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Justice Is Hard, Let's Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime

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ARTICLES

JUSTICE IS HARD, LET'S GO SHOPPING! TRADING JUSTICE FOR EFFICIENCY UNDER THE NEW AGGREGATE SETTLEMENT REGIME

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I. ÜBER-SETTLEMENT IN THE AGGREGATE

The era of the über-settlement has arrived.[1] In November 2007, Merck & Co. announced a $4.85 billion settlement with plaintiffs suffering injuries from its painkiller, Vioxx.[2] Plaintiffs' attorneys, representing multiple Vioxx-injured plaintiffs, agreed to recommend settlement to *all* of their Vioxx clients if any *one* of their clients signed onto the settlement.[3] Should any clients reject the settlement terms, the agreement directed plaintiffs' lawyers to take "all necessary steps" to withdraw representation.[4] The deal became binding only if 85% of plaintiffs agreed to the settlement.[5]

The Vioxx settlement is not an anomaly.[6] Aggregate settlements are all the rage: In recent years plaintiffs' lawyers aggregated settlements in the tobacco litigation,[7] the Dalkon Shield litigation,[8] and the Fen-phen litigation,[9] to name a few.[10]

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[1] *See* Nathan Koppel, *Vioxx Plaintiffs' Choice: Settle or Lose Their Lawyer*, WALL ST. J., Nov. 16, 2007, at B1.

[2] *Id.*

[3] *Id.*

[4] *Id.* (internal quotation marks omitted). In January 2008, Vioxx agreed to modify the deal, which now notes that "[e]ach Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program." Posting of Heather Won Tesoriero to Wall Street Journal Health Blog, http://blogs.wsj.com/health/2008/01/18/vioxx-settlement-plan-keeps-rolling (Jan. 18, 2008, 15:54 EST) (internal quotation marks omitted). Plaintiffs' lawyers and defense counsel, however, agree that the language change represents a point of clarification and not a substantive change to the deal. *Id.*

[5] Alex Berenson, *Merck Is Said To Agree To Pay $4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1. On March 3, 2008, Merck announced that enough consumers claiming to be hurt by Vioxx had enrolled in the proposed settlement for the plan to proceed. *More than 44,000 Enroll in Vioxx Settlement*, ADVERSE EVENT REPORTING NEWS, Mar. 11, 2008, at 21.

[6] *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386 (2000) (citing prominent examples of aggregate settlements).

[7] *Id.*

[8] *Id.* at 389.

Yet, the definition of aggregate settlement remains elusive.[11] The ABA Formal Ethics Opinion defines aggregate settlement as occurring when "two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas."[12] Case studies may offer more helpful definitions—the Vioxx settlement can be summarized as an agreement between plaintiffs' lawyers and Merck's defense team to settle each plaintiff lawyer's portfolio of cases. While these agreements take different forms, their underlying purpose is to resolve multiple claims outside the courtroom. As in the Vioxx settlement, defendant's acceptance of settlement is usually conditioned upon acceptance by a percentage of the claimants.[13]

Regardless of its definition, aggregate settlement is undeniably popular due to the procedure's flexibility and its lack of judicial oversight. As the Supreme Court makes it more difficult to pursue class actions,[14] lawyers improvise solutions outside the courtroom where parties face few regulations when constructing aggregate settlement agreements. Model Rule of Professional Conduct 1.8(g) requires a client's written consent to an aggregate settlement agreement and the lawyer's disclosure of all other claims involved in the settlement; however, aggregate settlements remain otherwise ungoverned.[15]

While some scholars find the increase in aggregate settlement proceedings problematic,[16] others rationalize aggregate settlement's ability to trade off individualized justice

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[9] *Id.* at 387, n.4.

[10] *Id.* at 386–401.

[11] Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1769 (2005) (labeling aggregate settlement "one of the most important yet least defined terms in complex litigation").

[12] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-438 (2006) (discussing a lawyer proposing to make or accept an aggregate settlement or aggregate agreement).

[13] *See* Nancy J. Moore, *The American Law Institute's Draft Proposal To Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 397–98 (2008).

[14] *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); Amchem Prods., Inc., v. Windsor, 521 U.S. 591, 623–26 (1997). These cases are discussed at greater length in §ection II.B.

[15] MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2007).

[16] *See* Koppel, *supra* note 1. The article cites Stanford Law School professor Deborah Rhode who worries that the settlement "stacks the choice for the client." *Id.* (internal quotation marks omitted); *see also* Erichson, *supra* note 6, at 384–86; Moore, *supra* note 13, at 396–401.

for efficiency.[17] Scholars' justifications for these tradeoffs deserve attention, especially because current proposals seek to further eliminate client consent in aggregate settlements. In a recent article, John Fabian Witt observed that "aggregating strategies of the plaintiffs' bar . . . adopt rules of thumb to minimize the administrative costs of tort claim settlements."[18] He rationalized aggregate strategies, noting that from behind a "veil of ignorance" most plaintiffs should agree to aggregate their claims ex ante "to increase the size of the settlement pie . . . by adopting the efficiencies of aggregation."[19] In making this appeal, Witt minimizes aggregate settlement's impact on individual liberties by implying that all rational people would consent to this tradeoff in advance. In other words, Witt justifies aggregate settlement's tradeoffs by appealing to a sense of fairness akin to the vision of liberalism expounded by renowned political theorist, John Rawls.[20]

Even Rawls's liberalism, however, cannot justify the tradeoffs made in our modern aggregate settlement regime. Witt relies on Rawls's difference principle[21]—making the least advantaged group as well off as possible when distributing social goods—to applaud aggregate settlement's ability to appease large groups of plaintiffs. Reliance on the difference principle,

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[17] *See, e.g.*, Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–49 (1997).

[18] John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 272 (2007).

[19] *Id.*

[20] *Id.* Rawlsian liberalism is possibly the weakest liberalism with regard to its demand on personal autonomy. Rawls pushes ex ante consent further than any other major liberal theorist, drawing sharp criticism from libertarian liberals in the process. Witt's appeal to Rawls stretches Rawls's ex ante justification even further than Rawls. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 310 (1974) (discussing Rawls's assertion that there is no single model for a society that sufficiently addresses the needs of all members). This is not to say that Witt fully endorses the current aggregate settlement system; instead, he offers his own critiques of the system. Specifically, both this Article and Witt argue that plaintiff attorneys' interests should be realigned to better match those of their clients. This Article, however, focuses on Witt's reference to Rawls because new developments and proposals to allow ex ante consent in aggregate settlements deserve attention. Witt's reference to Rawls offers us a starting point for this examination.

[21] *See* Witt, *supra* note 18, at 272.

however, exposes Witt's argument to the critique that aggregate settlement does not respect individual rights.[22]

Witt sidesteps this potential critique by using Rawls's second principle of justice.[23] Witt argues that from "behind a veil of ignorance" plaintiffs would choose aggregate settlement over individualized redress. Thus, Witt attempts to justify a system of tradeoffs as acceptable to our liberal philosophic sensibilities by merely echoing Rawls's veil of ignorance argument from *A Theory of Justice*.[24] In reality, Witt only appeals to fragmentary elements of one of the deepest and richest versions of liberal political thought. He applies these fragments arbitrarily to explain that aggregate settlement does not violate individual rights.

Witt's reliance on the "veil of ignorance" takes Rawls's ideas out of context. Rawls's difference principle is the *second* of two principles. Rawls's first principle states: "Each person has the same indefeasible claim to a *fully adequate scheme of equal basic liberties*, which scheme is compatible with the same scheme of liberties for all . . . ."[25] In omitting the first principle of justice in defending the aggregate settlement scheme, Witt avoids confronting the system's most serious flaw—aggregate settlement is at odds with the basic structure of liberal society.

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[22] Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 88 (1984). Witt's argument conflates the rule of maximizing the minimum—the *maximin* rule—as rule of utility with the difference principle, which, in the context of *A Theory of Justice*, is a rule for fair distribution within a basic structure of society where other rights that Witt has ignored are prior.

> [Rawls] argues against utilitarianism that it fails to take seriously the distinction between persons. In seeking to maximize the general welfare, the utilitarian treats society as whole as if it were a single person; it conflates our many, diverse desires into a single system of desires, and tries to maximize. It is indifferent to the distribution of satisfactions among persons, except insofar as this may affect the overall sum. But this fails to respect our plurality and distinctness. It uses some as means to the happiness of all, and so fails to respect each as an end in himself.

Id.

[23] JOHN RAWLS, POLITICAL LIBERALISM 291 (1993) ("Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.") [hereinafter POLITICAL LIBERALISM].

[24] *See* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (1971) [hereinafter A THEORY OF JUSTICE].

[25] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42 (Erin Kelly ed., 2001) (emphasis added) [hereinafter JUSTICE AS FAIRNESS].

The omission is fatal when one considers that Rawls's principles are ordered first and second intentionally because "[t]he principles are serial and cannot be traded against one another; thus no amount of distributive benefit can interfere with the priority of liberty."[26]

In citing the difference principle out of its broader justificatory context, Witt overlooks aggregate settlement's effects on the law's ability to ensure that "[e]ach person has the same indefeasible claim to a fully adequate scheme of equal basic liberties."[27] All this is not to single out John Fabian Witt's work—Witt stresses that "the way we regulate the [plaintiffs' bar] warrants attention and perhaps even revision."[28] In additon, most scholars ignore questions about invidual rights because the aggregate settlement scheme fails on this issue. In echoing Rawls, Witt is obviously concerned about protecting individual rights within the settlement system. His justification of ex ante consent, however, is insufficient.

Scholars should care when procedural mechanisms erase or trade off liberal rights in our justice system. America is a fundamentally liberal society, and no value is more important than consent.[29] To erode the basic organizing principles that legitimize our polity as a system of fair cooperation ultimately threatens the utility of all our political institutions. Without a general faith that our political system is a fair system of cooperation, disputes cannot be settled meaningfully.[30]

New developments in aggregate settlement—including proposals to further facilitate aggregate settlement—indicate that the time is ripe to examine these changes' effects on our justice system. This piece explores the ways that scholars rationalize tradeoffs that society accepts in condoning and encouraging aggregate settlements.[31] This Article does not

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[26] Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860, 1862 (1994).

[27] JUSTICE AS FAIRNESS, *supra* note 25, at 42.

[28] *See* Witt, *supra* note 18, at 261.

[29] STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 22–25 (1995).

[30] *See generally* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Comp., Inc. 1980) (1690); Elinor Ostrom, James Walker & Roy Gardner, *Covenants with and Without a Sword: Self-Governance Is Possible*, 86 AM. POL. SCI. REV. 404, 404 (1992).

[31] In 1984, Owen Fiss attempted a similar undertaking in *Against Settlement*. Fiss's thesis deserves reconsideration in light of the aggregate settlement system's

suggest that the current settlement system must be discarded; however, the tradeoffs must be recognized and discussed. The aggregate settlement system has the potential to better protect liberal ideas, and any proposal that would further facilitate aggregate settlement or eliminate individual plaintiff consent should be seriously examined.

Section II explains why the organizing principles of our political and judicial rules must withstand scrutiny from politically liberal objections. As the justificatory foundation of society's basic structure, politically liberal principles cannot be dematerialized in exchange for alternative utilities. This Section also explores how shifts in our judicial rules gave rise to the era of "über-settlement." Section III explains why a sufficiently liberal society cannot accommodate the tradeoffs that our current aggregate settlement system requires and cannot accommodate proposals that would further facilitate aggregate settlement. Finally, Section IV explores the ways that society can better manage these tradeoffs. Specifically, this Section critiques recent proposals to change the aggregate settlement rule and examines the Vioxx settlement.

II. SETTLEMENT, AGGREGATION, AND LIBERALISM: HOW DID WE GET HERE?

A. *Liberalism, Law, and the Political Regime*

Law and liberalism have an indirect relationship. They are both parts of our larger political regime.[32] In the American political regime, the law is an instrument for the acceptable use of judicial power and liberalism is its public philosophy. Our

evolution since 1984. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

[32] *See* STEPHEN L. ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON 74–116 (2006). *See generally* HANNAH ARENDT, ON REVOLUTION (Penguin 1990); BENJAMIN BARBER, STRONG DEMOCRACY (1984); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1986). Elkin argues that Madison views the relationship between law, liberalism, and the political regime in mind in constructing a framework for the American political regime. ELKIN, *supra*, at 19–50. Going further back, Aristotle and Montesquieu view the political regime as having a similar structure to Madison's view. *See* ARISTOTLE, THE POLITICS, bk. 2, 3 (Carnes Lord trans., Univ. of Chi. Press 1984); MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 29 (Raymond Geuss & Quentin Skinner eds., Anne M. Cohler, et al. trans. & eds., Cambridge Univ. Press 2000) (1748).

liberal political values inform our commitments to the basic structure of society and give this basic form meaning.[33] America's judicial institutions, actors, and customs have a generally liberal character.[34] Liberalism's critical role in our society means that proposed changes to legal procedures and legal institutions can be objected to on liberal grounds. While liberalism cannot inform all legal decisions,[35] the law must not undermine the values that legitimate the structure in which the law resides. If the law undermines our basic rights, it may undermine justification for its own existence.

1. What is Liberalism?

Identifying liberalism's basic characteristics helps one understand why these critical liberal traits justify the basic structure of our political society. "Liberalism," writes Stephen Holmes, "is neither a vague Zeitgeist nor the outlook of modern man, but a clearly identifiable set of principles and institutional choices endorsed by specific politicians, publicists, and popular movements."[36] All liberals do not enumerate liberalism's major commitments uniformly because liberalism is a dynamic political philosophy whose own basic tenants are subject to scrutiny and revision.[37] John Rawls wrote that liberalism has three "main features." Rawls defines these features as such:

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[33] John Rawls writes that the politically liberal values that justify the basic structures of society form "a moral conception worked out for a specific kind of subject, namely, for political, social, and economic institutions." POLITICAL LIBERALISM, *supra* note 23, at 11.

[34] Stephen Macedo, *The Politics of Justification*, 18 POL. THEORY 280, 280 (1990) ("Commitments to reason giving and reason demanding inform some of our most valuable political practices. Judicial review, most obviously, helps ensure that legislative and executive acts are reasonable in constitutional terms: In court it is not the fact of power but the display of reasons and evidence that counts.").

[35] *See* JUSTICE AS FAIRNESS, *supra* note 25, at 183; *see also* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 245 (1985) ("The conception of the citizen as a free and equal person is not a moral ideal to govern all of life, but is rather an ideal belonging . . . to the basic structure [of society].").

[36] HOLMES, *supra* note 29, at 13.

[37] *See* Macedo, *supra* note 34, at 281. Macedo asserts:

> At its most basic level, public justification has dual aims: It seeks reflective justification (good reasons), but it also seeks reasons that can be widely seen to be good by persons such as they are. These dual aims are pursued together so that, politically speaking at least, there is no independent standard against which a political theory can be judged.

Id.; *see also* POLITICAL LIBERALISM, *supra* note 23, at 52–55.

> [F]irst, a specification of certain basic rights, liberties and opportunities (of a kind familiar from constitutional democratic regimes); second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.[38]

Similarly, Robert Talisse recently identified five "major commitments" that liberals hold.[39] He identifies these commitments as: (1) Primacy of the Individual, (2) Moral Individualism, (3) Moral Autonomy, (4) Political Noninterference, and (5) Political Neutrality.[40] Liberals are not interested in essentializing the correct number of liberalism's main features as a public philosophy. Whether "main features" or "major commitments," the basic priorities of liberals overlap to justify a system of governance that "gives pride . . . to justice, fairness, and individual rights."[41] Liberalism's "core thesis is this: a just society seeks not to promote any particular ends, but enables its citizens to pursue their own ends, consistent with a similar liberty for all."[42]

Liberalism as a public philosophy not only provides justifiable political values, but also space and opportunity for those who live in a liberal world to reevaluate and possibly

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[38] POLITICAL LIBERALISM, *supra* note 23, at 6.

[39] ROBERT B. TALISSE, DEMOCRACY AFTER LIBERALISM: PRAGMATISIM AND DELIBERATIVE POLITICS 16–20 (2005) (citing MARTHA NUSSBAUM, *The Feminist Critique of Liberalism*, *in* SEX AND SOCIAL JUSTICE (1999); *see generally* A THEORY OF JUSTICE, *supra* note 24; RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Macmillan 1985); JOHN STEWART MILL, ON LIBERTY (Penguin Books 1985).

[40] TALISSE, *supra* note 39, at 15–20. Talisse provides quick definitions for each of these commitments (with the definitions shaped and assisted by those cited in the footnote above). *Primacy of the Individual* is stated to mean, "[t]he individual person is the fundamental element . . . in political theorizing." *Id.* at 17. *Moral Individualism* is defined as "[t]he good of each individual is morally prior to the good of groups of individuals." *Id. Moral Autonomy* "is properly the prerogative of the individual to identify, select, and pursue a conception of the good." *Id.* at 19. *Political Noninterference* "is justified in obstructing an individual in his pursuit of his conception of the good only in cases where his action interferes with another's legitimate pursuit of the good." *Id.* at 20. Finally, *Political Neutrality* is defined as, "[s]tate action and policy must be neutral among the various conceptions of the good which citizens may rightfully adopt." *Id.*

[41] Sandel, *supra* note 22, at 82.

[42] *Id.*

revise the values of their political community through rational deliberation.[43] Liberalism's neutrality and autonomy principles allow for an evolving consideration of who we are and what we value, even while we are interpreting the core values of liberalism.[44] A polity whose public philosophy remains uninterested in continued consideration of its own constitution or whose institutional design is aimed only at economizing particular instrumental ends is likely to learn "that in the pursuit of results we may consume the ingredients of a satisfactory political life."[45] Thus, a liberal public philosophy is justifiable, not only for the inherent analytical worth of its claims, but also for the variety of lives that its principles animate.[46]

When liberals defend arrangements of liberal values or prioritize certain values as more deserving of our attention than others, they do not generate such claims *ex nihilo*. Liberals have a broad set of constitutive concerns that aim to square the practice of our daily lives with the aspirations for coexisting in a way that promotes human flourishing.[47] Liberalism, despite its

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[43] *See* Stephen L. Elkin, *Economic and Political Rationality*, 18 POLITY 253, 264–69 (1985); LON L. FULLER, *Means and Ends*, *in* THE PRINCIPLES OF SOCIAL ORDER 47, 60 (Kenneth I. Winston ed., 1981).

[44] Amy Gutmann and Dennis Thompson argue that self-reflection on our basic principles allows for our way of life to remain "dynamic." AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 6 (2004) (emphasis omitted). They write, "[a]lthough deliberation aims at a justifiable decision, it does not presuppose that the decision at hand will in fact be justified, let alone that a justification today will suffice for the indefinite future." *Id.*

[45] Elkin, *supra* note 43, at 270.

[46] Robert Nozick puts the case for pluralism this way:

> Wittgenstein, Elizabeth Taylor, Bertrand Russell, Thomas Merton, Yogi Berra, Allen Ginsburg, . . . Buddha, Frank Sinatra, Columbus, Freud, Norman Mailer, Ayn Rand, Baron Rothschild, Ted Williams, Thomas Edison, H. L. Mencken, Thomas Jefferson, Ralph Ellison, Bobby Fischer, Emma Goldman, Peter Kropotkin, you, and your parents. Is there really *one* kind of life which is best for each of these people?

NOZICK, *supra* note 20, at 310.

On this point, Rawls and Nozick seem to find at least partial agreement, as Rawls writes: "I believe that a democratic society is not and cannot be a community, where by a community I mean a body of persons united in affirming the same comprehensive, or partially comprehensive, doctrine. The fact of reasonable pluralism which characterizes a society with free institutions makes this impossible." JUSTICE AS FAIRNESS, *supra* note 25, at 3.

[47] For example, Isaiah Berlin defends pluralism on the grounds that

> [p]luralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal than the goals of those who seek in the

allowance for liberty of opinion to all, is a thoroughly and mutually developed public philosophy that draws upon the resources and mental energies of many of history's most serious philosophic and scientific works. Even Robert Nozick, who audaciously opens *Anarchy, State, and Utopia* asserting that "[i]ndividuals have rights," maintains that this claim is indebted to centuries of prior work on contractarian liberalism.[48] Additionally, when John Rawls argues for the difference principle, it is in the context of his massive explanation of liberal political thought in *A Theory of Justice*, from which the principle of maximin utility is inseparable.[49] Even when Rawls advances the difference principle in the context of *A Theory of Justice*, he argues that this massive, detailed account of liberalism exists within a broader context of liberal justification, which he calls political liberalism.[50]

2. Comprehensive v. Political Liberalism

There are different ways to reasonably operate inside of society as a fair system of cooperation.[51] Our basic liberal principles are *politically liberal* because they are agreed upon by overlapping consensus amongst all particular, *comprehensively liberal* views of how a fair system of cooperation should operate.[52] All comprehensive doctrines agree on the basic principles of political liberalism even if they reasonably differ on

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> great, disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.

ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 171 (1969).

[48] *See* NOZICK, *supra* note 20, at ix, 7–9.

[49] *See generally* A THEORY OF JUSTICE, *supra* note 24.

[50] *See id.*; *see also* Rawls, *supra* note 35, at 244–47.

[51] *See* A THEORY OF JUSTICE, *supra* note 24, at 36.

[52] Rawls defines a comprehensive doctrine as a doctrinal view that "however understood, is usually said to hold for all kinds of subjects ranging from the conduct of individuals and personal relations to the organization of society as a whole as well as to the law of peoples." POLITICAL LIBERALISM, *supra* note 23, at 13. He further elaborates that "[a] conception is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system." *Id.* In comparison to this definition of a comprehensive doctrine, Rawls defines political liberalism by writing, "a political conception tries to elaborate a reasonable conception for the basic structure alone and involves, so far as possible, no wider commitment to any other doctrine." *Id.*

questions of institutional arrangements and schemes for the distribution of resources.[53] There is no further legitimate way to reconcile distinct points of view and experiences of individuals participating in society as a fair system of cooperation.[54] Political liberalism lays the ground rules for society's basic structure: Citizens must engage in politics to compete and choose among competing reasonable views of what is fair.[55] The role of liberalism, so described, reflects the principled stance of the American constitutional regime.[56]

In such a framework, legal decisions are instrumental, particular, and carried out through—hopefully—well-designed institutions or through the common, recognizable, everyday practice of law.[57] Yet, the everyday practice of law takes place in a political ecosystem of society as a fair system of cooperation. Everyday law must act with care towards its own habitat. Consistent with this observation, political actors, citizen participants, and judges generally carry in their own hearts and

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[53] Rawls writes, in regard to the relationship between the fundamental agreements that bind society in a fair system of cooperation, "we can say that when basic institutions satisfy a political conception of justice mutually acknowledged by citizens affirming comprehensive doctrines in a reasonable overlapping consensus, this fact confirms that those institutions allow sufficient space for ways of life worthy of citizens' devoted support." *Id.* at 187.

[54] For example, imagine a conflict between interested parties where state political neutrality might conflict with moral autonomy. While some members of society might err towards ensuring state political neutrality, others may favor moral autonomy. Ultimately, this conflict is a political dispute within a fair liberal society. Generally, by favoring a slightly different tradeoff, neither party denies the importance of the opposing party's liberal value. When such conflicts arise in the context of constitutional disputes, we often look for the basic structure of society to crown a winner in the values debate when, in fact, the architecture supports both positions. *See id.*

[55] *See* HOLMES, *supra* note 29, at 31–36; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 28–29 (1983).

[56] *See* POLITICAL LIBERALISM, *supra* note 23, at 8-11. Rawls specifically calls this "[t]he public political culture." *Id.* at 9.

[57] *See* ELKIN, *supra* note 32, at 1–18. While Elkin agrees that liberalism ought to play this sort of role in a good political regime, he suspects that we currently hold onto two bad forms of liberal public philosophy in "New Deal Liberalism and-free market conservatism," both of which Elkin believes, "do not help matters." *Id.* at 266. For another liberal view of the role of public philosophy as described in the text, see generally POLITICAL LIBERALISM, *supra* note 23, and JUSTICE AS FAIRNESS, *supra* note 25. For a view that sees the same role for public philosophy in the political regime but disagrees on the suitability of liberalism see MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 346–49 (1996).

minds values of a liberal character.[58] While most legal outcomes are formalistic and procedural in day-to-day practice, outcomes remain legitimate because they are justified by the principles of a system of fair cooperation.[59]

Thus, the basic commitments of political liberalism measure the justificatory logic of our broader constitutional arrangements.[60] When the structural fairness of judicial outcomes is questioned, arrangements must demonstrate themselves to be acceptably politically liberal. Judicial outcomes are not simply the result of a coin toss; they represent the deliberate exercise of judicial power.[61] Thus, proposed structural changes to judicial powers should concern not only the legal community, but anyone concerned with our political regime as a whole. Acceptable self-governance depends upon a reliable, common public philosophy, which has, in the case of the United States, a politically liberal character.

3. When Liberalism?

In some sense, all political acts are subject to scrutiny from the perspective of political theory. Michael Sandel explains that "[t]o engage in a political practice is already to stand in relation to theory."[62] In particular, the good political regime stands in relation to theory in ways that are practical and responsible to its improvement and maintenance.[63] Any change to the structure of

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[58] Alexis de Tocqueville observed that American judges were granted the power of judicial review so readily in part because "[i]n America, political theories are simpler and more rational." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 95 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago 2000).

[59] As Macedo writes:

> The conviction that other people should be treated reasonably, that the application of power should be accompanied by conscientious and open efforts to meet objections with reasons, is an important source of sustenance for liberal constitutionalism. This aspiration to public reasonableness helps explain and justify our commitment to the rule of law and to judicial review: one law applies to citizens and public officials alike, and individuals have the right to challenge elected officials to defend their interpretations of that law in court.

Stephen Macedo, *Liberal Virtues, Constitutional Community*, 50 REV. POL. 215, 215 (1988).

[60] *See* ELKIN, *supra* note 32, at 1–16.

[61] THE FEDERALIST NO. 47 (James Madison).

[62] MICHAEL J. SANDEL, *The Procedural Republic and the Unencumbered Self*, *in* PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 156, 156 (2005).

[63] *See, e.g.*, CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS 249–53 (1977).

our government potentially restructures many different institutional relationships. Even on an abstract level, we can imagine any proposed reform triggering costly reorganizations between government institutions, government and the governed, government and business, business and consumers, and between various private firms. If institutions are the furniture of our existence, then there are so many pieces of furniture that the slightest change in the room will prove a massive headache if we wish to hold the room together.[64] The most dangerous reforms are the ones that deny that the room can be held together at all. Those proposed reforms undermine the liberties that form society's basic structure.[65]

In the material world, politically liberal virtues can do no more than animate our aspirations for practical, justifiable governance. Political regimes that make liberal virtues real cannot also make them perfect.[66] For example, liberalism values moral autonomy and state neutrality on competing visions of the good, but the so-called liberal state seems to paradoxically undercut these values by coercing non-liberal views to accept the values of a liberal society.[67] Political liberalism does not impose this constraint. It stems from the fact that we all share one

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[64] *See* Charles E. Lindblom, *The Market as Prison*, 44 J. POL. 324, 329–32 (1982).

[65] Rawls, in fact, saw political liberalism as a way for us to take basic constitutional principles off the table, and allow ourselves to engage in controversial political discussions while agreeing to respect the basic structure of society. Rawls was not naïve to the fact that basic constitutional questions could be subject to questioning; indeed, if they are good principles, they can withstand such scrutiny. Nor was Rawls naïve about the fact that sometimes force may be necessary to combat unreasonableness if it proved resistant. The aspiration, however, of political liberalism is to serve, as much as possible and as best as possible, as a fair framework that politics can operate *within*, and as operating from within, may appeal out to politically liberal principles for justification. *See* POLITICAL LIBERALISM, *supra* note 23, at 150–54.

[66] Consider Alexander Hamilton's thoughts on the matter: " 'Why,' say they, 'should we adopt an imperfect thing? Why not amend it and make it perfect before it is irrevocably established?' " Hamilton answers his own question: "[T]he system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such an one as promises every species of security which a reasonable people can desire." A few sentences later, he adds, "I never expect to see a perfect work from imperfect man." THE FEDERALIST NO. 85 (Alexander Hamilton).

[67] Robert Talisse, *Can Liberals Take Their Own Side in an Argument?*, *in* LIVING IN A GLOBAL WORLD (Yvonne Raley & Gerhard Preyer eds.) (forthcoming 2009); William A. Galston, *Value Pluralism and Contemporary Political Philosophy*, 93 AM. POL. SCI. REV. 769, 770 (1999).

material world and hold reasonably plural points of view.[68] If liberalism desires to appear as real, it must accept its role as a general public philosophy that works in the context of a particular set of governing institutions, cultures, and economies. In other words, to fit in with its real world counterparts—institutions, social mores, shared histories, geographic and technological realities, and so on—liberalism must give a little to get a little.[69]

Due to the tradeoffs involved in the relationship between reforms and the nature of the world we live in, the liberal critique cannot come from the perspective of formalistic liberal purity. Still, the liberal virtues that animate our political culture cannot remain silent on the arrangement of judicial outcomes. The judicial branch is separate in our political model only insofar as the separation promotes the public good and protects against tyranny.[70] Judicial power that potentially threatens the public good or retards the abilities of the regime to combat tyranny are not exclusively the domain of practitioners of everyday law.[71] Rejecting both liberal formalism and legal formalism, we are left with difficult considerations about the tradeoffs at stake in any major reform within the political regime. This difficulty makes liberal normative arguments about changes in the structure of

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[68] HANNAH ARENDT, THE HUMAN CONDITION 7 (U. Chicago Press 1998) (1958) ("Action, the only activity that goes on directly between men without the intermediary of things or matter, corresponds to the human condition of plurality, to the fact that men, not Man, live on the earth and inhabit the world.").

[69] Stephen Holmes writes: "Liberalism will always remain an aspiration. It can never be fully realized or institutionalized. But it can provide a guide and stimulus to action." HOLMES, *supra* note 29, at 41.

[70] ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 4–33, 155–60 (2006). Dahl's analysis of the Madisonian model concludes that it assumes that there is such thing as a knowable public good and the best way to reach it would be through good leadership. *Id.* at 160. However, since good leadership cannot be relied upon, the separation of powers scheme is meant to align more selfish motivations closer towards public interest. *Id.* Dahl also concludes that the Madisonian model's primary objective is to prevent both majority tyranny and minority tyranny as best as possible. *Id.* at 9.

[71] JUDITH N. SHKLAR, LEGALISM 2–3 (1964). Shklar writes:

> The habits of mind appropriate, within narrow limits, to the procedures of law courts in the most stable legal systems have been expanded to provide legal theory and ideology with an entire system of thought and values. This procedure has served its own ends very well: it aims at preserving law from irrelevant considerations, but it has ended by fencing legal thinking off from all contact with the rest of historical thought and experience.

Id.

judicial outcomes subtle, not toothless. Generally speaking, law and economics arguments already make this distinction by advancing the position that consent and moral autonomy are practically ironclad virtues never to be given up for utility or social equality.[72] New proposals and developments in the aggregate settlement regime, however, abandon this view of liberal values.

B. Aggregate Settlement: How Did We Get Here?

Two trends drove the shift away from individual trials towards an aggregate settlement system,[73] and this Section provides a brief overview of aggregate settlement's evolution. First, this Section documents the shift from trials to settlements, a shift driven by procedural changes that increased trial costs. Second, the class action suit and other formal methods of aggregation are increasingly unable to resolve mass tort disputes. Because the class action has failed to provide closure for companies seeking relief, lawyers turned to aggregate settlement as a means to fill in the gap and side-step the Supreme Court's limits on class actions. Settlement's increasing role in our society, coupled with the demise of the class action and other forms of mass dispute resolution, created today's aggregate settlement system.

1. Why Settlement?

Several scholars have documented the shift towards settlement away from trials.[74] Today, 95% of cases settle.[75]

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[72] *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960).

[73] Some authors, however, suggest that the world of mass tort litigation has always been governed by an aggregate system in some respects. *See generally* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). Our Article, however, addresses the justifications for a system of aggregation. Thus, even if Witt and Issacharoff are correct in arguing aggregation has its roots deep in American history, such a system must be justified.

[74] *See generally* Erichson, *supra* note 6, at 397–401 (documenting the rise of aggregate settlements); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 593 (2005).

[75] Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1266 (2002).

Indeed, some theorists suggest that trial represents a failure in negotiations, suggesting that the question is not "why settlement" but rather "why trial?"[76] While scholars agree that the number of cases tried has decreased, their explanations as to why the shift occurred varies, and scholars offer several convincing explanations for the shift. First, the increasing costs and time of pursing a case through trial encourage settlement before parties bear these costs. Second, changes to procedure rules, including Multidistrict Litigation ("MDL") procedures and the Rules of Civil Procedure, increased the judge's ability to encourage settlement.

A standard law and economics primer demonstrates settlement's efficiency. The familiar story explains that as trials became increasingly expensive, parities realized that they could split a bigger pie between themselves if they could eliminate or reduce trial costs.[77] Agreeing to a division of resources before litigation's expensive trial phase leaves everyone, except, perhaps lawyers, better off.[78] Moreover, litigation, with its variable outcomes, is a riskier proposition than settlement; thus, where parties are risk averse, settlement becomes the more attractive route.[79]

Augmenting this story, Judith Resnick's work highlights the ways that rule changes encourage settlement, making discovery more costly.[80] Resnik cites amendments to the Federal Rules of Civil Procedure that "encourag[e] litigants to end their disputes through contracts for dismissal or judgment."[81] Judges adjudicated increasingly complex cases, and their desire to control these cases helped them develop managerial tools to encourage settlement.[82] In 1983, the drafters codified some

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[76] *See generally* Gross & Syverud, *supra* note 74, at 320.

[77] *See, e.g., id.*; Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 609 (2008).

[78] Scholars note that "settlement becomes more likely when the trial costs are larger." Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442, 444 (Peter Newman ed., 1998).

[79] *Id.* at 442.

[80] *See* Resnik, *supra* note 74, at 609–10.

[81] *Id.* at 597 ("[J]udges who once were skeptical of devolution of judicial authority to agency factfinders now permit the reallocation of adjudication to government officials working outside courthouses.").

[82] *Id.* at 612.

of these methods in Rule 16, authorizing judges to facilitate settlement.[83]

The rise of the MDL panel further exacerbated the push towards settlement.[84] Empowered by statute, the Judicial Panel on Multidistrict Litigation transfers related cases to a single district court for all pretrial proceedings.[85] Because the MDL court cannot proceed to trial, but only resolves pretrial matters, the judges encourage settlement.[86] Thus, MDL cases often settle without even the threat of trial where defense lawyers realize that judges loathe letting these cases return to a home court for trial.

These changes made judges more comfortable passing cases to extrajudicial rulemakers and arbitrators.[87] Because civil procedure rules endorse settlement, judges are encouraged to accept aggregate settlement as an appropriate procedure for resolving conflicts. Despite these procedural changes, little attention is paid to the larger implications that these procedures have on our system of governance and justice.

2. Why Aggregation?

As with the rise of settlement, scholars frequently spend more time analyzing the existence of aggregation than explaining why the shift occurred. That said, two factors appear to drive the plaintiffs' bar's move towards aggregation: a desire for increased efficiency and the failings of other methods for resolving these conflicts.

First, the plaintiffs' bar increased aggregation to pursue advantages of scale. John Fabian Witt argues that Belli's *Modern Damages* treatise marked a turning point for the plaintiffs' bar.[88] The book "collected and disseminated information about claims values that had previously been

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[83] *Id.* at 613. *See also* FED. R. CIV. P. 16 (enabling judges to consider the possibility of settlement or the use of extrajudicial procedures to resolve the dispute).

[84] *See, e.g.*, DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006).

[85] *See* Erichson, *supra* note 6, at 415–16.

[86] *See, e.g.*, *DeLaventura*, 417 F. Supp. 2d at 150 ("[T]he 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice.").

[87] Resnik, *supra* note74, at 597.

[88] *See* Witt, *supra* note 18, at 269–70.

available only to insurers and other repeat-play defendants."[89] Plaintiffs' attorneys realized the value of sharing information, and began exploring new ways to collaborate. Howard Erichson details this shift, describing that Plaintiffs' lawyers "work[ed] together to plan strategy, conduct discovery, hire experts, develop scientific evidence, conduct jury focus groups, and join efforts in countless other ways."[90] Newsletters, shared databases, and trial schools allowed plaintiffs' lawyers to level the playing field with the defense bar by pooling their resources.[91]

There are many ways that individual plaintiffs can profit from these economies of scale. Not only do the plaintiffs benefit from an attorney's knowledge database, but plaintiffs also benefit when their lawyer represents large groups of similarly situated individuals.[92] When the end game is settlement, defendant corporations will pay more to settle an aggregate mass of cases—they will pay a premium to resolve all the disputes at once.[93]

Restrictions on class actions, coupled with joinder's inefficacy, further increased aggregation's allure. In *Amchem Products, Inc. v. Windsor*,[94] the Supreme Court narrowed class certification's predominance requirement, holding that the class's desire to settle could not constitute the class's commonality.[95] Thus, the proposed settlement cannot supply the predominant common issue that justifies the class.[96] Under the Vioxx settlement, aggregation side-stepped these requirements, allowing Merck to negotiate global peace with diverse parties.[97]

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[89] *Id.* at 269.

[90] Erichson, *supra* note 6, at 389.

[91] *See* Witt, *supra* note 18, at 269.

[92] *Id.*

[93] Professor Nagareda fully explores the idea of "global peace," the peace that comes from resolving multiple claims. Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 n.8 (2002) (describing mass settlement as a way to achieve "global peace," but noting that "mass tort class actions are generally not 'global' in the literal sense of encompassing nondomestic claims" but finding the term useful "to underscore the comprehensive sweep of mass tort class settlements in recent years" (internal quotation marks omitted)).

[94] 521 U.S. 591 (1997).

[95] *Id.* at 597.

[96] *Id.*

[97] *See* Erichson, *supra* note 6, at 383 ("What the law cannot achieve formally, lawyers achieve informally.").

In *Ortiz v. Fibreboard Corp.*,[98] the Supreme Court struck down a class settlement that would have resolved future asbestos claims against the Fibreboard Corporation.[99] Specifically, the Court noted that holders of future asbestos claims must be dealt with separately from those with current claims.[100] The class action's inability to resolve future claims simultaneously with current claims drove parties outside of the system where they could more freely craft future-looking solutions.[101]

Beyond the class action, other aggregation methods have proved equally unsuited for the task of resolving mass tort disputes. Personal jurisdiction and venue complicate joinder when plaintiffs live in different states.[102] Moreover, because joinder is permissive, plaintiffs must affirmatively seek joinder.[103] *Parens Patrae* suits, brought by a state on behalf of its citizens, are limited to state-wide injuries and by a state attorney general office's budget and resources.[104] Procedure's inability to handle mass tort situations led to creative solutions by lawyers—because the procedures did not exist, lawyers created their own.

C. What Does The Future Hold?

As attorneys discover the benefits associated with aggregation—the peace that comes from settling several cases at once, avoidance of the class action court system, and economies of scale—attorneys also seek ways to further exploit these benefits.[105] The Vioxx settlement exemplifies this exploitation. In addition to existing methods of exploitation, new proposals would change ethics rules to further encourage aggregate settlement. This Section explores these two phenomena in turn. Section III discusses potential problems associated with both of these developments.

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[98] 527 U.S. 815 (1998).

[99] *Id.* at 821.

[100] *Id.* at 855–56.

[101] *Id.* at 854.

[102] *See* Erichson, *supra* note 6, at 409.

[103] *Id.*

[104] BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

[105] *See generally* Erichson, *supra* note 6 (discussing the ways attorneys seek to exploit the benefits of aggregation).

1. Vioxx Settlement

In 2004, Merck pulled Vioxx, an arthritis medication, from the market when research revealed a correlation between Vioxx use and heart attacks and strokes.[106] Thousands filed suits against the drug maker who originally pledged to defend each suit in court.[107] Eventually, however, facing pressure from judges, Merck announced a $4.85 billion settlement.[108]

The Vioxx settlement included provisions that have troubled ethics scholars.[109] Specifically, law firms with large numbers of plaintiffs' cases agreed to recommend settlement enrollment to 100% of their clients who alleged either myocardial infarction or ischemic stroke.[110] Moreover, "[i]f a client decides not to take part in the settlement, then the lawyer . . . must take 'all necessary steps' to withdraw from representing that client."[111] Parties included this provision where Merck feared that "plaintiffs' lawyers might act in the best interests of the clients who had the strongest cases."[112] Merck wanted to ensure that plaintiffs' lawyers would not settle their portfolio of weak cases while holding onto stronger ones. Tellingly, the settlement itself is not an agreement between plaintiffs and Merck. The settlement represents an agreement between "Merck and various plaintiffs' lawyers."[113]

Also troubling, the Vioxx settlement allowed Merck to distribute the funds via a "secret formula." That is, no single plaintiff would understand why they received a particular payout.[114] Two unions, the Service Employees International Union and the Teamsters Union, filed suit against six of the law

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[106] N.Y. Injury News, *First Vioxx Lawsuit Settlement Payments Sent out on Thursday*, Sep. 2, 2008, N.Y. INJURY NEWS, http://www.newyorkinjurynews.com/2008/09/02/product-liability-law_20080902209.html.

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

[108] *Id.*

[109] *See* Koppel, *supra* note 1. The article cites Stanford Law School professor Deborah Rhode, who worries that the settlement "stacks the choice for the client." *Id.* (internal quotation marks omitted).

[110] Press Release, Merck, Merck Agreement To Resolve U.S. Vioxx Product Liability Lawsuits (Nov. 9, 2007) (on file with authors).

[111] Koppel, *supra* note 1.

[112] *Id.*

[113] Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12.

[114] Chris Rizo, *Unions Sue over Vioxx Settlement*, Legal Newsline, June 10, 2008, http://www.legalnewsline.com/news/213367-%20unions-sue-over-vioxx-settlement.

firms handling litigation against Vioxx. The suit alleges that because the $4.85 billion settlement will be distributed by a secret formula, the settlement violates provisions of the Employee Retirement Income Security Act.[115]

These Vioxx provisions are not an anomaly, however, but rather the tip of an iceberg. Indeed, lawyers note that settlements more frequently contain such an ultimatum—join the settlement or the attorney will withdraw from representation.[116] In OxyContin litigation, at least one plaintiff's attorney took a similar tact—dropping clients who refused to participate in settlement. The plaintiff's attorney noted, "[i]f we truly believe it is in a client's best interest to settle and a client refuses, there is a perfectly appropriate legal basis to ask a court to be relieved of that representation."[117]

2. Proposals To Amend 1.8(g)

Beyond pushing the boundaries of current ethics rules, some scholars propose changing the Rules to further facilitate aggregate settlement.[118] Model Rule of Professional Conduct 1.8(g) currently requires that a lawyer representing two or more clients shall not settle the cases in aggregate unless each client gives informed consent. [119] Furthermore, the lawyer must outline the terms of settlement that the other clients will receive as well as reveal the nature of each other client's claims.[120] Those seeking to change the rule believe that "clients and their lawyers should be permitted to agree on alternatives to the disclosure and consent requirements set out in the Rule."[121] The American Law Institute ("ALI") is exploring such a proposal. The ALI's statement of principles, considered this past May, would allow

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[115] *Id.*

[116] *Id.*; *see also* John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1266 (2008) (suggesting that a system where lawyers recommend settlement irresponsibly could undermine the point of tort law).

[117] Koppel, *supra* note 1.

[118] *See, e.g.*, Katherine Dirks, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 501 (2008); Silver & Baker, *supra* note 17, at 736.

[119] MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2007).

[120] Every jurisdiction has adopted a version of the aggregate settlement rule. Nancy J. Moore, *Challenges to the Attorney-Client Relationship: Threats to Sound Advice*, 57 DEPAUL L. REV. 395, 395 (2008).

[121] Silver & Baker, *supra* note 17, at 736.

clients to waive their right to accept or deny a settlement by agreeing ex ante to be bound by the decision of a supermajority of the lawyer's clients.[122] In other words, from behind a "veil of ignorance" clients could waive their rights to object to settlement in advance, casting their lot with their attorney's other clients.

Others propose changing 1.8(g) so that, instead of requiring attorneys to reveal all information about their other clients, attorneys need only provide clients with a compensation grid outlining other clients' claim types and settlement amounts.[123] Such a proposal echoes accusations that Vioxx is distributing settlement funds via a secret formula.[124] Similar to the ALI's considered principles, this proposal also suggests that a supermajority of the clients should be able to approve the settlement terms.[125] Clients would consent in advance to these terms.[126]

Both these proposals would limit the individual plaintiff's participation in the judicial process. Under proposals that would bind plaintiffs ex ante, plaintiff's role in a suit becomes a one-way

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[122] Principles of the Law of Aggregate Litig. § 3.17 (Discussion Draft No. 2, 2007). Although the portion of the principles concerning the aggregate settlement rule was not adopted, it remains the subject of ongoing discussion. The April 2007 draft proposal specifically recommended that the following circumstances be required in order for aggregate settlements to be binding:

> (a) A lawyer who represents two or more clients on a non-class basis may settle the claims of those clients on an aggregate basis provided that each client gives informed consent, in writing, after reviewing the settlements of all other persons subject to the aggregate settlement.
>
> (b) In lieu of the requirements set forth in subsection (a), an individual claimant may agree in advance to be bound in a proposed settlement by the collective decisionmaking of 75% of the claimants represented by one lawyer or law firm who are covered by the proposed settlement (or, if the settlement significantly distinguishes among different categories of claimants, a separate 75% vote of each category of claimants represented by one lawyer or law firm in the matter), whether proceedings have been commenced or not. Such decisionmaking authority must be vested solely in the collective clients and may not be delegated to a lawyer or any one person otherwise acting in a representative capacity on behalf of claimants.

Id. The proposal goes on to stipulate that clients agreeing to be bound by a supermajority must be informed of the settlement offer, the costs, and the fees, as well as the settlement received by other claimants. *Id.* The proposed rule also notes that waivers are only valid if the amount in controversy is greater than five million dollars and the number of claimants involved is at least forty. *Id.*

[123] *See* Dirks, *supra* note 118, at 526.

[124] *See* Rizo, *supra* note 114.

[125] *Id.*

[126] *Id.*

ticket. The plaintiff opts into the lawsuit but cannot opt out—she becomes bound by a supermajority's rule. [127]

III. AGGREGATE SETTLEMENT AND THE COST OF CONSENT

Mass tort settlements distribute a vast amount of our socioeconomic resources, warranting attention from political theorists.[128] And, however we structure mass tort settlements, there will be tradeoffs that need to be made. Liberalism asks us to measure the cost of how the system affects the broader constitution of our political life. Arguments for economizing the mass settlement process must also demonstrate that such reforms are consistent with our broader commitment to self-governance. Reforms that loosen consent cannot meet the justificatory burdens a liberal regime requires because such reforms would damage the practical benefits adversarial legal input provides to self-government.

Economizing and bureaucratizing proposals embrace aggregate settlements and ask those interested in more adversarial law to give up the adversarial ideal.[129] These scholars ask us to recognize that we tolerate an overwhelmingly large number of settlements already.[130] Today's settlement system works well in many respects but carries structured costs and inefficiencies that could be eliminated by further reducing the individual plaintiff's incentive to continue conflict. Reducing incentive for legal conflict can be achieved by working out

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[127] Professor Burch summarized the ALI's proposal as essentially requiring "claimants to opt-in to a procedure rather than to provide informed consent to settlement terms." Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2538 n.121 (2008).

[128] John Fabian Witt wrote that, "[a]s much as $250 billion flows through the tort system each year, a figure that is about the same as the yearly amount paid to the recipients of old-age pensions through the Social Security system." Witt, *supra* note 18, at 262 (quoting Tillinghast-Towers Perrin, U.S. Tort Costs: 2004 Update 2 (2005), *available at* http://www.towersperrin.com/tillinghast/publications/reports/Tort_2004/Tort.pdf).

[129] *See id.* at 272. Witt notes:

> [W]hile it is true that the aggregation strategy of the tort claims administration may be in tension with the rhetoric of the common law and its individualized methods, it is not at all clear, at least in the first instance, that the aggregating strategies of the plainitffs' bar are a bad thing.

Id.

[130] *Id.* at 271; *see also* Issacharoff & Witt, *supra* note 73, at 1573–74.

predetermined payoff structures,[131] restructuring plaintiffs' bar incentives towards settling earlier more frequently, or even by forcing a settlement on an entire class by majority rule. For example, the ALI recently considered proposals to amend the aggregate settlement rule, which allow plaintiffs to consent in advance to majority-approved settlements.[132] Additionally, the Vioxx settlement included mechanisms to ensure that lawyers recommend the deal to their clients.[133] Once we overcome the idealized view of adversarial legalism, which is a fiction in today's mass tort universe, such reforms become palatable. Reforms are justified once, as John Fabian Witt has already noted, "we begin to recognize the tort system as a sprawling private bureaucracy with a significant role in American public policy."[134] Then, such proposed reforms are not outrageous; they just take the system as it more or less exists today and make it more efficient. What could be so objectionable?

From the perspective of society constituted as a fair system of cooperation, the proposed and recent tradeoffs present numerous problems. *First*, proposed mass settlement "efficiency" reforms[135] fail to recognize the priority of liberty. In exchange for efficiency, such a trade requires the forfeiture of access for some to due process in seeking redress for a wrong committed against their personage.[136] Proposals for super-majority consent would pattern settlements that favor defendants, giving a systemic advantage to those who *distribute* mass injuries upon plaintiffs. Even recent settlement offers, like Vioxx, create incentives for attorneys to shift costs from injurious firms to the clients who have been injured. In both instances, fairness is compromised, allegedly for efficiency. Even if this argument for efficiency is

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[131] Issacharoff & Witt, *supra* note 73, at 1573–74.

[132] Principles of the Law of Aggregate Litig. § 3.17 (Council Draft No. 1, 2007).

[133] Koppel, *supra* note 1.

[134] Witt, *supra* note 18, at 262.

[135] *See* Christopher D. Tomlinson, The ALI's "Alternative" to the Aggregate Settlement Rule: Sacrificing Allocational Fairness and Client Autonomy in the Name of Joint Gains (May 2008) (unpublished seminar paper, Vanderbilt University Law School, on file authors). Tomlinson argues that such proposals do not actually increase efficiency within the system.

[136] *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (discussing the right to redress private wrongs as grounded in the Fourteenth Amendment).

accepted, efficiency is not enough to recover the costs of weakening consent.

Second, changing the cost structure for taking claims to court, or having the ability to threaten taking claims to court, restricts the domain of contestation for redressing wrongs. By definition, a plaintiff deserving of reward is an individual rights-bearing citizen who has involuntarily received unwarranted harm. Changing the cost structure of going to court limits plaintiffs options more frequently into a structured pattern of settlement where defendants have an advantage as repeat players. Moreover, plaintiffs also lose more of the right to contest the legitimacy of prior patterns of settlement or damages spreadsheets as legitimate sources of authority for their claim. Under such conditions, our society surrenders one more institutional setting in which we engage in public reason.[137] Aggregate settlements are one of many viable avenues for citizens to challenge our public understanding about the nature of wrongs and what they are worth.[138] Today, however, aggregate settlement is being rationalized on a strictly economic rationality that is unreliable in making moral considerations.[139] Such moves undermine the credibility of justice in society as a fair system of

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[137] Stephen Macedo wrote that "[p]ublic justification should be a never-ending commitment. It would be sheer hubris to think that we have, or ever will have, the whole political truth. We are always learning and confronting new circumstances; we will always have progress to make." Macedo, *supra* note 34, at 287.

[138] *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995).

[139] Michael Sandel argues that markets sometimes cannot consider "the moral importance of goods at stake, the ones said to be degraded by market valuation and exchange." Michael J. Sandel, Professor, Harvard Univ., *in* The Tanner Lectures on Human Values: What Money Can't Buy: The Moral Limits of Markets 95 (May 11-12, 1998), *available at* http://www.tannerlectures.utah.edu/lectures/atoz.html#s. Suffice to say public reason would be an example of a public good that could be susceptible to what Sandel calls "the argument from corruption." *Id.* If someone were to be allowed to purchase the silence of certain points of view, there is a loss to the moral character of public reason that is not captured in the financial transaction. *Id.* Also, Phillip Pettit argues that "[p]rotective institutions represent the most salient possibility" to ensure citizens live under conditions of non-domination. Phillip Pettit, *Freedom as Antipower*, 106 ETHICS 576, 590 (1996). For those plaintiffs who may have had grounds to dislike the Vioxx offer or who would find themselves in the "super-minority" under the ALI proposal, the changes proposed reduce the possibility that litigation serves as a protective institution. Finally, Professor Goldberg argues that some plaintiffs may not even worry about efficiency—they may simply be seeking their day in court, or a system that takes their claims seriously. *See* Goldberg, *supra* note 116, at 1266–67.

cooperation. Ultimately, these moves undermine the credibility of the principles that justify the *economic rationality* of such settlement systems as well.[140]

Third, the arrangement of mass tort settlements, as it is trending now, privileges elites. Newly proposed arrangements will be between businesses—who distribute wrongs—and lawyers—who may seek to maximize their personal aggregate take from a settlement rather than provide representation that best fits the wishes of each of their clients. Furthermore, in winnowing out those clients who would reject proposed settlements, the truth-tracking capacity of the settlement process becomes gravely diminished. If we accept the liberal premise that greater variety of opinion and dissent increases our capacity to make correct decisions, then the likelihood at arriving at a truly fair settlement on a case-by-case basis and the ability to correctly track the overall fairness of the settlement system are jeopardized.

When mass settlement loosens consent in exchange for expediency, it does so without acknowledging any of these costs. Nevertheless, such costs are real, and proposed reforms do not come anywhere near adequately paying for them.

A. *The Priority of Liberty*

The evolving aggregate settlement system loosens the standards of consent in exchange for an increase in distributional utility. Justifications for this system reverse our common understanding of the relationship between basic liberties and distributive justice. To reemphasize, the priority of liberty is not a boutique concept peculiar to certain bookish liberal theorists; it is common to all liberal political thought.[141] It is the spine of our public philosophy. Imagine the state allowing the torturing of a

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[140] Stephen Elkin observed that "economizing requires value statements precise enough to guide policy selection." Elkin, *supra* note, 43 at 265. Karl Polanyi's famous study of the collapse of western civilization into two world wars opens with the following: "Our thesis is that the idea of a self-adjusting market implied a stark utopia. Such an institution could not exist for any length of time without annihilating the human and natural substance of society; it would have physically destroyed man and transformed his surroundings into a wilderness." KARL POLANYI, THE GREAT TRANSFORMATION 3 (Beacon Press 2001) (1944).

[141] H. J. McCloskey, *Liberalism*, 49 PHILOSOPHY 13, 17 (1974) ("[T]he liberal, like any other serious political theorist, has always insisted that the state make and act on the basis of value judgments . . . .").

little girl if doing so would make an entire city happy.[142] Or imagine the state telling someone they had to marry Mr. A because experts on marital bliss, your financial advisor, and a super-majority of your friends agreed that Mr. A would make you happier than if you married Mr. B even though you love Mr. B instead.[143] Imagine the state shrugging with indifference when large numbers of low-income families start selling organs to feed their families.[144]

A rejection of these scenarios comes from our common understanding of the priority of liberty. Citizens, as free and equal persons, recognize that if some people wish to treat our existence as a means to advance the greater ends of others, they must have the strongest justifications.[145] When the basic liberties of citizens are at stake, the collective convenience of others does not amount to sufficient justification.

With respect to tort law, there is a critical dynamic between plaintiffs and defendants that should not be lost. Namely, when the defendants are in fact guilty, they have *wronged* plaintiffs. Furthermore, they have done so in ways that the plaintiffs themselves did not deserve. It is, of course, important to recognize that defendants are not commonly punished according to their guilt due to the economics of settlement and that this favors plaintiffs oftentimes at least as much as it benefits defendants. Nevertheless, the aspiration of tort law must remain

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[142] *See generally* FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV (Constance Garnett, trans., Encyclopædia Britannica 1952) (making this famous anti-utilitarian metaphor first).

[143] *See, e.g.*, William A. Galston, *Diversity, Toleration, and Deliberative Democracy*, *in* DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 39, 39–40 (Stephen Macedo ed., 1999).

[144] *See* Sandel, *supra* note 139, at 94 ("A peasant may agree to sell his kidney or cornea in order to feed his starving family, but his agreement is not truly voluntary.").

[145] Consider the famous conclusion of Immanuel Kant:

> But in this way also does every other rational being think of his existence on the same rational ground that holds also for me; hence it is at the same time an objective principle, from which, as a supreme practical ground, all laws of the will must be able to be derived. The practical imperative will therefore be the following: Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.

IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS § 429, at 36 (James W. Ellington trans., Hackett Publ'g Comp., Inc. 3d ed. 1993) (1785).

settling actual wrongs on grounds of just dessert, or there remains little justification for tort law at all.[146]

Beyond this, there is an undeniable difference in agency if consent standards are loosened by mass tort settlement reform. Under such reforms, plaintiffs may find themselves the unwitting victims of harm against their personages or property in violation of their rights *and* also accomplices to settlements that they would not personally accept. The argument that consenting in advance, "veil of ignorance" style, is the same as consenting later rests on two premises that are both false. The first premise is that any information that one would learn later does not effect what one deserves in the distribution.[147] The second false premise is that accepting a settlement is simply accepting a particular outcome, rather than accepting an outcome *and also* accepting one particular avenue of pursuing justice rather than an alternative means.[148] Similarly, accepting

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[146] There exists a prevailing understanding that desert can be worked out by the parties on their own without third-party interference. The most famous version of this is Coasian bargaining. *See* Coase, *supra* note 72, at 2, 4. Experimental testing does not support the idea that such analytic concepts have the practical reach for generating the efficient outcomes that they claim. *See* Elizabeth L. Blake et al., The Coase Theorem Versus Coalitional Rationality: An Experimental Investigation of the Empty Core 18 (Aug. 25, 1994) (unpublished study by The Collective Choice Center and the Department of Government and Politics at the University of Maryland, on file with authors):

> What are the implications for the limits of Coasian bargaining? Our results suggest that one should not expect that Coasian bargaining will lead to Pareto optimal outcomes across all possible externality situations. In particular, one should not expect Pareto optimality in games where no Pareto optimal outcomes are coalitionally rational.

Id.

[147] The "veil of ignorance" version of ex ante consent is justified based upon the principle that "those similar in all relevant respects are to be treated similarly. With this precept satisfied, the original position is fair." JUSTICE AS FAIRNESS, *supra* note 25, at 87. In short, the justification for ex ante consent falls apart if we make ex ante agreements that prohibit us from discovering that we are, in fact, *not similar in all relevant respects*.

[148] *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 521–22 (1980). Rawls writes:

> [T]he members of a well-ordered society are free in that they think they are entitled to make claims on the design of their common institutions in the name of their own fundamental aims and highest-order interests. At the same time, as free persons, they think of themselves not as inevitably tied to the pursuit of the particular final ends they have at any given time, but rather as capable of revising and changing these ends on reasonable and rational grounds.

Id.

the court's ex ante judgment is different from accepting a settlement ex ante because the court is designed to produce results that are responsive to public reasons regarding the fairness of both means and ends as determined by standards of public rationality; however, this is not so with an aggregate settlement. As it happens, closing off plaintiffs from a legal system that is responsive to public reason invites an entirely separate class of problems for aggregate settlement.

B. The Displacement of Political Rationality

Political institutions give life to principled understandings of fairness that are required prior to distributing social goods. Moreover, political institutions play a large part in creating the particular setting in which our particular human lives take place.[149] If this were not the case, there would be no reason to care about questions of either fairness or efficiency. The reason that society expends the mental energy, physical resources, and time resolving disputes between plural individuals is because, for all of the joys of a reasonably plural society, we share the same world. Citizens are plural, but they are also cohabitants. It should also seem obvious upon reflection that a citizen of the Untied States does not simply cohabitate with others who share the territory of the United States, but also cohabitates with social, corporate, and governmental institutions. There are many permanent institutional structures that we can neither change nor ignore. Institutions also shape the behavior of individuals. Human beings are conditioned creatures,[150] and liberals going back to Locke and Rousseau understood that

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[149] *See* Sheldon S. Wolin, *Fugitive Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 31, 31 (Seyla Benhabib ed., 1996) ("[D]emocracy is a project concerned with the potentialities of ordinary citizens, that is, with their possibilities for becoming political beings through self-discovery of common concerns and of modes of action for realizing them.").

[150] Arendt teaches us that "[t]he human condition comprehends more than the conditions under which life has been given to man. Men are conditioned beings because everything they come into contact with turns immediately into a condition of their existence." ARENDT, *supra* note 68, at 9. Later in the same paragraph she further explains, "In addition to the conditions under which life is given to man on earth, and partly out of them, men constantly create their own, self-made conditions, which, their human origin and their variability notwithstanding, possess the same conditioning power as natural things." *Id.*

human beings could, and in fact, need to be educated and disciplined.[151]

Loosening consent requirements in mass tort settlements potentially changes the perception for the system's participants of what values are more important than others. When a society changes the priority of institutional rewards, that society also changes the behavioral reinforcement for those who participate in the system.[152] Particularly, in reversing the priority of liberty and making the economic rationality of distribution the most important principle, aggregate settlements modify the institutional reinforcement that citizens should, as a general

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[151] Jean-Jacques Rousseau opens *Emile* with the statement, "God makes all things good; man meddles with them and they become evil." JEAN-JACQUES ROUSSEAU, EMILE: OR, ON EDUCATION 3 (Barbara Foxley trans., Everyman Books 1992). He later writes, as a preparatory comment on education, "[w]e are born weak, we need strength; helpless, we need aid; foolish, we need reason. All that we lack at birth, all that we need when we come to man's estate, is the gift of education." *Id.* at 4. John Locke writes about discipline rather unambiguously:

> [T]hat the difference to be found in the manners and abilities of men is owing more to their *education* than to anything else, we have reason to conclude that great care is to be had of the forming children's *minds* and giving them that seasoning early which shall influence their lives always after. For when they do well or ill the praise or blame will be laid there: and when anything is done untowardly, the common saying will pass upon them, that it is suitable to their *breeding*.

JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF UNDERSTANDING 25 (Ruth W. Grant & Nathan Tarcov eds., Hackett Publ'g Comp, Inc. 1996) (1693).

[152] The effect of mores on laws and vice versa is a deep-rooted part of our understanding of politics. The sociological impact of law can be found particularly in liberal-republican thought such as that of Machiavelli, Montesquieu, and James Madison. As an example, consider Alexis De Tocqueville, who questions:

> Why, in the East of the Union, does republican government show itself strong and regular, and proceed maturely and slowly? What cause impresses a wise and lasting character on all its acts?
>
> How is it, on the contrary, that in the West the powers of society seem to march haphazardly?

DE TOCQUEVILLE, *supra* note 58, at 294.

Tocqueville then answers his own questions, writing:

> It is in the East that the Anglo-Americans have practiced the longest use of democratic government and have formed habits and conceived ideas most favorable to maintaining it . . . .
>
> In the West, on the contrary, a part of the same advantages is still lacking. Many Americans in the states of the West were born into the woods, and they mix with the civilization of their fathers the ideas and customs of savage life. Among them, passions are more violent, religious morality less powerful, ideas less fixed.

Id. at 294–95.

rule, respect the rights of citizens to make decisions for themselves where appropriate.

Still, it must be acknowledged that loosening consent for instrumental gains has a rhetorical advantage over the priority of liberty. It is far simpler to measure the effect of reconfiguring distribution than it is to measure exactly levels of behavioral reinforcement of liberal norms. The mass tort reformer can provide numerical projections in what gains in efficiency can be made. He or she can give detailed predictions with the accuracy and precision of modern social science techniques. Those who argue for the priority of liberty can only offer the vague fear that an idea will be lost. Still, instrumental reforms and reformers forget the scope, breadth, and importance of what it is that they are actually chipping away at by proposing tradeoffs antithetical to our liberal political values. The reformer's appeal sounds strong, but it is an appeal for simplicity for simplicity's sake and not an appeal for solid political judgment. For it would be difficult to justify the purpose of law at all if it were not considered in terms of *realizing and protecting the best ideas about justice and fairness* as best as possible.

The difference in the two points of view can be encapsulated in what Elkin defines as the difference between political and economic rationality. Elkin writes:

> Thus, underlying the differences between economic and political rationality is a different conception of the relationship between means and ends. Economic rationality relies on an "external" conception, where means and ends are causally and contingently related. Political rationality relies on an "internal" relationship where the end resides in having some activity done well.[153]

On this view, the request to loosen standards of consent can only be justified if the ends of handing out tort damages are "causally and contingently related."[154] The case for using economic rationality exclusively to address tort settlements is, in this way, predatory on the idea that truth is either relative or can be arrived at more reliably through market forces or political elites rather than by engaging in public reason. The very concept of

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[153] Elkin, *supra* note 43, at 364.

[154] *Id.*

tort liability seems to be an institutional system that cannot rest fundamentally on such a premise.[155]

Therefore, our institutional foundation needs something more: It needs an account of justice and fairness that can withstand public reason about what those values mean in the broadest possible sense of the term. Law must rest on the premise that others have been damaged without consent and are entitled to seek recompense under the law in the manner that they best see fit. The basic questions of redress for those harmed without consent are challenged in "the forum" and not "the market."[156] To move from the one to the other can only be legitimate if the harmed party consents.

C. *Privileging Elites, Damaging Truth-Tracking*

Several scholars raise the question as to whether the plaintiffs' bar, in accumulating wealth and power, has become another elite player in the system. In 1974, Marc Galanter proposed that the "haves" come out ahead in our litigation system because they are repeat players.[157] Defining the "haves" as those "involved in many similar litigations over time," Galanter identified some repeat-player advantages as including: "advance intelligence" enabling parties to build informational records, expertise and "ready access to specialists," "credibility," the opportunity to "develop facilitative informal relations," and

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[155] *Id.* at 265. Elkin writes:

> They seem to imply that since economizing requires value statements precise enough to guide policy selection, its natural home is within the executive. Executive officials are more likely than the legislature to be in a position to offer relatively clear guidance. Or if not, they are at least in a better position to accept the economizers advice about value selection. Moreover, executive officials are likely to view their job as instrumental—the execution of tasks to achieve some desired end.

Id.

[156] Jon Elster defines "the market" as a "private-instrumental view of politics" where the task of politics "is inherently one of interest struggle and compromise. The obstacle to agreement is not only that most individuals want redistribution to be in their favor, or at least not in their disfavor." Jon Elster, *The Market and the Forum*, *in* DELIBERATIVE DEMOCRACY: ESSAY ON REASON AND POLITICS 3, 4 (James Bohman & William Rehg eds., The MIT Press 1997). He defines "the forum" as "the idea of a *transformation* of preferences through public and rational discussion." *Id.* at 11. Elster also writes that "to create justice" is "a goal to which the aggregation of prepolitical preferences is a quite incongruous means." *Id.*

[157] *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 1, 3–4 (1974), *available at* http://MarcGalanter.net/documents/papers/whythehavescomeoutahead.pdf.

the ability to "play for rules as well as immediate gains."[158] Today, the capitalized plaintiffs' bar resembles the repeat players spoken of in Galanter's article.[159] The plaintiffs' bar now operates with economies of scale—sharing data, evidence, and trial strategies.[160] Large and credible plaintiffs' firms emerged. Through cooperation, plaintiffs' firms can conduct a Vioxx trial for as little as two hundred thousand dollars.[161] The plaintiffs' bar is a new member of the repeat-player elite.

Although the plaintiffs' bar's development benefits clients, a split emerges. When representing a portfolio of cases—like the Vioxx cases—a plaintiff attorney may be incentivized to consider his or her portfolio more than any one individual client. Thus, when Merck asks plaintiffs' attorneys to recommend its settlement to an entire class of plaintiffs, a plaintiff lawyer may consider the portfolio instead of the individual. The individual plaintiff becomes another "have not" in this system—alienated from his advocate.

This privileging relationship invites problems beyond the claims about fairness already discussed. Truth is also vital for conducting politics in a fair system of cooperation.[162] Recent work in social epistemology has reemphasized thinking about truth as a *procedural value* as something we do for justified true belief, both in our own minds and amidst a community of inquiry.[163] Broader communities of inquiry are more likely than

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[158] *Id.* at 4–6.

[159] *See* Witt, *supra* note 18, at 261–62, 269.

[160] *See id.* at 269.

[161] *See* Nocera, *supra* note 107.

[162] *See* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 85 (2008). Estlund establishes a compelling case that fair procedures without any epistemic (truth-tracking) foundation are incoherent under serious scrutiny because they fail to justify why such procedures exist as they are and not in some other way. *See id.* at 82.

[163] *See* TALISSE, *supra* note 39, at 103–05; *see also* KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 226 (2d ed. 1965). Popper notes:

> So one great advantage of the theory of objective or absolute truth is that it allows us to say—with Xenophanes—that we search for truth, but may not know when we have found it; that we have no criterion of truth, but are nevertheless guided by the idea of truth as a *regulative principle* (as Kant or Peirce might have said); and that, though there are no general criteria by which we can recognize truth—except perhaps tautological truth—there are criteria of progress towards the truth . . . .

Id.

others to voice possible reasons for holding claims to be true.[164] David Estlund notes that if we care about our institutions only for fair procedures, we could simply make all decisions by flipping a coin.[165] However, democratic proceduralism maintains the fairness of a coin flip while also producing outcomes with acceptable truth content.[166]

Social epistemology is valuable with regard to mass settlement reform by helping us determine fair damages. The public good in question is a recognizable and actionable understanding of fairness in tort law proceedings. Tort law improves, not only in the fairness of its outcomes, but also in the fairness of its procedures, through new iterations of contestation.[167] If tort settlement is decided only by the majority decision of plaintiffs, for example, the question allows each plaintiff to vote for or against the settlement based on indeterminate criteria. Those who voted "yes" are not accountable to those who voted "no"—in terms of providing reasons that must be publicly justifiable. There is no institutional mechanism that allows for an evolving thought about the group's interest.[168] Thus, future decisions, which will

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[164] *See* MILL, *supra* note 39, at 2–3, 168.

[165] Regarding the coin flip, Estlund argues, "[i]nsofar as we think this is an inappropriate way to decide some question, we are going beyond fairness." DAVID ESTLUND, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, *in* DELIBERATIVE DEMOCRACY 173, 176 (James Bohman & William Rehg eds., 1997).

[166] For a discussion of Estlund's concept of "fair epistemic proceduralism," see *supra* note 165. For a more detailed discussion, see *supra* note 162.

[167] Stephen Holmes writes that one of the "radically untraditional" ideas at the time that liberalism emerges in political thought was that "idea that *public disagreement is a creative force*." HOLMES, *supra* note 29, at 33. John Stuart Mill adds that:

> [T]he peculiar evil of silencing the expression of an opinion is[] that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

MILL, *supra* note 39, at 35–36.

[168] Michael Sandel offers up the example of rewarding teachers with financial compensation based upon their popularity. Certainly, aggregating individual preferences in this situation could be easily arranged to award popularity with financial compensation. But could we really be sure that popularity corresponds directly to being a good teacher? It would seem that the only way that we could know for sure would be to interrogate the reasons students had for liking a teacher to

be shaped in large part by past decisions, will be predicated on settlement patterns set by the contingencies of self-interest rather than public scrutiny.

Political theory calls the value of such repeat thought and discussion "reflective judgment."[169] Reflective judgment is valuable because it aids in the progress towards truth that the owing of public reasons to one another provides.[170] When we engage with others or with ourselves in our own mind, turning an idea over and over, we develop a "reflective equilibrium."[171] The constant revisitation of current public judgment on prior public judgments allows us to legitimate public judgments by holding out the possibility that we can be convinced otherwise by those who disagree. The current trends of mass tort reform increasingly remove this type of public legitimacy from the settlement process.

Mass tort reform that loosens consent standards also limits our ability to challenge the received wisdom of settlement law on fairness grounds.[172] Settlements like Vioxx or the new set of ALI proposals silence those who are the most likely to challenge the

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ensure that it was not simply that they were an easy grader, or gave out less assignments. *See* Sandel, *supra* note 139, at 89–90.

[169] Michael Sandel argues "deliberating about the common good under conditions where the deliberation makes a difference calls forth human capacities—for judgment and compromise, for argument and reflection . . . —that would otherwise lie dormant." *See id.* at 109. The theory also appears in legal scholarship. Some propose letting certain bellwether cases proceed to trial so that the market can price the case. *See* DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 156 (D. Mass. 2006) (noting that Judge Fallon, who presided over the Vioxx suits, believes that individual trials will help people determine the "real" value of settlement).

[170] John Rawls writes:

> [R]easonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them.

See JUSTICE AS FAIRNESS, *supra* note 25, at 6–7.

[171] John Rawls writes that those interested in constructing procedures that "model[] . . . practical reason" must believe "the correct model of practical reason as a whole will give the correct principles of justice on due reflection." POLITICAL LIBERALISM, *supra* note 23, at 96.

[172] Stephen Holmes believes that public disagreements' primary benefit is "a technique designed to enlist the decentralized imagination and knowledge of citizens, to expose errors, and to encourage new proposals." HOLMES, *supra* note 29, at 34.

fundamental fairness of established law. Aside from being a highly suspect way to treat individuals with due process rights, such proposals systematize an odious elitism. Now, elites will not only divide the rewards as agreed upon primarily by lawyers and defendants, they will also breed a contempt for minority opinion that is wholly *immodest* when it comes to the truth about fairness.[173]

IV. ENSURING LIBERALISM'S PLACE IN SETTLEMENT

If we seek to protect individual consent rights, the best way to proceed is to ensure that each individual has an advocate who is aligned with her client, beholden to her consent. Attorneys must not become more concerned with settling a portfolio of cases than they are with an individual client; the current aggregate settlement system rewards attorneys who would make this tradeoff because the system ignores the value of consent. As seen in the Vioxx litigation, attorneys profit when their clients sign onto the deal—regardless of whether the deal is the best solution for their suit.[174] Indeed, attorneys are encouraged to drop clients who refuse to sign on, further driving a wedge between the attorney and the individual. Thus, the reforms suggested below seek to realign plaintiffs' attorneys' interests with individuals and ensure that plaintiffs can give their informed consent.

These proposed reforms are not designed to increase plaintiff payouts, but rather to secure basic individual liberties. Moreover, we attempt to create a system of accountability that is practically efficacious. Settlement processes and liberalism are not mutually exclusive, but settlement can be conducted in a way that protects individual rights.

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[173] *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 156–57 (2004).

> Decision makers owe justifications for the policies they seek to impose on other people. They therefore must take seriously the moral reasons offered by their opponents. If they take seriously their opponents' moral reasons, they must acknowledge the possibility that, at least for a certain range of views, their opponents may be shown to be correct in the future.

Id. at 156.

[174] *See* Nocera, *supra* note 107.

A. Curbing Attempts To Allow Ex Ante Waiver of Unanimous Consent

At the least, we must reject proposals that would facilitate aggregate settlement by allowing a supermajority of clients to accept a settlement. We cannot permit plaintiffs to agree ex ante that they will settle should a super-majority of the group consent to a settlement. The ALI considered, and did not accept, such a statement at its May 2008 meeting; however, proponents of the idea are working on a new proposal that would recognize latitude for ex ante waiver of 1.8(g)'s unanimous consent rule.

Proponents of loosening consent standards for mass tort settlement see no appreciable difference between giving plaintiffs the power to withhold consent the whole way through the legal process and allowing them the power to consent ex ante.[175] They imagine that the more we squeeze consent out of the system for plaintiffs, the more efficiency we appear to maximize as there is less chance that individual plaintiffs will act as holdouts by pursuing more for themselves, or for demanding their day in court, we are asked to believe that everyone is better off.[176] After all, one would expect a citizen to consent in advance to judicial outcomes in a court of law regardless of whether or not the verdict is in their favor. If consent to the procedure is legitimate prior to the outcome in that instance, why not with aggregate settlement?

What this argument preys on, quite cleverly, is a general inability to make the critical distinction in consenting in advance to accept collective decisions generated by political rationality versus collective decisions generated by economic rationality. For example, citizens are expected to observe the outcomes of political elections ex ante because they determine which leaders do politics in what ways as actors *already bound to the basic structure of society*. Citizens are also expected to accept judicial decisions because the procedures of the court are designed to uncover the truth of the matter at hand and represent the best institutional chance of establishing justice for everyone in a fair

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[175] Principles of the Law of Aggregate Litig. § 3.17 cmt. a (Tentative Draft No. 1, 2008) ("Current law prohibits waiving individual-claimant settlement decisionmaking, thereby empowering individual claimants to exercise unfair control over a proposed settlement and to demand premiums in exchange for approval.").

[176] *See, e.g.*, Silver & Baker, *supra* note 17, at 752, 762, 767–68.

society. Mass tort settlements, as they are trending now, are neither operating completely inside of the basic structure of society nor are they offering plaintiffs a legitimate chance to pursue fairness in institutional arrangements that are designed to care. The changing standards of consent force plaintiffs to pursue not what is fair, but the best they can get under a set of incentives that force plaintiffs to go against their sense of fairness. These incentives create an undue pressure on plaintiffs to violate the basic principles of our public philosophy, and the incentives *need not* exist.[177]

Loosening consent matters well beyond the scope of efficient resource distribution. In this instance of law, loosening consent damages the fundamental properties of our governance, our law, and even the principles that form the foundation of economic exchange itself. It is bad for the institutional arrangements of our political regime, bad for plaintiffs, and bad for the mores of citizens who would be conditioned by operating in such an institutional framework. There is even a debate as to whether it delivers utility in the narrowest understanding of distributing settlement awards.[178] Perhaps loosening consent is not even as efficient as advertised in its resource allocation. Perhaps it is. Regardless, it is not even a question we should feel the need to consider. Unless mass tort reformers can come up with better justifications for why their proposals belong in society as a fair system of cooperation, there is no need to do the math.

B. Reforms

The Vioxx litigation demonstrates areas of the law in need of reform. Settlements should not require lawyers to recommend a settlement to their clients and encourage those lawyers to drop clients who refuse to sign onto the deal. Rule 1.8(g) should be amended specifically to prohibit this type of behavior, and

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[177] Aggregate settlement schemes that unnecessarily deter plaintiffs from litigating further meet both of the criteria for what we might call *situational coercion*. Situational coercion has two criteria. First, in situational coercion, the incentive structure must present itself as undesirable but acceptable only because the situation puts the chooser in a position where it is "an offer he or she can't refuse." Second, the circumstances that have structured incentive to force the individual into a degrading or objectionable choice must be a set of structures that need not exist. *See* Sandel, *supra* note 139, at 94.

[178] *See* Tomlinson, *supra* note 135.

lawyers should seek a client's written understanding of this point.

Indeed, much as some congressional members advocated for a United States Patients' Bill of Rights[179] so that citizens could dispute health care decisions armed with information,[180] the legal community should similarly consider enacting a Settlement Group's Bill of Rights. Plaintiff lawyers would present such a document to their clients before beginning representation. Potential rights to include in such a document could include: (1) the right to be informed of a settlement in advance of giving consent; (2) the right to refuse a settlement offer; and (3) the right to know about all other claims or pleas involved in a settlement. While these rights are nothing more than the current requirements of Rule 1.8(g), providing a list of rights to clients empowers clients and alerts them to the law's requirements.

Increased public information regarding settlement may also help better align plaintiff lawyers' interests with their clients—enabling informed consent. David Luban notes that "secret settlements"—settlements in which discovery materials are returned to the defendant and the plaintiff promises secrecy—are troubling because they deny knowledge of the settlement to the public.[181] He cites Kant for the point that "[a]ll actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity."[182] He approvingly notes that a few states have enacted sunshine laws curtailing secret settlements.[183] Luban is particularly concerned with secret settlements because they deny the public reason—the public law aspect of the legal system is diminished. In addition to reinforcing the public law aspect of the legal system, sunshine laws would also help realign plaintiff attorneys' interests with individuals.

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[179] *See generally* Bipartisan Patients' Bill of Rights Act of 2001, S. 889, 107th Cong. (2001).

[180] *See* 147 CONG. REC. S3154 (2001) (statement of Sen. Reed) ("By empowering health care consumers with information and effective strategies, . . . the chances that a health-related dispute will end up in court are drastically minimized.").

[181] David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995).

[182] *Id.* (internal quotation marks omitted).

[183] *Id.* at 2651.

While it may sound paradoxical that increasing the public law aspect of the court system strengthens individual rights, plaintiffs would inevitably benefit from these sunshine laws. When information is publicized, public watchdog groups can analyze settlements, provide information about settlement dollar amounts, and rate attorneys for their advocacy efficacy. Such information would enable plaintiffs to find the best possible representation and give plaintiffs points of comparison beyond an attorney's attestation that a deal is "fair." A plaintiff who consents to settlement under these circumstances can make a more informed decision. In other words, the plaintiff's consent is more meaningful.

Finally, increased judicial review of settlements—and attorney's fees paid under settlements—could disincentivize attorney misbehavior. Indeed, a federal district judge in New Orleans recently capped plaintiffs' attorneys' fees in the Vioxx settlement at 32%.[184] Judge Eldon Fallon noted that because many plaintiffs suffered "life-threatening injuries that could have prevented them from negotiating fair contracts with lawyers[,]" a standard fee of 33.3% to 40% seemed excessive.[185]

Judge Fallon's vigilance, noting that circumstances undermined plaintiff consent, may have two consequences. Attorneys will have an increased awareness about plaintiff consent issues. Those wishing to charge higher fees will find new ways to ensure plaintiff consent that can withstand judicial scrutiny. These methods may take the form of educational materials or programs educating plaintiffs as to their rights when hiring an attorney. And, new standards could creep into the realm of aggregate settlements. Additionally, other judges may begin reviewing plaintiff consent in similar cases—cases where a judge has reason to doubt that plaintiffs negotiated fair contracts with lawyers. Judge Fallon's action creates a precedent for other courts and offers a warning to attorneys who would ignore consent.

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[184] Melissa Maleske, *Got Capped*, INSIDE COUNS., Oct. 2008, at 13.
[185] *Id.*

V. CONCLUSION

While other scholars have criticized proposals to change Model Rule of Professional Conduct 1.8(g)[186] and the Vioxx settlement,[187] this piece adds another layer to those critiques by suggesting that these proposals and developments cannot be squared with American liberalism. Indeed, eliminating plaintiffs' consent in an aggregate settlement has the potential to undermine the entire justice system. Not only should we reject proposals that would eliminate plaintiff consent, but we must also continue to find ways to reassert consent within the system. Clients' consent to settle should be real, informed, and not based upon an ultimatum to "settle or lose their lawyer."

Oftentimes, resisting economizing proposals based on principle may appear weak or arbitrary. After all, those who warn us against diminishing what they claim are important principles oftentimes appear with arguments too vague, too difficult to measure, or that are, even worse, utopian in nature. It would be difficult to deny that, on countless occasions, principle has been used as a refrain to push back against progress.

Yet, some principles are necessary in order to breathe life into our law and society. Without principles, there is no justification for why society ought to pursue any particular ends at all. To come to know what these principles are and how we keep them relies upon our capacity for critical reflection and public justification. Public justification must be an ongoing and enduring part of our political process in as many institutional settings as we can allow it to flourish.

Economizing at the cost of basic rights may seem a coherent thought with regard to one particular institutional setting. But accepting such an argument asks us to commit an error of omission. For one could not realistically maintain the priority of efficiency over basic rights if one wanted to consider institutions as part of a coherent set of arrangements in a well-ordered society. In fact, such a reversal of priority would be unable to convincingly articulate what it means to have a well-ordered society in the first place.

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[186] *See, e.g.*, Moore, *supra* note 13, at 401–02; Tomlinson, *supra* note 135.

[187] *See* Koppel, *supra* note 1 (quoting Stanford Law School professor Deborah Rhode who worries that the settlement "stacks the choice for the client" (internal quotation marks omitted)).

Our institutions are more than just rules. Institutions are also the settings through which we mediate our coexistence with one another. Accordingly, we do well to remember the seriousness and complexity involved in institutional design. Changing the relative value between consent and expediency is likely a bad idea as it pertains to aggregate settlement. Such a move is unquestionably a bad move applied more generally.

As a society, we recognize very few justifications for ex ante consent situations, some of which, like elections or judicial opinions, have already been discussed. The aggregate settlement situations discussed in this piece come nowhere near even the loosest standards of reasonable justification for ex ante consent in any other fair social choice situation. We are not deaf to the importance of tradeoff in devising institutional rules. Our society can either have a fair aggregate settlement system, or it can move in the direction that aggregate settlement seems to be moving towards, but it cannot have both. While even fairness, in all likelihood, has a price, we simply cannot accept the explanations out there, as they stand, for how cheaply it should be sold away.