

## COMMENT

### ANECDOTES VERSUS DATA IN THE SEARCH FOR TRUTH ABOUT MULTIDISTRICT LITIGATION

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Litigation is rarely pleasant, particularly litigation that involves debilitating personal injuries. And settlements are rarely entirely satisfying to either party—not for the plaintiff who thinks she has a strong case, nor for the defendant who believes it is not legally responsible. But our law and norms demand that the experience of litigating, despite its inherent unpleasantness, be a process in which the participants feel heard and that their dignity has been respected. This is as true in large-scale, complicated, aggregate litigation as it is in simple, one-on-one cases.

Aggregate litigation, though, requires tradeoffs to ensure the efficiency necessary to handle large groups of similar disputes. Among other systemic benefits, such efficiencies allow individual plaintiffs to come together to level the playing field a bit when confronting better funded and more powerful defendants and further ensure that a court system with scarce resources can effectuate the just resolution of large numbers of claims that might otherwise never see the inside of a courtroom.<sup>1</sup> But even those benefits of aggregation must be assessed while recognizing that there may be costs in terms of individuals' participation. Federal Rule of Civil Procedure 1 admonishes all the players in the system to do their part to make litigation "just, speedy, and inexpensive," without

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<sup>1</sup> See, e.g., Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–49 (1997) (discussing the economic and other advantages to mass tort claimants of prosecuting their claims as a group).

explicitly recognizing that those three signature values often conflict.<sup>2</sup>

Litigation policy for large-scale, complicated disputes necessarily therefore involves tradeoffs. And in order to make good policies, policymakers must be able to assess the necessary tradeoffs in a clear-eyed way. Thus, contributions by academics to those policy debates should be made with great care. When those contributions involve empirical data, rigorous examination of the quality of that data is necessary to ensure that policymakers are not misled—especially by political interests that will surely make use of the data for their own purposes, even if those purposes are at odds with the goals of the scholars who developed the data.

Little information is available about the individual plaintiffs in most mass litigations, for a variety of reasons. In *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, Elizabeth Chamblee Burch and Margaret S. Williams attempt to shed some needed light on plaintiffs' experiences in multidistrict litigation, or MDL.<sup>3</sup> By surveying an admittedly small number of plaintiffs and reporting the negative experiences of some of those plaintiffs, Burch and Williams are taking a first step and trying to “ignite the discussion” of plaintiffs' experiences in MDL.<sup>4</sup> Their goals are laudable, and some of the experiences reported by some of their survey respondents are upsetting and unfortunate. However, Burch and Williams go on to make various broad and serious allegations about MDL more generally based solely on the reports of their limited group of survey respondents. Burch and Williams assert, essentially, that a substantial portion of the court-appointed lead lawyers and individually retained counsel for MDL plaintiffs nationwide regularly violate many of the fiduciary duties they owe their clients,<sup>5</sup> including the disclosure and informed consent obligations that attend aggregate settlements<sup>6</sup> and the duty to communicate with

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<sup>2</sup> FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

<sup>3</sup> 107 CORNELL L. REV. 1835, 1835-36 (2022).

<sup>4</sup> *Id.* at 1836.

<sup>5</sup> *Id.* at 1870-88.

<sup>6</sup> *Id.* at 1903-04; *see, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 2022); ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-438 (Feb. 1, 2006) [hereinafter ABA Formal Op. 06-438].

clients and keep them reasonably informed.<sup>7</sup> These alleged failures among others, according to Burch and Williams, lead to a dire verdict: “In sum, MDLs fail on nearly every fairness metric posed by existing research.”<sup>8</sup> Substantial reform to remedy these deficiencies, in their view, is vitally necessary.<sup>9</sup>

And reform is very much what Burch and Williams seek. As they note, and we agree, “[t]his study . . . comes at a vital time” because the Civil Rules Advisory Committee continues to consider potential rule amendments aimed at MDL.<sup>10</sup> At such a crucial moment in the history of MDL, with many of those in power receptive to critiques of the process, broadsides such as the Burch and Williams article are potentially quite influential.

And there is the rub. Although Burch and Williams’ goals are praiseworthy, their data cannot support their conclusions. As we elaborate below, because of the myriad flaws in their study, no meaningful generalizations about MDLs can be drawn from their data. Particularly troubling, at least to us, is that large, coordinated defense-side interests are exploiting Burch and Williams’ small group of survey responses—and their further leap from those data to their conclusions about MDL—to discredit the MDL process. Those interest groups are vigorously advancing “reforms” to MDL through both legislation and civil rulemaking that would in many ways make access to justice even more difficult for the mass-tort plaintiffs Burch and Williams are concerned about helping.

We scholars are in the knowledge-creation business. And, in general, creating more knowledge is a good thing. That said, when researchers, even those with good intentions, gather data and then extrapolate serious allegations that do not match those data, great mischief can occur—mischief that can make things worse for the people those researchers are trying to help. Regretfully, this is one of those cases. In our view, policymakers exposed to this Burch and Williams study must be made aware of its serious limitations so they can better assess its potential usefulness.

We begin below by discussing two serious limitations of Burch and Williams’ data which should cause readers to regard their results with skepticism: the extremely small number of survey respondents (sample size) and the bias in

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<sup>7</sup> Burch & Williams, *supra* note 3, at 1876-79; *see, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 2022).

<sup>8</sup> Burch & Williams, *supra* note 3, at 1914.

<sup>9</sup> *Id.* at 1914-24.

<sup>10</sup> *Id.* at 1842.

their group of respondents (selection bias). We then discuss Burch and Williams' failure both to acknowledge the limitations of their data and to address the "Compared to What?" problem. The latter is particularly significant for policy discussions involving aggregate litigation, which is always going to exact costs in individual participation in exchange for the substantial economic and other benefits of proceeding as a group. We conclude with an examination of what use, if any, policy makers can properly make of the Burch and Williams survey responses and, in particular, their policy recommendations regarding MDLs.

## I

## SAMPLE SIZE

Burch and Williams' data set consists of the responses given by a remarkably small number of claimants who chose to complete the authors' online survey regarding their experience in an MDL proceeding involving a product "targeted" toward women.<sup>11</sup> The survey participants were 193 individuals with a claim against one of the five major pelvic mesh defendants along with 24 individuals with claims in other MDLs.<sup>12</sup> Those 193 individuals are a minuscule proportion of the more than 104,000 individuals with a claim filed in the pelvic mesh MDL against the five major defendants, not to mention those whose pelvic mesh cases were filed in state courts or not filed at all.<sup>13</sup> To be precise, those 193 individuals constitute less than two tenths of one percent— .00186—of the more than 104,000 claimants in the pelvic mesh MDL. Moreover, only 168 of the respondents reported that they actually employed an attorney.<sup>14</sup> Even more troubling, only 63 individuals reported that they settled their

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<sup>11</sup> *Id.* at 1839 ("targeted its product toward women").

<sup>12</sup> *Id.* at 1860, Table 1. An additional 24 individuals with claims in other female-targeted MDLs also answered the survey. *Id.*

<sup>13</sup> See Michelle Llamas, *Transvaginal Mesh Lawsuits*, DRUG WATCH (Nov. 1, 2022), <https://www.drugwatch.com/transvaginal-mesh/lawsuits/> (giving statistics from the Nov. 19, 2019 report of the U.S. Judicial Panel on Multidistrict Litigation); see also Amanda Robert, *Pelvic Mesh MDL 'Most Complicated MDL in History,' Plaintiff Attorney Says*, LEGAL NEWSLINE (Nov. 24, 2015), <https://legalnewsline.com/stories/510649797-pelvic-mesh-mdl-most-complicated-mdl-in-history-plaintiff-attorney-says> (giving statistics from the Nov. 16, 2015 report of the U.S. Judicial Panel on Multidistrict Litigation for the mesh MDL docket showing the pending claims and total claims for each defendant). In addition, the claims of many thousands of other individuals were filed in state courts, on tolling agreements, or otherwise not filed.

<sup>14</sup> *Id.* at 1871, Table 6; 1886, Table 11.

claim while 84 reported that their claim was dismissed.<sup>15</sup>

We are not empiricists by profession, but it doesn't take graduate training in quantitative methods to justifiably worry about extrapolating from such a small number of respondents to the entire group of vaginal mesh claimants, let alone to the nearly 400,000 cases currently pending in all product liability MDLs.<sup>16</sup> Of course, such concerns might be mitigated if this small group of survey respondents could be considered representative of MDL plaintiffs generally, or even of the plaintiffs in the pelvic-mesh MDL.<sup>17</sup> Indeed, a truly representative sample, even if small, can provide useful and in some cases reliable data. That is, if we could confidently generalize from those who participated in Burch and Williams' survey to the universe of MDL plaintiffs, we might be persuaded that the views of those survey respondents could properly be the basis for proposed reforms.

## II

### SELECTION BIAS

It is therefore worth asking: How did this handful of individuals come to participate in Burch and Williams' online survey? The participants were not randomly selected nor otherwise selected to ensure that they were representative of the larger population of vaginal mesh (or MDL) claimants.<sup>18</sup> Instead, as Burch and Williams report, this was a "convenience sample."<sup>19</sup> They readily concede that "we know little about the sample size of the underlying population from which [respondents] are drawn."<sup>20</sup> Their approach was to recruit participants by posting the link to their online survey "in places where we expected plaintiffs to find it."<sup>21</sup> Burch and Williams

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<sup>15</sup> *Id.* at 1861, Table 4. Unfortunately, Burch and Williams do not report how many of the 168 claimants with an attorney were in each of the Table 4 categories of settled, dismissed, ongoing, or unknown.

<sup>16</sup> Statistics for pending and other MDLs are available on the website of the *Judicial Panel for Multidistrict Litigation*, U.S. CTS. <https://www.jpml.uscourts.gov/pending-mdls-0> (last visited Dec. 12, 2022).

<sup>17</sup> One might also question whether an MDL involving personal injury claims of only women and only involving pelvic mesh is representative of all product liability MDLs, let alone all MDLs. But, in our view, the more significant problem with the representativeness of Burch and Williams' survey respondents is the selection bias we discuss in the next section.

<sup>18</sup> Burch & Williams, *supra* note 3, at 1863. For proper quantitative social science methodology, see, for example, FLOYD J. FOWLER, JR., *SURVEY RESEARCH METHODS* 14-41 (5th ed. 2014).

<sup>19</sup> Burch & Williams, *supra* note 3, at 1863.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

also recruited survey participants through “social media like Twitter” and by “join[ing] public and private Facebook support groups dedicated to mesh, medical devices, osteoporosis, ovarian cancer, talc, breast implants, NuvaRing, and Mirena, each with thousands of members who might also be litigants in related lawsuits.”<sup>22</sup>

For instance, at least some participants were recruited from sites like “Mesh News Desk” which published an article entitled “*Fed Up? Want to talk To MDL Panel? Here’s How!*”<sup>23</sup> That particular online article, above a photo of Professor Burch with the admonition that “She Needs Your Help!,” encouraged women to participate in the survey by noting that “[t]housands of women have been hurt by the manufacturers then the system that let their lawyers keep them in the dark, then threaten them to take small settlements.”<sup>24</sup> The article adds:

Imagine 40-thousand women weighing in on how they were injured, AND the fact that the firms never spoke with them, AND then gave themselves a blank check where they could fill in the amount, AND asked you to sign off with no amount specified, AND charged you 40% even though they promised a trial, AND then threatened to drop you if you did not sign off on what was left in your settlement after expenses and liens and insurance, AND in some cases, the firm took home more than you even though you will need medical care for the rest of your life!<sup>25</sup>

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<sup>22</sup> *Id.* at 1858.

<sup>23</sup> *Id.* at 1858 & n.117 (referencing, *inter alia*, Jane Akre, *Fed Up? Want to talk To MDL Panel? Here’s How!*, MESH NEWS DESK (Dec. 4, 2018), <https://www.meshmedicaldevicenevnewsdesk.com/articles/fed-up-want-to-talk-to-mdl-panel-heres-how>). (N.B. The capitalization of the title of the Akre article reflects its presentation online.)

<sup>24</sup> *Id.* In a follow-up article encouraging participation, author Jane Akre adds,

Burch even provides her phone number so you can be reassured about confidentiality and the purpose of the survey. Otherwise the MDL system will continue what it’s always done, amassing huge numbers of cases into one court to get them through the system. If it didn’t work for you, perhaps you can pay it forward and help others.

Jane Akre, *Still Time to Participate in MDL Satisfaction Survey for Pelvic Mesh Plaintiffs*, MESH NEWS DESK (April 4, 2019), <https://www.meshmedicaldevicenevnewsdesk.com/articles/17472-2>.

<sup>25</sup> *Id.* Professor Burch herself encouraged additional participation on that same site, noting that “[i]t is easy for those of us who teach and no longer practice law to lose sight of the people behind every case. Talking with some of you has truly changed me, changed my perspective, broadened my view of justice, and deepened my commitment to fix the issues that so many of you have encountered.” *U of GA Study Closing Soon—Has Your Voice Been Heard?*, MESH NEWS DESK, (Dec. 1, 2020), <https://www.meshmedicaldevicenevnewsdesk.com/articles/u-of-ga-study-closing->

While several online solicitations Burch and Williams note in their article's footnotes have since been deleted, other invitations to participate in their survey can still be found online, including in a Facebook group for those injured by pelvic mesh called "Mesh Angels."<sup>26</sup> The administrator of that website also added her own commentary to the survey link: "Professor Burch wants to change the experience of plaintiffs, so tell her how you feel" and "[e]verything that has happened to women here in the U.S, should mean a good payout for a lifetime of injury, but it doesn't work that way at all. We have a great advocate in this professor, because she is paying attention and that is a first for here." In an earlier post, the site administrator adds: "I am sharing this, because This professor wants your help, by sharing with her, your good or bad experience with your own lawsuit. To do so, you will find a link at the top of this page, and *you can help change the bad side of horrible lawyers and puny settlements that someone forced you to take. Please don't give her the amount of your settlement, unless you refused it, instead share why your experience was so bad.*"<sup>27</sup>

Although we respect the good intentions of Burch and Williams, we fear they paved the road to hell. In short, it appears that the Burch and Williams sample is infused with what empiricists call "selection bias" in that their methodology for recruiting participants explicitly targeted a subset of claimants more likely to be dissatisfied with their experience.<sup>28</sup> Of course, Burch and Williams are not personally responsible

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soon-has-your-voice-been-heard. The aforementioned Jane Akre added below Burch's letter: "**Another 200 responses would really help here folks! You always want your voice heard. Judges often do not hear from Plaintiffs. Instead they deal with lawyers and you become invisible! Professor Burch has connections with those who can make the MDL process better in the future. At the present time the MDL is considering rules changes for the MDL and she has their ear! Let the MDL committee hear from you!**" (bold and italics in original).

<sup>26</sup> *Mesh Angels*, FACEBOOK, <https://www.facebook.com/meshangelnetwork/> [<https://perma.cc/32EW-WRYK>] (last visited Sept 16, 2022).

<sup>27</sup> Emphasis added. On another date: "Please let everyone know that the procedural justice survey will be over the end of November. This is not about how much their lawsuit settlement is of course, she is trying to learn why *women are upset over how their case was handled*" (italics added). Screenshots of both posts are on file with the Authors.

<sup>28</sup> See, e.g., FOWLER, *supra* note 18, at 10–11 (discussing "bias" and other kinds of error that affects the relationship between a sample of survey respondents and of the target population). It is also noteworthy and methodologically problematic that Burch and Williams' survey respondents were primed to think about their experience in a negative light right before they started answering the questions regarding their satisfaction. We are grateful to Nora Freeman Engstrom for this observation.

for the language used by others urging participation in their survey, but the potential bias of their sample should be obvious. And, as we elaborate below, extrapolation from such a sample is dangerous, and urging reform proposals based on such data is perilous in the extreme.

To further appreciate how unrepresentative Burch and Williams' small group of survey respondents are, consider one important example. One of Burch and Williams' survey questions was: "Before you agreed to settle or agreed to enter into a settlement program did you . . . [h]ave an estimate of your approximate monetary award based on the settlement program's tiers, allocation formula, or points[?]"<sup>29</sup> Describing the responses they received to this question, Burch and Williams state that "[l]ess than half" of their respondents whose cases settled "appears to have received the information required by ethics rules, which raises troubling questions about informed consent."<sup>30</sup> In short, Burch and Williams

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<sup>29</sup> Burch & Williams, *supra* note 3, at 1904, Table 17.

<sup>30</sup> *Id.* at 1904. Burch and Williams' statement that "less than half" of their respondents received the required settlement disclosures misrepresents the relevant survey responses they reported receiving. Of their 99 respondents for this question, some 46 answered that prior to settling their case they did receive "an estimate of [their] approximate monetary award based on the settlement program's tiers, allocation formula, or points." *Id.* at 1904, Table 17. And 21 respondents gave no answer to this question. *Id.* Thus, at most 32 of 99 respondents—that is, *at most one-third*—can fairly be understood as indicating that they did not receive the required information prior to agreeing to settle their claim.

It should also be noted that some of the survey respondents may reasonably have interpreted this particular survey question differently than Burch and Williams likely intended, further skewing the results in the direction of the plaintiffs' attorneys allegedly not fulfilling their ethical obligations. In particular, it is possible that some respondents read the question to be asking whether they knew how much they would be receiving—that is, their "net" settlement amount—prior to deciding whether to accept a settlement offer. Few if any clients would have received that information. Attorneys have no ethical obligation to attempt to convey information about a client's net settlement amount in addition to the gross settlement offer amount at the time the clients receive their settlement offer and must decide whether to accept it. In addition, because medical and other liens will remain to be resolved, a "temporary holdback" fund may remain to be allocated, and various expenses may not yet be invoiced, it would be virtually impossible for an attorney even to attempt to provide a useful estimate of the client's net proceeds at the time the settlement offer is made. Burch and Williams could have avoided this potential ambiguity in their question by stating that they were asking only about the client's settlement offer value and not the amount the client would receive after attorneys' fees, expenses, and any liens were deducted. (Burch and Williams did separately ask the respondents whether at the time they agreed to settle they knew "how much money you would receive from the settlement"; but that question is similarly subject to two interpretations, one about the respondent's gross settlement amount and one about the respondent's net settlement amount.)

would have us think that the lawyers for more than one half of all vaginal mesh plaintiffs who settled their claims did not ensure that their clients received all of the disclosures mandated by applicable state ethics rules.<sup>31</sup>

Of course, every claimant should receive the proper disclosures at the time they are deciding whether to settle their claim.<sup>32</sup> And indeed if the attorneys for fully one-third or more

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<sup>31</sup> Burch and Williams also inexplicably misrepresent mass-tort settlements more broadly as part of this discussion. They begin Section V.B.1 (on “Ethics and Informed Consent”) with the stunning claim that “mass-tort settlements differ from typical settlements” in that “Plaintiffs must often dismiss their case to enter into a settlement program without knowing what, if anything, they will receive in return.” *Id.* at 1903. What is their support for this very serious allegation against thousands of plaintiffs’ attorneys across the country, as well as against defense counsel (who are also obligated by Rule 8.4(a) to ensure that plaintiffs receive proper settlement disclosures)? Burch and Williams cite in footnote 395 to four pages of a previous Burch publication, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 126-29 (2017) of which only one sentence is arguably close to relevant to their claim in the text: “to enroll in a settlement, both clients and their individual attorneys must expressly waive all of their objections to both the settlement documents and the release of their claim,” *id.* at 126. And the support Burch gives for this sweeping claim is a single, public, 2015 settlement agreement in the DePuy ASR Hip Implant litigation that—contrary to Burch and Williams’ claim at 107 CORNELL L. REV. at 1903—provided detailed information about the dollar values that would be paid for claims with various, specified characteristics, 70 VAND. L. REV. at 126 n.287.

In the prior draft of their *Perceptions of Justice* article dated 11/18/21, which Burch and Williams circulated broadly and made available on SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3900527](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900527) through at least January 10, 2023, Burch and Williams instead support their broad claim by citing to two pages of Burch’s book, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 138–39 (2019). Described on those two pages is an *unsuccessful* lawsuit brought by a single disgruntled Vioxx claimant against Chris Seeger, one of the plaintiffs’ leadership attorneys in Vioxx.

Simply stated: neither of these citations provides any support for Burch and Williams’ sweeping indictment of mass-tort settlements and the attorneys on both sides who negotiate them.

<sup>32</sup> The required disclosures are specified in every state’s equivalent to ABA Model Rule 1.8(g) which states in relevant part:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of . . . the clients, . . . unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

See also ABA Formal Op. 06-438, *supra* note 6 (detailing disclosure and consent obligations for attorneys involved in aggregate settlements).

One of us (Baker) has published extensively on this disclosure obligation. See, e.g., Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165 (2020); Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291 (2016); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998); Silver & Baker, *supra* note 1.

of all claimants are not ensuring that their clients receive this information a *systemic* problem might well exist. In fact, however, there is good reason to think that Burch and Williams' 32 of 99 survey respondents who report not receiving the proper disclosures are outliers and are not in any way representative of the tens of thousands of clients who settled their vaginal mesh claims. Consider that one of us (Baker) served as the ethics advisor to the plaintiffs' lawyers in numerous confidential vaginal mesh settlements nationwide involving more than 51,000 total claimants. We therefore have first-hand knowledge that the disclosures provided to each of those 51,000+ claimants who received settlement offers were appropriate, comprehensive, and fully met the attorneys' obligations under the applicable state(s)' Rules of Professional Responsibility governing aggregate settlements.

Although our own empirical "sample" of claimants' experience on this important issue of settlement disclosures is one in which more than 51,000 claimants received proper, comprehensive information and zero claimants did not, we do not mean to suggest that all other vaginal mesh claimants received similarly proper disclosures from their attorneys. We simply don't know. We also do not mean to suggest that our sample of more than 51,000 claimants and their attorneys is representative of the more than 104,000 vaginal mesh claimants and their attorneys. Again, we simply don't know. We would submit, however, that generalizations based on more than 51,000 data points are more likely to be accurate than generalizations based on 32 or 99 data points.

### III

#### IGNORING THE LIMITATIONS OF ONE'S DATA

In sum, Burch and Williams' 193 survey respondents with vaginal mesh claims cannot plausibly be considered "representative" in any meaningful sense even of the more than 104,000 individuals with filed claims against the major defendants in the vaginal mesh MDL. One might expect Burch and Williams to expressly acknowledge this fact and to concede that no general conclusions about the vaginal mesh MDL—nor, of course, about MDLs more generally—can properly be drawn from their data. Instead, at various points in their article, Burch and Williams contend that their handful of respondents are, essentially, representative enough for them to generalize about MDL claimants and their attorneys and, further, for them to conclude that there are "systemic" problems with

MDLs.<sup>33</sup>

For example, Burch and Williams assert that their group of respondents “form a representative sample” not because proper selection methodology was followed but because the respondents were “217 people from 42 different states, who were represented by 295 different attorneys from 145 distinct law firms, whose cases originated in 32 different state and federal courts, and who had diverse educational levels, backgrounds, and races. In addition to demographic and geographic diversity, their responses varied substantially . . . .”<sup>34</sup> These facts establish only that 217 different individuals participated in the survey; this is not evidence of any accepted scholarly understanding of “representativeness.”<sup>35</sup>

Burch and Williams do concede, as they must, that they have no idea what the overall population of pelvic-mesh claimants looks like, because they don’t know.<sup>36</sup> Rather, they rely on the diversity of their respondents as a proxy for representativeness. But this ignores the selection bias of their sampling methodology—the differences among the survey respondents cannot substitute for the fact that these respondents are *not representative* in the ways that really matter to the conclusions they seek to draw. As noted above, the key selection threat in this case is that the survey respondents were recruited in a way likely to result in overstated litigant dissatisfaction—no amount of diversity along other metrics can cure that flaw. Moreover, that the respondents’ responses varied from one another tells us nothing about whether that variance is generalizable. If anything, given the way the respondents were recruited, such variance suggests that any conclusions drawn should be

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<sup>33</sup> See, e.g., Burch & Williams, *supra* note 3, at 1841, 1842, 1843, 1863 & 1914-24.

<sup>34</sup> *Id.* at 1841 (stating these facts about the respondents and concluding “all of which suggest[] they form a representative sample”).

<sup>35</sup> See, e.g., Michael Edward Darren, *Representative Sample*, in ENCYCLOPEDIA SURV. RSCH. METHODS (Paul J. Lavrakas, ed. 2008).

A representative sample is one that has strong external validity in relationship to the target population the sample is meant to represent. As such, the findings from the survey can be generalized with confidence to the population of interest. There are many factors that affect the representativeness of a sample, but traditionally attention has been paid mostly to issues related to sample design and coverage. More recently, concerns have extended to issues related to nonresponse.

*Id.*

<sup>36</sup> Burch & Williams, *supra* note 3, at 1863 & n.137.

considered preliminary, at best.

It is unfortunate but not surprising that among the hundreds of thousands of participants in MDLs each year some individuals are frustrated in various respects by their experience. But insofar as Burch and Williams' goal is to use the responses of their handful of survey participants to describe the world of the MDL plaintiff in a broader, generalizable sense, individual anecdotes cannot suffice and are inevitably misleading. Rather than address this concern, however, Burch and Williams note that "295 different lawyers from 145 law firms represented participants" and thus, they argue, the responses of their 217 survey participants "could not be chalked up to a few bad apples"<sup>37</sup> and "[t]he problems participants raised are systemic, not idiosyncratic."<sup>38</sup> The illogic of this claim is readily apparent. Consider the analogous situation of 217 students who are each evaluating a different large class taught by one of 217 different faculty members. Whatever the results of that survey, we would have no useful information about any of the 217 faculty members being evaluated. We would know only how one student in each professor's class felt about their experience in that unique class.

#### IV

#### AS COMPARED TO WHAT?

Even if one could ignore the problems discussed above and somehow conclude that Burch and Williams' data are sufficiently representative to demonstrate widespread plaintiff dissatisfaction in MDLs, we don't know how dissatisfied plaintiffs typically are in *non-MDL cases*.<sup>39</sup> Perhaps the median contingent fee client with a one-off personal injury claim outside of an MDL is as unhappy—or even more unhappy—with various aspects of their experience as is the median

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<sup>37</sup> *Id.* at 1843.

<sup>38</sup> *Id.*

<sup>39</sup> Arguably, one might look at how participants were recruited by Burch and Williams and be pleasantly surprised that, for instance, 35% of respondents were *not* dissatisfied with their lawyers. *Id.* at 1872, Table 7. It should be noted that Table 7 states 168 individuals were asked this question, but only 152 responses were received. Some 109 respondents of the 168 who were asked the question (65%) indicated that they were "somewhat" or "extremely dissatisfied" with their attorneys. *Id.* For further, useful discussion of the "as compared to what" question in the context of MDLs, see Todd Venook & Nora Freeman Engstrom, *Towards the Participatory MDL: A Low-Tech Step to Promote Litigant Autonomy*, section I.B.1, LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE (David Freedman Engstrom ed. 2023 (forthcoming)).

respondent to Burch and Williams' survey.<sup>40</sup> It seems likely that few personal injury claimants, inside or outside an MDL, have previously employed an attorney or sought redress through our civil courts.<sup>41</sup> Most plaintiffs therefore are likely to have little *ex ante* understanding of basic facts about the litigation process or the attorney-client relationship, which in turn may cause them to have unrealistic expectations about both. In what ways, and to what extent, is the median MDL claimant more or less dissatisfied with their attorney or the American system of civil justice than the median one-off tort claimant? And to what degree has the MDL status of the litigation made their experience or results better or worse? We don't know. And Burch and Williams don't know. In sum, Burch and Williams' group of survey responses do not and cannot offer any insights into whether or how MDL has made things worse or better.

## V

## THE USE AND MISUSE OF DATA IN POLICYMAKING

What use, if any, can policy makers *properly* make of the Burch and Williams survey responses and their policy recommendations regarding MDLs? Perhaps recognizing the mismatch between the paucity of their data and the grand sweep of their critique, Burch and Williams observe that “[c]ritics will prefer to ignore our results because we cannot guarantee representativeness, but our findings cannot be dismissed so easily.”<sup>42</sup> Indeed, but why should their findings *not* be dismissed? Burch and Williams' answer is a non sequitur: “We should be concerned that *anyone* spends years in court to redress harm only to walk away frustrated because the process sidelined them while attorneys they did not hire made key decisions on their behalf.”<sup>43</sup> But this is a different and more dangerous argument than the one the paper otherwise seeks to make. That is, instead of a claim that systemic problems exist that demand reform of the MDL

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<sup>40</sup> See, e.g., Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1500 (2009) (documenting that “settlement mill” lawyers who represent individuals pursuing certain types of one-off tort claims very rarely meet, or communicate with, clients); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92 (1989) (reporting that, even in simple, one-off tort litigation, the lawyer-client relationship is frequently “perfunctory” and “superficial”).

<sup>41</sup> See, e.g., HERBERT KRITZER, *RISK, REPUTATION AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* 45-95 (2004).

<sup>42</sup> Burch & Williams, *supra* note 3, at 1841.

<sup>43</sup> *Id.*

procedures, it's an argument, essentially, that even if the system has much to recommend it, it should be considered inadequate *a priori* if "anyone" has a bad experience. This is, of course, a much harder argument to win because this "concern" must be balanced against all of the *benefits* of MDL—something the authors do not attempt to do. And, as Rule 1 implicitly acknowledges, civil procedure *always* demands tradeoffs in the name of efficiency because scarce resources do not permit limitless litigation of every person's claim—an aspect of procedure that is especially true in large-scale cases.

Burch and Williams also contend that anecdotes about "participants' experiences are a valuable contribution in and of themselves" and that their "study offers a first look into this opaque world" of "the inner workings of attorney-client relationships" and "private deals."<sup>44</sup> They assert that their "empirical findings" about "very real people" are "rich" and that they "add[] data to problems that scholars speculate about."<sup>45</sup> They argue that the handful of responses to their survey "collectively provide valuable insights into the obscure MDL world."<sup>46</sup> In sum, their contention is that publishing some anecdotes is better than publishing no anecdotes—the better to, as the abstract states, "ignite the discussion."<sup>47</sup>

But *is* it better to publish some anecdotes rather than no anecdotes as Burch and Williams suggest, even as a pilot project? Our answer is an unconditional "No"—*especially* if the authors themselves are not explicit about the severe limitations on, and biases of, their data, which Burch and Williams are not. An article published in the *Cornell Law Review* that is co-authored by a tenured and accomplished professor at the University of Georgia Law School and a well-regarded procedural researcher with a Ph.D.<sup>48</sup> will have sufficient automatic legitimacy to demand attention from policymakers. Although academic readers may be alert to problems such as small sample size or selection bias when evaluating empirical research, Burch and Williams are eager to move beyond the academy and impact policy and law. Indeed, Professor Burch, on her personal website soliciting survey participation makes a point to note that "Professor Burch has been asked to present to the judges who handle

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<sup>44</sup> *Id.* at 1841 & 1842.

<sup>45</sup> *Id.* at 1842.

<sup>46</sup> *Id.* at 1863.

<sup>47</sup> *Id.* at 1836.

<sup>48</sup> Margaret Williams is an adjunct professor with a Ph.D. in political science from Ohio State University. *Id.* at 1835 n.††.

these cases and this survey is a way for plaintiffs to voice their thoughts about the process.”<sup>49</sup> Perhaps. But the reality is that we academics lose control over our work as soon as it is published—and we cannot dictate how it is used. Interest groups will be delighted to invoke Burch and Williams’ anecdotes and unrepresentative findings to serve their own purposes, even when those purposes are the opposite of those the authors claim to have. Burch and Williams assert that their study is a palliative for lawmakers such as the Rules Committee “hear[ing] principally from judges and attorney insiders who benefit from the status quo.”<sup>50</sup> But what if some of those talking to the rulemakers actually prefer a world where life is more difficult for people like personal injury claimants who responded to the Burch and Williams survey?

This is not a hypothetical concern. As Burch and Williams claim, this is a “vital time” for MDL policymaking. Both the Civil Rules Advisory Committee and perhaps the Congress may soon be considering making new procedural law for MDLs. And groups representing defense-side interests have already been using Burch and Williams’ results for their own purposes. Interest groups who represent corporate, repeat-player defendants have already seized on Burch and Williams’ critique based on circulated drafts, public presentations of the survey responses in this article, and news reports. As one of us (Bradt) has outlined, Burch recently presented these data at a symposium on the intersection between mass torts and bankruptcy held at Fordham Law School. Prominent counsel for corporate defendants immediately and ravenously seized on Burch’s presentation to argue that MDL is irretrievably broken (and therefore that bankruptcy via the “Texas Two-Step” would be a superior process).<sup>51</sup> But that was just an academic gathering, albeit with several prominent lawyers and federal judges in attendance.

One example of a well-funded group beyond the academy lobbying lawmakers for change is “Lawyers for Civil Justice,” (LCJ), whose members self-identify as “preeminent corporations, law firms, and defense bar

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<sup>49</sup> *Procedural Justice Study on Women’s Health Multidistrict Litigation*, UNIV. GA. SCH. L., <https://www.elizabethchambleeburch.com/womens-mdls> (last visited Dec. 13, 2022).

<sup>50</sup> Burch & Williams, *supra* note 3, at 1842.

<sup>51</sup> Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 *FORDHAM L. REV.* 309, 320-22 (2022) (noting that “defendants are quite adept at deploying arguments that plaintiffs are not getting a fair shake to advance defendants’ goals”).

organizations, [which] collaborate to provide compelling reasons for judges, Congress, and rule makers to give serious consideration to meaningful reforms.”<sup>52</sup> Their proposed reforms include mandating “early vetting” of plaintiffs’ claims in order to avoid “parking of specious claims, without mitigating any of the injurious consequences for courts, corporate defendants, and the public.”<sup>53</sup> In support of their reforms, they cite the Burch and Williams study as evidence that MDL plaintiff’s lawyers “never gather, and the court never considers, the facts of their cases.”<sup>54</sup> In LCJ’s view, presented in a memo to the Rules Committee, the Burch and Williams study serves to “highlight how MDL courts would serve claimants better if a ‘day one’ rule set the expectation that disclosure of the most basic evidence would be required soon after consolidation or filing.”<sup>55</sup> Although Burch and Williams make much of their respondents’ desire to tell their stories, one might guess they would not support a rule that required MDL plaintiffs to do so, with substantial supporting evidence, at the very outset of their cases.<sup>56</sup> Yet Burch and Williams’ results

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<sup>52</sup> LAWYERS FOR CIVIL JUSTICE, <https://www.lfcj.com/> (last visited Dec. 13, 2022).

<sup>53</sup> LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS MDL/TPLF SUBCOMMITTEE (Sept. 14, 2018), *published in* MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES MEETING AGENDA 165 (November 1, 2018), [https://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf).

<sup>54</sup> LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS MDL SUBCOMMITTEE 3 (March 8, 2022), [https://www.uscourts.gov/sites/default/files/22-cv-d\\_suggestion\\_from\\_lcj-\\_mdls\\_0.pdf](https://www.uscourts.gov/sites/default/files/22-cv-d_suggestion_from_lcj-_mdls_0.pdf) [hereinafter March 8, 2022, LCJ Comment]. LCJ also runs a website and Twitter account called “Rules4MDL,” through which they advocate for similar rule-based reforms. That Twitter account has publicized the Burch and Williams data several times. For instance, on Oct. 25, 2021, a tweet read, “No one is happy with the system’ says a plaintiff in the latest survey from the Cornell Law Review on the need for procedural fairness for both claimants and defendants in large MDLs.” @Rules4MDL, TWITTER (Oct. 25, 2021), <https://twitter.com/rules4mdls/status/1452602338510872577>. And on October 18, 2021: “A new survey of mass tort plaintiffs reveals that “MDLs fail on nearly every fairness metric posed by existing research,” showing that plaintiffs and defendants share common ground when it comes to the need for fair, consistent rules.” @Rules4MDL, TWITTER (Oct. 18, 2021), <https://twitter.com/rules4mdls/status/1450201129254539275>.

<sup>55</sup> March 8, 2022, LCJ Comment, *supra* note 54, at 7.

<sup>56</sup> LCJ also seizes upon Burch and Williams’ observation that MDL cases take four times as long to resolve as the “average” civil case in support of their proposed mandatory early vetting of cases. *Id.* at 8. Ironically, the answer to this concern may be found in Professor Williams’s own earlier scholarship, in which she warned that this statistic

has problems with facial validity as it assumes cases in [MDL] proceedings are like other civil cases when, in fact, they are not. Cases are included in proceedings *because* they are more complex

are being deployed by defense-side interest groups in an effort to show that most cases in MDLs are unvetted and meritless.

Burch and Williams say that their concern is to ensure justice for mass tort plaintiffs and to have the courts “afford more process to more people.”<sup>57</sup> Unfortunately, their anecdotes are most likely to be useful to interest groups keen to restrict access to the courts and to protect mass tort defendants from liability. Burch and Williams are eager to have their survey results inform the work of the Federal Rules Advisory Committee.<sup>58</sup> But legal reforms should be based on good empirical data, obtained through proper sampling techniques, not on the anecdotes of a handful of unrepresentative individuals, especially when the anecdotes are masquerading as data. Perhaps most tragically, Burch and Williams’ study is part of the problem of *client* misinformation and not part of the solution. Their anecdotes are likely to deter potential mass tort claimants from pursuing their personal injury claims when under-claiming by individuals who deserve payment but do not sue has long caused some scholars to opine that “the real tort crisis” is “a crisis of underclaiming rather than overclaiming.”<sup>59</sup>

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than the average civil cases (hence the need for the proceeding), and their complexity is magnified by the sheer number of cases tied together.

Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1255, 1271 (2019) (emphasis in original).

<sup>57</sup> Burch & Williams, *supra* note 3, at 1846.; *see also, e.g., id.* at 1843 (“Our findings reveal a system under stress that all too often fails to justly serve those who need it most.”); *id.* at 1925 (“MDLs must bend to serve the needs of the people forced to rely upon it—not just the demands of the judiciary and repeat players.”).

<sup>58</sup> *Id.* at 1842 (“This study . . . comes at a vital time: the Federal Rules Advisory Committee is currently weighing MDL-specific rules, but it hears principally from judges and attorney insiders who benefit from the status quo.”); *id.* at 1924 (“[T]he myth of individual representation and the many attorney-client problems participants identified suggests that judges and the Advisory Committee on Federal Rules should import certain class action safeguards.”).

<sup>59</sup> Richard Abel, *The Real Tort Crisis-Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987) (“The real tort crisis is old, not new. It is a crisis of underclaiming rather than overclaiming.”); Nora Freeman Engstrom, *ISO The Missing Plaintiff*, JOTWELL (Apr. 12, 2017), <https://torts.jotwell.com/iso-the-missing-plaintiff/> (observing that since Abel’s article, empirical researchers using a variety of methodologies “have, again and again, confirmed Abel’s basic empirical premise. In most areas of the tort law ecosystem, only a small fraction of Americans seek compensation, even following negligently inflicted injury.”); DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE* (2016); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1091–92 (2006) (“[T]he medical setting has provided the strongest evidence that the real tort crisis may consist in too few claims.”) (quoting PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* 62 (1993)); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation*

Again, Burch and Williams' goals are admirable. Although we doubt that customer-satisfaction surveys such as Burch and Williams' are a good way of measuring the efficacy of federal litigation brought by people suffering with personal injuries, we should of course aspire to ensure the dignity of all those who participate in litigation. But all litigation procedure—and especially aggregate litigation—is an exercise in the art of the possible. The system does not have the resources to provide the kind of full-dress “day in court” that some of Burch and Williams' survey respondents seek—and that's true in “simple” litigation, where trials are as scarce as ivory-billed woodpeckers, as well as in massive cases where a day in court for everyone may functionally mean a day in court for no one.<sup>60</sup>

The MDLs involving product liability claims are massive proceedings, complex substantively and procedurally, and expensive—and the scarcity of judicial resources demands tradeoffs in the name of efficiency. Although efficiency risks undervaluing the unique experiences of individuals in the litigation, efficiency also redounds to plaintiffs' benefit in myriad ways. The system is not perfect, to be sure, but one should pause before asserting “far-reaching normative implications” for “judicial legitimacy,” “due process rights,” and “procedural justice” on the basis of a handful of anecdotes.<sup>61</sup> Sadly, Burch and Williams' small, unrepresentative study

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*System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183 (1992); DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 122 fig. 5.2 (1991), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3999.pdf> [<https://perma.cc/M4LX-M6GA>] (Rand study showing that only about ten percent of Americans seek compensation when accidentally injured, and only about two percent actually file suit); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 29-30 (“In most areas of the tort-law ecosystem, only a minute fraction of those accidentally injured ever seek third-party compensation. Indeed, one of the most remarkable features of the tort system—and one of the most durable findings about the tort system—is just how few plaintiffs there are in proportion to the incidence of tortious injury.”) (internal quotation marks and citations omitted)).

As Nora Freeman Engstrom has importantly noted, there are good reasons to believe that the rate of claim initiation by mass-tort claimants is substantially higher than the “minute fraction” of injured individuals who file suit in other areas of the tort system. *Id.* at 29. We have no reason to think that this welcome (to us) increase in the likely rate of claiming has eliminated, rather than merely mitigated, the problem of under-claiming, however.

<sup>60</sup> On the lack of trials in “simple” litigation, see, for example, Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (offering a descriptive and normative analysis of “settlement mills” for the resolution of some auto accident claims).

<sup>61</sup> Burch & Williams, *supra* note 3, at 1842.

seeking to amplify the voices of individual plaintiffs may instead empower interest groups that seek to keep plaintiffs out of court altogether. Sometimes the problem with igniting a discussion is that you burn down the house.