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EMBEDDED AGGREGATION IN CIVIL LITIGATION

Richard A. Nagareda†

When one hears the term aggregation *in civil litigation, the long-running debate over class actions comes to mind. Viewed within its own terms, that debate tends to convey the impression that the world neatly divides itself into the mass effects somehow unique to class actions on the one hand and the confined realm of one-on-one litigation on the other. In the midst of this debate, a closely related set of issues has gone curiously underexplored.*

Here, the concern is not over some deviation from the one-on-one lawsuit. Rather, the basic suggestion is to circumscribe what an ostensible individual action may do in order to prevent it from exerting some manner of binding force upon broadly similar nonparties. The idea, in other words, is to constrain what individual litigation may do, precisely because it is not a "de facto class action" empowered to affect the rights of nonparties.

Variations of this concern have emerged across what might seem an unrelated array of contexts: the Supreme Court's 2008 decision in Taylor v. Sturgell, *rejecting the procedural doctrine of "virtual representation"; the Court's 2007 decision in* Philip Morris USA v. Williams, *identifying the constitutional due process limits on punitive damages; and the multibillion-dollar deal reached in 2007 to resolve mass tort litigation over the prescription pain reliever Vioxx. This Article explains that there is something deeper going on here but that its nature and implications remain undertheorized.*

Each instance involves a more general phenomenon—what this Article delineates as "embedded aggregation." In each, a doctrinal feature of what is ostensibly individual litigation—the scope of the right of action asserted, the nature of the remedy sought, or the character of the wrong alleged—gives rise to demands for the suit to bind nonparties in some fashion, beyond the ordinary stare decisis effect that any case might exert. Ironically, the features of Taylor, Williams, *and the Vioxx litigation that make them situations of embedded aggregation also, in all likelihood, would defeat efforts to aggregate them overtly as class actions. The result is to leave the law today in a kind of procedural catch-22 whereby embedded aggregation seemingly invites class-*

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My work as an Associate Reporter for the American Law Institute (ALI) project *Principles of the Law of Aggregate Litigation* informs the analysis in this Article. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010) [hereinafter ALI Principles]. The views stated here represent my assessment as an individual commentator, not necessarily the position of the ALI.

action treatment, but such treatment is unavailable due to the very features that make the situation one of embedded aggregation.

This Article frames a prescription for situations of embedded aggregation in a world in which the modern class action does not, and will not, realistically shoulder the entire regulatory load. The solution to the procedural catch-22 in which the law finds itself consists of "hybridization"—the combination of individual actions with some manner of centralizing mechanism, just not necessarily the unity of litigation generated by the class action device. Moving outside the parameters of the class action means shifting into new settings a similar need for a centralizing mechanism and, crucially, legal regulation of the manner in which that mechanism may exercise coercive power.

This Article seeks to break down the prevalent supposition of a neat division between the perceived need for legal regulation of class actions and the supposedly benighted world of autonomous individual lawsuits. The time has come to move the conversation about aggregate procedure beyond the class action device—to broaden the menu of approaches available for our modern world of mass civil claims. Such an approach actually would remain more true to the historical emergence of the class action device than would a prescription for either a vast expansion of that device or reflexive individualization in all situations of embedded aggregation. In addition, hybridization better accords with the emerging transnational conversation about the design of aggregate litigation procedures.

INTRODUCTION

In debates over civil litigation, class actions have long garnered considerable attention. Controversy continues to rage over efforts to certify class actions in the face of objections from defendants. For its proponents, certification of a class action promises to match allegations of wrongdoing on a mass scale with a commensurately aggregate mode of procedure.[1] For its critics, however, class certification is objectionable precisely for its aggregate perspective. On this competing account, class certification uniquely threatens to swamp material differences among the class members and, often, among the bodies of substantive law that govern their claims.[2] Critics also fear that class certification heightens settlement pressure on the defendant, potentially without adequate scrutiny of the merits.[3] The controversy over class actions, moreover, is not confined to their certification for purposes of adversarial litigation. Debate also swirls over their use as a vehicle for settlement, with the defendant's consent.[4] Here, the idea is for the class action to yield an approving judgment from the court—one that will bring peace on an aggregate scale by exerting preclusive effect over the absent members of the class who are not conventional parties to the lawsuit.

All of this ferment suggests that the big question about aggregate procedure today concerns when it should be superimposed—in other words, when to deviate from the traditional model of civil litigation in

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1 *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 162 (2006); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 853–54 (2002) (response to Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002)).

2 The most commonly invoked basis for class certification—Rule 23(b)(3) of the Federal Rules of Civil Procedure and its state-law counterparts—seeks to engage these concerns via insistence upon a judicial determination that common questions of law or fact "predominate" over individual questions concerning the proposed class members. *See* FED. R. CIV. P. 23(b)(3). On the connection between the predominance requirement and the papering over of material differences among class members, see Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1058–67 (2005). On the connection to choice-of-law problems presented by proposed class actions involving state-law claims, see Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2001–22 (2008).

3 The leading judicial statement of this concern remains *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995).

4 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–25 (1997) (overturning certification of opt-out class solely for purpose of settlement as inconsistent with Rule 23(b)(3)); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (overturning certification of settlement class for lack of bona fide limited fund under Rule 23(b)(1)(B)).

which conventional, named parties sue conventional, named parties and the binding effect of litigation tracks formal party status. Viewed within its own terms, this debate tends to convey the impression that the world neatly divides itself into the mass effects unique to class actions and the confined realm of litigation between individuals, each standing alone and each separately represented. As a result, amidst the ongoing debate over class actions, a closely related set of issues has gone curiously underanalyzed.[5]

Here, the concern is not over deviation from the model of the one-on-one lawsuit. Rather, the basic suggestion is to circumscribe what an ostensible individual action may do, by way of litigation or settlement, to prevent that lawsuit from exerting some manner of binding force upon nonparties who are broadly similar to the parties involved. The idea, in other words, is to constrain what individual litigation may do, precisely because such a proceeding is not a "*de facto* class action[ ]"[6] empowered to act upon nonparties.

In recent years, variations of this concern have surfaced across what might seem an unrelated array of contexts: in the Supreme Court's 2008 decision in *Taylor v. Sturgell*,[7] concerning preclusion principles and the procedural doctrine of "virtual representation"; in the Court's 2007 decision in *Philip Morris USA v. Williams*,[8] regarding the constitutional due process limits on punitive damages; and with respect to the widely reported $4.85 billion deal reached in 2007 to resolve mass tort litigation over the prescription pain reliever Vioxx.[9] Each of these situations would warrant scholarly attention in its own right. My suggestion is that there is something deeper going on here, but that its nature and implications remain undertheorized.

Each instance involves what this Article labels as a situation of "embedded aggregation." In each, a doctrinal feature of what is ostensibly individual litigation—the scope of the right of action asserted, the nature of the remedy sought, or the character of the alleged wrong—gives rise to demands for the suit to bind nonparties in some fashion, above and beyond the ordinary stare decisis effect that any case might exert.[10] An aggregate dimension, in short, is "embedded"

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5 The notable exception in the literature to date is Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (discussing the tension between formal procedural devices and the aggregation of claims).

6 *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008) (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 973 (7th Cir. 1998)).

7 128 S. Ct. 2161.

8 549 U.S. 346 (2007).

9 *See* Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed on the Signature Pages Hereto (Nov. 9, 2007), *available at* http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf [hereinafter Vioxx Settlement Agreement].

10 On the difference between the ordinary operation of stare decisis across all manner of civil lawsuits and the kind of binding effect (via preclusion doctrine, contractual agree-

doctrinally within what appears to be an individual lawsuit. That aggregate dimension, in turn, gives rise to demands for binding effect of a commensurately aggregate scope.

The Court's recent decision in *Taylor v. Sturgell* provides the perfect backdrop for this set of issues. *Taylor* involved the Freedom of Information Act (FOIA), a federal statute that confers an undifferentiated right upon "any person" to request the disclosure of "records" held by the federal government.[11] The difficulty this undifferentiated right presents is that the universe of potential claimants who might assert a right to disclosure with respect to any given record is without legal limits. *Taylor*, for example, concerned serial requests for the same record—blueprints for a vintage airplane—sought by two different antique-airplane enthusiasts.[12]

The Court in *Taylor* held that constitutional due process forbids the judgment entered in one FOIA requester's losing effort to compel disclosure from exerting preclusive effect upon a subsequent requester of the same record, at least absent agreement or collusion between the two seriatim requesters.[13] To hold otherwise—as some lower courts had done by developing a doctrine of virtual representation—would be to enable courts to "create *de facto* class actions at will,"[14] outside the strictures of Rule 23 of the Federal Rules of Civil Procedure[15] or counterpart state rules.

The concern over nonparties in individual actions extends beyond the unusual context of FOIA litigation, however. Under current doctrine,[16] the limits on punitive damages as a matter of federal constitutional due process bespeak a similar concern. In *Philip Morris USA v. Williams*, the Supreme Court held that the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially,

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ment, or otherwise) of concern in situations of embedded aggregation, see *infra* text accompanying notes 34–39.

11 5 U.S.C. § 552(a)(3)(A) (2006). State-law counterparts to FOIA are widespread, as evidenced by the Open Government Guide, an online guide to "open records" statutes at the state level maintained by the Reporters Committee for Freedom of the Press. *See* Open Government Guide, http://www.rcfp.org/ogg/ (last visited July 23, 2010).

12 Taylor v. Sturgell, 128 S. Ct. at 2167–68.

13 *See id.* at 2172–74.

14 *See id.* at 2176 (quoting Tice v. Am. Airlines, Inc. 162 F.3d 966, 973 (7th Cir. 1998)).

15 *See* FED. R. CIV. P. 23(a) (specifying procedural requirements whereby "[o]ne or more members of a class may sue . . . as representative parties on behalf of all members").

16 My point here is one of positive doctrine and its implications for procedural design. I do not engage the long-running debate among the Justices over the due process grounding, if any, for the Court's constitutional jurisprudence on punitive damages. *See* Philip Morris USA v. Williams, 549 U.S. 346, 361 (2007) (Thomas, J., dissenting). Nor do I address the wisdom of the *Williams* holding as a matter of tort theory.

strangers to the litigation."[17] To do so, the Court reasoned, would be to punish the defendant "for injuring a nonparty victim"—in *Williams*, the many other Oregon smokers of the defendant's cigarettes—without an "opportunity to defend against the charge" based upon the particulars of those nonparties.[18] *Williams*, in short, had never been certified as a class action.

On its face, the discussion of nonparties in *Williams* seems to dwell on the inputs to a punitive damages award in individual litigation rather than on its outputs in terms of nonparty effects. With respect to allegations of extreme, market-wide misconduct, however, the two cannot be so cleanly separated. Prior to *Williams*, serious concern had emerged that punitive damages awards in seriatim individual lawsuits over the same course of extreme, market-wide misconduct might amount, in the aggregate, to multiple punishments that then might warrant a clampdown on the availability of punitive damages for future plaintiffs.[19]

Williams establishes that punitive damages are, at least in theory, exclusively about "punishment" of the defendant for the extremity of its wrong as to the particular plaintiff at hand—not as to nonparties.[20] The Court nonetheless added that the jury may still consider harm to nonparties in assessing the "reprehensibility" of the defendant's misconduct vis-à-vis the plaintiff.[21] As a result, after *Williams*, an ostensible individual action for punitive damages resulting from market-wide misconduct will continue to have at least some nonparty dimension even though, again, nonparties have not been brought into the suit through class certification. For present purposes, the important point remains that *Williams*, too, grapples with how to regulate a kind of embedded nonparty dimension in individual litigation—albeit, not in terms of the due process limits on preclusion, as in *Taylor*, but instead, under the Court's due process jurisprudence for punitive damages.

The concern that the disposition of ostensibly individual cases might gravitate over to a kind of class action in disguise is not limited

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17 *Id.* at 353 (majority opinion).

18 *Id.*

19 *See infra* note 115 and accompanying text (discussing concern over multiple punishment in pre-*Williams* mass tort litigation).

20 *See Williams*, 549 U.S. at 353–54.

21 *Id.* at 355. For criticism of the majority's distinction, see *id.* at 360 (Stevens, J., dissenting) ("This nuance eludes me."), and *id.* at 363 (Ginsburg, J., dissenting) ("[J]ust what use could the jury properly make of 'the extent of harm suffered by others'? The answer slips from my grasp."). For scholarly defenses of *Williams* on various grounds, see Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE. L.J. 392 (2008) (arguing that imposition of punitive damages as punishment for public wrongs amounts to a substitute for criminal law, in violation of due process), and Benjamin C. Zipursky, *Punitive Damages After* Philip Morris USA v. Williams, 44 CT. REV. 134 (2009) (exploring the *Williams* decision and setting forth a theoretical justification for its nonparty-harm rule).

to adversarial litigation. The Vioxx settlement took the form not of a class action settlement but of a contract between the defendant-manufacturer Merck & Company, Inc. and the small number of law firms within the plaintiffs' bar with large inventories of Vioxx clients.[22] The contract described a grid-like compensation framework for the ultimate cashing out of Vioxx claims, but Vioxx claimants themselves literally were nonparties to that contract. The enforcement mechanism for the deal consisted not of preclusion but of contractual terms whereby each signatory law firm obligated itself to do two things: to recommend the deal to each of its Vioxx clients and—"to the extent permitted by" applicable ethical strictures—to disengage from the representation of any client who might decline the firm's advice to take the deal.[23] Absent a signatory law firm's commitment of its entire Vioxx client inventory to the deal, Merck would have the discretion to reject the firm's enrollment such that none of the firm's clients would be eligible to participate.[24]

The Vioxx settlement worked, at least in the practical sense that it garnered, by a comfortable margin, the overall rate of participation from Vioxx claimants that Merck had specified as a precondition for its funding obligations.[25] In a public speech, one of the key dealmakers on the plaintiffs' side explicitly touted the arrangement as a form of "mass settlement without class actions."[26] Along similar lines, the federal district judge widely credited with shepherding the Vioxx litigation toward settlement went on to describe the proceedings as a "quasi-class action."[27] The terminology here is revealing. The reference to a "quasi-class action" is the counterpart to the expressed concern in *Taylor* over the creation of a "*de facto* class action[ ]."[28] This is precisely the problem for critics of the Vioxx deal.

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22 *See* Vioxx Settlement Agreement, *supra* note 9.

23 *Id.* ¶¶ 1.2.8.1–1.2.8.2.

24 *See id.* ¶¶ 1.2.6–1.2.8.

25 *See id.* ¶ 11.1.1 (conditioning contract on eighty-five percent participation by Vioxx claimants overall within specified time frame); Press Release, Merck, Merck to Fund U.S. VIOXX® Product Liability Resolution Program (July 17, 2008), *available at* http://www.merck.com/newsroom/press_releases/corporate/2008_0717.html (reporting actual participation rate of ninety-seven percent).

26 The quoted language comes from the title of a March 11, 2008, speech delivered by Vioxx plaintiffs' attorney Chris Seeger at Benjamin N. Cardozo School of Law. *See* The Vioxx Story, http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10342&contentid=5512&folderid=308 (last visited July 23, 2010).

27 *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 611 (E.D. La. 2008). The use of the term "quasi-class action" in connection with lawsuits consolidated in a single federal district by the Judicial Panel on Multidistrict Litigation appears to originate with Judge Jack Weinstein. *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006).

28 *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2176 (2008) (quoting Tice v. Am. Airlines, Inc. 162 F.3d 966, 973 (7th Cir. 1998)).

Absent a judgment capable of yielding class-wide preclusion, the glue that held the Vioxx deal together ultimately consisted of individualized consent from each Vioxx claimant when the time came to accept (or not) her signatory lawyer's advice to enroll in the deal. For critics of the Vioxx settlement, this individualized client consent is illusory—a kind of consent obtained only through the leveraging of mass-client representation on the plaintiffs' side against itself. On this account, the deal effectively pitted the economic interest of the signatory firms against their obligation to render faithful advice to their individual clients tailored to particular situations of each client and, further, threatened dissenting clients with the prospect of having to start anew with alternate counsel, if any could be found.[29] For all its details, however, the central thrust of this criticism should sound curiously familiar. The insistence upon individualized client consent, unburdened by the strictures of the Vioxx settlement contracts, is the counterpart in the world of mass tort settlements to the insistence upon individualized procedure in *Taylor* and *Williams*.

The doctrine of virtual representation, the constitutional law of punitive damages, and the settlement of mass torts via contracts with plaintiffs' law firms clearly are different, and I do not seek to make light of the differences across those contexts. Still, cohesive consideration of these situations of embedded aggregation brings into focus four main points. These ideas are in the nature of a conceptual roadmap, a diagnosis of existing law, an emerging prescription, and a positive prediction for the future.

- *Roadmap:* Recognition of embedded aggregation as an underexplored category within our modern civil-justice landscape generates a need for a conceptual roadmap. This Article initiates such a conversation by understanding embedded aggregation in terms of the right of action asserted, the remedy sought, and the wrong on the merits that the litigation concerns.[30] A situation of embedded aggregation arises whenever any of these features extends beyond the plaintiff in an individual lawsuit. If so, then demands will tend to arise to bind, in some fashion, nonparties who are similarly situated to bring the scope of the resolution in line with the doctrinal feature that has an aggregate dimension.

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29 For thoughtful articulation of these criticisms, see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. (forthcoming Feb. 2011) (manuscript at 16–25, 34), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1560035; Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1000–04 (2010).

30 I do not write on a blank slate. The conceptual roadmap sketched here draws on a broadly similar framework that others have developed in tort theory. *See, e.g.*, Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

- *Diagnosis:* The most revealing aspect of the concern that individual litigation somehow is verging into a quasi or de facto class action is this: The features of *Taylor*, *Williams*, and the Vioxx litigation that make them situations of embedded aggregation, ironically enough, also would likely defeat efforts to aggregate them overtly as class actions. The result is to leave the law today in a kind of procedural catch-22: embedded aggregation seemingly invites class action treatment, but such treatment is unavailable due to the very features that make the situation one of embedded aggregation.[31]

It is only now, after forty-plus years of experience with the class action device in its modern form, that this catch-22 phenomenon could come to the fore. In decades past, much debate centered upon the aspiration for the class action essentially to occupy the field of aggregate procedure.[32] It is only upon the elaboration of what is now a distinctive body of procedural doctrine on what the class action realistically may and may not do that the remaining gaps in the world of aggregation come into sharper focus. Contrary to some voices in the literature,[33] this Article contends that the constraints on class certification elaborated over decades of real-world experience are not hypertechnical bugaboos. Rather, they stem ultimately from a well-taken notion of "preclusive symmetry"—an insistence that the plaintiff class ought not to be positioned to wield the bargaining leverage of a class-wide trial without, at the same time, affording to the defendant the assurance of a commensurately binding victory were the defendant, rather than the plaintiff class, to prevail on the merits.

- *Prescription:* Drawing on the FOIA, punitive damages, and Vioxx examples, this Article frames an emerging prescription for situations of embedded aggregation in a world in which the modern class action does not, and will not, realistically shoulder the entire regulatory load. The way out of the procedural catch-22 in which the law finds itself consists of what this Article dubs *hybridization*—the combination of individual actions with some manner of centralizing mecha-

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31 The use of the term *catch-22* is not intended to suggest that the underlying propositions of the catch somehow are ill formed or objectionable. Quite the contrary: in keeping with the literary origins of the term in Joseph Heller's iconic novel, the catch-22 quality of present-day aggregate litigation lies in the attractiveness of the two underlying propositions in their own right. It is precisely because the evolved limitations on the modern class action are, in my view, largely sound that we cannot plausibly extend the domain of that procedural device to encompass all instances of what this Article describes as embedded aggregation.

32 *See* sources cited *supra* note 1.

33 *See, e.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475 (2005) (criticizing the "counterreformation" of doctrinal and other developments to limit the class action device); Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 CARDOZO L. REV. DE NOVO 1 (2009) (describing alternate judicial approaches to issues of mass injury in various case examples).

nism, just not always or inevitably the unity of litigation that the class action device generates.

For FOIA, as I shall explain, the law might very easily specify what one might call a unity of forum for litigation that involves an undifferentiated right of action. The practical goal would be largely to disable seriatim lawsuits over the same disputed, government-held record in courts spread across the country by specifying a single forum for such actions. For punitive damages, I show how developments in tobacco litigation contemporaneous with *Williams* embody a nascent aspiration toward what one might call a unity of party—the notion that supracompensatory relief might best be accomplished by situating as plaintiff the government itself, but with the aid of private whistleblowers empowered to litigate on the government's behalf. I explain how developments under the Racketeer Influenced and Corrupt Organizations Act (RICO), the False Claims Act, and a reform proposal in the aftermath of the current economic crisis point haltingly toward such an approach.

The Vioxx deal underscores that the drive to identify some manner of centralizing mechanism for situations of embedded aggregation is not just the stuff of academic pipedreams or nascent developments in law. In seeking to deploy mass client representation in mass tort litigation as a mechanism for closure, the Vioxx deal effectively crafts a kind of near unity of representation—if not of all Vioxx claimants by a single law firm (as in class representation), then in substantial part due to the concentration of large Vioxx client inventories in the hands of a small number of signatory firms. This Article shows how further reform in the ethical strictures for what are known as "aggregate settlements" can refine and better regulate the use of this approach.

In sum, moving outside the parameters of the class action toward quasi, de facto versions that cannot realistically be folded into the class action device means shifting into new settings a similar need for a centralizing mechanism and, crucially, for legal regulation of the manner by which that mechanism may exercise coercive power. By bringing into sharper view situations of embedded aggregation in which the class action cannot shoulder the regulatory load, this Article seeks to break down the prevalent supposition of a neat division between the perceived need for legal regulation of class actions and the supposedly benighted world of autonomous individual lawsuits.

For situations of embedded aggregation, the answer does not lie in a roving, undifferentiated mandate for class actions. Nor does the answer lie uniformly in a reflexive and equally undifferentiated insistence upon notions of individual autonomy from the ancestral past of one-on-one litigation. The elaboration in decades past of what is now

a distinctive law of class actions has opened up a welcome conceptual space for experimentation with hybrid forms of rights, remedies, and wrongs that call for a commensurately hybrid approach on the part of civil justice system. The time has come to move the conversation about aggregation beyond the class action device and to broaden the menu of approaches available for our modern world of mass civil claims.

- *Prediction:* For the law of aggregate procedure, hybridization should be the watchword of today. The hard work consists of exposing and regulating this hybrid attribute. As I shall explain, such an approach actually would remain more true to the historical emergence of the class action device over time than a prescription for either a vast expansion of that device or reflexive individualization in all situations of embedded aggregation. In addition, hybridization better accords with the emerging transnational conversation about the design of aggregate litigation procedures.

This Article elaborates these various points in three Parts. Part I sets forth the conceptual roadmap summarized above. Part II examines the impulse in *Taylor* and *Williams* to constrain the nonparty effects of individual litigation out of concern that it otherwise would amount to a de facto class action. This Part then pinpoints the problem of procedural catch-22 that this effort has created. Part III points to the future, explaining how the elaboration of a distinctive law of class actions over the past four decades has made for welcome experimentation with hybrid processes in keeping with the hybrid rights of action, remedies, and wrongs deployed by modern law. This Part ends by situating the discussion of embedded aggregation under U.S. law within broader transnational developments in procedural design.

I
A Conceptual Roadmap

Before one may delve into specific instances of embedded aggregation and the hybrid legal responses that they demand, a conceptual roadmap is in order. As understood here, embedded aggregation concerns the relationship among three features of civil litigation. Speaking informally, one may understand these features in terms of who has a right of action for what remedy with respect to what manner of underlying civil wrong. Framed more crudely, these features concern who may sue for what and about what.

A situation of embedded aggregation arises whenever one or more of these features of underlying substantive law—the right of action asserted, the remedy sought, or the wrong alleged—admits of a mass or aggregate scope that then gives rise to demands for some manner of binding resolution of a commensurately mass scope. This

situation is what I mean by an aggregate dimension "embedded" within the doctrinal architecture of a civil lawsuit, even one ostensibly in the form of one-on-one litigation.

The notion that embedded aggregation gives rise to demands for aggregate resolution, in turn, distinguishes the situations of concern here from the routine operation of stare decisis. The adjudication of any civil action, whatever its procedural format, stands to yield precedent pertinent to other, similar actions in the future. As a doctrinal matter, however, the law of due process has not concerned itself with the routine operation of stare decisis.[34] Or, one might say, the process due consists of the usual judicial reasoning by analogy[35] (whereby the court in Case *B* asks whether it is relevantly similar to Case *A*), coupled with the well-rehearsed considerations that bear upon adherence to precedent in like cases.[36]

Within its domain of analogous cases, stare decisis simply provides one reason to adhere to the previous decision—a reason that is not absolute and that warrants evaluation in light of competing considerations.[37] The binding effect of concern in situations of embedded aggregation, by contrast, is urged to operate as a sufficient, dispositive reason to foreclose a subsequent claimant from proceeding as she otherwise might wish, whether because she is precluded or because she has agreed contractually to be bound. In embedded aggregation, the "binding-ness" of concern is invoked as a complete justification to shut down the subsequent claimant, not a reason at least to entertain her "nonfrivolous argument for . . . reversing existing law," in the parlance of Rule 11.[38] As subsequent Parts shall detail, it is this form of binding effect—not stare decisis—that forms the crux of concern, in one fashion or another, across *Taylor*, *Williams*, and the Vioxx settlement.[39]

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34 For a contrary suggestion that the law of due process should not distinguish so sharply between the preclusion of parties and the doctrine of stare decisis for courts, see Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1013 (2003) (arguing that "stare decisis often functions *inflexibly* in the federal courts, binding litigants in a way indistinguishable from nonparty preclusion").

35 *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949) (describing the "basic pattern of legal reasoning" as a "three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation").

36 For one much-discussed articulation of stare decisis in constitutional law, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–69 (1992).

37 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. i (1982). *But see* Barrett, *supra* note 34, at 1043–47 (questioning this distinction).

38 FED. R. CIV. P. 11(b)(2).

39 The prescription of this Article does not turn on any absolute, categorical separation between embedded aggregation and stare decisis. In the broadest sense, both concern a kind of externality exerted by one action upon another. Were one to include the routine operation of stare decisis within the definition of embedded aggregation, such a view would merely reinforce the intuition that no single procedure—much less, the class

A. Rights of Action

The first feature that may give rise to a situation of embedded aggregation—the scope of the right of action—consists of what one might call a notion of litigant "standing." The terminology here is admittedly risky, as any mention of the word *standing* in legal conversation has a tendency to invoke the heavily freighted meaning of that term in constitutional and administrative law.[40] One need not import that baggage here, however, in order to understand in a straightforward way the *who* question involved in any civil lawsuit. Simply put, that question asks who, as among all the people in the world, may invoke the coercive powers of the civil justice system in a given situation. More specifically, it contemplates who may demand a legal response from the defendant, at pain of a default judgment if no response is made.

This formulation is not intended to suggest that the *who* question exists entirely apart from how the law frames the underlying civil wrong or the menu of available remedies. In the early tort cases that remain the chestnuts of first-year legal instruction, for example,[41] the answer to the *who* question flows readily from the framing of the wrong and its appropriate remedy. A tort action for battery may be brought by the person battered (not by a third party, absent unusual circumstances) for the characteristic tort remedy of damages (paid to the plaintiff, not anyone else) to redress a wrong understood as a nonconsensual touching of the particular plaintiff by the defendant so named in the lawsuit.[42] The point is simply that civil law need not necessarily define the scope of the right of action in a manner that synchronizes with either the wrong or the remedy.

As Part II shall discuss, a desynchronized approach to the right of action under FOIA underlies much of the procedural difficulty presented in *Taylor*—in particular, the groping for some vehicle to resolve conclusively claims for disclosure of the same underlying government record. The extraordinary breadth of the right of action in *Taylor*, in short, is what gave rise to the unsuccessful efforts there to

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action alone—can plausibly comprise an across-the-board prescription. If a class action really is warranted in any situation with an aggregate dimension merely in the stare decisis sense, then the entire world would be a class action due to the potential of any single case to exert precedential effect.

40 For an overview of the constitutional and prudential requirements for standing, see 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1, at 1107–12 (4th ed. 2002). Civil recourse theories of tort law also refer to the notion of litigant "standing" in a manner similar to that suggested here. *See* Zipursky, *supra* note 30, at 4.

41 One widely used torts casebook starts with the classic nineteenth-century battery case of *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891). *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 4 (9th ed. 2008).

42 *See* DAN B. DOBBS, THE LAW OF TORTS §§ 28–29, at 52–58 (2000).

craft a basis for preclusion that would extend beyond conventional parties.

B. Remedies

The second feature of embedded aggregation is easier to pin down in legal parlance: It asks what remedy the plaintiff seeks. The field of remedies is, of course, considerable in modern civil law.[43] For present purposes, the important distinction concerns the divisibility of the remedy—whether it is such that the court could, as a practical matter, afford it to the plaintiff at hand without affecting the application or availability of the same remedy to other persons who are nonparties to the plaintiff's lawsuit.[44] The focus is on "matters of functionality and practical operation rather than inherited categorical labels" that stem from the origins of a given remedy in equity or at law.[45]

Examples of indivisible remedies include the classic sorts of prohibitory injunctions or declaratory judgments with respect to a generally applicable practice on the part of the defendant.[46] In functional terms, the court may enjoin the practice or not. It may declare that practice unlawful or not. The crucial point of indivisibility lies in the recognition that such remedies, if afforded, stand as a practical matter to redound to the benefit of all those adversely affected by the disputed practice on the defendant's part, not merely to the particular plaintiff who happens to have sued. The scope of the allegedly wrongful practice defines the scope of the indivisible remedy. And the scope of the remedy, in turn, gives rise to demands for some vehicle to determine conclusively the legality of the practice in question.

The paradigmatic form of divisible remedy is compensatory damages, a remedy gauged to the loss wrongfully suffered by the particular plaintiff and to be paid by the defendant to that plaintiff alone, apart from the compensatory damages that other similarly situated nonparties might seek or ultimately receive.[47] Only in the unusual situation of claims for compensatory damages against a "limited fund"—

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43 *See generally* DAN B. DOBBS, LAW OF REMEDIES (2d ed. 1993).

44 *See* ALI Principles, *supra* note †, § 2.04(b) ("Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants."). For a similar definition, see Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1895 (2009) ("Indivisible relief refers to situations in which the relief granted in one suit and the relief sought in a second suit cannot be treated separately—in other words, one is necessarily tied to the other. Indivisible relief situations often involve cases in which injunctive relief is sought.").

45 ALI Principles, *supra* note †, § 2.04 cmt. a, at 117.

46 *See id.*

47 *See* RESTATEMENT (SECOND) OF TORTS § 903 (1979).

whereby the estimated liability to all potential claimants exceeds the defendant's resources[48]—would the affording of compensatory damages to a given plaintiff affect the application or availability of the same remedy as to others. In this respect, the limited-fund scenario presents a specialized instance of the broader category of indivisible remedies.[49]

As Part II shall detail, a long-running debate over the divisibility of the punitive damages remedy in torts comprises a significant underlying theme in *Williams*—one that helps to frame the implications of the Court's decision there for class action treatment of punitive damages.[50] For now, it is enough simply to note the intuitive connection between remedial divisibility and aggregation as a procedural matter. Indivisible remedies vis-à-vis a general course of misconduct (or a limited fund) have an aggregate or class-like flavor, whereas divisible remedies—precisely because they are divisible—convey more of an individualized feel. When the remedy sought is indivisible, the claims of the would-be class members are already interdependent such that a class action does not somehow mark a deviation from the conventional one-on-one lawsuit so much as it helps to manage the existing interdependence among claimants.[51]

Class actions remain available in some situations of divisible remedies, as evidenced by the commonplace certification of class actions for damages in antitrust or securities fraud litigation under federal law.[52] As Part II shall explain, however, the crossing of the line from indivisible to divisible remedies has major implications for the availability of class treatment for punitive damages in torts. There, the move toward characterization of the punitive damages as a divisible remedy—what the Court in *Williams* ostensibly declares as a matter of constitutional due process—effectively becomes decisive as to the availability of class treatment. The consequence, as I shall elaborate, is to bring into play for punitive damages in tort actions the familiar sorts of barriers to class certification as to plain, old compensatory damages under state law—chiefly, choice-of-law problems and individ-

48 This is a nontechnical rendering of the criteria for certification of a Rule 23(b)(1)(B) mandatory class action based upon the existence of a limited fund. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999).

49 *See* ALI Principles, *supra* note †, § 2.04 cmt. a, at 118.

50 *See infra* Part II.B.1.

51 For further development of preexisting interdependence as an explanation for the architecture of the modern class action rule, see Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 231–33 (2003).

52 *See* ALI Principles, *supra* note †, § 2.03(b) (noting that class certification may encompass "both common issues of liability and individual issues of remedy" as to divisible relief, such as damages, "when resolution of the liability issues in claimants' favor will, in practical effect, determine both the choice of remedy and the method for its distribution on an individual basis").

ualized questions stemming from the personal, rather than economic, nature of the injury for which damages are sought.[53]

C. Wrongs

The third relevant feature concerns the nature of the underlying wrong that a civil lawsuit alleges. Here, the important question is whether the wrong is of such a nature as to affect a multitude of persons. It is not by happenstance that both *Williams* and the Vioxx litigation involved products liability claims concerning mass-marketed consumer goods—cigarettes and a prescription drug, respectively. To be sure, the sale of a single defective product to a single consumer is tortious, as in a case of a manufacturing defect found on a one-off basis in an otherwise safe product.[54] Mass tort litigation today, however, focuses overwhelmingly on alleged product defects that are not of a one-off nature but, instead, concern the design of products or the warnings conveyed with them—aspects that implicate all those who consumed the disputed product, not just an unlucky few who might encounter an anomalous manufacturing defect.[55] For many mass torts, moreover, a significant part of the proof on the merits takes an aggregate, epidemiological form: expert scientific testimony offered to show a general causal relationship between the product and the disease from which the plaintiff suffers.[56]

Once tort law comes to frame misconduct in terms of a product defect defined in a manner that implicates the entire product run, the conception of the wrong itself admits of a mass or aggregate perspective. A finding of defectiveness in the design or warning as to one plaintiff suggests that the product is defective in the same way as to all consumers. Such an implication of defectiveness does not automatically entitle all other consumers to damages, of course. Other features of substantive law may well pose stumbling blocks—for instance, the insistence upon a proximate causal relationship between the defect and the injury a given consumer suffered and, for that matter, the usual tort requirement of an actionable injury itself. The point here is simply that the framing of the wrong in much of modern products liability law results in a potential scope of litigation beyond the individual plaintiff in a given lawsuit.

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53 *See infra* Part II.B.2.

54 *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

55 Aside from manufacturing defects, design defects and inadequate warnings comprise the two major categories of product defects actionable under modern products liability law. *See id.* § 2(b)–(c).

56 This situation was the setting for the Supreme Court's famous decision on the admissibility of expert scientific testimony. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

Expansion in the potential scope of litigation gives rise to demands for settlement—for litigation peace—that are commensurate in their scope. Mass wrongs elicit efforts at mass settlement and, with it, a search for some vehicle through which to impose the deal on a suitably mass basis. The effort to craft such a vehicle absent the use of a class action is the essence of the Vioxx deal.

II
THE IMPULSE TOWARD INDIVIDUALIZATION

On their faces, the Supreme Court's decisions in *Taylor v. Sturgell*,[57] concerning FOIA litigation, and *Philip Morris USA v. Williams*,[58] regarding the constitutional limits on punitive damages, seem unconnected. Viewed with the aid of the roadmap for embedded aggregation in Part I, however, the affinity between *Taylor* and *Williams* emerges. Each deals with features that define embedded aggregation. *Taylor* concerns the unusual breadth of the right of action conferred by FOIA.[59] *Williams* speaks to a lingering point of uncertainty within the Court's own jurisprudence about the divisibility of the punitive damages remedy.[60]

In both decisions, the Court ultimately limits what an individual lawsuit may do out of concern that the lawsuit would otherwise operate as a de facto class action. Ironically, however, the features that make each situation one of embedded aggregation also would prevent the law from making that aggregate dimension overt through certification of a full-fledged class action. This feature comprises what one might call a form of procedural catch-22. As this Part shows, the path out of the catch lies in neither reflexive deployment of class actions in all situations nor retreat to one-on-one litigation but, rather, efforts to design a hybridized approach in keeping with the hybrid nature of the right of action or remedy involved.

A. Undifferentiated Rights of Action

When people think of FOIA, the narrative that comes to mind is one of the press or a public interest group seeking the release of "records"[61] held by the federal government, with the goal of shedding light upon suspected wrongdoing or other government blunders in

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57 128 S. Ct. 2161 (2008).

58 549 U.S. 346 (2007).

59 *See* discussion *infra* Part II.A.

60 *See* discussion *infra* Part II.B.

61 JAMES T. O'REILLY, 1 FEDERAL INFORMATION DISCLOSURE § 4:14, at 73 (3d ed. 2000) ("Documentary objects, and information which can be retrieved in the form of a documentary object, are *records.* The term is the subject of extensive case law, so it is not limited to the colloquial uses of the term *record.*" (footnote omitted)).

matters of considerable public concern.[62] The record at issue in *Taylor*, however, was much less momentous. The case arose from seriatim FOIA requests by two "antique aircraft enthusiast[s]," each of whom sought disclosure by the federal government of the plans for the "vintage" F-45 model of airplane.[63] The Court described the two requesters—Greg Herrick and Brent Taylor—as "friend[s],"[64] and the same lawyer represented each man in their respective FOIA requests for the plans,[65] which Herrick ultimately wished to use to facilitate his restoration of a surviving F-45.[66]

After the government denied his FOIA request, Herrick sued in federal district court in Wyoming, ultimately losing on the merits when the court ruled the plans to be exempt from disclosure as a trade secret.[67] Taylor thereafter filed his own FOIA request for the same plans, predictably eliciting the same denial from the government. Taylor then sued in federal district court in Washington, D.C., with the court deeming his action precluded by the earlier judgment against Herrick.[68] On appeal, the D.C. Circuit agreed, acknowledging Taylor's nonparty status in Herrick's lawsuit but nonetheless upholding the application of claim preclusion to shut down Taylor's lawsuit. The court held that a constellation of circumstances demonstrated the "virtual represent[ation]" of Taylor by the earlier Herrick.[69] In this endeavor, the D.C. Circuit was not alone; other lower courts had invoked the notion of virtual representation as a basis for preclusion of repetitive litigation in various contexts.[70]

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62 *See, e.g.*, Julia Preston, *A.C.L.U. Gains in Its Quest for C.I.A. Documents on Detainees*, N.Y. TIMES, Feb. 3, 2005, at A13 (American Civil Liberties Union request for records concerning treatment of prisoners by American military forces in Iraq); Don Van Natta, Jr., *Judge Orders Release of Energy Panel's Files*, N.Y. TIMES, Feb. 28, 2002, at A19 (news media request for records related to national energy task force).

63 *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2167 (2008). The predecessor agency to the Federal Aviation Administration had obtained the plans pursuant to its regulation of the airline industry. *See id.*

64 *Id.* at 2168.

65 *See* Taylor v. Blakey, 490 F.3d 965, 974 (D.C. Cir. 2007), *rev'd sub nom.* Taylor v. Sturgell, 128 S. Ct. 2161 (2008).

66 *See* Taylor v. Blakey, 490 F.3d. at 972 (noting that there was "evidence that Herrick and Taylor had the same motivation to obtain the documents, viz., the restoration of Herrick's F-45").

67 Herrick v. Garvey, 200 F. Supp. 2d 1321, 1328–29 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002).

68 Taylor v. Blakey, No. 03-0173 (RMU), 2005 WL 6003553, at *7 (D.D.C. May 12, 2005), *aff'd*, 490 F.3d 965 (D.C. Cir. 2007), *rev'd sub nom.* Taylor v. Sturgell, 128 S. Ct. 2161 (2008).

69 Taylor v. Blakey, 490 F.3d at 978. Among other circumstances, the D.C. Circuit pointed to the "close relationship" between the two requesters, "tactical maneuvering" by Taylor, and the relative strength of Herrick's incentive to litigate the disclosure claim in his earlier action. *Id.* at 972–73.

70 *See* Taylor v. Sturgell, 128 S. Ct. at 2169–70, 2173 (citing illustrative lower-court decisions).

The Supreme Court unanimously reversed, ending efforts to develop a doctrine of virtual representation as a permissible exception to the general rule against preclusion of nonparties in litigation—a rule grounded in constitutional due process.[71] Writing for the Court, Justice Ginsburg noted several "established categories" of exceptions to the rule against nonparty preclusion, the bulk of which involve contractual or other legal relationships between the nonparty and the party to the judgment now said to be claim preclusive.[72] The additional exception recognized for "representative" suits, such as class actions,[73] departs from the contractual model. Indeed, the contrast between class actions and contractual arrangements shall come to the fore later, in connection with the contracts used in the Vioxx settlement. For present purposes, the revealing portion of *Taylor* comes in the Court's rejection of virtual representation by contrast to the class action device.

The Court explained that "[a]n expansive doctrine of virtual representation . . . would 'recogniz[e], in effect, a common-law kind of class action.'"[74] Specifically, virtual representation "would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in" the law of class actions.[75] The "amorphous balancing" of ad hoc circumstances countenanced by notions of virtual representation would "allow[ ] courts to 'create *de facto* class actions at will.'"[76]

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71 The same term—*virtual representation*—has enjoyed a more successful run elsewhere in legal discourse. The law of trusts requires "consent . . . from or on behalf of all potential beneficiaries, including those who lack capacity," for the termination or modification of an irrevocable trust. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. b (2003). "The consent of potential beneficiaries who cannot consent for themselves, however, may be provided by guardians ad litem, by court appointed or other legally authorized representatives, or through representation by other beneficiaries under the doctrine of virtual representation." *Id. See also id.* reporter's notes on § 65 (discussing illustrative cases). I am grateful to Jeffrey Schoenblum for noting the trust law terminology.

72 These exceptions include situations in which the nonparty agrees to be bound by the judgment as to the party; a legal relationship exists between the two due, for example, to an underlying property arrangement; or the nonparty assumes control of the party's lawsuit. *See* Taylor v. Sturgell, 128 S. Ct. at 2172–73. The *Taylor* Court ultimately remanded the case to the D.C. Circuit for a more specific determination as to the applicability of this last, control-based exception, though the Court cautioned that "[a] mere whiff of 'tactical maneuvering' will not suffice" to demonstrate control. *Id.* at 2179.

73 *Id.* at 2172–73.

74 *Id.* at 2176 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 972 (7th Cir. 1998)). An amicus brief authored by David L. Shapiro and signed by several other prominent proceduralists underscored the same concern about the creation of a de facto class action. *See* Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Petitioner, Taylor v. Sturgell, 128 S. Ct. 2161 (2008) (No. 07-371).

75 Taylor v. Sturgell, 128 S. Ct. at 2176.

76 *Id.* at 1275–76 (quoting *Tice*, 162 F.3d at 973).

1. *Procedural Catch-22*

The holding in *Taylor* makes considerable sense. A fulsome doctrine of virtual representation would indeed comprise a vehicle for ad hoc evasion of class certification requirements. Still, the lower courts were on to something important in their attempts to fashion a coherent doctrine of virtual representation. Though ultimately unsuccessful, those attempts attest to a fundamental truth about situations of embedded aggregation. They predictably elicit efforts to bring about something approaching synchronization between the nonaggregate features of the dispute and those with an aggregate dimension—specifically, to synchronize the scope of preclusion in litigation with the potential scope of the underlying dispute. Here, the roadmap from Part I cast in terms of the underlying right of action, remedy, and wrong is helpful.

FOIA confers an undifferentiated right upon "any person" to seek disclosure of records held by the federal government and, thereafter, to sue if disclosure is withheld.[77] By "undifferentiated," I mean that FOIA affords its right of action irrespective of any injury from nondisclosure or, for that matter, any reason for the seeking of disclosure.[78] As Justice Scalia quipped at oral argument, "naked curiosity" is enough.[79] As to any given record, then, the potential scope of litigation extends to the world, commensurate with the underlying nature of the wrong framed in FOIA—namely, an unwarranted lack of transparency vis-à-vis the public at large concerning the operations of the federal government.

In addition to the undifferentiated scope of the right of action under FOIA, the remedy the statute provides comes close to an indivisible remedy. Specifically, the remedy consists of the relevant federal agency "'mak[ing] the records promptly available' to the

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77 5 U.S.C. § 552(a)(3)(A)(ii) (2006) (conferring the right to request disclosure on "any person"); *id.* § 552(a)(4)(B) (conferring jurisdiction upon the federal district court "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia . . . to enjoin the agency from withholding agency records").

78 FOIA differs in these respects from other statutes that authorize "any person" to sue, subject to the usual sorts of standing limits that differentiate the plaintiff from the citizenry generally. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–72 (1992) (analyzing constitutional limits on standing under citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g) (2006)). Standing to sue under FOIA stems from the denial of the plaintiff's disclosure request. But any person can make such a request in the first place such that a denial does not delimit the universe of potential litigants vis-à-vis the citizenry generally as to a given record. However, the same does not hold true for challenges to administrative agency rulemaking. Any person may comment on a proposed rule, but only those "adversely affected or aggrieved" by content of the rule ultimately promulgated may sue. *See* 5 U.S.C. § 702 (2006).

79 Transcript of Oral Argument at 10, Taylor v. Sturgell, 128 S. Ct. 2161 (2008) (No. 07-371), 2008 WL 1741237.

requester."[80] Although a victorious requester is not obligated to make the records available to the public, she certainly is free to do so; indeed, the point of the prototypical FOIA request is to do just that. As a result, from the defendant-government's standpoint, the bell of FOIA disclosure cannot be unrung.[81] Though the idea understandably escaped the 1966 Congress that enacted FOIA[82]—legislation based on a bill cosponsored by then-Representative Donald Rumsfeld[83]—a more technology-savvy statute today might make explicit what is implicit about the disclosure remedy: FOIA simply might provide for disclosure to the world via the Internet.

Once one sees the aggregate dimension to the right of action, the remedy, and the wrong involved, FOIA litigation might seem especially well suited for class actions. Indeed, the expressed fear about courts "creat[ing] *de facto* class actions at will"[84] conveys the impression that Herrick's initial lawsuit simply took place in the wrong procedural box to preclude similarly situated nonparties. Properly understood, however, the FOIA context actually reveals the curious nature of the Court's reference in *Taylor* to the class action device as a basis for nonparty preclusion. The features that make the FOIA situation one of embedded aggregation, ironically, are also what would prevent overt aggregation by way of a class action.

When "any person" potentially may sue for disclosure of government-held records, a class action to resolve conclusively the status of any given record would have to do something unprecedented: It would have to embrace the world.[85] The content and application of the modern class action rule will bear closer attention later in this Part. For now, however, one need not tarry with the subtleties of Rule 23 in order to grasp the odd situation in which *Taylor* leaves litigation of an undifferentiated right of action.

Its details aside, the modern class action rule has long been understood to contain an implicit requirement that a class must have ascertainable parameters to enable courts to tell who is within them

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80 Taylor v. Sturgell, 128 S. Ct. at 2167 (quoting 5 U.S.C. § 552(a)(3)(A)).

81 *Cf.* O'REILLY, *supra* note 61, § 9:49, at 372 ("Agency disclosure of a record to a person outside the agency generally waives the agency's discretion to assert exempt status for that same record against other requesters."). For criticism of the Court in *Taylor* for insufficient attentiveness to problems of nonparty preclusion in situations that involve indivisible relief, see Redish & Katt, *supra* note 44, at 1906.

82 Freedom of Information Act, Pub L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

83 *See* Christopher Caldwell, *The Rise and Fall of Donald Rumsfeld*, N.Y. TIMES, Aug. 9, 2009, at 15 (reviewing BRADLEY GRAHAM, BY HIS OWN RULES (2009)).

84 Taylor v. Sturgell, 128 S. Ct. at 2176 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 973 (7th Cir. 1998)).

85 *Cf.* DAVID HURWITZ, THE MAHLER SYMPHONIES: AN OWNER'S MANUAL, back cover (2004) (translating composer Gustav Mahler's remark that a symphony "must embrace the world" and "must contain everything").

and who is not.[86] This requirement would lose its meaning if a permissible class definition could embrace the world. The result in *Taylor* is to leave in a procedural catch-22 the resolution of FOIA disputes on a scale commensurate with the potential scope of litigation. Preclusion of nonparties is impermissible—Herrick's initial lawsuit "was doomed to fly solo," in Samuel Issacharoff's apt phrasing[87]—due to well-taken concern over the displacement of Rule 23 strictures. But, at the same time, Rule 23 itself is unavailable due to the undifferentiated, all-the-world nature of the FOIA right of action—one of the features of legal doctrine that embeds an aggregate dimension within the situation.

2. *Centralization of Forum, Not Parties*

Even under the usual rule against nonparty preclusion, the law is not without safeguards against repetitive litigation. As noted earlier, the doctrine of stare decisis operates across civil lawsuits generally.[88] That doctrine, however, consists of an argument on the merits at the end of the line and, more importantly for present purposes, an argument tempered in its application by the structural divisions within the federal judiciary. Stare decisis operates most strongly within the same court and between courts situated at different rungs within the same judicial hierarchy—for example, the obligation of a federal district court to follow the decisions of the circuit court in which it sits. But one circuit's decision is not stare decisis as to another circuit.

The Court in *Taylor* is correct in the further point that, even across judicial systems, people tend not to "waste money . . . on claims or issues that have already been adversely determined against others."[89] But, broadly speaking, the financial constraint that flows from the anticipated adherence to stare decisis tends to discourage repetitive litigation most when the disputed records are least significant. The larger the proverbial apple, one might say, the more reason there will be for persons to attempt multiple bites at it.

For FOIA, the law need not choose between the polar extremes of an unprecedented, all-the-world class action and seriatim, one-on-one lawsuits. For undifferentiated rights of action, a centralization of forum may substitute—if not completely, then substantially in func-

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86 *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. Supp. 2010). For a critique of the implicit requirement of ascertainability in consumer class actions, see Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499402.

87 Issacharoff, *supra* note 5, at 208.

88 *See supra* text accompanying notes 31–36.

89 Taylor v. Sturgell, 128 S. Ct. at 2178 (quoting DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001)).

tion—for the centralization of potential claimants in a single lawsuit via class certification. The idea here would be to make the constraints of stare decisis very likely to apply strongly. Just because any person may sue does not mean that she should be able to select among a multitude of fora. Rather, law reform might counter the centrifugal tendency of an undifferentiated right of action by specifying a particular forum for suit. The law might couple an undifferentiated right of action with a highly differentiated specification of forum. The latter is commonplace in environmental statutes that require challenges to nationwide agency rules be brought in the District of Columbia.[90] FOIA, by contrast, deems venue proper in the District of Columbia, but merely at the requester's option as among multiple potential districts for suit.[91]

If anything, the use of forum as a proxy for class certification sounds a familiar note in the world of aggregate procedure. Cast in its best light, the Class Action Fairness Act of 2005 (CAFA) expanded federal diversity jurisdiction over proposed nationwide class actions involving state-law claims[92] as a partial response to a genuine problem: the pre-CAFA tendency of class counsel to shop such proposed class actions to different state courts across the country in an effort to elicit certification from the anomalous state court—that is, one anomalous in its inclination to certify when the vast majority of federal courts, other states' courts, and perhaps even other courts within the same state would not.[93] When it comes to rulings on nationwide class certification, "[a] single positive trumps all the negatives."[94] The two suits for disclosure of the identical F-45 plans in *Taylor*—brought seriatim in two different federal district courts—replicated in microcosm the kind of strategic maneuvering as to forum that CAFA blunts in the class action world. A centralization of forum likewise can blunt such

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90 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(b)(1) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a) (2006); *see also* Federal Communications Act, 47 U.S.C. § 402(b) (2006). Patent law likewise centralizes litigation over patent validity in the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1292(c)(2) (2006).

91 *See* 5 U.S.C. § 552(a)(4)(B) (2006); *see also* O'REILLY, *supra* note 61, § 8:6, at 219 (discussing legislative history of the D.C. venue provision in FOIA). Alternatively, FOIA might require a plaintiff to sue in the district where the requested records are located, though that approach might prove difficult in a world where records are increasingly electronic.

92 *See* 28 U.S.C. § 1332(d)(2) (2006) (providing for federal diversity jurisdiction over class actions involving state-law claims based on minimal diversity of citizenship and more than five-million dollars in controversy).

93 For more extensive treatment of CAFA as a response to concern over the anomalous certifying state court, see Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1660–66 (2008).

94 *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

behavior under FOIA, even absent the ability to centralize in a single class action a given party to a conventional lawsuit along with all other would-be requesters in the world who are nonparties to the action at hand.

The preceding suggestion serves to introduce a relatively simple version of a more general point. When the structure of litigation is itself a hybrid—when its aggregate features coexist with nonaggregate ones—a viable alternative to the polar extremes of class actions and one-on-one lawsuits consists of a kind of hybridization of procedure itself. To that end, the class action device is only one of the tools available for procedural design.[95] For FOIA, one might combine an undifferentiated right of action and a near-indivisible remedy with a highly differentiated specification of forum. The next section highlights the possibility for a broadly similar hybridized response—this time, driven not by an undifferentiated right of action but by a hybridized remedy.

B. Punitive Remedies for Market-Wide Misconduct

When speaking of the connection between embedded aggregation and available remedies, Part I focused on the notion of remedial divisibility.[96] Indivisible remedies have an aggregate dimension by their nature: distribution to one claimant will exert an externality on the application or availability of the same relief as to other claimants situated similarly.[97] But what if a given remedy straddles the line between divisibility and indivisibility? Or, more precisely, what if the extent of that straddling itself is a point of uncertainty in doctrine? As this section explains, the Supreme Court's constitutional jurisprudence of punitive damages prior to *Philip Morris USA v. Williams*[98] generated such uncertainty. The organization of this section focuses on the nature of the remedial straddling involved, its significance for class certification, the Court's controversial prescription in *Williams*, and the significance of that prescription for embedded aggregation.

1. *Straddling Divisibility*

The *Williams* prescription—forbidden punishment of the defendant with respect to nonparties but permitted consideration of nonparties to determine the reprehensibility of the defendant's conduct

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95 *See* Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 128 S. Ct. 2531, 2545 (2008) ("[C]lass actions constitute but one of several methods for bringing about aggregation of claims, *i.e.*, they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.").

96 *See supra* Part I.B.

97 *See* ALI Principles, *supra* note †, § 2.04(b) (defining indivisible remedies).

98 549 U.S. 346 (2007).

as to the plaintiff at hand[99]—has elicited considerable attention.[100] The Court's holding bears attention here, however, as much for what preceded it as for what might follow. As I now explain, both the scholarly literature and the Court's own constitutional decisions prior to *Williams* approached the punitive damages remedy in such a way as to leave its divisibility unresolved. The consequence was to leave in a similarly indeterminate state the permissible treatment—if any—of that remedy by way of a class action.

Writings on punitive damages comprise one of the richest veins in torts literature. At the risk of suppressing nuances, one may distinguish in broad-brush terms between tort accounts of punitive damages that are essentially plaintiff-focused and those that are largely group-focused. By "plaintiff-focused" accounts, I mean to group together those that conceptualize punitive damages as a remedy for a qualitatively distinctive kind of wrong as to the plaintiff at hand: an extreme mistreatment of the plaintiff by the defendant.[101] Plaintiff-focused accounts have the virtue of highlighting the conceptual link between punitive damages in the modern world of mass, market-wide misconduct with origins of that remedy in one-off lawsuits over affronts to the plaintiff's honor.[102] In the view of plaintiff-focused accounts, there is no fundamental difference between one such affront and its latter-day mass equivalent, replicated in thousands of instances across the marketplace. Rather, under plaintiff-focused accounts, punitive damages continue to function as a form of proper redress for the distinctive badness of the wrong done to the plaintiff, not fundamentally as a vehicle by which to address some broader group-wide or societal wrong.[103]

By contrast, "group-focused" accounts conceptualize the plaintiff not so much as the locus of a qualitatively distinctive wrong but essentially as a useful private vehicle by which to bring to justice wrongful

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99 *See id.* at 353–55.

100 *See supra* note 21 (citing discussion in case law and commentary).

101 *See* Colby, *supra* note 21, at 396 (arguing that "punitive damages are a form of legalized private revenge"); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164 (2003) (contending that "punitive damages serve[ ] a range of functions, including vindication and redress for insult"); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005) (focusing on the "plaintiff's right to be punitive"). This is not to deny the existence of nuanced differences among these plaintiff-focused accounts.

102 *See* Sebok, *supra* note 101, at 185 (discussing nineteenth-century view of punitive damages as a remedy for "a 'sense of disgrace [or] wounded honor'" (alteration in original) (quoting Fay v. Parker, 53 N.H. 342, 359 (1872))).

103 *See* Zipursky, *supra* note 101, at 151 ("A plaintiff is entitled to go beyond making whole; she is entitled to *be punitive*. This permission exists because of the manner in which she was wronged—willfully or maliciously.").

behavior of a group-wide or societal nature.[104] Group-focused accounts have the virtue of underscoring the "punitive" nature of punitive damages—specifically, their affinity to criminal prosecutions for violations of the general social order on behalf of "the people" as a whole.[105] The tort plaintiff acts as a private attorney general to supplement criminal prosecution, if any, by public attorneys general.

The standard law-and-economics account of punitive damages casts this supplementation as a desirable response to concerns that extreme wrongs often take clandestine forms in the context of modern markets and, as such, tend to be underdetected.[106] Another major group-focused account casts the wrong itself as a societal wrong that warrants commensurately "societal damages"—relief that a prevailing plaintiff then might appropriately be required to pay over, in part, to the government.[107] In wording that foreshadows the title of the present Article, one commentator at the forefront of this second group-focused account describes the notion of "societal damages" as "embedded" within the punitive damages remedy in tort litigation.[108]

The torts literature on punitive damages straddles the line of divisibility. Plaintiff-focused accounts lean strongly toward divisibility, whereas at least some group-focused accounts tend toward indivisibility. As I shall explain momentarily, this straddling in terms of remedial divisibility has significant implications for the availability of class action treatment for punitive damages. For now, an additional point bears note: The Supreme Court's constitutional jurisprudence on punitive damages prior to *Williams* managed to replicate—indeed, accentuate—the straddling over the divisibility of that remedy in torts literature.[109]

In 1996, the Court for the first time struck down a punitive damages award as unconstitutional, holding that the Due Process Clause prohibits a state from imposing an award of such a magnitude that the

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104 *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874–76 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003).

105 The caption used for criminal cases in some states underscores this facet.

106 *See* Polinsky & Shavell, *supra* note 104, at 874–76.

107 *See* Sharkey, *supra* note 104, at 389–90.

108 *See id.* at 355, 390–91.

109 Interestingly enough, procedural law came to rest on a divisible characterization of the punitive damages remedy prior to *Williams* for purposes of the amount-in-controversy requirement then in place for federal diversity jurisdiction over class actions. *See, e.g.*, Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072–73, 1076–77 (11th Cir. 2000) (reversing, on rehearing, earlier panel decision and holding that punitive damages do not constitute an indivisible res for purposes of determining each plaintiff class member's individual jurisdictional amount). The Class Action Fairness Act of 2005 superseded the need for inquiry along these lines by providing for federal diversity jurisdiction over class actions that involve state-law claims with more than five-million dollars in controversy, calculated in the aggregate. *See* 28 U.S.C. § 1332(d)(6) (2006).

defendant would not have had "fair notice" that its misconduct might be met with such severity.[110] Elaborating on this due process limit in a subsequent case, the Court declined to set a "rigid benchmark[ ]" or "bright-line ratio" for punitive damages by comparison to compensatory damages.[111] But the Court nonetheless opined that, "in practice, few awards exceeding a single-digit ratio . . . to a significant degree, will satisfy due process"[112]—albeit, with somewhat greater latitude available for personal injuries as compared to economic ones.[113] The notion of a constitutional ratio aside, the Court added that a given state has no authority to punish the defendant either for conduct lawful in other states or for unlawful conduct that nonetheless involved "dissimilar acts, independent from the acts upon which liability [to the plaintiff at hand] was premised."[114]

The Court's pre-*Williams* jurisprudence nonetheless left unanswered the constitutional limits on punitive damages in a recurring scenario of considerable importance: a mass tort involving alleged misdeeds that involve the same conduct that is illegal market-wide. The open question was whether the constitutional ratio posited by the Court effectively made punitive damages an indivisible remedy. In particular, did that ratio in individual cases imply the existence of a similar ratio in the aggregate across multiple lawsuits and yet, at the same time, leave a substantial risk that the aggregate ratio might be exceeded if individual suits were to proceed seriatim? If so, then early individual actions would take place within constitutional strictures but, over time, similar actions might make for punitive damages "overkill"[115] in the aggregate—overkill that, in turn, would support calls for constraint as a constitutional matter with respect to later requests for the same remedy by subsequent plaintiffs. The constitutional ratio, in short, might introduce a degree of indivisibility—or, least, its potential—into individual punitive damages litigation when similarly situated would-be plaintiffs remained to sue.

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110 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

111 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

112 *See id.* Post-*Williams*, the Court adopted a single-digit ratio for punitive damages under federal maritime law as distinct from their usual source in state tort law. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2633 (2008). There, the punitive damages award that the Court struck down stemmed from a mandatory class action certified under Rule 23(b)(1)(B) prior to the Court's ruling in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–48 (1999). *See Exxon Shipping Co.*, 128 S. Ct. at 2613. The *Exxon* Court's grant of certiorari did not encompass the propriety of the class certification. *See id.* at 2611.

113 *See Campbell*, 538 U.S. at 426 (noting that the situation before the Court "arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries").

114 *Id.* at 422.

115 This wording comes from an influential opinion by Judge Henry Friendly at a time prior to the line of Supreme Court decisions that set forth constitutional limits on punitive damages. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

2. *Remedial Divisibility and Class Certification*

The divisibility of the punitive damages remedy is no mere technical question. Rather, it bears significantly on the availability of the class action device to bring together in a single action all would-be seekers of that remedy vis-à-vis the same market-wide misconduct. As Part I observed, the nature of an indivisible remedy is such as to make its provision to the plaintiff at hand interdependent with its application or availability as to others. The law of class action acts upon this preexisting interdependence. One might say that when the situation is already a de facto class action due to the indivisibility of the remedy sought, the law of class action authorizes the certification of a de jure class action—indeed, one as to which class membership is mandatory on the part of claimants.

Fittingly enough, the authorization for mandatory class certification in Rule 23(b) specifically refers to the classic forms of indivisible remedies. By its terms, Rule 23(b)(2) authorizes class certification when "the party opposing the class has acted . . . on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[116] Capturing the logic of the rule, one court observes that indivisible remedies "are class-wide whether the judge certifies a class action or not. (The need for, if not inevitability of, class-wide treatment when [an indivisible remedy such as] injunctive relief is at stake is what Rule 23(b)(2) is about.)."[117] The language of the other major subsection to authorize mandatory class treatment—Rule 23(b)(1)(B)—likewise invokes notions of indivisibility and interdependence among the claims of the class members against a limited fund.[118]

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116 FED. R. CIV. P. 23(b)(2). The reference in Rule 23(b)(2) to the classic forms of indivisible relief is in keeping with the drafters' objective to recognize 1950s- and 60s-style civil rights class actions. *See* FED. R. CIV. P. 23(b)(2) advisory committee's note; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967).

A commonplace observation today holds that judicial practice under Rule 23(b)(2) has effectively converged with that under Rule 23(b)(1)(A) such that the classes authorized under either subsection are largely indistinguishable. *See* ALI Principles, *supra* note †, § 2.04 reporters' notes, at 123; 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:8, at 31–32 (4th ed. 2002). The wording of Rule 23(b)(1)(A) captures the protective value of class certification for the defendant when remedies are indivisible, authorizing mandatory class treatment when individual litigation would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . . ." FED. R. CIV. P. 23(b)(1)(A).

117 Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 471 (7th Cir. 2004).

118 *See* FED. R. CIV. P. 23(b)(1), (b)(1)(B) (authorizing certification of a mandatory class if "separate actions by . . . individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be disposi-

Rule formalities aside, the practical point is that the involvement of an indivisible remedy goes a fair way toward class certification. To be sure, remedial divisibility is not decisive on the certification question. Like other forms of civil actions, class actions do not dispense with the need for choice-of-law analysis when the substantive basis for the requested remedy consists of materially different state laws.[119] But choice-of-law concerns did not derail the certification of a punitive damages class action in the pre-*Williams* period because the asserted indivisibility of that remedy rested upon a federal due process limit applicable nationwide, not a stricture of tort law among the various states.

By contrast to the treatment of indivisible remedies, the justification for class certification as to divisible remedies is comparatively less robust. Here, the focal point is Rule 23(b)(3), which famously authorizes certification of a nonmandatory class based upon two comparative determinations—respectively, that common questions "predominate" over those "affecting only individual members" and that the proposed class action would comprise a "superior" way of "adjudicating the controversy" by comparison to other procedural alternatives.[120] In its 1985 decision in *Phillips Petroleum Co. v. Shutts*, the Supreme Court upheld the constitutional permissibility of Rule 23(b)(3) class actions as a basis for aggregate disposition of claims for divisible remedies, upon the affording to class members of an opportunity to opt out, among other procedural rights.[121]

In broad-brush terms, Rule 23(b)(3) class actions for compensatory damages are commonplace in substantive areas that focus on "upstream," market-wide misconduct on the part of businesses[122]—say, the kinds of class actions for antitrust price fixing or securities fraud under federal law to which Part I referred. This is not to overlook the need for individual damage calculations for class members, only to recognize that liability for upstream economic misconduct, if shown, often tends to establish a method by which to turn the damage

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tive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests"); *see also supra* text accompanying note 49 (treating limited-fund scenario as an example of a situation involving an indivisible remedy).

119 As a matter of constitutional due process, a court may not proceed to certify a class action on the premise that various contending sources of substantive law are the same in content, absent a "thoroughgoing" choice-of-law analysis. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (overturning class certification for lack of such an analysis).

120 FED. R. CIV. P. 23(b)(3).

121 472 U.S. at 811–14. *Shutts* concerned a Kansas class action rule identical in relevant content to Federal Rule 23(b)(3).

122 *See* ALI Principles, *supra* note †, § 2.01 cmt. c, at 78. The wording stems from the helpful formulation in an earlier article. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997).

calculus into a mere number-crunching exercise.[123] The market connection between the upstream misconduct and the economic loss that individual class members suffer, in other words, tends to make the damage calculus an afterthought.

By contrast, substantive areas, such as torts, that concern "downstream" personal injuries have proven much less amenable to Rule 23(b)(3) class treatment.[124] For state-law claims of a downstream, personal nature, choice of law often presents a formidable obstacle to the certification of nationwide classes. State laws differ at a fine-grained level, even as to pervasively shared tort concepts. As Judge Richard Posner observes, "[t]he voices of . . . the states of the United States sing negligence with a different pitch."[125]

In addition, as to downstream personal injuries, proof of wrongful conduct on the part of the defendant tends not to establish liability for compensatory damages as to any individual class member. Take a commonplace scenario, as in the recent controversy over Vioxx: proof that the defendant inadequately warned consumers about the risks of its product does not establish liability for compensatory damages when further questions remain as to the existence of specific causation—for example, whether a given class member's heart attack was causally connected to Vioxx or likely would have occurred regardless due to background risk factors.[126]

In short, the divisibility of the punitive damages remedy stands to dramatically affect the argument for class certification. If punitive damages really are indivisible due to a federal due process stricture, then the argument for class certification gathers force. But if punitive damages are divisible (like compensatory damages), then the argument for class certification is remitted to a much rockier road.

In case law, suggestions that punitive damages might justify a move from a de facto class action on remedial grounds to a de jure class action under Rule 23 came to a head in 2005. In *In re Simon II*

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123 *See* ALI Principles, *supra* note †, § 2.03 reporters' notes, at 115.

124 *See id.* § 2.01 cmt. c, at 78–79.

125 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1301 (7th Cir. 1995). This statement seemingly contrasts with its author's early scholarly claim that a single formulation serves as a positive description of what common law courts do in negligence cases. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (discussing Judge Learned Hand's formulation of the negligence standard in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).

126 *See In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 462 (E.D. La. 2006). Rule 23(c)(4) goes on to authorize certification of class actions confined to "particular issues" among all those involved in a given litigation. FED. R. CIV. P. 23(c)(4). But even here, the extent to which a court may carve out particular issues for class treatment depends upon the degree to which substantive law separates them cleanly from the remaining issues in the litigation. When substantive law does not do so—when different elements of the cause of action or applicable defenses overlap conceptually, as in the law of torts—certification of an issue class will be unable to "carve at the joint." *Rhone-Poulenc*, 51 F.3d at 1302.

Litigation, class counsel persuaded Judge Jack Weinstein to certify a Rule 23(b)(1)(B) mandatory class action for punitive damages suffered by smokers nationwide against the tobacco industry based on its massive, decades-long campaign of fraud concerning the risks of cigarettes.[127] The alleged basis for certification in *Simon II* was a variation on the usual conception of a limited fund. In keeping with the discussion here, the posited limit consisted not of the tobacco industry's net worth but, instead, of an aggregate limit on the punitive damages that could be awarded in smokers' seriatim lawsuits under federal constitutional due process.[128]

For observers who had hoped for a synthesis of aggregate procedure and the constitutional law of punitive damages, *Simon II* proved to be a whimper rather than a bang. The Second Circuit overturned the class certification on the ground that the limit on the posited limited fund "is a theoretical one, unlike any of those in the [early equity] cases" that had served as the touchstones for the drafters of Rule 23(b)(1)(B).[129] The limit, the court said, "is—in essence—postulated, and for that reason it is not easily susceptible to proof, definition, or even estimation, by any precise figure."[130]

These observations merely restate the certification question but do not supply a meaningful answer to it.[131] The posited limit was indeed of a "theoretical" nature, entirely in keeping with its basis in constitutional doctrine rather than in hard financial terms estimable by way of a "precise figure."[132] If anything, as noted earlier, the Supreme Court prior to *Simon II* had shied from stating any "rigid benchmark[ ]" or "bright-line ratio" for punitive damages.[133] The answer to the certification question in *Simon II* comes not in the Second Circuit's opinion but, rather, years later from the Supreme Court in the individual lawsuit presented in *Williams*.

3. *Punitive Damages and Nonparties*

On its face, *Williams* presented no innovation in procedural format. The case consisted of a conventional individual action in which the plaintiff sued under Oregon tort law for the wrongful death of her husband. The plaintiff alleged that her husband's death was caused

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127 *See In re* Simon II Litig., 211 F.R.D. 86, 99–100, 106 (E.D.N.Y. 2002), *rev'd*, 407 F.3d 125 (2d Cir. 2005).

128 *See In re* Simon II Litig., 407 F.3d at 127–28.

129 *Id.* at 138.

130 *Id.*

131 For more extensive criticism of the reasoning in *Simon II* and an alternative rationale for decertification, see RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 128–34 (2007).

132 *Simon II*, 407 F.3d at 138.

133 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

"in significant part" by Philip Morris's campaign of deceit concerning the risks of smoking.[134] On appeal, Philip Morris pointed to "the roughly 100-to-1 ratio" between the punitive damages and the compensatory damages awarded by the jury following the trial.[135] The Supreme Court, however, did not base its reversal of the punitive damages award on the ratio as such. Writing for the majority, Justice Breyer expressly disavowed any determination of "whether the award here at issue is 'grossly excessive,'" grounding reversal instead on "the Constitution's procedural limitations."[136] Read alongside the Court's decision one Term later in *Taylor*, the due process limit in *Williams* looks familiar.

The Court in *Williams* held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[137] Plaintiff's counsel "had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been,'" but those other Oregon smokers were not before the court.[138] An action for Williams's death alone could not punish Philip Morris as to those other smokers without affording it an opportunity to show that those persons were "not entitled to damages" of any sort—for example, because they "knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."[139]

The constitutional message in *Williams*—that punitive damages are ultimately about punishment for the wrong done to the plaintiff at hand—gives a considerable nod to what I have described as plaintiff-focused views in torts literature.[140] The majority nonetheless added that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible" vis-à-vis the plaintiff.[141] It remains unclear whether jury instructions can police the line between impermissible consideration of nonparties for

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134 Philip Morris USA v. Williams, 549 U.S. 346, 349–50 (2007).

135 *Id.* at 351.

136 *Id.* at 353.

137 *Id.*

138 *Id.* at 350 (internal quotation marks omitted).

139 *Id.* at 353–54.

140 Defenders of *Williams* in the academy tend to be those who had come to relatively plaintiff-focused accounts of punitive damages beforehand. *Compare* Colby, *Clearing the Smoke*, *supra* note 21, *and* Zipursky, *Punitive Damages After* Williams, *supra* note 21, *with* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (arguing that "total harm" punitive damages are unconstitutional), *and* Zipursky, *Theory of Punitive Damages*, *supra* note 101.

141 Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007).

purposes of punishment and permissible consideration to assess reprehensibility as to the plaintiff at hand.[142] The latter point arguably tosses to group-focused views what one might call a "golden crumb[ ]"[143] of constitutional doctrine. My objective here, however, is not to replay the debate in torts literature over *Williams* but rather to assess the significance of the Court's analysis for the treatment of embedded aggregation.

4. *Procedural Catch-22 Revisited*

For punitive damages and aggregate procedure, *Williams* provides much of the doctrinal bang that *Simon II* did not. The holding in *Williams* substantially disables the earlier argument in *Simon II* for a constitutionally limited fund under Rule 23(b)(1)(B). That argument turned crucially upon the existence of some potential indivisibility to the punitive damages remedy as a constitutional matter—specifically, a disjunction between a ratio-based limit for individual litigation and the punishment that a series of such lawsuits might mete out in the aggregate. After *Williams*, however, there is no possibility—at least as a theoretical matter—that multiple individual actions could make for punitive damages awards that might be unconstitutional in magnitude on an aggregate basis. When punitive damages ultimately punish only the wrong done to the individual plaintiff and not similar wrongs to nonparties, there is theoretically no possibility of multiple counting over a potential series of such actions wherein nonparties to the first action might take on party status in lawsuits of their own.

As the Second Circuit observed in *Simon II*, the argument that punitive damages comprise an indivisible remedy was, at bottom, a "theoretical" argument based upon a reading of the Court's then-existing due process jurisprudence.[144] The holding in *Williams* seems to mean that punitive damages theoretically are about—and only about—the plaintiff at hand.[145] The Court's golden crumb concerning reprehensibility does bring the scope of market-wide misconduct into the conversation in an individual lawsuit. Its embedded aggregate dimension need not be wholly ignored. But this situation still does not make a punitive damages award into an indivisible remedy in the sense urged in *Simon II*.

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142 For an effort to formulate a jury instruction in light of *Williams*, see Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams*: We Can Get There from Here*, 2 CHARLESTON L. REV. 407, 418–20 (2008).

143 *Cf.* TOM WOLFE, THE BONFIRE OF THE VANITIES 236–37 (1987) (invoking Wall Street terminology for the "tiny little bit" of mega-sized financial transactions garnered by bond traders).

144 407 F.3d at 138.

145 For a similar argument, see Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 433, 454–58 (2008).

By casting punitive damages ultimately as punishment vis-à-vis the plaintiff—not anyone else—the Court arguably constitutionalizes a kind of divisible characterization for that remedy. On this view, punitive damages would be no more amenable to class treatment than demands for the prototypical divisible remedy of compensatory damages. Even before *Williams*, such an effort at nationwide class certification ran aground in tobacco litigation for much the same reasons that material differences in state law and the factual circumstances of class members generally plague proposed Rule 23(b)(3) class actions that seek compensatory damages for downstream personal injuries.[146]

This circumstance is procedural catch-22 all over again. The Court in *Williams* limits the punitive damages remedy as a constitutional matter out of concern that it otherwise would make for adjudication, in practical effect, of the defendant's rights vis-à-vis nonparties—in short, to prevent that remedy from operating as a kind of de facto class action. But, at the same time, the constitutional limit—the inability ultimately to punish the defendant in an individual lawsuit for wrongs suffered by nonparties—is also of such a nature as to prevent litigation from actually encompassing nonparties through overt certification of a class action.

Just as for the undifferentiated right of action in FOIA, the catch-22 quality of *Williams* invites reflection on how civil law might better account for the hybrid nature of punitive damages as a remedy ultimately about the individual plaintiff but with permitted consideration of nonparties to gauge the reprehensibility as to that plaintiff. Before turning to that discussion in the next section, however, a word is in order as to why we find ourselves in a catch-22 situation here. The law of class actions, after all, is not stuck forever with its present-day content, even if that content embodies forty-plus years of on-the-ground experience with Rule 23 in its modern form. There nonetheless is a deeper truth to the evolved content of class action doctrine that takes seriously limitations such as choice of law and individualized factual differences among would-be class members.

Civil actions in any form empower a plaintiff (or proper plaintiff class) to wield a particular kind of strategic leverage: the threat to compel the defendant to undergo a trial capable of yielding a preclusive judgment. Such a trial very well might not occur. Settlements, not trials, have long comprised the dominant endgame in class actions, as in civil actions generally.[147] A court, however, may not certify

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146 *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 741–45 (5th Cir. 1996).

147 *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 649 (2006) (documenting, through empirical research, prevalence of settlements in certified class actions).

a class action simply on the hope or supposition that a settlement will emerge.[148] Rather, authorization of a class action means authorization of a class-wide trial.

The reason why material differences in the content of applicable substantive law or in the factual circumstances of class members matter to class certification as a format for litigation does not stem from hypertechnicality; it stems from the need, absent settlement, to generate a judgment that will be issue preclusive on the parties plus those capable of being bound as nonparties, like absent class members. And issue preclusion turns upon actual litigation and determination of the *same* legal or factual issue across the proceeding said to yield such preclusive effect and the subsequent action to be precluded.[149] Material differences matter in practical terms because they threaten to disable a trial from doing the essential thing that it is supposed to do: resolve the disputed issues conclusively so as not to allow the losing side to relitigate the issue later.[150]

Viewed from the vantage point of plaintiffs, the attentiveness to differences within the class might seem a misguided due process concern for absent class members—one that robs them of an effective litigation procedure when claims are individually unviable.[151] But absent class members are not the only proper foci of due process concern. Rather, the logic of Rule 23 is to marry the strategic leverage that plaintiffs derive from the threat of a class-wide trial with the prospect of an equally encompassing victory for the defendant, were it to prevail on the merits at trial.[152] It is the latter prospect that material

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148 *See* ALI Principles, *supra* note †, § 2.02 cmt. a, at 84 (rejecting the notion that "the tendency of aggregate treatment to make settlement more likely—simply as a descriptive matter—should operate, in itself, as a consideration in favor of aggregate treatment").

149 On the stringency of the same-issue requirement for issue preclusion, see 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4417, at 412–65 (2d ed. 2002).

150 The operation of claim preclusion does not subsume the desired operation of issue preclusion. Under claim preclusion, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Put less formally, claim preclusion operates as to those claims that could have been brought in connection with the underlying events. Issue preclusion, by contrast, adds a further preclusive punch. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same *or a different claim.*" *Id.* § 27 (emphasis added). Issue preclusion, in short, operates as to the issue adjudicated when pertinent to a claim arising from entirely different events.

151 A leading member of the class action plaintiffs' bar voices this concern. *See* Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29, 31 (2009).

152 When a successful effort to obtain an indivisible remedy stands to redound to the benefit of all persons affected by the disputed course of conduct, class certification under

differences within the class stand to disable. The unavailability of class certification under such circumstances accordingly forms not a misguided concern for absent class members but, rather, a well-taken concern that they ought not to gain the leverage of a class-wide trial without also affording the defendant the prospect of a victory that would have a commensurately binding scope. In poker parlance, a proper class action effectively operates like a call of "all-in" on the part of class counsel, such as to make for preclusive symmetry as between the plaintiff class and the defendant.

The Court's post-*Williams* decision in *Taylor v. Sturgell*, if anything, reinforces the preceding point. In *Taylor*, the Court rightly regards with grave suspicion the notion that post hoc judicial evaluation of the similarities and congruence of interest between two litigants can form a proper basis for preclusion. The Court so says even though the governing substantive law was the same in both lawsuits; the interests of Herrick and Taylor were, if anything, on the high end of congruence; and the same lawyer represented both litigants—precisely the analysis of the D.C. Circuit that the Supreme Court rejected.[153] But if *ex post*, individually tailored assessments of similarity and congruence cannot suffice for preclusion, then it is hard to see how procedural law could take a substantially more lenient view in an *ex ante* posture, when a court is faced with a class action that would preclude persons who are, by definition, "absent" from the proceeding. In short, although the point seemingly has gone unnoticed in the literature, the holding in *Taylor* lends additional support to the insistence upon preclusive symmetry in the law of class actions. The evolved constraints on the class action device today are not mere rigid formalities but, rather, integral features of that device.

5. *Hybrid Statutes for Market-Wide Wrongs*

Permitted consideration of nonparties for purposes of reprehensibility does not go all the way to turn punitive damages into an indivisible remedy. But such consideration does lend an embedded, aggregate dimension to individual demands for punitive damages in situations of market-wide fraud—a dimension that even Philip Morris

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Rule 23(b)(1)(B) or (b)(2) ensures that the converse outcome—a victory by the defendant—likewise stands to bind all such persons to that loss. Rule 23(b)(3) proceeds from a similar concern that the preclusive effect of a class action properly operates symmetrically. In creating the opt-out class format for divisible relief, the rule drafters famously sought to avoid the kind of one-way intervention prevalent under previous class-action rules whereby the would-be absent class members could wait and see how the class litigation fared before deciding whether to opt into the class. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note; Kaplan, *supra* note 116, at 385.

153 *See* Taylor v. Blakey, 490 F.3d 965, 974, 978 (D.C. Cir. 2007), *rev'd sub nom.* Taylor v. Sturgell, 128 S. Ct. 2161 (2008).

did not deny in *Williams*.[154] Only when there are nonparties similar to the plaintiff, after all, do assessments of reprehensibility potentially extend beyond that individual plaintiff. The resulting inability to close one's eyes entirely to nonparties stands as a tacit acknowledgment in *Williams* that the law cannot completely assimilate punitive damages for market-wide wrongs into the model of a stand-alone, one-on-one dispute.

It is all too easy to lament the unavailability of class actions for punitive damages as reflecting an unwillingness to allow forward-looking lawyers and judges to use Rule 23 as a font of innovation to meet mass, market-wide wrongs with mass procedure.[155] Properly understood, however, the problem stems not from the law of class actions but from the substantive underpinning in torts for litigation that seeks to address market-wide wrongs with remedies other than compensatory ones. The problem is that the permitted nonparty dimension of punitive damages—the golden crumb in *Williams* as to reprehensibility—operates as a kind of overlay to what is, at bottom, an individual action.

One is reminded of the efforts by American automobile manufacturers during the late nineteen-eighties to stoke the demand of consumers to replace their conventional cars with a new kind of product: sport utility vehicles (SUVs). Detroit literally overlaid the design of SUVs onto the existing frames for trucks, such that early-model SUVs famously drove like trucks, with a corresponding risk of rollover that was not readily apparent to drivers.[156] The juxtaposition in *Williams* of permitted consideration of nonparties for purposes of reprehensibility, but not for ultimate punishment, is the counterpart in the constitutional law of punitive damages to the awkwardness of early SUV design.

Rather than overlay a remedy with a nonparty dimension onto the frame of party-based individual litigation, the law instead might do the overlaying in the opposite way. At the very least, the holding in *Williams* may tend to push future debate in such a direction. Specifically, one might start by defining a distinctively public wrong and then add a component of private litigation. If anything, one can see this move pursued haltingly in the tobacco context contemporaneously with *Williams*.

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154 *See* Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007) ("Philip Morris . . . does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility.").

155 *See* Weinstein, *supra* note 33, at 13–14.

156 On the evolution of SUV design and the related risk of rollover, see KEITH BRADSHER, HIGH AND MIGHTY 35, 52 (2002).

Apart from individual litigation of the sort in *Williams*, a parallel track of tobacco litigation sought to meet the defendant-industry's campaign of fraud concerning the risks of smoking with challenges under RICO.[157] This is not to say that RICO litigation has proven successful in the tobacco context thus far, only that its pursuit tentatively hints at a potential direction for future reform. For all its considerable difficulties—to which I shall turn momentarily—RICO litigation attempts to fashion a suitably hybrid approach in litigation for the hybrid quality of civil remedies that seek to accomplish something other than litigant compensation, as understood today.

It is no accident that law students encounter RICO in courses on federal criminal law, not private law.[158] The gravamen of the wrong under RICO consists of a pattern of racketeering activities specified in the statute—the main ones for present purposes being wire and mail fraud.[159] RICO defines a conspiracy to engage in such racketeering activities as a crime in itself, capable of public prosecution as such, and then overlays the additional possibility of civil litigation brought by both the federal government and by private persons injured "by reason of" the conspiracy.[160] Indeed, the underlying criminal character of the wrong means that a private litigant need not demonstrate "reliance" on the underlying RICO fraud, unlike for many other fraud-based actions in private law.[161]

RICO nonetheless remains a problematic vehicle. Lengthy litigation by the federal government—across the otherwise divergent Administrations of Presidents Bill Clinton, George W. Bush, and Barack Obama, no less—yielded a trove of judicial findings on the tobacco industry's lengthy fraud conspiracy.[162] But the federal government's RICO suit could not obtain the most hard-hitting remedy that it sought: a remedy of restitution to strip the industry of its ill-gotten gains from its decades-long conspiracy.[163] The D.C. Circuit held that the remedial menu of RICO does not authorize retrospective remedies, only prospective ones to guard against the recurrence of racketeering activity.[164] The federal government then petitioned unsuccessfully for the Supreme Court to review the D.C. Circuit's in-

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157 18 U.S.C. §§ 1961–1968 (2006).

158 *See, e.g.*, NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 434–514 (3d ed. 2000).

159 *See* 18 U.S.C. §§ 1341, 1343.

160 *Id.* § 1964(c).

161 *See* Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2139 (2008).

162 *See, e.g.*, United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 28 (D.D.C. 2006).

163 *See* United States v. Philip Morris USA Inc., 396 F.3d 1190, 1200–02 (D.C. Cir. 2005) (describing the government's remedial request).

164 *See id.* at 1192.

terpretation of the statute.[165] RICO doctrine aside, there is a certain degree of tension—to put it mildly—between accusations by the federal government that the tobacco industry is a longstanding racketeering enterprise and equally longstanding federal programs that significantly subsidize tobacco cultivation.[166]

On a separate front, a private class action under RICO focused on industry fraud in the marketing of "light" cigarettes but ultimately failed to garner class certification.[167] Even absent a need to show reliance, the private right of action under RICO remains focused on some manner of private injury, resulting in individualized questions about "proximate causation" between the underlying fraud and the alleged economic injury to smokers: elevated prices in the market for light cigarettes.[168] The locution here is noteworthy. For all its oft-noted breadth—some contend, overbreadth[169]—civil suits under RICO still embody some tort-like notions, a feature of the statute that is in keeping with the link between the RICO private right of action and some manner of injury to the private litigant.

The holding in *Williams* lends momentum for a more robust break from torts so as to marry a public conception of the wrong with a scheme for both public and private enforcement. The important move here lies not in the recognition of the public and private dimensions of punitive damages—a point ably treated in the literature[170]—

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165 *See* United States v. Philip Morris USA Inc., No. 09-978, 2010 WL 604182 (U.S. June 28, 2010) (denying U.S. Government's petition for writ of certiorari).

166 *See* RICHARD KLUGER, ASHES TO ASHES 550–52 (1997).

167 *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 233–34 (2d Cir. 2008).

168 *See id.* at 226; *see also* Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2141 (2008) (reaffirming that civil RICO includes a proximate causation element). For criticism of the class-certification analysis in *McLaughlin* with respect to the proximate causation element, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 148–49 (2009).

169 *See, e.g.*, Tricia Bozyk, Note, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129 (2006).

170 Benjamin Zipursky reads *Williams* as a judicial effort to discern the proper limits on punitive damages, insofar as they would encompass a public function distinct from their role as a means for private recourse. *See* Zipursky, *supra* note 21, at 154 ("[P]unitive damages *are* operating as part of the traditional common law of torts when the plaintiff is seeking to redress the defendant's injuring of her but that cannot be what is happening when the state is punishing the defendant for injuring nonparties. To the extent that the punitive damages award is punishing the defendant for injuring nonparties, it is serving as a form of public sanction, not simply as a form of private redress . . . . The non-party-harm rule of *Williams* can thus be understood as a litmus test for when the punitive-damages award is operating as a public sanction . . . ."). Thomas Colby suggests a finer line of distinction within the category of public sanctions, reading *Williams* as "preclud[ing] . . . one (and only one) particular vision or theory of punitive damages (punishment for public wrongs—the prevailing modern theory)." Colby, *supra* note 21, at 396. In Colby's view, there remains a permissible role in the future for creation of "a category of extracompensatory damages designed to ensure optimal deterrence." *Id.* Even though such damages "would seek to serve a purely public interest,"

but in the crafting of a correspondingly public-and-private procedural framework for litigation. The wrong might take the basic form found in criminal RICO: a pattern of fraud, wrongful in itself.[171] The law then might meet that wrong with the possibility of criminal sanctions and civil penalties that would be tied to neither personal nor economic injury to consumers. The private right of action then would consist of the opportunity to seek the prescribed civil penalties on behalf of the government but with a portion awardable to the prevailing private plaintiff.[172] The model here would be the framework for qui tam litigation found in the False Claims Act, whereby private persons may sue in the name of the United States to recoup the economic loss

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they would not, on his account, "constitute unconstitutional punishment for public wrongs." *Id.*

Along broadly similar lines, Dan Markel sketches the possibility for "retributive damages statutes" that "would empower private parties to act on behalf of the state to seek the imposition of what is in effect a civil fine determined largely by the reprehensibility of the defendant's misconduct." *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 239 (2009); *see also id.* at 325–27 (elaborating on proposal for retributive damages); Edward L. Rubin, *Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law*, 1998 WIS. L. REV. 131, 132–44 (suggesting that modern punitive damages might be better understood as akin to administrative penalties).

The posited distinction between a "public" sanction that punishes and one that deters builds on an earlier suggestion by Catherine Sharkey. Writing prior to *Williams*, Sharkey draws attention to the emergence of "split-recovery" statutes, whereby a percentage of the punitive damages awarded to a private plaintiff in a tort action is paid over to a "state- or court-administered fund[ ]." Sharkey, *supra* note 104, at 353. For Sharkey, "[t]he central concept—implicit in the modern innovations of split-recovery schemes—is that societal, as opposed to individual, interests may be vindicated by punitive damages." *Id.* at 372. For further discussion of how the Court's decision in *Williams* might nudge law reform at the state level toward greater use of split-recovery statutes, see Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of* Philip Morris v. Williams, 46 WILLAMETTE L. REV. 449, 476–77 (2010).

Building on this literature, I make two claims here. First, by situating punitive damages doctrine within the broader category of embedded aggregation, I draw attention to a different potential direction for law reform. The idea would be to focus less on the making of fine-grained distinctions in the objective to be served by supracompensatory damages at the behest of a private litigant. The idea instead would be to reconceptualize the party who may seek such a remedy—namely, a party conceived as a hybrid of public government and private whistleblower. Split-recovery statutes approach such a notion, but they get the hybridization backwards. They require public government to get a piece of the proverbial action of a private litigant's punitive damages award. I ask: Might it be better actually to run the hybridization the opposite way, whereby the litigant is the government and the private whistleblower receives a reward for her practical contribution to the success of the government's action? Second, I expose the degree to which such a possibility is implicit in real-world tobacco litigation. *See infra* notes 182–84 and accompanying text.

171 *Cf.* 18 U.S.C. § 1962(c) (2006) (deeming it a crime for "any person employed by or associated with" an enterprise engaged in or affecting interstate commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity").

172 Statutory specification of the civil penalties that a private litigant may obtain in the name of the government would help to address the incoherence that some observers see in present-day punitive damages awards. *See* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1160 (2002).

to the government, in its proprietary capacity, due to fraud by one of its private contractors.[173]

All of this is not to slight the debate over whether the law should authorize private persons to sue in the government's name as to extreme, market-wide wrongs. There remains considerable debate over whether the world of motor vehicles should make available such things as SUVs. So, too, healthy debate is warranted over whether the law should make available a private remedy that extends beyond individual-litigant compensation in situations of extreme market-wide wrongs. If anything, however, the need for such a debate forms an additional argument for the post-*Williams* conversation to proceed on the terms I suggest here.

If there really exists an unavoidable societal dimension to extreme, market-wide wrongdoing, then it is only fitting that a fair measure of deliberation within the sphere of public lawmaking should be involved. That deliberation conceivably might yield no private right of action along the lines sketched here. But at least that result would be the product of actual policy debate, not the unanticipated catch-22 consequence of the holding in *Williams* combined with the elaborated law of class actions.

The important point is that just as class actions operate within strictures, a private right of action along the lines described here would not appropriately remain unconstrained. As under the qui tam model, the would-be private litigant might have to tender the case to the government for a public enforcement action.[174] And, even when the government initially does not choose to pursue the action itself, the law could afford the government the right to take control of the action later by displacing the private litigant.[175]

For that matter, the setting of market-wide fraud unrelated to government contracting might enable the law to go considerably further. The government's decision whether to bring a public enforcement action generally would not concern would-be defendants with whom the relevant government decision makers might wish to maintain cozy relations, unlike in the classic qui tam setting of military-related procurement contracts.[176] The government's reasoned refusal

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173 *See* 31 U.S.C. §§ 3729–3733 (2006). The potential connection to qui tam litigation is mentioned in passing by Markel, *supra* note 170, at 280.

174 *See* 31 U.S.C. § 3730(b)(2).

175 *See id.* § 3730(c). For additional discussion of the need for regulation of private litigants under the False Claims Act, see J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 608–37 (2000).

176 *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:13, at 63 (2004) ("Fraud in the defense industry was the impetus for the original False Claims Act.").

to pursue a given action for civil penalties conceivably might disable a private litigant from doing so on the government's behalf.[177]

Specifics aside, the overarching objective would be to hybridize more fully the remedy for market-wide wrongs—to make explicit and to regulate its hybrid quality. The goal would be to combine a remedy that has nonparty scope with adjustment of the private right of action such that the private litigant sues not for herself—as now, for punitive damages in torts—but for the government as a proxy for the public generally. The kinship between this approach and the earlier prescription for FOIA bears note. In effect, the specification of a single party—the government, aided by a private whistleblower—capable of seeking supracompensatory relief in situations of extreme, market-wide misconduct would operate as the counterpart to the specification of a single forum for statutes like FOIA that recognize an undifferentiated right of action.[178] The government as a unitary party would do here what specification of a unitary forum would do for FOIA.

Here, again, the real world of tobacco litigation offers fragmentary hints. Much of the key information that ultimately led to the fuller understanding we now have of the industry's campaign of fraud came from insiders—among others, a law-firm paralegal (who reportedly acted in collaboration with a prominent tobacco plaintiffs' lawyer)[179] and a former in-house scientist for the tobacco industry[180] (famously chronicled in film).[181] The more fully hybridized approach sketched here would expose, systematize, and regulate in above-board fashion the process that transpired below-board in the tobacco setting, with considerable pressure—to say the least—on the insiders' respective duties of confidentiality.[182] As in qui tam litigation, the whistleblower would make for a suitable private litigant of the public wrong.[183] Indeed, given the conceptualization of the wrong as one vis-à-vis the public at large rather than a personal or economic injury to a private individual, the law might focus the private right of action

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177 For a suggestion of a similar approach for securities fraud, with emphasis on the need for agency articulation of its enforcement priorities *ex ante* and of the reasons for its refusal to enforce in a given instance *ex post*, see Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1358 (2008).

178 *See supra* notes 84–85 and accompanying text.

179 *See Tobacco Whistle-Blower Acknowledges Plaintiff Lawyers Paid Him*, N.Y. TIMES, May 1, 1996, at B6.

180 *See* Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 628 (1999).

181 *See* THE INSIDER (Touchstone Pictures 1999).

182 *See* Bast, *supra* note 180, at 628 n.6, 685–90.

183 *See, e.g.*, United States v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (observing that the "strong policy of protecting whistleblowers who report fraud against the government" under the False Claims Act barred a counterclaim against an employee for breach of a confidentiality agreement).

so as to emphasize the uncovering of the public wrong, not the notion of private injury.

If anything, real-world developments after *Williams* suggest a degree of gravitation toward such an approach. In the midst of the recent financial crisis, the Inspector General of the Securities and Exchange Commission (SEC) has suggested to Congress an approach along the lines sketched here, at least in part. Specifically, the SEC Inspector General has called for Congress to consider expanded use of civil penalties for Bernard Madoff-like cases of financial fraud that are extreme in nature and broadly harmful, with the private whistleblowers who help detect such wrongs eligible to receive a portion of the penalty.[184]

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For all their particulars, prescriptions for embedded aggregation in the nature of compelled adherence to individual litigation—whether with respect to its preclusive effect or its remedy—exhibit a similar logic. In both *Taylor* and *Williams*, individual litigation is constrained out of concern that it otherwise would act in some fashion with respect to nonparties. Yet, the constraints that the Court adopted simultaneously inhibit a move to expose and regulate that nonparty effect by way of a class action. This catch-22 quality of both *Taylor* and *Williams* invites reflection on whether the implicit choice between individual actions and class actions accurately describes the situation in which the law finds itself. This Part has suggested that hybrid processes have the potential to fit more comfortably the hybrid character of undifferentiated rights of action and punitive remedies. The hybrids envisioned in this Part admittedly would move beyond existing practices, but one should not take such a prescription to be merely the stuff of academic musing. As the next Part reveals, actual developments in the mass resolution of mass wrongs frame a similar agenda in real-world terms.

III
THE FUTURE OF HYBRIDIZATION

The preceding Part traced the efforts in *Taylor* and *Williams* to constrain the nonparty effects of individual actions. This Part moves

184 *See* Letter from H. David Kotz, Inspector Gen., Sec. & Exch. Comm'n, to Rep. Paul E. Kanjorski, Chair, Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the House Comm. on Fin. Servs. (June 30, 2009) (on file with author), *available at* http://www.securitiesdocket.com/2009/07/01/sec-ig-kotz-responds-to-rep-kanjorski-with-legislative-suggestions-to-improve-sec/ (calling for authorization of the SEC to "award a bounty for information leading to the recovery of a civil penalty from any violator of the federal securities laws").

beyond the confines of judicial decisions, explaining how innovation by private lawyers has framed a prescription that broadly aligns with those sketched in Part II. The hybrid character of this approach, its relationship to the prescriptions sketched earlier, and its implications for the intellectual agenda of civil procedure in the twenty-first century form the topics for this Part.

A. Mass Settlement for Mass Wrongs

The thought that settings of embedded aggregation might warrant some manner of aggregate process does not arise solely in the context of adversarial litigation. Even when the underlying right of action remains differentiated and the remedy divisible, the prospect of large numbers of claims with recurring features invites efforts to craft some manner of aggregate resolution. As Part I explained, modern products liability litigation takes such a form when the nature of the wrong itself—framed as an inadequate warning by a product manufacturer, for example—extends throughout the market for the product in question.[185]

In recent decades, a pervasive theme in mass tort litigation is the search for some vehicle by which to achieve broad closure and, ultimately, to make the deal stick. The many lawyers and judges who have puzzled hard over this search have not done so out of some passing fascination with settlement in the abstract. Rather, their behavior reveals an underlying truth: shared recognition of the potential for peace on a mass basis, precisely because of its encompassing scope, to bring into being additional resources that otherwise would not exist.[186] Mass settlements for mass torts are about unlocking and allocating the joint gains that arise from the replacement of litigation with peace.

Recognition of this practical point has a tendency to come across as a suggestion that procedural design should look exclusively to the endgame of settlement without regard for conventional individual trials as testing grounds for the merits of the litigation.[187] The most widely discussed settlement in mass tort litigation in recent years counsels otherwise. As this section explains, the 2007 settlement arrange-

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185 *See supra* Part I.C.

186 For further exposition of this point, see NAGAREDA, *supra* note 131, at x–xi. For a cautionary note on how insistence upon all-or-nothing settlements can give rise to distinctive ethical difficulties, see Erichson, *supra* note 29, at 982 ("[T]he current love affair with global settlements . . . should be tempered by a realistic appreciation of the ethical downside.").

187 *See* Douglas G. Smith, *An Administrative Approach to the Resolution of Mass Torts?*, 2009 U. ILL. L. REV. 895, 902–06 (reviewing RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007)) (arguing that individual litigation plays an essential role in the resolution of mass tort claims).

ment that structured the resolution of mass tort claims over the prescription pain reliever Vioxx frames in a new way the relationship between trials and mass settlement design. The Vioxx example does so by reconceptualizing the nonparty effects of individual trial outcomes.

1. *Trial as Pricing*

Both judges and scholars have long envisioned the possibility of "bellwether" trials as a way to manage large numbers of individual cases that exhibit recurring features.[188] The reference in terminology is to the image of a bellwether sheep that leads a much larger flock.[189] Interestingly enough, legal cultures that would seem to have greater historical familiarity with sheep herding have chosen to convey a similar notion in non-ovine terms: as "model case[s]" (for securities litigation in Germany)[190] or "pilot judgment[s]" (for litigation in the European Court of Human Rights).[191] Whatever the label, the workability of such an approach turns crucially on the cases selected for trial. Statistical analysis captures the point with precision, cautioning against the selection for trial of an unrepresentative sample of cases from the larger run.[192] The trick lies in what to do with the results in the tried cases.

Early versions of bellwether trials took a relatively hard-edged approach, consistent with the notion of judgments as the quintessential products of trials under the law of preclusion. The basic idea was for the judgments in the sample of tried cases to exert preclusive effect over the larger run of untried cases. Specifically, the tried cases were to supply both the axes and the dollar payouts for a compensation grid that the trial court would then impose on the remaining, untried cases.[193]

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188 *See, e.g.*, *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008).

189 *See Chevron*, 109 F.3d at 1019.

190 *See* CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS 299–310 (2008) (translating into English the German Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets).

191 *See* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 148, 154 (2008).

192 For prominent treatments, see, for example, Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 652–53 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992) (urging greater use of statistical sampling methods in mass tort trials); Laurens Walker & John Monahan, Essay, *Sampling Liability*, 85 VA. L. REV. 329 (1999) (urging greater use of proof by statistical analysis).

193 *See, e.g.*, *Cimino*, 151 F.3d at 299–300; *Chevron*, 109 F.3d at 1019.

Viewed today with the benefit of *Taylor v. Sturgell*,[194] it is all too apparent that the use of bellwether trials as a source of preclusion poses a major problem. The preclusive effect envisioned would operate with respect to nonparties such as to be unconstitutional in the absence of agreement on the part of the various individual plaintiffs.[195] The common defendant, to be sure, would be a party to all of the tried cases. But even as to such a defendant, lower courts voiced a related due process concern broadly similar to that in *Williams* as to punitive damages. As a precondition for a coercive judgment of tort liability, the defendant must have some opportunity to insist upon proof of its liability as to the particular plaintiff in question, not merely proof of her statistical similarity to some other sampled plaintiff.[196]

But now consider a different version of bellwether trials—one that would price, but not preclude, nonparties. Bellwether trials, in other words, simply might generate useful information on claim values for lawyers on both sides.[197] The resulting pricing would inform the design of a compensation grid to govern the other untried cases. The mechanism for enforcement of the eventual grid, however, would shift from preclusion to other means. As I shall elaborate, those other means in the Vioxx settlement consisted of the mass character of client representation on the plaintiffs' side of the litigation.

Recognition of the prospect that bellwether trials might serve as a pricing mechanism does not mean that such pricing was entirely infeasible earlier. Prior to the Vioxx litigation, a recurring feature of mass tort litigation consisted of the pendency of large numbers of claims in courts across the country.[198] Both trials and settlements in widely dispersed litigation can yield a kind of pricing information, if only haphazardly.[199] Still, the lack of judicial coordination in the setting of trial dates can affect dramatically the timing of the shift to peacemaking, with the sheer number of pending claims tending to exert a considerable momentum of its own. Two prominent defense lawyers capture this concern about the dynamics of mass torts, empha-

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194 128 S. Ct. 2161 (2008).

195 *See id.* at 2172 (noting that due process permits nonparty preclusion when a nonparty agrees to be so bound).

196 *See Cimino*, 151 F.3d at 314–21.

197 *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2331–32 (2008) (distinguishing similarly between a "binding" approach and an "informational" approach to bellwether trials).

198 *See* NAGAREDA, *supra* note 131, at xiv (discussing the significance of geographic dispersion for mass torts).

199 *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1045 (1993).

sizing the desirability of framing civil processes to "litigate the torts, not the mass."[200]

The concern that the sheer volume of mass tort litigation might exert a detrimental momentum of its own is far from hypothetical. Mass tort suits during the 1990s over an alleged causal connection between silicone gel breast implants and autoimmune disease precipitated a rush toward comprehensive settlement in the aftermath of a small number of multimillion-dollar verdicts at trial for individual plaintiffs. A wealth of scientific research in the years thereafter, however, failed to support the asserted causal relationship.[201]

Moreover, an informational approach for bellwether trials does not work absent substantial centralization and coordination within the judiciary. The Multidistrict Litigation Act provided the critical procedural mechanism to consolidate Vioxx lawsuits pending in the federal courts before Judge Eldon Fallon, allowing him to maintain firm control over the trial spigot.[202] This process also entailed significant informal coordination between Judge Fallon and his counterparts in key state judicial systems with large consolidated Vioxx dockets of their own.[203]

2. *Shifting from Litigating to Peacemaking*

Before one turns to the debate surrounding the Vioxx deal, some observations are in order about the strategic dynamics behind the de-

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200 *See* JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED (2009), *available at* http://www.wlf.org/upload/beisner09.pdf.

201 For more extensive discussion, see NAGAREDA, *supra* note 131, at 33–37. Mass tort litigation over the anti-nausea drug Bendectin followed a similar trajectory. *See* JOSEPH SANDERS, BENDECTIN ON TRIAL 23–43 (1998).

202 The Multidistrict Litigation Act created the federal Judicial Panel on Multidistrict Litigation (MDL Panel) and empowers it to transfer federal "civil actions involving one or more common questions of fact" to "any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a) (2006). The Act further specifies that "[e]ach action so transferred shall be remanded" to the federal district from whence it came "at or before the conclusion of" pretrial proceedings, absent disposition during that phase. *See id.*; *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) (invalidating judicial practice of self-transfer, whereby MDL transferee courts had retained transferred cases for trial). In order for bellwether trials in a representative sample of cases to be feasible following a multidistrict transfer, the MDL Panel must centralize the litigation in a federal district that already has significant numbers of pending cases of the relevant type—that is, cases originally filed or properly removed there and, as such, capable of being tried in that court.

203 *See* Fallon et al., *supra* note 197, at 2334–37 (discussing Judge Fallon's informal coordination with various state-court judges); Press Release, Merck, Merck Agreement to Resolve U.S. VIOXX® Product Liability Lawsuits (Nov. 9, 2007) [hereinafter Merck Press Release], *available at* http://www.aei.org/docLib/20080109_MerckPressRelease.pdf; *see also* http://www.fiercebiotech.com/press-releases/press-release-merck-agreement-resolve-u-s-vioxx-product-liability-lawsuits (noting involvement of state-court judges "overseeing the coordination of more than 95 percent of the current claims in the VIOXX litigation").

fendant's willingness to engage in deal making at all. Upon its withdrawal of Vioxx from the market in 2004, the defendant-manufacturer Merck voiced a steely willingness to litigate vigorously all cases rather than enter into peace negotiations.[204] Seen in light of this initial stance, Merck's eventual embrace of a broadly encompassing settlement arrangement in late 2007[205] might come as a surprise—it should not. Underlying features of the Vioxx litigation and the process of bellwether trials, together, explain the move from litigating to peacemaking for both Merck and the major plaintiffs' law firms involved.

First, the scientific research on Vioxx appears favorable to plaintiffs in one sense, suggesting the prospect of an elevated incidence of heart attacks and strokes in Vioxx users compared to persons otherwise similarly situated.[206] In tort parlance, the tough point concerns not the possibility of general causation but the considerable difficulty of proving specific causation—that a given Vioxx user's heart attack or stroke is Vioxx-related and likely would not have occurred anyway. Vioxx users, after all, consisted of persons in need of prescription-grade pain relief—a patient group that, in the aggregate, is already at elevated risk of heart attacks and strokes based upon underlying medical conditions.[207] Merck's studied persistence in litigation effectively brought home to plaintiffs' lawyers the difficulty—if not impossibility—of proving specific causation in individual cases, with Vioxx plaintiffs winning verdicts in only five of seventeen trials.[208]

Second, the withdrawal of Vioxx from the market in 2004 effectively enabled Merck to await the running of the three-year statute of limitations in most jurisdictions for the relevant sorts of tort claims.[209] By 2007, the adverse medical events in Vioxx users that might give rise to colorable claims against Merck had already occurred. Peacemaking at that point then could proceed without concern over a potential stream of unascertained, future claims.

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204 *See As Another Vioxx Trial Nears, Merck Vows to Keep Fighting*, N.Y. TIMES, Sept. 10, 2005, at C3.

205 *See* Merck Press Release, *supra* note 203.

206 *See, e.g.*, Peter Jüni et al., *Risk of Cardiovascular Events and Rofecoxib: Cumulative Meta-Analysis*, 364 LANCET 2021 (2004) (providing overview of medical literature on use of rofecoxib and increased cardiovascular risk).

207 *See* David Armstrong, *Bitter Pill: How the New England Journal Missed Warning Signs on Vioxx*, WALL ST. J., May 15, 2006, at A1.

208 *See* Merck Press Release, *supra* note 203 ("Juries have now decided in favor of the Company 12 times and in plaintiffs' favor five times."); *see also id.* (quoting remark from chair of plaintiffs' negotiating committee that "[s]pecific causation has been a very difficult issue"). On the ultimate disposition of the various individual Vioxx trial verdicts, see the tally recently compiled by Alexandra Lahav, available at http://lawprofessors.typepad.com/mass_tort_litigation/2009/10/vioxx-verdicts-.html.

209 *See* Merck Press Release, *supra* note 203 (observing that "[f]orty-two states, Puerto Rico and the District of Columbia have statutes of limitations of three years or less").

Third, consolidated litigation and bellwether trials are far from costless. Retained on their usual contingency-fee basis, plaintiffs' lawyers had to invest out of their own pockets in consolidated pretrial discovery and bellwether trials.[210] For its part, Merck had reserved a reported $1.9 billion to fund its defense.[211] Seen with the benefit of hindsight, this reserve turned out to be a savvy business investment. For $1.9 billion, Merck effectively reduced the overall price tag for peace from the $25 billion[212] that market analysts initially had estimated to a fixed price of $4.85 billion[213] for the deal announced in 2007. Peacemaking at that point seemingly reflects a straightforward awareness on both sides of the law of diminishing returns—recognition that investment in additional bellwether trials would be unlikely to move dramatically the overall price tag in either direction. The practical question then became what to do with the flock of untried cases.

3. *Settlement via Contracts with Plaintiffs' Law Firms*

The Vioxx deal is striking in that it neither settled a single extant Vioxx claim nor, for that matter, involved agreement with a single Vioxx user. Instead, the deal consisted of a contract between Merck and key law firms within the plaintiffs' bar that had large numbers of Vioxx clients. The contract described what would become a compensation grid for Vioxx claims, providing for allocation of the fixed overall sum of $4.85 billion from Merck according to a point system designed to assess the relative strength of individual Vioxx users' cases as to specific causation.[214] Merck's payment obligations remained contingent upon enrollment in the deal within a specified time period of at least eighty-five percent of Vioxx claimants overall, a condition ultimately satisfied by a comfortable margin.[215]

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210 This process ultimately led to heated disputes over fee allocation among the various plaintiffs' lawyers involved; some worked extensively on the consolidated proceedings while others did not. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–32, 134–35 (2010).

211 *See* Heather Won Tesoriero et al., *Merck's Tactics Largely Vindicated as It Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10–11, 2007, at A1.

212 *See* Alex Berenson, *Merck Is Said to Agree to Pay $4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1.

213 *See* Merck Press Release, *supra* note 203.

214 As reflected in hypothetical examples released in tandem with the announcement of the 2007 settlement, the point system accounted for such variables as the magnitude of non-Vioxx risk factors for heart attack and stroke (such as family history, hypertension, and body mass), the duration of Vioxx use, and the timing of the claimant's injury relative to such use. *See* EXAMPLES OF CLAIM VALUATION CALCULATIONS, http://www.officialvioxxsettlement.com/documents/Claimant%20Valuation%20Examples.pdf.

215 *See* Vioxx Settlement Agreement, *supra* note 9, ¶ 11.1.1; Merck Press Release, *supra* note 203.

The crucial enforcement mechanism for the deal did not consist of the preclusive effect of a judgment, either in a bellwether trial or a class action. In fact, Judge Fallon had declined to certify a nationwide Rule 23(b)(3) opt-out class, pointing to the usual choice-of-law problems presented by differences in the various states' tort laws as well as the inherently individualized nature of inquiries into specific causation.[216] Rather, the enforcement mechanism consisted of the mass scope of client representation itself. In their contracts with Merck, the signatory law firms for plaintiffs obligated themselves to "recommend" participation in the deal to 100 percent of their Vioxx clients.[217] In the event of a given client's decision not to participate, the signatory law firms promised, "to the extent permitted" by applicable strictures of legal ethics, "to disengage . . . from the representation" of any such dissenting client and, further, "to forego any [i]nterest" in whatever recovery she ultimately might obtain (say, under a client referral agreement with a nonsignatory firm).[218]

The use of a small number of signatory law firms within the plaintiffs' bar as the glue to hold the Vioxx deal together translates the approach suggested earlier for FOIA and punitive damages into the world of mass tort settlements. For FOIA, a unitary forum might counter the problems presented by an undifferentiated right of action. For punitive damages, a unitary party—the government—might counter the difficulties otherwise presented by the prospect of multiple private litigants seeking supracompensatory relief for extreme, market-wide wrongs. In both instances, the basic move is to identify some unitary feature to counteract all the nonunitary ones. The unitary feature simply does not take the form of unitary litigation procedure in the class action sense, due to the well-taken limitations that have evolved over the forty-plus-year experience with that device. So, too, for the Vioxx deal. The unitary feature here—if not literally, then nearly so—consists of the small number of signatory law firms that effectively function as the fulcrum through which to bind the mass of Vioxx claimants.

The mass torts literature has long recognized the considerable advantages that accrue to plaintiffs' law firms from the mass representation of clients. These include the ability to spread the fixed costs associated with development of common aspects of claims across a greater number of clients, the prospect of gaining control over the conduct of the litigation vis-à-vis competitor law firms, and the ability to precipitate the settlement endgame by tendering the prospect of

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216 *See In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 460–63 (E.D. La. 2006).

217 Vioxx Settlement Agreement, *supra* note 9, ¶ 1.2.8.1.

218 *Id.* ¶ 1.2.8.2.

litigation peace to the defendant.[219] These advantages notably accrue not only to plaintiffs' lawyers but also to their clients who would be unable to generate comparable litigation efficiencies or settlement dynamics if represented by a lawyer on a one-off basis.

The 100-percent client participation that the Vioxx deal required of each signatory law firm[220] turned this strength in numbers on its head. In effect, the deal leveraged large client inventories into a mechanism for closure. Upon the required recommendation by a signatory law firm faced with exclusion of its entire inventory from the deal,[221] individualized client consent supplied the binding quality that formal preclusion did not.

It bears note that the use of contracts with plaintiffs' law firms as a method to achieve closure is not beholden to the particulars of the Vioxx example. Litigation concerning two pharmacological cousins of Vioxx—the prescription pain relievers Bextra and Celebrex—reportedly has featured the use of broadly similar contracts between the defendant-manufacturer Pfizer Inc. and plaintiffs' lawyers with substantial client inventories.[222] For that matter, the contractual approach used in the Vioxx deal replicated arrangements originally crafted by Owens Corning in the asbestos litigation during the late 1990s. There, the idea was much the same: to discourage plaintiffs' lawyers with large asbestos claim inventories from casting into bankruptcy what was, at the time, the defendant with the largest still-solvent chunk of asbestos-related liabilities.[223] The obligation to recommend participation to one's entire client inventory stems from the Owens Corning example.[224]

4. *De Facto Class Actions Revisited*

Proponents of the Vioxx deal touted its practical success as a method for "mass settlement without class actions."[225] This approach, however, is the source of the problem for critics of the deal. Absent a

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219 *See* NAGAREDA, *supra* note 131, at 16–18, 20–24.

220 Vioxx Settlement Agreement, *supra* note 9, ¶ 1.2.8.1.

221 *Id.* ¶¶ 1.2.8.1–1.2.8.2.

222 *See* Nathan Koppel & Heather Won Tesoriero, *Pfizer Settles Lawsuits over Two Painkillers*, WALL ST. J., May 3, 2008, at A3.

223 On the strategy behind the Owens Corning's National Settlement Program (NSP), see NAGAREDA, *supra* note 131, at 108–13. The NSP ultimately failed for reasons that the Vioxx setting did not replicate: the entry of nonsignatory firms into the representation of asbestos plaintiffs, the extension of litigation to more remote defendants outside the traditional asbestos industry, and an emerging recognition on the part of plaintiffs' lawyers that asbestos-related bankruptcies were not a kind of bogeyman to be avoided. *See id.* at 111–12. The running of applicable statutes of limitation by the time of the Vioxx deal effectively prevented subsequent expansion in the parameters of the litigation. *See supra* note 212 and accompanying text.

224 *See* NAGAREDA, *supra* note 131, at 110–11.

225 *See supra* note 26.

preclusive class judgment, client consent must bear the full weight of justification for the binding force of the Vioxx deal. Yet, for critics, notions of client consent cannot bear such weight, because such consent under the Vioxx deal stems from coercion—the prospect of a dissenting client having to start anew with a different lawyer, if one can be found at all.[226]

Even worse, critics contend, the structure of the Vioxx deal delegitimizes a signatory law firm's underlying advice to take the deal, transforming that advice from an individually tailored assessment of a given client's best interests, as demanded by legal ethics,[227] into a manifestation of still more coercion. On this account, the additional coercive dimension stems from the wedge driven between lawyer and client by the specification of 100-percent participation by each signatory lawyer's client inventory. Signatory lawyers must advise all of their clients to take the deal else the lawyers themselves would lose the considerable payday from contingency fees upon delivery of their entire client base. In putting $4.85 billion on the table to fund the compensation grid overall, Merck effectively put one-third or more of that sum—over $1.6 billion—on the table for Vioxx plaintiffs' lawyers. Given the meager success of plaintiffs in bellwether trials, the availability of such a sum to Vioxx plaintiffs' law firms upon delivery of their entire client inventory was not something they would be inclined to bypass lightly.

In fairness to the deal designers, the 100-percent specification arguably reflected assessments already made by plaintiffs' lawyers, even before signing the deal, of their ability in good faith to recommend participation based upon their individual clients' situations.[228] The compensation grid, after all, did not take a one-size-fits-all approach or employ only a few blunderbuss axes of differentiation. Rather, the grid provided for fine-grained differentiation in its point system to reflect the relative strength of individual cases as to specific causation.[229] The 100-percent specification, moreover, does not differ from offers that a defendant is free to make in what have come to be known as "aggregate settlements" to resolve the cases of multiple clients repre-

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226 *See* Erichson & Zipursky, *supra* note 29, at 19–25.

227 *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003) (requiring a lawyer to "exercise independent professional judgment and render candid advice").

228 *See The Vioxx Settlement* (C-SPAN television broadcast Jan. 7, 2008), http://www.c-spanvideo.org/program/203393-1 (remarks of Andy Birchfield, co-lead counsel, Vioxx plaintiffs' steering committee) (emphasizing the "primary objective" of plaintiffs' negotiators to design "a settlement program . . . that actually serves the best interest of each and every individual client").

229 *See* Vioxx Settlement Agreement, *supra* note 9, at ¶¶ 3.1–3.2. At the time of the Vioxx deal, the dollar value of each point was not known precisely, but only a financially foolish plaintiffs' lawyer would sign such a deal without confidence in her estimate thereof.

sented by the same plaintiffs' lawyer.[230] Defendants remain free to insist upon full participation or, alternatively, to be content with some lesser extent of client acceptance with respect to an offer of an aggregate settlement.[231]

Even so, the aggregate-settlement rule[232] in legal ethics situates such deals squarely within the notions of individualized client consent that legitimize ordinary settlement contracts. The aggregate-settlement rule insists upon unanimous consent from each client upon the disclosure of the settlement terms not only as to the particular client herself but also as to all of the lawyer's other clients whom the deal would encompass.[233] On this point, the insistence of the rule is ironclad. The aggregate-settlement rule is not subject to waiver by advance agreement among the clients themselves—say, to abide by a supermajority rule for acceptance of any collective deal.[234]

By comparison to aggregate settlements, class action settlements do not break completely from consensual notions. The consent involved, however, is of a much more ephemeral, inferred sort rather than the individualized, autonomous consent enshrined in legal ethics. The effect of an approving judgment is literally to turn absent class members into parties to the class settlement agreement in the sense of being bound thereby.[235] In their most common form under Rule 23(b)(3), class actions infer absent class members' consent to be bound from the affordance of procedural protections in the nature of exit, voice, and loyalty rights—respectively, the opportunity to opt out, the chance to participate in the proceedings based upon adequate notice, and the assurance of adequate representation.[236] The insis-

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230 On aggregate settlements, see generally Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) (examining the differences between rules governing attorneys in consensual versus nonconsensual litigation groups).

231 *See* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784–95 (2005) (noting the variety of ways in which aggregate settlement offers might be structured).

232 The aggregate-settlement rule is embodied in Rule 1.8(g) of the Model Rules of Professional Conduct and in the ethics rules of every state in the nation. *See* ALI Principles, *supra* note †, § 3.17 reporters' notes, at 271.

233 On the considerable detail required for these disclosures, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006).

234 Under current doctrine, such an advance agreement remains ethically impermissible, even among sophisticated plaintiffs. *See* Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 522–23 (N.J. 2006) (deeming advance waiver impermissible under the current aggregate-settlement rule, but calling for ethics rulemakers to assess the continued wisdom of that limitation).

235 *See* Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) ("[N]onnamed class members are parties to the proceedings in the sense of being bound by the settlement.").

236 *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985). The terminology of exit, voice, and loyalty rights comes from Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366, who applied to class actions the

tence in Rule 23(e) upon judicial review of the settlement terms for substantive fairness in the class action setting[237] further underscores the break from individualized client consent, as to which no judicial review is required in ordinary litigation.

For its critics, the Vioxx deal lies betwixt and between, legitimized neither by client consent under the rules of legal ethics nor as a class action subject to judicial oversight. Whether the situation could have garnered class certification for purposes of settlement, rather than adversarial litigation, remains unclear as a strictly doctrinal matter. Speaking to settlement-only class certifications in two landmark asbestos cases in the late 1990s, the Supreme Court underscored the need for "undiluted, even heightened, attention" to "structural" conflicts of interest, both within the proposed plaintiff class and between the class as a whole and class counsel.[238] These disabling structural conflicts do not encompass all conceivable fissures but, rather, only those that "would present a significant risk that the lawyers . . . might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."[239]

The recognition that all heart attacks and strokes with colorable connections to Vioxx had already occurred—presenting no substantial prospect for future claims—means that a settlement-only class in the Vioxx context would not have posed the kind of "obvious" intraclass conflict between present-day and future disease claims that derailed the asbestos class settlements.[240] Nor would the definition of such a Vioxx class seem to have had a need to carve out, for separate resolution, claims already in the tort system (many of which were brought by plaintiffs represented by the same lawyers who would serve as class counsel). The Court rightly regarded such a class definition as giving rise to a lawyer conflict with the proposed asbestos classes,

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typology developed in ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). For a similar view, see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376–77 (2000).

237 *See* FED. R. CIV. P. 23(e)(2) ("If the [proposed class action settlement] would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

238 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 627 (1997).

239 ALI Principles, *supra* note †, § 2.07(a)(1)(B). *See also* Issacharoff & Nagareda, *supra* note 93, at 1684 (noting that the differences in the class "that matter are those that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims").

240 The class in *Amchem* exhibited a disabling intraclass conflict between asbestos-exposed workers with present-day, asbestos-related disease and those merely at risk of such disease in the future. *See* 521 U.S. at 626–27.

which were comprised exclusively of persons who had not yet sued.[241] Moreover, the kinds of fine-grained differences among state tort laws that characteristically derail certification for purposes of adversarial litigation likely would not have barred settlement-only certification, "for the proposal is that there be no trial" in which actual litigation and determination of disputed matters would need to yield issue preclusion.[242]

Still, even if the barriers to class certification might not have been as clear-cut doctrinally as those for a FOIA or punitive damages class, the designers of the Vioxx deal faced a formidable practical concern about the class settlement option. The major example of a mass tort class settlement to pass judicial muster after the Court's two asbestos decisions had emerged as a dismal failure along its most crucial dimension: its capacity to deliver actual peace. A 1999 class settlement for mass tort litigation over the diet drug combination fen-phen had sought to guard against the kinds of structural conflicts that sank the asbestos class settlements. The fen-phen class settlement succeeded in doing so, at least as a doctrinal matter, by providing "back-end" opt-out rights to drug users who subsequently manifested specified heart valve problems[243]—multiple opportunities for plaintiffs to exit the class at times after the single front-end opportunity that Rule 23 requires.[244]

The huge problem with the fen-phen class settlement was not doctrinal, but practical. In effect, the class unraveled, with high-stakes fen-phen claims exiting at both the front and the back ends. In addition, rival plaintiffs' law firms flooded the settlement regime with claims of dubious merit, wildly in excess of even the most conservative claim estimates at the time of class settlement approval.[245] The upshot was for the final price tag of peace to skyrocket for the settling defendant[246] and, even more importantly, for class members with meritorious claims in need of expeditious payment to suffer massive delays. These consequences stemmed chiefly from the need for court-ordered auditing of the settlement regime and the propping up of its

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241 The point is most crisply stated in *Ortiz v. Fibreboard Corp.*, in which the Court noted that the proposed asbestos class exhibited the same "obvious" intraclass conflict as in *Amchem* as well as one between the class as a whole and class counsel. 527 U.S. 815, 856 (1999).

242 *Amchem*, 521 U.S. at 620.

243 *See In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 226 F.R.D. 498, 503 (E.D. Pa. 2005).

244 *See* FED. R. CIV. P. 23(c)(2)(B)(v)–(c)(3)(B).

245 On both the problem of unraveling classes and the influx of dubious claims, see NAGAREDA, *supra* note 131, at 147, 150–51.

246 *See How Deep Do Merck's Wounds Go?*, WALL ST. J., Sept. 30, 2006, at B14 (estimating overall cost of fen-phen litigation for defendant manufacturer Wyeth Corporation at twenty-one-billion dollars).

capitalization through a series of amendments to the original class settlement agreement.[247] In sum, under the class settlement most salient to both sides in the Vioxx litigation, everyone seemingly had lost—except, perhaps, the dissenting plaintiffs' law firms that had set up "echocardiogram-mills" to support dubious claims.[248] The idea that yet another mass tort with a cardiologic connection should seek to make peace by way of a class settlement thus was decidedly disheartening.

By now, the arguments in the debate over the Vioxx deal should sound familiar. Replace the ethical strictures for individual client consent with concern over the preclusion of nonparties and one has a reprise of the argument to treat situations of embedded aggregation by reference to rules drawn from the ancestral past of one-on-one lawsuits.[249] Replace the practical aversion to use of a class settlement in the Vioxx setting with the doctrinal barriers to class certification for purposes of adversarial litigation, and one has a replay of the procedural catch-22 in FOIA and punitive damages litigation. The features that mark each situation as one of embedded aggregation—for the Vioxx litigation, a "quasi-class action"[250]—are, at the same time, what inhibit a move to regulate that dimension through class treatment.[251]

5. *Hybridized Consent*

The Vioxx deal effectively posits a hybrid mechanism to legitimate mass settlements, one that consists of neither pure-form client consent nor pure-form class treatment. Like the holdings in *Taylor* and *Williams*, the ethical critique of the Vioxx deal strives to push embedded aggregation into the principles of one-on-one lawsuits. In so doing, the ethical critique effectively would allocate the entirety of the

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247 *See Diet Drugs*, 226 F.R.D. at 505–09 (discussing problems with original settlement in course of approving seventh amendment to its terms).

248 *See id.* at 506. On the broader phenomenon of personal-injury plaintiffs' law firms that function as "settlement mills," see Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1491–1503 (2009) (noting ten characteristics that distinguish "settlement mills" from typical personal-injury law firms).

249 This similarity is also noted in Issacharoff, *supra* note 5, at 219 ("In this instance it was not the Federal Rules of Civil Procedure that were the issue so much as ethical rules . . . .").

250 *See In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 612 (E.D. La. 2008) (characterizing the consolidated Vioxx litigation in the course of asserting judicial authority to regulate the fees of plaintiffs' lawyers). For a critique of this and other assertions of fee regulation authority based upon the "quasi-class action" concept, see Silver & Miller, *supra* note 210, at 152–55.

251 Upon observing this similarity across all three examples—*Taylor*, *Williams*, and now, the ethical critique of the Vioxx settlement—one has the feeling of watching television reruns of a 1970s situation comedy with episodes that keep repeating the same plot structure. Here, too, three is indeed company—and, once again, Jack and Chrissie are fooling Mr. Roper. *Don't see Three's Company* (ABC television broadcast 1977–84).

uncharted territory between conventional, individual settlements and class settlements to the notions of individual client consent that govern the former. Yet, references to notions like individualized client advice and unanimous client consent ring hollow when the structure of representation in mass litigation—much to the benefit of claimants themselves—already has bypassed the model of a lawyer loyal to a single, one-off client.

To be sure, existing ethical rules are not blind to the possibility of nonclass aggregation. As construed today, the aggregate-settlement rule regulates the representation of multiple clients by the same lawyer when those clients present similar claims against a common defendant—in the mass tort setting, claims that may well have their greatest settlement value when tendered in the aggregate. But, far from being crafted with such a contemporary scenario in mind, the aggregate-settlement rule instead had its genesis in an effort to regulate a strikingly different situation. The rule drafting committee focused on a practice whereby a noted Texas plaintiffs' lawyer would represent multiple clients in unrelated tort cases that nonetheless happened to involve the same insurance carrier for the respective defendants.[252] The lawyer would go to the insurer and offer to settle the various cases as a group, without disclosure of this lawyer-made grouping to the clients.[253] One can see how an ironclad rule of unanimous client consent might form a sensible ethical prescription here but not necessarily for mass client representation in all situations of embedded aggregation today. The aggregate-settlement rule, in short, stems from a scenario in which the aggregate character of the situation is entirely the lawyer's creation, not the product of how applicable legal doctrine conceives the right of action, remedy, or wrong involved.

A different approach would seek not to wedge embedded aggregation into ethical rules for a one-on-one world but to expose its aggregate character and thus better regulate its workings. Properly understood, the real point of hesitation about the Vioxx deal lies not in its reliance upon client consent but in the timing for such consent—when billions of dollars were on table for both lawyers and clients—so as to accentuate both lawyer temptation and client concern about regret if the client were to decline the deal.[254] This timing is

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252 *See* Proceedings of the 85th Annual Meeting of the American Law Institute, 2008 A.L.I. PROC. 27, 91–92 (remarks of Professor Charles Silver) [hereafter ALI 2008 Annual Meeting]; *see also* Silver & Baker, *supra* note 230, at 1475 n.31 (noting that the aggregate-settlement rule "was intended to cover the situation in which a lawyer *separately* represents multiple clients with unrelated claims" and to require disclosure to clients of practices whereby the lawyer grouped such claims for settlement).

253 *See* ALI 2008 Annual Meeting, *supra* note 252, at 91–92.

254 Scholarship at the intersection of dispute resolution and cognitive psychology underscores the influence that litigant concern about the possibility of regret can have upon

understandable—indeed, inevitable—given the content of the current aggregate-settlement rule and its rejection of any manner of *ex ante* agreement to abide by non-unanimous consent.[255] But the situating of client consent at a time when money is on the table does lend a kind of bait-and-switch quality to the lawyer-client relationship.

For mass torts, a would-be client should understand clearly from the outset that the lawyer she is retaining—the kind of lawyer she should retain, as a strategic matter—is not a lawyer loyal exclusively to her due to a lack of other, similar clients. What such a client needs is a lawyer with the capacity to litigate and to tender her individual case for settlement along with large numbers of others, whether through the lawyer's own labors or via referral arrangements with other firms within the plaintiffs' bar. In short, such a client needs a lawyer able to structure an aggregate resolution for the litigation overall, in keeping with the embedded aggregate dimension of mass products liability. This capacity brings considerable benefits for the individual client, which come along with the potential for conflicts vis-à-vis other clients and even the lawyer herself in the tendering of all clients' cases for aggregate resolution.

Rather than insist upon client consent when money is on the table, the law might more fully hybridize client consent. The crucial move lies in situating aggregate settlements where they actually are institutionally: between the pure-form individualized client consent found in conventional one-on-one settlements and the inferred, ephemeral consent embraced under the law of class actions. In short, one might have individualized client consent but situate the timing for that consent before, rather than after, the making of an aggregate-settlement offer. The clients might agree in advance, by contract, to decision-making rules and processes with the anticipated endgame of aggregate settlement squarely in mind—for instance, advance agreement on the part of all clients to abide by supermajority rule for acceptance of the anticipated aggregate-settlement offer (so as to weaken the power of potential holdouts under a rule of unanimous consent) and to informal, third-party review of the deal terms (as sometimes occurs today through the use of an arbitrator or retired judge independent from plaintiffs' counsel).[256] In a world of

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the acceptance of settlement offers. *See* Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 72–81 (proposing a Regret Aversion Theory of Litigation Behavior and finding, through survey methodology, that litigants systematically prefer settlement over trial because it minimizes the likelihood that they will experience regret).

255 *See supra* note 234 and accompanying text.

256 A proposed alternative to the existing aggregate-settlement rule recently approved by the ALI for consideration by relevant ethical policymakers takes this approach. *See* ALI Principles, *supra* note †, § 3.17(b).

Facebook and websites for the victims of particular mass torts, the law should not underestimate the possibility of a bottom-up, rather than top-down, mode of interaction among clients.[257]

Such an approach would play out in the design of client consent the kind of prescription that the Supreme Court noted for the law of preclusion in *Taylor v. Sturgell*. As a chronological matter, the Vioxx dealmakers operated without the benefit of the *Taylor* opinion.[258] Still, the relationship today between the two bears note. Absent a class action, the other main scenario for nonparty preclusion under *Taylor* consists of advance agreement on the part of the would-be seriatim litigants to be bound to the outcome of the first litigant's case.[259] In effect, the approach I envision here would provide the vehicle for a similar process of *ex ante* agreement with regard to client acceptance of an anticipated aggregate-settlement offer. The law of client consent to aggregate settlements then would come into rough symmetry with the law of preclusion—fittingly so, given the use of client consent to lend the binding force to arrangements like the Vioxx deal that preclusion would not.

When preclusion and consent function as substitute means by which to legitimize some manner of aggregate settlement, it makes sense that the respective principles of preclusion and consent should not exhibit radical differences. Substantial symmetry between the two potential grounds for binding effect might guard appropriately against strategic arbitrage on the part of settlement designers.

In recognizing the prospects for private innovation in mass client representation, moreover, one should not come away with the impression that this process can or should take place without legal regulation. Just as a hybridized approach for punitive damages should come with limitations on the private whistleblower as a litigant in the government's name, so too should law structure *ex ante* agreements in mass client representation. Here, hybridized client consent would not operate without constraints upon plaintiffs' counsel—the person who would comprise the most immediate interlocutor between the various clients and, for that reason, someone who might be tempted to abuse that position.

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257 *Cf.* Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 16 (2009) (framing the trajectory of non-class aggregate litigation as proceeding from medieval groups to Facebook friends).

258 The announcement of the Vioxx deal predated *Taylor* by roughly six months.

259 *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2172 (2008). Given the *Taylor* Court's recognition of contractual agreement as a basis for nonparty preclusion, one wonders whether MDL transferee courts in the future might insist upon delivery of such agreements up front from the entire client bases of the relevant plaintiffs' law firms as a precondition for a bellwether trial process. I am grateful to Samuel Issacharoff for raising this permutation.

Boilerplate, adhesive retention agreements at the outset of the representation that depart from the unanimous client consent required by the existing aggregate-settlement rule warrant disfavor[260]—perhaps, even disallowance. The law, moreover, might insist upon disclosure to the clients of their right to stick with the existing aggregate-settlement rule and, further, upon the lawyer's obligation not to withdraw from the representation simply because of a given client's desire to adhere to the current rule.[261] These disclosures would underscore the nature of a client-centered alternative as just that—the formulation of an alternative to the existing aggregate-settlement rule by the clients themselves, not by a domineering lawyer.

Specifics aside, the basic trajectory remains the one traced in Part II. No less than in adversarial litigation, the hybrid nature of embedded aggregation in the settlement context warrants hybrid law, not a reflexive inclination to retreat entirely to one or the other familiar poles of one-on-one litigation ethics or class action procedures. Instead, the hard work should consist of more fully exposing and regulating the hybrid character of the situation involved. The next section speaks to the place of hybrid processes within the larger sweep of procedural history and the challenges that those processes present. Here, both the domestic past of debates over aggregate procedure within the United States and their transnational future deserve attention.

B. Hybridization and the Globalization of Procedural History

We live in a world of hybrids: of active government whose functions often are privatized, of private markets subject to substantial regulatory oversight, and of nation-states with their domestic affairs increasingly intertwined with the international sphere. We no longer can say coherently that what is good for General Motors is good for the United States when the two effectively have become one. Hybridization is the watchword of our time. In such a world, it should not surprise us that civil litigation in the twenty-first century would be grasping tentatively for prescriptions along similar lines.

To the generation that entered the legal profession since 1966, Rule 23 seems a familiar and well-established fixture of the procedural landscape. Rule 23 was anything but that before. The modern Rule 23 emerged from a distillation of prior judicial experimentation in equity plus, in no small part, creativity on the part of the rule drafters

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260 *See* ALI Principles, *supra* note †, § 3.17 cmt. d, at 269–70 ("Claimants . . . are likely to have more information about the benefits and risks associated with group-wide voting arrangements after some litigation has occurred than at the time of formation of the lawyer-client relationship. This consideration provides a circumstance surrounding the agreement that weighs in favor of postretention agreements, and against the use of agreements entered into at the outset of representation.").

261 *See id.* § 3.17(b)(4).

to envision further elaboration of the device in the form of the opt-out class.[262] Current prescriptions that posit only two basic regulatory responses for situations of embedded aggregation—class actions or one-on-one lawsuits—are unlikely to carry the day because they ultimately posit a kind of procedural "end of history."[263] Their central ambition is to assimilate entirely the hybrid rights of action, remedies, and wrongs of today into one or another familiar procedural category. This impulse reflects the fundamental ahistoricism of present-day debate, cast between the mass issues presented by class actions and the supposedly benighted realm of individual actions. For civil procedure in the twenty-first century, wishes for a grand "end of history" in the world of procedural design are unlikely to fare any better than they have in the realm of geopolitics.

Cognizance of the broader global world, if anything, deepens the preceding point. To frame the debate over embedded aggregation on a going-forward basis—as decisions like *Taylor* and *Williams* implicitly do—in terms of a choice between class actions and one-on-one lawsuits might make a certain degree of sense if the civil justice system of the United States realistically could maintain a kind of insularity vis-à-vis the world. But for civil processes, no less than for commerce, insularity is no longer practically possible. The history of civil procedure in the United States over the past century was a history predominantly confined to the United States.[264] The conversation about the shape of U.S. civil procedure in the twenty-first century will extend transnationally.

One can see the beginnings of this emerging conversation with reference specifically to aggregate procedure. The signal development on this front consists of the emergence of considerable European interest in the development of procedures for aggregate litigation.[265] This development has come to the fore primarily over the past decade, roughly in tandem with the greater economic inte-

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262 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1998) ("[T]he [Civil Rules] Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward looking as it was in anticipating innovations under Rule 23(b)(3).").

263 *Cf.* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (famously mispredicting global convergence toward the Western, liberal, democratic model of government).

264 This is not to slight the fundamental choices made in earlier centuries vis-à-vis continental civil procedure. *See* Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 483 (2009), *available at* http://www.bepress.com/til/default/vol10/iss2/art5; Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 (2005).

265 For a comprehensive description of the developments by nation, see HODGES, *supra* note 190.

gration facilitated by the European Union.[266] The expressed aspiration is to fashion distinctively European processes for aggregation, ones that will avoid what European policymakers disparage as the "litigation culture" of the United States.[267]

In pursuing this enterprise, European leaders seek to strike a delicate balance between facilitating the aggregate handling and disposition of claims already in the civil justice system while, at the same time, avoiding the enabling of claiming en masse.[268] Whether such a balance will make for a stable equilibrium over the long term remains unclear.[269] For that matter, the global conversation about aggregate procedure is not confined to the West. China recently saw the filing of a class action on behalf of children injured by tainted milk products, that nation's counterpart to the sorts of mass torts familiar in the legal annals of the West.[270]

For purposes of responses to embedded aggregation, two points stand out from a global perspective: first, the atypical character of the U.S.-style class action as a mode of aggregation by comparison to other nations;[271] and second, the sheer multiplicity of procedures for

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266 For further explanation of the possible connection between European economic integration and the current interest in new forms of aggregate procedure, see Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 26–27 (2009).

267 *See* David Gow, *Business Chiefs Attack Plan for US-Style Consumer Litigation*, GUARDIAN (London), Mar. 19, 2007, at 28 (quoting EU competition commissioner Neelie Kroes).

268 *See* HODGES, *supra* note 190, at 1; Nagareda, *supra* note 266, at 28.

269 *Compare* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 209–10 (2009) (doubting the stability of such a balance), *with* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 293 (2010) (sketching the prospects for European processes for aggregation that would not rely on entrepreneurial private lawyers on the U.S. model).

270 *See* Edward Wong, *Class-Action Suit, Rare in China, Is Filed Over Tainted Milk*, N.Y. TIMES, Jan. 21, 2009, at A19. For a general background on class actions in China, see Michael Palmer & Chao Xi, *China*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 270 (2009) (providing an overview of group litigation in China). Private litigation aside, the Chinese government imposed its most serious criminal sanctions on the businesspersons responsible for the tainted milk scandal. *See* David Barboza, *China Plans To Execute 2 in Scandal over Milk*, N.Y. TIMES, Jan. 23, 2009, at A5.

271 Relatively few European systems embrace the American notion of class membership on an opt-out approach; most use an opt-in approach. *See* Nagareda, *supra* note 266, at 21–25. For an explanation of this stance by reference to the civil-law tradition in many European nations, see S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 96 (2008).

The United Kingdom—the closest common-law counterpart to the United States—recently rejected a proposal by its Civil Justice Council to adopt an opt-out approach in civil litigation generally. *See* UNITED KINGDOM MINISTRY OF JUSTICE, THE GOVERNMENT'S RESPONSE TO THE CIVIL JUSTICE COUNCIL'S REPORT: "IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS" para. 35, at 11 (July 2009), *available at* http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf ("[The Government] sees considerable weight in the concerns about a full opt-out model, and considers that the same objectives would be better met in most cases by one of the hybrid models [for membership in group litigation]. But it does not rule out adoption of

aggregation in itself.[272] These features, together, underscore the future obstacles for prescriptions cast in terms of a choice between class certification and required individualization.

Because of their atypical character from a transnational standpoint, U.S.-style class actions will, for the foreseeable future, tend to lack the capacity to encompass the full aggregate scope of alleged wrongdoing when market-wide wrongs extend transnationally. In the context of securities fraud litigation involving corporations that are capitalized across global financial markets, U.S. courts already have begun to identify considerable uncertainties over the capacity of a U.S.-style class action to yield preclusion as to investors abroad—for instance, because of the disinclination of their respective home nations toward recognition of opt-out processes in particular or representative litigation more broadly.[273] The Supreme Court, moreover, recently clamped down on "f-cubed" securities fraud suits—those brought on behalf of foreign shareholders against foreign companies traded on foreign exchanges.[274] When aggregate wrongdoing increasingly extends transnationally but the U.S.-style class action does not, blanket prescriptions for aggregation along the lines of the latter are unlikely to gain much traction.

If anything, resistance to adoption of the U.S.-style class action in Europe suggests that civil procedure there will tend to encounter the challenges framed in this Article for situations of embedded aggregation relatively soon. That encounter has occurred in the United States only after the forty-plus-year elaboration of a distinctive law of class actions, enabling observers to discern situations with an aggre-

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an opt-out system in some sectors where this is the most cost-effective way of achieving a just outcome.").

272 For a chart summarizing the main differences, see Nagareda, supra note 266, at 21–25.

273 *See, e.g.*, *In re* Alstom SA Sec. Litig., 253 F.R.D. 266, 285–87 (S.D.N.Y. 2008); *In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 93–96 (S.D.N.Y. 2007). On these and other problems in U.S.-court securities class actions that involve foreign shareholders, see Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465 (arguing that current tests for determining the applicable class in transnational securities litigation are both uncertain and unpredictable and proposing that courts adopt a bright-line, exchange-based rule).

For an important analysis of the distinct meanings of judgment "recognition" and "preclusion" in transnational class actions, see Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion* 1 (Univ. of Pittsburgh Legal Studies Research, Paper No. 2010-04), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554472 (urging courts to "analyze recognition and preclusion issues separately, rather than conflating them").

274 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (limiting § 10(b) of Securities Exchange Act of 1934 to "the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States").

gate dimension that nonetheless cannot be addressed through the class action device. For the most part, the relative absence of the U.S.-style class action in much of Europe means that European civil justice systems effectively will fast-forward past the forty-plus-year process that took place in the United States.[275]

At the same time, the multiplicity of aggregate litigation procedures from a transnational perspective suggests the waning of the one-on-one lawsuit as a blanket prescription. In a world characterized only by the one-on-one format, it necessarily wins as a mode of litigation by default. But when different nations come to offer their own distinctive menus for aggregate procedure, the tendency will be toward mixing and matching. Procedure itself will become hybridized, especially in the posture of settlement.

One can see this move afoot in the recent settlement of antitrust litigation concerning price fixing in fuel surcharges for transatlantic commercial flights by British Airways and Virgin Atlantic. Airline ticket purchasers in the United States had their claims resolved via a Rule 23(b)(3) opt-out class action, but their counterparts in the United Kingdom had theirs resolved through an opt-in procedure.[276] A similar hybridization in settlement procedure characterizes the resolution of securities fraud claims concerning the alleged overstatement of natural-resource reserves by Royal Dutch Shell. There, the claims of shareholders in the United States were settled via a U.S.-court class action authorized for litigation purposes, while those of European inventors were resolved through an opt-out procedure authorized exclusively for settlement purposes under a 2005 Dutch statute.[277]

Hybridized procedure along national lines has the attraction of respecting transnational differences over the design of aggregate processes—in effect giving claimants situated in different parts of the world a form of civil process close to home. Courts nonetheless should be on the lookout for situations in which the hybrid nature of settlement in procedural terms effectively prices the underlying claims

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275 Interestingly enough, the U.S. criminal justice system appears to have followed a similar trajectory. There, the commitment to individualized adjudication is, if anything, even stronger than in the civil justice system, such as to inhibit dramatically the development of class actions for criminal cases (or, relatedly, civil habeas corpus class actions). *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 393–410 (2007). The unavailability of class actions nonetheless has led to the development of a variety of non-class devices with aggregate features for disputes that involve alleged systematic deficiencies in the criminal justice system. *See id.* at 410–21. These "grassroots innovations" in procedural design for the criminal context, *id.* at 387, broadly resemble the process anticipated here for civil litigation now that the uses and limits of the class action device for civil litigation have come more sharply into focus.

276 *See Airlines Settle U.K., U.S. Suits; International Lawyers Call Class Action a First for Britain*, 9 Class Action Litig. Rep. (BNA) 157 (Feb. 22, 2008).

277 *See* Michael D. Goldhaber, *Shell Games: Amsterdam Could Become the Class Action Capital of Europe if the U.S. Declines the Honor*, 5 AM. LAW. S22 (2007).

according to the least advantageous mode of aggregation from the claimants' standpoint and, then, seeks to project that pricing across the entire domain for settlement—even under more advantageous procedural formats for claimants. One mechanism by which settlement designers might attempt such a move consists of a "most favored nation" clause, whereby the settling defendant effectively signals its commitment not to resolve claims in other fora on terms more advantageous than those reached in the forum with the procedure least advantageous for claimants. As existing commentary observes, the use of a most favored nation clause in connection with the resolution of European investors' claims in the Royal Dutch Shell litigation raises precisely such a concern.[278]

Details aside, the larger point remains that the emerging transnational conversation points toward hybridization—not a choice between U.S.-style class actions and individual lawsuits—as a central theme for aggregate procedure today. If anything, the relatively rapid convergence in the United States toward class actions along the line of Rule 23—its adoption, either in form or in function, by the vast majority of states[279]—previously had the effect of suppressing debate over hybridization. It is only upon the emergence of an elaborated body of class action doctrine in recent years—as evidenced by American Law Institute's adoption, in 2009, of *Principles of the Law of Aggregate Litigation*—that debate could now attend to the possibility of hybrids between the class action and the individual lawsuit.

There are genuine risks to hybridization—at its worst, a sense that one is making up the rules for civil processes as one goes along. The ethical criticism leveled against the hybridized form of client consent envisioned in the Vioxx deal reflects such a concern. Viewed from a broader historical perspective, however, hybridization need not countenance lawlessness. Rather, as the emergence of Rule 23 itself teaches us, the impulse to grasp for new civil processes stems ultimately from a sense that existing ones do not adequately capture or account for the conditions under which civil disputes are now occurring. It is precisely because U.S. law already has embarked upon experimentation with new hybrid rights of action, remedies, and wrongs—precisely because we have things like FOIA, punitive damages, and mass products liability—that we are now faced with the fur-

278 *See* Nagareda, *supra* note 266, at 38–41 (discussing strategic dynamics of most favored nation clause in Royal Dutch Shell settlement).

279 *See* Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 147–48 (2007) ("[A] considerable majority of American states track Federal Rule 23, at least in its 1966 version before the 1998 and 2003 amendments and the 2007 style revisions, closely and in a good many cases word for word.").

ther question whether existing procedural modes can handle them desirably.

Justin Timberlake's analysis of romance also holds true for embedded aggregation today: "What goes around . . . comes all the way back around."[280] The modern Rule 23 represented the new procedural kid on the block in 1966, a vital innovation at the time. As the rule now enters its middle age, one might say that a more elaborated sense has emerged not only about its genuine usefulness but also about its well-taken limitations. Seen in this light, the prescription of hybrid civil processes I urge here would do what the modern class action did to the extant procedural modes of 1966: add to the menu of procedural options to suit the rights, remedies, and wrongs of the time.

What is needed today is a similar process of distillation, just one suited to the hybrid rights, remedies, and wrongs of today. What is needed is not civil process created on the fly but, rather, studied and deliberate effort to expose the hybrid quality of innovations like FOIA, punitive damages, and aggregate settlements in our contemporary world and to subject them to commensurately hybrid forms of legal regulation. In this endeavor, the poles of the one-on-one lawsuit and the U.S.-style class action define useful fixed points along a continuum, but neither alone provides the necessary roadmap for the uncharted territory in between. That territory—not either of the poles—comprises the domain for serious thinking about aggregate procedure in the twenty-first century.

CONCLUSION

This Article has urged attention to situations of embedded aggregation as a distinctive problem for modern regimes of civil litigation, particularly for systems like those in the United States that have already put into place innovative new rights of action, remedies, and wrongs in the late twentieth century. The roadmap offered here pinpoints situations in which applicable legal doctrine embeds an aggregate dimension within a given situation. The roadmap, in turn, reveals a recurring pattern. Across settings that initially would seem disparate, embedded aggregation presents what this Article has dubbed a form of procedural catch-22. The features that make the situation one of embedded aggregation, as understood here, simultaneously inhibit the move to make that aggregate dimension overt by way of class action treatment.

We are not stuck forever with procedural catch-22, however. In charting the viable paths out of the catch, this Article has sought to

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280 Justin Timberlake, *What Goes Around. . ./. . .Comes Around*, *on* FUTURESEX/LOVESOUNDS (Jive Records 2006).

recast existing debate. Properly understood, embedded aggregation demands a response in the nature of hybridization—one that exposes hybrids of traditional litigation features with aggregate ones and that then seeks to regulate them as such, not to shoehorn them awkwardly within either the class action device or the traditional model of the one-on-one lawsuit. When aggregation occurs without class actions, the situation demands a substitute mode of legal regulation for the kind of judicial oversight prescribed by the class action device. The hybridized approach to client consent as the vehicle to lend binding force and legitimacy to the recent Vioxx settlement offers a tentative, incomplete step in this direction. Our twenty-first-century world of burgeoning transnational diversity in aggregate procedure demands no less than that we keep walking on a path that leads beyond the U.S.-style class action.