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Multidistrict Litigation and Common Law Procedure

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Summary

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

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Introduction

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

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

By contrast, my thesis is that it is a normal and longstanding feature of our system that procedural rules develop in an iterative, common-law like fashion. The application of even written rules is in fact quite malleable and these rules evolve in a common-law like way. The way MDL procedures are evolving is very consistent with our tradition, and it is difficult to imagine procedure evolving any other way in the federal courts. Scholars critical of MDL common law procedure recognize that discretion characterizes the rules of procedure as a general matter;[2] the difference between us is one of emphasis. But the emphasis matters, because the exceptional aspect of MDLs is not the procedural but the substantive issues they raise. The undue focus on MDLs as procedurally exceptional distracts from the more serious problems: the lack of a normative set of principles for what aggregate litigation is trying to achieve and the failure to adequately address what constitutes fair procedure geared to realizing the aims of the substantive law in context.

The argument that justice in MLDs cannot be done without a set of written rules that have been made through the rulemaking process is not consistent with the practices of American courts, both before and after the adoption of the Federal Rules of Civil Procedure in 1938. It is also ironic, as the MDL statute itself was codified in response to a procedure created to deal with what, at the time, seemed to be a one-off problem of large numbers of antitrust cases filed across the United States.[3] The MDL statute is rather open-textured, leaving significant wiggle room about such crucial questions as when the Judicial Panel on Multidistrict Litigation should transfer and consolidate cases, and when it would be preferable not to do so.[4]

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[1] 28 USC 1407. Indeed, there is a website devoted to this public campaign. See www.rules4mdls.com. The website says it is sponsored by "Lawyers for Civil Justice, a national coalition of defense trial lawyer organizations, law firms, and corporations[.]" It appears that most of the push for altering the civil rules comes from the defense bar. There is also a scholarly literature critiquing judicial discretion in MDL litigation. *See, e.g.,* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 NYU L Rev. 767 (2017) (arguing that MDL procedure-making challenges rule of law values); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669 (2017) (arguing that MDLs represent a kind of common law procedural rulemaking that differs from normal or orthodox procedure); David Noll, *MDL as Public Administration*, 118 Mich. L. Rev. 403 (2019) (arguing that MDL is like an administrative agency without the protections of the Administrative Procedure Act). The Civil Rules Committee is currently considering some proposals. *See* October 2019 Agenda Book, Advisory Committee on the Civil Rules at 35. Available at https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-2019.

[2] See Bookman & Noll, id at 785 (recognizing discretion in the federal rules.)

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

[4] The statute merely says that cases may be transferred when "civil actions involving one or more common questions of fact" are filed. 28 USC 1407(a).

A significant amount of the American procedural landscape is only partially rules-based, and also largely common law-like in its development. Indeed, the rules of procedure are more like guidelines, within which there is a significant amount of discretion.[5] The view that MDLs are unique in this respect is as mistaken as the view that the Federal Rules of Civil Procedure are "rules" in the sense of rules as opposed to standards.[6] Rather, as a general matter, the federal rules are "rules" in the sense that they are the directives that govern the operation of the federal courts.

Some of the federal rules are indeed rules. These include, for example, various time limitations that cannot be adjusted based on equitable considerations.[7] Other federal rules are more like standards. A good example of this is the standard for permitting a plaintiff to amend her complaint: "The court should freely give leave when justice so requires."[8] When there is significant discretion in the rules, as there is with many of them, the interpretation of *how* to exercise that discretion develops over time, and often inconsistently across districts and even individual judges.[9] A superstructure of sub-rules is built around the original standard through a process of judges interpreting the rule, and so it is difficult to understand the application of the rule merely by reading its text; one must consult the caselaw.[10]

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

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

[6] For analyses of rules versus standards, see generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); Kathleen M. Sullivan, *Foreword—The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 56–94 (1992); Cass R. Sunstein, *Problems with Rules*, 83 Calif. L. Rev. 953 (1995).

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

[8] *See, e.g.,* Fed. R. Civ. P. 15(a)(2)(stating the standard for granting a request to amend a complaint).

[9] *See generally* Bone, *Who Decides?, supra* note __ (critiquing the over-reliance on judicial discretion in the federal rules).

[10] The debate over the pleading standard articulated in Rule 8 is an example of this. *See, e.g.,* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1 (2009) Brooke D. Coleman, *What If?: A Study of Seminal Cases As If Decided Under A Twombly/Iqbal Regime*, 90 Or. L. Rev. 1147, 1148 (2012); Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?,* 69 Vand. L. Rev. 333 (2016). The invention of the doctrine of ascertainability in class actions is another such example. Read the class action rule; this requirement is nowhere to be found. Nor is it uniformly applied in the circuits. *See* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1127 (9th Cir.), *cert. denied sub nom.* ConAgra Brands, Inc. v. Briseno, 138 S. Ct. 313 (2017) (describing circuit split).

procedural rulemaking is consistent with the rule of law requirement that the rules be known in advance.

I conclude that the rules/no rules for MDLs dichotomy makes little sense. Judges use the extant rules and extrapolate from them to manage multidistrict litigation. They do this in binary litigation as well as in complex litigation. These practices may be codified and reinterpreted in an iterative process, but the process of rule-creation is really beside the point. The only thing that *should* matter is the normative question of what is a fair and equitable way to manage this type of litigation, which means both fairness to individual plaintiffs and to the defendants they are suing, and to do so in a way that is efficient from the perspective of the court system.[11] The debate about whether these rules will emanate from a committee or judicial experimentation is merely a distraction from these important questions.

1. MDL and Common Law Procedure

The Federal Rules of Civil Procedure were announced as a simple set of rules for resolving all civil litigation—from ordinary contact actions to complex antitrust litigation.[12] In order to make rules that were trans-substantive, the rules had to involve a fair amount of judicial discretion in their application.[13] "The soul of the Federal Rules, it might be said, is judicial discretion, and discretion may be the price for their (relative) simplicity."[14] Discretion creates variety. The combination of the availability of discretion in rule interpretation and operation, and the wealth of problems faced in particular types of litigation, is that rules will be applied differently in different context. "The existence of the rules and related statutes governing all cases creates the appearance of consistency across cases, although in fact the rules are not always applied consistently across or even within a given subject matter."[15]

One example of the observation that the rules appear uniform but are in fact discretionary and vary across subject matter in application is products liability cases

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

[12] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 937-46 (1987) (describing complaints about the technical rules embodied in the Field Code).

[13] *Id*. at 964 (describing Charles Clark's preference for permitting judicial discretion in rulemaking). For an example of the use of discretion in practice, see William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 386–410 (2001) (discussing the different ways courts interpret Rule 23 for securities as opposed to mass torts class actions, differences which are attributable to the subject matter and not to doctrinal requirements).

[14] Alexandra D. Lahav, *Procedural Design*, 71 Vand. L. Rev. 821, 861 (2018). The article cited describes at great length, and in a variety of subject areas, how the federal courts' application of the rules does not follow the prescribed order often taught in law schools and which might be called the "textbook" order of procedure.

[15] Id.

transferred to one court under the Multidistrict Litigation Act.[16] Judges overseeing these cases are faced with a challenging task. Sometimes the cases themselves are complicated. For example, an MDL made up of multiple antitrust class actions is complex because antitrust law is complex and the class action rule adds a further complication.[17] That type of case would be complex whether or not it was consolidated with other cases raising similar factual issues. Other times the complications stem from the fact that there are so many cases in a given MDL that processing them is the main challenge.[18] Since it is clear that the judge cannot determine each case individually as judges do with the rest of their docket, methods have to be found for processing large numbers of cases with slightly different claims, often under different state laws, with different groups of lawyers. Some cases combine both elements: complex and novel legal questions and many moving parts.[19]

In response to these challenges, judges have adopted a number of different procedures. For example, judges appoint a Plaintiff's Management Committee to run the litigation.[20] They will issue orders permitting or requiring master complaints and master discovery requests.[21] They will issue orders requiring disclosure of information in various forms, including for example plaintiff fact sheets or other disclosures.[22] And, on the back end, they will issue orders with respect to attorneys fees, including sometimes capping those fees.[23]

Let us consider in more detail orders requiring plaintiffs whose cases have been transferred to an MDL to disclose certain information as an example of common law procedure in action. We begin with the groundwork of what the Rules permit. The Federal Rules of Civil Procedure permit the parties to exchange information in the discovery process and even mandate some initial disclosures of information between the parties,[24] although it is not clear how often these initial disclosures are in fact provided.[25] Among other things, these rules permit a party to provide the opposing side with written

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[16] 28 USC 1407.
[17] *See, e.g.,* In re Interest Rate Swaps Antitrust Litigation, MDL-2704 (multidistrict litigation consisting of antitrust class actions).
[18] *See, e.g.,* In re Xarelto (Rivaroxaban) Products Liability Litigation, MDL-2592 (multidistrict litigation consisting of individual products liability cases).
[19] *See, e.g.,* In re National Prescription Opiate Litigation, MDL-2804 (multidistrict litigation consisting of claims by state subdivisions and tribes against opioid manufacturers, distributors and pharmacies, among others, including novel state law public nuisance claims).
[20] Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67 (2017) (describing the process of appointing plaintiffs management committees and critiquing it).
[21] Robert H. Klonoff, Federal Multdistrict Litigation in a Nutshell (forthcoming 2020).
[22] Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 Yale L.J. 2, 5 (2019) (describing *Lone Pine* orders: "Though they vary on the specifics, these case-management orders generally require each plaintiff swept into a mass-tort proceeding to supply prima facie evidence of injury, exposure, and causation--all by a set date, under penalty of dismissal.")
[23] Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 Fordham L. Rev. 1833, 1835 (2011)(describing judicial decisions cutting attorneys' fees in MDLs).
[24] *See* Fed. R. Civ. P. 26(a)(1) (initial disclosures); 30-31 (depositions); 33 (interrogatories); 34 (document production).
[25] *See* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 Vand. L. Rev. 2037 (2018) (lamenting lack of empirical information about discovery).

interrogatories to which the party must respond within thirty days.[26] The rule limits the number of interrogatories to 25 (including sub-parts) and therefore feels "rule-like."[27] But this is misleading because in fact the parties may stipulate to or the court may grant additional interrogatories.[28]

Indeed, the rule about interrogatories is a good example of the discretion imbedded within the Federal Rules of Procedure. While it may seem rule-like on the surface (only 25!), in fact this limit is merely a default rule. A particularly harsh judge may impose the 25 interrogatory limit, or even require fewer interrogatories. A judge who is more loose may permit many more interrogatories. There is no limit, except the mandate that governs all discovery, which is that it be relevant and that it be proportional to the needs of the case.[29] Indeed, the general discovery rule specifically gives the judge discretion to alter the number and time limits of the key discovery rules.[30] And of course the parties may simply stipulate to a larger or smaller number. If they do, it seems likely the judge will let their judgment govern the issue.

In MDLs, the order requiring a party to answer questions is called a few different things, depending on the timing and extent of the request. These orders might be called "riffs" on interrogatories. The truth is that the nomenclature is not very precise, and even the use of a given term may mean different things to different people in different contexts, but the basic idea is that the plaintiff must answer some questions about the case, and potentially produce some evidence to support their claims, requested by the defendant. Consider the *Lone Pine* order.[31] This is an order that requires the plaintiff provide some proof of their injury, and potentially of causation as well. It may come in the beginning of

[26] Fed. R. Civ. P. 33.
[27] Fed. R. Civ. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).")
[28] Id.
[29] Fed. R. Civ. P. 26(b)(1)("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").
[30] Fed. R. Civ. P. 26(b)(2)("[T]he court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.")
[31] For a detailed discussion see Engstrom, *supra* note __. *See also* Alexandra D. Lahav, *Procedural Design*, 71 Vand. L. Rev. 821, 841 (2018)(discussing *Lone Pine* orders)

the litigation.[32] Or it may be issued after the litigation has been ongoing many years, as a way to evaluate claims in consideration of settlement.[33]

In some of the most contentious and criticized cases, courts have required plaintiffs to prove specific causation through such initial disclosures or face dismissal.[34] Under the discovery rules such a penalty for non-compliance would be considered extreme.[35] And it has been criticized as inconsistent with the rest of the scheme of the federal rules, in particular both the motion to dismiss and the summary judgment rule.[36] After all, a motion to dismiss allows a case to be dismissed only if the plaintiff has failed to plausibly state a claim for relief.[37] It does not require a plaintiff to *prove* the claim at that early stage. The summary judgment rule similarly permits a level of briefing and evaluation (that there is no material fact in dispute) prior to issuing the judgment, at odds with an order that would permit the judge to rule against a party merely because they failed to comply with a disclosure order.[38] Scholars, lawyers and judges thinking about MDLs can refer to these other rules, and to the general coherence in rule interpretation because the general structure of the rules is still understood to apply in the MDL context.

Indeed, the worst excesses, such as court orders dismissing cases as a result of plaintiff's failure to provide evidence of specific causation early in the litigation, are few and far between.[39] It appears that the dominant approach at the start of the litigation is to use plaintiff fact sheets, which educate the parties and the judge about the landscape of the aggregation. Recently judges have proposed going one step further and conducting a "census" of the cases before them.[40] These practices bear a closer resemblance to interrogatories, although they may sometimes be overlong.[41] It appears from existing

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[32] Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 833 (9th Cir. 2011) (upholding Lone Pine order prior to discovery); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (upholding district court order requiring plaintiffs to submit prediscovery expert affidavits to establish certain elements of their claim); McManaway v. KBR, Inc., 265 F.R.D. 384, 389 (S.D. Ind. 2009) (granting, in part, a prediscovery order requiring plaintiffs to present proof of injury and causation).
[33] *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (*Lone Pine* order used after case had been pending for three years and subject to significant discovery); Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1167–68 (11th Cir. 2014).
[34] Engstrom, *supra* note __ at 46.
[35] Fed. R. Civ. P. 37.
[36] *See* Engstrom, *supra* note __ at 46 (criticizing orders dismissing cases for failure to comply with disclosures relating to specific causation as out of step with the federal rules of procedure).
[37] *See* Fed. R. Civ. P. 8(a), *as modified by* Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[38] Enstrom, *supra* note __ at 43-44.
[39] Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom,* 129 Yale L.J. Forum 64, 67 (2019).
[40] *See* October 2019 Agenda Book, Advisory Committee on the Civil Rules at 35. Available at https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-october-2019.
[41] *See* Burch, *Nudges and Norms*, *supra* note __ at 80 (stating that "fact sheets often exceed 100 questions and seek information that one would ordinarily expect to convey when deposed or to send as part of Rule 26's initial disclosures.").

studies that the threat of dismissal for failure to disclose mostly comes at the close of the litigation, to pressure plaintiffs to join an existing settlement.[42]

The use of disclosure orders such as Lone Pine orders, plaintiff fact sheets, or other types of responses to factual questions about plaintiff's case, is evolving. But one thing is clear: judges assigned an MDL look to other judges to determine what they have done with respect to requiring disclosures and when. They consider the decisions of other MDL judges to be persuasive precedent. Parties litigating before them will rely on the rulings of other judges to support their positions, even when those judges are from faraway districts and circuits. This is how the common law evolves in every area. Here we happen to see the law's evolution in the realm of procedure. But it is not unique. These are not inventions out of whole cloth. Rather, they are anchored to the rules of procedure, which themselves offer great leeway for judicial discretion. To the extent these procedures appear arbitrary, that problem is not because the procedures are more common law-like than statutory. The problem is that it is possible for judges to make arbitrary choices in an MDL. What critics seem to miss is that judges could make arbitrary, or erroneous, or unfair decisions in any case, arbitrariness would be an abuse of their discretion under the rules, and unfortunately very often would still be unappealable.[43]

With respect to the issue of ad hoc or bespoke procedure, MDLs are like every other litigation. Before closing this section, I will give an additional example of judicial control and creativity from ordinary litigation. Some judges require in standing orders that before any pretrial motions can be filed, the parties must first have a conference with the judge. Further, parties are not entitled to seek discovery until they have proposed and had approved a joint discovery order, after meeting with one another and the judge.[44] Nowhere in the rules does it say that the judge must preapprove all discovery. Nor do the rules mandate that parties obtain permissions before filing motions. One can argue that this approach is sound management, or that it goes against the spirit of the adversarial system, which is often understood to be largely lawyer run. The point is that federal judges do many things in standing orders and local rules that are not in the Federal Rules of Procedure and that may be adopted by other judges in a common law-like way. Over the course of years these judicial decisions affect hundreds of thousands of cases, many more than are in a given MDL.[45]

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[42] Id.

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

[44] See *Procedures for Cases Assigned to Judge Lee H. Rosenthal*, U.S. DISTRICT & BANKR. CT. S. DISTRICT TEX., http://www.txs.uscourts.gov/sites/txs/files/lhr_16.pdf (last visited Feb. 26, 2018) [https://perma.cc/TV75-GQTA]. Judge Rosenthal chaired the Judicial Conference Committee on the Rules of Practice and Procedure from 2007 to 2011.

[45] To the extent that scholars are concerned with unorthodox rulemaking or ad hoc procedure, they should be worried about the system quite generally. *See* Lahav, *Procedural Design*, supra note __ (describing the disintegration of the order of procedural rules). But see Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, supra note __ (describing MDL procedure as exceptional and assuming that the rest of procedure is not unorthodox.) By contrast, I have argued that for the last 30 years orthodoxy has been relegated

In sum, the debate over MDL rulemaking misses the bigger picture of our procedural development generally, which is that there is no baseline, or orthodoxy, or textbook approach from which the MDL judges are diverging. It is discretion all the way down. Those who find the use of judicial discretion in MDLs problematic are either too myopic in looking only at MDL, or actually mean to critique the judge's use of discretion in these cases as unfair on the merits.

2. The Costs and Benefits of Common Law Procedure

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

2.1. Institutional Competence (Judges versus Rules Committee)

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

The first is objective administrative expertise. The idea is that the rules committee is made up of judges and practitioners from both sides of the "v." and has the time and opportunity to study the costs and benefits of any rule change in depth more objectively. By contrast, an individual judge does not have the luxury of such in depth study before adopting a rule. Nor will the judge have the insights of practitioners who are sitting back and thinking of the system as a whole. While the judge may have the input of the parties in the case, these players ought to be thinking about which approach would be best for their clients rather than for either the system as a whole or the particular side which they

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to the textbooks, not the development of procedural law on the ground. Gluck raises the important question of why MDLs are considered so exceptional, but does so in the context of why they are exceptional from the point of view of it being permissible in MDLs to allow unorthodox procedure. Id. at 1690. That is, Gluck assumes that MDLs are exceptional, and the question she asks is why this is so. She is right that judges see MDLs as exceptional, because of a number of reasons she points to, including that being assigned these cases is considered a feather in a judge's cap. Id. at 1698 (citing Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399 (2014)). And, of course, that billions of dollars are at stake. But in terms of discretionary application of the federal rules (using what I have called bespoke procedure and what others call ad hoc or unorthodox procedure) the process that has been the source of recent controversy, they are no different from other litigation.

represent in general. It is entirely possible that in a given litigation a plaintiff may advocate for an interpretation that will benefit their client but not plaintiffs generally. The same is true for defendants.

This assumption is flawed because it presents a rather rosy picture of federal rulemakers as being above the fray, when in fact their appointment and the makeup of the rules committee is a political decision made by the Chief Justice.[46] It is true that despite judicial attempts to use the rules committee as an agent of procedural retrenchment, studies have shown that "stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it[.]"[47] This means that procedural change—which has been mostly inclined towards curbing litigation and access to justice—is largely judge-made.[48] Perhaps the crux of the administrative argument is that its proponents prefer the status quo, and the rules committee's incremental approach to rulemaking suits their policy preferences. This is not an argument that the rules committee is better at making decisions as a matter of *process*, however, but rather an argument for the advocate's outcome preferences. That is fine as far as it goes, but it really ought to be an argument about the merits of procedural change rather than the process through which that change happens.

The second assumption about the relative expertise of a committee as compared to individual judges is that the Rules Committee is better able to see the systemic big picture than an individual judge. Indeed, there is ample evidence that judges do not consider the effect of one change on the rest of the life of the lawsuit.[49] Worse yet, judges may also have cognitive biases that may affect their decision-making in individual cases and which may

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[46] Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 Nev. L.J. 1559, 1568 (2015) (describing changes in the makeup of the rules committee which now has fewer practitioners and almost no academics, in contrast to the makeup of the committee in the 1960s). "…Committee practitioners are composed overwhelmingly of two types: plaintiffs' lawyers representing individuals or classes of them, and corporate defense lawyers, with the latter consistently holding the balance of power." Id. at 1570. The authors also note that "Chief Justices have made choices in appointing practitioners that cannot be described as yielding "broadly representative" groups…" Id. at 1570-71.

[47] Burbank & Farhang, id. at 1562.

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

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

lead to procedures that are unsound or unfair.[50] I would worry, for example, that a procedure requiring dismissal with prejudice of a case where the plaintiff has failed to produce evidence of specific causation within the first few months of filing is unfair to the plaintiff, who has not had an opportunity to build her case and benefit from discovery. The reason for imposing such a requirement might be that the judge suspects that many cases are filed in a products liability case by people not in fact exposed to the product, for example. But is this suspicion justified by empirical facts about the litigation or is it driven by a convenience sample or inaccurate view driven by other factors?

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

2.2. Centralized versus Decentralized Rulemaking

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

The most important point for those concerned about MDL procedure to understand is that centralization and uniformity is not a good description of the federal court system as it currently operates. Truth be told, the phenomenon of divergence among the federal courts has been recognized for a long time.[51] This divergence is the result of a structural feature of the federal court system: it is a coordinate system, not a hierarchical one.[52] What this means is that in a given case the federal judge has the power to interpret the law, attuned

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

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

[52] Mirjan Damaska, St*ructures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 509 (1975).

to the perceived needs of the individual case, and, indeed, the needs of the individual case will ordinarily trump the desire for uniform rules.

Accordingly, the claim that procedure or substance is uniform across the circuits with the exception of the MDL is not one that can be made with any credibility. And the idea that increased appellate review actually results in uniformity seems debatable, at least from evidence across the circuits in the doctrine of class actions.[53] It may prevent mistakes, or spur a dialogue between appellate and district judges, but based on past experience appealability is unlikely to result in uniformity across the country.

Whether centralization is superior to decentralization in judicial decision making is open to debate.[54] That debate is an old one when it comes to the common law more generally. I will call a model that assumes that the process of interpreting general principles to adapt to the needs to of the day the pluralist model.[55] The alternative is the idea that common law decision-making is better understood as a process of legal concepts working themselves pure through a rise in the judicial hierarchy.[56] I will call this the rationalist model.[57] The rationalist model assumes that there is a right answer to legal questions and that ultimately the correct answer will be determined at the highest judicial level, rendering a decision that

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

[54] There is a small scholarly literature critiquing the idea that uniformity is necessary in the federal courts, or even desirable. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639, 642-43 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 Tul. L. Re. 2369 (2008); Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1569 (2008) Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 Geo. Wash. L. Rev. 628 (2011); Linda S. Mullenix, *Reflections of A Recovering Aggregationist*, 15 Nev. L.J. 1455, 1456 (2015); Elizabeth Chamblee Burch, Disaggregating, 90 Wash. U.L. Rev. 667 (2013); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 Cal. L. Rev. 991 (2018).

[55] As Massachusetts Justice Lemuel Shaw put it:

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

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

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

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

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

These two models have always been part of our common law heritage, including in the law of procedure. We have already seen how the federal rules *appear* to hew to the rationalist model, providing a complete set of rules that are meant to apply to every case, but in practice are more pluralistic. These two approaches also correspond to two jurisprudential views. The rationalist model assumes that law can be complete and decisive in every case. The pluralist model assumes that law is variable and changes with context.

There are costs and benefits to pluralism and centralization. A pluralistic model allows for experimentation, innovation, and avoids the inefficiencies imposed by rigidity. But it also may lead to unpredictability, experiments that fail, and, as noted earlier, the expression of the judge's individual biases through the procedural rules. The rationalist model is the mirror opposite: it is predictable and limits the opportunity for the judge's unconscious biases to creep in, but it is also rigid, potentially entrenching poorly functioning procedures or creating inefficiencies by requiring the application of ill-fitting procedural rules. If biases drive the rulemaking process, then even general rules without discretion by evince bias.[58] And finally, if it is impossible for law to truly constrain judicial discretion, the rationalist model may in the end be a pipe dream.

The biggest conceptual problem that those concerned about the exceptionalism of MDLs face is that MDLs are not an outlier in an otherwise rationalist system.[59] Those who argue that judicial management MDLs leads to variance in procedure because judges are interpreting the rules of procedure to deal with new challenges, and that this is a bad result, often justify their critique with the claim that MDLs are exceptional in their rule-less-ness. Because this claim is incorrect, their criticism of MLD is really a criticism of the system as a whole. Yet these scholars do not seem prepared to argue that the entire procedural system is profoundly flawed.[60] Accordingly, they need to justify what is special about MDL that uniformity is of greater concern here than elsewhere. In some ways MDLs are less unpredictable than other areas of the procedural law. For example, it seems that transferee judges in MDLs are more likely to reach across federal jurisdictions to find models for managing the cases they are assigned.[61] The result is that there is an equal or greater risk of judges being too quick to follow in the footsteps of previous cases.[62]

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[58] *See* Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DePaul L. Rev. 755, 757 (2016); Brooke D. Coleman, *One Percent Procedure*, 91 Wash. L. Rev. 1005, 1023 (2016) (describing ties between corporate actors and the rulemaking process).

[59] *See* Bone, *Improving Rule 1, supra* note __ at 301 (describing costs of judicial discretion in the federal system generally).

[60] Other scholars have argued that the system is deeply flawed. *See e.g.,* Bone, *Discretion*, supra note _; Coleman, *One Percent Procedure*, *supra* note __.

[61] The use of bellwether trials is a good example. *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 Rev. Litig. 185 (2018).

[62] *See* Burch, *Monopolies*, *supra* note __.

Decentralization and innovation in procedure making in general creates one serious problem that so far has not been adequately addressed in the discussions of MDL procedure. That is the rise in efforts to influence federal judicial decision-making because there is such flexibility in the system. Because judges are looking for guidance, they may turn to resources outside the caselaw. One such resource is the Manual for Complex Litigation, a publication of the federal courts through the Federal Judicial Center, but which has not been revised since 2004 and seems woefully out of date.[63] A second resource is the ALI Principles of the Law of Aggregate Litigation.[64] A third is the Bloch Institute's Guidelines and Best Practices for Large and Mass Tort MDLs, now in its second edition.[65] In some ways, this is no different from what occurs in many other areas of procedural and substantive law when one thinks about the influence of treatises, for example. Still, the observation raises some questions as to publicity and accountability. Do the authors of these authoritative tracts consider the effects on all participants in a litigation equally? Do they have their own prejudices and preferences, whether conscious or unconscious, that influence their suggested solutions to the problems MDL judges face? And in what venues are they debates and what dissenting voices are able to be heard in those venues? Most importantly, are their suggestions for management of these cases fair and wise? I take no position on these questions here, but think they are important to consider.

2.3. Knowing the Rules in Advance

A final argument to consider is that judicial discretion in this area violates rule of law principles because the participants do not know the rules in advance.[66] Some have argued that the solution to this problem is to understand large-scale litigation as a form of administrative governance that should borrow from rules from administrative law.[67]

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

The claim that procedural rules should be known in advance, and to what level of specificity, is worthy of further jurisprudential study. It is easy to understand why rule of law principles would not permit new or unarticulated rules to be applied retroactively to

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[63] Federal Judicial Center, Manual on Complex Litigation, Fourth (2004).
[64] American Law Institute, Principles of the Law of Aggregate Litigation (2010).
[65] Bloch Institute at Duke Law School, *Guidelines and Best Practices for Large and Mass Tort MDLs* (2nd ed. 2018) (available at https://judicialstudies.duke.edu/conferences/publications/).
[66] *See* Noll, *MDL as Public Administration*, *supra* note 1 at 425-27.
[67] Id. at 429. The focus on administrative has a long history; it was particularly important in the discussion of mass torts around the period when there were attempts to collectively resolve asbestos cases in the late 1990s. *See* Richard A. Nagareda, *Turning from Tort to Administration,* 94 Mich. L. Rev. 899 (1996); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 Colum. L. Rev. 2010 (1997).

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

It is harder to understand why the rule of law requires that all the specificities of a procedure be made public in advance of the parties filing a case. Usually the argument that the rules ought to be known in advance is predicated on the idea that rules affect primary conduct. People need to know the rules in advance so that they can take them into account in choosing whether to act. This is sometimes true of procedural rules loosely defined, particularly the rules of evidence.[68] To demonstrate that the fact of ad hoc or bespoke rulemaking in the MDL context violates this rule of law principle, it must be shown that participants base their primary conduct on the MDL rules.

If, as I suspect, most innovative or experimental rules developed in the course of an MDL do not violate the rule of law, this does not mean that these rules are always fair and efficient. They may be unfair, or inefficient, or otherwise inadvisable. Each innovation should be carefully considered. And the normative case for such considerations should be more expressly debated, both in the courts and in academia.[69]

Conclusion

This essay has argued that when it is viewed from the perspective of our rules system as a whole, the complaints that procedures in MDLs are divergent, unorthodox and

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[68] *See* Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior,* 124 Harv. L. Rev. 518 (2010) (arguing that evidentiary rules lead actors to engage in sub-optimal behavior in order to be able to prove their case in court).

[69] *See* Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. Rev. 1155, 1156 (2006) (arguing that the main normative foundation for procedural law is that it enables the goals of the substantive law at issue in the case). In previous work I evaluated procedural design based on four goals. Lahav, *Procedural Design*, *supra* note __ at 870–71 ("(1) whether the procedural design provides for a meaningful hearing, (2) how likely it is to achieve a just resolution of the dispute, (3) the likely speed of resolution, and (4) whether it achieves justice and speed while minimizing cost."). I am not quite sure what the best approach is to evaluating procedural design and think it is an issue that deserves further study. I have argued elsewhere that there are special concerns in mass litigation that procedures must be designed to address, including the agent principal problem, equity between claimants, and the desire for global peace. Lahav, *The Continuum of Aggregation*, *supra* note __ at1394.

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

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