MULTIDISTRICT LITIGATION AND COMMON LAW PROCEDURE

by
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On the 50th anniversary of the Multidistrict Litigation Act, the Act has gotten more attention than ever. One area that has led to significant controversy is the use of judicial discretion to craft procedures to manage MDLs. It is generally agreed that judges exercise discretion to create innovative procedures to resolve large-scale aggregate litigation transferred to their courts and that judges learn from approaches in previous MDLs that they think were successful in crafting these procedures. The controversy is that some think that this procedural approach is both exceptional and lawless. This Essay argues against this view, showing how the judicial approach to MDL procedure is the same as the judicial approach across procedural areas, which is to say that procedures develop in a common-law-like fashion with extensive reliance on judicial discretion. The argument about rulemaking processes in MDL is a distraction from what should really matter, which is the normative underpinnings of the procedural regime, what it is trying to achieve, and whether the procedures currently in use adequately meet these normative goals.

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INTRODUCTION

On the 50th anniversary of the Multidistrict Litigation Statute, the MDL has become a source of controversy. Among the most controversial issues is the current debate about whether the federal rule-makers should create new federal rules that

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apply only to cases consolidated before one judge pursuant to the Multidistrict Litigation Act.[1] This Essay argues that critics of MDL rulemaking are focusing on the wrong thing when they argue that the problem is that the rules governing MDLs are made by unorthodox methods or are too ad hoc.

By contrast, my thesis is that it is a normal and longstanding feature of our system that procedural rules develop in an iterative, common-law like fashion. In a previous article entitled *Procedural Design*, I showed the extent of disintegration or disorder in the judicial doctrines that have grown around the Federal Rules of Civil Procedure in run-of-the-mill cases.[2] There is a perception that procedure is meant to dictate the development of a case in a certain order—from filing to trial to appeal—but as I demonstrate at length in that work, this perception is wrong in all areas of procedural law. The application of even written rules is in fact quite malleable and these rules evolve in a common-law-like way. The way MDL procedures are evolving is very consistent with this general trajectory of the procedural law, one that is consistent with common law tradition (if not always wise), and it is difficult to imagine procedure evolving any other way in the federal courts. Scholars critical of MDL common law procedure recognize that discretion characterizes the rules of procedure as a general matter;[3] the difference between us is one of emphasis. But the emphasis matters, because the exceptional aspect of MDLs is not the procedural problems judges face, but rather the substantive issues these large lawsuits raise. The undue focus on MDLs as procedurally exceptional distracts from the more serious problems: the lack of a normative set of principles for what aggregate litigation is

[1] *See* 28 U.S.C. § 1407 (2012). Indeed, there is a website devoted to this public campaign. *See* RULES4MDLS, https://www.rules4mdls.com (last visited Feb. 23, 2020). The website says it "is sponsored by Lawyers for Civil Justice, a national coalition of defense trial lawyer organizations, law firms, and corporations." *Id.* It appears that most of the push for altering the civil rules comes from the defense bar. There is also scholarly literature critiquing judicial discretion in MDL litigation. *E.g.*, Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 835 (2017) (arguing that MDL procedure-making challenges rule of law values); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1674 (2017) (arguing that MDLs represent a kind of common law procedural rulemaking that differs from normal or orthodox procedure and presenting evidence that judges view MDLs this way); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 454 (2019) (arguing that MDL is like an administrative agency without the protections of the Administrative Procedure Act). The Civil Rules Committee is currently considering some proposals. *See* ADVISORY COMMITTEE ON CIVIL RULES (Oct. 29, 2019), https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf.

[2] Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 861 (2018) [hereinafter Lahav, *Procedural Design*]. In the interest of saving space, I refer readers who are unconvinced to this work, which traces the disintegration of procedure in doctrines ranging from standing and the motion to dismiss, to class actions, interlocutory appeals and more over a 40-year period.

[3] *See* Bookman & Noll, *supra* note 1, at 785 (recognizing discretion in the federal rules).

trying to achieve as a matter of substantive law, questions of professional responsibility in mass litigation which is not governed by federal rules,[4] and the failure to adequately address what constitutes fair procedure geared to realizing the aims of the substantive law in context.

The argument that justice in MDLs cannot be done without a set of written rules that have been made through the rulemaking process is not consistent with the practices of American courts both before and after the adoption of the Federal Rules of Civil Procedure in 1938. It is also ironic, as the MDL statute itself was codified in response to a procedure created to deal with what, at the time, seemed to be a one-off problem of large numbers of antitrust cases filed across the United States.[5] The MDL statute is rather open-textured, leaving significant wiggle room for answering such crucial questions as when the Judicial Panel on Multidistrict Litigation should transfer and consolidate cases, and when it would be preferable not to do so.[6]

A significant amount of the American procedural landscape is only partially rules-based and largely common-law-like in its development. Indeed, the rules of procedure are more like guidelines, within which there is a significant amount of discretion.[7] The view that MDLs are unique or even exceptional in the alteration of procedures to meet the perceived exigencies of litigation is as mistaken as the view that the Federal Rules of Civil Procedure are "rules" in the sense of rules as opposed to standards.[8] Rather, as a general matter, the Federal Rules of Civil Procedure should be understood as "rules" in the sense that they are the legal guidelines that govern the operation of the federal courts.

Some of the federal rules are indeed rules. These include, for example, various time limitations that cannot be adjusted based on equitable considerations.[9] Other

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[4] *See generally* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943 (2017) (mapping the ethical issues in the structuring of mass tort settlements that are a hallmarks of the largest and most controversial MDLs).

[5] For a history of the statute's evolution, see Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 863 (2017) (describing the evolution of consolidation and transfer).

[6] The statute merely says that cases may be transferred when "civil actions involving one or more common questions of fact" are pending. 28 U.S.C. § 1407(a).

[7] Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1962 (2007) ("Federal district judges exercise extremely broad and relatively unchecked discretion over many of the details of litigation.").

[8] For an analysis of rules versus standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). *See also* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592 (1988); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959 (1995).

[9] *See, e.g.*, FED. R. CIV. P. 23(f) (imposing 14-day deadline for appealing a class certification order); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 713 (2019) (14-day deadline for appealing a class certification order was not subject to equitable tolling).

federal rules are more like standards. A good example of this is the standard for permitting a plaintiff to amend her complaint: "The court should freely give leave when justice so requires."[10] When rules allow judges to exercise substantial discretion, the interpretation of *how* to exercise that discretion develops over time and often inconsistently across districts and even individual judges.[11] A superstructure of sub-rules is built around the original standard through a process of judges interpreting the rule. For this reason it is difficult to understand the application of the rule merely by reading its text; one must consult the caselaw, local rules and individual judge's standing orders even in an ordinary, run-of-the-mill case.[12]

This Essay begins with a description of MDL procedure and how it operates like other areas of common law development. It then turns to the costs and benefits of common law development particularly in the field of procedure. Considerations in evaluating whether pre-written rules or evolving rules are superior include the relative institutional competence of judges as compared with rulemaking committees, the costs and benefits of centralized versus decentralized decision-making, and whether the common law method of procedural rulemaking is consistent with the rule of law requirement that the rules be known in advance.

I conclude that the rules/no rules for MDLs dichotomy makes little sense. Judges use the extant rules and extrapolate from them to manage litigation. They do this in binary litigation as well as in complex litigation. These practices may be codified and reinterpreted in an iterative process, but the process of rule-creation is really beside the point. What *should* matter is the normative question of what is a fair and equitable way to manage this type of litigation, which means both fairness to individual plaintiffs and to the defendants they are suing and how to do so in a

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[10] FED. R. CIV. P. 15(a)(2) (stating the standard for granting a request to amend a complaint).

[11] *See generally* Bone, *supra* note 7 (critiquing the over-reliance on judicial discretion in the federal rules).

[12] The debate over the pleading standard articulated in Rule 8 is an example of this superstructure of sub-rules. *See, e.g.*, Brooke D. Coleman, *What If?: A Study of Seminal Cases as If Decided Under a* Twombly/Iqbal *Regime*, 90 OR. L. REV. 1147, 1149 (2012); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 1 (2009); Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 333 (2016). The invention of the doctrine of ascertainability in class actions is another such example. Read Rule 23; this requirement is nowhere to be found. Nor is it uniformly applied in the circuits. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.3 (9th Cir. 2017), *cert. denied sub nom.* ConAgra Brands, Inc. v. Briseno, 138 S. Ct. 313 (2017). I am not making a normative claim here. In fact, I have criticized this approach in previous work. Developing rules in this manner often ends with rules that are unworkable, unfair or inefficient. This is a descriptive claim that courts have been developing rules in this manner for at least 40 years and that the common law approach to rule development is not unique to MDL. I worry that exceptional treatment of MDL makes scholars of the justice system more sanguine about other areas where similar problems exist but are not recognized.

way that is efficient from the perspective of the court system.[13] The debate about whether these rules will emanate from a committee or judicial experimentation is merely a distraction from these important questions.

I. MDL AND COMMON LAW PROCEDURE

The Federal Rules of Civil Procedure were originally described by the drafters, especially Charles Clark, as a simple set of rules for resolving all civil litigation—from ordinary contract actions to complex antitrust litigation.[14] The drafters had to bake in a fair amount of judicial discretion in order to craft rules that could be trans-substantive, because different types of cases have different trajectories and life histories.[15] As I explained in previous work: "The soul of the Federal Rules, it might be said, is judicial discretion, and discretion may be the price for their (relative) simplicity."[16] Discretion creates variety. The combination of the availability of discretion in rule interpretation and operation, and the wealth of problems faced in particular types of litigation, is that rules will be applied differently in different contexts: "The existence of the rules and related statutes governing all cases creates the appearance of consistency across cases, although in fact the rules are not always applied consistently across or even within a given subject matter."[17]

One example of the observation that the rules appear uniform but are in fact discretionary and vary across subject matter in application is cases transferred to one court under the Multidistrict Litigation Act.[18] Judges overseeing these cases are faced with a challenging task. Sometimes the cases themselves are complicated. For example, an MDL made up of multiple antitrust class actions is complex because antitrust law is complex, and the class action rule adds a further complication.[19] That type of case would be complex whether or not it was consolidated with other cases raising

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[13] Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1394 (2019) [hereinafter Lahav, *Continuum*] (describing the main issues that plague aggregate litigation in any form: equality among plaintiffs, the agent-principal problem between plaintiffs and their lawyers, and the defendant's and court's desire for global peace).

[14] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931–39 (1987) (describing complaints about the technical rules embodied in the Field Code).

[15] *Id.* at 964 (describing Charles Clark's preference for permitting judicial discretion in rulemaking). For an example of the use of discretion in practice, see William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 386 (2001) (discussing the different ways courts interpret Rule 23 for securities as opposed to mass torts class actions—differences which are attributable to the subject matter and not to doctrinal requirements).

[16] Lahav, *Procedural Design*, *supra* note 2, at 861.

[17] *Id.* at 861–62.

[18] 28 U.S.C. § 1407 (2012).

[19] *See, e.g.*, *In re* Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 441 (S.D.N.Y. 2017) (multidistrict litigation consisting of antitrust class actions).

similar factual issues, but they usually involve few plaintiffs and defendants.[20] A second set of cases may be complicated because there are so many cases in a given MDL that processing them is the main challenge, although on their own they may be considered more "ordinary."[21] Since it is clear that the judge cannot determine each case individually the same way judges do with the rest of their dockets, they have developed methods for processing large numbers of cases with slightly different claims, often under different state laws, with different groups of lawyers. A third set of cases combine both elements: complex and novel legal questions and many moving parts.[22]

In response to these challenges, judges have adopted a number of different procedures. For example, judges will appoint a Plaintiff's Management Committee to run the litigation.[23] They will issue orders permitting or requiring master complaints and master discovery requests.[24] They will issue orders requiring disclosure of information in various forms, including for example plaintiff fact sheets or other disclosures.[25] And, on the back end, they will issue orders with respect to attorneys' fees, including sometimes capping those fees.[26]

As an example of common law procedure in action, let us consider in more detail orders requiring plaintiffs whose cases have been transferred to an MDL to disclose certain information. We begin with the groundwork of what the Rules permit. The Federal Rules of Civil Procedure permit the parties to exchange information in the discovery process and even mandate some initial disclosures of information between the parties,[27] although it is not clear how often these initial

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[20] I recognize that a class action theoretically includes many absent class members, but in terms of the court's management of the case, it involves only the named plaintiffs, their lawyers, defendants, their lawyers, and the occasional objector.

[21] *See, e.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1404 (J.P.M.L. 2014) (multidistrict litigation consisting of individual products liability cases).

[22] *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017) (multidistrict litigation consisting of claims by state subdivisions and tribes against opioid manufacturers, distributors, and pharmacies, among others, including novel state law public nuisance claims).

[23] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 67 (2017) (describing and critiquing the process of appointing plaintiffs' management committees).

[24] ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 201–02, 206 (2020).

[25] Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 5 (2019) (describing *Lone Pine* orders: "Though they vary on the specifics, these case-management orders generally require each plaintiff swept into a mass-tort proceeding to supply prima facie evidence of injury, exposure, and causation—all by a set date, under penalty of dismissal.").

[26] Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1835 (2011) (describing judicial decisions cutting attorneys' fees in MDLs).

[27] *See* FED. R. CIV. P. 26(a)(1) (initial disclosures); FED. R. CIV. P. 30 (oral depositions);

disclosures are in fact provided.[28] Among other things, these rules permit a party to provide the opposing side with written interrogatories to which the party must respond within 30 days.[29] The rule limits the number of interrogatories to 25 (including sub-parts) and therefore feels "rule-like."[30] But this is misleading because in fact the parties may stipulate to or the court may grant additional interrogatories.[31]

Indeed, the rule about interrogatories is a good example of the discretion imbedded within the Federal Rules of Civil Procedure. While it may seem rule-like on the surface (only 25!), in fact this limit is merely a default rule. A particularly harsh judge may impose the 25-interrogatory limit or even require fewer interrogatories. A more flexible judge may permit many more interrogatories. There is no limit, except the mandate that governs all discovery, which is that it be relevant and that it be proportional to the needs of the case.[32] Indeed, the general discovery rule specifically gives the judge discretion to alter the number and time limits of the key discovery rules.[33] And of course the parties may simply stipulate to a larger or smaller number. If they do, it seems likely the judge will let their judgment govern the issue.

In MDLs, the order requiring a party to answer questions is called a few different things, depending on the timing and extent of the request. Sometimes these orders might be described as "riffs" on interrogatories, a kind of procedural analogue to improvisational jazz. The truth is that the nomenclature is not very precise, and even the use of a given term may mean different things to different people in different contexts, but the basic idea is that the judge orders the plaintiff to answer some questions about their case, and potentially produce some evidence to support their claims. The *Lone Pine* order is an extreme example.[34] This is an order that requires

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FED. R. CIV. P. 31 (written depositions); FED. R. CIV. P. 33 (interrogatories); FED. R. CIV. P. 34 (document production).

[28] *See* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2037 (2018) (lamenting lack of empirical information about discovery).

[29] FED. R. CIV. P. 33.

[30] FED. R. CIV. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).").

[31] *Id.*

[32] FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

[33] FED. R. CIV. P. 26(b)(2)(A) ("[T]he court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.").

[34] For a detailed discussion, see Engstrom, *supra* note 25. *See also* Lahav, *Procedural Design*,

plaintiffs to provide some proof of their injury and potentially of causation as well. Rarely, judges will issue a *Lone Pine* order in the beginning of the litigation.[35] More often, judges issue such orders after the litigation has been ongoing many years as a way to evaluate claims in the process of global settlement.[36]

In some of the most contentious and criticized cases, courts have required plaintiffs to prove specific causation through such initial disclosures or face dismissal.[37] Under the discovery rules, such a penalty for non-compliance would be considered extreme and it is hard to imagine it being imposed. Further, this approach has been criticized as inconsistent with the rest of the scheme of the federal rules, in particular both the motion to dismiss and the summary judgment rule.[38] After all, a motion to dismiss allows a case to be dismissed only if the plaintiff has failed to plausibly state a claim for relief.[39] It does not require a plaintiff to *prove* the claim at that early stage. The summary judgment rule similarly permits a level of briefing and evaluation (that there is no material fact in dispute) prior to issuing the judgment, which is at odds with an order that would permit the judge to rule against a party merely because it failed to comply with a disclosure order.[40] Scholars, lawyers, and judges thinking about MDLs refer to these other rules, and to the general coherence in rule interpretation, in discussing the propriety of the most egregious form of *Lone Pine* orders. They are able to do so because the general structure of the Federal Rules of Civil Procedure is still understood to apply in the MDL context. The Federal Rules of Civil Procedure remain the touchstone. But that some judges think they can impose such orders is also a feature of the structure of the Rules of Civil Procedure, particularly the grant of substantial discretion to judges to control discovery.

It is likely because the most extreme examples are so inconsistent with the general structure of the rules that the worst excesses, such as court orders dismissing cases as a result of the plaintiff's failure to provide evidence of specific causation

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supra note 2, at 840–41 (describing *Lone Pine* orders as an example of the larger trend towards disordering procedure).

[35] Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 833 (9th Cir. 2011) (upholding *Lone Pine* order prior to discovery); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (upholding district court order requiring plaintiffs to submit pre-discovery expert affidavits to establish certain elements of their claim); McManaway v. KBR, Inc., 265 F.R.D. 384, 389 (S.D. Ind. 2009) (granting, in part, a pre-discovery order requiring plaintiffs to present proof of injury and causation).

[36] *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (*Lone Pine* order used after case had been pending for three years and subject to significant discovery).

[37] Engstrom, *supra* note 25, at 46–47.

[38] *See id.* (criticizing orders dismissing cases for failure to comply with disclosures relating to specific causation as out of step with the federal rules of procedure).

[39] *See* FED. R. CIV. P. 8(a), *as modified by* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[40] Engstrom, *supra* note 25, at 43–44.

early in the litigation, are few and far between.[41] These are rare because most judges understand that they are unfair. The dominant approach among judges at the start of an MDL litigation is to use plaintiff fact sheets, which educate the parties and the judge about the landscape of the aggregation.[42] Recently judges have proposed going one step further and conducting a "census" of the cases before them.[43] These practices bear a closer resemblance to interrogatories, although they may sometimes be overlong.[44] It appears from existing studies that the threat of dismissal for failure to disclose mostly comes at the close of the litigation to pressure plaintiffs to join an existing settlement.[45]

The use of disclosure orders such as *Lone Pine* orders, plaintiff fact sheets, or other types of responses to factual questions about a plaintiff's case is evolving. But one thing is clear: judges assigned an MDL look to other judges to determine what they have done with respect to requiring disclosures and when. They consider the decisions of other MDL judges to be persuasive precedent. Parties litigating before them will rely on the rulings of other judges to support their positions, even when those judges are from faraway districts and circuits. This is how the common law evolves in every area. Here we happen to see the law's evolution in the realm of procedure. But it is not unique. These are not inventions out of whole cloth. Rather, they are anchored to the rules of procedure, which themselves offer great leeway for judicial discretion. To the extent these procedures appear arbitrary, that problem is not because the procedures are more common-law-like than statutory. To some extent, critics are right that it is a problem that judges can make arbitrary choices in an MDL. What critics seem to miss is that judges could make arbitrary, erroneous, or unfair decisions in any case. Such arbitrariness would be an abuse of their discretion under the rules, and unfortunately very often would still be unappealable.[46] We observe this in MDLs because they are the subject of significant scholarly and media attention; they are *salient*. But scholars critical of these approaches should also worry about the run of cases where arbitrary procedural choices are made without recourse.

With respect to the issue of ad hoc or bespoke procedure, MDLs are like every other litigation. Before closing this Section, I will give an example of judicial control and creativity from ordinary litigation. Some judges require in standing orders that before any pretrial motions can be filed, the parties must first have a conference with

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[41] Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J. FORUM 64, 68–69 (2019).

[42] *Id.* at 66.

[43] *See* ADVISORY COMM. ON CIVIL RULES, *supra* note 1.

[44] *See* Burch, *supra* note 41, at 80 ("[F]act sheets often exceed 100 questions and seek information that one would ordinarily expect to convey when deposed or to send as part of Rule 26's initial disclosures.").

[45] *Id.* at 81–82.

[46] *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009) (discovery orders implicating attorney-client privilege cannot be appealed).

the judge. Further, parties are not entitled to seek discovery until they have proposed and had approved a joint discovery order after meeting with one another and the judge.[47] Nowhere in the rules does it say that the judge must preapprove all discovery. Nor do the rules mandate that parties obtain permissions before filing motions. One can argue that this approach is sound management, on the one hand, or that it goes against the spirit of the adversarial system, which is often understood to be largely lawyer-run, on the other hand. Whatever one thinks of the merits of these orders, the point is that federal judges do many things in standing orders and local rules that are not in the Federal Rules of Civil Procedure and that may be adopted by other judges in a common-law-like way. Over the course of years these low-level judicial decisions affect hundreds of thousands of cases, many more than are in a given MDL.[48]

In sum, the debate over MDL rulemaking misses the bigger picture of our procedural development generally, which is that there is no baseline, or orthodoxy, or textbook approach from which the MDL judges are diverging. It is discretion all the way down. Those who find the use of judicial discretion in MDLs problematic are

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[47] *See Procedures for Cases Assigned to Judge Lee H. Rosenthal*, U.S. DIST. & BANKR. CT. S.D. TEX. (2016), http://www.txs.uscourts.gov/sites/txs/files/lhr_16.pdf. Judge Rosenthal chaired the Judicial Conference Committee on the Rules of Practice and Procedure from 2007 to 2011.

[48] To the extent that scholars are concerned with unorthodox rulemaking or ad hoc procedure, they should be worried about the system quite generally. *See generally* Lahav, *Procedural Design*, *supra* note 2 (describing the disintegration of the order of procedural rules). *But see* Gluck, *supra* note 1, at 1707 (describing MDL procedure as exceptional and assuming that the rest of procedure is not unorthodox). By contrast, I have argued that for the last 30 years orthodoxy has been relegated to the textbooks, not the development of procedural law on the ground. Gluck raises the important question of why MDLs are considered so exceptional, but does so in the context of why they are exceptional from the point of view of it being permissible in MDLs to allow unorthodox procedure. *Id.* at 1690. That is, Gluck documents judges asserting that MDLs are exceptional, and the question she asks is why this is so. She is right that judges *see* MDLs as exceptional because of a number of reasons she points to, including that being assigned these cases is considered a feather in a judge's cap. *Id.* at 1698 (citing Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 417 (2014)). And, of course, billions of dollars are at stake. But in terms of discretionary application of the federal rules (using what I have called bespoke procedure and what others call ad hoc or unorthodox procedure), the process that has been the source of recent controversy, MDLs are no different from other forms of litigation. I think the reason for judges' opinions that MDLs are exceptional is that they are exceptional, but not in a procedural way. They are massive. And they present management issues that judges ordinarily do not face, such as how to apply the rules of professional responsibility to members of the plaintiff's management committee (PMC), what the appropriate relationship is between the PMC, individual lawyers and clients, and whether it is fair to charge ordinary contingency rates to inventory clients. The Federal Rules of Civil Procedure were not written to address these issues because they are professional responsibility issues that are the purview of state bar associations. And these issues have been around for as long as mass torts. *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 38–46 (1995) (a book-length treatment of the problems judges face in mass tort litigation).

either too myopic in looking only at MDL, or actually mean to critique the judge's use of discretion in these cases as unfair on the merits. If the latter, the focus needs to shift not to process but to substance.

II. THE COSTS AND BENEFITS OF COMMON LAW PROCEDURE

Having established that in all types of cases, be it large aggregations or a single case, judges use their discretion in applying and adopting the rather malleable procedural rules to suit their vision of how to do justice in the individual case or litigation, the next step is to turn to the normative issues raised by this observation. The following arguments might be made in favor of greater "rules" in the context of procedural regimes. First, that individual judges are not institutionally competent to make such decisions. Second, that decisions about rulemaking should be centralized. Third, that procedural common law violates the rule of law principle that the rules should be known in advance.

A. Institutional Competence (Judges Versus Rules Committee)

One argument against common law rulemaking is that individual judges are not competent to make rules and that rules are better made through the process of the Rules Committee. There are at least two assumptions underlying this argument.

The first is objective administrative expertise. The idea is that the Rules Committee is made up of judges and practitioners from both sides of the "v." and has the time and opportunity to study the costs and benefits of any rule change in depth more objectively. By contrast, an individual judge does not have the luxury of such in-depth study before adopting a rule. Nor will the judge have the insights of practitioners who are sitting back and thinking of the system as a whole. While the judge may have the input of the parties in the case, these players ought to be thinking about which approach would be best for their clients rather than for either the system as a whole or the particular side that they represent in general. It is entirely possible that in a given litigation a plaintiff may advocate for an interpretation that will benefit his or her client but not plaintiffs generally. The same is true for defendants.

This assumption is flawed because it presents a rather rosy picture of federal rulemakers as being above the fray, when in fact their appointment and the makeup of the Rules Committee is a political decision made by the Chief Justice.[49] It is true

[49] Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1568 (2015) (describing changes in the makeup of the Rules Committee, which now has fewer practitioners and almost no academics compared to the makeup of the Committee in the 1960s). "Committee practitioners are composed overwhelmingly of two types: plaintiffs' lawyers representing individuals or classes of them, and corporate defense lawyers, with the latter consistently holding the balance of power." *Id.* at 1570.

that despite judicial attempts to use the Rules Committee as an agent of procedural retrenchment, studies have shown that "the stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it."[50] This means that procedural change—which has been mostly inclined towards curbing litigation and access to justice—is largely judge-made.[51] Perhaps the crux of the administrative argument is that its proponents prefer the status quo, and the Rules Committee's incremental approach to rulemaking suits their policy preferences. This is not an argument that the Rules Committee is better at making decisions as a matter of *process*, however, but rather an argument for the advocate's outcome preferences. That is fine as far as it goes, but it really ought to be an argument about the merits of procedural change rather than the process through which that change happens.

The second assumption about the relative expertise of a committee as compared to individual judges is that the Rules Committee is better able to see the systemic big picture than is an individual judge. Indeed, there is ample evidence that judges do not consider the effect of one change on the rest of the life of the lawsuit.[52] Worse yet, judges may also have cognitive biases that may affect their decision-making in individual cases and which may lead to procedures that are unsound or unfair.[53] I would worry, for example, that a procedure requiring dismissal with prejudice of a case where the plaintiff has failed to produce evidence of specific causation within the first few months of filing is unfair to the plaintiff, who has not had an opportunity to build her case and benefit from discovery. The reason for imposing

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The authors also note that "Chief Justices have made choices in appointing practitioners that cannot be described as yielding 'broadly representative' groups." *Id.* at 1570–71.

[50] *Id.* at 1562.

[51] *Id.* (stating that the difficulty of achieving change through the rules process "set[s] in relief the ability of a conservative majority of the Supreme Court to make potentially radical inroads on private enforcement by 'interpreting' the Federal Rules"). Burbank and Farhang focus too much on the Supreme Court for my taste, because significant common-law-like procedural interpretation occurs at the lower court level. Their decision is a product of another type of academic myopia, which has to do with an unhealthy obsession with hierarchy, and the Supreme Court sits at the top of the heap. But there is a significant amount of work showing that a lot of percolation and development happens at the lower court level and that the Court is often a follower not a leader. A good example is the summary judgment rule, where lower court decisions begat the Supreme Court trilogy, which in turn led to a change in the rule's text. Lahav, *Procedural Design*, *supra* note 2, at 848 (although that article also focuses too much on the Supreme Court, for which I apologize).

[52] Lahav, *Procedural Design*, *supra* note 2, at 866 (discussing the changes in standing doctrine that have negatively affected how a lawsuit can proceed efficiently).

[53] *Id.* at 878 ("For example, if judges engage in value-motivated cognition, that is, the tendency to privilege their own view of contested facts, they may structure the bespoke procedure to achieve the outcome that results in their view being vindicated."); *see also* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 301 (2010) (describing the effect of cognitive bias).

such a requirement might be that the judge suspects that many complaints are filed in a products liability case by people not in fact exposed to the product, for example. But is this suspicion justified by empirical facts about the litigation or is it based on a convenient sample or inaccurate view driven by other factors? Judges should be wary of implementing unfair and draconian procedures without better support.

Centralized rulemaking separated from an individual litigation in which all sides of the question have an opportunity to make their case for their preferred rule outside of the pressures of any individual case, and with reference to empirical evidence from the run of cases, may counteract such biases. On the other hand, if the decision-makers in the administrative body themselves share assumptions about litigation that are unfounded, the issue is not resolved by the change in decision-making body.

B. Centralized Versus Decentralized Rulemaking

A second argument against discretion in the application of federal rules generally, and in MDL specifically, is that as a matter of policy rulemaking should be a centralized process. Reasons for a preference for centralization can include a belief that the federal courts ought to be uniform in their application of rules of procedure (and other laws) because the federal courts are a unified system, or the view, discussed in the previous section, that individuals in a decentralized system may not be able to make good decisions for the system as a whole either because of cognitive biases or myopic views of the effect of procedural rules. This subsection will discuss the argument that procedural decisions in the federal courts should be uniform and centralized, and that divergence from this norm is cause for concern.

The most important point for those concerned about MDL procedure to understand is that centralization and uniformity are not good descriptors of the federal court system as it currently operates. Truth be told, the phenomenon of divergence among the federal courts has been recognized for a long time.[54] This divergence is the result of a structural feature of the federal court system: it is a coordinate system, not a hierarchical one.[55] What this means is that in a given case the federal judge has the power to interpret the law, attuned to the perceived needs of the individual case, and, indeed, the needs of the individual case will ordinarily trump the desire for uniform rules.

Accordingly, the claim that procedure or substance is uniform across the circuits with the exception of the MDL is not one that can be made with any credibility. And the idea that increased appellate review actually results in uniformity seems

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[54] *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (arguing that appellate review is necessary for consistency across cases in the federal system).

[55] Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 509 (1975).

debatable, at least from evidence across the circuits in the context of class actions.[56] It may prevent mistakes in the long run (the jury is out on that as well) or spur a dialogue between appellate and district judges, but based on past experience, appealability is unlikely to result in uniformity across the country.

Whether centralization is superior to decentralization in judicial decision-making is open to debate.[57] That debate is an old one when it comes to the common law more generally. I will call a model that assumes that the process of interpreting general principles at the district level to adapt to the needs of the day the "pluralist model."[58] The alternative is the idea that common law decision-making is better understood as a process of legal concepts working themselves pure through a rise in the judicial hierarchy.[59] I will call this the "rationalist model."[60] The rationalist model assumes that there is a right answer to legal questions and that ultimately that answer will be determined at the highest judicial level, rendering a decision that will

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[56] Class actions are appealable under Rule 23(f). This has resulted in an increase in appellate decisions, but there are still circuit splits on various important issues. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 732 (2013); Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 982 (2017).

[57] There is some scholarly literature critiquing the idea that uniformity is necessary in the federal courts, or even desirable. *See* Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 668–69 (2013); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642–43 (1981); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2388 (2008); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1456 (2015); Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 697 (2011); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1043 (2018).

[58] As Massachusetts Justice Lemuel Shaw put it:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.

Norway Plains Co. v. Boston & Maine R.R., 67 Mass. 263, 267 (1854).

[59] The idea that common law "works itself pure" is a statement from Lord Mansfield's opinion in Omychund v. Barker (1744) 26 Eng. Rep. 15, 23 (Ch.) (emphasis omitted). For a brief history, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1824 n.11 (2016). For a general discussion of common law evolution and its relationship to rules, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884–85 (2006) (arguing that deducing general principles from concrete cases is "more often distorting than illuminating").

[60] I follow here the nomenclature used by Jacob Levy. *See generally* JACOB LEVY, RATIONALISM, PLURALISM AND FREEDOM (2015).

be final as well as correct. That level might be the Supreme Court, or it might be the Civil Rules Committee.

These two models have always been part of our common law heritage, including in the law of procedure. We have already seen how the federal rules *appear* to hew to the rationalist model, providing a complete set of rules that are meant to apply to every case, but in practice are more pluralistic. These two approaches also correspond to two jurisprudential views. The rationalist model assumes that law can be complete and decisive in every case. The pluralist model assumes that law is variable and changes with context. Of course, there are nuances that are not addressed here, but these two ideal types describe two approaches to thinking about procedure and are reflected in complaints about the system from various quarters.

There are costs and benefits to pluralism and rationalism. A pluralistic model allows for experimentation and innovation and avoids the inefficiencies imposed by rigidity. But it also may lead to unpredictability, experiments that fail, and, as noted earlier, the expression of the judge's individual biases through the procedural rules. The rationalist model is the mirror opposite: it is predictable and limits the opportunity for the judge's unconscious biases to creep in, but it is also rigid, potentially entrenching poorly functioning procedures or creating inefficiencies by requiring the application of ill-fitting procedural rules. If biases drive the rulemaking process, then even general rules without discretion evince bias.[61] And finally, if it is impossible for procedural rules to be both workable across cases and meaningfully constrain judicial discretion, the rationalist model may in the end be a pipe dream.

The biggest conceptual problem that those concerned about the exceptionalism of MDLs face is that MDLs are not an outlier in an otherwise rationalist system.[62] Those who argue that judicial management in MDLs leads to variance in procedure because judges are interpreting the rules of procedure to deal with new challenges and that this is a bad result often justify their critique with the claim that MDLs are exceptional in their rulelessness. Because this claim is incorrect, their criticism of MDL is really a criticism of the system as a whole. Yet these scholars do not seem prepared to argue that the entire procedural system is profoundly flawed.[63] Accordingly, they need to justify why MDL presents greater concern about uniformity than other areas of the procedural law.[64] In some ways MDLs are *more* predictable, or at

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[61] *See* Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 756–57 (2016); *see also* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1023 (2016) (describing ties between corporate actors and the rulemaking process).

[62] *See* Bone, *supra* note 53, at 301 (describing costs of judicial discretion in the federal system generally).

[63] Other scholars have argued that the system is deeply flawed. *See, e.g.*, Bone, *supra* note 7, at 1964; Coleman, *supra* note 61, at 1013–14.

[64] I think the additional attention to MDLs at this moment in time is in part due to the increase in MDL centralization which brought attention to this phenomenon. Margaret S.

the very least not less predictable, than other areas of the procedural law. For example, it seems that transferee judges in MDLs are more likely to reach across federal jurisdictions to find models for managing the cases they are assigned.[65] The result is that there is an equal or greater risk of judges being too quick to follow in the footsteps of previous cases.[66]

Decentralization and innovation in procedure-making in general create one serious problem that so far has not been adequately addressed in the discussions of MDL procedure. That is the rise in efforts to influence federal judicial decision-making because there is such flexibility in the system. Because judges are looking for guidance, they may turn to resources outside the caselaw. One such resource is the *Manual for Complex Litigation*, a publication of the federal courts through the Federal Judicial Center, but which has not been revised since 2004 and seems woefully out of date.[67] A second resource is the *ALI Principles of the Law of Aggregate Litigation*.[68] A third is the Bolch Institute's *Guidelines and Best Practices for Large and Mass-Tort MDLs*, now in its second edition.[69] In some ways, this is no different from what occurs in many other areas of procedural and substantive law when one thinks about the influence of treatises, for example. Still, the observation raises some questions as to publicity and accountability. Do the authors of these authoritative tracts consider the effects on all participants in a litigation equally? Do they have their own prejudices and preferences, whether conscious or unconscious, that influence their suggested solutions to the problems MDL judges face? In what venues are they debating, and what dissenting voices are able to be heard in those venues? Most importantly, are their suggestions for management of these cases fair and wise? I take no position on these questions here, but think they are important to consider.

C. *Knowing the Rules in Advance*

A final argument to consider is that judicial discretion in this area violates rule of law principles because the participants do not know the rules in advance.[70] Some have argued that the solution to this problem is to understand large-scale litigation

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Williams, *The Effect of MDL on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1270 (2019). Williams shows the variability of actions inside MDLs, explaining that "it is the proceedings that have been created, and not necessarily the nature of litigation itself, that has increased the number of actions in proceedings over time." *Id.*

[65] The use of bellwether trials is a good example. *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 200–02 (2018).

[66] *See* Burch, *supra* note 23, at 86.

[67] FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH (2004).

[68] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (AM. LAW INST. 2010).

[69] BOLCH JUDICIAL INST., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (2d ed. 2018), https://judicialstudies.duke.edu/conferences/publications/.

[70] *See* Noll, *supra* note 1, at 425–27.

as a form of administrative governance that should borrow rules from administrative law.[71]

Whatever the solution, and taking a page from administrative law may be a good one, let us first consider the problem: is it true that common law procedural decision-making violates the rule of law? If it does, our system of procedural law making and application is in fact one giant violation of rule of law principles, because as I have demonstrated, it is discretion and variation all the way down. Indeed, our entire common law system may be a violation of the rule of law under this strict definition.

The claim that procedural rules should be known in advance, and to what level of specificity, is worthy of further jurisprudential study.[72] It is easy to understand why rule of law principles would not permit new or unarticulated rules to be applied retroactively to one party's detriment without a chance to cure. For example, suppose a judge mid-way through a lawsuit imposes a rule that a plaintiff must include a specific piece of information in her complaint or her case will be dismissed with prejudice. Given that the plaintiff did not have an opportunity to draft the complaint with this rule in mind, dismissing her case under these circumstances would be a violation of this rule of law principle. If the judge sets out rules at the commencement of the litigation, however, it is by no means clear that the fact that these rules are tailored to the needs of the particular case violates the rule of law. For example, suppose a judge rules at the commencement of litigation that the plaintiffs must allege some specific piece of information or their case will be dismissed and gives them the opportunity to amend their complaints. This procedure was not known in advance of filing, but would not be considered a violation of the rule of law. Indeed, we are quite used to it: what I am describing is a motion to dismiss under Rule 12(b)(6).

It is harder to understand why the rule of law requires that all the specificities of a procedure be made public in advance of the parties filing a case. Usually the argument that the rules ought to be known in advance is predicated on the idea that rules affect primary conduct. People need to know the rules in advance so that they can take them into account in choosing whether to act. This is sometimes true of procedural rules loosely defined, particularly the rules of evidence.[73] To demonstrate

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[71] *Id.* at 429. The focus on administrative rules has a long history; it was particularly important in the discussion of mass torts around the period when there were attempts to collectively resolve asbestos cases in the late 1990s. *See* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2025–26 (1997); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902–03 (1996).

[72] For one excellent discussion, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[73] *See* Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 520–21 (2010) (arguing that evidentiary rules lead actors to

that the fact of ad hoc or bespoke rulemaking in the MDL context violates this rule of law principle, it must be shown that participants base their primary conduct on the MDL rules. This seems unlikely.

If, as I suspect, most innovative or experimental rules developed in the course of an MDL do not violate the rule of law, this does not mean that these rules are always fair and efficient. They may create inequality between litigants, be overly coercive, inefficient, or otherwise inadvisable. Each innovation should be carefully considered. And the normative case for such considerations should be more expressly debated, both in the courts and in academia.[74]

CONCLUSION

This Essay has argued that when viewed from the perspective of our rules system as a whole, the complaints that procedures in MDLs are divergent, unorthodox, and potentially violate rule of law principles are strange. This is because the system in its entirety is dependent upon judicial discretion and has all the same problems critics point to in MDLs as well as the same benefits. What the existence of this debate illustrates is a fundamental failure to understand how the rules of procedure have developed in our system generally. It is a common-law-like system in which general principles are interpreted to lead to concrete rules in the extant litigation, and those rules (in turn) may differ based on the circumstances of the case.

To the extent that critics have found unfairness in the MDL process, this is not the result of the process of rulemaking. Instead, it is a result of a normative problem. This problem is the inability to agree on the normative purpose of the procedures: is it to "dispose" of cases? To settle the litigation as a whole? To make sure that the purpose of the substantive law is realized? Rather than discussing the process for rule formulation, the more important discussion ought to focus on the purpose of procedure in mass tort litigation and evaluate the procedures used based on these normative touchstones.

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engage in sub-optimal behavior in order to prove their case in court).

[74] *See* Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1156, 1162 (2006) (arguing that the main normative foundation for procedural law is that it enables the goals of the substantive law at issue in the case). In previous work I evaluated procedural design based on four goals. Lahav, *Procedural Design*, *supra* note 2, at 870–71 ("(1) whether the procedural design provides for a meaningful hearing, (2) how likely it is to achieve a just resolution of the dispute, (3) the likely speed of resolution, and (4) whether it achieves justice and speed while minimizing cost."). I am not quite sure what the best approach is for evaluating procedural design and think it is an issue that deserves further study. I have argued elsewhere that there are special concerns in mass litigation that procedures must be designed to address, including the agent principal problem, equity between claimants, and the desire for global peace. Lahav, *Continuum*, *supra* note 13, at 1394.