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Many Minds, Many MDL Judges

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I
INTRODUCTION

Over his long career, Francis McGovern was a leading supporter of decentralizing the fact finding that goes on in multidistrict litigation (MDL). His advocacy of letting torts "mature" gave rise to the sampling that takes place in today's bellwether jury system.[1] More recently, he advocated selective remands of cases from MDLs to other judges so the litigation could proceed in parallel before multiple judges rather than serially before one.[2] In this Article, I try to formalize and extend the intuition behind McGovern's ideas and ask why, if decentralization is good for fact finding, is it not also good for the legal decisionmaking that takes place in MDLs? My answer is that decentralization is indeed just as good on the legal side. I therefore analyze two ideas for how we might capture the benefits of decentralized legal decisionmaking without incurring too many costs.

This is an important matter because the federal MDL statute[3] now concentrates more power in the hands of a single person than perhaps any other part of our judicial system. A single judge can end up resolving hundreds, thousands, or even hundreds of thousands of individually viable cases. This has benefits—most notably efficient case processing, uniformity of results, and the facilitation of global peace—but it also has costs.

My focus here is on a cost that has been surprisingly neglected by scholars but may be the greatest cost of them all: the accurate adjudication of legal claims and defenses. I suspect it is intuitive to most of us that asking one person to decide something instead of inviting many other people to weigh in probably reduces the quality of the resulting decision. There is a literature that formalizes this intuition called "many-minds" scholarship. It proceeds from a famous mathematics proof known as the Condorcet Jury Theorem. Although some

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1. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 694 (1989) (discussing "new mass tort-specific dispute resolution procedures").

2. *See* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1892 (2000) ("[T]he MDL judge would remand a limited number of cases to federal and state courts for trial with a sound methodology of case selection, creating a more representative marketplace of litigation . . . .").

3. 28 U.S.C. § 1407.

people have questioned the applicability of many-minds theories to legal decisionmaking, if there were ever a legal context in which they could be applicable, I argue it is in the context of our MDL system.

If we find this literature persuasive, how can we bring more minds to bear on the legal questions in MDLs without undoing too many of the benefits of consolidation? Although I cannot undertake a full cost-benefit analysis here, I sketch out a partial analysis for two ideas: (1) more appellate review of decisions by MDL judges and (2) assigning MDLs to panels of judges instead of just one. The first idea fares worse on a cost-benefit analysis because appeals are sequential and take so long to resolve. Moreover, commentators have discussed increasing appellate review for many years and it has thus far been difficult to implement. Not only would it require lawmaking, but the contours of the proposal have been hard to write down on paper. I argue that these considerations make the second idea more appealing. Yet, it has received very little scholarly attention and requires no change in the law to implement.

II
THE CONCENTRATED POWER OF MDL JUDGES

Let me begin by explaining why our MDL system concentrates judicial power to an extent that perhaps no other corner of our justice system does. Under the MDL statute, a panel of federal judges called the Judicial Panel on Multidistrict Litigation (JPML) can transfer all of the cases in the federal system with even a single factual question in common to one district court judge for resolution of all the pretrial matters in those cases.[4] This is often only dozens or hundreds of cases, but sometimes it is thousands, tens of thousands, or even hundreds of thousands of cases.[5] All to one judge. Those cases would have been handled by dozens or even hundreds of other judges.

Although the statute directs MDL judges to decide only pretrial matters, this is, as we know, ninety-nine percent of modern litigation. Pretrial matters include motions to dismiss, motions for summary judgment, motions to exclude experts, motions to exclude other evidence, motions for class certification, and many, many other decisions.[6] But MDL judges often resolve matters at trial as well. Although their ability to preside over trials is limited, there are ways around these limits and MDL judges take advantage of them.[7] But most of the time the MDL enters into some sort of mass-settlement well before any, or at least many, of its cases are remanded to their original courts for a trial in any event.[8] Moreover, even on the rare occasions when cases are remanded back to their original courts,

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    4. *Id.*

    5. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1246 (2019).

    6. ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 197 (2020).

    7. *See id.* at 327–30 (describing the ways MDL judges can preside over trials despite *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)).

    8. *Id.* at 197 ("[O]nly about three percent of MDL cases get remanded to the transferor courts.").

the pretrial decisions made by the MDL judge are insulated from reconsideration through the law-of-the-case doctrine.[9] For all these reasons, the MDL judge usually makes not just ninety-nine percent of decisions in all the cases transferred to it, but one hundred percent of the decisions.

One might think the MDL judge's hold on the litigation could be tempered by appellate review, but this too is hard to come by. Pretrial decisions are usually not appealable on account of the final judgment rule.[10] Interlocutory review by certification[11] or mandamus[12] is, by design, infrequent.[13] Thus, for all practical purposes, the decisions of the single MDL judge are usually the only decisions *any* federal judge at *any* level will render in MDL cases.

In MDLs based on diversity subject matter jurisdiction, there are sometimes cases in state courts that cannot be removed to federal court.[14] These cases temper the exclusive hold of the MDL judge over the decisions that arise in the litigation. These cases are therefore exceptions to the general rule I described in this Part. Nonetheless, many commentators want to stamp out these exceptions and bring them, too, into the MDL judge's fold.[15]

I believe these commentators are misguided if we are concerned, as we should be, about accurate decisionmaking in MDLs. Rather, we should build on the state court orphans by finding ways to involve more judges, not fewer, in MDL cases.

III
MANY-MINDS THEORIES AND LEGAL DECISIONMAKING

Concentrating decisionmaking in the hands of one person has undoubted benefits. Most notably, it is much more efficient for one judge to process thousands of similar cases than for hundreds of judges to have to do so. As Andrew Bradt has expertly chronicled, the political constituency for the MDL statute was federal judges rather than litigants; protecting their dockets from being overwhelmed by too many cases was the primary motivation for the

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9. *Id.* at 333.
10. *See id.* at 310–12 (discussing the difficulty of appealing interlocutory orders).
11. 28 U.S.C. § 1292(b).
12. 28 U.S.C. § 1651.
13. KLONOFF, *supra* note 6, at 248 (discussing a "defendant's inability to obtain interlocutory review"). *But see* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1707 (2017) ("This is not to say there are no MDL cases in the federal courts of appeals. A brief review, based on cases accessible in Westlaw, reveals at least 100 MDL cases that reached the circuit courts on direct review over the past five years.").
14. KLONOFF, *supra* note 6, at 335; DOUGLAS G. SMITH, THE RISING BEHEMOTH: MULTIDISTRICT AND MASS TORT LITIGATION IN THE UNITED STATES 126–32 (2020). Sometimes the state court cases outnumber the cases in the MDL. *See* KLONOFF, *supra* note 6, at 335 (highlighting examples).
15. *See, e.g.*, KLONOFF, *supra* note 6, at 379 (describing a proposal that "would allow removal from state court to federal court of a case not qualifying for diversity jurisdiction when: (1) the case arises from the same transaction or occurrence (or series of transactions or occurrences) as a case in federal court; and (2) the cases share a common factual or legal question"). *Cf.* Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. (forthcoming 2021) (advocating consolidation of state cases to facilitate coordination with the MDL judge).

statute.[16] But there have been other benefits, too. One is uniformity: one judge deciding all the cases means all the plaintiffs are treated the same—for better or for worse.[17] Moreover, concentration confers economies of scale not only to the judiciary but to the litigants as well.[18] This is most important for plaintiffs, as concentration gives their lawyers the incentives and means to invest in the litigation in the same way a defendant facing thousands of similar cases would even without concentration.[19] This should help improve the quality of the resulting decisions in MDL litigation. But it is also important for defendants because it eases resolution of the lawsuits that have been filed against them; with only one set of lawyers to negotiate settlement with, they can more easily achieve what is known as "global peace."[20]

But concentration has many costs as well. Because other commentators have discussed many of these costs, I will not repeat them here.[21] Instead, I wish to focus on something that has been surprisingly neglected by commentators even though I think it may be the most significant cost of all: accurate adjudication.[22] While concentrating cases in the hands of one judge can improve the quality of decisionmaking by improving the plaintiffs' presentation as I discussed above, it

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16. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

17. *See* Jack B. Weinstein, *Notes on Uniformity and Individuality in Mass Litigation*, 64 DEPAUL L. REV. 251, 254 (2015) (discussing the fact that uniformity ensures that all parties' rights are equally protected).

18. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1597 (2004) (discussing how economies of scale help in "avoiding the multiplication of costs necessary to bring individual claims").

19. *See* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the Haves on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 91 (2019) ("By aggregating their claims, plaintiffs can pool resources, share risk, coordinate litigation strategy, disable holdouts, and present a unified negotiating position—all things that offset some of the defendant's repeat-player advantage.").

20. *See* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 La. L. Rev. 397, 413–18 (2014) ("Defendants in mass litigation want peace, and they are often willing to pay [a premium] for it.").

21. The most comprehensive treatment is Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021). *See also, e.g.*, Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 54 (2009) ("This impulse toward efficiency . . . is often at odds with procedural justice tenets."); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 76 (2015); Gluck, *supra* note 13, at 1669, 1670–74, 1693–94 (2017) (noting that "MDL judges are particularly focused on efficiency" while "[s]cholars worry about lack of transparency, loss of the individual claim, and the dearth of uniform procedural law"); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 149 (2015).

22. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to A Procedural Problem*, 99 Geo. L.J. 65, 67 (2010) ("A principal goal of civil procedure—indeed, *the* principal goal—is the accurate application of law to fact."). The only commentators I have seen address this cost—albeit briefly—are John Rabiej, *Two Proposals to Improve How Courts Manage "Mega-MDLs,"* 3 (George Washington MDL Roundtable, April 27, 2017) (mentioning "questionable rulings"), Stephen A. Wood, *Improving Multidistrict Litigation: The Case for Three-Judge Panels* 12 (Wash. Legal Found. Critical Legal Issues, Working Paper No. 208, 2018) (mentioning "extreme, unusual, incorrect, or even unfair results"), and SMITH, *supra* note 14, at 132–38 (discussing MDL participants' dissatisfaction with a single decisionmaker).

can also undermine the quality of decisionmaking by cutting off second, third, fourth, and fifth opinions before judges render final verdicts on matters that can impact large numbers of people. I think this cost is intuitive, but, as I explain, the many-minds literature has formalized the intuition. This literature has many strands,[23] but below, I focus on the two that I find most compelling because they rely on simple mathematics: what I call "decisional" many-minds theory and "statistical" many-minds theory.[24]

A. Decisional Many-Minds Theory

Decisional many-minds theory begins with something called the Condorcet Jury Theorem. Using simple mathematics, the Marquis de Condorcet long ago showed that, if we hold everything else constant, the more people we ask a question, the greater the chance the majority of them will select the correct answer. This holds if each person has a better than even chance at selecting the correct answer on their own and if they make their selections at least somewhat independently of one another.[25] The Theorem has been extended in many ways in the ensuing years. For example, not every person needs to be better than even if the average of the group is better than even,[26] and, although the Theorem was based on questions that pose only a binary choice, it has been extended to a plurality's answer to multiple-choice questions.[27] It works for both simultaneous decisionmaking or sequential decisionmaking.[28] Moreover, it does not depend in

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23. For example, there are also strands based on the Hayekian virtues of evolutionary thought and the Aristotelian virtues of deliberative thought. *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 33–41 (2008) [hereinafter VERMEULE, LIMITS OF REASON]. The literature is most often invoked in political science. *See, e.g.,* David Estlund & Helene Landemore, *The Epistemic Value of Democratic Deliberation, in* THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY (Andre Bachtiger, et al., eds., 2018). But much of it was popularized in JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004).

24. For one of the best discussions of the mathematical strands, *see* Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem,* 31 J. LEG. STUD. 327 (2002). He distinguishes between the "polling" model, which is what I call statistical many-minds, and the "aggregation" model, which is what I call decisional many-minds. *See id.* at 332–34.

25. People also have to answer sincerely and be personally unaffected by the outcome. CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 25, 27–28 (2006); Hélène Landemore, *Democratic Reason: The Mechanisms of Collective Intelligence in Politics, in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 251, 265 (Hélène Landemore & Jon Elster eds., 2012); Adrian Vermeule, *Collective Wisdom and Institutional Design, in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 338, 344–45 (Hélène Landemore & Jon Elster eds., 2012) [hereinafter Vermeule, *Collective Wisdom*]; VERMEULE, LIMITS OF REASON, *supra* note 23, at 28 ("The independence required by the Jury Theorem is 'statistical, not casual,' meaning that so long as A's vote is the same as A's vote conditional on B's vote, statistical independence is preserved . . . .").

26. Vermeule, *Collective Wisdom, supra* note 25, at 345.

27. *See, e.g.,* Nicholas R. Miller, *Information, Individual Errors, and Collective Performance: Empirical Evidence on the Condorcet Jury Theorem,* GROUP DECISION AND NEGOTIATION, 211, 213–14 (1996).

28. Vermeule, *Collective Wisdom, supra* note 25, at 346. There is mixed evidence on whether synchronism improves or hinders accurate decisionmaking. VERMEULE, LIMITS OF REASON, *supra* note 23, at 49–50.

any way on deliberation among the persons answering the question;[29] there are some reasons to think that deliberation improves accuracy, but some reasons to think that it does not.[30]

If everything else is not held constant, the Theorem does not hold. But that could be either good or bad; that is, it is possible that a bigger group may perform even better than Condorcet would have predicted if other factors weigh in that direction. A nice statement of this comes from Adrian Vermeule, who summarizes the probability that the majority of a group of people will select the correct answer to a question as a function of three variables: the size of the group (the more people the better), the average competence of the group (the more competent the better), and the diversity within the group (the more diversity— that is, uncorrelated or negatively correlated errors—the better).[31] In other words, increasing the number of decisionmakers should improve the accuracy of the decision so long as average competence improves or at least does not fall and diversity improves or at least does not decline. As I explain below, I believe that is precisely what would happen if we increased the number of judicial minds involved in MDLs .

It is important to note that the Condorcet Theorem and its subsequent extensions depend on an exogenously correct answer to the question put to the group.[32] That is, there must be some truth that we are pursuing. This applies easily to factual questions—even if it may be difficult to figure out what the correct answers are—because factual questions are essentially empirical questions: what happened on such date at such and such place. But juries (if we get that far) resolve factual questions in MDL cases; the questions answered by MDL judges are legal questions. It is harder to see how legal questions can have correct answers because they are a matter of interpretation: judges are free to use different interpretative methods and, even when they use the same method, every method is indeterminate to at least some extent. Nonetheless, most people seem to agree there are at least *some* legal questions that have determinate answers.[33] If that is true, then it is not so important to try to figure out how many legal questions have determinate answers—at this at this point, anyway; it may affect

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29. VERMEULE, LIMITS OF REASON, *supra* note 23, at 37 ("[T]he Jury Theorem is a statistical mechanism that can go through whether or not the participants talk to each other . . . .").

30. SUNSTEIN, *supra* note 25, at 57–64; Vermeule, *Collective Wisdom*, *supra* note 25, at 348; Dan Sperger & Hugo Mercier, *Reasoning as a Social Competence*, *in* COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 368–86 (2012) (endorsing group deliberation); VERMEULE, LIMITS OF REASON, *supra* note 23, at 36–41, 73–75 (noting the danger of "information cascades").

31. Vermeule, *Collective Wisdom*, *supra* note 25, at 346; *see also id.* at 56–70, 269, 354 (discussing diversity as lack of error correlation); VERMEULE, LIMITS OF REASON, *supra* note 23, at 78 (same).

32. *See, e.g.*, Vermeule, *Collective Wisdom*, *supra* note 25, at 342–43 (discussing "epistemic accuracy" and "truth-tracking capacity").

33. VERMEULE, LIMITS OF REASON, *supra* note 23, at 8, 67 ("I will assume that there is a truth that legal institutions can track—that there are exogenously defined right answers to the relevant legal questions. [A]lthough this is an assumption . . . it is also a substantively plausible assumption . . . .").

the cost-benefit analysis I undertake in Part IV.[34] So long as we assume that there are *some* questions presented to MDL judges that have correct answers, then decisional many-minds theory can tell us something about the best way to find the answers to *those* questions.

B. Statistical Many-Minds Theory

But even if you don't believe legal questions can ever have exogenously correct answers, the statistical many-minds theory can still be applicable. Statistical many-minds theory is not concerned with exogenously correct answers but endogenously representative answers.[35] That is, it seeks to improve the likelihood that questions are answered with mainstream answers rather than outlier answers; here, an accurate answer to a question might be the modal answer that all possible decisionmakers would give.

It is easier to see that many of the questions that arise in MDLs can be more or less accurate in this sense: for almost any question, we can imagine a range of answers that would be given in the federal judiciary; some of those answers will be more common and some of those answers will be less common. If the answer is less common, it is less accurate in the simple sense that most judges would have given a different answer.

The math behind statistical many-minds is little more than the familiar mathematics of statistical sampling: the more minds we sample, the closer the modal answer of the group gets to the modal answer that would be given by all people.[36] The theory works even if the sampling is done randomly, as it usually is in statistics; we don't have to worry about the average competence of the minds sampled like we do with the decisional many-minds theory. For these reasons, it will be even easier to see how increasing the number of judicial minds in MDL litigation can improve statistical accuracy.

C. Many Minds and Legal Decisionmaking

It is not important which of these two many-minds theories you like better because they both point in the same direction: the more minds, the better.[37] Thus, if you think *either* correct *or* representative legal decisions are both possible and desirable, then many-minds theory has something to say about our MDL system. Indeed, although the many-minds literature has never been applied to MDL judges, it has been applied to legal decisionmaking many times over.[38] There is

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34. Vermuele, *Collective Wisdom, supra* note 25, at 339 ("These controversies affect the size of the domain within which epistemic accuracy gets purchase but do not undermine the baseline conception itself.").

35. *See id.* at 342 (discussing representative answers).

36. *See* Edelman, *supra* note 24, at 342 ("The larger the panel, the more likely it is that the outcome will be representative of the wishes of the judges in the circuit as a whole.").

37. *See id.* at 334 ("[F]or numerical purposes, . . . these models lead to the same conclusions.").

38. *See, e.g.,* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 9–10, 96–112, 166–184, 196–209 (2009); VERMEULE, LIMITS OF REASON, *supra* note 23; Michael Abramowicz, *En Banc Revisited,* 100 COLUM. L. REV. 1600 (2000); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court,* 96

nothing about the decisions that MDL judges face that suggests they would be any less applicable.

It is true some scholars have been skeptical of applications of decisional many-minds theory to legal decisionmaking. But in my view, the MDL system is the ideal context for the decisional theory. For example, although skeptics sometimes question whether any group of judges will have a better than even chance at knowing the correct answer to a legal question, this skepticism is less applicable to the MDL system than perhaps any other body of judges: not only are federal judges our most talented judges, but, when the JPML picks among them for MDL duty, the JPML seeks out the very best of the best.[39] Other skeptics note that there are diminishing returns to competence and diversity as we add more judges to a group.[40] But these concerns have little traction in the MDL context: here, we are talking about increasing the number of judges from *one* to more than one. There are not yet diminishing returns when we have only barely begun the additive process. This feature of the current MDL system makes it something of a paradigmatic example for the efficacy of many-minds theory. As Professor Vermeule, who is perhaps the leading skeptic of decisional many-minds theory in law, has noted, the theory is at its *apex* when it is comparing one mind to many.[41]

Professor Vermeule has cast special doubt on the applicability of decisional many-minds theory when judges make decisions sequentially. Because later judges may free ride off earlier decisions, average competence may not improve while diversity—in the sense of independent error—may decrease.[42] Much of his concern is based on the legal imperative that later judges follow the precedents set by earlier judges.[43] But, in the ideas I examine below, precedent will be at its weakest, to the extent it is relevant at all: the ideas involve either judges sitting as a panel in the first instance or judges sitting as an appellate panel exercising de

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YALE L.J. 82 (1986); William Ortman, *Rulemaking's Missing Tier*, 68 ALA. L. REV. 225 (2016); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES L. 125 (2002); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011). Less formal but similar ideas underlie the preference for letting legal issues percolate before the Supreme Court reviews them. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017).

    39. *See* KLONOFF, *supra* note 6, at 132 ("Some academics and MDL judges believe that the Panel tries to pick the best and brightest judges to serve as MDL judges.").

    40. VERMEULE, LIMITS OF REASON, *supra* note 23, at 13 ("[M]ore heads can actually be worse than fewer; adding imperfect epistemic agents to the system might not merely produce diminishing returns, it might actually reduce the system's epistemic quality.").

    41. *Id.* at 53–54 ("Even if one-many comparisons of this sort succeed, the legal system typically presents a very different type of issue: *many-many comparisons*, in which institutions staffed by many minds are on both sides . . . .").

    42. *Id.* at 44, 46–47, 73–75. Many of these points are also made by Stephenson, *supra* note 38.

    43. He calls this the "Burkean paradox": more judges add more value by giving independent answers, but the common-law method forces them to follow the answers of others. VERMEULE, LIMITS OF REASON, *supra* note 23, at 46, 75–76. *See also* Stearns, *supra* note 38, at 128–29 ("[W]e cannot know with certainty whether like outcomes are the product of independent reflection or, instead, an endogenous function of the operation of precedent itself.").

novo review. Although free riding is still possible, it is certainly not required or encouraged in the way it was in Professor Vermeule's discussion of the common law.

But it is important to emphasize that none of these skepticisms and none of these caveats apply to statistical many-minds theory. As I noted above, we can pick judges at random and the group's modal answer will still get closer and closer to the modal answer of all judges as the size of the group increases. This is true even if the judges' decisions are not entirely independent of one another. Hence, there is little reason to doubt the applicability of statistical many minds to the ideas explored below.

D. Empirical Evidence for Many Minds in MDLs?

Although these many-minds theories are only theories, I find them particularly compelling because they depend on little more than simple mathematics. But it is of course impossible for me to prove empirically that our MDL judges are rendering less accurate decisions than they would in an alternative system; there is no alternative system in place to which the current system may be compared. Nonetheless, I think it is fair to ask whether I have any examples of decisions made by MDL judges that might have been different had they enjoyed the benefit of more minds. Identifying decisions that could have been improved according to the decisional model would require me to look deeply into the merits of rulings, which I do not have the capacity to do for this Article. Moreover, I am even reluctant to try to identify decisions that could have been improved in the endogenous-statistical sense without collecting data on how other judges have looked at the same questions. But it is no secret that different MDL judges can rule quite differently on the similar matters. Other scholars have chronicled many of these differences.[44] Surely some of these decisions would have come out otherwise had these judges been able to weigh in on each other's cases rather than render their decisions in isolation.

IV
IMPLEMENTING MANY MINDS IN MDLS

If you agree that it might be beneficial to increase the number of judicial minds in MDL litigation, is there a way to do it without significantly undermining the benefits of consolidation? I think so. As I noted, Professor McGovern favored earlier and more frequent remands of cases from MDL judges back to their original judges, advice that Judge Polster followed in the *In re National*

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44. *See, e.g.,* KLONOFF, *supra* note 6, at 208–17 (discussing conflicting decisions over the admissibility of experts, preemption, and summary judgment); Diego A. Zambrano, *How Litigation Imports Foreign Regulation,* 107 VA. L. REV. (forthcoming 2021) (discussing conflicting decisions over discoverability and admissibility of foreign regulatory information).

Prescription Opiate Litigation.[45] Although I, too, like this idea, it is unclear how many cases it can realistically free from the clutches of MDL judges, especially given that it depends upon the cooperation of those very MDL Judges who must agree to remand the cases.[46] Instead, I consider below two more systematic proposals: (1) more appellate review of decisions by MDL judges and (2) assigning MDLs to panels of judges instead of just one.

A. Increased Appellate Review of MDL Decisions

Scholars and other commentators have long debated increasing the opportunities for parties in an MDL to appeal the decisions of the MDL judge.[47] There is little doubt that both statistical and even decisional many-minds would predict that this would improve accuracy: instead of one judge deciding nearly everything, four judges (the district court and a panel of three appellate judges) would decide some things (more on the some below); quadrupling the number of minds also necessarily improves diversity; and there would be no reason to think average competency would fall.

But it is important to note that this may not be as big an improvement as it might appear at first blush. Because three of the judges will sit as a panel, we have to be concerned with more free riding among them than if they were deciding on their own.[48] Moreover, members of panels sometimes go along with their colleagues for reasons of collegiality.[49] As I noted above, the record on deliberation is mixed at best. Thus, although adding appellate review should improve accuracy on net, the panel format probably misses some of the potential many-minds gain.

Moreover, this proposal will improve accuracy only for the decisions that we allow the parties to appeal. How many will those be? Presumably only a small minority of the decisions made by the MDL judge, lest we let MDLs mire in appeals like a Dickens novel.[50] Although we might permit appeals from the most important decisions the MDL judge makes (more on that below), because this

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45. MDL No. 2804, 2020 WL 582151, at *3 (J.P.M.L. Feb. 5, 2020); Jeff Overley, *Opioid MDL Judge Picks New Bellwethers, Denies Retaliating*, Law360 (April 7, 2021) (remanding for trial five bellwethers to five different judges, in five different districts, in five different states, in five different Circuits). *See also* Rabiej, *supra* note 22, at 4–5 (endorsing this idea).

46. *See* KLONOFF, *supra* note 6, at 330 (citing J.P.M.L. Rule 10.3(a)) ("The JPML rules note that 'the Panel is reluctant to order a remand absent the suggestion of the transferee judge.'").

47. *See, e.g.*, SMITH, *supra* note 14, at 146–49 (endorsing more opportunities for appellate review); Joshua P. Davis & Brian J. Devine, *Procedural Self-Inflicted Wounds?*, 24 LEWIS & CLARK L. REV. 497, 506 (2020) (arguing that expansion of appellate review would not serve asserted policy goals of its proponents); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 464 (2019) (advocating appeal to three-judge panels comprised of district court judges).

48. VERMEULE, LIMITS OF REASON, *supra* note 23, at 88 (noting that when "each judge [is a] pivotal voter, the incentive to acquire information is greater, and it is easier [to avoid] free-riders").

49. *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1653 (2003) ("[T]he internal dynamics of the panel may lead judges to compromise their ideological preferences to maximize 'strategic' goals—such as being in the majority, influencing the content of the majority opinion, avoiding writing a dissent, or building capital for future cases.").

50. *See e.g.*, CHARLES DICKENS, BLEAK HOUSE (LONDON, BRADBURY & EVANS 1853).

will still leave plenty of things unreviewed, we are again achieving only a fraction of the potential gain of increasing the number of judicial minds.

But it gets even worse: against this very modest accuracy benefit comes a very considerable cost to efficiency. Because appeals happen sequentially, every time we allow a party to take one, the litigation is prolonged. That is, the more we gain in accuracy by permitting more appeals, the more we will lose in efficiency. Indeed, the average time to resolve an appeal is roughly a year in most circuits, and as much as two years in some circuits;[51] if we allowed each party to appeal more than once, the length of an MDL would automatically double.[52] It is not clear that the modest gains to accuracy will outweigh these considerable costs to efficiency.

Finally, this proposal comes with two major practical impediments: deciding which appeals to allow and enacting the proposal in whatever form we decide is best. With regard to the first impediment, it is difficult to capture on paper what will be the most important decisions made by MDL judges. Commentators have proposed various lists,[53] but they all seem over- or underinclusive in foreseeable ways, let alone in all the unforeseeable ones. One way to avoid specifying a list of important decisions in advance is to permit each side to take a limited number of appeals whenever they choose; something like the system professional football coaches use when they want to challenge decisions made by referees by appealing to instant replay.[54] Although I prefer privately-ordered solutions of this sort to centrally-decreed solutions like trying to divine a list in advance, it may be too cute for serious consideration by lawmakers.

This brings me to the second impediment: expanding appellate opportunities requires lawmaking. Either Congress or the Judicial Conference's Committee on Rules of Practice and Procedure would have to legislate the change, and, in light of the fact that any change is thought to aid MDL defendants more than MDL

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51. U.S. COURTS, U.S. COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR CIVIL AND CRIMINAL APPEALS TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2017 2 (2017), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf [https://perma.cc/F52J-WKR6].

52. *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2148 (2020) ("[Products liability p]roceedings were open an average of 1,743 days (4.7 years), with a minimum of 202 days . . . and a maximum of 4,964 days . . . .").

53. *See, e.g.*, LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 5 (2018), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl__tplf_proposals_for_discussion_9-14-18__004_.pdf [https://perma.cc/Z79K-DPZF] (discussing which decisions should be subject to appellate review).

54. *See* Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 269 (2017) (arguing for each side in a case to be given one "challenge appeal"); *see also* Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639, 652–53 (2019) (arguing for each side in a case to have only one opportunity to petition for discretionary appeal).

plaintiffs,[55] it is difficult to see how change advances in either venue; indeed, the rulemaking committee very recently declined to move forward with the idea.[56]

B. MDL Panels

Wouldn't it be nice if there was a many-minds improvement that could be implemented without lawmaking? There is: assigning MDLs to panels of judges. Although this idea has received much less attention than expanding appellate review,[57] existing law already permits it because the MDL statute says the JPML can transfer multidistrict litigation to "a judge *or judges*."[58] Indeed, on rare occasions, the JPML has done just that: I know of two instances where the JPML—albeit in its earliest days—transferred litigation to a two-judge panel.[59]

Is the right size for the panel only two judges? Although we usually use three-judge district court panels,[60] there is no reason it cannot be two or many more than two; courts of last resort like the U.S. Supreme Court sit with many more judges. Laboratory experiments outside of legal decisionmaking have found diminishing returns to accuracy after somewhere between three and six people have been consulted,[61] but this is something the JPML could experiment with. So long as the judges on the panel make their decisions jointly like any other multi-judge panel rather than dividing the issues in the MDL among themselves—the accuracy gains from many minds comes from redundant decisionmaking; as I noted above, we want more minds thinking about the *same* question—then the panel should make more accurate decisions than a single judge

The cost to efficiency would be negligible for the parties: cases wouldn't take any longer and they wouldn't have to do any more work; they would make the same motions and attend the same hearings that they do now. The cost to efficiency for the judiciary would not be negligible because now multiple judges are consumed by an MDL rather than just one.[62] But this cost strikes me as a very

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55. *See* KLONOFF, *supra* note 6, at 353 ("For the most part, plaintiffs' attorneys . . . have not urged MDL reform.").

56. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 28–29 (May 27, 2020), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_may_2020_0.pdf [https://perma.cc/S5EA-GGDB].

57. The only example I am aware of is Wood, *supra* note 22, at 9. But weaker versions of this idea might include the growing use of special masters by MDL judges, *see* Burch & Williams, *supra* note 52, and the informal coordination between MDL judges and state judges that sometimes takes place, *see* KLONOFF, *supra* note 6, at 337.

58. 28 U.S.C. § 1407 (emphasis added).

59. *See* Order Reassigning Litigation to Judges Pierson M. Hall and Manuel Real, *In re* Air Crash Disaster Near Papeete, Tahiti, on July 22, 1973 (J.P.M.L. 1979) (No. 206); *see also In re* Air Crash Disaster Near Chicago, Ill., on May 25, 1979, 476 F. Supp. 445, 452 (J.P.M.L. 1979) (assigning the MDL to Judges Edwin A. Robson and Hubert L. Will). Many thanks to Margaret Williams for these examples.

60. 28 U.S.C. § 2284.

61. Ilan Yaniv, *The Benefit of Additional Opinions*, 13 CURRENT DIRECTIONS PSYCH. SCI. 75, 75 (2004) (explaining that in the domains of perception, general knowledge, business, and economics three to six opinions are sufficient to realize accuracy gains).

62. *See* Wood, *supra* note 22, at 13.

small price to pay if we can gain a more accurate adjudication of hundreds, thousands, or even hundreds of thousands of legal claims and defenses that are at issue in an MDL.

The accuracy gains will be much greater than in the appellate proposal because, here, multiple minds will be deciding all questions rather than only the small minority of questions that can be appealed. It is true that we still have to worry about the diversity-sapping panel effects of free riding and collegiality, so the accuracy gains will not be maximal, but, given the small price in efficiency, this idea strikes me as a clear net improvement over the status quo.

Even so, this idea may not be suitable for every MDL. Although most of us envision mass torts with thousands of cases when we conjure up images of MDLs in our heads, the truth of the matter is that most MDLs are small affairs.[63] If the number of cases in an MDL is not numerous, it may not be worth drawing on more judicial time to assign the litigation to a panel. Moreover, even when the cases are numerous, it does not mean every MDL should receive a panel of the same size: it might be worth assigning the biggest, so-called "mega" MDLs to even larger panels because the accuracy gains given the number of cases might be large enough to justify even more judicial time. Again, these are all questions that the JPML has the freedom to experiment with under existing law.

V
CONCLUSION

Like other commentators, I think our MDL system has focused too single-mindedly on efficiency to the detriment of other procedural values.[64] Unlike other commentators, the procedural value that I worry has been most neglected is what may be the most important one of them all: the accurate adjudication of legal claims and defenses. One way to improve accuracy is to increase the number of judges involved in MDLs . The best and easiest way to accomplish this may be to assign MDLs to a panel of judges instead of just one judge. Unlike many academic proposals, this requires no change in the law; the JPML has done it in the distant past, and it could do it again.

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63. *See* Williams, *supra* note 5, at 1275 (explaining that in 2011 "mega proceedings were not more than 15% of all the proceedings created."); *see also* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1320 (2020) ("[M]ega-MDLs may not be representative of MDL litigation overall.").

64. *See* articles cited *supra* note 21.