

In a Different Voice

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Elizabeth Chamblee Burch & Margaret Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, __ **Cornell L. Rev.** __ (forthcoming 2022), available at [SSRN](#).

How should we measure the value of an article? Easy metrics come to mind: citation counts, the h-index, SSRN downloads, likes and retweets, etc. All reflect the pathogenic logic of YouTube and Instagram celebrityhood transposed to legal scholarship. We all know that. Yet many of us pour over top-10 lists of most-cited scholars in different fields, compare downloads, and fret when a forthcoming article in our area does not cite us. When the masters behind the tyranny of the U.S. News metrics flirted with including citation counts, more than a few corners of legal academy prepared to fall in line. Some perhaps a bit too eagerly.

How about other (anti-)metrics: humanity and compassion? A bit quaint, perhaps, too cute in a hardnosed data-driven world. But why not focus on meaningful markers of human flourishing?

Elizabeth Chamblee Burch and Margaret Williams's new article would score high on both counts.

The article opens with the obligatory observation in the field that MDL caseloads swallow up more and more of the federal docket and involve many high-profile issues (e.g., opioids). This trend has drawn significant scholarly attention. Yet we still know little about the individual plaintiffs in many of these MDLs. Their views, concerns, and frustrations have largely remained hidden. Burch and Williams conducted a survey of plaintiffs in numerous MDLs to understand their perspectives and inform numerous doctrinal debates.

Burch and Williams begin by rehearsing MDLs' transfer provisions and specialized litigation procedures. They contrast these structural features with the main findings of the procedural justice literature. That literature suggests individuals value proceedings that allow for participation (or at least presence), that are intelligible, where an attorney they trust can influence proceedings, and where a judge considers the facts of their case. MDLs might be efficient (allowing for one judge and a few adjuncts to handle huge numbers of cases), but they purchase such efficiency at the cost of distant proceedings that drag on for years, that are led by a team of attorneys with no relation to most plaintiffs, and that rarely concern themselves with the messy business of understanding the stories of individual plaintiffs.

Then comes Burch and Williams' main contribution: they ask a bunch of plaintiffs a bunch of questions. The article analyzes how these answers relate to important doctrinal questions, raise ethical concerns for the often absent or dismissive MDL attorneys, and generally show "a system under stress," often unable to meet basic thresholds of what we expect from a proud judicial system. The article includes various proposals to ameliorate the current state of affairs, ranging from required attorney public-disclosure statements to technologically enabled transparency measures (Zoom MDLs!) to appointment of separate attorneys for separate interests.

I could summarize the article and its practical, doctrinal, and theoretical points at great length. But the point of the article is to let MDL plaintiffs speak in their voices. So here are a few quotes from the article. (There are many more and they deserve to be read with care.)

- “I was on an assembly line and just waited for years.”
- “I feel that the judicial system is treating this serious matter just like a mass production of a product and not as legal human suffering cases where people’s lives are at stake.”
- “It was a total failure of the system. I lost faith in the legal system and feel these multi district lawsuits do not help the individual in any way.”
- “I absolutely feel like I don’t matter. I would even say I kinda feel like my attorney just wishes I would die so they could forget about the whole thing.”
- “I feel as though I was never represented. To this day I have never spoken with the attorney . . . I had absolutely no input in my own case.”
- “[My lawyers] waited till the night before to tell me that I had a deposition the next morning” and then “no showed and the person from Johnson and Johnson had to conference call them in so they could continue. I walked into that deposition so unprepared and alone.”
- “I felt like I didn’t matter at all and I was just another number.”
- “My life has been ruined and my attorney apparently doesn’t care. There’s been no personal interaction with him.”

One might have different reactions at this point. One is to examine the data and the process that generated it. There are weak points. For example, the survey focuses on plaintiffs in 26 thematically linked MDLs out of hundreds available. The survey was web-based, not administered in person or on paper. The authors relied on social media, webpages, plaintiff’s attorneys, and news coverage to spread the word about the survey. It yielded 217 unique and verified responses (the authors also “spoke with over 20 [plaintiffs] by phone and corresponded with over 90 by email and electronic messages”). In short, the survey is not random and it is difficult to identify a population from which it samples. Also, as the authors acknowledge, “it is possible that those who felt more strongly about their experiences might have been more likely to participate and, of course, recollections may be tainted by any number of biases.” As such, all claims that rely on the representativeness of the survey must be read with lavish caution.

But perhaps that misses the point. Perhaps a better reaction to the many quotations in this article is to reflect on the suffering and outrage that these people experienced within these MDLs. Perhaps one might even ponder one’s role in all of this. I wondered if I had trained any of the lawyers involved. That is uncomfortable terrain, and I found myself instinctively reaching for the familiar comfort of literally any other article to avoid the emotional drain of this one. I am humbled by the compassion and humanity it took to research and write this article.

Of course, it could be that the survey responders are outliers. But I am not sure anymore. Are there accounts of people ennobled by MDLs and pleased with the procedure? Plaintiffs who were properly treated, respected, their stories heard and their view of the legal profession, the legal system, and the rule of law enhanced? Such people might exist (after all, without MDLs they might have been unable to find a lawyer and sue at all). But perhaps it is time for MDL proponents to find these people and bring forward their side of the story. As it stands, we have many stories that make the usual invocations of efficiency and lack of alternatives ring hollow.

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