

## Procedure and Society: An Essay for Steve Yeazell

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### ABSTRACT

Stephen Yeazell's pathbreaking study of the history of group litigation revealed how disparate societies have shaped the rules of group litigation to meet their own needs. Professor Yeazell thereby demonstrated that procedural rules are socially contingent rather than universal in nature. In this Essay, I transform that lesson into a new approach to joinder rules. Specifically, I argue that if joinder rules arise out of specific social situations, then the simplest approach to joinder is to adopt a default rule calling for the shape of litigation to reflect the shape of the social activity that gave rise to the litigation. Labeling this concept "social loyalty," I argue that it provides a new way of identifying what cases ought to be adjudicated in the aggregate and a new defense of their aggregation.

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William B. Rubenstein is the Sidley Austin Professor of Law, Harvard Law School. This Essay is a written version of the talk I delivered at the 2013 *UCLA Law Review* Symposium honoring Steve Yeazell. I am indebted to the participants at the Symposium for their helpful comments, to John Goldberg, Sam Issacharoff, Martha Minow, and Seana Shiffrin for their comments on an earlier draft, and to Chris Keys for his research assistance. The talk's title appears as a heading in one of Steve's first articles, *Group Litigation and Social Context: Toward a History of the Class Action*.\*

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\*Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).



## I.

In 1997, after about a decade as an attorney with the American Civil Liberties Union's (ACLU's) National Lesbian and Gay Rights and AIDS Projects, I came to UCLA School of Law as a junior faculty member. My goal was to remake my career from one as a gay-rights litigator to one as a teacher and a scholar of litigation more generally. A primary reason I chose to pursue this academic agenda at UCLA was that Steve Yeazell was a member of its faculty. I had long admired Steve's scholarship. Then, the year before I went on the law teaching market, I taught civil procedure for the first time as a visiting assistant professor from practice at Stanford Law School. In doing so, I discovered the *Teacher's Manual* to Steve's casebook<sup>1</sup>—a guide so perfectly instructive that I clung to it as if it were a life preserver and I was on a sinking ship, which is exactly what teaching civil procedure for the first time felt like. The punch line is that I was not even using Steve's casebook. But until I read Steve's *Teacher's Manual*, I had thought the Socratic method was spontaneous. Meeting Steve in person during the hiring process enabled me to predict with some confidence that he would be the ideal senior colleague for this new endeavor of mine.

So much that we predict in life about other people is so often so wrong—how many times has *love* failed you?—that it is rather shocking when one of our predictions is not only fulfilled but surpassed. In eighteen years of academic life, I have never had a better colleague than Steve Yeazell. Every article that I have written since meeting Steve has spent its entire “” footnote finding new ways to thank him. At the outset of my career, Steve gave me the perfect advice: that not every article had to be a full-on symphony, that good prose mattered, that the world would be fine without ever seeing a sentence that contained the phrases “in Part I, in Part II,” and so on, and perhaps most importantly, that an article should never overclaim.

This advice came from a man whose very first sentence ever published in a law review read: “We still misunderstand the class action”<sup>2</sup>—a sentence that was itself overinclusive since, of course, Steve meant that *you* still misunderstand the class action and included himself in the formulation only out of modesty. If there were any doubt about the originality of this new voice, it was dispelled by the

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1. STEPHEN C. YEAZELL, CIVIL PROCEDURE (8th ed. 2012).

2. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).

third paragraph of Steve's first law review article, in which he wrote, "The class action has been a freak from birth, a useful—perhaps an essential—bastard, but one whose existence nonetheless makes us question the categories that polite legal society uses to order the world."<sup>3</sup> And if any doubt about Steve's brilliance lingered, that too was settled on the second page of Steve's first law review article when, with the simple phrase "[he] was writing as an advocate,"<sup>4</sup> Steve took down Zechariah Chafee, a scholar whose reputation exceeded even his parents' prophetic aspirations. In that first article, Steve retold the story of three millennia of group litigation in thirty-one pages, announcing his arrival on the scholarly scene with what might best be called a bang not a whimper. That same year, Steve published a companion piece,<sup>5</sup> the first sentence of which read, "A curious thing is happening in a courtroom in downtown Los Angeles,"<sup>6</sup> but which enacted the fact that a remarkable thing was happening in a law school office on the west side of Los Angeles.

Steve's study of group litigation commenced in the decade after the 1966 promulgation of the modern class action rule.<sup>7</sup> The rule and its early applications proved controversial.<sup>8</sup> One defense of the class suit rested in part upon the notion that, being a product of the equity courts, it had been around since time immemorial.<sup>9</sup> This had been Chafee's folly some decades earlier,<sup>10</sup> one oft-repeated by later commentators. Steve's research demonstrated that "the smoothly continuous history implied by the generally accepted account is wrong,"<sup>11</sup> that the story of group litigation demonstrates the social contingency of procedural rules,<sup>12</sup> and that this history "preclude[s] easy assumptions that formally similar procedural devices play similar roles in different social circumstances."<sup>13</sup>

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3. *Id.*

4. *Id.* at 867.

5. Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977).

6. *Id.* at 244.

7. FED. R. CIV. P. 23.

8. See Yeazell, *supra* note 2, at 866.

9. *Id.* at 866–68.

10. *Id.* at 867 (discussing ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149–295 (1950)).

11. *Id.* at 866.

12. *Id.* at 866–67.

13. *Id.* at 896.

In a related article published the same year,<sup>14</sup> Steve applied these lessons to the curious case happening in a courtroom downtown—the Los Angeles school desegregation case. California’s courts had found Los Angeles’s schools to be unconstitutionally segregated on the basis of race and had ordered the school board to integrate them.<sup>15</sup> After the board essentially failed at the task,<sup>16</sup> the court took it upon itself to fashion a remedy.<sup>17</sup> A number of groups sought to intervene in that proceeding.<sup>18</sup> California’s appellate court ordered the intervention,<sup>19</sup> utilizing conventional intervention doctrine albeit in a novel fashion.<sup>20</sup> Steve approved the end but not the means. His article defended the outside group’s intervention on the grounds that what was curious about what was happening in the courtroom was that the court was holding, essentially, a town hall meeting<sup>21</sup> and that, as long as it was forced to do so by the failure of the political branches, it might as well do the job well.<sup>22</sup> Steve argued that the pretense of using conventional intervention doctrine in these circumstances was just that—a pretense.<sup>23</sup> His point was that procedural rules adapt as they are needed and that their legitimacy rides as much on their function as on their lineage.<sup>24</sup> In short, Steve’s early work stands for the proposition that joinder rules are not universal but are a product of the societal setting in which they operate, that understanding group litigation requires an understanding of the underlying social context.

## II.

My proposal is that we take Steve’s grand, sweeping history lesson and reduce it to a simple rule of joinder. If, as Steve argues, joinder rules are a product

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14. Yeazell, *supra* note 5.

15. *See Crawford v. Bd. of Educ.*, 551 P.2d 28, 42 (Cal. 1976).

16. *See Yeazell, supra* note 5, at 245.

17. *Id.* at 259 (“[The] court is displacing the board, not only as the framer of the remedy but also as the initial forum for the airing of views.”).

18. *Id.* at 245–46.

19. *See Bustop v. Superior Court*, 137 Cal. Rptr. 793, 797 (Ct. App. 1977).

20. *See Yeazell, supra* note 5, at 245–56.

21. *Id.* at 244 (“A curious thing is happening in a courtroom in downtown Los Angeles. Anywhere else the event would be called a town meeting; there, it is going by the name of intervention.”); *id.* at 260 (“I began by suggesting that the present phase of the trial court hearings resembled a town meeting. It is by now clear, I hope, that the metaphor may be both accurate and non-pejorative.”).

22. *Id.* at 260 (“After all, if courts must sometimes act as legislatures, we should not balk at their becoming effective ones.”).

23. *Id.* at 255–56.

24. *Id.* at 256–60.

of their societal setting, what if we, in turn, created a simple joinder rule that let the societal structure of a particular dispute dictate the structure of litigation that might grow out of that social conflict? We could take Occam's razor to the Federal Rules of Civil Procedure—and wouldn't that be fun?—and simply pare Rules 13, 14, 18, 19, 20, 21, 22, 23, and 24 down to one simple rule: The structure of a piece of litigation should resemble the structure of the societal activity that triggered the litigation.

The universal joinder rule would mean that a car accident involving two automobiles and two drivers should create two-party litigation, while a series of injuries from a mass-marketed drug gone bad should create aggregate litigation. The idea is that litigation should be isomorphic to the societal events it addresses—"iso" meaning same, "morph" meaning shape—that litigation is properly structured when its shape is the same as the shape of the underlying societal events. For ease of exposition, I substitute the word "loyalty" for "isomorphic"—the shape of litigation should be "loyal" to the shape of the underlying societal events—even though I am not talking about "loyalty" in the sense of individual commitment but solely in the sense of similarity of shape, as in "the Warhol was a loyal representation of a soup can."

There is a wealth of literature concerning the aggregation of legal claims. A central feature of that literature, as Steve has noted, is that it conceptualizes litigation as inherently individual in nature and then strives to justify aggregation's affront to individualism.<sup>25</sup> What is new here is that the concept of loyalty challenges the baseline premise that litigation is inherently individual.<sup>26</sup> It suggests a different default rule—that the shape of the litigation will mimic the shape of the triggering events—and it therefore puts a burden of persuasion on a party arguing away from adherence, reversing current procedural doctrine as it applies to aggregate litigation. The point is not that mass events *must* lead to aggregate litigation but rather that if they do, such a form carries with it a presumption of legitimacy.

This concept of social loyalty provides a new lens through which to assess several contemporary debates concerning the desirability of aggregate litigation. The U.S. Supreme Court rejected class action aggregation in two asbestos cases

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25. See, e.g., STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 11–21 (1987). For a further exploration, see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1644–54 (1997).

26. So does an understanding of the actual history of American litigation. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

in the late 1990s;<sup>27</sup> and then, in 2011, in two 5–4 decisions, the Court protected corporations’ ability to contract out of aggregate litigation through consumer contracts compelling individual arbitration<sup>28</sup> and rejected an aggregate approach in the *Wal-Mart* sex discrimination case.<sup>29</sup> Yet amidst these decisions, multidistrict litigation (MDLs) and some other forms of class actions have proliferated. Aggregate litigation is therefore a little bit like homosexuality was when I started doing gay-rights cases: It is simultaneously common and taboo—and remarkably resilient to the Supreme Court’s hostility. The social loyalty rubric recasts two of aggregate litigation’s central debates—the legitimacy of anti-aggregation arbitration clauses and pro-aggregation MDLs—bringing a new perspective to the questions of litigative form that lie at the heart of those debates.

#### *Arbitration Clauses*

Defendants do not like aggregation of small claims cases because absent aggregation they may escape liability as no individual has sufficient incentive to pursue a lawsuit against them. Defendants have therefore long searched for ways to resist aggregation—opposing class actions generally, resisting class certification in specific cases, and most recently discovering how, in many cases, arbitration clauses could accomplish that end for them.

The common law disfavored arbitration, but in 1925, the U.S. Congress enacted the Federal Arbitration Act (FAA) to encourage its use in resolving disputes among businesses.<sup>30</sup> In the late twentieth century, the use of arbitration spread from the business setting to an aggregate setting, with large companies increasingly incorporating arbitration clauses into investment, employment, and consumer contracts. Companies then began insisting on a secondary measure: Not only were disputes to be arbitrated but they were to be arbitrated individually, with the clauses prohibiting class arbitrations.<sup>31</sup> While some courts

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27. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (holding that class certification under Rule 23(b)(1)(B) was inappropriate because the parties had not properly demonstrated the existence of a limited fund); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (holding that case could not proceed as a class action because conflicts among class members rendered the proposed class representatives inadequate).

28. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

29. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Five justices found that the case failed to meet the commonality test of Rule 23(a)(2) of the Federal Rules of Civil Procedure. *See id.* at 2550–57. The Court also unanimously held that the case should not have been certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure, given the presence of nonincidental, individualized monetary damages. *See id.* at 2557–61.

30. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 39 (1991).

31. *See, e.g., Concepcion*, 131 S. Ct. at 1744 & n.2.

found such clauses to be unconscionable on the ground that they effectively insulate corporations from liability,<sup>32</sup> the Supreme Court held that the FAA preempted antiarbitration contract rules, thus effectively enabling such clauses.<sup>33</sup>

Social loyalty focuses attention on a particular moment in the historical development of arbitration—the moment at which arbitration clauses went from being bilateral agreements between businesses to being embedded in consumer adhesion contracts. The point is not that adhesion contracts cram down such agreements—though others have convincingly pressed that contention<sup>34</sup>—but rather that these clauses engender a form of dispute resolution that is disloyal to the underlying societal interaction. When such clauses are used in conjunction with a mass-marketed product, they are by definition part of a mass controversy. Social loyalty teaches that if the product is mass produced and mass marketed, the societal interaction at its heart is not an individualized one. The default presumption for litigation arising out of that transaction is therefore that it, too, should not be individualized.

Social loyalty is agnostic as to arbitration itself—a two-party arbitration resulting from a two-party dispute and a class action arbitration arising out of a mass dispute are both forms of dispute resolution loyal to their societal setting.<sup>35</sup> The asymmetry occurs not with the choice of dispute resolution system but with the dictation of a joinder rule disloyal to the underlying societal interaction. Embedded in mass transactions, the anti-aggregation rules are presumptively illegitimate and the burden should be on those proposing them to justify their departure from a socially loyal, aggregate adjudication. Because the issue is not arbitration versus litigation, that defense cannot be premised upon arbitration's streamlined nature. Rather, any defense would have to explain why an aggregated societal interaction should be adjudicated individually.

### *Multidistrict Litigation (MDL)*

Plaintiffs do not like aggregation of larger claims, particularly personal injury matters, because absent aggregation their claims are generally worth

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32. See, e.g., *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005).

33. *Concepcion*, 131 S. Ct. at 1746–53.

34. See, e.g., David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

35. This does not, of course, mean that class action arbitrations do not raise other problems. For an accounting, see Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1732–42 (2006).



more.<sup>36</sup> For example, once asbestos liability was established in the 1980s, trial lawyers could take asbestos cases to trial one by one and reap significant punitive damages (and correlative contingent fees) case after case. Their only real problem—since quantity of clients, causation, and liability provided none—was the possibility that asbestos claims would be resolved in the aggregate. For this reason, the trial bar funded the Supreme Court litigation<sup>37</sup> opposing the class settlements in *Amchem Products, Inc. v. Windsor*<sup>38</sup> and *Ortiz v. Fibreboard Corp.*,<sup>39</sup> and, having succeeded in both cases, seemingly put an end to aggregated resolution of mass torts.

But just as water finds its level, mass transactions have found a new form of aggregated litigation—the multidistrict litigation, or MDL.<sup>40</sup> A class action resolves many suits in the aggregate by appointing representatives for the absent class members and by empowering attorneys to resolve the cases of all class members; those unhappy with the outcome can opt out. An MDL, by contrast, aggregates only cases that have actually been filed and aggregates them only for pretrial purposes.<sup>41</sup> Although an MDL may generate an aggregate solution, if that solution is not a class action, each individual must opt into it; those who do not may have their cases tried individually. That description makes MDLs sound tentative and voluntary, but in fact most mass tort MDLs effectively compel aggregation.

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36. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 402 & n.142 (2001) (“[L]arge claimants will generally recover less through a class settlement than they would have been able to in an individual case before a jury or in an individual settlement.” (citing John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 653 (1987))).

37. For an insightful description of these dynamics, see Joseph Nocera, *Fatal Litigation*, FORTUNE, Oct. 16, 1995, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/1995/10/16/206859](http://money.cnn.com/magazines/fortune/fortune_archive/1995/10/16/206859), and Joseph Nocera, *Fatal Litigation, Part II: Dow Corning Succumbs*, FORTUNE, Oct. 30, 1995, [http://money.cnn.com/magazines/fortune/fortune\\_archive/1995/10/30/207226/](http://money.cnn.com/magazines/fortune/fortune_archive/1995/10/30/207226/). See also Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925 (2002).

38. 521 U.S. 591 (1997).

39. 527 U.S. 815 (1999).

40. To be sure, the MDL statute and its use date to the 1960s. See 2 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 6:40 (5th ed. 2012). In the wake of *Amchem* and *Ortiz*, however MDLs have become *the* form for resolution of mass tort matters. *Id.* It is worth noting that one factor explaining the rise of MDLs is that trial lawyers’ resistance to aggregation moderated after the Supreme Court’s decisions capping punitive damages. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). With the possibility of large punitive damage awards tempered, trial lawyers’ bet for a lucrative payday suddenly became aggregated litigation.

41. See 28 U.S.C. § 1407(a) (2006).

Litigation over the drug Vioxx shows how.<sup>42</sup> The pharmaceutical company, Merck, developed, manufactured, marketed, and distributed Vioxx. The drug was primarily intended to relieve pain and inflammation associated with arthritis without causing stomach problems. And apparently it was quite good at hitting this mark: In the five years after the FDA approved Vioxx for sale, about one hundred million prescriptions were written to approximately twenty million patients. Unfortunately, it turned out that Vioxx was associated with increased risk of heart attacks and strokes, facts that Merck either did or did not know in the period it marketed the drug. Regardless, it withdrew Vioxx from the market in September 2004. Tens of thousands of individual and class action lawsuits alleging product liability, tort, fraud, and warranty claims were filed in state and federal courts.

The Judicial Panel on Multidistrict Litigation (JPML) established an MDL in February 2005—five months after Merck removed Vioxx from the market—and appointed Judge Eldon Fallon in New Orleans to oversee the matter.<sup>43</sup> All cases that were pending in any federal court, that would later be filed there, or that Merck could remove there from state courts would be sent to Judge Fallon's court for aggregated pretrial proceedings<sup>44</sup> (ultimately about 50,000 cases). What that meant was that Judge Fallon would oversee the pretrial aspects of the cases and then remand them to their transferor districts for trial.

At the outset of the MDL, Judge Fallon appointed a Plaintiffs' Steering Committee (PSC) to run the plaintiffs' side of the case. The parties engaged in discovery. Judge Fallon then conducted a series of test (or bellwether) trials, to give both sides a sense of the strengths and weaknesses of their respective cases and an idea of how juries would respond to them. In late 2007, following the bellwether trials and utilizing the information learned from their outcomes,<sup>45</sup> the PSC and Merck agreed to an aggregate settlement of \$4.85 billion. Individual litigants whose cases had been sent to the MDL were asked whether they wanted

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42. The facts in this paragraph are taken from histories of the Vioxx litigation provided in *In re Vioxx Products Liability Litigation*, 401 F. Supp. 2d 565, 570–72 (E.D. La. 2005) and *McDarby v. Merck & Co.*, 949 A.2d 223, 229–48 (N.J. Sup. Ct. App. Div. 2008).

43. *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

44. *Id.*

45. State courts conducted bellwether trials as well. Merck effectively prevailed against all but one of eighteen bellwether plaintiffs. For a full accounting, see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 278 (2011) (citing, *inter alia*, Alexandra D. Lahav, *Rediscovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2394 nn.106–07 (2008) (collecting *Vioxx* trial outcomes)).

to accept the aggregate settlement and, within a year, 99.79 percent of the eligible federal claimants had done so.

This story makes an MDL appear to be a voluntary aggregation. But appearances are deceiving. Through a variety of mechanisms, the MDL process makes it very difficult, if not impossible, to disentangle an individual case from the mass of cases. For example, MDL courts are unlikely to remand any individual cases until the aggregate settlement is fully resolved, which could take years. Moreover, the Vioxx settlement coerced plaintiff participation by insisting that any lawyer who signed the agreement or enrolled a client in the claiming program was required to recommend enrollment to all her clients—and if any clients refused to participate, the lawyer was obligated to withdraw from representing them.<sup>46</sup> Thus, as Sam Issacharoff has joked: An MDL is like a Roach Motel, cases check in but they never check out.<sup>47</sup>

The MDL therefore suffers a legitimacy problem: Mass processing appears to violate both the MDL statute's insistence that coordination is solely for pretrial purposes and the Supreme Court's dislike of aggregation. There are a variety of ways to defend MDLs,<sup>48</sup> but social loyalty is a new one. Put simply, if a product like Vioxx is mass produced and sold to millions of Americans, the societal context is an aggregated one; litigation arising out of that aggregate controversy is most loyal to its context when it, too, is undertaken in the aggregate. The shape of the Vioxx MDL adhered to Vioxx's societal context and that loyalty alone gives it significant legitimacy.

### III.

I have taken Steve's lesson—that litigative form responds to social context—and turned it into a universal joinder rule: Litigative form ought to mirror the underlying societal context. The point is not aesthetic, however.

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46. For a further description, see Erichson & Zipursky, *supra* note 45, at 280–81.

47. See *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405 n.16 (D. Mass. 2008) (quoting Professor Samuel Issacharoff). On the dynamics explained in this paragraph, see 2 RUBENSTEIN, *supra* note 40, § 6:40.

48. See, e.g., Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332–40 (2008) (demonstrating benefits of bellwether trials enabled through multidistrict litigation practice); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2295–96 (2008) (stating the “basic conclusion” that the Judicial Panel on Multidistrict Litigation’s “inclination toward maximalist multidistrict aggregation serves many valid purposes”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008) (“The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement.”).

Rather, it is one that I propose to defend on instrumental grounds: Litigation that is loyal to its societal context accomplishes several functions central to the very purpose of dispute resolution. Let me conclude by identifying what a fuller version of the argument will explicate.<sup>49</sup>

First, social loyalty enacts a sense of fairness. Equity suggests that if a corporation mass markets a product, it is not unfair to make the corporation litigate in the aggregate. There is an element of estoppel present: Proceeding in the aggregate for profit arguably relinquishes the right to insist on proceeding individually for loss. Admittedly, the argument is not as immediately apparent on the plaintiffs' side of the ledger, as the Vioxx user whose personal injury claim is effectively forced into an aggregated MDL resolution does not experience her prelitigation self as being part of an aggregate. But she is. She benefitted from other individuals testing the drug in their bodies, thus enabling FDA approval; and she benefitted from the drug being mass produced, mass marketed, and mass distributed. All of this made the drug far more affordable than it would have been had it been tailored to her individual needs. Indeed, without these economies of scale, it is unlikely there would be drugs. While plaintiffs might not have as much volition in becoming members of an aggregate as defendants have in deciding whether to enter a mass (as opposed to individualized) business, plaintiffs nonetheless garner benefits from their positioning; hence requiring plaintiffs to litigate in the aggregate enacts at least a mild form of fairness by enforcing a symmetry to the societal setting. The logic of this symmetry argument is not abstract but litigation specific. Litigation is a process that attempts to assess liability for specific societal activities. It follows that there is an inherent equity when the shape of the litigation relates to the shape of the underlying activity.

Second, social loyalty challenges the substantive law's conceptualization of torts as individual in nature. One theory of tort law contends that tort law's function is to empower an individual to bring a wrongdoer into court to answer to that individual for the wrong that was done to her.<sup>50</sup> This view is hostile to MDL aggregation, arguing that in such mass tort situations, "[t]he most important reasons for thinking of individual claims as fundamentally dependent on their relation to the group claim are inapposite."<sup>51</sup> Such a conceptualization fails to

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49. See William B. Rubenstein, *Litigation's Mirror: The Procedural Consequences of Social Relationships* (unpublished manuscript) (on file with author).

50. My colleague John C.P. Goldberg and his frequent coauthor, Benjamin Zipursky, are the primary proponents of this "civil recourse" theory. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

51. Erichson & Zipursky, *supra* note 45, at 314.

account for the fact that the defendant developed and marketed a drug in the aggregate and that individuals who ingested that drug also were involved in an aggregate relationship. If the purpose of tort law is to enable the harmed to confront her wrongdoer, perhaps in an aggregate situation, the point is not to empower an individual to confront her wrongdoer but to empower a group to confront its wrongdoer.

Third, social loyalty serves as an independent procedural value, enabling us to measure the virtue of a particular procedural form by its adherence to social reality. That adherence is likely to make dispute resolution more efficient, fair, and accurate. Most importantly, though, as Steve's intervention article contended, attunement to a court's societal setting helps a court do its job effectively.<sup>52</sup> Indeed, that a lawsuit's structure should reflect the shape of the events that triggered it speaks to the very function of courts. If the purpose of adjudication is to address societal disputes, it is fair to ask whether a dispute has in fact been addressed when but a single strand of a large mosaic has been reviewed. The social relations that gave rise to the dispute have barely been framed, much less resolved, in such a circumstance. The law could place Linda Brown into a classroom full of white students and a step towards racial integration will have been achieved, but such a remedy is so incongruous with the shape of the social problem that to adjudicate *Brown v. Board of Education*<sup>53</sup> as an individual lawsuit, or worse, as an individual arbitration—as today's class action law may require—would be to pervert the meaning of litigation, the reason for establishing courts.

While I have elided many difficult questions here—for example, questions that Steve has long asked about representational legitimacy<sup>54</sup>—let me be clear about what I am not avoiding: Social loyalty forces us to confront the possibility that aggregation should not just be tolerated but that it should be compelled, that defendants in small claims cases and plaintiffs in large claims cases should, perhaps, be forced to litigate in the aggregate. The idea of compelled aggregation challenges the fundamental tenet of individualism that runs through American substantive and procedural law. But, if courts must sometimes act to resolve disputes arising out of mass events, to end by paraphrasing the words that ended Steve's first law review article, perhaps we should not balk at them doing so effectively.<sup>55</sup>

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52. See Yeazell, *supra* note 5, *passim*.

53. 347 U.S. 483 (1954).

54. See YEAZELL, *supra* note 25, at 197–212.

55. Cf. Yeazell, *supra* note 5, at 260.