

# MDL AS CATEGORY

Zachary D. Clopton†

*Multidistrict litigation (MDL) dominates the federal civil docket. MDL has been used to consolidate hundreds of thousands of cases, including with respect to asbestos, the BP oil spill, Johnson & Johnson baby powder, NFL concussions, opioids, and more. In recent years, MDL has attracted the attention of reformers and scholars, who have offered proposals for rules or practices that would apply to all MDLs, and to only MDLs.*

*These proposals are premised on a fundamental error about what MDL is. Using quantitative and qualitative data, case studies, and interviews with judges, this Article demonstrates that reformers and scholars have made a mistake about what defines the category “MDL.” MDL is not a uniform category of large civil cases demanding one-size-fits-all procedure. Recent proposals for MDL-specific rules, therefore, are misguided. Indeed, because such proposals would create incentives for parties to “procedure shop” into or out of MDL, they imperil horizontal equity and invite abuse. Proposals for MDL-specific rules thus risk exacerbating existing problems in MDL and creating new problems that were not there before.*

*That said, MDL is a coherent category with respect to the way MDLs are created. Every MDL is created by the Judicial Panel on Multidistrict Litigation (JPML), a group of seven judges hand picked by the Chief Justice, who have the nearly unconstrained authority to decide whether to consolidate cases and to which federal judge to assign them. Yet despite this unusual and highly consequential procedure, reformers and scholars have paid scant attention to the JPML. Having dispensed with the initial MDL categorization error, this Article also examines the understudied role of the JPML and offers suggestions for JPML reform consistent with a clearer description of what MDL is.*

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† Professor of Law, Northwestern Pritzker School of Law. Thank you to Emad Atiq, Samuel Bray, Stephen Burbank, Kevin Clermont, Erin Delaney, Maggie Gardner, Tracey George, Lonny Hoffman, Tonja Jacobi, Linda Mullenix, David Noll, James Pfander, Theodore Rave, Martin Redish, William Rubenstein, Steven Shiffrin, Adam Steinman, Jay Tidmarsh, and the anonymous federal judges who participated in my research.

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## INTRODUCTION

Multidistrict litigation (MDL) has evolved from a “disfavored judicial backwater” to the “dominant form of complex litigation procedure.”<sup>1</sup> Tucked away among other federal venue statutes, the Multidistrict Litigation Act of 1968 permits the consolidation of federal civil cases from multiple district courts.<sup>2</sup> This procedure has been used to consolidate hundreds of thousands of cases, including in some of our most public controversies: asbestos, the BP oil spill, Johnson & Johnson baby powder, NFL concussions, opioids, and more.

Likely as a result of its meteoric rise, MDL has recently become the focus of reform efforts.<sup>3</sup> Interest groups have successfully lobbied for MDL to be placed on the agenda for amendments to the Federal Rules of Civil Procedure. Proposed amendments include rules on heightened pleading, enhanced disclosures, and more appellate review, to be applied in all MDL proceedings—and in only MDL proceedings. The House of

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<sup>1</sup> Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013) [hereinafter Mullenix, *Aggregate Litigation*]; Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1469 (2015). See also *infra* subparts I.A–B (providing background on MDL and narratives about MDL cases).

<sup>2</sup> See 28 U.S.C. § 1407 (2018). See also *infra* subpart I.A (providing background on MDL).

<sup>3</sup> See *infra* subpart I.C (collecting reform proposals).

Representatives also passed a bill that included provisions for MDL-specific procedure.

These MDL reform efforts are premised on well-known MDL narratives: MDLs are massive and unwieldy; they are magnets for bad cases and black holes from which cases never return; and they require judges to exercise substantial (and perhaps unauthorized) levels of control. These narratives are drawn from a small set of high-profile MDLs. But as this Article demonstrates, MDLs vary widely along the dimensions that matter. Pending MDLs range from tens of thousands of consolidated cases to just a few, and there are thousands of cases consolidated in MDLs apart from the largest MDLs that dominate the narrative. Some MDLs address issues on the front page of *The New York Times*, while others are probably unknown to everyone but the parties and their lawyers. In short, different kinds of MDLs present different trade-offs and place different demands on the judicial system. Thus, even if we took reformers at their word, their diagnoses apply only to a small set of MDLs.

In this way, prescribing rules for all MDLs based on a few high-profile MDLs reflects a categorization error. And this categorization error could come with significant costs. Adopting the proposed MDL reforms would mean that rules designed for the largest MDLs would be unjustifiably applied to many other cases that do not share the relevant characteristics. Perhaps more importantly, the proposed rules if adopted could have a pernicious dynamic effect on federal litigation. Because the proposed procedures would not apply in all federal cases, they could create incentives for parties to “procedure shop” into or away from MDL—which would distort those particular cases and would undermine the broader system of complex dispute resolution.

It is possible that certain pieces of massive or high-profile litigation would benefit from special treatment.<sup>4</sup> But not all MDLs are massive or high-profile. The mere fact that parties rely on the MDL process for consolidation says little about the procedures that should be applied after cases are consolidated. MDL-specific rules of procedure, therefore, should be opposed.

Correcting the MDL categorization error is important for more than just the evaluation of proposed rule changes. The

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<sup>4</sup> I do not mean that the particular special rules under consideration today are the right ones—indeed, I think many of the proposals are misguided. But the point here is a more general one, i.e., even on their own assumptions, these proposals are not appropriate for MDL as a category.

federal judiciary hosts annual meetings for “MDL judges” addressing the special task of managing an MDL.<sup>5</sup> The *MDL Standards and Best Practices* guide acknowledges that “every MDL remains unique and different,” but then goes on to recommend best practices for all MDLs.<sup>6</sup> These efforts (and others like them) run the risk of transplanting insights from the most salient MDLs to other diverse cases where they may not apply. That, too, should be opposed.<sup>7</sup>

Legal scholars also make the MDL categorization error. MDL scholars describe special roles for MDL judges (“information-forcing,”<sup>8</sup> “facilitative,”<sup>9</sup> “public administration,”<sup>10</sup> and “polic[ing] the [lawyer] monopoly”<sup>11</sup>) and special procedures for MDL cases (“ad hoc,”<sup>12</sup> “exceptional[ ],”<sup>13</sup> “unique,” and “more unique”<sup>14</sup>). While these scholarly treatments may be consistent with the very largest MDLs, they are not particularly relevant to most MDLs.<sup>15</sup> Many of these scholars carefully caveat their recommendations but obscuring the variety of MDLs may

<sup>5</sup> See Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 332 & n.9 (2014); see also Judge interview on file with author (discussing these events).

<sup>6</sup> DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES, at ii (2014), [https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL\\_Standards\\_and\\_Best\\_Practices\\_2014-REVISED.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf) [https://perma.cc/J85P-YBMK]. The Manual for Complex Litigation also singles out MDL for comment on case management. See FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

<sup>7</sup> This situation should be particularly concerning to those who are critical of mega-MDL practice. See, e.g., Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) (“MDL involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”); see also *infra* subpart I.B (collecting additional sources).

<sup>8</sup> Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1264 (2017).

<sup>9</sup> Dodge, *supra* note 5, at 332.

<sup>10</sup> David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 407 (2019).

<sup>11</sup> Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 77 (2017).

<sup>12</sup> Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772 (2017).

<sup>13</sup> Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689 (2017).

<sup>14</sup> *Id.* at 1690.

<sup>15</sup> These scholars, too, see MDLs as involving massive numbers of claims and lawyers, supervised by highly active judges, and resolving large public disputes in light of conflicting interests in efficiency and individual-claim resolution. See also *infra* subpart I.B (collecting additional sources). This characterization applies to MDL's scholarly critics and defenders alike. See *id.*

encourage misguided reforms that apply uncritically to all MDL cases.

Again, the MDL categorization error involves a misleading picture of what happens inside MDL cases. But there is one important thing that all MDLs have in common. All MDLs are initially created by the Judicial Panel on Multidistrict Litigation (JPML), a panel of seven judges appointed by the Chief Justice of the United States.<sup>16</sup> The role of the JPML has little to do with the case management concerns that have occupied reformers and scholars, but it is the defining feature of the MDL category.

Having clarified the MDL category, this Article turns to examining the JPML's role. The JPML has nearly unconstrained power to select cases for consolidation and to select the judge to whom the consolidated proceedings are assigned. These decisions routinely discard the presumption of plaintiff venue choice, avoid the rules of personal jurisdiction and venue, and abandon the presumption of random judicial assignment. As such, these decisions are highly consequential—yet they are rarely the subjects of sustained scrutiny. This Article, therefore, calls for renewed attention to the JPML.

This Article's analytic work interrogating the MDL category also can help shed light on the JPML's consolidation and assignment decisions. On the one hand, there are strong functional justifications for consolidation in the largest MDLs. Although this conclusion is not grounded in the intentions of the MDL framers, it resonates with their overriding concern about a perceived "litigation explosion."<sup>17</sup> On the other hand, the JPML should be cautious when our attachment to party choice or random judicial assignment is particularly strong. These ideas may be incorporated by the JPML on its own, though many also call out for additional oversight and review.<sup>18</sup>

The balance of this Article proceeds as follows. Part I gives background on MDL and the recent spate of MDL reform proposals. Part II provides a descriptive account of MDL using mixed methods: quantitative and qualitative data about cases, judges, and attorneys; case studies; and interviews with judges

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<sup>16</sup> 28 U.S.C. § 1407 (a), (d) (2018).

<sup>17</sup> See *infra* subpart I.A & IV.A.

<sup>18</sup> As explained in more detail *infra* Part IV, these arguments are independent of the case-management issues that arise in some MDLs. Even for those who find those internal issues unacceptable, my taxonomy may be useful for evaluating best responses.

handling complex civil litigation.<sup>19</sup> While much ink has been spilled on the largest MDLs, this Part also takes up the heretofore neglected task of describing examples of small MDLs, as well as identifying examples of “mega”-cases that do not rely on the MDL process for consolidation.

Because “MDL” is both under and overinclusive with respect to the category of cases for which special rules of case management might be appropriate, Part III argues against reform efforts that target the workings of an MDL once in the hands of a transferee judge. These arguments are not some paean to trans-substantive rules of procedure.<sup>20</sup> There is an important argument about the costs and benefits of trans-substantivity. But even if we intended to depart from the norm of trans-substantive procedure, drawing the dividing line at MDL is a mistake.

Part IV then turns to what makes MDL special: the JPML’s authority to consolidate cases and assign MDLs to particular judges. In particular, this Part urges moderation with respect to consolidation and concerted attention to the selection of transferee districts and judges. It also calls for further consideration of MDL’s normative commitments and institutional design.

In sum, this Article attempts to recenter MDL discourse around a clearer picture of the MDL category. MDL is not a category of massive public disputes. Instead, MDL is a category of cases that were consolidated and assigned by a potent and unusual federal judicial agency. Proposals to reform MDL should stick to reforming what MDL is, and not what it isn’t.

## I

### MULTIDISTRICT LITIGATION

#### A. Background

The history of MDL has been told before, in far more detail than can be presented here.<sup>21</sup> In brief, in reaction to a building

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<sup>19</sup> The products of the judge interviews are anonymized in this paper and are on file with author.

<sup>20</sup> For important discussions of the costs and benefits of trans-substantivity, see generally, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463 (1987); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377 (2010).

<sup>21</sup> For examples of scholarship on the history of MDL, see generally, e.g., Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litiga-*

perception of a “litigation explosion,” a small group of judges and their allies got together to draft and promote a federal statute to permit the consolidation of cases across federal district courts.<sup>22</sup>

The result of their efforts was the Multidistrict Litigation Act of 1968.<sup>23</sup> The Act created a new species of federal litigation referred to as the MDL, which would comprise two or more civil cases filed in different federal districts to be consolidated in a single federal court. To manage the MDL process, the Act also created a new body called the Judicial Panel on Multidistrict Litigation (the JPML or the Panel). The Chief Justice of the United States appoints the Panel, which consists of seven judges from seven circuits. These seven judges are responsible for deciding whether to consolidate cases and, if so, which judge will be assigned the consolidated proceeding.

A few aspects of the MDL statute merit special attention. First, the standard for consolidation is quite broad.<sup>24</sup> Consolidation is permitted as long as the cases involve at least one common question and that consolidation “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>25</sup>

Second, having decided to create an MDL, the Panel has wide authority to assign the consolidated proceeding to a district and a judge. The typical rules of personal jurisdiction and venue do not apply to MDL transfers.<sup>26</sup> And other than clear-

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tion, 90 N.Y.U. L. REV. 71 (2015); Gluck, *supra* note 13; Mullenix, *Aggregate Litigation*, *supra* note 1; Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5 (1991). And for a survey on MDL-equivalents in state court systems, see generally Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. \_\_ (forthcoming 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3571712](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571712) [<https://perma.cc/3E7C-KH35>] (last visited Apr. 29, 2020).

<sup>22</sup> See Bradt, *supra* note 21, at 839. Their effort owes an important debt to the informal coordination of the “electrical equipment” antitrust cases. See *id.* at 854–63; see also CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 317–321* (1973) (describing the history of the electrical equipment antitrust litigation); Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 621–22 (1964) (same).

<sup>23</sup> 28 U.S.C. § 1407 (2018).

<sup>24</sup> See, e.g., Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1720–21 (2019) (collecting sources); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 437–38 (2013) (same).

<sup>25</sup> 28 U.S.C. § 1407(a).

<sup>26</sup> See, e.g., *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App’x 436, 442 (6th Cir. 2010) (dismissing the argument that transfer is improper due to lack of in personam jurisdiction or venue); *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d

ing the choice of a transferee judge with the district's chief judge, the Panel is also seemingly free to assign the case to any federal district judge in the country.<sup>27</sup>

Third, the Panel exercises its substantial power nearly free from oversight. The Act provides that decisions to deny consolidation are not reviewable.<sup>28</sup> Decisions to create MDLs are reviewable only on mandamus.<sup>29</sup> No such writ has ever been granted.<sup>30</sup>

Fourth, the Act specifies that cases are to be consolidated only for "pretrial proceedings."<sup>31</sup> Uninformed observers might think that this limitation minimizes the effect of MDL consolidation, but not so. It is important to remember that the "vanishing trial" means that virtually all federal civil cases are resolved during "pretrial proceedings," either by settlement or dispositive motion.<sup>32</sup> As a result, virtually all cases consolidated in an MDL will be resolved in the MDL. Even in MDLs in which there are "bellwether trials," MDL judges often handle those trials, and the remaining cases are usually settled in the MDL court.<sup>33</sup>

Putting all of this together, the Panel has nearly unreviewable discretion to consolidate cases into a single unit and to

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1425, 1432 (2d Cir. 1993) (same); *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (same); *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969) (same). Bradt and Rave call this a feature of MDL's "split personality." Bradt & Rave, *supra* note 8, at 1269-73. To be clear, personal jurisdiction and venue must be established in the transferor court but not in the transferee court.

<sup>27</sup> 28 U.S.C. §1407(a). See Clopton & Bradt, *supra* note 24 (noting that few limits exist and identifying factors relevant to the choice); Williams & George, *supra* note 24, at 451-56 (same).

<sup>28</sup> 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.").

<sup>29</sup> *Id.* ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ . . ."). After consolidation, petitions shall be filed in the court of appeals for the transferee court. *Id.*

<sup>30</sup> See Williams & George, *supra* note 24, at 427.

<sup>31</sup> 28 U.S.C. §1407(a).

<sup>32</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (studying the decline in federal civil trials from 1962 to 2002). See also John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524-26 (2012) (discussing implications of the decline in trials); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 374-80 (1982) (same).

<sup>33</sup> See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2328-29 (2008). See generally Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008) (surveying bellwether practices). Although transferee judges are not supposed to try transferred cases, see *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), they may do so based on consent, or they may try cases that have been filed directly into the MDL.

handpick any district judge in the country to (almost certainly) steer those cases to final resolution.

## B. MDL Narratives

Accompanying the recent MDL boom has been the rise of a set of narratives about MDL cases. For example, Lawyers for Civil Justice (LCJ) is an organization that has been at the forefront of the MDL reform efforts described below.<sup>34</sup> The front page of LCJ's MDL rules website provides the following description of MDL:

As of the end of September 2019, MDL cases constituted 46.7 percent of the pending federal civil caseload, continuing a five-year trend of cases in MDLs dominating the federal civil docket. An MDL case today can have hundreds or even thousands of individual claims, making certain aspects of the Federal Rules of Civil Procedure (FRCP) difficult or even impossible to apply. . . . [M]any judges handling MDL cases attempt to make up for the FRCP's deficiencies by improvising with *ad hoc* practices. While some individual practices have more merit than others, they all share the same lack of clarity, uniformity and predictability that the FRCP are supposed to provide.<sup>35</sup>

I do not single out LCJ's description because it is unusual. In fact, the opposite is true. The LCJ's description tracks the dominant narratives about MDL. Even MDL defenders describe MDLs in similar terms, though without the critical commentary.

To begin with, a common feature of MDL narratives is an emphasis on the sheer number of MDL cases. When writing about MDL, it seems almost obligatory to cite the large proportion of the federal civil docket occupied by MDL cases.<sup>36</sup> I

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<sup>34</sup> See *infra* subpart I.C. LCJ describes itself as "a partnership of leading corporate counsel and defense bar practitioners . . . ." *About LCJ*, LAW. FOR CIV. JUST., <http://www.lfcj.com/about-us.html> [<https://perma.cc/ZU25-2XX7>] (last visited Jan. 22, 2019).

<sup>35</sup> *Rules 4 MDLs*, LAW. FOR CIV. JUST., <https://www.rules4mdls.com> [<https://perma.cc/45Q4-M2RH>] (last visited Apr. 27, 2020).

<sup>36</sup> See, e.g., Bradt, *supra* note 21, at 831 ("As the class action has declined in prominence, MDL has surged: to wit, currently more than a third of the cases on the federal civil docket are part of an MDL."); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1261 (2018) ("MDL . . . makes up more than one-third of the entire federal civil docket."); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012) ("According to recent statistics by the Federal Judicial Center, a third of all pending federal civil cases are part of an MDL . . . ."); Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class*

*Action Alternative*, 165 U. PA. L. REV. 1711, 1718 (2017) (“While the statistics tell only a partial story, the recent report that MDL cases comprise more than a third of the federal civil docket is remarkable.”); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 401 (2014) (“[I]n 2012, the multidistrict litigation docket comprised roughly 15% of all federal civil cases.”); Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 846 (2017) (“With over forty percent of the actively litigated civil cases in federal courts now in the MDL dockets, the transformation in mass resolution is well underway.”); Dodge, *supra* note 5, at 331 (“Today, fully one-third of all federal cases are MDL matters.”); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 7 (2019) (“As recently as 1991, MDLs accounted for only about 1 percent of pending civil cases. Now, that figure has swelled to 37 percent . . . .”) (footnote omitted); Gluck, *supra* note 13, at 1710 (“MDLs are certainly not the only example of unorthodox civil procedure, but with thirty-nine percent of the federal docket, they are certainly warranting of more theoretical and doctrinal analysis.”); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 827-28 n.20 (2018) (“In 2015, approximately thirty-nine percent of the federal pending cases were MDLs . . . .”); Clay D. Land, *Multidistrict Litigation After 50 Years: A Minority Perspective from the Trenches*, 53 GA. L. REV. 1237, 1238 (2019) (“Currently, more than one-third of the civil cases pending in federal courts are part of an MDL.”); Jeff Lingwall, Isaac Ison & Chris Wray, *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 132 (2018) (“Despite accounting for roughly half the modern federal docket, mass tort multidistrict litigation (MDL) remains an ethical, procedural, and monetary minefield.”); Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133, 175-76 (2013) (“In fact, a surprisingly high percentage of all pending federal civil cases are cases subjected to MDL proceedings. In 2012, for example, 22% of all pending civil cases were subjected to MDL proceedings.”); Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 KAN. L. REV. 531, 533 (2017) (“While it was once the case that only a few judges presided in transferee fora in MDL cases, and they were a tiny fraction of the civil docket, now they make up a significant part of the federal civil docket and occupy the time of many trial judges.”); Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 845 (2017) (“Whereas in 2002, MDL cases made up 16 percent of the federal caseload, they now make up 36 percent of the civil caseload . . . .”); Morris A. Ratner, “MDL Problems”—A Brief Introduction and Summary, 37 REV. LITIG. 123, 123 (2018) (“MDL proceedings now account for roughly forty percent of the federal civil docket.”); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1025 (2017) (“[A]s of the fall of 2015, almost forty percent of pending federal civil cases were part of MDLs, clustered before a single federal judge to whom cases were consolidated for pre-trial proceedings.”); Judith Resnik, “Vital” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765, 1767 (2017) (“One marker of that change comes from 2015, when the related aggregate form of multi-district litigation (MDL) accounted for almost forty percent of the federal courts’ docket of pending civil cases . . . .”); Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 848 (2017) (“The MDL docket comprised roughly 15% of all federal civil cases in 2012 . . . .” (internal quotation marks omitted)); Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1640 n.16 (2017) (“Thirty-nine percent of the federal courts’ entire civil caseload proceeds in multidistrict litigation.”); Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1924 (2018)

should know, I have done it myself.<sup>37</sup> I discuss further the meaning of these statistics below. Note also that these statistics embody an implied premise that MDL is a meaningful category worthy of discussion (and perhaps of reform).

Having identified MDL as a numerically significant phenomenon, MDL narratives then look within the MDL. What they describe is an unusual type of federal litigation defined by certain key features. Both critics and defenders describe MDLs as massive and often unwieldy. LCJ noted the hundreds or thousands of claims that may be consolidated in a single MDL.<sup>38</sup> Scholars do the same. When introducing MDL, one scholarly critic characteristically remarked: “The actions consolidated in an MDL proceeding can number in the thousands. A single judge, for example, will handle hundreds of federal actions arising out of the 2010 BP oil spill in the Gulf of Mexico.”<sup>39</sup> On the other side, a recent article defending certain aspects of MDL noted that “MDL cases . . . are the mechanism for resolution of some of our largest controversies.”<sup>40</sup>

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(“This staggering number of geographically dispersed [MDLs] represents approximately 35% of the total number of pending civil cases in federal court.”); Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 771, 771–72 (2019) (“Presently, more than 143,500 cases—or substantially more than one-third of all federal civil lawsuits—are pending in an MDL proceeding.”); Cory Tischbein, *Animating the Seventh Amendment in Contemporary Plaintiffs’ Litigation: The Rule, or the Exception?*, 16 U. PA. J. CONST. L. 233, 242 (2013) (“A third of all currently pending federal civil cases are part of an MDL . . . .”); Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2277 (2017) (“As multidistrict proceedings begin to take up a larger portion of the federal docket, the use of bellwether trials will only grow.” (footnote omitted)); Jordan F. Bock, Note, *All Disputes Must Be Brought Here: Atlantic Marine and the Future of Multidistrict Litigation*, 106 CALIF. L. REV. 1657, 1659 (2018) (“[A]pproximately one-third of all federal civil cases currently belong to a pending MDL.”); Jack Downing, Note, *A Blatant Inequity: Contributions to the Common Benefit Fund in Multidistrict Litigation*, 81 MO. L. REV. 831, 833 (2016) (“In total, MDLs make up nearly forty percent of all federal civil actions.”).

<sup>37</sup> Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 907 (2018) (“MDL is now in the spotlight, if for no other reason than the surprising statistic that MDL cases currently make up more than one-third of the pending federal civil docket . . . .”).

<sup>38</sup> See *supra* note 35 and accompanying text.

<sup>39</sup> Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1645–46 (2011) (footnotes omitted).

<sup>40</sup> Bradt & Rave, *supra* note 8, at 1308. See also, e.g., Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 980 (2012) (“Congress enacted the MDL statute in 1968 to foster coordination of related proceedings (to reduce the risk of inconsistent treatment) and strong judicial case management (to bring unwieldy litigation to heel).”); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1357 (2014) (“MDLs often have thousands of parties and cases that cannot, as a practical matter, be individually adjudicated. The need for

Given the size and scope of these proceedings, MDL narratives often call out the special characteristics of MDL procedure. LCJ labeled the procedures “ad hoc” and bemoaned their “lack of clarity, uniformity and predictability.”<sup>41</sup> Scholars, too, have either criticized or celebrated what they see as special procedures adopted for these massive cases.<sup>42</sup> Moreover, there is a cottage industry among legal academics describing “MDL judges”—sometimes criticizing their awesome power, sometimes praising the special techniques they adopt to resolve massive disputes.<sup>43</sup> Either way, these narratives see MDL judges as special and powerful.

Critics of MDL, in particular, also suggest that these large proceedings are “black holes” and “magnets.” MDLs are “black holes” in that, once a case is transferred to the consolidated proceeding, it is rarely sent back to its original district.<sup>44</sup> MDLs cases are “magnets” in that, once an MDL is created, new claimants (perhaps with weak claims) are drawn into the proceeding in hopes of sharing in a global settlement.<sup>45</sup> For example, LCJ asserted that “[o]ne of the greatest problems identified with the MDL process is its tendency to attract meritless claims.”<sup>46</sup> MDLs are also frequently characterized as “mag-

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global settlements and common benefit funds is often acute—for both the parties and the court.”).

<sup>41</sup> Lawyers for Civil Justice, *Request for Rulemaking to the Advisory Committee on Civil Rules, Rules For “All Civil Actions and Proceedings”: A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within the Federal Rules of Civil Procedure* 481 (Aug. 10, 2017), in LAWYERS FOR CIVIL JUSTICE, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, (Nov. 2017), [http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf) [<https://perma.cc/4GUL-ZJDD>] [hereinafter *LCJ Request*]; *Rules 4 MDLs*, *supra* note 35.

<sup>42</sup> See *supra* notes 12–15 and accompanying text (collecting sources); see also Redish & Karaba, *supra* note 7, at 131 (“[A] case transferred into an MDL proceeding looks drastically different from a typical lawsuit . . .”).

<sup>43</sup> See *supra* notes 8–11 and accompanying text (collecting sources).

<sup>44</sup> See, e.g., Fallon, Grabill & Wynne, *supra* note 33, at 2330 (“Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a ‘black hole,’ into which cases are transferred never to be heard from again.”).

<sup>45</sup> See, e.g., *LCJ Request*, *supra* note 41, at 481–97 (“This current rule environment allows non-meritorious claims to thrive.”); see also Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 655 (2017) (describing this as a problem of “oversubscription”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 494–95 (1994) (noting a “vacuum cleaner” effect in which lawyers “suck up good and bad cases, hoping that they can settle in gross”).

<sup>46</sup> *MDL Practices and the Need for FRCP Amendments* [sic]: *Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules*, LAW. FOR CIV. JUST., Sept. 14, 2018, at 1, 1, [http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_memo\\_mdltplf\\_proposals\\_for\\_discussion\\_9-14-18\\_004.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_mdltplf_proposals_for_discussion_9-14-18_004.pdf) [<https://perma.cc/3CXZ-4TVE>].

nets” for repeat-player attorneys, particularly on the plaintiffs’ side.<sup>47</sup>

Importantly, these characterizations of MDL tend to rely on descriptions of a small number of very large and well-publicized MDLs. As described in more detail below, as of April 2018, there were nineteen MDLs with more than 1,000 cases each, including the BP oil spill,<sup>48</sup> the Volkswagen “clean diesel” scandal,<sup>49</sup> Johnson & Johnson’s baby powder litigation,<sup>50</sup> and multiple MDLs involving pelvic mesh<sup>51</sup> and hip replacements.<sup>52</sup>

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<sup>47</sup> Compare Burch, *supra* note 11, at 79 (criticizing “repeat players”), with Andrew D. Bradt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 88–100 (2019) (defending “repeat players”).

<sup>48</sup> See, e.g., Campbell Robertson, John Schwartz & Richard Pérez-Peña, *BP to Pay \$18.7 Billion for Deepwater Horizon Oil Spill*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/03/us/bp-to-pay-gulf-coast-states-18-7-billion-for-deepwater-horizon-oil-spill.html> [<https://perma.cc/D74V-NR7Y>] (discussing the BP oil spill settlement); DEEPWATER HORIZON (Participant Media 2016) (film based on the BP oil spill). See generally *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2010, No. 2:10-MD-2179 (E.D. La. filed May 6, 2010) (oil spill docket).

<sup>49</sup> See, e.g., JACK EWING, FASTER, HIGHER, FARTHER: THE VOLKSWAGEN SCANDAL 1–5 (2017) (discussing the “clean diesel” scandal); Jack Ewing, *10 Monkeys and a Beetle: Inside VW’s Campaign for ‘Clean Diesel’*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/world/volkswagen-diesel-emissions-monkeys.html> [<https://perma.cc/Q3UH-ES62>] (same); DIRTY MONEY (Netflix 2018) (television documentary series featuring episode on the Volkswagen “clean diesel” scandal). See generally *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-MD-2672 (N.D. Cal. filed Sept. 23, 2015) (“clean diesel” docket).

<sup>50</sup> See, e.g., Tiffany Hsu, *Johnson & Johnson Told to Pay \$4.7 Billion in Baby Powder Lawsuit*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/business/johnson-johnson-talcum-powder.html> [<https://perma.cc/BB8U-FF4J>] (discussing Johnson & Johnson talcum powder case outcome). See generally *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:16-MD-2738 (D.N.J. filed July 15, 2016) (talcum powder docket).

<sup>51</sup> See, e.g., *Lawsuit: Pelvic Mesh Implants Caused Hundreds of Women Devastating Pain*, ASSOCIATED PRESS (July 4, 2017), <https://www.cbsnews.com/news/lawsuit-filed-against-johnson-johnson-over-pelvic-mesh-implants/> [<https://perma.cc/M2S2-HZSX>] (discussing class action lawsuits against pelvic mesh manufacturers). See generally *In re Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-MD-2326, (S.D. W. Va. filed Nov. 28, 2011) (Boston Scientific pelvic mesh docket); *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-MD-2327 (S.D. W. Va. filed Nov. 28, 2011) (Ethicon pelvic mesh docket); *In re C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:10-MD-2187 (S.D. W. Va. filed July 15, 2010) (C.R. Bard pelvic mesh docket).

<sup>52</sup> See, e.g., Lisa Bartley & Jovana Lara, *‘Billion Dollar Baby’: Lawsuits Over Profit, Pain and the Hip Implant Some Call ‘Toxic’*, ABC7 (Dec. 21, 2017), <http://abc7.com/health/lawsuits-over-profit-pain-and-the-hip-implant-some-call-toxic/2724100> [<https://perma.cc/754F-4JSQ>] (discussing hip implant lawsuits); Tina Bellon, *Johnson & Johnson Hit with \$247 Million Verdict in Hip Implant Trial*, REUTERS (Nov. 16, 2017, 12:05 PM), <https://www.reuters.com/article/us-johnson-johnson-verdict/johnson-johnson-hit-with-247-million-verdict-in-hip-im->

By July of 2018, the highly publicized opioid MDL included more than 1,000 cases as well.<sup>53</sup> The sources collected in this section routinely and primarily rely on large MDLs such as these to describe MDL overall. And they are not alone. For example, the phrase “multidistrict litigation” returns sixty-six relevant articles in the archive of *The New York Times*.<sup>54</sup> Nine were about the BP oil spill, nine were about the General Motors case, six were about Volkswagen Clean Diesel, and five were about asbestos.<sup>55</sup> Similarly, while scholars often address “MDL judges” generally, they typically base their arguments on the characteristics of large and well-publicized MDLs.<sup>56</sup> The

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plant-trial-idUSKBN1DG2MB [https://perma.cc/RSH2-A2MX] (discussing hip implant trial verdict). See generally *In re Stryker Rejuvenate and ABG II Hip Implant Prods. Liab. Litig.*, No. 0:13-MD-2441 (D. Minn. filed Feb. 19, 2013) (hip replacement docket); *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-MD-2244 (N.D. Tex. filed Mar. 28, 2011) (hip replacement docket); *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, No. 1:10-MD-2197 (N.D. Ohio filed Sept. 3, 2010) (hip replacement docket).

<sup>53</sup> See, e.g., Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [https://perma.cc/U6EB-GYBJ] (discussing opioid MDL judge); HEROIN(E) (Netflix 2017) (opioid epidemic documentary). See generally *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio filed Sept. 25, 2017) (opioid docket).

<sup>54</sup> The *New York Times* archives can be searched at <https://www.nytimes.com/search>. The results of this particular search are on file with author.

<sup>55</sup> Other cases addressed in more than one article were NFL concussions (three), opioid (two), NHL concussions (two), NSA privacy (two), and breast implants (two). Similar results can be found in MDL scholarship. For example, from 2012 to 2019, Westlaw identifies 70 national law reviews and journals with “multidistrict” or “mdl” in the title. Of those, 32 mention “bp oil” or “deepwater,” and 41 mention “asbestos.” Results are on file with author.

<sup>56</sup> There are many excellent scholarly treatments, so I highlight here only two examples. First, Abbe Gluck discussed MDL and “unorthodox civil procedure.” Gluck, *supra* note 13. Gluck interviewed twenty judges with MDL experience. Though these judges had experience with large and small MDLs, Gluck limited her scope: “This Article focuses on large MDLs, which the judges described as quite different from smaller ones. It is the unique pressure of managing hundreds, often thousands, of individualized claims in the aggregate that has birthed the procedural unorthodoxies that are the subject of this Article.” *Id.* at 1675.

Second, Elizabeth Burch has done pioneering work on MDL judges’ management of MDL lawyers, including “repeat player” lawyers. See, e.g., Burch, *supra* note 11. Burch focused on repeat players among plaintiff and defendant attorneys in MDLs. Key evidence came from a subset of MDLs: thirteen settlements from products liability and sales practices cases. Burch explained: “Although thirteen settlements seems like a small number, the proceedings in which those settlements occurred collectively included 64,107 total actions . . . . [P]roducts liability and sales practices should provide a representative sampling of multidistrict proceedings, for they constitute well over one-third of all multidistrict litigations (the largest segment by far), and up to ninety-two percent of the actual cases pending within all proceedings on the multidistrict docket.” *Id.* at 87–88 (footnote omitted).

same thing could be said for major conferences—though billed as events discussing “MDL,” the actual conversations focus on a handful of very large MDL proceedings.<sup>57</sup>

### C. MDL Reforms

The central narratives about MDL suggest that these proceedings dominate the federal docket, and that MDLs themselves are massive black holes controlled by powerful transferee judges. It would be one thing if these narratives stayed within the pages of law reviews and newspapers, but they also contribute to efforts at MDL reform.<sup>58</sup> In particular, recent MDL reform proposals have responded to these narratives by seeking to alter the way that MDLs are managed once they are created—and they do so by suggesting rules to be applied only in MDL cases.

The most important avenue for MDL reform appears to be through the Federal Rules of Civil Procedure.<sup>59</sup> Although the Federal Rules do not presently single out MDL, there have been moves in that direction. At the center of these efforts has been a special MDL subcommittee created by the Advisory Committee on Rules of Civil Procedure,<sup>60</sup> which is the body appointed

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For additional examples, see *supra* subpart I.B (discussing the narrative of MDLs as massive and unwieldy proceedings).

<sup>57</sup> See, e.g., *MDL at 50— The 50th Anniversary of Multidistrict Litigation*, CTR. ON CIV. JUST., <http://www.law.nyu.edu/centers/civiljustice/2018-early-fall-conference-mdl-at-50> [<https://perma.cc/D72J-NLQX>] (last visited Dec. 22, 2019) (providing an example of conference truly focusing on large MDL proceedings).

<sup>58</sup> I do not attempt to answer the chicken-egg question regarding MDL reforms and MDL narratives, and such an answer is not necessary for this Article's thesis.

<sup>59</sup> See 28 U.S.C. §§ 2071–2077 (2018) (Rules Enabling Act); see also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–15 (2002) (describing the rulemaking structure of the federal courts). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018–27 (1982) (describing the origins and adoption of the Rules Enabling Act); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 U.C.L.A. L. REV. 654 (2019) (analyzing and interpreting the Rules Enabling Act and describing the division of judicial and legislative regulatory authority).

<sup>60</sup> See Advisory Committee on Civil Rules, *Report to the Standing Committee*, Dec. 6, 2017, at 236, in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (2018), <http://www.uscourts.gov/sites/default/files/2018-01-standing-agenda-book.pdf> [<https://perma.cc/BP9S-6DQ3>]. MDL is not the only topic for which there is a subcommittee. For example, at the April 2018 meeting of the Civil Rules Committee, reports also were delivered by subcommittees related to social security cases and Rule 30(b)(6). See ADVISORY COMMITTEE ON CIVIL RULES, MEETING REPORT 7 (2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/CT2F-BZEV>] [hereinafter ADVISORY COMMITTEE REPORT].

by the Chief Justice to propose and consider amendments to the Federal Rules.<sup>61</sup> At a minimum, the creation of this subcommittee suggests that the Advisory Committee is open to the idea of MDL-specific rules.

MDL reformers have seized on the subcommittee. In August 2017, LCJ presented a set of proposals for Federal Rules amendments.<sup>62</sup> In short, these proposals would heighten plaintiffs' pleading and disclosure obligations, facilitate dismissal and interlocutory review, and limit bellwether trials—all of which function as responses to the problems described above. LCJ's proposals would apply to *all cases* consolidated in an MDL, and not to any non-MDLs.

The focus on MDL-specific rules is not limited to the defense side of the “v.” The American Association for Justice (AAJ), an organization that represents the interests of the plaintiffs' bar, offered some of its own proposals to the MDL subcommittee.<sup>63</sup> Among its suggestions were MDL-specific rules to deal with remands, appointment of lead counsel, and protective orders.<sup>64</sup>

Having received this input, the MDL subcommittee issued a report to the full Advisory Committee in 2018.<sup>65</sup> The report identified issues that might merit further attention. Centrally,

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<sup>61</sup> See generally 28 U.S.C. § 2073 (authorizing federal advisory committees); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 65–67 (2017) (describing how Chief Justices have affected the Advisory Committee on Civil Rules).

<sup>62</sup> More specifically, LCJ has proposed the following:

- (1) Pleadings: Include in Rule 7 the documents that function as pleadings in MDL cases;
- (2) Dismissal: Add individual claims in MDL cases to Rule 9's list of matters that must be pled with particularity or, alternatively, create a Rule 12(b)(8) for individual claims in MDL cases that lack meaningful evidence of a valid claim;
- (3) Joinder: Amend Rule 20 to prohibit joinder of plaintiffs who fail to abide by the statutory requirements for filing a complaint and over whose claims the MDL court lacks jurisdiction;
- (4) Required disclosures: Modify Rule 26 to require plaintiffs in MDL cases to produce meaningful evidence in support of their claims, and to disclose the existence of third-party financing arrangements and the use of lead generators;
- (5) Trial: Establish in Rule 42 a confidential consent procedure without which bellwether trials in consolidated trials cannot occur; and
- (6) Appellate review: Create a straightforward pathway for appellate review of critical rulings in MDL cases.

LCJ Request, *supra* note 41 at 481–83.

<sup>63</sup> See ADVISORY COMMITTEE REPORT, *supra* note 60, at 205–08.

<sup>64</sup> For example, AAJ called for “[a] specific exception . . . in Rule 26I stating in detail that manufacturers be precluded from obtaining protective orders in MDLs, except in the case of trade materials.” *Id.* at 207.

<sup>65</sup> *Id.* at 147–53.

these issues seemed to adopt the MDL-reformers' frame of special rules for "MDL cases" and only "MDL cases."<sup>66</sup> Although the subcommittee queried whether the rules would apply just to MDLs, it has mostly ignored this question.<sup>67</sup> And, again, the mere existence of the subcommittee suggests that MDL-specific rules may be in the cards.

Meanwhile, Congress has also gotten into the act. Although class actions and tort litigation have been frequent targets of "litigation reformers," MDL has usually avoided legislative attention.<sup>68</sup> But in February 2017, Representative Bob Goodlatte (R-Va) introduced H.R.985, entitled "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017."<sup>69</sup> The bill passed the House in March 2017.<sup>70</sup> Relevant here is Section 105 of the bill, which would add four new subsections to the MDL statute to increase appellate review, impose heightened evidentiary burdens on plaintiffs, limit the use of bellwether trials, and cap attorney fees.<sup>71</sup>

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<sup>66</sup> To be more specific, among the issues identified by the subcommittee were (i) special rules for master complaints; (ii) heightened pleading rules, potentially including *Lone Pine* orders or fact sheets; (iii) requiring each MDL plaintiff to pay a separate filing fee and/or limiting party joinder; (iv) resequencing discovery to place affirmative burdens on plaintiffs; (v) disclosure of litigation funding; (vi) bellwether trials; (vii) interlocutory review; (viii) collaboration with state courts; and (ix) rules for selection of lead counsel or steering committee members. *Id.*

<sup>67</sup> The Report stated: "The question of scope of application for any rule amendments probably can't be fully explored until it is determined what those amendments might be." *Id.* at 148.

<sup>68</sup> Other than a small amendment in 1976 permitting consolidation of certain Clayton Act cases, the Multidistrict Litigation Act has been unchanged since it was first adopted. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 303, 90 Stat. 1383, 1396 (1976) (codified at 28 U.S.C. § 1407(h) (2018)). And despite the importance of MDL, Congress has not held a single oversight hearing on MDL or the JPML since the statute was adopted in 1968. These results were confirmed using various search terms in Lexis Congressional and are on file with author. See also H.R. Rep. No. 115-25, at 6 (2017) (noting the lack of hearings on the recent MDL bill).

<sup>69</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017). See generally Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87 (2018) (discussing this proposal); J. Maria Glover, "Encroachments and Oppressions": *The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113 (2018) (same).

<sup>70</sup> See H.R. 985.

<sup>71</sup> Subsection (i) would require personal injury plaintiffs to provide evidentiary support for the factual allegations in a pleading—a dramatic departure from the "notice pleading" that characterizes the Federal Rules and even a dramatic departure from the "plausibility pleading" of *Twombly* and *Iqbal*. See FED. R. CIV. P. 8; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Subsection (j) would require that all MDL parties consented to any trial before the transferee judge. Subsection (k) would permit interlocutory appeals of remand decisions in all MDLs and would permit interlocutory appeals of

Some of these proposals apply to all MDLs, and others apply to any MDL that includes a claim for “personal injury”—a term not defined in the Act.

Finally, though not formally reform proposals, efforts to improve “MDL judging” also sweep broadly to cover all MDLs. Training programs for “MDL judges” have targeted any judge handling any MDL,<sup>72</sup> and scholars advising on “MDL judging” have done so in terms that seemingly apply to any MDL proceeding.

## II

### MDLS IN PRACTICE

The previous Part described the rise of MDL, and the concomitant rise of MDL narratives and MDL reform efforts. But importantly, the MDL narratives and associated reform proposals are based on an incomplete picture of MDL. This Part tries to complete the picture by describing the full scope of MDL cases and by highlighting the ways that the largest MDLs are not representative of MDL as a whole.

#### A. MDL by the Numbers

In April 2018, the JPML published the astounding statistic that MDLs account for 123,293 pending cases in federal court.<sup>73</sup> At the start of 2018, there were approximately 340,000 pending civil cases in federal courts overall,<sup>74</sup> meaning that MDLs likely comprised about one-third of the federal docket.<sup>75</sup>

The first thing that must be said about this statistic is that it overstates MDL’s share of federal judicial business. It cannot be true that an MDL involving 20,000 cases should “count” the same as 20,000 individual cases. If it did, then a judge handling one 20,000-case MDL and no other civil cases would still be responsible for almost 6% of the federal civil docket on her

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any order in a personal injury MDL when “an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings.” Subsection (l) would require that that personal-injury plaintiffs in MDL cases receive no less than 80% of any recovery. See H.R. 985.

<sup>72</sup> See *supra* notes 5–11 and accompanying text (collecting sources).

<sup>73</sup> See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (2018) [hereinafter MDL DOCKETS BY ACTIONS PENDING] (on file with author).

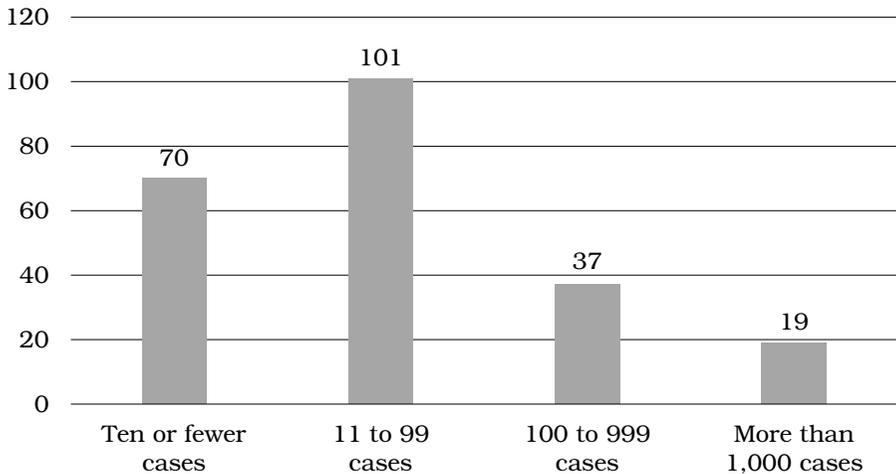
<sup>74</sup> See Table C: U.S. District Courts—Civil Cases Commenced, Terminated, and Pending, ADMIN. OFF. U.S. CTS. (2017), <http://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2017/12/31> [<https://perma.cc/GJP7-MGBH>].

<sup>75</sup> I did it again!

own.<sup>76</sup> This also means that MDL percentages might overstate the share of judicial business that purportedly reflects “MDL problems.”<sup>77</sup>

More importantly for present purposes, interrogating these numbers reveals wide variation among MDLs. The 123,293 MDL cases comprised 227 pending MDLs.<sup>78</sup> The largest pending MDL has more than 20,000 pending cases. The next largest has more than 13,000. Nineteen “mega-MDLs” include more than 1,000 cases each.<sup>79</sup> Meanwhile, seventy MDLs have ten or fewer pending cases.<sup>80</sup> Or, to put it another way, the median MDL has twenty pending cases while the mean would be more than 500.

FIGURE 1  
MDLs BY SIZE (2018)



<sup>76</sup> If we counted each MDL as one case, then MDLs would comprise about 0.1% of the federal civil docket. When the Administrative Office of U.S. Courts calculates its “weighted filings” for each judgeship (in order to permit interdistrict comparisons), it excludes cases transferred by the JPML but counts those directly filed into an MDL. See *U.S. District Courts – Judicial Business 2017*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017> [https://perma.cc/7V4W-FK28] (last visited Nov. 10, 2019). This choice reflects a formalism about MDL that is not borne out by MDL practice.

<sup>77</sup> Margaret Williams also criticizes the pending case statistic. See Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1270–72 (2019). Williams contends that because MDL cases tend to linger longer than non-MDL cases, a more appropriate measure is the share of filed cases, which she finds to be no higher than 21%. *Id.*

<sup>78</sup> See MDL DOCKETS BY ACTIONS PENDING, *supra* note 73.

<sup>79</sup> These nineteen mega-MDLs accounted for more than 85% of all pending MDL cases.

<sup>80</sup> *Id.* These data reflect the number of pending cases. One could also consider the total cases that ever appeared within each pending MDL. Using that measure, thirty-eight MDLs contained more than 1,000 total cases; twenty-six MDLs had ten or fewer; exactly 100 had more than ten but fewer than fifty.

Of course, numbers do not tell the whole story. Individual cases can vary in their complexity and in the obstacles to their resolution. Moreover, some of the cases that are consolidated are themselves class actions, mass actions, or other representative suits.<sup>81</sup> But at a minimum, the size of MDLs gives us some hint that the label “MDL” might mask important differences within that category.

### B. Variation Among MDLs

It is one thing to note that MDLs vary in size. But it is also important to acknowledge that, although the mega-MDLs dominate the narrative, they are not representative of MDL as a whole.

First, if we simply counted the number of MDL proceedings, the mega-MDLs would represent less than 10% of them.<sup>82</sup> That alone should raise red flags about MDL-specific rules that purportedly respond to mega-MDL problems.

Another relevant dimension is case type. The JPML helpfully catalogs MDLs by category. Looking at the 227 MDLs in my study, products-liability cases were the most common, though this category comprised fewer than one-third of all MDLs.<sup>83</sup> The next largest categories were antitrust and sales practice litigation, with the remaining cases covering topics such as contract, disasters, employment, IP, and securities.

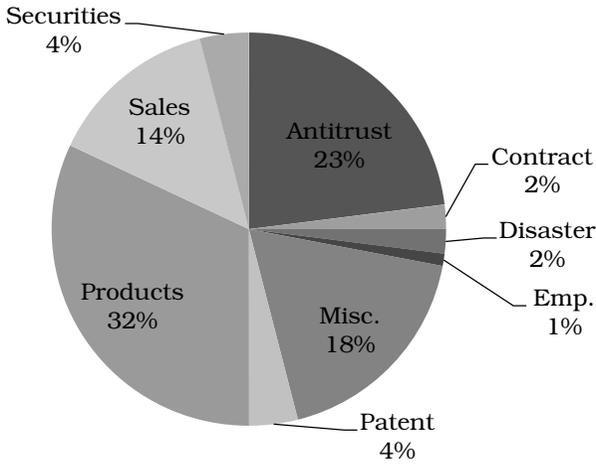
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<sup>81</sup> See *infra* subpart II.C. There is also the question of how much the underlying cases overlap—as the statute requires only “one or more common questions of fact.” 28 U.S.C. § 1407(a) (2018). Based on this language, the Panel seemingly would be permitted to consolidate cases based on a single common fact question, if the Panel believed that consolidation would promote convenience, justice, and efficiency.

<sup>82</sup> See *supra* subpart II.A.

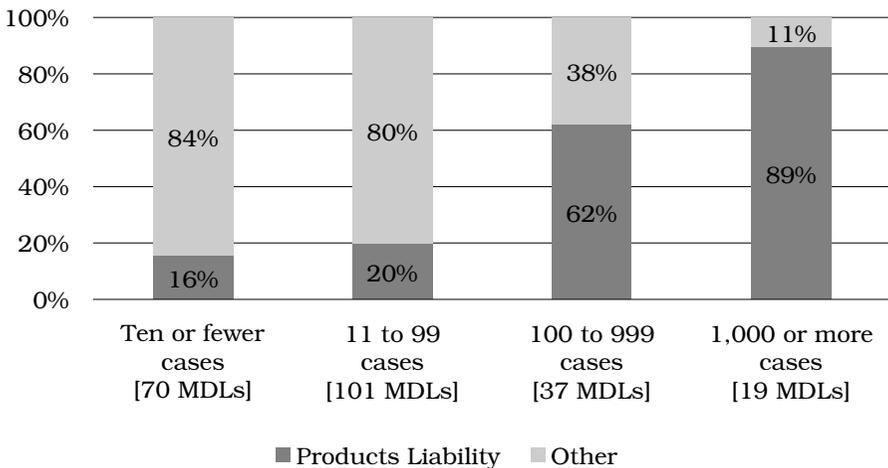
<sup>83</sup> Specifically, the JPML categorized 71 of 227 cases as “products liability.” See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DOCKET TYPE SUMMARY (2018) (on file with author).

FIGURE 2  
MDLS BY CATEGORY (2018)



This variation is not equally distributed. The nineteen mega MDLs included seventeen cases categorized as products liability, one “common disaster” (BP Oil Spill), and one “miscellaneous” case that involved personal injury claims against a product manufacturer.<sup>84</sup> In other words, we could easily categorize all nineteen mega-MDLs as “mass torts.” The smallest MDLs, meanwhile, were sometimes products-liability cases. But they also often involved claims sounding in antitrust, data security, patent, marketing and sales practice, and securities law.

FIGURE 3  
MDLS BY SIZE AND CATEGORY (2018)



<sup>84</sup> Full results are on file with author.

Interviews with MDL transferee judges reveal that they too see variation among MDLs. Sometimes judges made these views express. One judge said that MDLs “are very much not all created equal.”<sup>85</sup> Another said “they are not all the same.”<sup>86</sup> And a third, when asked if there were commonalities across MDLs handled by that judge, said flatly “no.”<sup>87</sup> Other times the judges’ views were implied. I asked about a particular mega-MDL currently in front of a judge. That case, the judge said, is a “vastly different creature.” Reflecting the common MDL narrative, the judge called this very large case an “MDL in all ways.”<sup>88</sup>

It also seems that the Panel judges think mega-MDLs are different. Andrew Bradt and I studied all judges to whom MDLs were assigned from 2012 to 2016.<sup>89</sup> We found that MDL transferee judges closely track federal district judges in terms of race (roughly 20% non-white) and gender (roughly 30% female).<sup>90</sup> Looking only at the nineteen mega-MDLs described above, none were assigned to non-white judges and only three (16%) were assigned to female judges.<sup>91</sup> Perhaps more tellingly, we found that 32% of all MDLs were assigned to first-time MDL judges during that period.<sup>92</sup> For the nineteen mega-MDLs,

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<sup>85</sup> Judge interview is on file with author.

<sup>86</sup> Judge interview is on file with author.

<sup>87</sup> Judge interview is on file with author.

<sup>88</sup> Judge interview is on file with author.

<sup>89</sup> See Clopton & Bradt, *supra* note 24, at 1716. Brooke Coleman (among others) has noted the lack of diversity on the federal civil rules committee. See Brooke D. Coleman, #SoWhiteMale: Federal Civil Rulemaking, 113 NW. U. L. REV. 52, 62 (2018) (“In terms of race and gender, the historical composition of the Committee is 85% white men, 3% black men, 0.7% Latino/Hispanic men, and 11% white women. No women of color have ever served on the Committee, and only five men of color have served—four black men and one Latino/Hispanic man.”). I have shown that this lack of diversity persists to the present day on the federal committee but less so on analogous state committees. See Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 26–28 (2018).

<sup>90</sup> Clopton & Bradt, *supra* note 24, at 1738. The demographic characteristics of judges were taken from data compiled by the Federal Judicial Center (FJC). The FJC’s biographical information comes from a range of primary sources identified in the *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUDICIAL CTR., <https://www.fjc.gov/node/7946> [<https://perma.cc/MHK9-383E>] (last visited Nov. 9, 2019).

<sup>91</sup> Results are on file with author. I describe here the judges to whom the MDLs were originally assigned. One of these MDLs was reassigned to another district judge within the transferee district but that is distinct from the Panel’s original assignment process. During the period studied in the prior article, we found no mega-MDLs assigned to non-white judges and only 14% assigned to female judges. Clopton & Bradt, *supra* note 89, at 1738.

<sup>92</sup> Clopton & Bradt, *supra* note 24, at 1738.

only three (16%) were assigned to new MDL judges.<sup>93</sup> The judges assigned the mega-cases were particularly experienced with MDL: on average, these judges had been assigned more than five MDLs each.<sup>94</sup> In short, the Panel's choices for mega-MDLs were more circumscribed than for MDLs overall.

Differences among MDLs also connect to MDL lawyering. A common refrain among MDL critics is that these cases are dominated by a small set of "repeat player" attorneys.<sup>95</sup> The repeat players, it is alleged, leverage their insider status for their own benefit, often to the detriment of individual litigants.<sup>96</sup> While it may be true that one can identify "repeat players" in the largest MDLs, I find that these lawyers rarely appear in the smallest MDLs.<sup>97</sup>

In one important respect, however, the mega-MDLs are not special. All MDLs are created by the JPML through the same process of consolidation and assignment.<sup>98</sup> Indeed, even within that process, there are similarities in treatment across MDLs. One feature of the JPML process is that parties can suggest to the Panel their preferred districts for consolidation. In our study, we found that plaintiff and defendant suggestions to the Panel fared roughly equally—and these results were the same for mega-MDLs and for all MDLs.<sup>99</sup> I have more to say below about this seeming equality. In any event, it is noteworthy that this similarity across MDLs has nothing to do with the management of MDLs once created but instead is about the

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<sup>93</sup> Results are on file with author. In the prior study, we found that 23% of mega-MDLs were assigned to new judges. *Id.*

<sup>94</sup> *Id.* The opioid MDL, which is not included among these nineteen, is being handled by a white, male judge who has previously handled other MDLs. See Hoffman, *supra* note 53, at 1.

<sup>95</sup> See, e.g., Burch, *supra* note 11, at 79–80 (explaining that empirical evidence confirms that the same "repeat players" occupy the position of lead plaintiff's lawyer time and time again); Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 157 (2012) (analyzing repeat-player lawyers in MDLs).

<sup>96</sup> See, e.g., Burch, *supra* note 11, at 67 (explaining there is a concern that "repeat players" will use their experience to "enshrine practices and norms that benefit themselves at consumers' . . . expense").

<sup>97</sup> I obtained this result by comparing the lawyer rosters from small MDLs (available on Bloomberg Law dockets) to the appendices in Burch, *supra* note 11, at 158–59, which documented repeat players in MDL. I have more to say about these results below.

<sup>98</sup> See 28 U.S.C. § 1407 (2018). See also *infra* Part IV.

<sup>99</sup> Clopton & Bradt, *supra* note 24, at 1727–28. In our period, the Panel selected a district supported by both plaintiffs and defendants in 115 out of 207 cases. *Id.* at 1727. In MDLs in which plaintiffs and defendants jointly supported at least one district, the Panel selected one such district in 115 out of 147 cases. Various measures showed that when plaintiffs and defendants diverged, they performed roughly equally. *Id.*

process of creating MDLs in the first place. I have more to say below about this issue as well.<sup>100</sup>

### C. The Other MDLs

The foregoing suggests that the mega-MDLs may not be representative of MDL litigation overall. More granularly, we know a lot about a few large MDLs that dominate the narratives, and readers may be familiar with BP, opioids, or others. But what about the smaller MDLs? Though I cannot do justice to the variety of small MDLs, a few examples help differentiate these cases from the MDL narratives and associated reform efforts.

Some “small MDLs” are simply a collection of individual cases, many of which do not present any unusual complexity in case management. Consider MDL 2515.<sup>101</sup> Various plaintiffs filed lawsuits against Pilot Flying J alleging a fraudulent scheme to withhold discounts and rebates. One plaintiff sought MDL consolidation, but that motion was denied because a nationwide class action settlement was about to be entered.<sup>102</sup> After the settlement was finalized, defendant Pilot Flying J went back to the JPML to seek consolidation of seven actions in six districts filed by individual plaintiffs who had opted out of the class settlement. All plaintiffs opposed consolidation, seeking instead to pursue their cases in their districts of choice.<sup>103</sup> The Panel decided to override plaintiffs’ venue preference and to consolidate these cases in a single district—meaning that plaintiffs who affirmatively opted out of class litigation were then involuntarily consolidated for “pretrial proceedings.” Indeed, the JPML selected a district in which no plaintiff had originally filed.<sup>104</sup> The MDL eventually comprised

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<sup>100</sup> See *infra* Part IV. It also appears that the remand rate in mega-MDLs is not substantially different from the overall MDL remand rate. For MDLs terminated from 2015 to 2017, the remand rate was 3.1% for MDLs with more than 1,000 cases and 3.1% for MDLs with fewer than 1,000 cases. These data and related findings are on file with author.

<sup>101</sup> *In re Pilot Flying J Fuel Rebate Contract Litig.* (No. II), 11 F. Supp. 3d 1351, 1351–52 (J.P.M.L. 2014).

<sup>102</sup> *In re Pilot Flying J Fuel Rebate Contract Litig.*, 959 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013).

<sup>103</sup> Plaintiffs contended that “individual issues of fact will predominate over those that are common because plaintiffs agreed to different rebate deals made by different regional sales managers.” See *In re Pilot Flying J Fuel Rebate Contract Litig.* (No. II), 11 F. Supp. 3d at 1352. The Panel acknowledged that “[m]uch of the discovery in this litigation may be case-specific.” *Id.*

<sup>104</sup> The Panel’s explanation in this case is striking. The Panel noted that there was an ongoing and related criminal prosecution in the Eastern District of Tennessee. That criminal case was in front of Judge Thapar, a federal district judge

nine cases, resolved by at least five separate settlement agreements, multiple voluntary dismissals, and one remand—all overseen by the handpicked MDL judge.<sup>105</sup>

Or, consider MDL 2461.<sup>106</sup> MyKey Technology filed six separate lawsuits against nine defendants regarding alleged infringement of three of MyKey's patents. At the time that MyKey sought consolidation in California, the six actions were pending across three districts: three in the Central District of California (in front of three different judges), two in the Eastern District of Wisconsin, and one in the Western District of Washington.<sup>107</sup> Note that this case involved a motion to consolidate filed by a plaintiff that presumably could have selected a common venue in the first place. My suspicion is that plaintiff did not do so because personal jurisdiction or venue could not have been obtained in the Central District of California for all of the claims. Because MDL consolidation is not subject to the limits of personal jurisdiction and venue, the Panel was able to transfer the non-California cases to the Central District, and to reallocate all cases to a single judge. The cases were resolved pursuant to six separate settlement agreements from 2015 to 2017, and there appears to have been nothing special in the way the cases were handled once transferred.<sup>108</sup>

Other “small MDLs” are in fact a small number of overlapping class actions, which once consolidated essentially function as if they were a single class action. Consider MDL 2022.<sup>109</sup> Jessica Clark and Michael Swaney filed separate class action lawsuits against Payless ShoeSource under Cali-

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from the Eastern District of Kentucky sitting by designation in the Eastern District of Tennessee. Reflecting the Panel's emphasis on judges rather than districts, the Panel consolidated the case in the Eastern District of Kentucky (not Tennessee) in order to place it with Judge Thapar. None of the consolidated cases had been filed in Kentucky, defendant was not located in Kentucky, and no party recommended Kentucky as the venue for consolidation. *Id.* at 1351–52.

<sup>105</sup> Additional information about these cases can be located on the Eastern District of Kentucky's docket, *In re Pilot Flying J Rebate Contract Litig.* (No. II), No. 2:14-MD-02515 (E.D. Ky.) (terminated Sep. 16, 2015).

<sup>106</sup> *In re MyKey Tech. Inc. Patent Litig.*, 961 F. Supp. 2d 1358 (J.P.M.L. 2013).

<sup>107</sup> Regarding these cases, the JPML conceded that “there is some difference in the asserted claims between the actions, and some difference in the accused products . . . .” *Id.* at 1359.

<sup>108</sup> Additional information about these cases can be located on the Central District of California's docket, *In re MyKey Tech. Inc. Patent Litig.*, No. 2:13-ML-02461 (C.D. Cal.) (terminated Jan 4, 2017), as well as on the individual dockets for the consolidated cases.

<sup>109</sup> Additional information about these cases can be located at *In re Payless ShoeSource, Inc., Cal. Song-Beverly Credit Card Act Litig.*, 609 F. Supp. 2d 1372 (J.P.M.L. 2009), as well as on the individual dockets for the consolidated cases.

fornia's Song Beverly Credit Card Act.<sup>110</sup> Clark's suit was filed in the Central District of California; Swaney's was filed in the Eastern District of California. Payless moved to consolidate these cases in the Eastern District. Neither set of plaintiffs responded, and the JPML granted the motion.<sup>111</sup> The cases were consolidated, and in about one year, the parties had reached a preliminary settlement. The court ultimately certified a class for settlement purposes comprising all plaintiffs in both complaints.<sup>112</sup>

Or, consider MDL 2103.<sup>113</sup> Four class action suits were filed in four districts arising out of KFC's promotions for a new line of grilled chicken items. KFC sought consolidation in the Northern District of Illinois, where one of the four suits was pending. Plaintiffs opposed consolidation, and in the alternative, they all agreed that consolidation in the Central District of California was preferable. The JPML consolidated in the defendant's preferred venue. The case ultimately settled as a single class action, for no more than \$15.96 per household.<sup>114</sup>

Again, I do not mean to suggest that these cases are representative of the full scope of small MDLs. But, at a minimum, they stand in marked contrast to the BP or opioid litigation that so often dominates the literature on MDL. The MDL judges contacted for this project echoed this sentiment. One judge noted that small MDLs "were no different than other cases,"<sup>115</sup> while another said that a small MDL was "no different than any single case."<sup>116</sup> A third judge remarked a small MDL might be "no different than five lawyers filing five cases in the district

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<sup>110</sup> See CAL. CIV. CODE § 1747.08 (2011) (prohibiting retailers from requesting and retaining personal identification information in consumer credit card transactions).

<sup>111</sup> *In re Payless ShoeSource*, 609 F. Supp. 2d at 1372.

<sup>112</sup> Additional information about these cases can be located on the Eastern District of California's docket, *In re Payless ShoeSource, Inc., Cal. Song-Beverly Credit Card Act Litig.*, No. 2:09-MD-2022 (E.D. Cal.) (terminated June 24, 2011) (transferred to *Swaney v. Payless ShoeSource, Inc.*, No. 2:08-cv-02672) (E.D. Cal.).

<sup>113</sup> *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 659 F. Supp. 2d 1366 (J.P.M.L. 2009).

<sup>114</sup> Final Approval of Class Action Settlement at \*3, *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 659 F. Supp. 2d 1366 (J.P.M.L. 2009) (No. 1:09-cv-07670). This is not meant to suggest that plaintiffs would have recovered more in another court—only that this case is a far cry from BP or opioid.

Additional information about these cases can be located on the Northern District of Illinois's docket, *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, No. 1:09-cv-07670 (N.D. Ill.) (terminated Dec. 6, 2011).

<sup>115</sup> Judge interview is on file with author.

<sup>116</sup> Judge e-mail is on file with author.

court.”<sup>117</sup> But, of course, even these unremarkable MDLs passed through the JPML to a handpicked transferee judge.<sup>118</sup>

#### D. The Other Mega-Cases

This Part has shown that the dominant MDL narratives do not accurately describe all MDLs. In addition, it turns out that there are large and publicly important cases that resemble the MDL narratives yet are not themselves MDLs.

A frequent subject of the “MDL judge” literature is the 9/11 first-responders litigation handled by Judge Hellerstein in the Southern District of New York.<sup>119</sup> Under Judge Hellerstein’s watch, more than 10,000 claims were settled for more than \$600 million.<sup>120</sup> But notably, this litigation was not actually an MDL. Instead, it proceeded under a special procedure established by the Air Transportation Safety and System Stabilization Act (ATSSSA).<sup>121</sup> The ATSSSA funneled litigation into New York. The MDL statute had nothing to do with it.

The *Agent Orange* litigation is another common example in the literature on aggregate litigation and settlement. This case involved extensive “managerial judging” from Judge Weinstein and introduced the world to settlement-master Ken Feinberg.<sup>122</sup> *Agent Orange* was not an MDL either—it was a class

<sup>117</sup> Judge statement is on file with author.

<sup>118</sup> See *infra* Part IV.

<sup>119</sup> See generally, e.g., Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653 (2013) [hereinafter Hellerstein et al., *9/11 Litigation Database*] (discussing this litigation); Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127 (2012) [hereinafter Hellerstein et al., *Managerial Judging*] (same). Judge Hellerstein’s performance has been discussed in articles otherwise addressing MDL. See, e.g., Bradt & Rave, *supra* note 8, at 1263, 1265, 1274–75, 1277, 1299–1300, 1204 (discussing Judge Hellerstein’s rejection of certain settlements); Burch, *supra* note 21, at 111, 117–18 (same).

<sup>120</sup> See Hellerstein, Henderson & Twerski, *9/11 Litigation Database*, *supra* note 119, at 653, 666 n.70. Judge Hellerstein also relied on bellwether trials to facilitate settlement. See Lahav, *supra* note 33, at 580–81.

<sup>121</sup> 49 U.S.C. § 40101 (2018). Some have argued that this statutory basis tells us something about proper case management. See, e.g., Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1029–30 (2013) (“Judge Hellerstein acted within the proper scope of his authority in employing such forceful tactics with the litigants before him. His authority was not that of a generic ‘managerial judge.’ It was the authority to use case management and procedural innovation as tools for carrying into effect the distinctive liability policies enacted by Congress in the comprehensive statutory scheme that defined and limited the relief available to first responders.”).

<sup>122</sup> See, e.g., Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 COLUM. J.L. & SOC. PROBS. 481, 482–84 (2012) (describing Judge Weinstein’s innovative procedures in *Agent Orange*).

action, though a highly “democratic” one in which individual litigants were given a role.<sup>123</sup>

Traditional mass joinders also share features with many MDLs but do not rely on Section 1407. Critics have objected to the use of “quasi-class actions” that meld class procedures with non-class cases.<sup>124</sup> Although the quintessential quasi class action was the *Zyprexa* MDL,<sup>125</sup> most uses of this label have occurred outside the MDL context.<sup>126</sup> Returning to Judge Weinstein, he handled a consolidated mass tort suit related to in utero exposure to diethylstilbestrol (DES).<sup>127</sup> As all suits were filed in the same court, no MDL was necessary.

Still other vehicles exist for resolution of mass claims. State courts handle mass disputes without relying on the federal MDL statute.<sup>128</sup> Many federal lawsuits brought by state attorneys general are coordinated without the use of MDL.<sup>129</sup> Bankruptcy, too, has the ability to consolidate mass claims without relying on the MDL device.<sup>130</sup> All of these proceedings

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<sup>123</sup> Years later, Cabraser and Issacharoff noted the rise of the “participatory class action” in which absent class members are informed of and participate in the case. See Cabraser & Issacharoff, *supra* note 36, at 849.

<sup>124</sup> See, e.g., Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 390 (2011) (“[T]he quasi-class action ought to be repudiated as an unfortunate drift into further lawlessness in administering aggregate claims.”) [hereinafter Mullenix, *Dubious Doctrines*].

<sup>125</sup> *Id.* at 392, 401 (citing inter alia *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006)).

<sup>126</sup> For example, Professor Mullenix discussed *Zyprexa* at length, but most of her other citations to the use of the “quasi-class action” moniker were not from MDLs. Mullenix noted three other cases in which Judge Weinstein used the label, none of which were MDLs; she pointed to FLSA collective actions, which were not MDLs; she discussed Mississippi property damage suits after Hurricane Katrina, which were never MDL’d; and she cited a number of other federal cases that were not MDLs. See *id.* at 392–94. Mullenix did not claim to be addressing MDL, so there is nothing problematic about her discussing MDL and non-MDL cases together. The point instead is that if the targets of concern were “quasi-class actions,” then “MDL cases” is both over and underinclusive.

<sup>127</sup> See, e.g., *In re DES Cases*, 789 F. Supp. 552, 556–57 (E.D.N.Y. 1992) (“The torts alleged here involve numerous claims of injury from exposure *in utero* to diethylstilbestrol (DES).”).

<sup>128</sup> For example, as discussed further below, the *Lone Pine* order—a common tool in MDL cases—has its origins in a mass joinder in New Jersey state court. See *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at \*2–4 (N.J. Super. Ct. Law Div. Nov. 18, 1986). And while some states have established MDL-like procedures for coordinating complex cases in state courts, see, e.g., W.V. TRIAL CT. R. 26 (West Virginia’s procedures for mass litigation), these procedures would not be covered by MDL reform proposals either.

<sup>129</sup> See, e.g., Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 496–98 (2012) (describing modern *parens patriae* cases brought by state AGs).

<sup>130</sup> See, e.g., McKenzie, *supra* note 40, at 999–1002 (describing case aggregation through bankruptcy proceedings).

face managerial challenges that might sound familiar to MDL reformers, yet they would not be covered by the MDL reforms.<sup>131</sup>

The point of this digression is to demonstrate that the label “MDL” connoting mega-cases is not only overinclusive with respect to many smaller MDLs, but also potentially underinclusive with respect to large non-MDLs.<sup>132</sup>

### III

#### REJECT MDL-SPECIFIC RULES

##### A. The Categorization Error

MDLs vary dramatically in size, salience, and treatment. More than just nose counting, what makes this important is the contrast between this variation and the one-size-fits-all proposals to create specialized rules that would apply to all MDL proceedings.

Imagine, for example, that LCJ’s proposals were adopted.<sup>133</sup> That would mean that all MDLs—not just large or otherwise complex MDLs—would be subject to special rules. All MDL plaintiffs would be required to plead with particularity under Rule 9, rather than under Rule 8 as usual.<sup>134</sup> MDL plaintiffs also would have dramatically more disclosure requirements than other plaintiffs, including obligations to disclose litigation financing and claim-specific facts upfront. Bellwether trials would virtually disappear from MDL practice, but not necessarily from non-MDL cases.<sup>135</sup> And defendants would have access to interlocutory appeals as of right that would be unavailable outside of MDL. These rule changes presume that MDLs comprise a coherent category of federal litigation. They do not.

Perhaps the clearest way to see the problem is to compare the logic of MDL-specific rules to the reality of MDL practice. A common refrain in the MDL narrative justifying reform is that

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<sup>131</sup> To put it another way, “since the very beginnings of U.S. tort law, a variety of aggregate settlement institutions have powerfully shaped the resolution of particular cases in some of the most important fields of tort practice.” Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1574 (2004).

<sup>132</sup> As one judge put it to me, “MDLs are not necessarily the most complex.” Judge interview is on file with author. Another judge acknowledged that, even looking at that judge’s docket, the MDLs were not the most complicated cases. Judge interview is on file with author.

<sup>133</sup> LCJ Request, *supra* note 41.

<sup>134</sup> *Id.* at 482–83.

<sup>135</sup> *Id.* at 495–96.

MDLs are massive and unwieldy proceedings.<sup>136</sup> This might be true for the mega-MDLs, but it does not seem particularly persuasive for the scores of MDLs comprising a handful of consolidated cases. Many smaller MDLs require no more than the usual tools of case management.<sup>137</sup>

Central to the criticism of MDLs is the claim that they are “magnets” for bad cases.<sup>138</sup> But this claim is hard to sustain for small MDLs or for MDLs in which very few (if any) cases are filed after the creation of the MDL. For example, among the approximately 1,500 MDLs closed through 2017, almost three-quarters included fewer than ten cases filed directly into the MDL court.<sup>139</sup> If these thousand-plus MDLs were magnets, they must be incredibly weak ones.

It is also not clear that potential responses to the “magnet” problem should be MDL-specific. For example, many reformers have called for codification of something like a *Lone Pine* order,<sup>140</sup> which would require plaintiffs to make preliminary showings of evidence at the outset of litigation.<sup>141</sup> *Lone Pine* orders make the most sense when used to triage among large numbers of claims and claimants. But again, this does not apply to many smaller MDLs, which present no special triage problems. These proposals also could be relevant to non-MDLs.<sup>142</sup> Indeed, the *Lone Pine* order itself is named for *Lore v.*

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<sup>136</sup> See *supra* subpart I.B.

<sup>137</sup> See generally FED. R. CIV. P. 16 (Pretrial Conferences; Scheduling; Management).

<sup>138</sup> See *supra* subpart I.B. (collecting sources).

<sup>139</sup> See generally U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2017, [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Cumulative\\_Terminated\\_Litigations-FY-2017.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2017.pdf) [https://perma.cc/V63G-ZMTW].

<sup>140</sup> See *LCJ Request*, *supra* note 41, at 488–89.

<sup>141</sup> See, e.g., 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3866, n.22 (4th ed. 2019) (“Usually, such an order requires the plaintiffs to make a preliminary showing of evidence supporting their claims.”).

<sup>142</sup> Parties frequently request *Lone Pine* orders in non-MDL proceedings in state and federal courts. See, e.g., *Adinolfé v. United Techs. Corp.*, 768 F.3d 1161, 1164–65 (11th Cir. 2014) (discussing a request for *Lone Pine* order in consolidated toxic torts case); *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 151 (Colo. 2015) (“The trial court granted the motion and issued a *Lone Pine* order . . . .”); *Manning v. Arch Wood Prot., Inc.*, 40 F. Supp. 3d 861, 863 (E.D. Ky. 2014) (“Defendants filed a *Lone Pine* Motion in three of the four cases.”); *Pinares v. United Techs. Corp.*, No. 10-80883-CIV, 2011 WL 240512, at \*1 (S.D. Fla. Jan. 19, 2011) (“[This cause] comes before the Court pursuant to Defendant’s motion for *Lone Pine* case management order . . . .”); *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 385 (S.D. Ind. 2009) (“Defendants seek the issuance of a ‘*Lone Pine* order.’”); *Ramos v. Playtex Prods., Inc.*, Nos. 08-CV-2703, 08-CV-2828, 08-CV-3352, 2008 WL 4066250, at \*6 (N.D. Ill. Aug. 27, 2008) (“Such orders are commonly referred

*Lone Pine Corporation*—not an MDL, but a state court case involving the mass joinder of defendants.<sup>143</sup>

Some reformers argue that MDLs need special rules because of the unprecedented powers of MDL transferee judges.<sup>144</sup> For one thing, there are no such special powers. All federal civil cases are subject to the Federal Rules of Civil Procedure, including all MDL cases.<sup>145</sup> Moreover, some of the most well-known examples of intensive judicial involvement were not MDL cases. Judge Hellerstein's 9/11 litigation was not an MDL.<sup>146</sup> Judge Rakoff's decision to reject a Citigroup-SEC settlement was not in an MDL either.<sup>147</sup> Professor Resnik focused scholars' attention on "managerial judges" well before the MDL boom.<sup>148</sup> Again, it may be that large and unwieldy cases demand something different from the judges handling them, but that is not a comment about MDL as a category.

Relatedly, some MDL critics have called for special rules governing the use of bellwether trials in MDL proceedings.<sup>149</sup> Special rules for bellwethers might make sense, but it is not obvious why those rules should be limited to MDLs. In Alexan-

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to as '*Lone Pine orders*' and have been employed by various state and federal courts." (footnote omitted)); *Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 801 (Mont. 1997) ("[T]he District Court issued a Case Management Order . . .").

<sup>143</sup> *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

<sup>144</sup> For example, the LCJ asserted (without support) that "[i]t is widely known . . . that the FRCP do not govern key elements of procedure in many MDL cases, which now constitute 45 percent of the federal docket." See *LCJ Request*, *supra* note 41, at 481. See also, e.g., Mullenix, *Dubious Doctrines*, *supra* note 124, at 391 ("MDL judges . . . by endorsing the concept of the quasi-class action have greatly expanded the scope of their authority . . ."); *supra* Section I.B (citing literature on MDL judges).

<sup>145</sup> FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . ."); FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

<sup>146</sup> See, e.g., Hellerstein et al., *Managerial Judging*, *supra* note 119, at 177 (noting that "[i]n the 9/11 responders' litigation, the claims were consolidated because Congress mandated" it); Wolff, *supra* note 121, at 1029 (describing Congress's creation of the 9/11 compensation scheme).

<sup>147</sup> See *SEC v. Citigroup Glob. Mkts. Inc.*, 827 F. Supp. 2d 328, 329 (S.D.N.Y. 2011).

<sup>148</sup> See Resnik, *supra* note 32. With respect to attorney management, Judge Kaplan's famous "auction method" for lead counsel was deployed in a non-MDL securities case, see *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000), and the Private Securities Litigation Reform Act's provisions on lead plaintiffs apply independent of MDL consolidation. See 15 U.S.C. § 78u-4(3) (2018).

<sup>149</sup> See, e.g., *LCJ Request*, *supra* note 41, at 492-94 (arguing for reforms to the Federal Rules of Civil Procedure).

dra Lahav's survey of bellwether practice, for example, the central examples were non-MDL proceedings.<sup>150</sup>

Some critics also suggest that MDLs need special rules because they are "black holes" from which transferred cases never return.<sup>151</sup> It is indisputable that most MDL cases are resolved by settlement or dispositive motion in the transferee court.<sup>152</sup> But it is not as if the trial rate in non-MDL litigation is substantial either.<sup>153</sup> Policy interventions to increase trial rates, in other words, need not target MDLs.

There is also no clear reason that just being in an MDL—rather than something about size, importance, or case-specific facts—should make a suit more or less likely to attract problematic litigation financing, more or less in need of increased interlocutory review, or more or less likely to have parallel state-court litigation.<sup>154</sup> Yet these are arguments made in favor of MDL-specific rules as well.<sup>155</sup>

To be sure, an "MDL-specific rule" might account for MDL variation within the structure of the rule. But, to date, the leading proposals for MDL rules seem to make the categorization error I have described here.<sup>156</sup> Perhaps proponents of MDL-specific rules have accepted the MDL narratives and are thus unaware of the variety in MDL practice.<sup>157</sup> This inattention thesis is made more plausible by the fact that those with

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<sup>150</sup> See Lahav, *supra* note 33, at 580–87. Lahav emphasized Judge Hellenstein's use of bellwethers in the non-MDL 9/11 litigation, Judge Parker's use of bellwether trials for asbestos cases (separate from the asbestos MDL), and Judge Real's use of bellwether trials for the damages phase of a class action against the estate of Ferdinand Marcos.

<sup>151</sup> See *supra* subpart I.B (collecting sources).

<sup>152</sup> As noted *supra* note 100, the remand rate for MDLs terminated from 2015 to 2017 was 3.1% both for MDLs with more than 1,000 cases and for MDLs with fewer than 1,000 cases.

<sup>153</sup> See *supra* note 32 (collecting sources on the vanishing trial).

<sup>154</sup> Compare these aspects of MDL litigation to the topics addressed in the class action rule. FED. R. CIV. P. 23. All class actions must be defined and certified, and all class actions have class counsel and produce a class judgment. Indeed, one might think of most of the work of Rule 23 as analogous to Section 1407, in that both sources define the process of creating the new type of litigation rather than managing it. See *infra* note 172.

<sup>155</sup> See, e.g., ADVISORY COMMITTEE REPORT, *supra* note 60, at 175 (noting that "parallel cases in state and federal court has occurred several times"); *LCJ Request*, *supra* note 41, at 489, 493, 495 (arguing for reforms due to the possibility of third-party financing and difficulties arising from interlocutory appeals).

<sup>156</sup> See *supra* subpart I.C.

<sup>157</sup> This idea is a version of the availability heuristic, which posits that people's judgments are colored by the easiest examples to remember. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 220–27 (1973) (demonstrating the relationship between availability and recall of information).

the incentive to invest in MDL rulemaking are mostly participants in the mega-cases.<sup>158</sup> It is also possible that the interest groups seeking reform would not mind if rules designed for mega-cases spilled over into other types of litigation.<sup>159</sup> Either way, reform proposals calling for MDL-specific rules are problematic because they rely on misleading descriptions of what MDL is.

Finally, it is instructive to compare the proposed MDL rules to another Federal Rule that seemingly addresses a category of cases: Federal Rule of Civil Procedure 23 on class actions. Rule 23 primarily addresses the criteria for certifying a class action, the procedures for notification of members, and the terms of a class judgment.<sup>160</sup> Nowhere does Rule 23 propose heightened pleading or enhanced disclosures or new limits on discovery. Indeed, Rule 23 looks a lot more like Section 1407—defining how and when cases get into the category rather than what happens once they are there—than it looks like the proposals for MDL reforms. Even when Rule 23 turns to interlocutory appeals, it does so in relation to the initial decision to certify the class,<sup>161</sup> which would parallel a rule on appellate review of Panel decisions, not a rule on appeals of transferee-court decisions.<sup>162</sup> In other words, the example of Rule 23 does not help MDL-rule proponents carry their burden of showing that MDL cases are a coherent category of federal litigation deserving specialized procedural rules. If anything, it cuts the other way.

## B. Costs of the Error

Importantly, the MDL categorization error could come with significant costs. All procedural rules involve trade-offs among accuracy, fairness, efficiency, and other values. One premise of MDL reform is that these trade-offs are different for MDLs than for other cases. Given the common MDL narratives, we might understand those proposals as responding to the trade-offs presented in a small number of mass tort MDLs. But of course, the trade-offs might point one direction for big cases and another direction for small cases. Applying mega-case rules to small cases is thus a mismatch. This claim connects

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<sup>158</sup> See Williams. Lee & Borden, *supra* note 95, at 143–44; see also *infra* Section III.B (discussing repeat players).

<sup>159</sup> See *infra* subpart III.B (discussing the risk of procedure shopping).

<sup>160</sup> See FED. R. CIV. P. 23.

<sup>161</sup> See FED. R. CIV. P. 23(f). Rule 23(g) does discuss the appointment of class counsel, but this is far from the most important aspect of Rule 23 and is far less intrusive than the MDL proposals described in this article.

<sup>162</sup> I call for further attention to exactly this issue in MDL *infra* Part IV.

with Professor Coleman's one percent procedure critique, which argues that federal procedure has prioritized a small number of complex cases over the bulk of federal litigation.<sup>163</sup> Adopting rules for all MDLs—based on trade-offs that apply only to a small share of MDLs—risks compounding this error.

Moreover, and making this situation worse than mere procedural mismatch, adopting special rules for MDLs invites a new brand of forum shopping.<sup>164</sup> If MDL-specific rules favored plaintiffs (or their attorneys), then you might find plaintiffs filing cases in separate districts in hopes of convincing the Panel to consolidate them into an MDL. If new rules favored defendants, then you might expect defendants to seek consolidation in order to obtain undeserved benefits, while plaintiffs would oppose even justified consolidation in order to avoid MDL-specific rules.<sup>165</sup> No matter which side is favored, horizontal equity would be disrupted, and opportunities for abuse would increase.

Meanwhile, some critics have argued that defendants “collude” with plaintiffs’ attorneys in MDL settlements to the detriment of plaintiffs themselves.<sup>166</sup> If new rules facilitated these settlements, then we should expect defendants and plaintiffs’ attorneys to collude in hopes of convincing the JPML to consoli-

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<sup>163</sup> Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1041 (2016) (“A procedural system created by and for the one percent is not problematic simply because it is a one percent product. It is problematic because it underestimates, and perhaps even undervalues, other types of litigation.”). Coleman is not the only person to have lodged this critique. See, e.g., Burbank, *supra* note 20, at 1465 (“Recent amendments to the Federal Rules of Civil Procedure have been the subject of criticism on the ground that they provided responses to problems arising chiefly or exclusively in complex cases . . . . [T]he fact that complex litigation has brought to light serious problems may make us less critical than we ought to be about the effects of proposed reforms in other types of cases.”).

<sup>164</sup> Forum shopping is not necessarily problematic. See *Atlantic Star v. Bonas Spes* [1974] AC 436 at 471 (Eng.) (“‘Forum-shopping’ is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.”); see also Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 628 (2016) (identifying misconceptions about forum shopping in transnational litigation). But, at a minimum, forum shopping may suggest additional scrutiny.

<sup>165</sup> This appears to have been the goal of plaintiffs in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), who structured their state court suit in order to avoid removal and likely consolidation in an MDL.

<sup>166</sup> See, e.g., L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 158–61 (2004) (arguing that because of lack of judicial oversight and weak attorney-client relationships, mass-tort claim plaintiff attorneys may settle for less than they should); Mullenix, *Dubious Doctrines*, *supra* note 124.

date cases even when not otherwise justified. This, too, should be avoided when possible.

Specialized MDL rules also would put the Panel between a rock and a hard place. In some cases, the Panel would face the difficult choice between consolidating cases to achieve efficiency gains despite mismatched procedures, versus rejecting justified consolidation because the application of special rules would be unfair. Neither resolution is ideal, and forcing this choice will unnecessarily increase the stakes of the consolidation decision.

At the same time, specialized MDL rules interface with the alleged “repeat player problem” among attorneys.<sup>167</sup> One could imagine two types of repeat players—those with expertise in a substantive area (e.g., mass torts) and those with expertise in MDL as a process. Margaret Williams and colleagues found that the “most active repeat players” are the subject-matter specialists,<sup>168</sup> and it makes sense that lawyers might specialize in mass torts or antitrust. But there seems to be little logic in concentrating MDL work, regardless of topic, among a small group of lawyers. Yet if MDL had its own procedures, then we should expect a shift toward more MDL specialists. Indeed, when I asked one district judge about proposals for MDL-specific rules, the judge lamented that such rules “would make MDL a specialized bar.”<sup>169</sup>

In sum, therefore, MDL-specific reforms should be rejected as an unfortunate consequence of the MDL categorization error. It is one thing for scholars to use MDL as a proxy. Research often requires simplifying assumptions, and as long as they are made explicit, they are a hazard of the job. But that should not be license for legislators or rule-makers to use the same crude proxies in their proposed statutes or rules.<sup>170</sup> And, again, drift toward MDL-specific rules risks a dynamic effect that exacerbates existing problems and creates new ones that were not there before.

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<sup>167</sup> See, e.g., Burch, *supra* note 11; Williams, Lee & Borden, *supra* note 95. Even if one does not believe that there is currently a repeat-player problem, the creation of an MDL-specific bar might be one.

<sup>168</sup> Williams, Lee & Borden, *supra* note 95, at 157.

<sup>169</sup> Judge interview is on file with author. One could imagine a similar trend among MDL judges, which would roll back recent gains in expanding the MDL judge pool. See Clopton & Bradt, *supra* note 24.

<sup>170</sup> To the extent that scholarly works are being used to support those efforts, academics should speak up about their assumptions. See, e.g., *Rules 4 MDLs*, *supra* note 35 (citing scholarly work in this way).

Perhaps extremely large or important cases, or cases addressing certain issues, require special rules. Congress apparently thought so when it adopted the Private Securities Litigation Reform Act, the Class Action Fairness Act, the Fair Labor Standards Act, and others.<sup>171</sup> But MDL is the wrong category.

#### IV

##### FOCUS ON CONSOLIDATION AND ASSIGNMENT

MDL-specific rules should be rejected because MDL is not a coherent category for case-management purposes. But that does not mean that MDLs have nothing in common. All MDLs have a common origin. All MDLs arise from the JPML's exercise of its nearly unconstrained authority to consolidate cases and assign them to any federal district judge in the country.<sup>172</sup>

This core aspect of MDL has received relatively little attention. None of the proposed rule changes or statutory amendments addressed the JPML's role.<sup>173</sup> Other than an occasional jab at the Panel for selecting the same judges as transferees, scholars rarely have focused on the Panel's consolidation and assignment decisions.<sup>174</sup> Formal consolidation orders contain little more than a few bromides, though I presume that Panel members take their roles seriously.<sup>175</sup> Especially in an era when delegations are questioned and judicial behavior is scrutinized, it is somewhat surprising that there has not been sustained attention on MDL's institutional design.<sup>176</sup>

This Part begins that task. The first step is to identify the stakes. Because what distinguishes MDL is not what happens inside the consolidated proceeding but how cases get there, we can focus our attention on the creation of an MDL.<sup>177</sup> When

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<sup>171</sup> 15 U.S.C. § 78u-4 (2018) (PSLRA); 29 U.S.C. §§ 201-219 (2018) (FLSA); Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (CAFA).

<sup>172</sup> See *supra* subpart I.A (describing the features of the MDL statute). Analogously, as noted *supra* note 154, all class actions have a common origin in the certification proceed. And, indeed, the Federal Rules treat class actions primarily by focusing on the certification process. See FED. R. CIV. P. 23.

<sup>173</sup> See *supra* subpart I.C (collecting proposals).

<sup>174</sup> See *supra* subpart I.B (collecting sources). See also *infra* note 220 and accompanying text.

<sup>175</sup> See Williams & George, *supra* note 24 (collecting and coding justifications in JPML orders).

<sup>176</sup> For a notable exception with both doctrinal and normative insights, see 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 6:39-52 (5th ed. 2019).

<sup>177</sup> Notably, some critics find MDL's "internal" problems so severe that they oppose consolidation in the first instance. See, e.g., Redish & Karaba, *supra* note 7, at 113-15 (arguing that MDL itself is unconstitutional). While there might be

the JPML decides to consolidate cases and assign them to a transferee judge, MDL departs from normal federal litigation in at least three ways:

- First, because the MDL statute applies only when cases are filed in more than one federal district, a decision to consolidate necessarily overrides plaintiff venue choice in some or all cases in an MDL.
- Second, because the transfer decision is not constrained by the rules of personal jurisdiction or venue, MDLs of all sizes may involve the suspension of the traditional protections for defendants that those doctrines provide.
- Third, when the Panel selects a judge to handle an MDL, it abandons the typical mode of judicial assignment, i.e., random assignment within a district.<sup>178</sup>

One can debate how highly the system should value these features—or whether they should be valued at all. But these background principles describe federal litigation in the normal course, so it seems reasonable to demand some justification for setting them aside in only a subset of cases. Or, to put it another way, departures from the normal course should be the product of open and transparent decision making about the values of aggregation litigation. This Part hopes to begin that conversation.

To that end, this Part considers the Panel's initial decision to consolidate cases as well as its follow-on choices of transferee districts and judges. It then concludes with a brief comment on related questions of institutional design.

### A. Consolidating Cases

Even if this Article is successful in opposing MDL-specific procedure, the JPML's decision to consolidate is still meaningful because it may result in a departure from the background rules that limit the forums in which cases may be adjudicated as well as the background rules that determine who chooses among acceptable forums. Because these departures are

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merit to this prophylactic approach, I assume that MDL will persist for at least the near future. And as this Article suggests, my own view is that the problems identified by critics are not universal to MDL. That said, the taxonomic work of this Part also might be useful for those focused on "internal" objections. See *infra* notes 179, 184, 187 (applying this Part's approach to the "internal" critique).

<sup>178</sup> Professor Levy has demonstrated that not all federal case assignments are in fact random, but many still are, and randomness remains the norm. See Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 9–11 (2015); Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 71–72 (2017).

meaningful, the Panel should exercise its power to consolidate cases judiciously.

Beyond urging Panel judiciousness, it might be useful to think about circumstances when departing from default rules would be more or less justified. For some of the same reasons that large MDLs are not representative of MDL overall, large MDLs may be the easiest cases to justify departures from rules of jurisdiction and venue.<sup>179</sup> MDL consolidation is centrally justified by efficiency. The efficiency gains are greater when dealing with thousands of cases than with just a few. The risks of waste and inconsistent judgments increase with the number of cases. And informal coordination across cases becomes more difficult the more parties and courts in play.<sup>180</sup>

These arguments supporting consolidation in mega-cases resonate with both the history of the MDL statute and recent scholarly commentary. Historically, MDL was thought of as a response to a perceived “litigation explosion.”<sup>181</sup> This history supports a bigger role for MDL when litigation is exploding—that is, in the mega-cases. In addition, though I chided scholars for overemphasizing the mega-MDLs, they are right that these cases present different considerations. For example, Abbe Gluck explained that the defining characteristic of MDLs (which I take to mean of large MDLs) is the “claim-narrowing and information-gathering process required in each case to sufficiently educate each side before settlement can occur.”<sup>182</sup> While I do not agree that these features justify MDL-specific rules, they are consistent with a notion that consolidation is more justified when the claim-narrowing and information-gathering processes are more extensive—again, in the mega-cases.

The inverse of this suggestion is that when the Panel faces requests to consolidate smaller numbers of cases, it should be

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<sup>179</sup> This suggestion also coheres with the literature recognizing the particular problem that mass tort cases pose under current jurisdictional doctrine. See, e.g., Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917, 957 (1995).

<sup>180</sup> To repeat a point made *supra* note 177, these arguments are “external” to MDL procedure. To be sure, one might object to what happens “internal” to an MDL, but that is not my focus here. It is noteworthy, though, that the internal objections to MDL are also likely the strongest in the mega-cases. To my mind, that makes it even more important that scholars continue to think about appropriate procedures for the types of large-scale disputes that are likely to be consolidated—whether in an MDL or otherwise. Cf. Issacharoff & Witt, *supra* note 131 (discussing the “inevitability” of mass tort aggregation).

<sup>181</sup> See, e.g., Bradt, *supra* note 21.

<sup>182</sup> Gluck, *supra* note 13, at 1690.

less willing to depart from default rules of jurisdiction and venue.<sup>183</sup> The benefits of consolidation are likely lower when dealing with a small number of cases.<sup>184</sup> The need for the JPML to facilitate those benefits is also reduced: parties themselves can informally coordinate across proceedings, or they could employ contractual solutions such as post-dispute forum-selection agreements to bring cases into a single court.<sup>185</sup>

Because smaller MDLs have been absent from the MDL narratives, I worry that the Panel has gotten a free pass on this issue. Although I would not require some minimum number of cases to permit consolidation, I would urge the Panel to be particularly cautious of consolidating small numbers of cases—and to be particularly protective of plaintiff venue choice and personal jurisdiction values when they do.<sup>186</sup> (I have more to say about this latter point below.)

Even when the number of cases in a proposed MDL is small, the balance may tip back toward consolidation when the cases to be consolidated are class actions.<sup>187</sup> Class actions

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<sup>183</sup> *In re MyKey Tech. Inc. Patent Litig.*, 961 F. Supp. 2d 1358, 1359 (J.P.M.L. 2013) and *In re Pilot Flying J Fuel Rebate Contract Litig.* (No. II), 11 F. Supp. 3d 1351, 1351–52 (J.P.M.L. 2014), described *supra* subpart II.C, might fit the bill.

<sup>184</sup> On the other hand, for those concerned with the “internal” procedures of MDL, these cases present fewer (if any) problems. Because of the small number of parties and cases, courts rarely reach for the “ad hoc” procedures that characterize the MDL narratives. So, for critics that seek to regulate MDL in order to respond to the “internal” problems, the taxonomy suggested in this Section is still applicable, except that the conclusion is reversed—small MDLs present few internal concerns, while large MDLs present significant internal problems. See *supra* note 177.

<sup>185</sup> If a defendant achieved substantial economies of scale from litigating multiple cases in a single court, then the defendant might use some of its surplus to compensate plaintiffs for giving up their venue preference. Although there has been much consternation in the literature about pre-dispute procedural contracting (e.g., agreements to arbitrate), I have long thought that there were untapped opportunities for post-dispute contracting between represented parties. See Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387, 1414–20 (2015) (proposing a contractual solution to the purported preclusion problem in international class actions).

<sup>186</sup> To put it another way, one of the reasons to worry about unjustified consolidation is that—even if courts applied the same procedures to MDLs and non-MDLs—it empowers the JPML to select a district and judge for no good reason. See *infra* subparts IV.B-C.

<sup>187</sup> These cases also present relatively few “internal” problems, see *supra* note 177, and they include the “internal” protections of class action procedure. See Mullenix, *Aggregate Litigation*, *supra* note 1, at 551 (objecting to non-class aggregate settlements because, in those cases, “[t]he carefully articulated due process protections embedded in decades of class action jurisprudence . . . have been jettisoned”). Therefore, these consolidated class actions might be the best cases for MDL consolidation. See *supra* note 177.

already depart from the ideal of the individual day in court.<sup>188</sup> The named plaintiffs' venue preferences may be less significant when they are suing on behalf of others.<sup>189</sup> And the ability to combine overlapping classes into a single class for disposition is an obvious benefit of MDL in these cases. It is also arguable that when Congress adopted the Class Action Fairness Act (CAFA),<sup>190</sup> it expressed a preference for diminishing plaintiff venue choice in at least some of the largest class actions.<sup>191</sup> With or without CAFA, the nature of class litigation suggests that we might be less concerned about protecting any one plaintiff's venue choice in a class action suit. And the need for such a vehicle may be more pressing if courts extend the *Bristol Myers Squibb* decision to class actions.<sup>192</sup>

The foregoing discussion of consolidation was not meant to be exhaustive. Any number of other considerations may affect the propriety of consolidating cases (and thus affect the propriety of departing from the background rules of jurisdiction and venue).<sup>193</sup> Nor do I mean to suggest that the Panel is not en-

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<sup>188</sup> See, e.g., Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 653 (2014) (explaining the "external view" of class actions, which is concerned with trying to ensure a class litigant's right to their day in court); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918 (1998) ("[T]he class as entity should prevail over more individually oriented notions of aggregate litigation.").

<sup>189</sup> See generally Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597 (1987) (contrasting representative- and joinder-type class actions).

<sup>190</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (requiring only minimal diversity for putative class actions of at least 100 plaintiffs and seeking at least \$5 million).

<sup>191</sup> See, e.g., James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1444-45 (2007) (connecting CAFA to concerns with forum shopping into state courts); Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1883 (2017) (explaining that CAFA allows defendants to opt for federal forums in large state-law class actions). I prefer to read CAFA as expressing a vertical preference for federal courts rather than any horizontal preference among federal courts. But even that reading suggests that CAFA identified a category of cases (large class actions) that merits special attention. One could make a similar argument for mass-accident cases that qualify for the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA). See 28 U.S.C. §§ 1369, 1441(e) (2018).

<sup>192</sup> See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781-82 (2017) (mass action case). See generally Bradt & Rave, *supra* note 36.

<sup>193</sup> For example, I contend that the Panel should be reluctant to consolidate highly partisan cases. See Bradt & Clopton, *supra* note 37, at 925 n.120. Although cases such as the Travel Ban litigation seemingly satisfied the requirements of Section 1407, and although it seemed as if consolidation might have been in the interest of the federal defendants, the problem with consolidation is that it would require the Panel to select a particular judge to handle these cases. Any such choice would be immediately viewed through a partisan lens. The result could be problematic for the consolidated cases, and it might risk further politiciz-

gaged in a meaningful screening process.<sup>194</sup> From fiscal years 2012 through 2018, the Panel denied 212 motions for consolidation (including at least 34 including products or disaster claims), and another 99 motions were mooted, withdrawn, or otherwise disposed of.<sup>195</sup>

The main point here is that these choices are consequential, and therefore that they merit further attention descriptively and normatively. And, consistent with earlier themes, these choices become even more consequential to the extent that MDLs are governed by different rules than other federal civil cases.<sup>196</sup>

## B. Choosing Districts and Judges

Once the Panel has decided to consolidate cases, it must assign the MDL to a district and a judge. These choices also implicate the interests protected by plaintiff's venue preference and defendant personal jurisdiction, as well as the background principle of random judicial selection. As a result, these choices may have profound effects on cases and parties.

First, the JPML assigns each MDL to a federal district.<sup>197</sup> Many such choices will be consensual or uncontroversial, but

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ing the JPML. *See id.* An alternative solution to this problem (suggested below) would be for the Panel to adopt *random* assignment for these MDLs. *See infra* subpart IV.B.

<sup>194</sup> For most of the Panel's history, the grant rate was around 70-80%. *See Williams & George, supra* note 24, at 433 fig.1. From 2012 to 2017, the grant rate dropped to 57%. *See Clopton & Bradt, supra* note 24, at 1724. This does not necessarily mean the JPML tightened its standard, as the pool of cases could have changed. But it suggests, at a minimum, that the JPML is not rubber-stamping motions to consolidate.

<sup>195</sup> These results were compiled relying on reports made available by the JPML and searches of Westlaw and Bloomberg. *See, e.g.,* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DOCKET TYPE SUMMARY 1-4 (2019), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDLS\\_%20by\\_Type-October-15-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDLS_%20by_Type-October-15-2019.pdf) [<https://perma.cc/5Y5C-F6VM>] (listing multidistrict litigation cases transferred and currently pending). Doing my best to approximate the JPML's categorization, the denied motions were 14 antitrust, 8 contract, 2 disaster, 17 employment, 13 patent, 27 products liability, 36 sales practice, 8 securities, and 109 miscellaneous.

<sup>196</sup> Even if proposed amendments to the Federal Rules are rejected, these cases would still be treated differently if judges uncritically applied mega-case insights to small MDLs, as I worry that some of the literature and training programs might suggest. *See supra* notes 5-15 and accompanying text.

<sup>197</sup> Sometimes the parties agree on consolidation but disagree about where to consolidate. *See Clopton & Bradt, supra* note 24, at 1716 n.10. These examples of "elective" consolidation respond to some criticisms of MDL, *see Redish & Karaba, supra* note 7, at 110-12, but still call out for attention on JPML behavior.

not always.<sup>198</sup> If it appeared that plaintiffs were attempting to use MDL to skirt the rules of personal jurisdiction,<sup>199</sup> then the Panel might want to select only among districts in which personal jurisdiction could have been obtained.<sup>200</sup> If the benefits of consolidation are low (such as in some of the smaller MDLs), then the Panel might be reluctant to disrupt plaintiff venue choice. In this vein, it is noteworthy that not only does MDL abandon some plaintiffs' initial venue preference, but also I have found that plaintiffs do no better than defendants in securing their preferred venues in the JPML,<sup>201</sup> which is a far cry from the *presumption* of plaintiff venue choice in the normal course.<sup>202</sup> This finding held even for the smaller MDLs, which again may present weaker cases for consolidation.<sup>203</sup>

There also may be cases in which certain districts look particularly inappropriate in light of plaintiffs' venue preference or personal jurisdiction values. In those cases, we might object to particular districts even if consolidation were justified. (If all districts looked inappropriate, then perhaps the Panel should reassess whether to consolidate the cases at all.) One option for evaluating districts would be the "reasonableness" prong of personal jurisdiction law. Separate from "minimum contacts," reasonableness analysis includes considerations of the burden on the defendant, the interests of the plaintiff, and

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<sup>198</sup> For example, the choice of district may be directly consequential for issues of federal law, if the assignment decision changes the applicable circuit law. See *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987); Jeffrey L. Rensberger, *The Metasplit: The Law Applied after Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 848–50, 859–62 (collecting cases applying transferee- and transferor-circuit law).

<sup>199</sup> I have found a few examples of the Panel rejecting consolidation as an attempt to circumvent personal jurisdiction law, see, e.g., *In re Klein Litig.*, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013); *In re Highway Accident near Rockville, Conn.*, on Dec. 30, 1972, 388 F. Supp. 574, 576 (JPML 1975); *In re Truck Accident near Alamogordo, N.M.*, on June 18, 1969, 387 F. Supp. 732, 734 (J.P.M.L. 1975), though it is much more common for the Panel to remind litigants that it is not constrained by personal jurisdiction when selecting districts.

<sup>200</sup> A related suggestion would be that the Panel should be wary of transferring a case to a district other than one identified in a binding forum selection agreement. Such a case would not technically cause a problem under personal jurisdiction or venue law, but such a dramatic change from party expectations might deserve enhanced scrutiny. See Bock, *supra* note 36, at 1658–61 (discussing forum selection clauses and MDL).

<sup>201</sup> See Clopton & Bradt, *supra* note 24, at 1716–17; see also *supra* subpart II.B.

<sup>202</sup> See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (“[T]here is ordinarily a strong presumption in favor of the plaintiff’s choice of forum . . . .”); see also Clopton & Bradt, *supra* note 24, at 1731–32 (comparing the MDL results to other horizontal disruptions of plaintiff venue choice).

<sup>203</sup> See Clopton & Bradt, *supra* note 24, at 1733; see also *supra* subpart II.B.

the interests of the forum.<sup>204</sup> Translating these concepts to MDL, perhaps the JPML might avoid consolidation in districts that would be “unreasonable” to any party (plaintiff or defendant) that did not consent to the transferee forum.<sup>205</sup> And perhaps the reasonableness analysis will play out differently in mega-cases than smaller ones.<sup>206</sup>

Second, while typical federal cases are randomly assigned to a judge within the district, the JPML identifies by name the judge who will handle an MDL. There is little doubt that the Panel thinks about particular judges when assigning cases.<sup>207</sup> This nonrandom assignment is perhaps the most distinctive feature of MDL procedure, and perhaps the most consequential—though it is rarely the subject of MDL commentary.<sup>208</sup>

Because every MDL involves the nonrandom selection of a transferee judge by the seven-member Panel, the task of select-

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<sup>204</sup> See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting these considerations along with the interstate judicial system’s interest and the interest in substantive social policies). See generally 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* §§ 1067-1069.8 (4th ed. 2019) (providing background on personal jurisdiction law). Personal jurisdiction reasonableness is not an excessively difficult test to satisfy, yet it does provide a check in the most exorbitant cases. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (holding that mere foreseeability or awareness that a good was in the “stream of commerce” is insufficient to establish personal jurisdiction reasonableness). And although personal jurisdiction law does not typically apply to plaintiffs, its principles could guide the choice among federal courts once the Panel has decided to consolidate cases. Cf. Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1464–65 (2019) (arguing the plaintiff’s rights should be considered when the defendant has moved to transfer the case to a new venue).

<sup>205</sup> This suggestion is consistent with calls to recenter personal jurisdiction on the due process interests of parties, rather than on notions of federalism that are absent from other aspects of due process. See, e.g., Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113–14 (1981) (arguing that, under the due process clause, the Supreme Court should not be able to limit a state’s ability to exercise personal jurisdiction over a defendant if the defendant will not suffer harm as a result). Indeed, federalism concerns seem especially weak in federal MDL.

<sup>206</sup> This result would follow from the reasonable analysis’s consideration of plaintiff interest, defendant interest, and forum interest. See *supra* note 204 and accompanying text.

<sup>207</sup> See, e.g., Williams & George, *supra* note 24, at 445 (“The MDL Panel’s choice of a district is frequently justified based on the location of the judge to whom they want to assign the matters (44.7 percent of all orders).”).

<sup>208</sup> See, e.g., *id.* at 440 (commenting and collecting sources); Clopton & Bradt, *supra* note 24, at 1738–39 (same). Practitioners, though, are well aware that MDL assignment is “not so much a where question, but a who question.” See Audio tape: MDL Problems, Proceedings of the Section on Litigation, Annual Meeting of the American Association of Law Schools (Jan. 6, 2017) (statement of Elizabeth Cabraser) (recording on file with the American Association of Law Schools).

ing Panel membership is highly significant.<sup>209</sup> Currently that task is delegated exclusively to the Chief Justice of the United States, but this practice could be changed.<sup>210</sup> At a minimum, it would be a mistake to let the Chief's choices for Panel membership go unstudied.

The Panel's power to select transferee judges for particular cases also calls for an open discussion of what we value in MDL judges—which is far from obvious, and to date has been under-addressed. Consistent with earlier comments, this Article suggests that any such discussion should acknowledge the variation among MDLs. We might like the nonrandom selection of experienced judges for extremely complex disputes, but chafe at the Panel meddling in many other cases.<sup>211</sup>

In that light, it is not obvious that nonrandom selection is necessary to MDL, or at least to all MDLs. Even if we thought it was important to select certain types of judges for unusual cases, the Panel could randomize its choice of transferee judge when an MDL presented no special demands—such as in the small MDLs described above. The JPML is currently employed to *randomly assign* a small class of consolidated administrative-law cases,<sup>212</sup> and Bradt and I suggested that it might be asked to randomly assign “national injunction”-type cases against the federal government.<sup>213</sup> Without any change in law,

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<sup>209</sup> For one example, from 2012 to 2016, the Panel had roughly equal representation of men and women but was 100% white. This Panel increased the proportion of women serving as first-time MDL judges (relative to district judges overall) but made no such gains on racial representation. See Clopton & Bradt, *supra* note 24, at 28. Though we cannot establish a causal link, it is at least plausible that Panel membership had a trickle-down effect on the selection of transferee judges.

<sup>210</sup> See, e.g., James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1128 (2013) (arguing that the Constitution and historical record reveal a preference against vesting such power in the Chief Justice); Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1585–86 (2006) (same); Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 388–89 (2004) (proposing alternative methods for appointments of judges to special panels).

<sup>211</sup> At the same time, we also should not assume that all MDL diversity is created equal. If transferee-judge diversity were a goal, then we might want to look at transferee-judge diversity in different classes of MDLs. See Clopton & Bradt, *supra* note 24, at 1744.

<sup>212</sup> See 28 U.S.C. § 2112(a)(3) (2018); see also Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1466–67 (2010) (explaining the statute's origins and function).

<sup>213</sup> See Bradt & Clopton, *supra* note 37, at 925 n.120. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–65 (2017) (describing the effect of national injunction cases and why

the Panel could adopt a norm of randomization when there is no compelling reason to select a particular judge. But as long as nonrandom assignment remains part of MDL practice, it will remain a part of MDL practice that deserves attention.

### C. Reforming MDL

Finally, it is worth returning for a moment to the topic of MDL reform. This Article rejected efforts at MDL reform premised on the MDL categorization error. But because MDL is a meaningful category with respect to consolidation and assignment, these decisions could be sites for MDL reform efforts.

As this Part has implied, hard and fast rules about consolidation and assignment are likely ill-advised.<sup>214</sup> This is an area in which standards seem preferred, and I suggested above some standards that the Panel might adopt on its own.

Rather than focusing on new standards (or new rules), it may be more productive to focus on the institutional environment within which the Panel applies those legal principles. As long as we retain an option for interdistrict consolidation, then some process must be employed to administer consolidation and assignment. I chose the word “administer” intentionally to invoke the analogy to administrative law. Administrative law is not just a system of delegations, but a system of delegations that is deeply connected to modes of procedural regularity and external review.<sup>215</sup>

The JPML has its own system of rules,<sup>216</sup> but its decisions are not subject to meaningful review individually or collectively. Individually, as Williams and George pithily put it, “The Panel’s decision on whether, where, and to whom to transfer [cases] is effectively unreviewable and has never been overturned.”<sup>217</sup>

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they should be limited), *with* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (defending the practice). Our main argument, though, was that the JPML should stay out of highly partisan cases.

<sup>214</sup> See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155–58 (tent. ed. 1958) (explaining the choice between rules and standards).

<sup>215</sup> See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 500–596 (2018); Congressional Review Act, 5 U.S.C. § 801 (2018). See also Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1206 (2012) (analogizing the Federal Rules to administrative law).

<sup>216</sup> See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. R. P.; see also 28 U.S.C. § 1407(f) (2018) (“The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.”).

<sup>217</sup> Williams & George, *supra* note 24, at 427. As noted *supra* note 29, review of JPML decisions (when permitted) occurs in the appellate court for the transferor court prior to consolidation and in the appellate court for the transferee

Perhaps this should change. Collectively, Congress has not held a single hearing on the JPML or MDL since the MDL statute was adopted fifty years ago.<sup>218</sup> This, too, need not be the case. And as suggested above, the Chief Justice's administration of the Panel itself also could be the subject of further scrutiny.<sup>219</sup>

In part, this Article's discussion of JPML decision making is intended to contribute to efforts at JPML oversight. There is reason to believe that public scrutiny in this area might have an effect. The JPML has made strides in transferee-judge diversity following academic attention on the issue,<sup>220</sup> and transparency-enhancing reforms in the federal rulemaking process grew out of scholarly criticism of the Advisory Committee.<sup>221</sup> Merely shifting the MDL narrative toward consolidation and assignment, therefore, might have consequences for Panel decisions going forward. And, again, my hope is that this shift in attention can lead to further thinking about the design of MDL institutions.

#### CONCLUSION

MDL dominates the federal civil docket, at least by the numbers. And MDL is becoming more central to the academic study of federal courts and to the efforts of reformers to regulate federal civil litigation. But MDL is not one thing—at least it is not the one thing that the conventional wisdom suggests.

MDL is not a category of massive, unwieldy, and publicly significant cases. So while some special rules for massive, unwieldy, and publicly significant cases might be a good idea, applying these special rules uncritically to all MDLs would be an error.

MDL is a highly consequential mechanism to consolidate cases and assign them to particular federal district judges. So it also would be an error to let misleading MDL narratives distract us from this defining feature of the MDL category.

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court after consolidation. Even unsuccessful challenges could affect JPML behavior or generate useful conversation.

<sup>218</sup> See *supra* note 68.

<sup>219</sup> See *supra* note 210 and accompanying text.

<sup>220</sup> See Clopton & Bradt, *supra* note 24, at 17238 n.53 (suggesting that the Panel may have read the results of Williams & George, *supra* note 24).

<sup>221</sup> See Clopton, *supra* note 89, at 2–4 (discussing these efforts).