# COMMENT

# DATA VERSUS MORE DATA IN MULTIDISTRICT LITIGATION

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*Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* presents the results of a study that no one wanted us to do—or help us to do. Professors Lynn Baker and Andrew Bradt would prefer to dismiss as "anecdote" our two-year effort to find and gain the trust of multidistrict litigation (MDL) plaintiffs whose attorneys told them not to discuss their case with anyone, including us.[1]

Baker and Bradt raise two primary criticisms: that Dr. Margaret Williams and I have too small a sample and that the participants we do have are biased. We acknowledge both sample size and selection bias as potential limitations in the article.[2] And yet, it is noteworthy that our 217 plaintiffs lived in 42 different states and had diverse backgrounds, educations, and races. Their cases originated in 32 different state and federal courts, and 295 lawyers from 145 law firms represented them.

Other noteworthy studies have included a similar number of participants yet have much to say about procedural justice. For her book, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties*, Tamara Relis's spoke with only 17 plaintiffs.[3] Professor Gillian Hadfield had 155 usable survey responses for her work on the 9/11 Victim Compensation Fund.[4] And perhaps most famously, *The Perception of Justice*, a RAND study by noted scholars Allan Lind, Robert MacCoun, Patricia Ebener, William Felstinger,

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1 Lynn A. Baker & Andrew Bradt, *Anecdotes versus Data in the Search for Truth About Multidistrict Litigation*, 107 CORNELL L. REV. ONLINE 249 (2023).

2 Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1857–64 (2022).

3 TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 27 (2009).

4 Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 651(2008).

Deborah Hensler, Judith Resnik, and Tom Tyler included 286 litigants from three counties in three states.[5]

Nor should there be a concern that a majority of our respondents were plaintiffs in a pelvic mesh MDL. Research demonstrates that most products-liability MDLs (the pelvic-mesh proceedings included) involve the same repeat-player attorneys, settlement provisions, and judicial techniques.[6] Those similarities allowed us to keep the sample size manageable without sacrificing generalizability.

If the size of our study is comparable to others, what about selection bias? We could not, of course, control what others said about our study, though Bradt and Baker make much of this. We aimed to reach a diverse cross-section of plaintiffs not only by posting in social media and publicizing the survey through articles in *The New York Times*, *Reuters*, *Law.com*, and *The Daily Report*, but also by going directly to the source. We contacted 42 plaintiffs' attorneys (some from each proceeding) as well as special masters like Lynn Baker.

We hoped that they would help us disseminate the study to the thousands of plaintiffs they worked with. They didn't. Most never responded at all. One, however, was candid. After he checked with the other lawyers in the firm he headed, he said,

> [T]hey do not want to give up a list of the NuvaRing clients (more then 500). The settlement was a disaster, coming after the cases were dismissed, so there was very little $ available per client for a lot of women. So they all expressed their unhappiness to us. Your [questions] will only stir up their anger again, which is in part directed toward the lawyer.[7]

The least surprising aspect of our findings was that plaintiffs were unhappy with the procedural opportunities

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5 E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES viii (1989).

6 *E.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 99–128 (2019); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2152–66, 2171–82 (2020); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1445, 1469–1516 (2017); Nora Freeman Engstrom & Amos Espeland, Lone Pine *Orders: A Critical Examination and Empirical Analysis*, 168 PENN. L. REV. 91, 104 (2020); Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 55 GA. L. REV. 221, 249–62 (2020).

7 Email from [redacted] to Elizabeth Burch (March 12, 2019 at 11:03 AM).

MDL affords them. There are decades worth of procedural-justice studies demonstrating that people want their attorneys to be involved with them and their case, expedient resolution and adversarial process before a neutral decisionmaker, and control over the process through opportunities to participate, present evidence, and tell their story.[8] These components form the cornerstone of fair process everywhere: in the workplace,[9] during police encounters,[10] in alternative dispute resolution,[11] and, of course, in court.[12] But these hallmark features are often lacking in MDL, which focuses on efficiency.

Nevertheless, Baker and Bradt take issue with the primary finding that plaintiffs in MDL may not be happy about the process. In so doing, they assume that typical MDL plaintiffs are satisfied. But they provide no evidence to support their assumption. And they don't want their assumption tested because, as they say, the results could be fodder for the defense bar.

Academics should not avoid asking questions or studying issues because they fear how their results might be used. Unlike our critics, neither Dr. Williams nor I consult for plaintiffs or defendants (or anyone else for that matter).[13] If

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8 Burch & Williams, *supra* note 2, 1848–50.

9 Joel Brockner & Batia M. Wiesenfeld, *Organizational Justice Is Alive and Well and Living Elsewhere (But Not Too Far Away)*, *in* SOCIAL PSYCHOLOGY AND JUSTICE 213 (E. Allan Lind, ed. 2019); Russell S. Cropanzano, Maureen L. Ambrose & Phoenix Von Wagoner, *Organizational Justice and Workplace Emption*, *in* SOCIAL PSYCHOLOGY AND JUSTICE 243 (E. Allan Lind, ed. 2019); Robert Folger & Mary A. Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 128 (1989).

10 Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2149 (2017); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534 (2003); Tom R. Tyler, *Procedural Justice and Policing*, *in* SOCIAL PSYCHOLOGY AND JUSTICE 134 (E. Allan Lind, ed. 2020).

11 E. Allan Lind et al, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235-36 (1993); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993).

12 *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104–06 (rev. ed. 2006).

13 *E.g.*, Transcript of Status Conference at 9, *In re* NuvaRing Prods. Liab. Litig., No. 08-MD-01964 (E.D. Mo. Oct. 23, 2014) (noting that plaintiffs' counsel hired Lynn Baker and that her outstanding fees were $115,000); Declaration of Andrew Bradt, Reply in Support of Motion for Preliminary Approval of Proposed Class Settlement, Appointment of Interim Class and Subclass Counsel, Direction of Notice Under Fed. R. Civ. P. 23(e), Scheduling of a Fairness Hearing, and Stay of the Filing and Prosecution of Roundup-Related Actions by Settlement Class Members, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Apr. 7, 2021), ECF No. 12911–5. Dr. Margaret Williams has never worked as an

small sample size and selection bias are truly Baker and Bradt's concerns, both could be addressed by extending the study with more data. But nowhere in their essay do they suggest that. Instead, they would prefer we not ask the question in the first place. We agree that "scholars are in the knowledge-creation business."[14] Creating knowledge means asking hard questions even if—*especially if*—others would rather you not.

outside consultant, and, with one exception as a class notice expert in 2009, neither has Professor Burch.

14 Baker & Bradt, *supra* note 1, at 251.