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AGGREGATING DEFENDANTS

GREG REILLY*

ABSTRACT

No procedural topic has garnered more attention in the past fifty years than the class action and aggregation of plaintiffs. Yet, almost nothing has been written about aggregating defendants. This topic is of increasing importance. Recent efforts by patent "trolls" and BitTorrent copyright plaintiffs to aggregate unrelated defendants for similar but independent acts of infringement have provoked strong opposition from defendants, courts, and even Congress. The visceral resistance to defendant aggregation is puzzling. The aggregation of similarly situated plaintiffs is seen as creating benefits for both plaintiffs and the judicial system. The benefits that justify plaintiff aggregation also seem to exist for defendant aggregation—avoiding duplicative litigation, making feasible negative-value claims/defenses, and allowing the aggregated parties to mimic the non-aggregated party's inherent ability to spread costs. If so, why is there such resistance to defendant aggregation?

Perhaps, contrary to theoretical predictions, defendant aggregation is against defendants' self-interest. This may be true in certain types of cases, particularly where the plaintiff's claims would not be viable individually, but does not apply to other types of cases, particularly where the defendants' defenses would not be viable individually. These latter cases are explained, if at all, by defendants' cognitive limitations. In any event, defendant self-interest does not justify systemic resistance to defendant aggregation. Likewise, systemic resistance is not warranted because of concerns of weak claims or unsympathetic plaintiffs, the self-interest of individual judges handling aggregated cases, or capture by defendant interests. This Article proposes that to obtain the systemic benefits of defendant aggregation and overcome the obstacles created by defendant and judicial self-interest, cognitive limitations, and capture, defendant aggregation procedures should use non-representative actions, provide centralized neutral control over aggregation, and limit aggregation to common issues. This Article concludes with a modified procedure to implement these principles: inter-district related case coordination.

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I. INTRODUCTION

Suppose that Netflix offered a one-month free trial before a customer was billed,[1] but actually added a small additional charge to the first bill to cover tax owed for this "free" trial. If customers wanted to sue Netflix for deceptive trade practices, it would be unsurprising if they sought to sue collectively via voluntary joinder, a class action, or multi-district litigation and, absent a contractual provision, were permitted to do so.[2] But what if Netflix discovered widespread violations of a provision of the Terms of Use prohibiting users from sharing their passwords with people other than "household members?"[3]

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1. *See Netflix Terms of Use*, NETFLIX, https://signup.netflix.com/TermsOfUse (last visited July 25, 2014).

2. This is similar to *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), where there was little doubt aggregation would have been possible absent a contractual provision requiring individual arbitration; indeed, it is exactly the likelihood of aggregation that led to the inclusion of the contractual provision. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 414 (2005). *See generally* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623 (2012) (discussing *Concepcion* and its aftermath).

3. Netflix's terms of use permit sharing of passwords with "household members" but are actually ambiguous about sharing with non-household members. *See* NETFLIX, *supra* note 1. The hypothetical assumes that the Terms of Use include choice of law, choice of

Could Netflix aggregate its breach of contract claims and litigate against the consumers collectively? Both experience and most people's gut reactions suggest no.

This raises a puzzle. Why are multiple people harmed by the same defendant in similar ways considered an appropriate litigation group but multiple people harming the same defendant in similar ways are not? In theory, aggregation of similarly situated defendants offers the same benefits as aggregation of similarly situated plaintiffs: avoiding duplicative and potentially inconsistent litigation; promoting optimal deterrence by making negative-value claims (for plaintiffs) or defenses (for defendants) viable; and encouraging resolution on the merits, not litigation costs, by allowing the aggregated party to spread its costs in the same way that the non-aggregated party inherently can.[4]

Yet, efforts to aggregate similarly situated defendants across several substantive areas have sparked widespread and vehement opposition from defendants, courts, and policymakers. Courts have rejected joinder where "the plaintiff does no more than assert that the defendants 'merely commit[ted] the same type of violation in the same way' "[5] and have even described efforts to aggregate similarly situated defendants as a "gross abuse of procedure."[6] Even Congress has weighed in, with one member describing defendant aggregation as an "abusive practice."[7]

Defendant aggregation has been particularly controversial in patent litigation, where courts and defendants have resisted efforts by patent holders, particularly controversial patent assertion entities or "trolls," to join unrelated companies with similar but competing products alleged to infringe the same patent.[8] When the plaintiff-friendly Eastern District of Texas permitted it, Congress passed a special statutory provision prohibiting joinder or consolidation for trial of unrelated accused infringers.[9] Efforts by copyright holders of pornographic films to join dozens or hundreds of users of the internet file sharing protocol "BitTorrent" have encountered similar

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forum, and consent to jurisdiction provisions, though the actual terms of use include an individual arbitration provision like in *Concepcion*. *See id.*

4. *See* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 696-99 (2005); *see also* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563-64, 570-72 (1987) (describing rationales for aggregating plaintiffs).

5. Digital Sins, Inc. v. Does 1–245, No. 11Civ.8170(CM), 2012 WL 1744838, at *2 (S.D.N.Y. May 15, 2012) (alteration in original).

6. Nassau Cnty. Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151, 1154 (2d Cir. 1974).

7. David O. Taylor, *Patent Misjoinder*, 88 N.Y.U. L. REV. 652, 703 (2013) (quoting 157 CONG. REC. H4426 (daily ed. June 22, 2011) (statement of Rep. Bob Goodlatte)).

8. *See generally id.*

9. *See* 35 U.S.C. § 299 (Supp. V 2011); *see generally* Taylor, *supra* note 7.

resistance,[10] as has the music industry's own copyright fight against internet file sharers and DirecTV's campaign against individual signal "pirates."[11]

Unlike the exhaustive scholarly consideration of *plaintiff* aggregation,[12] only a handful of articles have addressed *defendant* aggregation.[13] Entirely overlooked in this limited scholarship is the basic puzzle of defendant aggregation—that is, why aggregation of similarly situated defendants has been so controversial in practice despite its theoretical benefits.[14] This Article tackles this puzzle. The disconnect between the benefits defendant aggregation offers and the opposition it has encountered may result from an assumption that defendant aggregation must take the procedural form most familiar from plaintiff aggregation—the class action—and a belief that the class action is problematic when absent defendants, not absent plaintiffs, are to be bound by a class judgment. This Article, however, is *not* an analysis of defendant class actions. Rather, it first steps back from the mechanics of aggregation and asks whether collective resolution of claims against similarly situated defendants is desirable in the first place. Only then does it address the appropriate procedural mechanism for achieving this collective resolution, whether already existing or newly developed for the specific needs of multi-defendant cases.

The Article proceeds in four main parts. Part II describes the background of aggregation generally and the puzzle of defendant aggregation specifically. Part III looks at the puzzle from the defendant perspective and Part IV from the societal perspective. Defendants' resistance to being aggregated is the easier of the two to understand. In many contexts defendants have strategic reasons to oppose being aggregated, including avoiding litigation that otherwise would not be brought and resisting the choice of the presumably self-interested plaintiff. On the other hand, defendants often overestimate the strength of these strategic concerns, and these strategic reasons do not even exist in certain contexts—particularly where the stakes are

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10. *See, e.g.*, Sanne Specht, *Judge Dismisses Film Company's Lawsuit Against Local Defendants*, MAIL TRIBUNE (May 14, 2013, 2:00 AM), http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20130514/NEWS/305140311; Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BLOOMBERG BUSINESSWEEK (May 30, 2013), http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls#p1.

11. *See infra* Part III.D.

12. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' note to cmt. a, at 15 (2009).

13. *But see infra* notes 20–23.

14. Prior works either focus on the theoretical benefits to defendants and ignore the practical opposition from defendants, *see* Hamdani & Klement, *supra* note 4, or focus on the practical opposition from defendants and ignore the theoretical benefits to defendants, *see* Sean B. Karunaratne, Note, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283 (2012).

too low to justify an individual defense—which are explained, if at all, by defendants' cognitive limitations.

Turning to the more interesting and important question of why aggregation of similarly situated defendants has faced systemic resistance, Part IV first concludes that any negative effects defendants suffer from being aggregated should not trouble courts and policymakers, as they neither distort the substantive remedial scheme nor raise fairness concerns. They explain systemic resistance, if at all, based on "capture" by defendants' interests. Although courts and policymakers may use de-aggregation as a way to police weak or disfavored substantive claims, these problems are better addressed through other procedural mechanisms or substantive reform. Finally, while managing the complexities created by defendant aggregation may challenge an individual judge's self-interest, it is not worse for the judicial system than repetitive or overlapping dispersed litigation.

Part V identifies three core features of an optimal procedure for aggregating similarly situated defendants: (1) a non-representative structure (i.e., not class actions); (2) control by a centralized body, not the parties or individual judges; and (3) aggregation only of common issues, not cases. Part V concludes by sketching a mechanism to implement these principles: inter-district related case coordination, which is a hybrid of existing multi-district litigation and the related case procedures many federal district courts use to manage cases filed within a single district.

II. OVERVIEW OF DEFENDANT AGGREGATION

Scholars and policymakers have paid surprisingly little attention to aggregation of defendants in litigation.[15] To some extent, this is because complex litigation scholarship focuses overwhelmingly on the class action and largely overlooks other means for aggregating parties, like joinder (Federal Rules of Civil Procedure 19 and 20), consolidation (Federal Rule of Civil Procedure 42), and multi-district litigation (28 U.S.C. § 1407).[16] Recent efforts to aggregate defendants largely have been via these other procedural devices, not defendant class actions,[17] and therefore have escaped the notice of many class-action-focused scholars. Moreover, efforts to aggregate similarly situ-

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15. Hamdani & Klement, *supra* note 4, at 689, 696.

16. *See* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 763-64 (2012) (noting that analysis of joinder is mentioned largely as an afterthought to the discussion of mass tort class actions); Emery G. Lee et al., The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation 5-7 (July 10, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443375 (summarizing limited literature on multi-district litigation).

17. RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 382 (3d ed. 1998).

ated defendants are uncommon compared to aggregation of similarly situated plaintiffs,[18] though they are becoming more frequent as mass communications allow dispersed people to cause the same injury to the same person in the same way.[19]

The leading work on aggregating similarly situated defendants is a paper by Professors Assaf Hamdani and Alon Klement in which they argued that the same justifications for plaintiff aggregation apply to defendant aggregation and proposed a procedure by which *defendants* could initiate a defendant class action.[20] A subsequent article by Nelson Netto, largely tracking Hamdani and Klement, contended that defendant classes were an important "functional device for the defendants" and proposed mandatory defendant class actions without opt-out.[21] More recent work by Francis Shen developed in more detail the theoretical case for defendant class actions, arguing that the device can maximize social welfare.[22] In contrast to this theoretical work, several scholars, practitioners, and students have described efforts by *plaintiffs* in specific substantive contexts to aggregate defendants and the *resistance of* defendants, courts, and policymakers.[23]

These conflicting lines of scholarship neatly illustrate the puzzle of defendant aggregation, which is laid out in more detail in this Part. Section A provides a background of aggregation procedures generally and Section B of defendant aggregation specifically. Section C describes the theoretical argument for aggregation of similarly situated defendants, and Section D describes the widespread resistance it has faced.

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18. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' note to cmt. b(1)(A), at 17 (2009); *id.* § 1.02 reporters' note to cmt. b(1)(B), at 23; STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 58 (1987).

19. Hamdani & Klement, *supra* note 4, at 741.

20. Hamdani & Klement, *supra* note 4, at 699 (discussing the similarities between numerous plaintiffs and numerous defendants and benefits to defendants from being aggregated). A few previous articles touched on defendant aggregation while focusing on plaintiff aggregation. Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 401-08 (2000). Defendant class actions also have received some attention in student notes and practitioner articles. *See, e.g.*, Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319 (2000); Notes, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978).

21. Nelson Rodrigues Netto, *The Optimal Law Enforcement with Mandatory Defendant Class Action*, 33 U. DAYTON L. REV. 59, 67, 97-101 (2007).

22. Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 74 (2010).

23. *See, e.g.*, Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695 (2011) (copyright); Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483 (2013) (intellectual property); Taylor, *supra* note 7 (patent); Tracie L. Bryant, Note, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25 HARV. J.L. & TECH. 687 (2012) (patent); Karunaratne, *supra* note 14, at 286-87 (copyright).

A. Aggregation Procedures

Federal procedural mechanisms have been the focal point for debate over defendant aggregation.[24] The most famous of these mechanisms is the class action, which is a representative action by which one or more people can sue on behalf of a class of similarly situated individuals, provided the many threshold requirements of Federal Rule of Civil Procedure 23 are satisfied: sufficient class size; common question of fact or law; adequacy and typicality of the representative; etc.[25] Class actions bind all individuals that meet the class definition, even if not actual parties to the litigation.[26] Hundreds of class actions are filed in federal court every month,[27] and they have been subject to substantial political, public, and scholarly scrutiny.[28] Although Rule 23 purports to apply equally to plaintiffs and defendants, defendant classes are virtually non-existent.[29]

Aggregation occurs less famously but more commonly by joining a person as a party in the same lawsuit.[30] Joinder actions only bind the individuals to the litigation; at least in theory, each individual party retains control over its separate claims, defenses, and rights.[31] Federal Rule of Civil Procedure 19 describes when a plaintiff must join other parties,[32] while Rule 20 gives the plaintiff discretion to do so in other circumstances.[33] Rule 24 describes when a third-party can "intervene" or join itself to a lawsuit,[34] while Rule 14 permits the defendant to "implead" or add a third party that is liable for the claim made against the defendant.[35] Finally, Rule 22 allows a party to "in-

24. Aside from formal aggregation in federal court, aggregation can occur: (1) in state court under procedures similar to federal aggregation procedures; (2) inherently when corporations or voluntary associations (e.g., unions) litigate on behalf of their members; (3) informally among counsel on the same side of related individual cases; and (4) via some substantive remedial schemes like bankruptcy. *See* Erichson, *supra* note 20; Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 23, 28, 38-39 (1991).

25. FED. R. CIV. P. 23.

26. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B), at 11 (2009).

27. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals,* 156 U. PA. L. REV. 1723, 1750 (2008).

28. *See* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 997 n.1 (2005) (collecting scholarship).

29. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 119-20 (1996).

30. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' note to cmt. b(1)(A), at 16 (2009).

31. *Id.* § 1.02 cmt. b(1)(A), at 11; *id.* § 1.02 reporters' note to cmt. b(1)(A), at 18.

32. FED. R. CIV. P. 19.

33. FED. R. CIV. P. 20.

34. FED. R. CIV. P. 24.

35. FED. R. CIV. P. 14.

terplead" other parties that have claims exposing the party to double- or multiple-liability.[36] These joinder rules generally apply to both plaintiffs and defendants.[37] They normally are used to aggregate a small number of parties; though joinder of tens, hundreds, or thousands is increasingly common, particularly in mass torts.[38] Most mass joinders involve plaintiffs.[39]

The third type of aggregation is coordination or consolidation of individual lawsuits, which can occur for hearing, trial, or any other purpose via Rule 42(a) if all of the cases are pending in the same federal district[40] or only for pre-trial proceedings (e.g., discovery, summary judgment, etc.) via the multi-district litigation statute, 28 U.S.C. § 1407, if cases are pending in different federal districts.[41]

Aggregation occurs in two types of cases.[42] First, many of the procedures only apply if individual adjudication could result in a problematic remedy, such as incomplete relief,[43] exposure to double, multiple, or inconsistent obligations or liability,[44] prejudice to a third party,[45] or effective determination of an entire group's rights.[46] This type of remedy-driven aggregation has deep historical roots[47] and is generally uncontroversial.[48]

Second, several procedures permit aggregation based only on various levels of commonality among the claims. Permissive joinder under Rule 20 requires a common "question of law or fact" *and* that the claim "aris[e] out of the same transaction, occurrence, or series of

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36. FED. R. CIV. P. 22.

37. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' note to cmt. b(1)(A), at 16 (2009).

38. *Id.* § 1.02 reporters' note to cmt. b(1)(A), at 16-17.

39. *Id.* § 1.02 reporters' note to cmt. b(1)(A), at 17.

40. FED. R. CIV. P. 42(a). District courts often have procedures for designating cases as related and assigning them to the same judge or permitting intra-district transfer. *See, e.g.*, U.S. DIST. CT. S.D. CAL. R. 40.1; U.S. DIST. CT. N.D. ILL. R. 40.4.

41. 28 U.S.C. § 1407(a) (2012); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) (requiring remand to original district for trial).

42. *See* Effron, *supra* note 16, at 764, 819-21 (proposing similar division).

43. *See* FED. R. CIV. P. 19(a)(1)(A) (mandatory joinder); *see also* FED. R. CIV. P. 14(a)(1) (interpleader).

44. *See* FED. R. CIV. P. 19(a)(1)(B)(ii) (mandatory joinder); FED. R. CIV. P. 22 (interpleader); FED. R. CIV. P. 23(b)(1)(A) (class action).

45. *See* FED. R. CIV. P. 19(a)(1)(B) (mandatory joinder); FED. R. CIV. P. 23(b)(1)(B) (class action); FED. R. CIV. P. 24(a)(2) (intervention).

46. *See* FED. R. CIV. P. 23(b)(2) (class action).

47. *See* YEAZELL, *supra* note 18, at 16, 58, 65.

48. *But see* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009) (suggesting that mandatory class treatment is inconsistent with individual autonomy but not challenging non-class aggregation in similar circumstances).

transactions or occurrences . . . ."[49] A class action under Rule 23(b)(3) requires only a common question of law or fact but requires that the common question(s) "predominate over any questions affecting only individual members . . . ."[50] Multi-district litigation under 28 U.S.C. § 1407, consolidation under Rule 42(a), and permissive intervention under Rule 24(b) permit aggregation based only on a common question,[51] though courts tend to require a strong overlap before ordering aggregation.[52]

Commonality-driven aggregation was largely an innovation of the 1938 Federal Rules of Civil Procedure and amendments in the 1960s.[53] Coordination or consolidation is generally uncontroversial,[54] while permissive joinder has been described as both too restrictive for requiring an overlap in operative facts and too expansive for allowing mass joinders.[55] Common question class actions under Rule 23(b)(3) are far more controversial: they have been accused of creating substantial exposure that encourages settlement of even meritorious defenses;[56] enriching plaintiffs' lawyers with large fee awards while recouping trivial recoveries for class members;[57] being inappropriate for substantive claims that are positive-value and rife with individual

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49. FED. R. CIV. P. 20(a)(1)(A)-(B); 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 20.05[3] (3d ed. 2013).

50. FED. R. CIV. P. 23(a)(2); FED. R. CIV. P. 23(b)(3). Common-question class actions must also be superior to other means for resolving the dispute. FED. R. CIV. P. 23(a)(1)-(4).

51. *See* 28 U.S.C. § 1407(a) (2012); FED. R. CIV. P. 24(b); FED. R. CIV. P. 42(a). The multi-district litigation statute only expressly includes "common questions of fact," 28 U.S.C. § 1407(a) (2012), but consolidation has occurred based primarily on common legal questions or mixed questions of law and fact. *See* Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 47-48 (1971).

52. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 1.02 reporters' note to cmt. b(2), at 27-28; Effron, *supra* note 16, at 789-804 (suggesting courts normally apply predominance standard when evaluating permissive joinder or consolidation).

53. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 47-60 (1989); Resnik, *supra* note 24, at 16, 29-32.

54. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2381 (3d ed. 2008) (Rule 42(a)); Resnik, *supra* note 24, at 35 (multi-district litigation). Some say that limiting multi-district litigation to pre-trial proceedings is too constraining. *See* Resnik, *supra* note 24, at 35; *see also* Erichson, *supra* note 20, at 416.

55. *Compare* Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure*, 12 FLA. COASTAL L. REV. 247, 265-66 (2011) (stating that the free joinder of parties is encouraged), *with* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 reporters' note to cmt. b(1)(A), at 16 (stating that the rules of joinder "allow[] persons with related claims to join as coparties but [do] not requiring them to").

56. Resnik, *supra* note 24, at 16.

57. *See, e.g.*, Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 679 (1979).

issues, like mass torts;[58] and threatening the autonomy of absent class members.[59]

B. Two Types of Defendant Aggregation

Though the historical roots of group litigation lie in aggregation of *defendants*—often an entire village with a shared obligation of harvest to a landlord or tithe to a church—aggregation of defendants has been described as a "rarity" in modern times.[60] Yet, litigation against multiple defendants occurs every day in courts across the country: employers and employees, corporations and their subsidiaries, principals and agents, co-conspirators, manufacturers and distributors, insured and insurers, etc.[61] Two types of defendant aggregation must be distinguished.

When a plaintiff has a single claim to a single recovery for which more than one person is potentially liable, whether jointly (e.g., co-obligors on a contract), severally (e.g., joint tortfeasors), or in the alternative (e.g., a manufacturer and its component part supplier in a product defect case), aggregation of defendants is common and uncontroversial.[62] Remedy-driven aggregation procedures often apply. Even if not, aggregation reflects the core purposes for which commonality-driven procedures were added to the federal rules: to prevent division of a single recovery into multiple lawsuits.[63] Like the historical roots of defendant aggregation, the defendants in these cases tend to have a pre-existing relationship, often direct (e.g., a manufacturer and its distributor) but at least indirect (e.g., two component part suppliers for the same manufacturer).

On the other hand, when a plaintiff has similar but independent claims (each entitled to its own recovery) against multiple unrelated but similarly situated defendants, aggregation is far less common and more controversial. This Article focuses on these cases and uses the phrases defendant aggregation or aggregation of similarly situated defendants to refer to them. Notably, aggregation of unrelated plaintiffs with similar but independent claims is common and widely accepted.[64] This is not to deny the serious debate, extensive commentary, and numerous policy proposals surrounding aggregation of simi-

58. *See* Rosenberg, *supra* note 4, at 565-66 (summarizing criticism).

59. *See* REDISH, *supra* note 48, at 169-73.

60. YEAZELL, *supra* note 18, at 58, 135-36.

61. *See, e.g.*, 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1657 (3d ed. 2001) (and notes therein).

62. *See* FED. R. CIV. P. 20(a)(2)(A); *see also* WRIGHT, MILLER & KANE, *supra* note 61, § 1654 (and notes therein).

63. *See* McFarland, *supra* note 55, at 260 n.66.

64. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1322 (1976).

larly situated plaintiffs, particularly via the class action. However, that debate is over the proper scope (e.g., are class actions appropriate for mass tort claim?) or procedures (e.g., how to protect absent class members or avoid agency problems with plaintiffs' lawyers). On the defendant side, the controversy is over the basic availability of aggregation for similarly situated defendants.

C. *The Argument for Aggregating Similarly Situated Defendants*

Prior scholarship on defendant aggregation has concluded, "the fundamental justification for consolidating plaintiff claims applies with equal force to defendants."[65] Specifically, aggregation of similarly situated plaintiffs is justified on three primary grounds that also seem to apply to similarly situated defendants: eliminating duplicative litigation, making otherwise negative-value claims viable, and allowing plaintiffs to match defendants' inherent ability to spread costs.

First, a benefit of all aggregative devices is the elimination or reduction of repetitive litigation over the same or similar issues, which wastes judicial and litigant resources[66] and risks inconsistent judgments that could undermine public faith in the administration of justice.[67] Multi-defendant cases are as likely to raise the same or similar issues as multi-plaintiff cases; for example, multiple patent defendants can each challenge the validity of the patent and rely on the same evidence and arguments.[68]

Second, plaintiff aggregation makes viable otherwise negative-value claims, that is, "where the net expected recovery is [individually] small" and would not justify the cost of litigation, "but the total extent of societal loss is large."[69] Aggregation insures that the defendant "pay[s] an amount equal to the losses caused by its wrong," thereby "secur[ing] the practical implementation of the substantive law" and providing a deterrent that "reduces the willingness of the defendant to engage in the illegal conduct that caused the harm in

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65. Hamdani & Klement, *supra* note 4, at 689.

66. *See* WRIGHT & MILLER, *supra* note 54, R. 42(a) (consolidation); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989); Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1728-30 (1998) (permissive joinder); Susan M. Olson, *Federal Multidistrict Litigation: Its Impact on Litigants*, 13 JUST. SYS. J. 341, 341 (1988-89) (multi-district litigation); Rosenberg, *supra* note 4, at 563-64 (class actions).

67. *See* Freer, *supra* note 66, at 814; Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 236-43 (1991).

68. *See* Bryant, *supra* note 23, at 704-05.

69. Richard A. Epstein, Commentary, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 6 (1990); *see also* Rosenberg, *supra* note 4, at 563-64, 570-72.

the first place."[70] Aggregation of defendants similarly allows the plaintiff to eliminate some costs that cannot be spread over multiple individual actions (e.g., filing fees, attending hearings and trial, and taking and defending depositions). This cost-reduction will make otherwise negative-value claims viable, promoting optimal deterrence.

Moreover, the negative-value defense provides a "mirror-image" justification for aggregation of similarly situated defendants.[71] Even defendants with meritorious defenses will settle if the cost of litigation exceeds the potential liability, and this threat of overpaying could over-deter legitimate conduct ex ante.[72] For example, many say patent-assertion entities exploit their cheaper litigation costs to obtain settlement payments less than the expected cost of defense, even for weak patents.[73] Aggregation should allow defendants to reduce total costs by exploiting economies of scale, making more defenses positive-value, and moving closer to optimal deterrence.[74]

Third, even for individually positive-value claims, plaintiff aggregation allows plaintiffs to share and spread costs over the whole set of their claims, which the defendant naturally will be able to do simply by being involved in many similar cases (e.g., by using the same expert witnesses, reusing briefing, undertaking a single document collection, etc.).[75] Aggregation thus evens the ability and incentives of the parties to invest in litigation, making it more likely that the resolution will reflect the merits rather than a "war of attrition" of costly discovery and motion practice.[76] Cost-spreading also applies in reverse—that is, absent aggregation of defendants, plaintiffs have a greater ability to exploit economies of scale and therefore have greater settlement leverage or ability to engage in a war of attrition.[77] For example, patent assertion entities have been accused of exploiting their lower cost of litigation and ability to spread costs among many defendants by making broad and costly discovery requests.[78]

Thus, in theory, defendant aggregation offers the same benefits as plaintiff aggregation, and these benefits generally accrue to the

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70. Epstein, *supra* note 69, at 6-7; *see also, e.g.*, Rosenberg, *supra* note 4, at 563-64 (discussing how aggregation can reduce the costs of individual litigation and promote optimal deterrence).

71. Hamdani & Klement, *supra* note 4, at 696-99.

72. *Id.* at 697.

73. *See* Ranganath Sudarshan, *Nuisance-Value Patent Suits: An Economic Model and Proposal*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 159, 160 (2008); Taylor, *supra* note 7, at 674-75; Bryant, *supra* note 23, at 693.

74. Hamdani & Klement, *supra* note 4, at 698-99.

75. *See* Rosenberg, *supra* note 4, at 570-71.

76. *See id.*

77. Hamdani & Klement, *supra* note 4, at 696-99.

78. *See* Sudarshan, *supra* note 73, at 166-67; J. Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 368, 375 (2010).

courts and the party being aggregated (the defendant) at the expense of the non-aggregated party (the plaintiff).[79] It also may serve an additional socially beneficial function not shared by plaintiff aggregation, forcing defendants to produce information about relative contributions to harm.[80]

D. Resistance to Aggregating Similarly Situated Defendants

Recent efforts by *plaintiffs* to aggregate unrelated but similarly situated defendants have sparked fierce resistance from *defendants*, courts, policymakers, and commentators in a variety of substantive areas. Although most of the controversy has centered on joinder of defendants under Rule 20, there also has been resistance to aggregating defendants via defendant class actions,[81] consolidation under Rule 42(a),[82] and the multi-district litigation statute.[83]

1. Patent Litigation

In recent years, patent litigation has become concentrated in districts seen as particularly friendly to patent owners, also known as "patentees," especially the Eastern District of Texas.[84] Filing in a plaintiff-friendly district has been popular among what are variably called patent assertion entities, non-practicing entities, or pejoratively, patent trolls,[85] which derive revenue from threatening or filing patent litigation rather than commercializing the invention.[86] Patent assertion entities are "perhaps the most controversial and least popular group of patent [holders]" accused of delaying litigation to maximize damages and leverage and using weak patents that are likely invalid but costly to invalidate.[87]

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79. *See* Hamdani & Klement, *supra* note 4, at 698-99 (describing benefit to defendants); *id.* at 726-27 (noting that "[f]or plaintiffs, the downsides of the class defense are obvious" and "[t]he upside of the class defense for plaintiffs is unclear").

80. *See* Shen, *supra* note 22, at 98.

81. *See* Donald E. Burton, *The Metes and Bounds of the Defendant Class Action in Patent Cases*, 5 J. MARSHALL REV. INTELL. PROP. L. 292 (2006) (describing disuse of defendant class actions and objections raised to it).

82. *See* 35 U.S.C. § 299 (Supp. V 2011) (prohibiting consolidation of patent defendants for trial).

83. *See* Greg Ryan, *JPML Head Judge Explains Why Panel Is More Picky*, LAW360 (May 24, 2013, 8:21 PM), http://www.law360.com/articles/442674/jpml-head-judge-explains-why-panel-is-more-picky (attributing increase in denial of multi-district litigation motions to increase in motions in patent cases, i.e., where defendants being aggregated).

84. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 404 (2010).

85. PWC, 2012 PATENT LITIGATION STUDY 24 (showing that 37.4% of patent decisions in the Eastern District of Texas involved patent assertion entities compared to 20.6% in all districts).

86. Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1578 (2009).

87. *Id.* at 1577-80.

Patent assertion entities often filed a single lawsuit against multiple unrelated defendants accused of infringing the same patent(s) with independent but similar products. For example, a patent assertion entity whose patent purportedly covered MMS messaging in mobile phones might sue LG, Sanyo, Samsung, Research in Motion, and Apple—each of whom developed and sold MMS-capable phones but did so independently of, and in competition with, each other. Though not used exclusively by patent assertion entities, multi-defendant patent suits came to be associated with their questionable (or to be fair, questioned) litigation tactics and the plaintiff-friendly Eastern District of Texas. Patent assertion entities filed nineteen percent of patent cases but sued twenty-eight percent of defendants,[88] and nearly twice as many defendants were sued per case in the Eastern District of Texas than the national average.[89] Patent assertion entities were assumed to file multi-defendant suits to decrease their own costs, increase the costs of defendants, and decrease the chances of transfer by naming at least one defendant with a connection to the plaintiff-friendly district.[90]

The overwhelming majority of district courts, ultimately endorsed by the Federal Circuit, held that claims against "separate companies that independently design, manufacture and sell different products in competition with each other" did not arise from the same transaction or occurrence for purposes of joinder, even where the products were accused of infringing the same patent and operated similarly.[91] Rather, "an actual link" between the products was required, such as a relationship between the defendants, the use of identically sourced components, or overlap in the products' development or manufacture.[92] The minority view, adopted almost exclusively by the Eastern District of Texas,[93] held that patent infringement claims arose from the same transaction or occurrence "if there is some nucleus of operative facts or law," such as allegations that the defendants infringed the same patent or had products that were not "dramatically differ-

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88. *Id.* at 1603-04 (2000–08 time period).

89. *See* James C. Pistorino, *2012 Trends in Patent Case Filings and Venue: Eastern District of Texas Most Popular for Plaintiffs (Again) but 11 Percent Fewer Defendants Named Nationwide*, PAT., TRADEMARK & COPYRIGHT L. DAILY, Feb. 11, 2013, at 3. This number is derived from the data reported for 2011, before Congress altered the joinder rules for patent cases.

90. Taylor, *supra* note 7, at 671-78.

91. Pergo, Inc. v. Alloc, Inc., 262 F. Supp. 2d 122, 128 (S.D.N.Y. 2003); Androphy v. Smith & Nephew, Inc., 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998); *see also In re* EMC Corp., 677 F.3d 1351, 1357 & n.2, 1359 & n.3 (Fed. Cir. 2012) (adopting the overwhelming view outside the Eastern District of Texas that joinder is inappropriate for independent but similarly situated defendants).

92. *In re EMC Corp.*, 677 F.3d at 1359-60.

93. *Id.* at 1357 & n.2.

ent."[94] Citing judicial economy, these decisions reasoned that the most important issues, including the determination of patent scope, or "claim construction," and invalidity, would be identical.[95]

Congress resolved this split as part of a more general overhaul of the patent system in the 2011 America Invents Act (AIA).[96] A new statutory provision, 35 U.S.C. § 299, provided that joinder, or consolidation for trial, of accused infringers only was permitted if the claims involved the making, using, importing, offering to sell, or selling "of the same accused product or process" and clarified that "allegations that [the defendants] each have infringed the patent or patents in suit" alone were insufficient for joinder.[97] Though the legislative history is sparse, the provision appears to have been motivated by concern about the Eastern District of Texas and perceived abusive litigation practices of patent assertion entities.[98] As a result of the AIA's anti-joinder provision, claims against unrelated defendants with independent products only can be aggregated for pre-trial purposes and only through Rule 42(a) consolidation (if pending in the same district) or through multi-district litigation (if pending in different districts).[99]

2. Trademark and Copyright Litigation

Trademark holders have similarly sought to join several unrelated defendants for similar but independent activities alleged to violate the same rights. Defendants have objected, and courts have held that these independent activities are not part of the same transaction or occurrence for purposes of joinder.[100]

Efforts to aggregate similarly situated copyright defendants have been even more controversial. The internet allows diffuse individuals to share copyrighted movies, videos, or music through so-called "peer-to-peer" (P2P) networks, the earliest and most famous of which was

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94. MyMail, Ltd. v. Am. Online, Inc., 223 F.R.D. 455, 456-57 (E.D. Tex. 2004).

95. *See* Innovative Global Sys. LLC v. Tpk. Global Techs. LLC, No. 6:09-CV-157, 2009 U.S. Dist. LEXIS 105929, at *5-7 (E.D. Tex. Oct. 20, 2009); Adrain v. Genetec Inc., No. 2:08-CV-423, 2009 U.S. Dist. LEXIS 86855, at *7-10 (E.D. Tex. Sept. 22, 2009); Sprint Commc'ns Co. v. Theglobe.com, Inc., 233 F.R.D. 615, 617 (D. Kan. 2006); *MyMail*, 223 F.R.D. at 456-58.

96. *See generally* Taylor, *supra* note 7 (discussing background and consequences of AIA reforms to patent joinder).

97. 35 U.S.C. § 299 (Supp. V 2011).

98. *See* Taylor, *supra* note 7, at 700-06.

99. *See id.* at 719-22.

100. *See* Bravado Int'l Grp. Merch. Servs. v. Cha, No. CV 09-9066 PSG, 2010 U.S. Dist. LEXIS 80361, at *11-14 (C.D. Cal. June 30, 2010); Golden Scorpio Corp. v. Steel Horse Bar & Grill, 596 F. Supp. 2d 1282, 1285 (D. Ariz. 2009); Colt Def. LLC v. Heckler & Koch Def., Inc., No. 2:04CV258, 2004 U.S. Dist. LEXIS 28690, at *15-16 (E.D. Va. Oct. 22, 2004); SB Designs v. Reebok Int'l, Ltd., 305 F. Supp. 2d 888, 892 (N.D. Ill. 2004).

Napster.[101] After early efforts to hold P2P networks liable ultimately failed,[102] the Recording Industry Association of America (RIAA) and its major record label members began suing individual file-sharers, primarily as a deterrent.[103] The RIAA's basic strategy was to search P2P networks for particular copyrighted materials; collect the IP addresses of uploaders of infringing files; sue numerous "John Does" in a single lawsuit, with each John Doe representing a different uploader's IP address; seek court approval for early subpoenas to internet service providers (ISPs) to determine the identities of the John Does; and contact the John Does and offer to settle the case for around $3000, which was less than the cost of defense.[104] Overall, the RIAA and its members sued 30,000 individuals during its 2003 to 2008 enforcement campaign, sometimes in individual lawsuits and sometimes in groups of dozens or hundreds of individuals, most of whom were John Does.[105]

Of the many potential problems with the RIAA's strategy,[106] courts and defendants focused primarily on the propriety of joinder.[107] Plaintiffs alleged that joinder was proper because each defendant "committed violations of the same law (*e.g.*, copyright law), by committing the same acts (*e.g.*, the downloading and distribution of copyrighted sound recordings owned by Plaintiffs), and by using the same means

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101. Bridy, *supra* note 23, at 698-710; Hamdani & Klement, *supra* note 4, at 699-700.

102. *See* Hamdani & Klement, *supra* note 4, at 700.

103. See *id.* at 700-01.

104. Karunaratne, *supra* note 14, at 286-87.

105. Bridy, *supra* note 23, at 721. Commentators frequently suggest that the RIAA "usually nam[ed] dozens or hundreds of defendants per suit." David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), http://www.wired.com/threatlevel/2010/05/riaa-bump/. But the RIAA sued the 30,000 individuals in approximately 13,000 lawsuits, an average of only 2.3 defendants per lawsuit. Bridy, *supra* note 23, at 721 (noting increase in copyright lawsuits from 2003–2008 and attributing it to RIAA campaign). The RIAA lawsuits were a mix of suits against a single individual file-sharer and suits against dozens or hundreds of file-sharers, most of whom were John Does. *See* Ray Beckerman, P.C., *Index of Litigation Documents Referred to in "Recording Industry vs. The People"*, BECKERMANLEGAL, http://beckermanlegal.com/Documents.htm (last updated May 17, 2013) (listing exemplary music industry cases). The RIAA generally used aggregated actions when it did not know the identity of the defendants and individual actions when it did. *See* Arista Records, LLC v. Does 1–11, No. 1:07–CV–2828, 2008 WL 4823160, at *3 & n.3, *6 (N.D. Ohio Nov. 3, 2008) (stating that the RIAA will likely re-file individual actions once the defendants are identified). Individual suits may have been used to deprive defendants of economies of scale, *see* Hamdani & Klement, *supra* note 4, at 699-702, or it may be that most defendants chose to settle and those that did not were not subject to personal jurisdiction and venue in the same district. *See* Karunaratne, *supra* note 14, at 287, 298-302.

106. *See generally* Karunaratne, *supra* note 14 (noting concerns about abuse of John Doe procedures, insufficient showings for expedited subpoenas, lack of personal jurisdiction, and lack of a necessary connection between IP address and file-sharer).

107. *See id.* at 287-88 (noting that courts in RIAA cases responded "with particular force on the joinder issue" and that courts "were less willing to confront questions of personal jurisdiction").

(*e.g.*, a file-sharing network) that each Defendant accessed via the same ISP."[108] The propriety of joinder often was contested by a defendant[109] or the court *sua sponte*,[110] and "the majority of district courts who . . . addressed the issue of joinder . . . concluded that those allegations were insufficient to satisfy the transactional requirement of Fed.R.Civ.P. 20(a)(2) and that joinder was therefore improper."[111] Courts held that "merely alleging that the Doe Defendants all used the same ISP and file-sharing network to conduct copyright infringement without asserting that they acted in concert was not enough to satisfy the same series of transactions requirement under the Federal Rules," and that merely alleging that the defendants caused "the *same type of harm*" rather than "the *same harm*" was insufficient for joinder.[112] Some courts even proposed sanctions against the plaintiffs for attempting joinder.[113]

With the end of the RIAA's campaign, mass copyright enforcement shifted to the movie industry and to the pornographic films industry in particular. The litigation model essentially was the same as that of the RIAA, though joinder often was now of hundreds or thousands of John Does.[114] As with the RIAA litigation, defendants[115] or courts *sua sponte*[116] challenged the mass joinder of defendants, and many courts held that "the fact that a large number of people use the same method to violate the law does not authorize them to be joined as defendants in a single lawsuit" because each defendant independently accessed the P2P network and downloaded the copyrighted file pieces in "discrete and separate acts that took place at different times" without concerted action.[117]

108. *Does 1–11*, 2008 WL 4823160, at *1 (quoting complaint); Arista Records, LLC v. Does 1–27, No. 07-162-B-W, 2008 WL 222283, at *1 (D. Me. Jan. 25, 2008) (quoting complaint), *report and recommendation adopted*, 584 F. Supp. 2d 240 (D. Me. 2008).

109. *Does 1–11*, 2008 WL 4823160, at *1.

110. *See Does 1–27*, 2008 WL 222283, at *6 n.5.

111. *Does 1–11*, 2008 WL 4823160, at *6; *see also* Bridy, *supra* note 23, at 722, 723 & nn.164-69 (explaining the reasoning of courts' *sua sponte* finding of improper joinder in multiple jurisdictions); Karunaratne, *supra* note 14, at 287-88 & nn.25-28 (noting that courts find joinder to be improper in file-sharing cases when defendants only use the same ISP and peer-to-peer networks). The limited courts not ordering de-aggregation generally concluded only that severance was premature until the Does were identified. *See Does 1–11*, 2008 WL 4823160, at *3-5.

112. *Does 1–11*, 2008 WL 4823160, at *6.

113. *See Does 1–27*, 2008 WL 222283, at *6 n.5.

114. *See* Bridy, *supra* note 23, at 721-22. *See generally* Karunaratne, *supra* note 14 (discussing the propriety of joinder in copyright infringement cases against John Does).

115. *See* Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1153 (N.D. Cal. 2011).

116. *See* Next Phase Distrib., Inc. v. Does 1–27, 284 F.R.D. 165, 166 (S.D.N.Y. 2012).

117. Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at *2 (S.D.N.Y. May 15, 2012).

Courts in the pornography cases are more divided on joinder than in the RIAA cases, but the division is over whether the defendants acted in concert, not whether similar claims against unrelated defendants can be aggregated.[118] In earlier P2P networks, a single user uploaded a copyrighted file, which was then downloaded in its entirety separately by other users. BitTorrent breaks the copyrighted material into pieces, which a user then collects from various other users and must share with others once in her possession.[119] Some courts have upheld joinder (or postponed resolution), concluding that concerted action existed to the extent the defendants were part of the same group of users (called a "swarm") sharing the same pieces at the same time or in the same time period.[120]

3. *Telecommunications Cases*

Controversy over aggregation of similarly situated defendants has frequently arisen in telecommunications cases,[121] most notably in DirecTV's campaign against piracy. DirecTV raided businesses selling devices that could unscramble its signals and sent demand letters to more than 170,000 purchasers, offering to settle for $3500 per purchaser (presumably less than the cost of defense).[122] DirecTV ultimately sued over 24,000 individuals under various wiretap, communications, and copyright laws, often by suing several unrelated and independent violators in a single suit.[123]

Once again, many potential problems existed with these cases,[124] but the joinder issue, raised either by defendants' motions or *sua sponte* by the court,[125] was the focal point of resistance.[126] "Most courts presented with a suit of this type have concluded that the claims against the various defendants are not transactionally relat-

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118. *See Next Phase*, 284 F.R.D. at 168-69.

119. Karunaratne, *supra* note 14, at 288-90.

120. Digital Sin, Inc. v. Does 1–27, No. 12 Civ. 3873(JMF), 2012 WL 2036035, at *2 (S.D.N.Y. June 6, 2012).

121. *See, e.g.*, Don King Prods., Inc. v. Colon-Rosario, 561 F. Supp. 2d 189 (D.P.R. 2008); Movie Sys., Inc. v. Abel, 99 F.R.D. 129, 129-30 (D. Minn. 1983) (18 suits against 1,795 total individuals).

122. *In re* DIRECTV, Inc., No. C-02-5912-JW, 2004 WL 2645971, at *2 (N.D. Cal. July 26, 2004); Hamdani & Klement, *supra* note 4, at 703-06.

123. *See* David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1725-26 (2005). For example, DirecTV sued 775 defendants in 180 lawsuits in the Northern District of California. *See DIRECTV*, 2004 WL 2645971, at *2.

124. *See* Hamdani & Klement, *supra* note 4, at 703-06 (noting concerns about viability of statutory claims, investigative techniques, and lack of necessary correlation between device and piracy).

125. *See, e.g.*, *DIRECTV*, 2004 WL 2645971, at *1 (*sua sponte*); DirecTV, Inc. v. Beecher, 296 F. Supp. 2d 937, 939 (S.D. Ind. 2003) (motion).

126. *See DIRECTV*, 2004 WL 2645971, at *5 (summarizing cases).

ed" for joinder.[127] They have held that "[i]ndividual purchasers, who have no business connection with one another and who make their purchases independently of one another are not engaged in the same transaction," even though they received their devices from the same shipping facility, "perform[ed] the same act in the same [geographic] area," and engaged in "similar statutory violations" that "injured DIRECTV in the same manner."[128]

4. Other Examples

Technology cases are not the only examples of efforts by plaintiffs to aggregate similarly situated defendants and corresponding resistance by defendants, courts, and policymakers. This has also occurred in products liability,[129] environmental,[130] consumer protection,[131] indemnification,[132] and other types of cases.[133]

E. The Puzzle of Defendant Aggregation

The narrative of plaintiff aggregation has become well defined in its nearly half-century at the forefront of American litigation. Plaintiffs (and their attorneys) seek aggregation because they benefit from its economies of scale, while defendants generally oppose plaintiff aggregation because of the *in terrorem* effect of the aggregated liability.[134] Courts and policymakers walk a middle ground, allowing ag-

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127. MOORE ET AL., *supra* note 49, § 20.05[3], at 20-37; *see also DIRECTV*, 2004 WL 2645971, at *5 (summarizing cases and rationales); McFarland, *supra* note 55, at 268 (noting that out of the several courts that have considered joinder in television-pirating cases, one has allowed joinder while a dozen others have denied it).

128. *DIRECTV*, 2004 WL 2645971, at *4.

129. Erichson, *supra* note 20, at 403 & n.80. Many multi-defendant products liability cases, and multi-defendant cases in other contexts, involve aggregated plaintiffs each injured in similar ways but only by one defendant. Defendants have contested the propriety of defendant aggregation in these cases, *see, e.g.*, Turpeau v. Fidelity Fin. Servs., 936 F. Supp. 975, 980 (N.D. Ga. 1996), but more often, defendants contest whether plaintiffs meet the requirements for a class action, *see, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 489 (E.D. Pa. 1997), or joinder, *see, e.g.*, Abdullah v. Acands, Inc., 30 F.3d 264, 268 & n.5 (1st Cir. 1994).

130. *See, e.g.*, Coal. for a Sustainable Delta v. U.S. Fish & Wildlife Serv., No. 1:09–CV–480 OWW GSA, 2009 WL 3857417 (E.D. Cal. Nov. 17, 2009).

131. *See, e.g.*, *Turpeau*, 936 F. Supp. at 979-80.

132. *See, e.g.*, United States v. Katz, 494 F. Supp. 2d 645, 646 (S.D. Ohio 2006).

133. *See, e.g.*, Nassau Cnty. Ass'n of Ins. Agents v. Aetna Life & Cas. Co., 497 F.2d 1151, 1152 (2d Cir. 1974) (employment and antitrust case).

134. *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1873-74 (2006) [hereinafter Nagareda, *Discontents*]. This description is admittedly a generalization. *See* Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 11-12 (2009) (discussing a defendant's preference for aggregated settlements of mass joinder actions); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 (2002) (discussing defendants' support for settlement classes) [hereinafter Nagareda, *Autonomy*]; David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost*

gregation of similarly situated plaintiffs but imposing limits in some cases and some contexts. By contrast, the narrative of defendant aggregation is utterly confused. Theoretically, defendants obtain similar economies of scale and the judicial system obtains similar efficiencies from aggregation. Defendants face no *in terrorem* effect, as an individual defendant's liability does not change with aggregation. To the contrary, defendant aggregation increases resources on the defense side and raises the stakes for the plaintiff, since a single loss extinguishes all of its claims.

Yet, *plaintiffs* have generally sought to aggregate defendants while *defendants*, courts, and policymakers have resisted, assuming that defendant aggregation *benefits plaintiffs at the expense of defendants*.[135] Parts III and IV seek to solve this puzzle of defendant aggregation, with the former focusing on defendant resistance and the latter systemic resistance.

III. DEFENDANTS' OPPOSITION TO DEFENDANT AGGREGATION

This Part explores why defendants oppose being aggregated despite the economies of scale benefits they should obtain. In some contexts, the explanation is easy because aggregation is clearly against defendants' interests. In other contexts, the effects of aggregation on defendants are unclear. And, in at least one category of cases, defendants lose nothing from being aggregated and their resistance appears irrational.

A. Creating Additional Litigation for Defendants

Defendants' opposition to being aggregated is easy to explain in cases, like the BitTorrent copyright litigation, where the stakes are small, each defendant's liability is less than the cost of individual litigation, and the claims are only economically viable because of the cost-savings the plaintiff realizes from defendant aggregation. Defendants are better off without being aggregated because these claims would never be brought individually and defendants would have no need for the economies of scale aggregation offers them.

This category of cases may not be particularly large. Even without aggregation, a plaintiff can spread many of its costs over the full portfolio of individual cases through, for example, form complaints; reuse of briefs, expert reports, and discovery requests; and a single fact investigation and document collection.[136] In only a limited set of

Without Benefit, 2003 U. CHI. LEGAL F. 19, 22-23 (2003) (discussing hold-out and opt-out plaintiffs in mass joinders and class actions).

135. *See, e.g.*, Bridy, *supra* note 23, at 722-24; Taylor, *supra* note 7, at 671-78.

136. *See* Hamdani & Klement, *supra* note 4, at 696 n.36.

cases will the additional savings the plaintiff realizes from defendant aggregation—filing fees, administrative costs related to preparing and submitting court documents, and attendance at depositions, hearings, and trial[137]—be the difference in the viability of the claim. In the BitTorrent cases, the plaintiff had unusually high up-front costs because it only knew the infringers' IP addresses and needed expedited subpoenas to obtain the identities of those whom it could target for settlement demands.[138] The cost of separate filing fees, moving individually for expedited subpoenas, attending separate subpoena hearings, and executing individual subpoenas on the ISPs would likely dwarf the few thousand dollars at stake.[139] A small subset of extreme patent troll cases also may fit in this category, where the patentee sues large numbers of end-users of common technology (e.g., hotels using Wi-Fi related patents or small businesses using scanners) and demands only a few thousand dollars from each.[140] The patent anti-joinder provision seems to have deterred these small-stakes patent cases.[141]

On the other hand, higher stakes cases where defendant aggregation is not the difference in the viability of the plaintiffs' claims will be brought even if defendants cannot be aggregated. This is true of most patent cases; there was only a small decrease in the total number of defendants sued and no significant effect on patent assertion entities' share of defendants after enactment of the patent anti-joinder provision.[142] Similarly, the financial stakes in the individual RIAA and DirecTV cases were small, but the corporate plaintiffs derived significantly greater value from the larger deterrent effect of the suits.[143] While it is possible they would have sued fewer defendants without aggregation, depending on how many suits were necessary to provide sufficient deterrence, both the RIAA and DirecTV plaintiffs often pursued individual, negative-value lawsuits when necessary.[144]

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137. *See* Bridy, *supra* note 23, at 722; Taylor, *supra* note 7, at 672.

138. *See* Karunaratne, *supra* note 14, at 291.

139. *See* Karunaratne, *supra* note 14, at 303-04.

140. *See, e.g.*, Joe Mullin, *Wi-Fi Patent Troll Hit with Racketeering Suit Emerges Unscathed*, ARS TECHNICA (Feb. 13, 2013, 10:05 AM), http://arstechnica.com/tech-policy/2013/02/wi-fi-patent-troll-hit-with-novel-anti-racketeering-charges-emerges-unscathed/.

141. *See* Colleen Chien, Patent Trolls by the Numbers 3 (Mar. 13, 2013) (unpublished manuscript), *available at* https://ssrn.com/abstract=2233041.

142. *Id.*; Pistorino, *supra* note 89, at 4.

143. *See supra* Part III.D.2-3.

144. *See* Arista Records, LLC v. Does 1–11, No. 1:07–CV–2828, 2008 WL 4823160, at *5 (N.D. Ohio Nov. 3, 2008) ("Plaintiffs indicated to the Magistrate Judge that they intend to sever the Doe Defendants' cases once they have been identified.").

B. Cost-Differentials

Even for claims with high enough stakes to be brought individually, defendant aggregation could create, or accentuate, a pro-plaintiff cost-differential, incentivizing plaintiffs to bring weak claims and defendants to settle meritorious defenses, at least at the margins.[145] Despite the suggestions that this has occurred in multi-defendant patent "troll" cases,[146] it is unclear why the net costs of defendant aggregation would favor plaintiffs.[147]

Although empirical evidence is lacking, it is doubtful that aggregating defendants would eliminate more costs from individual litigation for plaintiffs than defendants. Plaintiffs can spread many of their costs over individual cases, and any efforts by defendants in individual suits to spread costs through a joint defense group or other informal aggregation are likely to be less effective, efficient, and substantial.[148] With the exception of the $400 filing fee, an insubstantial amount for any individually viable claim, defendants can match or exceed whatever additional cost-savings plaintiffs realize from defendant aggregation by, for example, dividing responsibility for depositions, hearings, and trial; splitting up document review and fact investigation; and preparing joint briefing or expert reports on common issues.[149]

On the other hand, defendant aggregation may impose new costs on defendants not present in individual litigation and not matched by the individual plaintiff. Aggregated parties often are required, either by court order or strategic considerations, to agree on a common strategy, achieve consensus on the myriad of issues that arise in litigation, divide tasks, file a single brief on common issues, or even present a single argument at a hearing or single case at trial,[150] all of which could impose substantial coordination costs in attorney time and client money.[151] Aggregated plaintiffs minimize these coordination costs because plaintiffs' lawyers' contingency fee arrangements provide an incentive to reduce costs by dividing, rather than duplicat-

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145. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 891 (1987).

146. *See* Taylor, *supra* note 7, at 673-75.

147. *See* Coffee, *supra* note 145, at 891-94 (describing difficulty in identifying existence and extent of cost-differential in litigation).

148. *See* Taylor, *supra* note 7, at 673-75.

149. *See* Erichson, *supra* note 20, at 403-05.

150. Taylor, *supra* note 7, at 673 & n.103, 674.

151. *See* Mark Baghdassarian & Aaron Frankel, *Litigation: Managing Joint Defense Groups in Asymmetrical Lawsuits*, INSIDECOUNSEL (Aug. 23, 2012), http://www.inside counsel.com/2012/08/23/litigation-managing-joint-defense-groups-in-asymme?t=litigation&page=2; *see also* Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 304 (1996) (noting increase in plaintiff aggregation of "multiple sets of lawyers within a single aggregated litigation").

ing, work and compromising, rather than disputing, strategy or responsibilities.[152] But for aggregated defendants, defense attorneys' hourly fee arrangements are likely to increase coordination costs, as duplicating work (e.g., attending every deposition or carefully editing every joint submission) and disputing strategy and responsibilities maximizes fees.[153] Yet, if the resulting high coordination costs eliminated the cost-savings defendants otherwise realize from being aggregated, a rational defendant would respond by insisting on fee arrangements that minimized coordination costs, not by rejecting aggregation. Before Congress passed the patent anti-joinder provision, companies sued in multi-defendant patent cases in the Eastern District of Texas had begun to share a common attorney with other defendants, insist on a fixed fee, or refuse to pay for duplicative work.[154]

Aggregated defendants also face potential free-rider problems, that is, some defendants do the minimal work necessary for their individual cases and rely on other defendants to develop common defenses that apply to all defendants regardless of who pays for them.[155] However, common defenses are public goods and a defendant that prevails on a common defense in individual litigation will bear the full cost but realize only some of the benefits, which are shared with any other similarly situated defendant.[156] Thus, aggregation poses no greater free-rider costs than individual litigation.[157]

C. Substantive Effects

Defendant aggregation does not just affect the costs of litigation; it also affects its substance. Perhaps defendants oppose being aggregated despite its potential economies of scale, because of substantive concerns.

1. Asymmetric Preclusion

The doctrine of non-mutual issue preclusion precludes a party from re-litigating an issue it lost in a prior suit but does not bind a non-party to the prior suit.[158] As a result, if a plaintiff loses on a key issue in an individual case then it will be bound by that loss in all other cases against similarly situated defendants, but if it prevails, it

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152. *See* Coffee, *supra* note 145, at 889-94; *see also* Resnik et al., *supra* note 151, at 309-14 (describing workings of aggregated plaintiffs' lawyers).

153. *See* Coffee, *supra* note 145, at 892.

154. *See* Baghdassarian & Frankel, *supra* note 151 (suggesting shared counsel).

155. *See id.*

156. *See* Roger Allan Ford, *Patent Invalidity Versus Noninfringement*, 99 CORNELL L. REV. 71, 109-12 (2013).

157. *See Defendant Class Actions*, *supra* note 20, at 648. The public good nature of common defenses is normally an argument for, not against, aggregation of similarly situated defendants. *See* Parchomovsky & Stein, *supra* note 23, at 1534-35.

158. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

still has to re-litigate the issue with each subsequent defendant, with the risk that a subsequent loss will be binding in all remaining cases. Aggregation deprives defendants of the multiple bites at the apple offered in serial litigation by non-mutual preclusion.

However, this is only a loss to defendants if their defenses are individually positive-value, that is, the potential liability exceeds the cost of individual litigation. If the cost of individual litigation exceeded the potential liability, defendants would settle, and there would be no final judgment to which asymmetric preclusion could apply.[159] For example, some patent troll cases, the RIAA file-sharing litigation, and the DirecTV suits likely involved negative-value defenses where asymmetric preclusion would be largely irrelevant.[160]

Even in higher stakes cases with individually positive-value defenses, asymmetric preclusion only is significant in limited circumstances. If the primary issues are legal, subsequent defendants often will be effectively bound by resolution of an issue in earlier litigation through stare decisis, persuasive power, or simply disinclination to revisit something already decided.[161] A rational defendant probably would prefer aggregation and the opportunity to influence the initial decision than the gamble that it can convince a subsequent court to revisit the issue after it was botched by the first defendant,[162] especially since plaintiffs in serial litigation target weak, underfunded defendants first to cheaply and quickly obtain favorable precedent.[163] Asymmetric preclusion also is of little help in cases where the primary issues relate to fact questions unique to each defendant—say the purpose to which the defendant put the DirecTV unscrambling device—since favorable findings for earlier defendants would be inapplicable to subsequent defendants.

Thus, asymmetric preclusion only is advantageous to defendants in cases where the primary issues are factual but common, such as questions related to the plaintiff's conduct. Patent litigation is one such example: two key patent defenses—invalidity and misconduct in the Patent Office (i.e., "inequitable conduct")—have significant factual components common to each defendant.[164] It is possible that patent

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159. *See* Hamdani & Klement, *supra* note 4, at 737.

160. *See id.* at 701-04 (describing negative-value nature of defenses in RIAA and DirecTV cases); Jeremy P. Oczek, *Rethinking Defense in "Patent Troll" Cases*, CORP. COUNS., Mar. 27, 2013, *available at* http://www.bsk.com/media-center/2730-rethinking-defense-patent-troll-cases (noting that the average cost to defend patent cases is $1 million when less than $1 million is at stake and $3 million when $1 to 25 million is at stake).

161. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 391 (1996) (noting that stare decisis would apply to patent claim interpretation even without issue preclusion).

162. *See* Jeffrey T. Haley, *Strategies and Antitrust Limitations for Multiple Potential Patent Infringers*, 21 AIPLA Q.J. 327, 334-35 (1993).

163. *See* Parchomovsky & Stein, *supra* note 23, at 1488.

164. *See id.* at 1501-03.

defendants realize more benefits from asymmetric preclusion than they do from aggregation's economies of scale, though, even here, commentators have suggested that the rejection of an invalidity defense in an earlier case makes a later finding of invalidity less likely.[165]

2. Jury and Judicial Confusion

Pursuing separate claims simultaneously against multiple defendants may allow the plaintiff to exploit judicial or jury confusion over which evidence and arguments apply to which defendants.[166] Confusion is not inherently detrimental to aggregated defendants. For example, a similar risk of confusion of evidence and arguments is seen as *benefitting* aggregated plaintiffs by allowing them to focus on the strongest claims or combine strong parts of various claims to create a collective claim stronger than any individual one.[167]

However, plaintiffs may strategically use their control over aggregation to combine weaker claims with stronger claims, hoping the evidence and arguments for the latter will bolster the former. For example, a DirecTV defendant that used the unscrambling device for some legitimate purpose will have a difficult time highlighting this when aggregated with lots of defendants who used the device to steal DirecTV's signals. Similarly, aggregating claims that a few defendants willfully and knowingly infringed a patent may bolster claims of ordinary (strict liability) infringement against other defendants.

When applicable, the risk of judicial or jury confusion is a strong reason for defendants to resist being aggregated. On the other hand, potential confusion from aggregation does not make defendants whose individual defenses are negative-value worse off, since they would default or settle individual litigation without the opportunity to benefit from an unconfused decision-maker. Even for positive-value defenses, confusion only poses a problem if there is significant heterogeneity among the defendants.[168] If the primary defenses are common (e.g., patent invalidity when the claims are broad and clearly cover the accused products) or very similar (e.g., patent non-infringement when the patentee alleges the patent covers all prod-

165. Glynn S. Lunney, Jr., FTC v. Actavis*: The Patent-Antitrust Intersection Revisited* 44 (Tulane Sch. of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 13-19, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348075.

166. *See, e.g.*, Bridy, *supra* note 23, at 722-23.

167. *See* Erbsen, *supra* note 28, at 1009-14.

168. *See id.* at 1014; *see also, e.g.*, Philips Elecs. N. Am. Corp. v. Contec Corp., 220 F.R.D. 415, 418 (D. Del. 2004) (citing potential prejudice in ordering de-aggregation because co-defendant was not presenting defense to infringement at trial).

ucts with certain functionality regardless of how implemented),[169] there is little risk of prejudice to defendants from jury or judicial confusion. For example, potential confusion does not explain resistance to aggregation in many patent troll cases, which often involve broadly asserted claims and, consequently, defenses of either invalidity or non-infringement that apply equally to all defendants.

3. Autonomy

Autonomy includes "the power of individuals to make fundamental choices concerning their legal rights of action – for example, the power to choose when and how to sue, whether to settle, and if so, under what terms."[170] Plaintiff aggregation increasingly faces autonomy concerns,[171] and these concerns may also underlie resistance to defendant aggregation.[172] However, aggregation can only raise autonomy concerns for positive-value defenses; for negative-value defenses, aggregation promotes defendants' autonomy by allowing them to defend rather than default and by deterring plaintiffs from bringing strike suits.[173] Individual autonomy also is of questionable relevance to corporate defendants, who lack the strong autonomy interests of individuals.[174]

Moreover, in practice, defendant aggregation almost never is attempted through representative procedures, like the class action, that pose the greatest threat to individual autonomy.[175] Rather, defendant aggregation has generally occurred via procedures (e.g., permissive joinder, consolidation, or multi-district litigation) that leave the substantive rights of the defendants separate and allow each defendant to retain control over its own case, obtain a separate judgment as to its liability, choose its own attorney, settle whenever and on whatever terms it chooses, and present its individual de-

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169. *See* Mark A. Lemley, *Software Patents and the Return of Functional Claiming*, 2013 WIS. L. REV. 905, 907-08 (describing common problem of broad functional claims that "purport to cover any possible way of achieving a goal").

170. Nagareda, *Autonomy, supra* note 134, at 750; *see also* Epstein, *supra* note 69, at 5 (stating that autonomy over one's lawsuit is a critical element of fairness).

171. Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1060-61 (2012).

172. *See, e.g.*, Wiav Networks, LLC v. 3COM Corp., No. C 10-03448 WHA, 2010 U.S. Dist. LEXIS 110957, at *16 (N.D. Cal. Oct. 1, 2010) ("[T]he accused defendants — who will surely have competing interests and strategies — are also entitled to present individualized assaults on questions of non-infringement, invalidity, and claim construction.").

173. *Cf.* Epstein, *supra* note 69, at 6 (concluding that plaintiff aggregation raises no autonomy concerns when the plaintiffs' claims are too small to pursue individually because individual control is too expensive for anyone to rationally choose it).

174. *See* Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New* Lex Mercatoria, 83 DENV. U. L. REV. 101, 114 (2005).

175. REDISH, *supra* note 48, at 230.

fense.[176] Thus, aggregated defendants are not "forced to adjudicate their [defenses] passively" but rather are "able to represent [their] own interests fully as a litigant before the court."[177]

Thus, the only autonomy interest inherently threatened by defendant aggregation is the ability to present one's defense without the judge or jury hearing any other defense or to pursue one's preferred strategy without any compromise or potential dilution from the judge or jury being presented with competing strategies from co-defendants. A defendant would have to value autonomy unusually highly to conclude that this limited threat outweighed the benefits from aggregation's economies of scale. Admittedly, judicial practices aimed at maximizing efficiency or minimizing workloads do accentuate autonomy concerns, as judges sometimes mandate that all aggregated defendants file a single brief, speak with a single voice, or share the same amount of trial time as allotted to a single plaintiff.[178] If these practices were defendants' real concerns, the proper recourse would be to challenge judicial case management procedures or judicial discretion, not to seek full-scale de-aggregation.

4. Tool to Achieve Other Substantive Objectives

Another possibility is that defendants oppose being aggregated not because they dislike defendant aggregation as such but because seeking de-aggregation is doctrinally possible and serves other strategic objectives, such as creating delay and cost for the plaintiff from motion practice and re-filing[179] or eliminating a co-defendant with ties to a plaintiff-friendly jurisdiction that serves as an anchor preventing transfer.[180] Or perhaps defendants take the doctrinal opportunity for de-aggregation simply as a reflex from always opposing plaintiff aggregation or because they fear that greater use of aggregative procedures will have spillover effects that will promote plaintiff aggregation. Of course, the benefits from these other strategic objectives

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176. *See, e.g.*, FED. R. CIV. P. 20(a)(3); Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993); Dupont v. S. Pac. Co., 366 F.2d 193, 195-96 (5th Cir. 1966); MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958); MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.222, 12.21–.22, 13.21 (2004); MOORE ET AL., *supra* note 49, § 20.02[4].

177. REDISH, *supra* note 48, at 230.

178. *See, e.g.*, Trial Scheduling Order, Fractus S.A. v. Samsung Elecs. Corp., No. 6:09–CV–203 (E.D. Tex. May 6, 2011) (allotting thirty minutes per side for jury selection, forty minutes per side for opening arguments, fifteen hours per side for direct/cross examination, and one hour per side for closing arguments in patent case involving single plaintiff and multiple unrelated defendants).

179. *See* Rosenberg, *supra* note 4, at 571.

180. *See* Taylor, *supra* note 7, at 676-79. De-aggregation has done little to help patent defendants get out of the Eastern District of Texas, as courts have relied on the pending litigation in the same district against the previously aggregated defendant as a basis for denying transfer. *See In re* EMC Corp., 501 F. App'x 973, 976 (Fed. Cir. 2013).

would have to be greater than the benefits defendants realize from aggregation's economies of scale, which is unlikely to be true at least when the defenses are individually negative-value.

De-aggregation is doctrinally viable for defendants. Under Rule 20, the primary tool for defendant aggregation, joinder is permitted when "any *right to relief* is asserted against [the defendants] jointly, severally, or in the alternative with *respect to or arising out of the same transaction, occurrence, or series of transactions and occurrences*."[181] Although courts only require a "logical relationship" for events to be part of the same transaction or occurrence,[182] they have narrowly defined from what events the "right to relief" arises, requiring that there be a "logical relationship" in the defendants' activities that allegedly violate the legal duty.[183] Even though the right to relief arguably arises out of each of the four elements of a prototypical legal claim—(1) a violation of (2) a legal duty that (3) causes (4) harm to the plaintiff—courts generally have held that a logical relationship in the events giving rise to the legal duty (e.g., the issuance of the patent)[184] or the harm caused to the plaintiff (e.g., the stealing of the same broadcast signal without paying for the rights)[185] is insufficient for joinder.[186] This interpretation of Rule 20 favors joinder of multiple unrelated plaintiffs suing a single defendant, where it is more likely that the defendant's alleged violation of the legal duty is the same or factually related for all plaintiffs (e.g., the same allegedly illegal practice or policy). By contrast, for a single plaintiff suing multiple unrelated defendants, the defendants' alleged violations of the legal

181. FED. R. CIV. P. 20(a)(2)(A) (emphasis added).

182. Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974); WRIGHT, MILLER & KANE, *supra* note 61, § 1653, at 409.

183. *See, e.g.*, *In re* EMC Corp., 677 F.3d 1351, 1358 (Fed. Cir. 2012) (requiring that "the defendants' allegedly infringing acts" share operative facts to satisfy logical relationship test); Nassau Cnty. Ass'n of Ins. Agents, v. Aetna Life & Cas. Co., 497 F.2d 1151, 1154 (2d Cir. 1974) (finding no logical relationship because defendants' allegedly wrongful actions were "separate and unrelated").

184. *See, e.g.*, Androphy v. Smith & Nephew, Inc., 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998) (allegations of infringement of same patents "does not mean the claims against the two companies arise from a common transaction or occurrence"); *see also Nassau Cnty.*, 497 F.2d at 1154 ("violations of the same statutory duty" are not enough to permit joinder (quoting Kenvin v. Newburger, Loeb & Co., 37 F.R.D. 473, 475 (S.D.N.Y. 1965))).

185. McFarland, *supra* note 55, at 268-69; *see also* Colt Def. LLC v. Heckler & Koch Def., Inc., No. 2:04CV258, 2004 U.S. Dist. LEXIS 28690, at *12 (E.D. Va. Oct. 22, 2004) (rejecting argument that transaction or occurrence requirement was satisfied because both defendants were "attempting to commit 'genericide' on Colt's M4 trademark").

186. Consolidation under Rule 42(a) and the multi-district litigation statute only require a common question, but courts tend to require a degree of similarity approaching what is required of permissive joinder. *See supra* Part III.A. In fact, when Congress prohibited joinder of similarly situated patent defendants, it also prohibited consolidation for trial even though such claims certainly possess the single common question required by the plain language of Rule 42(a). *See* 35 U.S.C. § 299(a) (Supp. V 2011).

duty are unlikely to be factually related, even if similar (e.g., developing and selling different products alleged to infringe the same patent).

D. Cognitive Limitations

Cost and substantive explanations only partially explain defendants' widespread resistance to being aggregated. Since defendants should realize significant economies of scale from being aggregated and, in some cases, lack economic or strategic reasons to oppose collective resolution, perhaps defendants' opposition to being aggregated is not fully motivated by rational concerns. Information problems may exist, with defendants and their counsel unaware of the benefits of being aggregated (given that defendant aggregation is rare and novel compared to plaintiff aggregation) or failing to adequately distinguish between plaintiff aggregation (which is generally against defendants' interests) and defendant aggregation (which often aligns with defendants' interests).

Alternatively, some of the resistance to defendant aggregation may result from cognitive biases—biases and aversions that can lead to inaccurate perceptions of what is and is not in defendants' interest.[187] There is good reason to think that cognitive biases are part of the explanation, as the resistance to defendant aggregation has been vehement even though the economic and strategic arguments are, at best, ambiguous. Anecdotal evidence points to three relevant cognitive limitations: bias against forced groups, self-serving biases, and loss aversion.

1. Involuntary Groups

Research in a variety of fields indicates that, compared to individuals, groups perform better, make better decisions, and are better problem-solvers.[188] Admittedly, aggregated plaintiffs generally choose their litigation group,[189] whereas similarly situated defendants

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187. Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS 13, 14-15 (Cass R. Sunstein ed., 2000); Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 3-5 (Cass R. Sunstein ed., 2000) [hereinafter Sunstein, *Introduction*].

188. *See* Martin Kocher et al., *Individual or Team Decision-Making—Causes and Consequences of Self-Selection*, 56 GAMES AND ECON. BEHAV. 259, 259-60, 268 (2006). *See generally* CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006) (discussing how aggregating knowledge and perspectives can produce more accurate information and decisions).

189. *See* Freer, *supra* note 66, at 823-24. Joinder by definition requires a voluntary choice by plaintiffs. *Id.* Common-question class actions include an opt-out mechanism, while other types of class actions normally track groups that pre-date litigation. *See* Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 890-92 (2010) (describing, though questioning, reliance on pre-existing groups). Consolidation via Rule 42(a) or multi-district litigation can be initiated by the court *sua sponte* or on a defendant's motion, but plaintiffs are more likely to initiate these procedures. *See*

normally are forced to litigate together by the plaintiff with no ability to avoid group litigation if the requisite commonality in the claims is present.[190] Yet, research demonstrates that self-selection of groups is not a prerequisite for successful group performance and involuntarily selected groups are as capable of successful and cohesive performance as voluntarily selected groups.[191] Thus, a rational defendant would seem to prefer litigating as part of a defendant group, rather than individually.

Despite these benefits of even involuntary groups, people are often biased against working in forced groups, resisting participation, expressing skepticism of the group's objectives, showing distrust of fellow group members, being less cooperative, and being worse at resolving conflicts.[192] These biases against forced groupings are exacerbated when, as with aggregated defendants, the group is chosen by an adversary, not a neutral. "Reactive devaluation" suggests that "proposals made by adversaries will be valued lower than identical proposals made by a neutral party or a member of one's own group"[193] as a result of zero-sum or fixed-pie bias (i.e., the assumption that a gain for the opponent equals a loss for self).[194]

To overcome initial biases and perform effectively, an involuntary group often requires a collective goal that generates a task-based cohesion.[195] Aggregated defendants lack an inherently collective goal, as each defendant's goal is to defeat the plaintiff's claim with whatever combination of individual and common defenses is best for that

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Olson, *supra* note 66, at 360-63; Notice of Hearing Session, (J.M.P.L. July 25, 2013) (MDL No. 875), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Hearing_Order-7-25-13.pdf (listing plaintiff as moving party for multi-district proceedings in twelve of sixteen matters).

190. *See* Freer, *supra* note 66, at 823-26; Parchomovsky & Stein, *supra* note 23, at 1522.

191. *See* Dwight R. Norris & Robert E. Niebuhr, *Group Variables and Gaming Success*, 11 SIMULATION & GAMES 301, 306-09 (1980).

192. *See, e.g.*, Ronald Rooney & Michael Chovanec, *Involuntary Groups*, *in* HANDBOOK OF SOCIAL WORK WITH GROUPS 212, 215-16 (Charles D. Garvin et al. eds., 2004) (involuntary psychotherapy groups); *Work with Involuntary Groups*, *in* STRATEGIES FOR WORK WITH INVOLUNTARY CLIENTS 244, 246, 256 (Ronald H. Rooney ed., 2d ed. 2009) (involuntary psychotherapy groups); Donald R. Bacon et al., *Lessons from the Best and Worst Student Team Experiences: How a Teacher Can Make the Difference*, 23 J. MGMT. EDUC. 467, 468, 482 (1999) (management/business education); Kenneth J. Chapman et al., *Can't We Pick Our Own Groups? The Influence of Group Selection Method on Group Dynamics and Outcomes*, 30 J. MGMT. EDUC. 557, 565 (2006) (management/business education); Paul Miesing & John F. Preble, *Group Processes and Performance in a Complex Business Simulation*, 16 SMALL GROUP BEHAV. 325, 334-36 (1985) (management/business education).

193. Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 96-97 (2005).

194. *See* Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 740-42 (2005).

195. Norris & Niebuhr, *supra* note 191, at 306-09.

defendant, regardless of the outcome for the rest of the group.[196] In fact, aggregated defendants that are competitors have an incentive to favor individual defenses over class or general defenses exactly because they can prevail without benefitting their competitors.[197]

Anecdotal evidence supports the intuition that biases against involuntary groups create resistance to defendant aggregation. Defendants seeking de-aggregation have argued "that it is *inherently unfair* to join separate defendants in the same proceeding when they are competitors,"[198] that is, to force a group where none would otherwise exist. Similarly, even though Rule 20 focuses on the *relationship of the claims*, arguments often focus on the *lack of relationship or existence of competition among the defendants*, that is, the lack of a preexisting group, even when the claims have common roots.[199]

2. Self-Serving Bias

Aside from, or perhaps in conjunction with, biases against forced groupings, "[p]eople tend to make judgments about themselves, their abilities, and their beliefs that are 'egocentric' or 'self-serving.' "[200] This bias can manifest itself in several ways, including "a tendency for people to see themselves as having a greater than average share of some desirable quality" or "skewed predictions; that which is desired is thought more likely to occur than that which is undesired."[201] Applied to the litigation context, self-serving bias suggests that "litigants, their lawyers, and other stakeholders might overestimate their own abilities, the quality of their advocacy, and the relative merits of the positions they are advocating."[202]

In the litigation context, egocentrism is most commonly applied to explain settlement failures,[203] but it also suggests that each defendant will over-value the strength of its own defense and each defense

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196. *See* Ford, *supra* note 156, at 93-112; *see also* Parchomovsky & Stein, *supra* note 23, at 1483 (categorizing defenses into general, class, and individual).

197. *See* Ford, *supra* note 156, at 109-12.

198. Sprint Commc'ns Co. v. Theglobe.com, Inc., 233 F.R.D. 615, 617 (D. Kan. 2006) (emphasis added).

199. *See, e.g.*, Spread Spectrum Screening, LLC v. Eastman Kodak Co., No. 10 C 1101, 2010 U.S. Dist. LEXIS 90549, at *6 (N.D. Ill. Sept. 1, 2010) (noting alleged common roots between each defendant's accused product, but emphasizing that "Kodak and Heidelberg are business competitors of one another" in rejecting joinder); Pergo, Inc. v. Alloc, Inc., 262 F. Supp. 2d 122, 128 (S.D.N.Y. 2003).

200. Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017, 2042 (2006).

201. Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 569-70 (2003).

202. Guthrie & Rachlinski, *supra* note 200, at 2044.

203. Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 922-23 (1997).

attorney will over-value her own abilities and strategies. This has two important consequences for defendant aggregation. First, even absent a rational reason to assume a stronger defense than co-defendants, an egocentric defendant will perceive aggregation as detrimentally mixing its "stronger" position with the "weaker" positions of the co-defendants. Second, if each defendant (and defense attorney) is overly confident in her own strategy, compromise will be more difficult when coordinated action is required, leading to conflict and increased coordination costs. Similarly, an egocentric defense attorney will be more likely to duplicate efforts (e.g., ask her own questions at depositions, revise every joint brief, etc.) rather than divide labor and trust the work of other defense lawyers perceived as of lower quality. This again increases coordination costs. Although plaintiffs and plaintiffs' attorneys should be subject to similar self-serving biases, contingent fee arrangements necessitate the division of labor and reduction of coordination costs to maximize fees. Plaintiffs' attorneys' economic incentives thus mitigate egocentrism.

Anecdotal evidence again supports the role of egocentrism in multi-defendant cases. Practitioners report that managing aggregated defendants in patent litigation "can sometimes be like herding cats, with each defendant wanting to go in its own direction. Clients and their counsel may have differing strategies, and it can be necessary to remind co-defendants that healthy compromise may be necessary to get everyone rowing in the same direction."[204]

3. Loss Aversion

A common reaction to aggregation of similarly situated defendants is that the problems created by collective resolution are worse for aggregated defendants, who face a potential judgment against them, than for aggregated plaintiffs, who only seek to obtain new benefits.[205] This reaction reflects loss aversion; that is, despite being economically equivalent, people "are more displeased with losses than they are pleased with equivalent gains – roughly [sic] speaking, twice as displeased."[206] As a result, defendants will care more about paying $100 in damages than plaintiffs will care about recovering $100 in damages.

Of course, loss aversion does not directly explain resistance to defendant aggregation; if aggregation helps defendants, a loss-averse defendant should strongly favor it. But loss aversion does seem rele-

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204. Baghdassarian & Frankel, *supra* note 151.

205. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985) (suggesting that due process protections are greater for defendants than plaintiffs because "an adverse judgment typically [will not] bind an absent plaintiff for any damages" even though it will "extinguish any of the plaintiff's claims which were litigated").

206. Sunstein, *Introduction*, *supra* note 187, at 5.

vant in two ways. First, defendants are more likely to overvalue the potential problems with aggregation than are plaintiffs because they are more concerned about their potential loss than plaintiffs are about their potential gain. Second, the status quo is normally the reference point for determining whether something is a gain or loss.[207] The individual lawsuit is the status quo for all procedural rules,[208] particularly for the relatively uncommon and novel aggregation of similarly situated defendants. Thus, defendants are likely to overvalue the "losses" they realize from being aggregated (as compared to the individual lawsuit) and undervalue the gains.

E. Summary and the Role of Selection Effects

The justifications for defendants' opposition to aggregation of similarly situated defendants fall on a spectrum. At one end, collective resolution is clearly against defendants' interests when the plaintiff's claim is so small that it could not be profitably brought individually, such as in the BitTorrent copyright cases. Without aggregation, defendants would never be sued.

At the other end, defendants have no economic or strategic reasons to oppose being aggregated when there are asymmetric stakes, such that the plaintiff's claim against each defendant would be individually viable but each defendant's cost of individual defense would be greater than its expected liability. These asymmetric stakes can arise, first, because the plaintiff has a cost advantage due to the lesser amount of discoverable information in its possession or its ability to spread costs across multiple individual cases. This is often the case with patent trolls.[209] Alternatively, asymmetric stakes exist when the plaintiff receives some additional benefit from the litigation beyond the damages paid by the defendant, such as the deterrence sought by the RIAA and DirecTV plaintiffs. A rational defendant in these circumstances would default or settle and is no worse off from aggregation regardless of any strategic consequences. To the contrary, these defendants are better off because the economies of scale that aggregation offers increase the chances of a positive-value defense. Thus, cognitive biases are the only possible explanation for resistance to defendant aggregation when there are asymmetric stakes.

Between these two extremes lie cases where there is enough at stake to justify the plaintiff in bringing litigation individually and

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207. *Id.* at 6.

208. *See* David Marcus, *From "Cases" to "Litigation" to "Contract": A Comment on Stability in Civil Procedure*, 56 ST. LOUIS U. L.J. 1231, 1232 (2012).

209. *See* Coffee, *supra* note 145, at 899; *see also In re* Genentech, Inc., 566 F.3d 1338, 1345 (Fed. Cir. 2009) (noting that patent defendants generally have more discoverable information than patentees).

each defendant to defend individually, as is true for most patent cases, even those brought by so-called trolls. In these cases, objecting to being aggregated with similarly situated defendants may or may not be rational for a defendant, depending on the fact-specific question of whether the strategic benefits of, for example, asymmetric preclusion or avoiding jury confusion outweigh the economies of scale of a collective defense. Part III.C suggests that the strategic considerations often will not outweigh the economies of scale aggregation and therefore defendants opposing aggregation in these cases often will be acting irrationally.

Perhaps selection effects provide a simple explanation for why defendants oppose being aggregated. The plaintiff generally controls whether or not to aggregate defendants,[210] and it is reasonable to think that aggregation only occurs when it is in the plaintiff's self-interest and, presumably, against the defendants' self-interest. Defendants' consistent resistance to being aggregated thus may result from selection effects—they are only aggregated in those cases where it is detrimental to their interests. The limited cases in which the plaintiff aggregates defendants even when it is beneficial to defendants may simply go unnoticed because no one objects to collective resolution. Although perfectly plausible, there are three reasons to doubt the simplicity of this explanation.

First, defendants appear to oppose aggregation even when it is not a self-interested choice by the plaintiff. Defendants have some mechanisms to seek aggregation even if the plaintiff chooses individual litigation, yet rarely use them.[211] For example, in the RIAA and DirecTV cases where the plaintiff proceeded individually, the defendants did not request consolidation or multi-district litigation.

Second, aggregated defendants have objected to collective resolution even in the category of cases in which they should favor it, that is, where a plaintiff with a positive-value claim sues a defendant with a negative-value defense. For example, patent defendants pushed for and obtained a blanket prohibition on joinder of similarly situated defendants, even in the many patent troll cases where a cost-differential makes the patentee's claim greater than its litigation costs but less than the defendant's cost of defense. Similarly, the RIAA and DirecTV

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210. *See* Freer, *supra* note 66, at 823-26; Parchomovsky & Stein, *supra* note 23, at 1522.

211. Defendants appear to be able to request defendant class treatment, yet virtually never do so. *See Defendant Class Actions*, *supra* note 20, at 630 n.3. Defendants also can seek permissive intervention in similarly situated defendants' cases, but never do so. *See* Haley, *supra* note 162, at 334. Nor have similarly situated defendants made significant use of opportunities to aggregate themselves via Rule 42(a) or multi-district consolidation. *See* Olson, *supra* note 66, at 360-63; *see also* Notice of Hearing Session, (J.M.P.L. July 25, 2013) (MDL No. 875), *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Hearing_Order-7-25-13.pdf (listing plaintiff as moving party for multi-district proceedings in twelve of sixteen matters).

defendants repeatedly opposed being aggregated despite their negative-value defenses and the likely positive-value claims.

Third, just because plaintiffs choose aggregation does not mean that it is against the defendants' interest. Multiple lawsuits are more time-consuming and bothersome to the plaintiff than a single suit, regardless of the strategic benefits.[212] Moreover, the plaintiff may have capital constraints that necessitate the immediate savings from a collective lawsuit even if the long-term benefits favor defendants, or the plaintiff may have agency problems if its lawyer realizes benefits from aggregating defendants that are not passed on to the plaintiff (e.g., less work in a contingency fee arrangement). Finally, aggregation is not necessarily zero-sum but instead may reduce the transaction costs for both parties or offer both the plaintiff and defendants benefits that are not mutually exclusive. For example, a plaintiff suing multiple defendants internalizes the entire risk from asymmetric preclusion, whereas each defendant only internalizes a part of the benefit, making elimination of asymmetric preclusion a greater gain for the plaintiff than loss for each defendant. Thus, both the plaintiff (from eliminating asymmetric preclusion) and the defendants (from economies of scale) could be better off from defendant aggregation.

IV. Defendant Aggregation From the Systemic Perspective

Part III identified several potential problems with defendant aggregation, finding them more limited or weaker than may be initially thought. But Part III focused only on whether defendant aggregation was problematic *for defendants*. That defendant aggregation may be bad for defendants in some circumstances tells us little about whether it is socially optimal. To the contrary, it may be socially optimal exactly because it is against defendants' interest, for example, by increasing the chances that wrongful conduct will be remedied. From a societal or systemic perspective, there are two key questions. The first is the economic question of whether aggregating similarly situated defendants makes litigation more efficient or more costly.[213] The second is the substantive question of whether defendant aggregation promotes the substantive remedial scheme by increasing the chances that wrongdoers are found liable and innocent parties escape liability or whether defendant aggregation distorts the substantive remedial scheme by permitting wrongdoers to escape liability or by imposing liability on innocent actors.[214]

212. *See* Freer, *supra* note 66, at 824 (arguing that plaintiffs are unlikely to omit defendants).

213. *See* Rosenberg, *supra* note 4, at 562-65.

214. *See* Nagareda, *Discontents*, *supra* note 134, at 1874-78. Common-question plaintiff class actions have been accused of distorting substantive law by increasing the costs of

As discussed earlier, defendant aggregation is socially optimal from a theoretical perspective, as it eliminates duplicative litigation, promotes deterrence by permitting negative-value claims and defenses to be brought, and encourages resolution based on the merits, not costs.[215] Yet, in practice, courts, policymakers, and commentators have been highly critical of efforts to aggregate similarly situated defendants. This Part considers possible justifications for this systemic resistance, finding them insufficient to reject defendant aggregation wholesale but suggestive of the proper procedures for aggregating similarly situated defendants. The first three Sections consider whether systemic opposition to defendant aggregation is warranted based on its potential negative consequences for defendants, with Section A addressing the economic consequences for defendants, Section B the substantive consequences for defendants, and Section C the possibility of capture by defendant interests. Section D considers, and rejects, the possibility that systemic resistance to defendant aggregation is warranted based on negative consequences for judges or the judicial system.

A. Cost-Differentials, Weak Claims, and Unsympathetic Plaintiffs

Defendants sometimes have sound economic reasons to resist being aggregated, despite its theoretical economies of scale, because aggregation offers cost-savings to plaintiffs that allow litigation that otherwise would not be brought or accentuates pro-plaintiff cost-differentials by imposing coordination costs on defendants.[216] However, the fact that aggregating defendants makes some otherwise negative-value claims viable is a reason for the judicial system to embrace defendant aggregation, not resist it, as this promotes optimal deterrence and secures faithful implementation of the substantive remedial regime.[217] Likewise, aggregated defendants' potentially high coordination costs are largely a result of defense attorneys' fee structure,[218] and systemic resistance is not warranted simply to preserve the fees of defense attorneys, countenance inefficient lawyer-client arrangements, or stifle innovation in fee arrangements.

However, courts and policymakers may be concerned that the additional litigation and cost-differentials created by defendant aggregation encourage strike suits, that is, non-meritorious claims that are

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defense or increasing the risks of litigation through the massive potential liability. *See* Resnik, *supra* note 24, at 16.

215. *See supra* Part III.C.

216. *See supra* Parts IV.A-B.

217. *See supra* Part III.C.

218. *See supra* Part IV.B.

settled for less than the cost of defense.[219] For example, one district court cited a BitTorrent plaintiff's prior "abusive litigation practices," "coercive settlements," and "thus-far-unsubstantiated and perhaps erroneous allegation"[220] in rejecting defendant joinder, while Congress relied on "abusive" litigation practices by patent assertion entities to justify the patent anti-joinder provision.[221] De-aggregation and re-filing may be seen as a way to eliminate individually negative-value strike suits and make positive-value strike suits less profitable.

The Supreme Court recently cautioned against allowing merits questions to drive the aggregation decision.[222] Addressing strike suits through de-aggregation has spillover effects, as it creates doctrine—and in the case of patent law, statutory provisions—hostile to defendant aggregation generally, foreclosing meritorious negative-value suits that promote the substantive remedial scheme and optimal deterrence. Courts have more direct means that are better tailored to addressing weak claims and strike suits, such as dismissal for failure to state a claim upon which relief can be granted,[223] sanctions for harassing or frivolous litigation,[224] and review of the merits before entering a default judgment.[225]

More troubling, courts' concern with the multi-defendant suits may be that they are undesirable as a matter of policy, not that they lack legal merit.[226] Multi-defendant cases have often involved unsym-

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219. Next Phase Distrib., Inc. v. Does 1–27, 284 F.R.D. 165, 170-71 (S.D.N.Y. 2012) ("[T]he Court recognizes that joining 27 defendants, a substantial number of whom may have no liability in this case, in a copyright infringement case when the copyright itself might be deemed invalid, could prove to be a costly and futile exercise for Next Phase and the Court, and a damaging an [sic] unnecessary ordeal for the John Does."); Taylor, *supra* note 7, at 674-75 (noting concern with strike suits in multi-defendant cases).

220. Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at *3-4 (S.D.N.Y. May 15, 2012).

221. Taylor, *supra* note 7, at 702.

222. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

223. FED. R. CIV. P. 12(b)(6); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (describing what is needed for a complaint to survive a motion to dismiss for failure to state a claim).

224. FED. R. CIV. P. 11(b)(2).

225. *In re* DIRECTV, Inc., No. C–02–5912–JW, 2004 WL 2645971, at *7-12 (N.D. Cal. July 26, 2004).

226. *See* Ingenuity 13 LLC v. Doe, No. 2:12–cv–8333–ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013) (noting that BitTorrent plaintiffs "outmaneuvered the legal system" by "discover[ing] the nexus of *antiquated copyright laws*, paralyzing social stigma, and unaffordable defense costs" (emphasis added)); *DIRECTV*, 2004 WL 2645971, at *7-12 (finding that most of DirecTV's claims had sufficient legal merit to warrant a default judgment); Karunaratne, *supra* note 14, at 303 (noting that file-sharing plaintiffs "generally have legitimate substantive grounds for their allegations of copyright infringement" but still suggesting need to make litigation less profitable for them).

pathetic plaintiffs: patent trolls;[227] the "porno-trolling" BitTorrent plaintiffs accused of fraud, extortion, and exploiting antiquated copyright laws and social stigma;[228] and large corporate interests like DirecTV and the RIAA suing individuals or small businesses.[229] Many today view: patents as too prevalent or too broad;[230] copyright as a poor fit for the internet;[231] and large corporate interests suing financially limited individuals as not a proper use of judicial resources.[232]

Using de-aggregation as a de facto reform of substantive law is inconsistent with the ideal that "the format for the resolution of civil disputes . . . should not alter substantive law."[233] Of course, it would not be the first time that "[t]he affording or withholding of aggregate treatment . . . operates as a backdoor vehicle to restructure the remedial scheme in applicable substantive law."[234] However, judicial nullification of substantive law via de-aggregation hinders the development of substantive law. Legislators who know judges will use procedural tools to avoid implementation of substantive law when it seems the most unfair or antiquated will have little incentive to undertake efforts to repeal or amend the law. For example, to the extent that the patent anti-joinder provision decreases litigation by patent assertion entities, it could relieve some of the pressure on Congress or the Federal Circuit to adjust substantive patent law doctrines that create broad patents, even though the problem of broad patents is not limited to multi-defendant cases or patent assertion entities.

B. Substantive Effects, Fairness, Autonomy, and Due Process

Aside from its effects on litigation costs, defendants' resistance to being aggregated may be motivated by non-economic concerns. Three of defendants' possible concerns are clearly inapplicable from the systemic perspective. Asymmetric preclusion, though potentially beneficial to defendants, is generally seen as undesirable from a systemic perspective because it encourages gamesmanship and duplicative

227. *See* Bryant, *supra* note 23, at 690-94.

228. *See Ingenuity*, 2013 WL 1898633, at *1.

229. *See supra* Part III.D.2-3.

230. *See, e.g.*, Charles Duhigg & Steve Lohr, *The Patent, Used as a Sword*, N.Y. TIMES (Oct. 7, 2012), http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?pagewanted=all&_r=0.

231. *See, e.g.*, Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 1 (2010).

232. *See, e.g.*, Opderbeck, *supra* note 123, at 1727.

233. Nagareda, *Discontents*, *supra* note 134, at 1874-78.

234. *Id.* at 1877-78. Professor Nagareda argues "that aggregate procedure is under constant pressure—sometimes from plaintiffs and sometimes from defendants—to serve as the vehicle for reform of underlying substantive law through means other than actual reform legislation." *Id.* at 1877.

litigation. Aggregation procedures are often justified exactly because they eliminate asymmetries in the preclusive effect of judgments.[235]

Similarly, doctrinal opportunities to de-aggregate may offer defendants some benefits and may explain some recent court decisions taking a narrow doctrinal focus,[236] but they do not explain why the doctrine developed or has persisted in this manner, or why Congress has endorsed the doctrine. Permitting joinder based on overlap in the underlying legal duty or the harm caused to the plaintiff, not just the defendants' allegedly unlawful conduct, is equally consistent with Rule 20's plain language and policy goal, that is, promoting efficiency by avoiding separate litigation where there is a substantial evidentiary overlap.[237]

Finally, judges and policymakers are not immune from cognitive biases,[238] but biases against participation in involuntary groups, self-serving biases, and loss aversion more directly explain why defendants would conclude aggregation is against their interests than why judges or policymakers would.[239]

On the other hand, the risk of judicial or jury confusion is a significant systemic concern and is often cited by courts in ordering de-aggregation.[240] Allowing a defendant to be found liable, or escape liability, simply because the jury or judge misattributed evidence or arguments against another defendant could distort the substantive remedial regime. Of course what this means for defendant aggregation depends on how strong and extensive this risk is and whether the other ways in which aggregation promotes the substantive remedial scheme are greater than the distortions created by confusion. In any event, courts' severance orders, as well as Congress's patent anti-joinder provision, are written broadly to bar aggregation of similarly situated defendants generally, even in the many situations in

235. *See* 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4464, at 692-93 (2d ed. 2002); *Developments in the Law*, *supra* note 64, at 1394.

236. *See* Taylor, *supra* note 7, at 701.

237. *See* McFarland, *supra* note 55, at 268-70; *see also* Kane, *supra* note 66, at 1729-30, 1746 (explaining that the policy goal of joinder rules is to encourage efficient resolution of claims, especially when there is factual overlap).

238. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001).

239. *See supra* Part III.D.1–3. On the other hand, courts in other contexts have been skeptical of forced associations. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (right of expressive organizations to exclude members); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (employment relationships).

240. *See, e.g.*, Colt Def. LLC v. Heckler & Koch Def., Inc., No. 2:04CV258, 2004 U.S. Dist. LEXIS 28690, at *15 (E.D. Va. Oct. 22, 2004).

which there is little risk of problematic confusion.[241] Moreover, courts and policymakers have more tailored ways to address potential confusion short of de-aggregation, such as requiring that common questions predominate or satisfy some other threshold of similarity, asking whether individual issues are so prevalent as to make aggregate resolution unduly burdensome,[242] or holding separate trials for individual issues.[243]

There also seems to be some sense that aggregating similarly situated defendants is unfair or contrary to due process. This largely reflects concerns about forced groupings, autonomy, or potential confusion that have already been addressed. There may be some additional belief that defendants facing liability are entitled to pursue whatever strategy they choose without having to compromise or be affected by defendants pursuing other strategies. This contention is doubtful. Even without aggregation, defendants will often be effectively bound by the strategic decisions of earlier defendants via principles like stare decisis, and it is equally unfair to require earlier defendants to bear the burden of defense alone.[244] Moreover, extreme defendant autonomy creates externalities unfair to third parties by consuming judicial resources that otherwise could be spent on other cases or other socially beneficial activities. Admittedly, joint resolution of individual issues and judicial case management procedures that limit the ability of defendants to present defenses on individual issues may raise greater fairness or due process concerns, but this problem is with the aggregation *procedures*, not aggregation itself.

C. Capture

Even if the potential problems aggregation creates for defendants are not troubling from a systemic perspective, these concerns could still explain systemic resistance based on a "capture" theory. Public choice theory predicts that policy outcomes will favor concentrated groups with high individual stakes, such as organized corporate interests, because more diffuse interests, such as taxpayers, consumers, or citizens, generally suffer greater free-rider problems and are more difficult to mobilize.[245] Because defendants are more likely to be

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241. *See* Taylor, *supra* note 7, at 708-15 (describing situations where joinder is likely not permitted despite little risk of harmful confusion regarding patent infringement); *supra* Part IV.C.2.

242. *See* Erbsen, *supra* note 28, at 1002.

243. *See, e.g.*, Jaime Dodge, *Disaggregative Mechanisms: The New Frontier of Mass-Claims Resolution Without Class Actions*, 63 EMORY L.J. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243032.

244. *See supra* Part IV.C.1.

245. *See* Daniel A. Farber, *Introduction* to PUBLIC CHOICE AND PUBLIC LAW ix, x (Daniel A. Farber ed., 2007).

large corporate interests and plaintiffs to be individuals, public choice theory would predict that procedural rules are more likely to reflect the interests of defendants than plaintiffs.

For example, Congress is widely seen as enacting the anti-joinder provision for patent cases at the behest of corporate interests, largely in the high technology area, which are frequently targeted by small patent assertion entities.[246] However, in other prominent examples, concentrated corporate plaintiffs (e.g., DirecTV and RIAA) sought to aggregate diffuse individual defendants.[247] Therefore, resistance to defendant aggregation is the opposite of public choice predictions. Moreover, the public choice literature debates to what extent the independent judiciary is subject to interest group pressures.[248]

Whatever the descriptive power of public choice theory for systemic opposition to defendant aggregation, it does not provide a normatively sound justification on which to deny aggregation of similarly situated defendants. However, it does provide an important insight. Overcoming systemic resistance to defendant aggregation and obtaining the efficiencies and other benefits it offers likely requires blunting defendants' opposition to being aggregated. Thus, a procedural mechanism that mitigates the problems for defendants created by aggregation is more likely to be adopted and be effective in practice.

D. Judicial Self-Interest

A judge may resist aggregating defendants, not because it is against defendants' interests, but because it is against the judge's own self-interest.[249] In granting de-aggregation, judges sometimes cite self-interested justifications that are weak from a disinterested perspective, such as the plaintiff's circumvention of filing fees or the single credit the judge gets for purposes of caseload distribution.[250]

Judges also often cite concerns that multi-defendant cases will require too much effort to manage, contending, for example, that aggregation lacks "litigation economies" because each defendant "is

246. *See* Bryant, *supra* note 23, at 701-02 & n.102.

247. *See supra* Part II.D.2-3.

248. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975), *reprinted in* PUBLIC CHOICE AND PUBLIC LAW 22, 22-24 (Daniel A. Farber ed., 2007).

249. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). On the other hand, aggregation (whether of plaintiffs or defendants) may be in judges' self-interest, since handling "big" cases is a way for a judge to enhance prestige and reputation. *Id.* at 13-15.

250. Order Severing Parties Due to Misjoinder and Dismissing All but the First Named Defendant at 2, Finisar Corp. v. Source Photonics, Inc., No. C 10–00032 WHA (N.D. Cal. dismissed May 5, 2010).

likely to have *some individual defense* to assert."[251] Of course, the fact that there may be "some individual defense" says little about litigation economies without also considering the common questions that exist, the relative importance of common and individual questions in the particular case, and the ability to efficiently resolve individual questions through means short of de-aggregation, such as separate trials.

Moreover, the concern that multi-defendant litigation is too complex to handle collectively reflects a narrow focus on the self-interest of the individual judge in the aggregated proceedings, rather than the interests of the judiciary as a whole. Individual litigation requires resolution of both individual and common issues for each defendant. By contrast, aggregate litigation allows resolution of common issues collectively for all defendants, even if it still necessitates some form of separate proceedings to resolve individual issues. Unless common issues are minor, greater systemic efficiency should result from aggregate proceedings (even if individual issues must be addressed separately) than individual proceedings (where both individual and common issues must be addressed separately). Managing individual issues in aggregate litigation may be more work for the individual judge, but it normally will be less work for judges as a whole than numerous individual cases. Thus, concerns about the complexity of aggregated litigation are unpersuasive from a systemic perspective.

V. OVERCOMING RESISTANCE TO DEFENDANT AGGREGATION

To this point, this Article has focused on the *why* (and the what) of defendant aggregation, explaining that aggregating defendants is socially desirable because it can improve efficiency, deterrence, and compensation. This Part turns to the *how* of defendant aggregation, identifying how defendant aggregation can be implemented while minimizing the problems it may create. Minimizing the problems from aggregation both enhances its social desirability and, more pragmatically, increases the chances that courts and policymakers will actually permit collective resolution of claims against similarly situated defendants.

This Part does not purport to definitively resolve the proper procedural mechanism for aggregating defendants, nor does it purport to work out all of the logistical considerations. That will have to wait for further work, debate, and practical experience. Rather, this Part has three goals: to question the common assumption that defendant aggregation is synonymous with defendant class actions, to identify key

251. Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at *3 (S.D.N.Y. May 15, 2002) (emphasis added); *see also* Next Phase Distribution, Inc. v. Does 1–27, 284 F.R.D. 165, 169-70 (S.D.N.Y. 2012); Colt Def. LLC v. Heckler & Koch Def., Inc., No. 2:04CV258, 2004 U.S. Dist. LEXIS 28690, at *15-16 (E.D. Va. Oct. 22, 2004).

principles to guide design of defendant aggregation procedures, and to sketch the initial outlines of a procedural mechanism that implements these principles: inter-district related case coordination.

A. Principles of a Defendant Aggregation Procedure

Regardless of the precise details, a procedural mechanism for aggregating similarly situated defendants should be non-representative, subject to centralized (neutral) control and limited to common issues. These features will both optimize defendant aggregation and reduce the resistance from defendants, courts, and policymakers that stands as a practical obstacle to achieving the benefits of defendant aggregation.

1. Non-Representative Aggregation

Commentators often assume that if defendants are to be aggregated, the procedure must track the most common form of plaintiff aggregation: the class action.[252] This is probably unsurprising given the scholarly, political, and popular obsession with the class action. Yet, the possibilities for aggregation are far richer than just the representative class action and include procedures that permit collective resolution while offering much greater protection for individual interests than the class action, like joinder and multi-district litigation.[253]

Admittedly, the class defense is probably the mechanism for aggregating defendants with the lowest litigation costs, since treating the defendants as a unitary body with centralized representation maximizes cost-savings and cost-spreading, while minimizing coordination costs.[254] But it also accentuates the substantive concerns with aggregating similarly situated defendants. Because it minimizes the individualized nature of the claims and defenses, it increases the chances of jury confusion and the possibility that evidence will be misattributed in a way that improperly imposes or excuses liability.[255]

Moreover, a class defense is a representative procedure that would impose liability on absent defendants based on the decisions and strategies pursued by other defendants and their chosen counsel. This raises autonomy concerns (to those who emphasize individual

252. *See, e.g.*, Hamdani & Klement, *supra* note 4; Netto, *supra* note 21; Shen, *supra* note 22; Simpson & Perra, *supra* note 20; Matthew K.K. Sumida, Note, *Defendant Class Actions and Patent Infringement Litigation*, 58 UCLA L. REV. 843, 853-57 (2011). *But see* Parchomovsky & Stein, *supra* note 23, at 1513-15 (semi-voluntary joinder); Edward Hsieh, Note, *Mandatory Joinder: An Indirect Method for Improving Patent Quality*, 77 S. CAL. L. REV. 683 (2004).

253. *See supra* Part III.A.

254. *See* Hamdani & Klement, *supra* note 4, at 711-13.

255. *See* Erbsen, *supra* note 28, at 1009-14 (recognizing the problem of jury confusion in context of plaintiff class actions).

autonomy)[256] and is likely to generate practical opposition from defendants, courts, and policymakers. Of course, defendants could be permitted to opt out,[257] minimizing autonomy concerns, but this would likely undermine the practical benefits of defendant aggregation. Many defendants likely would opt out because: the plaintiff's claims would not be individually viable; other self-interested reasons exist; or self-serving biases make them unwilling to hand over control of their defense to the class representative.[258] If opting out were not permitted, a mandatory class defense would likely run afoul of due process protections, at least if damages were at stake,[259] as well as raise serious concerns about jury confusion, autonomy, and involuntary groupings.

Thus, defendant aggregation is unlikely to be adopted by courts and policymakers in practice unless it uses a non-representative procedure—more akin to joinder, consolidation, or multi-district litigation—where the claim against each defendant remains separate and each defendant can retain its own lawyer and make its own decision regarding settlement.

2. *Centralized Control Over Aggregation*

Professor Richard Freer has argued that aggregation generally should be controlled by a neutral judge, rather than the plaintiff, to minimize duplicative litigation, maximize efficiency, and avoid the whims of the plaintiff's strategic interests.[260] *Centralized* neutral control is a particularly sound principle for defendant aggregation. Plaintiff aggregation is generally in the interest of plaintiffs, and therefore the plaintiffs' incentives will normally line up with the sys-

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256. *See*, *e.g.*, REDISH, *supra* note 48, at 169-73 (raising autonomy concerns in context of plaintiff class actions).

257. *See* FED. R. CIV. P. 23(c)(2)(B)(v).

258. Hamdani and Klement struggle with opt-out. They suggest that plaintiffs opt out only in low numbers and conclude that this will likely be true of defendants, overlooking the effects of loss aversion on defendants. *See* Hamdani & Klement, *supra* note 4, at 725. Although they suggest that defendants are unlikely to opt out because they will not want to identify themselves to the plaintiff, in the primary examples of defendant aggregation, the defendants were either already known to the plaintiff (patent and DirecTV litigation) or easily identifiable through other means (subpoenas to ISPs in the file-sharing litigation). *See id.* at 722. Moreover, because claims against similarly situated defendants normally involve money damages, the potential defendants would already need to be identified for purposes of notice if they are to be bound by the class judgment. *See* FED. R. CIV. P. 23(c)(2)(B); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-13 (1985). Ultimately, Hamdani and Klement acknowledge that "[t]he barriers to opting out pose a major challenge to the legitimacy of the class defense as the opt-out option is important in preserving due process rights." Hamdani & Klement, *supra* note 4, at 722.

259. *See Phillips Petroleum*, 472 U.S. at 811-13; *see also* Netto, *supra* note 21, at 68 (proposing mandatory defendant class actions without considering opt-out and due process requirements).

260. *See* Freer, *supra* note 66, at 812-13.

temic interest in collective resolution.[261] By contrast, who benefits from defendant aggregation is more complex and dependent on the facts of particular cases; therefore, the plaintiffs' incentives will not always correspond to the systemic interest in collective resolution.[262]

Defendant aggregation at the plaintiff's behest, such as permissive joinder, has provoked resistance from defendants, courts, and policymakers. The different stakeholders likely resist aggregation because the plaintiff is perceived as aggregating only when it benefits and when the defendants suffer from aggregation. Alternatively, resistance could stem from biases against forced groupings, reactive devaluation, and zero-sum biases.[263] On the other hand, defendant aggregation at the defendants' behest, as some have suggested, wound tend to be underutilized, as is true of the existing procedures defendants have to aggregate themselves.[264] Self-interested concerns and self-serving biases would lead defendants to think they were better off litigating alone.[265] Finally, if the aggregation decision were left to the individual presiding judge, the self-interest of that judge may cause him or her to reject aggregation even when beneficial to the judicial system as a whole.

Thus, to best overcome obstacles to defendant aggregation, a centralized body representing the judicial system's interests should be provided with information about related cases and then allowed to determine *sua sponte* whether to aggregate them.[266]

3. Issue-Only Aggregation

Most aggregative devices presumptively apply to entire cases, not merely common issues. Permissive joinder applies to entire cases, though a court is permitted to order separate trials or take other precautions "to protect a party [from] embarrassment, delay, expense, or other prejudice . . . ."[267] Similarly, the multi-district litigation statute generally provides for transfer of the entire "civil action[]," though the statute allows the panel to separate and remand "any claim, cross-claim, counter-claim, or third-party claim" to the original judge.[268] At the same time, the Judicial Panel on Multi-District Litigation has concluded that it "does not have power to separate issues

261. *See supra* Part III.E.

262. *See supra* Part III.E.

263. *See supra* Part III.

264. *See* Freer, *supra* note 66, at 823-26; Parchomovsky & Stein, *supra* note 23, at 1522.

265. *See supra* Part III.

266. *Cf.* Freer, *supra* note 66, at 841-51 (proposing duty to notify court of potential duplicative litigation and court determination of whether to "package" litigation).

267. FED. R. CIV. P. 20(b).

268. 28 U.S.C. § 1407(a) (2012).

in civil actions, assigning one or more to the transferee court and one or more to transferor courts."[269] Although Rule 23 appears to provide for class actions limited to specific common issues, with resolution of other issues left for subsequent individual cases, issue class actions remain an exception.[270] Consolidation under Rule 42(a) is the only aggregative device that does not presumptively apply to the entire case.[271]

When entire cases are aggregated, a mix of common and individual issues will exist, creating concerns about fact-finder confusion, fairness and autonomy, and coordination costs. Moreover, the different portfolio of individual and common defenses possessed by each defendant can hinder the development of a shared-task focus to overcome bias against forced groupings and can create room for egocentric perceptions of the relative strengths of the different defendants' positions. Limiting aggregation to common issues, with individual issues resolved separately outside of the group litigation, eliminates or minimizes these problems.

B. Inter-District Related Case Coordination

1. Overview of Inter-District Coordination

Multi-district litigation is a good starting point for a defendant aggregation procedure because it offers a non-representative structure, uses a centralized, neutral body to make the aggregation decision, and allows the exercise of nationwide jurisdiction and venue.[272] However, multi-district litigation suffers from three shortcomings that undermine its effectiveness for aggregating similarly situated defendants. First, in practice, multi-district litigation only happens at the request of one of the parties, with only four percent of proceedings initiated via the panel's authority to order aggregation *sua sponte*.[273] Second, multi-district litigation normally applies to entire cases,

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269. *In re* A.H. Robins Co., 610 F. Supp. 1099, 1101 (J.P.M.L. 1985); *see also* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3862, at 451 (3d ed. 2013) ("The ability to subdivide a case is limited . . . . The Panel will not separate and transfer discrete issues for [multi-district litigation] . . . .").

270. *See* Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 251-54, 266-67. *But see* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 713-14, 763-64 (2003); *see also* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 568 (2004) (questioning permissibility and desirability of issue classes).

271. FED. R. CIV. P. 42(a)(1) (allowing the court to "join for hearing or trial any or all matters at issue in the actions"); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2382, at 9-10 (3d ed. 2008).

272. 28 U.S.C. § 1407(a), (c) (2012); *see also In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

273. *See* § 1407(c)(i); Lee et al., *supra* note 16, at 4.

or at least claims, and therefore aggregates individual issues as well as common issues.[274] Third, aggregation of cases or claims via multi-district litigation is only for the purpose of pre-trial proceedings and does not allow ultimate resolution of common issues via trial.[275]

To overcome these shortcomings, the proposed inter-district coordination procedures are more akin to the related case procedures most district courts use for intra-district coordination, except applied across district lines. Most district courts require a notice of related cases to be filed with the complaint that identifies any other action previously filed or currently pending in the same district that, *inter alia*, involves the "determination of the same or substantially related or similar question[s] of law and fact" or "would entail substantial duplication of labor if heard by different judges."[276] In many districts, assignment or transfer of related cases to the same judge is automatic. For example, in the Southern District of California, the clerk is tasked with identifying cases that meet the definition of related cases, with identified cases automatically assigned (or reassigned) to the judge with the first-filed of the related actions.[277]

The procedures for resolution of these related cases vary depending on the district, the nature of the cases, and the degree of overlap. Sometimes cases are consolidated for all purposes, while other times they remain entirely separate with coordination simply allowing a single judge to master the issues involved and avoid inconsistent results. But, importantly for present purposes, it is common in intra-district related cases for the common issues to be resolved collectively in a group proceeding and individual issues in separate individual proceedings, with consolidation or reassignment sometimes happening only for the limited purpose of resolving common issues. For example, multiple cases alleging infringement of the same patent pending in the same district have been reassigned to a single judge only to interpret the patent claims.[278] Similarly, the Northern District of California assigned 200 DirecTV cases to a single judge only to resolve the propriety of joinder, determine whether certain statutory provisions allowed private rights of action, and establish the necessary showing under various statutes for default judgments.[279]

274. *See supra* Part V.A.3.

275. *See* § 1407(a); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998). Common issues can be resolved via summary judgment in multi-district proceedings or tested via sample or "bellwether" trials.

276. C.D. CAL. L.R. 83-1.3.1.1; *see also, e.g.*, S.D. CAL. L.R. 40.1(e)-(j).

277. S.D. CAL. L.R. 40.1(e)-(j).

278. *See, e.g.*, Kohus v. Toys "R" Us, Inc., Nos. C-1-05-517, C-1-05-671, 2006 WL 1476209, at *1-2 (S.D. Ohio May 25, 2006).

279. *In re* DIRECTV, Inc., No. C-02-5912-JW, 2004 WL 2645971, at *1, *12 (N.D. Cal. July 26, 2004).

In essence, the proposed inter-district coordination applies the tools developed for intra-district related case procedures—especially the use of automatic reassignment and reassignment for the limited purpose of (final) resolution of only common issues—to cases involving similarly situated defendants that reach across district boundaries. It also formalizes the standards and procedures for related case coordination, which in the intra-district context, often are ad hoc and subject to substantial judicial discretion, and therefore judicial self-interest.

Although developed for the needs of defendant aggregation, inter-district related case coordination may be useful for certain types of multi-plaintiff cases that share similarities with multi-defendant cases, including the presence of both significant individual and significant common issues and the inappropriateness of representative procedures. For example, mass tort cases, which fit these criteria and have faced obstacles to aggregation under existing procedures, may benefit from inter-district coordination. Indeed, aspects of inter-district coordination echo the proposals from the American Law Institute's Complex Litigation Project in the 1990s, which was largely focused on plaintiff aggregation.[280]

2. *Mechanics of Inter-District Coordination*

The proposed inter-district coordination procedures would be initiated when the plaintiff filed a complaint (probably a form complaint) against each defendant in a chosen district court with jurisdiction and venue over that defendant. The plaintiff also would file a notice listing any "related cases" already pending or concurrently filed.[281] Related cases could be defined generically to include, *inter alia*, cases with a common, or perhaps "significant," question of fact or law.[282] Substance-specific aggregation protocols, discussed in more detail below, also would be useful to provide more specific definitions or guidance as to what constitutes a related case in various substantive areas.[283] To prevent serial litigation when it suited the plaintiff's interest, incentives could be provided to name all defendants at once, such as a substantially discounted bulk rate filing fee, a penalty or moratorium for subsequently filing related cases, or even preclusion of related claims that were identifiable and could have been brought at the time of original filing.[284]

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280. AM. LAW INST., COMPLEX LITIGATION PROJECT 1-4 (Proposed Final Draft 1993).

281. *See, e.g.*, Notice of Designation of Related Civil Cases Pending (D.D.C.), *available at* https://www.dcd.uscourts.gov/dcd/sites/dcd/files/CO932-online.pdf.

282. *See* S.D. CAL. L.R. 40.1(f)-(g).

283. *See* D.D.C. L.R. 40.5(a) (providing different definitions of "related case[s]" for criminal, civil forfeiture, and civil cases).

284. *Cf.* Parchomovsky & Stein, *supra* note 23 (suggesting that procedural tools, like preclusion and restitution, can lead to more efficient defense-side outcomes).

The notice of related cases would be filed simultaneously with the chosen court and a centralized body—perhaps the Judicial Panel on Multidistrict Litigation (JPML). The centralized body would conduct a preliminary review to insure the cases actually qualify as related cases. If the definition of related cases is clearly specified, this task could be assigned to the equivalent of a clerk to reduce costs.[285] The centralized body would then reassign the related cases to a single judge for the limited purpose of resolving common issues. Under existing multi-district litigation procedures, the choice of judge is at the discretion of the JPML and often is subject to briefing and a hearing.[286] Because of its automatic application, inter-district coordination will involve many more cases than multi-district litigation, and it will be infeasible to litigate the identity of the coordinating judge in every case. To reduce transaction costs, the identity of the coordinating judge should be determined automatically[287]—perhaps by assigning the related cases to a judge in the district with the most related cases, a judge in the district that is geographically closest to the most defendants, a judge that has volunteered for coordinated cases either generally or in specific substantive areas, a judge that has passed some minimal screening for ability to handle complex litigation, or a judge with some combination of these factors.

Once reassigned for coordination, the coordinating judge would develop a coordination plan specifying the common issues, the plan for discovery and resolution of the common issues, and the status of the individual cases. This coordination plan would involve input from the parties and probably a hearing, and the parties would also have the chance to seek de-aggregation on limited, specific grounds (e.g., although the same patent is involved, totally different claims are asserted against each defendant). The coordinating judge could stay proceedings in the individual cases pending outcome of the common issues, especially where the common issues could be dispositive of all cases (e.g., patent invalidity). In other circumstances, individual issues may be litigated simultaneously with the coordinated proceedings, such as when one patent has been asserted against many defendants but a second patent is asserted individually against just one defendant. Once the common issues have been resolved, the related cases would be returned to the individually chosen districts for reso-

285. *See* S.D. CAL. L.R. 40.1(g)-(h) (requiring clerk to identify related cases and prepare an order for judge's signature).

286. *See* Margaret S. Williams & Tracey E. George, Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation, 10-11, 23-24 (July 1, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1633703.

287. *Cf.* S.D. CAL. L.R. 40.1(h)-(i) (assigning related cases to the judge with the "low-numbered" case). The low-number rule would not work for inter-district coordination because plaintiffs could consistently choose the most plaintiff-friendly districts simply by filing the first of the related cases in that district.

lution of individual issues.[288] Any common issues resolved in the coordinated proceedings would have law of the case or collateral estoppel effect in the individual proceedings.[289]

To reduce litigation costs, minimize disputes over the coordination plan, and constrain judicial variability and self-interest, presumptively binding guidelines could be used to specify what constitutes a common issue appropriate for coordinated resolution, what constitutes an individual issue not appropriate for coordinated resolution, in what circumstances to stay individual proceedings, how to structure discovery, and how to handle trials. Although trans-substantive guidelines would help, substance-specific protocols would allow greater specificity and detail and be preferable, at least for substantive areas that repeatedly produce multi-defendant cases (e.g., patent litigation or internet file-sharing).[290]

For example, under a patent-specific protocol, a related case could be defined as one alleging infringement of the same patent or perhaps patents that issued from a common application. The common issues would include interpretation of the patent (i.e., "claim construction"), whether the patent is invalid for failing to meet the statutory requirements,[291] defenses related to the patentee's conduct in the Patent Office (e.g., "inequitable conduct"), and maybe infringement issues in those cases where they are likely to be identical for each defendant.[292] As for structure, the patent-specific protocol could provide for an early claim construction hearing to resolve the scope of the patent,[293] then discovery limited to invalidity and inequitable conduct issues, and finally trial of invalidity and inequitable conduct. Because the common defenses are potentially case-dispositive and therefore can save the costs from discovery and trial on infringement,

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288. *Cf. In re* DIRECTV, Inc., No. C-02-5912-JW, 2004 WL 2645971, at *12 (N.D. Cal. July 26, 2004) (referring cases back to originating judge after resolving certain common issues on a district-wide coordinated basis).

289. *See* Romberg, *supra* note 270, at 254 (similar suggestion for issue class actions).

290. Despite the trans-substantive nature of most procedural rules, *see* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067 (1989), substance-specific procedures are increasingly common in complex areas, including Patent Local Rules, *see, e.g.*, N.D. CAL. PATENT L.R., *available at* http://www.cand.uscourts.gov/localrules/patent, guidelines from court advisory councils on discovery and case management, *see* Jason Rantanen, *Model Order Addressing Numerosity of Claims and Prior Art [UPDATED]*, PATENTLYO (July 26, 2013), http://www.patentlyo.com/patent/2013/07/model-order-addressing-numerosity-of-claims-and-prior-art.html, and the ad hoc guidelines on the showing required for a DirecTV default judgment created by the Northern District of California, *see In re DIRECTV, Inc.*, 2004 WL 2645971, at *6-11.

291. Parchomovsky & Stein, *supra* note 23, at 1484-86 (classifying patent law defenses as individual or common).

292. *See* Taylor, supra note 7, at 717-19.

293. *See, e.g.*, N.D. CAL. PATENT L.R. 4 (setting procedures for early claim construction hearing).

damages, and other individual issues—individual proceedings generally should be stayed until after the common issues are resolved,[294] or at least until claim construction is resolved.[295]

C. Potential Obstacles to Inter-District Coordination

A benefit of inter-district coordination is that it is a hybrid of two well-established procedures (multi-district litigation and intra-district related case coordination) and therefore poses minimal implementation problems. This Section considers a few implementation obstacles.

1. Practical Obstacles: Free Riding

Although common defenses are public goods and raise the possibility of free riding with or without aggregation,[296] aggregation may accentuate the problem. In individual litigation, each defendant must expend money and effort to develop its defenses, including common defenses; if it does not, it loses.[297] But aggregated defendants prevail when the group succeeds on a common defense, regardless of their contribution. Thus, in theory, each defendant's incentive is to underinvest in the common defense, relying on other defendants to develop defenses that also allow the free-riding defendant to escape liability.[298]

Free riding poses fewer obstacles to aggregation of similarly situated plaintiffs because successful aggregated claims create a common pool of money from which to pay the lawyers, incentivizing lawyers to vigorously pursue the common cause.[299] Aggregated defenses create no common fund, but rather require expenditures to avoid greater expenditures.[300] To overcome the free-riding problem for aggregated defendants, Hamdani and Klement proposed one-way fee-shifting,

294. *See* Ford, *supra* note 156, at 119-22 (suggesting resolving invalidity first for substantive reasons).

295. Claim construction is the single most important event in patent cases and is often case-dispositive. *See* Greg Reilly, *Judicial Capacities and Patent Claim Construction: An Ordinary Reader Standard*, 20 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2014) (manuscript at 24-25), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310026.

296. *See supra* Part IV.B.

297. An individual defendant may be able to free ride if it is sued after another defendant has prevailed on a common defense, *see* Parchomovsky & Stein, *supra* note 23, at 1518, or is part of a joint defense group sharing information and work product, *see* Erichson, *supra* note 20, at 401-08. Moreover, a rational defendant in individual litigation may focus on individual defenses to avoid creating a common good. *See* Ford, *supra* note 156, at 109-12.

298. *See* Hamdani & Klement, *supra* note 4, at 712.

299. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2139-40 (2000).

300. *See* Hamdani & Klement, *supra* note 4, at 715.

where a losing plaintiff would pay the defendants' fees.[301] However, most cases settle.[302] A settlement for aggregated plaintiffs still creates a common fund to pay the lawyers, but a settlement for aggregated defendants neither creates a common fund nor results in a losing plaintiff. Hamdani and Klement would have the plaintiff pay fees when the defendants prevail *or settle*,[303] even though the settlement could reflect the strength of the plaintiff's case, not its weakness. This could deter plaintiffs from bringing meritorious claims or reduce settlements, increasing costs and congestion in the courts.

Free riding may not pose as great an obstacle to inter-district coordination as may be first thought. Practitioners involved in multi-defendant litigation, at least in higher stakes cases like patent litigation, suggest free riding is less of a problem than "over-riding," that is, each defendant insisting on pursuing its preferred strategies and being involved in or taking the lead on every aspect of the litigation.[304] The incentive for defense lawyers to over-ride is clear: it maximizes their billable hour fees. Over-riding may be rational for defendants themselves when aggregation occurs via non-representative procedures and each defendant can settle separately. If other defendants settle, a free-riding defendant would be left exposed to liability without having developed a defense. In fact, practitioners report "plaintiffs often offer the most favorable settlements to the defendants that are best prepared, to remove them from the case and focus on the more vulnerable parties."[305] Even if not perfectly rational, clients may permit over-riding because of monitoring deficiencies or the influence and self-interested advice of the lawyers. Finally, because of loss aversion, defendants will tend to pay more in defense than they rationally should, and because of self-serving bias, defendants will overvalue their own strategies and abilities (or the wisdom of their choice of counsel) and be unwilling to sacrifice their defense to perceived "weaker" defendants or lawyers.

Even in lower stakes cases, like the DirecTV and internet file-sharing cases, one or more defendants have been willing to take on

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301. *Id.* at 715-17; *see also* Netto, *supra* note 21, at 112-16 (also supporting fee-shifting in part to motivate attorneys to present defenses instead of settling).

302. Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), http://www.nytimes.com/2008/08/08/business/08law.html?_r=1& ("The vast majority of cases do settle — from 80 to 92 percent by some estimates . . . .").

303. Hamdani & Klement, *supra* note 4, at 715-17.

304. *See, e.g.*, Irene C. Warshauer et al., *Methods to Effectively Manage Complex Multi-Party Disputes*, 14A ROCKY MTN. MIN. L. FOUND. (SPECIAL INST. ON RESOL. & AVOIDANCE OF DISPUTES) 3, 3-15, 20 (1984); Baghdassarian & Frankel, *supra* note 151.

305. Baghdassarian & Frankel, *supra* note 151; *see, e.g.*, Warshauer et al., *supra* note 304, at 3-19.

common issues on behalf of all defendants.[306] Aggregation probably makes it more likely that the common defense will be developed in low-stakes cases because it offers greater opportunities to fund defense lawyers than individual litigation. For example, aggregation may encourage involvement by public interest groups whose substantive interests line up with the defendants—such as the open-access movement in intellectual property cases—by lowering the required costs and effort and raising the stakes and prominence.[307] Alternatively, defense lawyers could collect an inventory of cases, charging each defendant a small amount but creating a respectable war chest.[308] For example, if a defense lawyer can sign up 100 clients for a flat fee of $1000,[309] the $100,000 total should allow a better common defense than any defendant could put on in individual litigation.

Finally, free riders in aggregate litigation do not make participating defendants worse off than in individual litigation, as participating defendants would likely litigate the same common issues at virtually the same cost without aggregation.[310] To the extent that free riding is seen as unfair or creating under-investment in common defenses, mechanisms could be used to encourage or force all defendants to contribute where feasible.[311]

2. *Statutory and Constitutional Obstacles*

Much of the proposed inter-district coordination procedure can be implemented under the JPML's existing rulemaking authority,[312] including the procedures for choosing a coordinating judge and the development of general and substance-specific protocols. However, inter-district coordination cannot be fully implemented without

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306. *See, e.g.*, Arista Records, LLC v. Does 1–11, No. 1:07–CV–2828, 2008 WL 4823160, at *1-2 (N.D. Ohio Nov. 3, 2008) (noting that Defendant Doe #9 had entered an appearance via counsel and filed a motion "to dismiss all Doe Defendants except Defendant Doe # 1" for improper joinder); *In re* DIRECTV, Inc., No. C-02-5912-JW, 2004 WL 2645971, at *1 (N.D. Cal. July 26, 2004) (noting that attorneys appeared on behalf of defendants at hearing on joinder and DirecTV's required *prima facie* showing).

307. *Cf.* Hamdani & Klement, *supra* note 4, at 717-18 (noting that class defense mechanisms could provide additional funding for public interest organizations).

308. *See* DirecTV, Inc. v. Beecher, 296 F. Supp. 2d 937, 939 (S.D. Ind. 2004) ("Many of the defendants in the several cases in this court have banded together for a common defense.").

309. People with minimal resources regularly pay $1000 or more to defend DUI charges. *See*, *e.g.*, Lisa Ellis, *What It Costs for a DUI Attorney*, WHAT IT COSTS, http://business.whatitcosts.com/dui-attorney.htm (last visited July 25, 2014).

310. *See Defendant Class Actions*, *supra* note 20, at 648. Coordination costs are unlikely to be significant if other defendants are free riding.

311. *See* Ford, *supra* note 156155, at 123 (proposing accounting action for defendants who prevail on a common defense to recover from other potential defendants); Parchomovsky & Stein, *supra* note 23, at 1520-24.

312. *See* 28 U.S.C. § 1407(f) (2012) ("The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.").

amendments to the multi-district litigation statute to permit issue-only coordination since the JPML has interpreted the statute as limited to coordination of entire claims.[313] Likewise, statutory amendments would be necessary to implement automatic coordination procedures, as the statute currently requires notice and a hearing before transfer,[314] and to allow trial of common issues in the consolidated proceedings, since the statutory language and Supreme Court precedent require remand at the end of pre-trial proceedings.[315]

Inter-district coordination does not appear to raise any novel constitutional issues. Although the coordinating forum may not otherwise have personal jurisdiction and venue over all defendants, "Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction," which it did in the multi-district litigation statute.[316] Likewise, issue-only aggregation does not run afoul of the Seventh Amendment's guarantee that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States . . . ."[317] Common legal issues do not implicate the Seventh Amendment, and even for common issues subject to a jury trial, the Seventh Amendment only bars revisiting of the same issue, not simply an overlap in evidence presented to two juries.[318] If common issues are properly defined by the coordinating judge and properly given preclusive effect in indi-

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313. *See supra* Part V.A.3.

314. *See* § 1407(c).

315. *See* § 1407(a); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

316. *In re* "Agent Orange" Prod. Liab. Litig. MDL No. 381, 818 F.2d 145, 163 (2d. Cir. 1987) (absent class members); *see also In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (defendants). This is clearly true for cases subject to federal question jurisdiction. In these cases, the Due Process Clause of the Fifth Amendment applies and requires only minimum contacts with the United States as a whole. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1, at 597-602, 612 (3d ed. 2002). By contrast, in diversity cases, the Due Process Clause of the Fourteenth Amendment applies; allowing a federal, nationwide jurisdiction statute to trump the state-specific minimum contacts analysis required in state courts would seem to run afoul of the Erie Doctrine. *Id.* § 1068.1, at 592. Yet, personal jurisdiction has not proven an obstacle to multi-district litigation, even in diversity cases. *See Agent Orange*, 818 F.2d at 152, 163. For aggregated defendants, personal jurisdiction may prove more problematic in diversity cases because of the heightened due process concerns for defendants as compared to plaintiffs. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985). At the very least, personal jurisdiction issues are likely to receive more attention than they have received in multi-district litigation if inter-district related case coordination is used in diversity cases.

317. U.S. CONST. amend. VII.

318. *See* Romberg, *supra* note 270, at 324-25. For a detailed consideration of the Seventh Amendment issue in the context of issue class actions, see Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998).

vidual litigation, there is no risk that the individual jury would reconsider issues resolved by the coordinated jury.[319]

VI. CONCLUSION

This Article has explored the overlooked puzzle of defendant aggregation: the opposition of defendants, courts, and policymakers to aggregation of similarly situated defendants despite the theoretical benefits it offers courts and the judicial system. Defendants' opposition is more easily explained, at least for some defendants and some types of cases. Yet, these explanations are weaker and less broadly applicable than may be commonly assumed. Systemic opposition likely results from some combination of improper merits or policy determinations, capture by defendant interests, and a narrow focus on a judge's own self-interest rather than that of the judicial system as a whole.

The need for aggregation of similarly situated defendants to date has largely arisen in technology cases—patent cases, internet file-sharing copyright litigation, and satellite television piracy—but is likely to spread to other areas in the coming years as a result of mass communications that increase the ability of dispersed people to injure a single plaintiff.[320] Others have noted the parallels between the rise of mass communications and defendant aggregation in the 21st century and the rise of mass production and a national economy and plaintiff aggregation in the mid-20th century.[321] Overlooked, however, is that the increased demand for plaintiff aggregation in the 1950s and 1960s sparked procedural innovation that resulted in new multi-district litigation procedures[322] and substantially revised class action procedures.[323] The modern demand for defendant aggregation similarly necessitates procedural innovation that will overcome the obstacles created by defendant and judicial self-interest and cognitive limitations.

This Article takes a first step in that direction and proposes an inter-district related case coordination procedure. The debate going forward should be about how to better tailor a procedure for the needs of defendant aggregation, not whether, or how well, aggregation of similarly situated defendants fits into the boxes of existing procedures largely crafted for aggregating plaintiffs.

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319. *See* Romberg, *supra* note 270, at 324-25 (reaching a similar conclusion in the context of issue class actions).

320. *See* Hamdani & Klement, *supra* note 4, at 741; Netto, *supra* note 21, at 61-62.

321. *See* Hamdani & Klement, *supra* note 4, at 741; Netto, *supra* note 21, at 61.

322. *See* Resnik, *supra* note 24, at 30-33 (describing the history of the 1968 enactment of the multi-district litigation statute).

323. *See id.* at 9-17 (describing the history of the 1966 revisions to class action procedures).