorneys are more likely to focus on collective issues during the immature mass tort stage.⁷² This section thus sketches the theory supporting these two new points—group-oriented individuals and individuals-within-the-collective—and posits that we should consider the mindset differences between these claimants when contemplating and implementing procedural justice.

1. *Group-Oriented Individuals*

Group cohesion, and thus a class of group-oriented individuals, can form in various ways. Specifically, claimants may have egocentric interests that align, overlap, and coalesce, such as establishing causation and maximizing total recoveries. For simplicity, call this form of group cohesion "egocentric overlap." Other claimants might have overarching, group-oriented litigation goals such as product recalls, retribution, institutional reforms, or even apology seeking. I will broadly label this type of group cohesion "joint intent." These terms are not mutually exclusive; strong social identification with a group and personal interaction may transform a cadre of individuals with egocentric overlap into a group with joint intent, whose concerns extend to allocation fairness.⁷³ Groups with joint intent may even display concerns that

70. NAGAREDA, *supra* note 14, at 16.

71. *Id.* at 14, 16; Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2120–29 (1997) (discussing the difficulties of proving cause in toxic tort cases); Rheingold, *supra* note 62, at 9 (providing a list of activities and services performed by the plaintiffs' steering committee for the swine flu litigation); Rheingold, *supra* note 46, at 19 (observing the benefits of group discovery in the Dalkon Shield litigation); Shapiro, *supra* note 13, at 930 (discussing the benefits of class litigation in establishing cause).

72. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 909–10 (1996) (arguing that attorneys must devote considerable resources to developing generic assets long before they reach the mature mass-tort state of settlement or in-court victory).

73. LIND & TYLER, *supra* note 34, at 230; Steven L. Blader, *What Determines People's Fairness Judgments? Identification and Outcomes Influence Procedural Justice Evaluations Under Uncertainty*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 986, 987 (2007); David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 325–27 (2006); Gilbert, *supra* note 59, at 16

expand beyond those involved in the litigation, to altruistic public policy objectives. Howard Erichson, in his article *Doing Good, Doing Well*, describes multiple accounts of mass tort attorneys and litigants who, at times, voice their objectives in public interest terms.⁷⁴ For instance, lawyers and claimants describe their roles in gun control litigation as curbing violence, in the tobacco litigation as changing the world, in Agent Orange litigation as honoring Vietnam War veterans and saving taxpayers costs in medical care, in the Swiss Bank litigation as finding justice for and giving voice to Holocaust victims, and in general products liability litigation as protecting the American public.⁷⁵ Rhetoric aside, procedural justice prescriptions cannot assume that all individuals in nonclass adjudication are purely self-interested, or even singularly motivated.⁷⁶ Most often, litigants will have mixed motives that change over time.

The most familiar example of group-oriented individuals displaying joint intent comes from *A Civil Action*, which chronicles the battle between citizens of Woburn, Massachusetts on one side and W.R. Grace and Beatrice Foods on the other over contaminated water and whether it caused leukemia.⁷⁷ The key moment from a

(indicating that although “[a] joint commitment may trump one’s inclinations in the balance of reasons, . . . it does not obliterate them”).

74. Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2089 (2004).

75. *Id.* at 2089–2103; see also MICHAEL D. GREEN, BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 111 (1996) (noting plaintiff Betty Mekdeci’s self-description as a crusader); ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN 17 (2001) (observing plaintiffs’ requests that the lawyer do everything possible “to get these drugs off the market” and to advertise the drug’s dangers); Tamara Relis, “*It’s Not About the Money!*”: A Theory on Misconceptions of Plaintiffs’ Litigation Aims, 68 U. PITT. L. REV. 701, 721–25 (2007) (finding that plaintiffs’ litigation goals included wanting “dignity and respect after the injury” rather than money); Rheingold, *supra* note 62, at 6 (indicating that clients and lawyers prefer to broadcast their views beyond the lawsuits by testifying before Congressional committees and the FDA). As Judith Hager, a class member in the Holocaust Victim Litigation testified:

Again, I want to thank United States for this great opportunity she gave people to speak out. It’s not a matter of how much pennies or how much dollars or how much millions you have; it’s the great opportunity to speak out, even 55 years later, and I think that even 1,000 years later, our generations to come will continue to speak and to value it . . . and to continue in the path of helping each other.

Transcript of Record at 112:21 to 113:4, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), 1999 WL 34870142.

76. There is a good bit of social-psychology research supporting the notion of altruism even in social dilemmas involving groups. See, e.g., C. Daniel Batson et al., *Empathy and the Collective Good: Caring for One of the Others in a Social Dilemma*, 68 J. PERSONALITY & SOC. PSYCHOL. 619 (1996).

77. JONATHAN HARR, *A CIVIL ACTION* (1995). Lewis Grossman and Robert

group-orientation perspective comes when Jan Schlichtmann, the plaintiffs' attorney, receives a settlement offer and presents it to the group:

"When we start talking about money," continued Schlichtmann, "people get emotionally involved. That's a reality of life. In this case, that reality is backed up by a very personal claim. You'll all have to agree that you will act as one unit. . . ."

"If the eight families can't do that," Schlichtmann said, "then we're in real trouble. If there's a problem between families, then I won't know who I'm representing. If there's a problem, it means that each family will have to get its own attorney."

Thirty seconds of silence ensued. Schlichtmann waited for a response. People looked cautiously at each other, wondering who would speak first.

Richard Toomey, whose dead son, Patrick, had the strongest of the remaining claims, sat directly across the table from where Schlichtmann stood. Toomey's eyes were half closed, his hands folded across his large barrel chest. He was the first to break the silence, in a voice clear and strong. "We're all in this together," he said. "That's how we started, and that's how we'll stay."

Anne Anderson smiled in sudden relief, and everyone began to say, as if in chorus, "We're unanimous, we're together."

At ease now, and with a sense of common purpose, they began to talk freely among themselves about the prospects of settling or going ahead with the trial. Again it was Toomey who spoke most forcefully. "A settlement is one thing," he said, "but I'm not willing to throw out the verdict in order to settle. They're guilty of polluting. My child died from their stupidity. I didn't get into this for the money. I got into this because I want to find them guilty for what they did. I want the world to know that."

Most seemed to agree with this. Pasquale Zona said, "A settlement without disclosure is no settlement at all."⁷⁸

Thus, the depth of the literature must account for this rich array of

Vaughn have compiled a documentary companion with all of the pleadings from the case itself. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* (4th ed. 2008).

78. HARR, *supra* note 77, at 442-43.

substantive litigation objectives, the spectrum of group cohesion during various temporal points, and the strata of claimants' internal goals from self-interestedness through public-mindedness. We can no longer shoehorn procedural justice into a one-size-fits-all model.

The group-value model and other relational theories provide some insight into individual displays of joint intent. These theories, including the fairness heuristic theory, observe positive correlations between procedural fairness and perceptions of intra-group belonging, respect from authorities and group members, and legitimate decisions made by the group leader (whether that leader is the attorney in intra-group governance or the judge in the larger context).⁷⁹ Procedural justice for highly cohesive individuals with joint intent is thus important on two levels: in collective litigants' interactions with the court and in intra-group governance.⁸⁰ Thus, depending on group cohesion, voice and participation opportunities during intra-group governance might serve as a proxy for voice in judicial hearings.

Value-expressive functions of process control, such as participation, are important on both levels. In explaining the group-value model, Tom Tyler notes that procedural justice provides opportunities to affirm people's group status—both in the group and in society:

Procedures that allow them to present evidence on their own behalf affirm status, because they allow people to feel that they are taking part in their social group. Similarly, the willingness of the authority [both their attorney and the judge] to listen to them and consider their arguments is a recognition of their social standing. . . . People feel that their membership and status in the group are confirmed when their views are heard and considered, irrespective of the decisions made by the third party.⁸¹

The group is reflexive in this sense; individuals' self-esteem comes partially through group membership, communities or neighborhoods for instance, and partially from being treated as valued members of

79. Leung et al., *supra* note 50, at 476; see also Linda D. Molm et al., *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128, 128–29 (2003).

80. See generally Kees van den Bos & E. Allan Lind, *The Psychology of Own Versus Others' Treatment: Self-Oriented and Other-Oriented Effects on Perceptions of Procedural Justice*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1324, 1331–33 (2001) (revealing strong other-oriented justice effects as compared to self-oriented justice effects).

81. TYLER, OBEY THE LAW, *supra* note 33, at 176; see also Jody Clay-Warner, *Perceiving Procedural Injustice: The Effects of Group Membership and Status*, 64 SOC. PSYCHOL. Q. 224, 225–26 (2001); Jan-Willem van Prooijen et al., *Procedural Justice and Status: Status Salience as Antecedent of Procedural Fairness Effects*, 83 J. PERSONALITY & SOC. PSYCHOL. 1353, 1354 (2002).

that group.⁸²

The idea that group-oriented individuals may have atypical expectations has important implications for “what counts” when contemplating the role of participation. For example, Owen Fiss contends that interest representation is all that is required in structural litigation; the Constitution does not guarantee the right to participate but the “right of representation”—that is, the right to have one’s interest represented, not to have one’s day in court.⁸³ Fiss’s interest representation has pragmatic appeal in the class action context: absent class members are not present to participate, plus group rights are at stake. Due process thus hinges on adequate interest representation in class actions.⁸⁴ Lawrence Solum criticizes Fiss’s argument by recasting it into individualized litigation while conceding that it may be fitting when addressing group interests.⁸⁵ He writes, “Interests themselves have no moral standing. Individuals represent themselves, not because they are the best or most efficient representatives of their own interests; [but] because they are human persons, who act on their own behalves, define their own interests, and speak for themselves.”⁸⁶

The problem is that again we are left with this persistent dichotomy of individual versus class litigation when nonclass aggregation falls in between. The theory underlying group-oriented individuals begins to fill this gap. Although further research is needed, highly cohesive group-oriented individuals who come closer to sharing a joint intent may satisfy certain psychological desires—such as participation—through intra-group opportunities. If they share goals, they may come closer to Fiss’s structural representation and thus feel less compelled to satisfy psychological needs in court if those needs are met elsewhere. Representing these individuals thus requires careful attention to negotiating potential intra-group conflicts of interest, to creating appropriate voice opportunities and exit strategies, and to anticipating changes in group cohesion levels.

2. *Individuals-Within-the-Collective*

Unlike group-oriented individuals, individuals-within-the-collective tend to consider litigation goals principally from a self-interested, egocentric perspective. Granted, these individuals still may enjoy seeing equity in the collective outcome. But, because of low group cohesion levels, they are concerned primarily with their

82. See Clay-Warner, *supra* note 81, at 225; Molm et al., *supra* note 79, at 131–32.

83. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970–71 (1993).

84. See generally *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (outlining general due process rights in class litigation); *Hansberry v. Lee*, 311 U.S. 32 (1940) (requiring adequate representation).

85. Solum, *supra* note 28, at 302.

86. *Id.* at 302–03.

individual outcome and secondarily with the collective outcome.⁸⁷ Many mass tort litigants, even those sharing the same attorney, never meet one another and thus never have an opportunity to collaborate on litigation goals or to otherwise coalesce.⁸⁸ Identifying with a group impacts procedural justice views: if litigants associate themselves with others, then it is not enough to afford procedural justice to individual members—those members compare their treatment and allocation with that of the other group members.⁸⁹

Yet, litigants within certain types or phases of litigation lack key characteristics that typically define unified groups. Characteristics of low group identification include greater geographic and temporal dispersion (although some groups have overcome this barrier), low levels of claim and damage homogeneity, weak collective intentions, and few shared life-defining experiences.⁹⁰ In general, less group cohesion is expected as the mass tort matures because both making and enforcing compensation grids focus on individual damages.⁹¹ Traditional groups require both task interdependence—the work itself requires cooperation to complete the task—and outcome interdependence—“the degree to which shared rewards or consequences are contingent on collective (rather than individual) performance.”⁹² Individuals-within-the-collective lack task interdependence: they, as litigants, are not collectively responsible for completing a particular task and thus are not dependent on one another in the classic sense.⁹³ Outcome interdependence, however, may exist. For example, to the extent that establishing general causation in mass torts will aid in proving specific causation or foster aggregate settlements, the litigation outcome is interdependent. Put differently, individual mass tort suits have interdependent values; similar claims mean that a single

87. See Leung et al., *supra* note 50, at 476–78.

88. See Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 253–60 (1991).

89. See Jason A. Colquitt, *Does the Justice of the One Interact with the Justice of the Many? Reactions to Procedural Justice in Teams*, 89 J. APPLIED PSYCHOL. 633, 643–44 (2004). Note that individuals-within-the-collective can easily occur in class action litigation, particularly where the claims are personal to the holder as they were, for example, for pet owners in the *Pet Food* litigation. *In re Pet Food Prods. Liab. Litig.*, 544 F. Supp. 2d 1378 (J.P.M.L. 2008).

90. See Gilbert, *supra* note 59, at 5; Philip Pettit & David Schweikard, *Joint Actions and Group Agents*, 36 PHIL. SOC. SCI. 18, 23–24 (2006) (defining five causes for joint action).

91. See generally Pettit & Schweikard, *supra* note 90, at 24–32.

92. Colquitt, *supra* note 89, at 633; see also Pettit & Schweikard, *supra* note 90, at 21 (including in “joint action” the criteria that “[e]ach of us in the plurality intends that we together enact the relevant performance”).

93. See Ruth Wageman, *The Meaning of Interdependence*, in GROUPS AT WORK: THEORY AND RESEARCH 197, 198–200 (Marlene E. Turner ed., 2001). See generally Gilbert, *supra* note 59, at 8 (defining a joint commitment as “the collective analogue of a personal commitment of the will”).

victory or defeat on significant matters—even during discovery and pretrial stages—significantly affects other cases.⁹⁴

This relatively simple observation that individuals within mass tort litigation may not form a group or develop a joint commitment bears significantly on procedural justice requisites. Because these litigants lack strong group identification, their primary process concern is with the court fulfilling their own psychological needs, not with obtaining equity in the collective outcome.⁹⁵

Social exchange models posit that people are inherently self-interested, but they will curb that interest and cooperate with others when they cannot reach their goals individually.⁹⁶ Tom Tyler's vivid example is that of a child wanting to swing but needing other children to give her a push: she may desire to always sit in the swing rather than trade roles, but she cannot maintain that relationship without reciprocity.⁹⁷ A similar bargainer's dilemma exists for individuals-within-the-collective: individual mass tort claimants may desire autonomy, but they also want to put forth the best case possible and obtain a favorable outcome. These latter goals necessitate collective litigation to pool resources, mount a credible threat against corporate defendants, and overcome systemic disadvantages such as informational asymmetries.⁹⁸ But they can achieve these goals only through an agent, who adds her own self-interest into the mix. The attorney is a repeat player and has formed reciprocal relationships with bargainers outside of the attorney-client relationship, such as other plaintiffs' counsel, defense counsel, and (less explicitly) judges.

Because group members and the agents themselves may differ over theories of the case, which claims to pursue, which evidence to present, or when to settle, collective litigation requires compromise and cooperation.⁹⁹ Thus, before voluntarily entering into collective litigation, would-be litigants must balance the anticipated benefits of litigating en masse versus the costs of restricting their autonomy. Of course, this cost-benefit analysis may actually be a Hobson's choice for two reasons: (1) litigants lack the knowledge to make an informed decision and thus rely on their attorney's self-interested recommendation, and (2) individual litigation may be prohibitively expensive, making the choice not between individual and collective

94. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 967 (1993).

95. See generally Colquitt, *supra* note 89, at 642-44; Rheingold, *supra* note 62, at 1-5.

96. See TYLER, OBEY THE LAW, *supra* note 33, at 170-71; Rheingold, *supra* note 46, at 18 (observing that plaintiffs litigate in groups for various reasons but primarily for economy, unified bargaining, and a spirit of camaraderie).

97. TYLER, OBEY THE LAW, *supra* note 33, at 170-71.

98. NAGAREDA, *supra* note 14, at 13-15.

99. See Sherman, *supra* note 88, at 253 (arguing that such a restriction in a litigant's autonomy may constitute a denial of due process).

litigation but between collective litigation and no litigation.

Despite these generalizations about group-oriented individuals and individuals-within-the-collective, my point is not that these categories are static, nor that there is a prescribed pattern, nor that we should pigeonhole litigants into one category or the other. Rather, these theory-based insights about the array of claimants' mindsets can inform the way we conceive and respond to shifting procedural justice needs. Expectations differ based on the litigation's stage and maturity, the composition of the litigants, and the degree of homogeneity on key issues.

Moreover, the nature of adjudication may catalyze a change in the level of group homogeneity.¹⁰⁰ Mediation, for instance, when conducted openly and honestly, and on both a group and an individual level, has the potential to convert individuals-within-the-collective into group-oriented individuals.¹⁰¹ Mediation (or using special officers) is also flexible enough to provide individualized justice, as Ken Feinberg demonstrated in the September 11 litigation.¹⁰² Studies about allocating goods indicate that giving participants an opportunity to voice their opinions about the allocation process fosters cooperation and a sense of belonging.¹⁰³ For instance, in mediating a nightclub fire in Rhode Island that killed one hundred people and injured more than two hundred, Francis McGovern held twenty-one group meetings with 306 victims and their families.¹⁰⁴ He asked each of the victims about their preferred litigation outcome and presented various distribution

100. I should note that mediation can also catalyze conflict. For example, when Ken Feinberg handled the September 11 Fund, he said that the disparity in valuing a death proved divisive:

[I]f I had my druthers, as I did in Virginia Tech, I'd give every death claim the same amount. That's my personal view but it's also based on practical considerations. . . . You want to discourage people you're trying to help from being angered that their next-door neighbor got more for a death than they got for the death of a loved one. The minute you try to value different lives and give different amounts to each victim, you'll anger and divide the very people you're trying to help.

Tracy Breton, *Payments Pending for Fire Victims*, PROVIDENCE J. BULL., Aug. 3, 2008, at 1.

101. See generally Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 428 (1989); van den Bos & Lind, *supra* note 80, at 1331–33 (“Although it may be the case that we are sometimes insensitive to the injustices of others in many real-world settings, the findings that are reported here show that that insensitivity is not insurmountable.”).

102. Feinberg, *supra* note 1, at 789.

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

104. Tracy Breton, *Station Lawyers Recommend Guardian*, PROVIDENCE J. BULL., Aug. 1, 2008, at 1.

models that had been used in past disasters.¹⁰⁵ In so doing, he fostered group deliberation, which led to increased cohesion. Ultimately, he built consensus and support for the final compensation grid.¹⁰⁶

3. *Public Perceptions*

There is yet a third perspective distinct from the individual-within-the-collective and the group-oriented individual: the public. Because aggregate litigation frequently involves “social policy torts,” the litigation’s ripple effect on regulatory policies and product availability are of primary concern. Tobacco,¹⁰⁷ asbestos,¹⁰⁸ handguns, and prescription drugs like Vioxx,¹⁰⁹ for example, have ignited heated public policy debates.¹¹⁰ Mass torts involving divisive social issues tend to make public concerns more political and partisan.¹¹¹ The public perspective thus emphasizes governance-based democratic participation and discourse, which is critical to developing norms and building consensus about substantive law.¹¹²

Mass tort litigation is, in many respects, public law litigation. Although I have made this point in detail elsewhere,¹¹³ the basic observation is this: using private attorneys in decentralized

105. Breton, *supra* note 100, at 1; Francis E. McGovern, Professor, Duke Univ. Law Sch., Luncheon Address at the Southeastern Association of Law Schools Annual Meeting: Handling Hurricanes and Other Mass Litigation Problems: Lessons from Katrina (Aug. 1, 2008).

106. McGovern, *supra* note 105. Final court approval of this settlement is still pending. *Id.* See generally Paula W. Potter, *Procedural Justice and Voice Effects*, 10 J. ORG. CULTURE, COMM. & CONFLICT 33 (2006) (“Research has consistently shown that granting individuals the opportunity to voice their preferences and opinions during the decision-making process increases fairness judgments.”).

107. See generally *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

108. See generally *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

109. See generally *In re VIOXX Prods. Liab. Litig.*, No. 06-30378, 2006 WL 1726675 (5th Cir. May 26, 2006); Editorial, *Ignoring the Warnings, Again?*, N.Y. TIMES, May 25, 2007, at A18; *Vioxx Damage Award*, N.Y. TIMES, June 6, 2007, at C8.

110. See generally Erichson, *supra* note 74, at 2093 (observing that mass tort litigation has gained increasing recognition as a forum for public policy); Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495 (2001) (noting the use of “social policy torts” to bring attention to legislative and social change); cf. Ted Gup, *America’s Secret Obsession*, WASH. POST, June 10, 2007, at B1 (“Excessive secrecy is at the root of multiple scandals—the phantom weapons of mass destruction, the collapse of Enron, the tragedies traced to Firestone tires and the arthritis drug Vioxx, and more.”).

111. See Leung et al., *supra* note 50, at 477.

112. Baird, *supra* note 35, at 334; Tyler & Lind, *supra* note 25, at 86–87. This discourse is not always available in litigation, which has prompted some to claim that these social policy debates should occur in legislative hearings, not judicial forums.

113. Burch, *supra* note 2, *passim*.

enforcement has some benefits. It frees the public from bureaucratic remedies, vindicates substantive rights too costly to pursue individually, overcomes federal information gaps about local practices, insulates enforcement from agency capture, supplements regulatory resources, and is a viable alternative to costly governmental monitoring.¹¹⁴ But because private attorneys perform quasi-governmental functions, transparency in adjudication is crucial to legitimacy. This is true both from a litigant's and the public's perspective. For example, in devising a compensation grid for Alabama DDT claimants, the special master conducted surveys and held consensus group deliberations to devise a fair monetary allocation system.¹¹⁵ Most claimants thought they should receive "whatever everyone else gets."¹¹⁶ This ultimately made it critical to explain to both the litigants and the public why the settlement allocated more compensation to some plaintiffs than others and to devise mechanisms for venting concerns.¹¹⁷

The public, however, receives its information less directly, primarily through media outlets.¹¹⁸ Although some judges suggest that direct court involvement, through jury duty for example, is a better source of information, jury trials are a rarity in mass tort

114. *Id.* at 2520–25; Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63 (2008); see also Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1931 (2006); Chayes, *supra* note 23, at 1281; Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 22 (1996) ("This reluctance [to rely on government-initiated civil suits] may reflect the characteristic American distrust of government power and the desire to preserve a place for the ingenious and imaginative citizen."); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338; Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987). Private attorneys general may also have some drawbacks. See, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220 (1983); Hensler, *supra* note 110, at 495.

115. Francis E. McGovern, *The Alabama DDT Settlement Fund*, LAW & CONTEMP. PROBS., Autumn 1990, at 61, 72; see also Dana, *supra* note 73, at 325–27.

116. McGovern, *supra* note 115, at 72; see also Molm et al., *supra* note 79, at 130 (noting the role of social norms in comparing treatment of self versus others).

117. McGovern, *supra* note 115, at 72–76 (observing that each class member received "a brochure explaining the allocation and distribution process").

118. A 2005 study of citizens in California demonstrated that sixty-nine percent of those surveyed reported "often" or "sometimes" gaining information about the courts through television; fifty-nine percent rely on newspapers or magazines for such information. DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 11 (2005), available at http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf.

litigation.¹¹⁹ Because open access is critical for disseminating accurate information, it is not surprising that Americans view public fora as more procedurally fair than private resolution through, for example, arbitration.¹²⁰ In short, the need for procedural fairness is ubiquitous; it colors litigants' experience with the justice system and impacts public perception and compliance.

B. *Fundamental Procedural Justice Components*

Procedural justice literature has changed its focus from distributive justice and outcome-based satisfaction—that is, satisfactory adjudicative results based on classic notions of winning or losing—to process-related satisfaction.¹²¹ Contemporary procedural justice theorists, largely comprised of social psychologists, have characterized this new doctrine in terms of litigant satisfaction with process.¹²² Psychological satisfaction necessitates a choice: should procedural design be *ex ante*—what disputants would choose before a dispute arises to resolve that dispute—or *ex post*—what procedures the disputant would use after

119. *E.g.*, Burke & Leben, *supra* note 21, at 10; *see also* Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 645–46 (1989); Walker et al., *supra* note 27, at 1419.

120. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 64–65 (finding that tort defendants in particular preferred public fora). Judge Wayne Brazil makes an interesting point on this subject in the alternative dispute resolution context and likens docket driven procedures to institutional navel-gazing and shirking. He writes:

[A] preoccupation with reducing docket congestion . . . can impose pressures on neutrals and on program administrators that can threaten the quality and integrity of ADR processes. . . . When the people believe that an institution's goal is to get rid of them they are likely to resent that institution, not respect it. Thus, docket-driven ADR programs can make the people feel alienated from their public institutions and from the democracy those institutions run. A very different picture emerges when . . . [i]nstead of looking primarily inward, toward themselves, courts . . . look primarily outward, toward the people.

Wayne D. Brazil, *The Center of the Center for Alternative Dispute Resolution*, 6 PEPP. DISP. RESOL. L.J. 313, 315–16 (2006).

121. For examples of early procedural justice research focusing on satisfactory outcomes, see Joseph Berger et al., *Structural Aspects of Distributive Justice: A Status-Value Formulation*, in SOCIOLOGICAL THEORIES IN PROGRESS 119, 144 (Berger et al. eds., 1972); Duane F. Alwin, *Distributive Justice and Satisfaction with Material Well-Being*, 52 AM. SOC. REV. 83 (1987); Guillermina Jasso & Peter H. Rossi, *Distributive Justice and Earned Income*, 42 AM. SOC. REV. 639 (1977).

122. Hay, *supra* note 29, at 1806.

the fact? Empirical research has demonstrated that the two vantage points are distinct: ex ante evaluations do not necessarily predict ex post satisfaction.¹²³

The initial impulse perhaps favors the ex ante view, the view from behind the Rawlsian “veil of ignorance.”¹²⁴ The ex ante contractarian argument posits that a procedure is fair if all parties would—actually or hypothetically—agree to it in advance without knowing their particular place within the dispute.¹²⁵ The problem, as Richard Nagareda points out, is that the ex ante view “is an inapt perspective on mass tort disputes, which are all about how to reallocate, as between particular plaintiffs and particular defendants, losses that already have occurred.”¹²⁶ That is, litigation is inherently ex post; mass torts concern exchanging rights after everyone’s preferred choice (nonoccurrence of the tort-triggering event) is no longer an option.¹²⁷ Furthermore, the primary question is how to fashion the exchange of rights, rights that are held ex post, so that the transaction itself is seen as legitimate.¹²⁸

Thus, in lieu of the ex ante model, I use an ex post constructivist epistemology, which focuses on social experiences with legal authorities, human perception and preference, and, to some degree, moral constructs and convention. Subjective preferences take center stage for several reasons: (1) normative justice theories such as John Rawls’s “justice as fairness” posit that fairness is necessary in its own right; (2) democratic governance incorporates citizen preference in institutional design; and (3) procedural experiences impact institutional legitimacy and compliance with judgments.¹²⁹

More specifically, this constructivist epistemology features choice as a hallmark of procedural justice. Choice, in theory, encompasses two key decisions: whether to litigate as an individual or in a group and the place and procedures for dispute resolution. The problem is that even when mass tort victims choose autonomy through individual litigation, systemic preferences transfer,

123. See Donna Shestowsky & Jeanne M. Brett, *Disputants’ Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study* 30 (Univ. of Cal. Davis Legal Studies Research Paper Series, Paper No. 130, 2008), available at <http://ssrn.com/abstract=1103585>.

124. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (rev. ed. 1999) (“The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.”).

125. See Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 496 (2003).

126. Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 794 (2002) [hereinafter Nagareda, *Autonomy*].

127. *Id.*

128. *Id.* at 795.

129. LIND & TYLER, *supra* note 34, at 63–64.

centralize, and consolidate them. Thus, some litigants view coordination as a second-best substitute.¹³⁰

Perhaps oddly, people are often more concerned with just procedures than fair outcomes.¹³¹ Procedural justice components have been described in various ways. For instance, in 1980, Gerald Leventhal proposed that people use six criteria when evaluating procedural fairness: (1) whether all interested parties' views were represented; (2) the decision maker's consistency in applying substantive laws and legal rules; (3) the use of nonbiased decision makers; (4) whether the decision was based on accurate information; (5) whether there are error correction mechanisms; and (6) whether those involved in decision making acted ethically.¹³² Allan Lind and Tom Tyler further distill these six criteria into three relational factors: (1) feeling that authorities are trustworthy and benevolent, (2) feeling that litigants are treated with dignity and respect, and (3) feeling that decision makers are neutral and evenhanded.¹³³

Drawing on these traditional concepts, this framework includes the following variables based on both adjudicatory and psychological preferences: objective criteria for discerning liability such as whether the system is adversarial or inquisitorial; levels of cost and delay; the use of precedent, error distribution, and error correction; participation, voice, and control; and the use of impartial and nonbiased decision makers. These concepts rest on a central assumption: that people are concerned with maximizing social welfare and self-interest, but may also care about how resources are allocated within a particular group.¹³⁴

As the following section illustrates, these variables often form a caustic marriage both with one another and with mass tort litigation. For example, we temper our quest for perfect truth with considerations of cost and delay; endless litigation is too taxing on both the litigants and the system.¹³⁵ Plus, aggregate litigation itself is in tension with a system founded on individual adversarial litigation that promises each litigant her own day in court.¹³⁶ Thus,

130. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1496 (2005).

131. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 818 n.150 (2001).

132. LIND & TYLER, *supra* note 34, at 107.

133. *Id.*; Tyler & Lind, *supra* note 25, at 75.

134. See NAGAREDA, *supra* note 14, at 121; van den Bos & Lind, *supra* note 80, at 1331 ("In both experiments, knowing that another research participant had received an unfair procedure did as much to lower fairness judgments as did receiving an unfair procedure oneself.")

135. See John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 565-66 (1978).

136. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (noting "our 'deep-rooted historic tradition that everyone should have his own day in court'"); Marcus, *supra* note 45 (manuscript at 2). This individual day in court notion can be traced back to eighteenth-century common law tradition. See *Martin v.*

conflict arises not only in balancing procedural justice components but also in positioning that institutional design within a system intended to resolve individual disputes. The following sections thus introduce preference, practice, and the disparity in between.

1. *Systemic Preferences for Adversarial Litigation*

People prefer adversarial litigation. As Robert Kagan writes, because of “American adversarial legalism’s capacity for heroic moral action,” it “is in many respects the envy of the world—admired for its openness to new ideas, its ability to challenge governmental and corporate arbitrariness, and its empowerment of political, ethnic, and social minorities.”¹³⁷

Empirical research supports this proposition. John Thibaut and Laurens Walker’s research tested disputants’ preferences for several types of dispute resolution procedures.¹³⁸ The options included bargaining between disputants without a third-party adjudicator, pure inquisitorial adjudication where a third-party both investigates and resolves claims, a single-investigator adjudication where one investigator works for the judge and produces information and evidence, double-investigator adjudication where the judge appoints two investigators to develop and present evidence, and pure adversarial adjudication where a third-party decision maker issues a binding opinion based on evidence produced from disputant-selected investigators.¹³⁹ The last procedure closely resembles traditional adversarial litigation.¹⁴⁰ Operating from behind a Rawlsian veil of ignorance, some participants were not told which side of the dispute they were on, whereas others were told that the evidence either favored or disfavored their position.¹⁴¹

All three groups evinced a strong first preference for the pure adversarial procedure.¹⁴² Adversarial representation fostered trust in the representative and led to greater procedural satisfaction.¹⁴³

Wilks, 490 U.S. 755, 762 (1989).

137. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 23 (2001).

138. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 104 (1975).

139. *Id.* at 104–06; *see also* LIND & TYLER, *supra* note 34, at 31. In inquisitorial litigation, state agents often control the proceedings. *See, e.g.*, Benjamin Kaplan et al., *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 (1958) (outlining Germany’s inquisitorial process).

140. BAYLES, *supra* note 47, at 14 (further defining adversarial adjudication by distinguishing it from administration).

141. THIBAUT & WALKER, *supra* note 138, at 106; *see also* LIND & TYLER, *supra* note 34, at 31.

142. LIND & TYLER, *supra* note 34, at 32 fig.2-2; THIBAUT & WALKER, *supra* note 138, at 107 tbl.11-1; Walker et al., *supra* note 27, at 1412.

143. THIBAUT & WALKER, *supra* note 138, at 107 tbl.11-1; *see also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL’Y & L. 211, 218–19 (2004).

Participants in additional studies were content with the adversarial process even when they received an unfavorable verdict.¹⁴⁴ Thibaut and Walker then conducted similar studies in England, France, and what was then West Germany (which used elements of both pure inquisitorial and single-investigator procedures).¹⁴⁵ Allan Lind likewise studied three Western European nations.¹⁴⁶ Participants in each study, regardless of their national judicial system, demonstrated a preference for pure adversarial adjudication, with all but the French participants indicating that they associated adversarial adjudication with greater fairness.¹⁴⁷ More recent research suggests that this correlation is based on a preference for process control over presenting arguments and evidence, enhanced distributive fairness, and opportunities to participate in the decision-making process.¹⁴⁸ Inquisitorial models, on the other hand, afford little process control and thus led to less procedural satisfaction.¹⁴⁹

Other studies reinforce these findings.¹⁵⁰ In 1989, the RAND Institute for Civil Justice assessed procedural fairness in trials, arbitrations, and settlement conferences.¹⁵¹ Participants were happier with trials and arbitrations, in part because they perceived

144. LIND & TYLER, *supra* note 34, at 95 (“[E]ven when subjects received an unfavorable verdict they showed no inclination to believe that the adversary procedure was to blame.”); Walker et al., *supra* note 27, at 1414.

145. THIBAUT & WALKER, *supra* note 138, at 78–80 & tbl.8-5. For more information on German civil procedure, see William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT’L & COMP. L. REV. 221 (1983); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

146. E. Allan Lind et al., *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 J. CONFLICT RESOL. 318, 322–23 (1978) [hereinafter Lind et al., *Procedural Models*].

147. THIBAUT & WALKER, *supra* note 138, at 72–80; Lind et al., *Procedural Models*, *supra* note 146, at 318–41.

148. LIND & TYLER, *supra* note 34, at 39; Susan Turner Kurtz & Pauline Houlden, *Determinants of Procedural Preferences of Post Court-Martial Military Personnel*, 2 BASIC & APPLIED SOC. PSYCHOL. 27 (1981) (finding that prisoners in a military stockade preferred the pure adversary procedure).

149. LIND & TYLER, *supra* note 34, at 94–95 & tbl.5-1.

150. See, e.g., Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13, 29 (1978); Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319 (1976); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980). Note, however, that other studies have concluded that people prefer negotiation and mediation in handling interpersonal conflicts as opposed to legal conflicts. See, e.g., Larry B. Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERSONALITY & SOC. PSYCHOL. 700, 704 (1986) (dividing labor for a mundane task); Robert S. Peirce & Dean G. Pruitt, *Complainant-Respondent Differences in Procedural Choice*, 4 INT’L J. CONFLICT MGMT. 199, 201 (1993) (studying organizational policy).

151. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 45.

that trials and hearings afforded greater respect and dignity in the proceedings.¹⁵² Most recently, a 2008 study by Donna Shetowsky and Jeanne Brett evaluated ex ante choices versus ex post preferences across a range of real-world disputes.¹⁵³ These disputes varied in both amounts in controversy (from \$30,000 to over \$17 million) and in legal issues (personal injury, malpractice, and contract).¹⁵⁴ Those involved with a personal injury dispute and in conflict with a collective (i.e., corporation or company), rather than an individual, preferred adjudicative procedures that allocated control to a third-party neutral.¹⁵⁵ Their findings also suggested that nonadjudicative procedures (such as mediation) failed to meet disputants' ex ante expectations, whereas those initially selecting adjudicative procedures (such as trial or arbitration) were highly satisfied ex post.¹⁵⁶

Still, this study had only one participant opt for mediation and the mediation program was relatively new.¹⁵⁷ As Jean Sternlight has theorized, facets of adversarial litigation, such as attorney advocacy, can work well in mediation if the parties' goals do not center on publicity and precedent setting.¹⁵⁸ Although many mass tort claimants voice their objectives in terms of public interest, Sternlight's theory suggests that mediation might be acceptable when no confidentiality restrictions limit the results.

In the mass tort context, however, even court-based litigation no longer qualifies as pure adversarial adjudication. For instance, parties requesting certification for settlement purposes only may agree on settlement terms before ever filing a complaint.¹⁵⁹ Even

152. *Id.*

153. Shetowsky & Brett, *supra* note 123, at 2; *see also* Donna Shetowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 612–14 (2008) (noting different ex ante and ex post criteria may lead to dissatisfaction).

154. Shetowsky & Brett, *supra* note 123, at 22–23.

155. *Id.* at 27, 33.

156. *Id.* at 30. This confirms the findings of previous researchers.

157. *Id.* at 34. Other studies on smaller scales have shown that some litigants prefer mediation and that mediation has a high compliance rate. *See, e.g.,* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 640 (2002). For one attempt to explain and reconcile these differences, *see* Shetowsky, *supra* note 153, at 617–20.

158. Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 291–97, 302–04 (1999); *see also* Macdonald, *supra* note 49, at 20–21 (noting how participation rights are different in mediation).

159. *E.g.,* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *see also* Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1996–97 (1999).

when litigants never request class certification, settlement has become the end game rather than a litigation byproduct. This early settlement focus circumnavigates conventional litigation between adversaries. Facts and evidence usually unearthed during the discovery process remain buried. This bypass necessitates an active judicial role. But judges facing complex legal, evidentiary, and factual issues often avoid those issues by aggressively promoting settlement.¹⁶⁰ Thus, any “findings of fact” and “conclusions of law” are simply part and parcel of the parties’ bargaining process.¹⁶¹

As early as 1976, Abram Chayes famously recognized the decline of conventional adjudication and the rise of “public law litigation.”¹⁶² He observed that litigation was no longer bipolar but amorphous and sprawling; the judge acted less as a fact-finder and more as a facilitator, administrator, negotiator, and even mediator; the remedy did not end the proceedings but began claimant administration; and established legislative functions bled into judicial decrees.¹⁶³ In short, the judge acted more as an extra-judicial legislator than a typical third-party neutral.¹⁶⁴

The trappings of adversarial litigation continue to change and decline as judges become managers and complex litigation resembles a business deal. Managerial judges encourage and facilitate early settlement, employ informal pre- and post-trial conferences in-chambers and out of the public eye, and acquire and use knowledge gained outside traditional evidentiary rules.¹⁶⁵ Judicial fact-finding and persistent inquiry into the merits are hallmark features of inquisitorial, not adversarial, litigation.¹⁶⁶ These inquisitorial and

160. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.13 (2004); SCHUCK, *supra* note 43, at 163 (detailing Judge Jack Weinstein’s role in promoting settlement in the Agent Orange litigation); Dayton, *supra* note 42, at 911; McGovern, *supra* note 42, at 1810–11 (“If a court viewed the defendants as impediments to settlement, it would not be unusual for a court to set large numbers of cases for trial at the same time, even empanelling multiple juries for a single trial.”); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 855 (1997) (observing that the judge “is not the disengaged arbiter coming fresh to the question of the quality of the outcome” but “is often a participant in framing both the conditions under which negotiations have occurred and sometimes proposing terms for the settlement itself”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982) [hereinafter Resnik, *Judges*]. Some courts have imposed penalties on litigants for failing to try to settle a case. *E.g.*, *Shedden v. Wal-Mart Stores, Inc.*, 196 F.R.D. 484, 486–87 (E.D. Mich. 2000).

161. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1084 (1984).

162. Chayes, *supra* note 23, at 1281.

163. *Id.* at 1289–1305; see also Sherman, *supra* note 67, at 692.

164. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371 (2001).

165. Resnik, *Judges*, *supra* note 160, at 403–13; *e.g.*, FED. R. CIV. P. 16.

166. Erichson, *supra* note 159, at 2006–08; see also Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of*

managerial attributes led Bill Rubenstein to recharacterize complex aggregate litigation within a transactional model where cases are more akin to business deals than litigation.¹⁶⁷ In these deals, defendants purchase finality by buying plaintiffs' rights to sue.¹⁶⁸ The third-party neutral is neutral no longer; rather, she has a vested interest in creating finality so that she is relieved of adjudicatory work.¹⁶⁹

To evaluate the case as adversarial litigation breaks down, courts must rely on their own investigation into science, causation, and factual information.¹⁷⁰ But judges trained in an adversarial culture find themselves ill-equipped and reluctant to shift to an inquisitorial role.¹⁷¹ They thus increasingly depend on court-appointed experts.¹⁷² This practice of appointing experts generates several risks, including the potential for bias in appointing experts sympathetic to one side or the other; insulating trial courts from reversal; and impinging on the jury's province.¹⁷³ These nonadjudicative procedures color litigants' entire experience: their distributive justice perceptions,¹⁷⁴ their compliance with the decision, and their view of systemic legitimacy.¹⁷⁵ Moreover,

Justice?, 76 JUDICATURE 109, 162 (1992).

167. Rubenstein, *supra* note 164, at 372.

168. *Id.*

169. *Id.* at 373; *infra* notes 241–47 and accompanying text.

170. WEINSTEIN, *supra* note 41, at 111; Erichson, *supra* note 159, at 1985.

171. See *Gold v. Dalkon Shield Claimants Trust*, 1998 WL 351466, at *2 (D. Conn. June 3, 1998) (declining to use a court-appointed expert out of respect for the adversarial process); Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1019 (1994) ("In general, it conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.") (quoting a federal judge); Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 494–95 (1988).

172. *E.g.*, *In re Breast Implant Cases*, 942 F. Supp. 958, 960–61 (S.D.N.Y. 1996); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1391–96 (D. Or. 1996); *In re Joint E. & S. Dists. Asbestos Litig.*, 830 F. Supp. 686, 693 (S.D.N.Y. 1993); *DePyper v. Navarro*, 1995 WL 788828, at *2 (Mich. Cir. Ct. Nov. 27, 1995). Rule 706 of the Federal Rules of Evidence authorizes courts to appoint independent experts. FED. R. EVID. 706.

173. See Erichson, *supra* note 159, at 1993–94; Ellen Relkin, *Some Implications of Daubert and its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2264 (1994); see also E. Allan Lind & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 19, 20–21 (1985).

174. Research has shown that in both laboratory and field studies greater perceptions of procedural justice create greater perceptions of distributive justice. LIND & TYLER, *supra* note 34, at 242; Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 859 (1994).

175. See Welsh, *supra* note 131, at 791–92.

nonadversarial litigation in a purportedly adversarial system with asymmetrical bargaining power and potentially inadequate claimant representation gives rise to a powerful incentive toward collusion between plaintiffs and defense counsel.¹⁷⁶

2. *Cost and Delay*

Cost and delay are routinely invoked to justify efficient resolution through settlement and creative procedures such as statistical sampling, bellwether trials, and consolidation.¹⁷⁷ In studies analyzing typical bipolar litigation, however, cost and delay did not significantly affect litigants' procedural fairness opinions.¹⁷⁸ When delay did affect tort litigants' attitudes, it was not in terms of absolute delay time, but whether the delay was reasonable.¹⁷⁹

Litigants' perception of cost in bipolar litigation was similarly unrelated to judgments of fairness or system satisfaction.¹⁸⁰ Although individual tort litigation differs markedly from mass tort litigation, the contingent fee is a common denominator. Contingent fee rates did not significantly relate to procedural fairness satisfaction.¹⁸¹ When researchers further tested the effects of defendants paying their own costs versus defendants with fees paid by insurance companies, they still found no relationship between procedural fairness judgments and cost discrepancies.¹⁸² In short, within the realm of traditional tort litigation, cost and delay did not

176. See Chamblee [Burch], *supra* note 6, at 170–71; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Dana, *supra* note 73, at 325–26; Erichson, *supra* note 159, at 2002–03. Bill Rubenstein proposed several models for reinvigorating the adversarial process in class litigation fairness hearings. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1436–40 (2006). The American Law Institute has similarly proposed using guardian ad litem, “special officers,” and special masters in aggregate litigation. THE AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.06 (Discussion Draft No. 2, 2007). Using these figures as a proxy for simulating adversarial litigation may mitigate the dangers of potential collusion between plaintiffs and defense attorneys, but their effect on participation should also be considered. To the extent that these special officers speak in lieu of competent adults, rather than alongside those litigants, they may undermine legitimacy and inhibit participation. Still, pragmatically, many claimants in aggregate litigation are absent; centralized litigation may proceed too far from their homes to engender ongoing traditional participation, or advanced stages of illness may similarly affect participation.

177. See *infra* note 305.

178. See LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 55.

179. *Id.* at 77; see also E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 983–84 (1990) [hereinafter Lind et al., *Eye of the Beholder*].

180. See LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 56.

181. *Id.* at 57–58; see also Lind et al., *Eye of the Beholder*, *supra* note 179, at 975.

182. See LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 57; see also Lind et al., *Eye of the Beholder*, *supra* note 179, at 984.

greatly impact litigants' procedural justice evaluations.¹⁸³ Generalizing these findings suggests that efforts to reduce cost and delay should not be undertaken at the expense of dignity, careful process, and impartiality in decision making.¹⁸⁴

Of course, extreme and unreasonable cost and delay would be troublesome. On one hand, the public shares romantic notions that the justice system is a truth-finding mechanism; on the other, ferreting out perfect truth, if possible, could take many years and deplete litigants of both time and money. Some might say that mass tort litigation does the same thing.¹⁸⁵ For many asbestos victims compensation comes too late and the system takes too long.¹⁸⁶ Their goals are less publicity- and education-oriented and instead center on obtaining funding for medical costs. In reality, we settle for an approximation of truth that is tempered by resource constraints. But we must also eschew generic approaches and tailor process to litigants' mindsets, goals, and expectations.

3. *Decisional Basis, Error Distribution, and Error Correction*

Given that we must recognize diminishing marginal returns in desiring perfect accuracy, deontological concerns dictate that the risks of error must be equally distributed among the parties.¹⁸⁷ Neither plaintiffs nor defendants should inequitably bear those risks. Balancing a pure utilitarian cost-benefit model with deontological constraints aids in disbursing costs and correcting errors as well as ensuring that the procedural system does not disproportionately favor or burden one side.¹⁸⁸ Put differently, process should allocate the risk of error and the cost of access as evenly as possible among the parties.¹⁸⁹

Imparity in substantive decisions is also lessened through

183. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 77; Lind et al., *Eye of the Beholder*, *supra* note 179, at 984 (noting that subjective measures of outcome and cost were based on whether a litigant has modest expectations and understands the economic realities of litigation).

184. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 78.

185. *E.g.*, Marcus, *supra* note 45 (manuscript at 32–33).

186. *See, e.g.*, David J. Kahne, *Curbing the Abuser, Not the Abuse: A Call for Greater Professional Accountability and Stricter Ethical Guidelines for Class Action Lawyers*, 19 GEO. J. LEGAL ETHICS 741, 749 (2006); Steven L. Shultz, In Re Joint Eastern and Southern District Asbestos Litigation: *Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Actions*, 58 BROOK. L. REV. 553, 562 (1992); Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, WASH. POST, Sept. 25, 2002, at E1.

187. Macdonald, *supra* note 49, at 19; Solum, *supra* note 28, at 257–58.

188. *See* Solum, *supra* note 28, at 257.

189. Bone, *supra* note 125, at 514 (“In addition to considering the risk of error, a theory of procedural fairness also must take account of process costs, including the social costs of additional procedure to reduce error, and it must do so within the framework of the fairness theory itself.”); Solum, *supra* note 28, at 257–58; *see also* BAYLES, *supra* note 47, at 117–20.

adherence to precedent and error correction mechanisms such as new trials, appeals, petitions for rehearing, judgments as a matter of law, and renewed judgments as a matter of law. But few of these measures are available to correct error in nonclass aggregation. While judges may rule on motions to dismiss for failure to state a claim, evidentiary matters, motions for summary judgment, and motions to certify, most litigation settles.¹⁹⁰ More often than not, those settlement agreements include confidentiality provisions.¹⁹¹ And, because they are not class actions, there are no fairness hearings or opportunities for appeal.¹⁹² Thus, precedent and error-correction mechanisms are frequently available in name only.

Because most cases settle, decisional precedent takes on a different character—defendants regularly use settlement amounts and injury criteria informally to establish a compensation grid.¹⁹³ This creates informational asymmetries in decisional basis and works to defendants' advantage.¹⁹⁴ For example, in a typical mass tort case, repeat defendants typically know more than plaintiffs do about previous settlements, expert evidence, and discovery materials.¹⁹⁵ Informational asymmetries thus disadvantage claimants in settlement negotiations.¹⁹⁶ Granted, with greater transparency and less confidentiality in aggregate settlements, plaintiffs could regain some symmetry by prompting favorable settlements on behalf of other litigants and, conversely, deterring noncompensable cases.¹⁹⁷

Nonconfidential settlement agreements, perhaps realistic in theory only, would similarly advantage interested nonparty public observers such as prescribing physicians, pharmacists, and the Food

190. Ellen S. Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307, 332 (2008).

191. Keeping discovery materials and the settlement terms confidential often prompts conflict between individual and group interests. Erichson, *supra* note 7, at 560–61. Erichson notes that “[i]n most of these situations, the multiple representation ought to be permitted with client consent.” *Id.* at 560.

192. See FED. R. CIV. P. 23(e).

193. *E.g.*, *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984); see David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 582 (1987).

194. See David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 900 (1984); W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 71–72 (2007).

195. See WEINSTEIN, *supra* note 41, at 70–71; Rosenberg, *supra* note 194, at 902; Weidemaier, *supra* note 194, at 71–72.

196. See John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 278–79 (2007). Repeat players, on the whole, retain better lawyers, hire the best experts, and craft settlement agreements that strengthen their position. KAGAN, *supra* note 137, at 122–23.

197. William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 724 (2006).

and Drug Administration. Assuming that confidentiality provisions withhold information from the public that could be essential to informed decision making, transparency would enhance social welfare.¹⁹⁸ Still, despite a few notable exceptions,¹⁹⁹ many attorneys succumb to the lure of higher attorneys' fees rather than insist on transparency.

4. *Participation, Voice, and Control*

Participation humanizes process and affords litigants a degree of control.²⁰⁰ Past studies have demonstrated that fairness perceptions and litigant satisfaction increase when participants feel some control over their cases.²⁰¹ As early as 1959, Thibaut and Walker theorized that people first seek to maximize control over decisions and outcomes by resolving disputes without a third-party neutral.²⁰² But when they face an impasse and must allocate control to a third party, they prefer pure adversarial litigation.²⁰³ Still, they want to maintain some process control through, for example, presenting evidence and stating their case.²⁰⁴

Social psychologists are of two minds as to the value of process control: the instrumental view is that participation opportunities are valuable only because litigants believe that their voice influences the case's outcome ("decisional control" or "outcome control"); the noninstrumental normative perspective suggests that process control is independently valuable because people simply appreciate being able to state their position to a decision maker

198. See WEINSTEIN, *supra* note 41, at 66–71. Transparency also enhances meaningful participation:

Without key information on the ways in which a product might be risky—for example, scientific research revealing that tobacco is both addictive and carcinogenic, asbestos is carcinogenic, or a birth control device breeds lethal bacteria—regulators, the public at large, and other stakeholders cannot participate meaningfully on whether or how to regulate products that cause harms.

Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 697–98 (2007).

199. Several private lawyers in the tobacco litigation who represented the State of Minnesota refused to settle on a basis that would have kept documents produced in discovery out of the public eye even though it reduced their attorneys' fee. DEBORAH CAULFIELD RYBAK & DAVID PHELPS, *SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL* 385, 399 (1998); Erichson, *supra* note 74, at 2097–98.

200. See LIND ET AL., *PERCEPTION OF JUSTICE*, *supra* note 13, at ix; Chamblee [Burch], *supra* note 6, at 209 ("The core of the Court's *Amchem* decision held that a class action attorney could adequately represent only a class with sufficient cohesion."). On the issue of representation, see Fiss, *supra* note 114, at 25.

201. LIND ET AL., *PERCEPTION OF JUSTICE*, *supra* note 13, at 61.

202. LIND & TYLER, *supra* note 34, at 96–97.

203. TYLER, *OBEY THE LAW*, *supra* note 33, at 116.

204. *Id.*; Thibaut & Walker, *supra* note 135, at 546–47.

(“process control”).²⁰⁵ Recent studies have embraced the latter noninstrumental view and posit that people value the chance to explain their side regardless of whether their story influences the third party’s decision.²⁰⁶

Moreover, as a subset of process control in adversarial litigation, litigants prefer either well-established court rules or ex ante agreed-upon procedures.²⁰⁷ Allowing litigants to participate in designing procedures enhances both judgments about the procedure’s fairness and the substantive outcome.²⁰⁸ Although instrumental participation, where the group discussed and selected adjudicatory rules, greatly enhanced subsequent procedural fairness views, group discussion alone, without any actual control over which rules were used, also slightly enhanced procedural justice beliefs.²⁰⁹

This finding has interesting implications for attorney-client or client-client agreements as well as adjudicatory procedures in mass tort litigation—particularly for group-oriented individuals. It suggests that if claimants participated in designing process or collective governance agreements, then they might view the process as more legitimate and fair, regardless of whether that design was actually used.²¹⁰ Furthermore, including a deliberative process in the governance agreement that allows group members to voice their concerns about settlement allocation or amount before accepting or rejecting the settlement increases cooperation and makes it less likely that they will withhold their consent in hopes of a higher individual payout.²¹¹ Put differently, if the group itself designs and implements fair deliberative processes, processes that provide participation opportunities, then group members are more likely to

205. TYLER, OBEY THE LAW, *supra* note 33, at 116; E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

206. TYLER, OBEY THE LAW, *supra* note 33, at 133; *see also* LIND & TYLER, *supra* note 34, at 96–97. *But see* Rosenberg, *supra* note 7, at 214–15 (criticizing the focus on individual control and advocating a tort-based perspective of policy that centers on deterrence and compensation). This is true even when litigants have previous relationships with their adversary before the disputed incident and where the outcomes are unfavorable. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 6; LIND & TYLER, *supra* note 34, at 97.

207. Shestowsky, *supra* note 143, at 233, 243.

208. LIND & TYLER, *supra* note 34, at 102–03; Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223, 237–38 (1983).

209. LIND & TYLER, *supra* note 34, at 102–03; Musante et al., *supra* note 208, at 237–38.

210. *See* LIND & TYLER, *supra* note 34, at 103; Macdonald, *supra* note 49, at 19 (describing additional rights inherent in participation).

211. *See generally* TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 74–75 (2000) (“[P]eople’s general willingness to cooperate in groups is shaped by their judgments about the fairness of the procedures within the group.”).

cooperate with one another and less likely to derail a fair settlement agreement.²¹² Providing these voice opportunities within the group deliberation might thus serve as a proxy for extensive court-based participation.

In its simplest form, both intra-group and court-based participation necessitate that those who are bound by a decision or a settlement have an opportunity to take part (and be heard) in the adjudicatory or deliberation process.²¹³ Structural opportunities for participating are insufficient when litigants' voices are neither heard nor considered by the decision maker.²¹⁴ Moreover, participation encompasses inherent rights to present evidence, observe the proceedings, cross-examine witnesses, and hear the judge's decision.²¹⁵ And voice, even in aggregate litigation, affords litigants dignity by granting them a forum in which to tell their story.²¹⁶

Litigants have expressed dissatisfaction with court-annexed

212. *See id.* at 79, 85–86.

213. *Martin v. Wilks*, 490 U.S. 755, 768 (1989); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (contending that “the promotion of participation and dialogue by affected individuals in the decisionmaking process” is a central feature of the Due Process Clause); *Solum*, *supra* note 28, at 259. *See generally* Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 269 (1992).

214. TYLER, OBEY THE LAW, *supra* note 33, at 149.

215. BAYLES, *supra* note 47, at 40 (“The common-law principle of an opportunity to be heard has typically been taken to include rights (1) to adequate notice, (2) to pre-hearing discovery, (3) to an adjournment, (4) to present evidence, (5) to rebut evidence and often to cross-examine adverse witnesses, (6) to a copy of the transcript, and (8) [sic] to reasons for a decision.”); *Solum*, *supra* note 28, at 280.

216. *E.g.*, *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 430 (D.N.J. 2000) (providing an opportunity for Holocaust victims to tell their stories); *see* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74–76. As Cabraser describes:

The settlement approval process itself enabled class members [involved in Holocaust litigation] to tell their stories in court, in formally reported proceedings, with permanent transcripts. Their personal stories became matters of permanent public record, accorded the dignity and weight of court testimony. This, in itself, was of tremendous value to many Holocaust survivors and their family members.

Cabraser, *supra* note 55, at 2232–33. *See generally* LIND & TYLER, *supra* note 34, at 101; Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 93–95; Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 160 (“As researchers have learned, litigants report more satisfaction with types of processes in which they understand themselves as having an opportunity to give voice to their injuries, make their defenses, be treated with dignity, and have their claims heard and evaluated by unbiased decisionmakers.”); *Solum*, *supra* note 28, at 262–64 (noting that dignity is a component of participation). This respect for dignity of the individual resembles the Kantian ideal of respect for persons.

arbitration procedures because they had little opportunity to explain their position.²¹⁷ For instance, Ken Feinberg, who handled the September 11 Victim Compensation Fund, observed that because money is a poor substitute for losing a loved one, the court should afford each victim an opportunity to make a public statement “on the record, under oath.”²¹⁸ He notes, “[g]iving people the opportunity to be heard is very important in helping them cope and move on as best they can.”²¹⁹ Although “storytelling” has been criticized when used to demonstrate satisfaction with process as a proxy for “justice,”²²⁰ social psychologists determined through both field and laboratory studies that the occasion to tell one’s story and to voice concerns to a neutral decision maker (or someone in power) is critical to procedural fairness judgments.²²¹ Thus, in some ways, this opportunity to be heard becomes alternative currency when money cannot hope to adequately compensate victims.²²²

Imagine, for instance, a system without opportunities for participation. Two flaws surface: (1) how could the system yield accurate results, and (2) how could the public view that system as legitimate and thus authoritative? Furthermore, without an opportunity for participation, litigants can morally rationalize noncompliance by claiming that the flawed procedure led to a flawed outcome.²²³ In mass tort litigation, as in individual litigation, most litigants participate through counsel. Thus, the efficacy of counsel positively correlates with procedural fairness judgments.²²⁴ Litigants do not necessarily require constant or direct participation, but need opportunities for participation at critical points such as

217. JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 65–66 (1983). Because perceptions of even distributive justice can be enhanced through participation, some researchers have suggested that all class members should receive notice regardless of the type of class action. Walker et al., *supra* note 27, at 1418–19.

218. Breton, *supra* note 100, at 1.

219. *Id.*; see also THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT’S RIGHT* 107–09, 116–17, 133 (2004).

220. See, e.g., Bone, *supra* note 125, at 505–06.

221. LIND & TYLER, *supra* note 34, at 106.

222. See McGovern, *supra* note 38, at 1380 (“Less obvious assets include the velocity of resolutions, varieties of behavioral and noneconomic compensation, and the offer of finality and closure.”). One recent study demonstrated that nearly all personal injury lawyers assume, however, that litigation is primarily about the money—despite their clients’ actual goals. Relis, *supra* note 75, at 718 & fig.3.

223. See Solum, *supra* note 28, at 280.

224. LIND ET AL., *PERCEPTION OF JUSTICE*, *supra* note 13, at 61. One study conducted on students at Stanford University indicated that participants preferred self-representation but, “Stanford University students might generally feel competent enough to represent themselves in relatively simple disputes.” Shestowsky, *supra* note 143, at 233, 244. This preference is not likely to be the case in complex mass tort disputes.

settlement.²²⁵ Laypeople generally follow their attorney's advice about when to settle and what to accept.²²⁶ But this advice is compounded by mixed motives in nonclass aggregation.

In nonclass aggregation, consent legitimates the settlement and theoretically justifies the lack of judicial oversight.²²⁷ The trouble is that the aggregate settlement rule, the only positive authority regulating collective settlements, does not require similarity of settled claims or necessitate distributive fairness in allocating settlement funds.²²⁸ Thus, unlike class actions that contain judicial quality control measures such as subclassing and settlement approval, consent hypothetically alleviates intra-client conflicts and allocative disparities.²²⁹ Moreover, the class context explicitly

225. Solum, *supra* note 28, at 275; *see also* Bone, *supra* note 125, at 487 (questioning why participation and control are necessary for institutional legitimacy); Walker et al., *supra* note 27, at 1417 ("The case ought to be regarded as belonging to the client, not to the lawyer, and the attorney should see himself as the agency through which the client exercises salutary control over the process.").

226. *See* Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 284–85 (2007); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988) ("Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves . . ."); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997); Sternlight, *supra* note 158, at 318 ("[C]lients are largely dependent upon their agents or attorneys for information as to the strengths and weaknesses of each side's case and for an evaluation of the advantages and disadvantages of a proposed settlement.").

227. NAGAREDA, *supra* note 14, at 60.

228. MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (1983); NAGAREDA, *supra* note 14, at 60.

229. For an explanation of "judicial quality control measures," *see supra* note 9. Although Judge Posner has suggested that the judge in class litigation acts as a fiduciary of the class, the dangers and duties packed within that obligation do not inure to aggregate litigation though the same preconditions for collusion do. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002). Judge Posner writes:

The principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class. . . . We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.

Id. at 279–80 (citing *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987); *Stewart v. Gen. Motors Corp.*, 756 F.2d 1285, 1293 (7th Cir. 1985)); *see also* Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1060–62

recognizes the existence of attenuated attorney-client relationships, inherent conflicts of interest, and temptations for collusive behavior among repeat players.²³⁰ To curb these demons, Rule 23 requires judicial oversight: the judge appoints class counsel, approves settlements, and awards attorneys' fees.²³¹ Nonclass aggregate litigation carries the same inherent dangers without these protections.²³²

Communication gaps further complicate the attorney-client relationship. One recent study interviewing both plaintiffs' attorneys and plaintiffs found a fundamental disparity in litigation goals: attorneys assumed money was the primary litigation objective, whereas plaintiffs wanted to be heard, to be respected post-injury, to reveal cover-ups, and to prevent others from injury.²³³ We see this phenomenon quite prevalently in plaintiff Anne Anderson throughout the lawsuit's progression in *A Civil Action*:

In recent months Anne had begun to resent Schlichtmann [her attorney]. She found his manner with the families patronizing, as if he were talking to a group of children. There would have been no case had it not been for her efforts, and yet she felt as if he had systematically excluded her and the others from important decisions. Whenever she ventured an opinion that differed from his, he would always say, "Trust me, trust me." How many times had she heard him say that? It galled Anne, but what bothered her most was a growing conviction, now that the trial was over, that he didn't really care at all about her or the others. She came to believe that he'd been using them simply as a vehicle for his own ambition, for his own fame and fortune. "I was doing this for my baby, for Jimmy," she explained later. "It started out in a pure manner. We didn't want what happened to us to happen to anyone else. But by the time I got through dealing with Jan [Schlichtmann], I felt violated. The lawsuit made me feel dirty."

(2004).

230. In class actions, attorney agency and adequate representation form the cornerstones of due process. See *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940) ("It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation . . ."). For thoughtful commentary on this decision and on adequate representation in the class context, see Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287 (2003).

231. FED. R. CIV. P. 23.

232. I have detailed these concerns and the potential for collusion elsewhere. See Chamblee [Burch], *supra* note 6, at 158–59. Granted, the aggregate settlement rule covers this situation, but not particularly well. See *infra* notes 281–83 and accompanying text.

233. Relis, *supra* note 75, at 721–25 & fig.4; see also Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1367 (1992).

She insisted that she didn't really care about the money.
But Schlichtmann, she believed, cared a lot about it.²³⁴

This disunity between client goals and attorney goals, as well as the resulting distrust, poses not only ethical concerns, but also inhibits participation and group cohesion. The result is increased client-client and attorney-client conflicts, which deteriorate the settlement's legitimacy and may promote inequitable allocation.

5. *Impartiality*

Even if litigants have perfect participatory opportunities, without impartiality, they are frustrated and dissatisfied; they imagine a nonbiased decision maker would reach a more favorable outcome.²³⁵ No one disputes that impartiality in both procedures and in judging increases objective fairness.²³⁶ Neutrality-based assessments focus on outward signals such as professionalism, expertise, equitable application of rules and procedures, and even-handed use of facts.²³⁷ Neutrality similarly requires independence both in terms of not being beholden to a particular party or interest (to avoid impartial rule application) and avoiding commingling investigative and prosecutorial functions with decision-making functions.²³⁸ The latter concern over commingling functions commonly arises in the administrative context where, for example, the Securities and Exchange Commission investigates, charges, and hears the cases.²³⁹ But this concern also exists in collective litigation when the judge acts as inquisitor, manager, and deal-broker.²⁴⁰ This unusual conflation of responsibilities may cause the judge to prejudge the facts or, absent adversarial evidence production, may leave her without enough information to make an informed decision.

Bias need not arise through favoring one party over another—it may arise from something as simple as self-interest.²⁴¹ As used in

234. HARR, *supra* note 77, at 453.

235. LIND ET AL., PERCEPTION OF JUSTICE, *supra* note 13, at 65–66; TYLER, OBEY THE LAW, *supra* note 33, at 117; Lind & Lissak, *supra* note 173, at 26–27; Macdonald, *supra* note 49, at 19; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482–91 (1986); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873–74 (2002).

236. The right to an impartial tribunal is reaffirmed in both national and international documents. For example, Article 14(1) of the International Covenant on Civil and Political Rights and Article 8.1 of the American Convention on Human Rights both recognize this right. International Covenant on Civil and Political Rights art. 14(1), Dec. 19, 1966, 1976 U.N.T.S. 172.

237. Tyler, *Citizen Discontent*, *supra* note 16, at 890; *see also* Lind & Lissak, *supra* note 173, at 20.

238. BAYLES, *supra* note 47, at 21–22, 31.

239. *Id.* at 31.

240. *See supra* notes 159–76 and accompanying text.

241. For example, self-interest is frequently observed in corporate law and psychology. *E.g.*, Robert A. Prentice, *Regulatory Competition in Securities Law*:

social psychology, “self-serving bias” describes the human tendency to construe reality in one’s own favor.²⁴² Linda Babcock and George Lowenstein observe that in the litigation context, people often “conflate what is fair with what benefits oneself.”²⁴³

Consider the following statistics: (1) there are only 678 federal district court judges²⁴⁴ with various judicial vacancies,²⁴⁵ and (2) in federal courts, CAFA increased the number of diversity class actions from twenty-seven cases per month to approximately fifty-three.²⁴⁶ Now imagine yourself as a federal judge with a burgeoning docket faced with a close class certification question. Self-interest might lead you to decrease your workload.²⁴⁷ If mass tort litigants attempt class certification and the judge takes no action on the motion, then litigants voluntarily dismiss thirty-one percent of the cases; if judges deny certification, then litigants voluntarily dismiss nineteen percent of the cases.²⁴⁸ Furthermore, certifying class actions leads to

A Dream (That Should be) Deferred, 66 OHIO ST. L.J. 1155, 1204 (2005) (“Even managers who are consciously trying to serve their principals’ best interests will be affected by the self-serving bias. This will tend to affect their gathering, processing, analyzing, and remembering of information, leading them to reach conclusions, unjustified by objective reality, about the firms’ prospects and their responsibility for them.”). Robert Robinson defines naïve realism as:

[one’s] unshakable conviction that he or she is somehow privy to an invariant, knowable, objective reality—a reality that others will also perceive faithfully, provided that they are reasonable and rational, a reality that others are apt to misperceive only to the extent that they (in contrast to oneself) view the world through a prism of self-interest, ideological bias, or personal perversity.

Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995).

242. Robinson et al., *supra* note 241, at 405.

243. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997).

244. U.S. Courts, Federal Judicial Vacancies, Authorized Judgeships, http://www.uscourts.gov/cfapps/webnovada/CF_FB_301/index.cfm?fuseaction=R eports.ViewJudgeships (last visited Feb. 19, 2009).

245. As of June 10, 2007, there were thirteen vacancies at the courts of appeals and thirty-seven at the district court level. Robert Barnes & Michael Abramowitz, *Conservatives Worry About Court Vacancies*, WASH. POST, June 10, 2007, at A4.

246. Thomas E. Willging & Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FJC RESEARCH BRIEF 1, Apr. 2007, at 2, [http://www.fjc.gov/public/pdf.nsf/lookup/resbrf01.pdf/\\$file/resbrf01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/resbrf01.pdf/$file/resbrf01.pdf) (“Seventy percent of the study districts experienced an increase in diversity class action filings in the last twelve months of the study period (July 2005 through June 2006), compared to the last full calendar year before CAFA went into effect (2004).”).

247. *See generally* Erichson, *supra* note 159, at 1996 (“It is easy to see why many courts have been willing to approve such [settlement class actions]. All parties seemingly win. The court disposes of enormous, burdensome litigation on a basis that appears to satisfy both sides.”).

248. Willging & Wheatman, *supra* note 5, at 636 tbl.12 (finding that

more work: discovery battles, *Daubert* motions, and an array of other pretrial requests. A self-interested bias may thus persuade a judge to delay ruling or to vigorously promote settlement.

Granted, conceding this proposition that judges will act selfishly illegitimizes judicial institutional design since the problem is ubiquitous.²⁴⁹ To borrow from *Federalist No. 51*:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.²⁵⁰

Thus, the allure of self-interest makes checks and balances necessary. District court judges are thus subject to multifaceted layers of accountability including appellate review,²⁵¹ precedent constraints, judicial codes of conduct,²⁵² and even impeachment.²⁵³ But these checks and balances are less available when litigation ends in an aggregate settlement.

In sum, mass tort litigation is at odds with litigants' expressed preferences: despite the veneer of pure adversarial adjudication, aggregate litigation has become increasingly inquisitorial. Formal precedent and error-correction mechanisms have been replaced with informal compensation grids and aggregate settlements rife with informational asymmetries.²⁵⁴ Participation through attorney agency is tainted by conflicts with both other clients and with

nineteen percent of cases not certified as class actions are voluntarily dismissed).

249. The potential for self-serving bias has been widely recognized by the behavioral economics movement and in corporate law. See, e.g., Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 768 (2007) ("[P]ublic company executive officers are likely to exhibit a self-serving or self-interest bias in making disclosure determinations relating to personal facts."); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 425 (2003) ("[T]he self-serving bias means, among other things, that people's judgments, including judgments of fairness, tend to be influenced by their self-interest. Even if people are trying to be fair, what seems fair to them is inevitably influenced by what is in their own best interests.").

250. James Madison, *The Federalist No. 51*, in 1 READINGS IN AMERICAN DEMOCRACY 169, 170 (Gerald Stourzh & Ralph Lerner eds., 1958).

251. Litigants may immediately request appellate review when a judge grants or denies class certification. FED. R. CIV. P. 23(f).

252. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(2) (2004) (requiring judges to be faithful to the law).

253. Federal judges may be removed through impeachment. U.S. CONST. art. III, §§ 1–2, art. I, § 3.

254. See *supra* note 98.

attorney self-interest.²⁵⁵ And judicial impartiality is similarly impaired by self-interest and the need for efficiency.²⁵⁶ The continuing risks are three-fold: (1) litigants—both plaintiffs and defendants—will view the process as illegitimate and will be less inclined to comply with the final judgment or settlement; (2) the unpredictable nature of process stemming from both creativity and need, such as bellwether trials and statistical sampling, make process less certain, impact substantive liability, and make it increasingly difficult to avoid adjudication through behavioral modification; and (3) the result from both of the first two risks is that the system itself gambles with its legitimacy, which has ramifications beyond the litigants and spills over into routine cost-benefit compliance analysis. But, as the next section illustrates, no quick fix exists, and every “solution” introduces a new set of problems.

III. PRELIMINARY OBSERVATIONS ON INSTITUTIONAL DESIGN

Thus far this Article has focused on the disunity between ideal procedural justice principles and the current practices in nonclass aggregation. And yet, compromises with reality are inevitable—perfectly implementing procedural fairness is simply not possible. For instance, consider just a few of the innate trade-offs: litigation is no longer adversarial despite litigants’ preferences, *but* effective individual litigation is too costly to pursue; aggregate settlements provide few opportunities for participation and no avenues for appeal or error correction despite potential conflicts, *but* without aggregate settlements, cost and delay could be staggering and the relief may come too late; mediators or special masters might afford claimants additional participatory opportunities, *but* process is then less adversarial and may suffer from legitimacy problems.

The question then becomes not only how to strike an appropriate balance between competing procedural justice components, but also how to consider these realities. Initial balancing questions often incite deeper institutional questions such as how litigation risks and burdens should be distributed to achieve a fair balance of litigating power and avoid potentially serious social costs; what role, if any, should an economic cost-benefit analysis play in defining constitutionally protected procedural rights; why is it ever legitimate, in the name of enforcing procedural rights, for a court to substitute its own balance of costs and benefits for the balance already struck by a state legislature?²⁵⁷ These are just some of the Gordian knots without Alexandrian solutions raised when designing procedural justice for collective litigation.

255. See discussion *supra* p. 3.

256. See *supra* Part II.B.5.

257. Such questions are truly at the heart of all aggregate litigation. Shapiro, *supra* note 13, at 918 (identifying a number of institutional questions).

The goal then is to minimize potential injustice while balancing considerations such as cost and delay.²⁵⁸ Striking that balance is not easy. Any ultimate model for implementing procedural preferences must consider the claimants' various mindsets and levels of group cohesion, as well as how to minimize conflicts of interest and align the agent's interest with the principal's, when participation is important, and how to foster voice opportunities.

It may be that we need to look outside traditional legal approaches to research on moral and political philosophy, social dilemmas, group psychology, collective intentions, and democratic decision making to address the spectrum of needs within the mass tort continuum. Bearing in mind that claimants may have mixed motives and that their mindset is not static, when they are functioning more like individuals-within-the-collective or more like group-oriented individuals, institutional designers face different challenges. Individuals-within-the-collective, for instance, may expect autonomy and their own day in court. Group-oriented individuals, on the other hand, with joint intent or egocentric overlap, are more likely to form and coalesce if the group is smaller. But systemic interests often favor coordination and consolidation, making groups larger and more unwieldy.²⁵⁹ Consequently, my goal here is to lay the foundation for reconsidering the institutional framework by providing a more nuanced account of the hurdles for different types of claimants within the mass tort context.²⁶⁰

A. *The Persistence of Autonomy*

In theory, aggregation helps effectuate substantive goals, particularly in bringing small claims suits that otherwise would have negative value and high transaction costs.²⁶¹ But personal injury or products liability claims (claims frequently alleged by mass tort litigants) are different, more personal; litigants might initiate these suits on their own (perhaps with less success).²⁶² In these

258. Solum, *supra* note 28, at 239–40.

259. See *supra* Part II.A.2.

260. I should note that my next few articles will be addressing these issues and suggesting a prescriptive approach to the aggregate procedural justice dilemma.

261. As Roger Cramton describes:

Individual trials that replicate evidence of exposure, causation, and injury in case after case burden the courts, create judicial delay, and carry high transaction costs. In conventional tort litigation, approximately sixty percent of amounts paid go to accident victims. A study of asbestos litigation estimates that plaintiffs only receive about forty percent of each litigation dollar.

Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 817 (1995).

262. See Dana, *supra* note 73, at 294 (“[T]he stakes for victims of toxic torts and personal injuries from dangerous products are likely to be very high, such that the presence or absence, and fullness or nonfullness, of compensation can

cases, the policies underlying aggregation include avoiding inconsistent judgments, overcoming informational asymmetries on the plaintiffs' side, promoting cost-effective discovery, and leveraging economies of scale to level the playing field.²⁶³ Consequently, in these suits individual autonomy and procedural justice perceptions are more important than in negative-value suits or securities and antitrust class actions where personal involvement is less prevalent.²⁶⁴

There has long been discord between overly traditional individual process and mass tort litigation.²⁶⁵ Central to this debate is whether to treat nonclass aggregation in the same manner as individual lawsuits, or to create alternative governance theories to handle the increasing differences and complications that flow from adjudicating large numbers of claims.²⁶⁶ The problem, in part, is one of framing: if we are willing to buy into a consent-based model that allows individuals-within-the-collective to contractually exchange procedural justice components like participation and adversarial litigation for collective representation, then we must recognize that those individuals may want more for the trade, given that the exchange is fundamentally a willingness-to-accept problem.²⁶⁷

This willingness-to-accept problem has created an expectation that our system can no longer afford. A system founded on individual litigation, one that emphasizes the individual's right to her day in court, promulgates a classic discrepancy: what one is willing to pay initially for autonomy is different than what one is willing to accept to give up this customary right.²⁶⁸ In a sense, we are asking individuals-within-the-collective how much they will

often have a real impact on the life prospects of particular individuals and/or their survivors.”).

263. See *supra* pp. 103, 122.

264. Also, because individual issues predominate or choice-of-law problems exist, courts typically do not certify mass torts as class actions. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); see Rubenstein, *supra* note 164, at 376.

265. See, e.g., Lahav, *supra* note 20, at 576.

266. See, e.g., Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 925–26 (1998).

267. The questions thus become: should claimants be permitted to barter away procedural elements at the expense of systemic legitimacy; how much paternalism should we eschew in the name of “informed consent”; and should there be a mechanism by which the individual who truly wants individual litigation and is willing to bear its costs can avoid being swept up in the sea of aggregation? Put differently, should courts or private governance agreements allow individuals-within-the-collective to opt out of centralization? These questions deserve far more attention than I can give them here, in this bird's eye view, but I will revisit them in future work.

268. See generally Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993) (discussing the idea that the willingness to accept is greater than the willingness to pay).

demand to hand over a deeply rooted, socially constructed right to their own day in court.²⁶⁹ As demonstrated by psychologists and economists, what one is willing to pay initially differs from what one would demand to give up that something—in this case, the day in court ideal.²⁷⁰ Put simply, when someone feels that she owns or is entitled to something, the purchase price is higher than what she would be willing to pay for it in the first place.

Again, even in this discrepancy, there is a disparity between class litigation and nonclass aggregation. Most class litigation creates no expectancy of one's own day in court. Rather, in small claims or negative-value class actions, representatives litigate on behalf of absent members.²⁷¹ Thus, class actions do not pose the same willingness-to-accept problem since class members never expected autonomy. Group-oriented individuals, particularly those entering into the litigation with joint intent, likewise may have low autonomy expectations.²⁷² Individuals-within-the-collective and even group-oriented individuals with egocentric overlap, on the other hand, initiate what they might conceive as ordinary bipolar litigation. But they are then swept into involuntary centralization, even though they typically allege personal injury claims. Thus, these claimants may initially expect more autonomy.

This expectation might be explained in terms of endowment effects—i.e., now that one “owns” this right to a day in court it

269. *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (observing a “deep-rooted historic tradition that everyone should have his own day in court”) (citation omitted). See generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1268 (2003) (“It is no doubt true that, at least to some extent, preferences are socially constructed rather than fixed and unchanging.”).

270. For empirical evidence of this difference in other contexts, see *Waterfowl and Wetlands: Toward Bioeconomic Analysis*. JUDD HAMMACK & GARDNER MALLARD BROWN, JR., *WATERFOWL AND WETLANDS: TOWARD BIOECONOMIC ANALYSIS* 26 (1974) (surveying duck hunters about the value of protecting wetlands from development and showing that they were willing to pay \$247 per person for the right to prevent development but would demand \$1044 to give up their entitlement to hunt there); see also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330 (1990) (conducting a well-known study using Cornell coffee mugs); Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507, 512–13 (1984) (giving some participants a lottery ticket for a \$50 cash prize and other subjects only \$3 and then offering to buy or sell tickets for \$3; 82% of ticket holders kept their tickets, suggesting that the willingness-to-accept was greater); Murray B. Rutherford et al., *Assessing Environmental Losses: Judgments of Importance and Damage Schedules*, 22 HARV. ENVTL. L. REV. 51, 60–61 (1998) (studying environmental protection in terms of willingness-to-pay versus willingness-to-accept).

271. See, e.g., John Randall Whaley et al., *Precertification Discovery: A User's Guide*, 80 TUL. L. REV. 1827, 1831 (2006).

272. See, e.g., Lahav, *supra* note 20, at 610–11.

becomes more valuable.²⁷³ Thus, some claimants with consolidated or coordinated claims feel entitled to their own day in court. If explained by the endowment effect, this presumption may arise from the option value people place on a right or an object once they own it. Consequently, when people feel entitled to their day in court, altering the status quo is more difficult.²⁷⁴

Add to this difficulty an additional wrinkle: the individual's preexisting substantive right to maximize her own tort gains.²⁷⁵ Maximizing tort gains can again be explained as a willingness-to-accept versus a willingness-to-pay problem. In addition, individuals-within-the-collective may each have different ideas about how to maximize these gains, which makes collaboration difficult.²⁷⁶ One potential avenue for promoting harmony in this regard is enhancing group identification and thereby encouraging individuals-within-the-collective to become group-oriented. Put simply, reinforcing trust and realigning group interests with individual ones fosters collaboration.²⁷⁷ The problem here, however, is the same problem noted at the outset of this Article: many claimants within the aggregate never meet one another to form a group identity. So, while fair procedures, both in the judicial system and in intra-group relations, can motivate litigants to collaborate with one another, without the structural opportunity for collaboration, most claimants will remain individuals-within-the-collective. And while technology makes communication across geographic boundaries possible—as it did for breast implant plaintiffs—the barrier is higher. Still, mediation presents an opportunity to potentially change this dynamic, provided the mediator can point out egocentric overlap or catalyze litigants to recast their personal goals into homogeneous ones. But, if

273. See generally Korobkin, *supra* note 269, at 1228 (“The much studied ‘endowment effect’ stands for the principle that people tend to value goods more when they own them than when they do not.”) (citation omitted); see also Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 44 (1980) (coining the term “endowment effects”). While many studies of endowment effects deal with tangible objects, some studies in the environmental context have demonstrated that endowment effects similarly exist with regard to legal entitlements. See, e.g., Rutherford et al., *supra* note 270, at 60–61 (studying environmental protection in terms of willingness-to-pay versus willingness-to-accept).

274. As Korobkin notes:

If the endowment effect demonstrates that people value what they have more than what they do not have, all other things being equal, changing a law that reflects one balance of costs and benefits may be difficult even if a different balance would be preferred were the issue to be addressed today for the first time.

Korobkin, *supra* note 269, at 1266–67.

275. NAGAREDA, *supra* note 14, at 120 (elaborating on this fundamental doctrinal point).

276. De Cremer & Tyler, *supra* note 103, at 152.

277. *Id.* at 153.

individuals-within-the-collective are geographically dispersed, then mediation may present a feasibility problem. This begs the question of whether in-person mediation is a cost-effective strategy and whether the same goals could be accomplished absent physical proximity.²⁷⁸

Without reorienting litigation goals and overcoming autonomy expectations, consent-based models for individuals-within-the-collective tax and test the boundaries of adequate representation—and hence participation—because of conflicts of interest. Settling competing claims of individuals-within-the-collective may demand the impossible: scale economies create more effective litigation, but professional responsibility rules insist on conflict-free representation. As Richard Nagareda notes, “[e]ven someone choosing ‘behind the veil of ignorance’ between the tort system and a regime of damage averaging would be concerned with the applicable legal constraints on the self-appointed agent who purports to do the averaging.”²⁷⁹ This presents a two-fold difficulty in the problem of imperfect agency: (1) fractured cohesion in representation makes perfect agent faithfulness impossible and bears on legitimacy, and (2) because claimants functioning more as individuals-within-the-collective participate primarily through their attorneys, balkanization undercuts the participatory legitimacy thesis and may lead to misallocation.²⁸⁰

Class action scholars frequently lament the agency problem in class action litigation—that class counsel may neglect her duties to the class, elevate self-interest over the entity’s interest, and even collude with defendants.²⁸¹ The conventional answer in the class context is judicial oversight.²⁸² And while one can argue that this solution is merely cosmetic, it is surely more effective than self-policing through professional responsibility rules.²⁸³

Legal ethics rules presume individual autonomy and traditional attorney monitoring and thus take for granted that clients understand what it is that they are consenting to when they provide “informed consent.”²⁸⁴ But recall that most will simply follow their

278. Of course, it is possible that the mediator could meet with groups of claimants regionally.

279. Nagareda, *Autonomy*, *supra* note 126, at 792.

280. See generally Dana, *supra* note 73, at 325–27; Paul H. Edelman et al., *The Allocation Problem in Multiple-Claimant Representations*, 14 SUP. CT. ECON. REV. 95 (2006); Erichson, *supra* note 7, at 519–20; Gilbert, *supra* note 59, at 12–13 (noting that for collective agents to act through their members, its members must be jointly committed and understand the commitment).

281. See Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1436 (1997).

282. *Id.* at 1437.

283. See Erichson, *supra* note 7, at 568–72.

284. See Marcus, *supra* note 45 (manuscript at 28–29) (“[I]t may be [that] valid interest representation alone cannot function as a complete due process substitute for the consensual attorney-client relationship and the respect it

attorney's advice without full knowledge of its consequences and the attorney may fundamentally misunderstand her client's litigation goals. Thus, conceiving and implementing procedural justice for the individual-within-the-collective mindset requires either attitudinal shifts toward group cohesion or a more explicit understanding of the cost-benefit modeling. Moreover, ethical reforms are most clearly needed for claimants functioning principally as individuals-within-the-collective. Although I leave the precise nature of these ethical reforms for another day, reformers might consider the type of client, the group of clients' initial cohesion, and design appropriate voice and exit opportunities even on this relational level.

B. The Continued Rise of Unwieldy Litigation Groups

In some respects, the agency problem is less prevalent in smaller, more cohesive groups. Smaller groups, as noted by Mancur Olson in his classic work on collective action, tend to act more decisively, use resources more effectively, and have more autonomy than larger ones.²⁸⁵ Yet collective litigation seeks to strike an optimal balance in its numbers: the group must be sizeable enough to present a credible threat but not so terribly large that it becomes coercive, subverting procedural justice preferences and expectations.

Still, in the name of efficiency, courts increasingly avoid the jurisdictional redundancy and legal pluralism that once made smaller groups possible.²⁸⁶ Although horizontal, state-versus-state, redundancy has remained a reality, CAFA's recent enactment combined with traditional removal provisions has lessened vertical state-versus-federal redundancy.²⁸⁷ Synchronic jurisdictional redundancy has waned as concerns about inconsistent rulings, efficiency, and finality triumphed.²⁸⁸ Once in federal court, multiple

affords individual autonomy.”).

285. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–54 (1965) (citing GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 92 (Kurt H. Wolff trans., 1950)).

286. See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (outlining the functions of complex concurrency and jurisdictional redundancy); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2375 (2008) (stating that strategic choice and jurisdictional redundancy have come under attack); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 6 (1991) (stating that participants in aggregate litigation and commentators have changed their views about the propriety of aggregate litigation). “Legal pluralism” is “defined as a situation in which two or more legal systems coexist in the same social field.” Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 870 (1988). Legal pluralism may also include other normative orders such as families, communities, and work groups. *Id.* at 870–71.

287. Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 146 U. PA. L. REV. 1649, 1663–64 (2008).

288. Lahav, *supra* note 286, at 2370, 2381–83, 2388.

rules and statutes exist to facilitate centralization and coordination: the multi-district litigation statute,²⁸⁹ transfer statutes,²⁹⁰ permissive and compulsory party joinder,²⁹¹ and consolidation.²⁹² Other statutes and ex post doctrines such as full faith and credit, preclusion doctrines, the Anti-Injunction Act,²⁹³ the abstention doctrines,²⁹⁴ and the Rooker-Feldman Doctrine²⁹⁵ require deference between fora and reinforce finality—regardless of whether the case was aggregated or individual, correctly or incorrectly decided.²⁹⁶ Of course, the decisional stakes in nonclass aggregation are multiplied by the sheer number of litigants affected.

Repeat players—plaintiffs and defense attorneys as well as judges—favor coordination, centralization, and consolidation for various reasons.²⁹⁷ Take, for example, plaintiffs' attorneys. The economics of mass tort litigation dictate that plaintiffs' attorneys collect a sizeable inventory of claimants, often through advertisements or referrals, to present a credible threat to defendants and reduce litigation and expert witness costs per claimant.²⁹⁸

Collective litigation likewise advantages defendants in that it enables, to some degree, a broadly inclusive resolution—settlement.²⁹⁹ Defendants design these settlements to incorporate as

289. 28 U.S.C. § 1407 (2000). CAFA enables defendants to remove putative class actions from state to federal court so long as there is minimal diversity and the aggregate amount in controversy exceeds \$5 million. 28 U.S.C. § 1332(d) (Supp. V 2007).

290. 28 U.S.C. § 1406 (permitting transfer from an improper venue to a proper one); 28 U.S.C. § 1404 (permitting transfer for the convenience of the parties and witnesses and in the interest of justice).

291. FED. R. CIV. P. 20 (permissive party joinder); FED. R. CIV. P. 19 (compulsory party joinder).

292. FED. R. CIV. P. 42(a).

293. 28 U.S.C. § 2283; *see also* Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 459–64 (1999).

294. *E.g.*, *Younger v. Harris*, 401 U.S. 37, 54 (1971) (creating the *Younger* abstention doctrine).

295. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

296. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373–74 (1996).

297. I have previously explored this point at length. Chamblee [Burch], *supra* note 6, at 160; *see also* Issacharoff & Witt, *supra* note 44, at 1577–90 (observing the emergence of repeat players).

298. *See* NAGAREDA, *supra* note 14, at 13–14; Erichson, *supra* note 5, at 1774–75.

299. As Erichson explains,

A defendant's search for broadly inclusive resolution reflects a desire to put the dispute in the past and get on with business. It is driven, in part, by the financial markets' demand that businesses contain the liability risk. The broader the resolution, the easier it is for a defendant to quantify the remaining risk.

Erichson, *supra* note 5, at 1776.

many claimants as possible through most-favored nation provisions, liens on their assets in favor of settlement recipients, and walkaway provisions.³⁰⁰ Moreover, the Civil Justice Reform Act of 1990,³⁰¹ which mandates a report from every case and motion pending on the federal docket for more than six months, supplies ample incentives for federal judges to consolidate cases and promote settlement. This allows them to avoid the media scrutiny garnered by heavy case backlogs.³⁰² Given that coordination and consolidation advantages each repeat player, the continued practice of both is hardly surprising.

This impulse toward efficiency, centralization, and coordination is often at odds with procedural justice tenets. While collective litigation may diminish the free-rider problem, involuntary coordination may create a kidnapped rider. As defined by Roger Cramton, the “kidnapped rider” is “an individual deprived of any freedom of action by being drawn involuntarily into collective litigation.”³⁰³ Through forced collectivization, these individuals frequently lose meaningful participation opportunities and process control over their own cases.³⁰⁴ After collectivization, the new bureaucracy of compensation grids, statistical sampling, and claims resolution facilities envelops them.³⁰⁵ Because private parties, special masters, or magistrate court judges administer these schemes, they may lack the institutional legitimacy typically

300. See e.g., Class Action Settlement Agreement among Sulzer Orthopedics and Affiliated Entities Including Sulzer Medical Ltd. and Class Counsel on Behalf of Class Representatives (Aug. 23, 2001), Class Action Settlement Agreement, *In re Inter-Op Hip Prosthesis Liab. Litig.*, No. 01-CV-9000 (N.D. Ohio 2001) (original settlement); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, No. 1401, slip op. at 3 (N.D. Ohio Mar. 14, 2002) (summarizing final settlement terms); Press Release, Merck, Merck Agreement to Resolve U.S. VIOXX® Product Liability Lawsuits (Nov. 9, 2007), available at http://www.merck.com/newsroom/press_releases/corporate/2007_1109.html; see also NAGAREDA, *supra* note 14, at 151–59.

301. See RAND Institute for Civil Justice, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the CJRA* (1996), available at http://rand.org/pubs/research_briefs/RB9027/index1.html.

302. E.g., Joe Palazzolo, *New Report Identifies the Slowest Federal Judges in the Land*, LEGAL TIMES, Jan. 22, 2008, <http://www.law.com/jsp/article.jsp?id=1200650742999>.

303. Cramton, *supra* note 261, at 821–22; Rheingold, *supra* note 62, at 12–13 (“The courts are consolidating litigation to diminish their own burdens and thereby bringing plaintiff’s groups into existence, willingly or otherwise.”).

304. Cramton, *supra* note 261, at 822.

305. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.13; Cramton, *supra* note 261, at 821–22; see also Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 391, 413 (2007); McGovern, *supra* note 38, at 1362; Rheingold, *supra* note 62, at 5. For an example of an agency created to deal with a mass tort, see Kenneth R. Feinberg’s book, *What Is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11* (2005), which details Feinberg’s work involving the administrative allocation of funds.

afforded to legislatively created public-benefit programs.³⁰⁶ Moreover, because the kidnapped rider cannot leave the group (unless she dismisses her case) and traditionally has fewer voice opportunities, she may feel that the nonclass aggregation fails to adequately serve her interests.³⁰⁷ The group faces a similar dilemma: congruence of interest, absent exit mechanisms, is impossible.

Polycentric litigation may make smaller groups with increased homogeneity possible, but it is rarely permitted to run its course. By “polycentric litigation,” I mean litigation with multiple centers and I do not intend to import wholesale or take a position on Lon Fuller’s use of “polycentric disputes.”³⁰⁸ Still, it is worth noting that Fuller’s adjudication test—which asked whether a basis for principled decision existed and whether the judge could remain nonbiased while compassionately listening to all sides—is easier to satisfy with fewer issues and parties.³⁰⁹

As Robert Cover argued over twenty years ago, polycentric jurisdiction has utility in reducing error, avoiding corrupt judges (or even the suspicion of biased decision makers), and encouraging innovative norm articulation that is reinforced in independent jurisdictions.³¹⁰ Incidentally, it also makes adversarial litigation and voice opportunities more likely. For our purposes, Cover’s identification of strategic choice—that is, the ability to choose a forum where the risks of error are justly disbursed and the litigation is not in danger of becoming prohibitively unwieldy—is pivotal.³¹¹ Granted, polycentric litigation may generate inconsistent adjudications and lead to inefficiency. Plus, much research is needed on the effects of preclusion and the Anti-Injunction Act before reconsidering the merits of polycentric litigation.³¹² But, if

306. NAGAREDA, *supra* note 14, at 58–70.

307. Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 44.

308. My use of the term here most closely resembles that of “multi-centered litigation.” Lahav, *supra* note 286, at 2374–75. Lon Fuller has also used the term “polycentric disputes.” Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–99 (1978); see also Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1314 (1995).

309. LON F. FULLER, *ANATOMY OF THE LAW* 34–37 (1968); Bone, *supra* note 308, at 1319–20. Yet he did not foreclose the possibility of complex litigation. FULLER, *supra*, at 34–37, 163; see also Bone, *supra* note 308, at 1319–20; Lahav, *supra* note 286, at 2372–73 (“Many of the cases that courts and commentators seek to centralize, such as tort cases, fall squarely within the category of cases that Fuller would have considered appropriate for adjudication.”).

310. Cover, *supra* note 286, at 646–75.

311. *Id.* at 646.

312. See Lahav, *supra* note 286, at 2372 (“Atomization is the central quality of a system that requires complete individuation of lawsuits. It is an ideal based on the individual right to be heard and participate in a process that leads

the cost-benefit analysis persists, as is likely, it is at least worth adding procedural justice components into the consolidation and centralization equation alongside consistency, efficiency, and finality.

In sum, obstacles such as imperfect agency, lingering individual autonomy expectations, kidnapped riders, the collapse of jurisdictional redundancy and polycentric litigation, and the rise of larger litigation groups are just a few of the quagmires institutional designers face in formulating procedural justice for nonclass aggregate litigation. Even initially introducing procedural concerns from defendants' perspectives, such as finality and peacemaking, layers new tensions atop those briefly mentioned here. Procedural justice in mass litigation is a chronic balancing act. Thus, we must be ever-willing to make adjustments and to recalibrate and revisit conventional practice.

CONCLUSION

Procedural justice and nonclass aggregation need not be seen as concepts wholly in conflict. Granted, given the inherent Gordian knots, it is impossible to create perfect harmony between the two, but perfect is the enemy of good. Neither procedural justice nor aggregate litigation takes sole responsibility for adapting. Rather, procedural justice must account for the richness, texture, and cohesion present in group litigation. And players within nonclass aggregation must not forget that procedural justice reinforces rather than frustrates institutional legitimacy, voluntary compliance, and litigant dignity.

This Article is principally diagnostic and analytical; its most important claim is that a new framework is needed to ensure procedural justice and promote equilibrium between the intrinsic trade-offs. Not only does the conventional dichotomy between individual and class litigation misunderstand the nature of nonclass aggregation, it misconceives claimants' needs. Consequently, this Article is the beginning of an extensive conversation and a request to enter procedural justice into current cost-benefit equations. It calls for a nuanced approach to a dilemma that is too often ignored or compounded into traditional due process.

To probe beyond convention, I have relied on group theory and social psychology to unearth one potential vein for exploration: the rough delineations between group-oriented individuals and individuals-within-the-collective. While more cohesive groups lend

to the resolution of a lawsuit."); Resnik et al., *supra* note 25, at 308; Rubenstein, *supra* note 235, at 1893. This brief treatment of both polycentric litigation and atomization is quite general due to space constraints. I will, however, revisit it and the problems it presents with preclusion and removal in subsequent articles. For an overview of some of these problems, see Hoffman, *supra* note 293.

themselves to class certification, it is possible that smaller cadres of group-oriented individuals could tolerate less individual participation and satisfy voice needs through alternative avenues. The practicalities, impact on preclusion doctrines, drawbacks, and full development of this idea have yet to be explored and can reasonably be debated, but I offer it here as fodder for discussion in the emerging frontier of nonclass aggregation.