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## Proof of Classwide Injury

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# PROOF OF CLASSWIDE INJURY

*Sergio J. Campos*\*

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## INTRODUCTION

Imagine a country with a law that mirrors Title VII.<sup>1</sup> Suppose that an employer in that country has put up posters stating that persons of a certain race “need not apply” for pay increases.<sup>2</sup> A worker of that race requests a pay raise and the employer rejects the request. The worker

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1. 42 U.S.C. § 2000e *et seq.* (2006).

2. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (contrasting obvious, “first genera-

then asserts a disparate treatment claim against the employer for a “pattern or practice” of racial discrimination.<sup>3</sup>

The worker would like to bring a class action because her damages, as well as the damages for all other affected workers, would be small. But to proceed as a class action in that country, the worker must first prove that each member of the class was injured by the alleged discriminatory practice. The worker must do so even though, to prevail on the claim, Title VII does not require plaintiffs “to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer’s discriminatory policy.”<sup>4</sup> Proving the fact of injury on a classwide basis may be difficult because some class members may not have deserved a pay increase in the absence of the discriminatory practice.

The requirement of proof of classwide injury, in effect, prevents the worker’s class action from being certified, even though the employer’s conduct is manifestly unlawful, and the class would certainly prevail on the merits. Given the small claims of each of the class members, the requirement likely prevents all actions from being filed. As it turns out, this requirement applies to class actions in the United States.

This symposium addresses the spread of the U.S. litigation model to other jurisdictions, and arguably there is no procedure more American than the class action.<sup>5</sup> Recently, however, other countries have adopted class actions or similar collective procedures.<sup>6</sup> This Article discusses the

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tion” forms of discrimination, such as signs stating “Irish need not apply,” from more complex, “second generation” forms of discrimination, such as unconscious bias).

3. 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race”); see also *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (defining disparate treatment pattern-or-practice claims).

4. *Teamsters*, 431 U.S. at 360–61 (noting that after a “pattern-or-practice” has been found to violate Title VII, “a district court must usually conduct additional proceedings after the liability phase to determine the scope of individual relief”).

5. Richard A. Nagareda, *Aggregate Litigation across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009) [hereinafter Nagareda, *Aggregate Litigation across the Atlantic*] (noting “several exceptional features of the U.S. civil justice system,” including “class actions”); Edward F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Actions*, 52 DEPAUL L. REV. 401, 401 (2002) (“The class action is a uniquely American procedural device.”).

6. Manuel A. Gomez, *Collective Redress in Latin America: The Regulation of Class Actions and Other Forms of Aggregate and Group Litigation for the Protection of Consumer Rights*, in L’ART. 140 BIS DEL CODICE DEL CONSUMO: L’AZIONE DI CLASSE 265 (Lorenzo Mezzasoma & Francesco Rizzo eds., 2011) (It.) (discussing class actions and similar procedures in Latin America); Nagareda, *Aggregate Litigation across the Atlantic*, *supra* note 5, at 4 (noting recent implementation of procedures “within the broad

merits of the class action both here and abroad, but takes an American focus. It examines a recent requirement of U.S. class action doctrine illustrated by the hypothetical above—proof of classwide injury. The Article argues that the requirement reveals misunderstandings about the class action. It then uses these misunderstandings to suggest factors that both the United States and other jurisdictions should consider in implementing class actions or similar procedures.

Federal courts in the United States have recently required proof of “classwide injury” to certify a class action for damage remedies.<sup>7</sup> Proof of classwide injury is generally understood as proof that the defendant injured every member of the class.<sup>8</sup> Such proof does not have to show the amount of damages for each plaintiff. Instead, it only has to show that each plaintiff was in fact injured by the defendant’s alleged unlawful conduct.<sup>9</sup>

Proof of classwide injury is referred to in antitrust litigation as proof of classwide or common “impact,”<sup>10</sup> and in securities fraud and Racketeer Influenced and Corrupt Organizations Act (“RICO”) fraud litigation as

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rubric of ‘aggregate litigation,’” such as “English group litigation orders” and “Italian class actions”). Many of the contributions to this symposium discuss in great detail collective procedures in different countries.

7. *E.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (affirming denial of class certification since plaintiffs “cannot prove classwide injury with proof common to the class”); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001) (finding that there was no proof of classwide “injury” since “[w]hether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested”).

8. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008) (“[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.”).

9. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 694 (D. Minn. 1995) (“[T]he issue in the common impact analysis is the fact, not the amount, of injury.”).

10. *E.g.*, *Hydrogen Peroxide*, 552 F.3d at 311 (“Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation.” (citing *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977))); *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008) (“The real dispute revolved around whether common evidence could be used to prove the impact of the alleged conspiracy on U.S. consumers (‘common impact’).”); *see also id.* at 19 n.18 (noting that “[t]he element of injury in the antitrust context is often referred to as ‘impact’ or ‘fact of damage,’” (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 n.18 (5th Cir. 1978))).

classwide proof of “transaction causation.”<sup>11</sup> Courts have similarly required proof of classwide “specific causation” in mass tort cases,<sup>12</sup> as well as proof of the common “glue” that injured the plaintiffs in employment discrimination cases.<sup>13</sup> In all contexts proof of classwide injury is referred to as common proof of the “fact” of injury.<sup>14</sup>

Courts generally require proof of classwide injury to satisfy the “predominance” requirement of Federal Rule of Civil Procedure 23(b)(3), which requires plaintiffs seeking to certify a class to show that “the questions of law or fact common to class members predominate over any questions affecting only individual members.”<sup>15</sup> In *Wal-Mart Stores, Inc. v. Dukes*,<sup>16</sup> decided this past term, the Supreme Court suggested that “significant proof” of classwide injury may be required to satisfy the “commonality” requirement of Rule 23(a)(2), which only requires a showing that “there are questions of law or fact common to the class.”<sup>17</sup>

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11. *E.g.*, *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008); *Newton*, 259 F.3d at 172 (noting, in the context of civil RICO fraud litigation, that “[r]eliance, or transaction causation, establishes that but for the fraudulent misrepresentation, the investor would not have purchased or sold the security” in securities fraud litigation). *But see* *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (holding that plaintiffs are not required to prove reliance to assert a civil RICO claim, but still requiring a showing of proximate cause).

12. *E.g.*, *In re Vioxx Products Liab. Litig.*, 239 F.R.D. 450, 462 (E.D. La. 2006) (finding a lack of predominance despite common issues of general causation, since “each individual plaintiff must meet his or her own burden of medical causation” (quoting *Steering Comm. v. Exxon Mobil Corp.* 461 F.3d 598, 603 (5th Cir. 2006))). *Cf.* *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (finding no predominance in settlement class action involving asbestos claims “given the greater number of questions peculiar to the several categories of class members,” including injury).

13. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2545 (2011).

14. *E.g.*, *New Motor Vehicles*, 522 F.3d at 20 (noting that “[i]n antitrust class actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof”).

15. FED. R. CIV. P. 23(b)(3); *see also* *New Motor Vehicles*, 522 F.3d at 20 (requiring “common proof” of “antitrust impact” to satisfy the predominance requirement). Some courts also require proof of classwide injury to satisfy the “superiority” requirement of Rule 23(b)(3), although here I will focus on the predominance requirement. FED. R. CIV. P. 23(b)(3) (requiring, for purposes of class certification, a showing “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”); *Newton*, 259 F.3d at 192 (“Because injury determinations must be made on an individual basis in this case, adjudicating the claims as a class will not reduce litigation or save scarce judicial resources. Under these circumstances, plaintiffs fail to satisfy the superiority standard.”).

16. *Wal-Mart*, 131 S. Ct. 2541.

17. FED. R. CIV. P. 23(a)(2); *see also* *Wal-Mart*, 131 S. Ct. at 2545 (holding that the commonality requirement of Rule 23(a)(2) requires “significant proof that an employer

Unlike Rule 23(b)(3), which defines a residual category that mainly applies to class actions seeking monetary remedies, Rule 23(a)(2) is a prerequisite for all class actions.<sup>18</sup>

This Article examines proof of classwide injury as a requirement for certification of a class action. Although the requirement has not attracted much scholarly attention, most scholars, such as the late Richard Nagareda, have concluded that proof of classwide injury should be a prerequisite for class certification.<sup>19</sup> In fact, the Supreme Court in *Wal-Mart* quoted a seminal article by Nagareda to support its view that the “commonality” requirement of Rule 23(a)(2) not only requires “common questions,” but proof of “common answers” as to injury:

What matters to class certification . . . is not the raising of common “questions”—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.<sup>20</sup>

The *Wal-Mart* Court did not find sufficient proof of “common answers” because the plaintiffs, all female employees of Wal-Mart, challenged the thousands of allegedly discriminatory pay and promotion decisions made

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operated under a general policy of discrimination” (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982))).

18. FED. R. CIV. P. 23(b) (providing that “[a] class action may be maintained if Rule 23(a) is satisfied and” the proposed class action fits into one of the categories defined under Rule 23(b)).

19. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 98–109 (2009) [hereinafter Nagareda, *Class Certification*]; see also Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 149–55 (2010) [hereinafter Nagareda, *Common Answers*]. Some scholars have not addressed the issue of classwide injury but have implied such a requirement in arguing that the predominance requirement requires a finding that the cases can be substantially “resolved” on a common basis. See, e.g., Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005–06 (2005); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997). The American Law Institute’s PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION has adopted this “resolvability” approach to the predominance requirement, and has specifically cited Allan Erbsen’s seminal article for support. AM. L. INST. [ALI], PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02(a)(1) cmt. a (2010). Other scholars have required an assessment of the merits prior to class certification, which would entail a finding of classwide injury. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1253–54 (2002); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3–6 (2001).

20. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *Class Certification*, *supra* note 19, at 132).

by store and regional managers at Wal-Mart's many stores. The Court concluded that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."<sup>21</sup>

This Article argues that the proof of classwide injury requirement arises from three fallacies about the class action. The first fallacy is that class actions require a court to resolve all issues in one fell swoop. Thus, proof of classwide injury is necessary because, without such proof, the class action would unravel into separate trials on the issue of injury.<sup>22</sup> But, as argued below, the class action does not require an all-at-once determination of the merits because the class action is not primarily an all-at-once trial device but a trust device. The function of the class action is to assign dispositive control over the plaintiffs' claims to a third party, class counsel, for the benefit of the plaintiffs. It does so to allow the class attorney to make common investments, which, because of economies of scale, lowers the average costs for each plaintiff. The trust function of the class action is essential for litigation involving small claims because without it no plaintiff would have incentive to bring suit. More importantly, the trust function of the class action does not entail an all-at-once determination of the merits. A class action can incorporate multiple trials of the issues as long as the class attorney can make common investments for the class.

The second fallacy is that the class action is an extraordinary remedy that, like a preliminary injunction, requires the plaintiffs to show a likelihood of success on the merits.<sup>23</sup> In *In re New Motor Vehicles Canadian Export Antitrust Litigation*,<sup>24</sup> for example, the court required proof of

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21. *Id.* at 2552 (emphasis in original).

22. See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001) (concluding that, in the absence of proof of classwide impact, proving injury on an individual basis would be a "Herculean task," which "counsels against finding predominance"); see also Nagareda, *Class Certification*, *supra* note 19, at 132 ("What matters to class certification . . . [is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation."); *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *Common Answers*, *supra* note 19, at 132) (same); Erbsen, *supra* note 19, at 1025 (proposing a "finality principle" for the predominance requirement that provides that "a certified class action seeking damages should eventually result in a judgment resolving the claims of all class members").

23. *E.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (noting that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits," among other things.).

24. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

classwide injury in part to test the “novel and complex” theory supporting the plaintiffs’ claims.<sup>25</sup> Other circuits have required merits determinations to justify granting the “extraordinary leverage” the plaintiffs gain from the class action, which can create undue pressure for the defendant to settle.<sup>26</sup> But permitting a court to preview the merits before certifying the class action is at odds with the trust function of the class action. The trust function of the class action is designed to equalize the stakes between the plaintiffs and the defendant because the defendant can automatically exploit economies of scale to invest in common issues.<sup>27</sup> Accordingly, the class action corrects a structural bias the defendants have in developing the merits. To avoid this bias, class certification should be awarded *before* any merits determination, not *after*.

The third fallacy is that, in the absence of proof of classwide injury, individual trials are required to accurately determine each individual plaintiff’s injury, and thus prevent uninjured plaintiffs from recovering. Setting aside the all-at-once fallacy, this individualist fallacy suggests that individual trials are always better than classwide trials to determine individual issues. However, and as suggested by the hypothetical above, the lack of proof of classwide injury arises mainly from uncertainty as to the counterfactual world. Whether a plaintiff has suffered damage depends on how he or she would have fared in the absence of the alleged unlawful conduct. As argued below, proving the counterfactual may involve evidence that is common to some or all of the members of the class. Moreover, many other areas of the law express no concern for uninjured plaintiffs recovering. Most importantly, the deterrence function of the litigation does not require any improved accuracy that may result from individualized hearings. As discussed below, the deterrence function only requires an assessment of the damage at the class level, not the individual level, leaving distributional accuracy a matter of secondary importance.

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25. *Id.* at 26–28 (concluding that a searching inquiry as to classwide impact is necessary since “the granting of class status ‘raises the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle’” (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000))).

26. *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *overruled by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

27. This is one of the great insights of David Rosenberg’s work on mass tort litigation. *See, e.g.*, David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. LEGIS. 393, 395 (2000) [hereinafter Rosenberg, *Mass Tort Class Actions*]; *see also* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1074–76 (2012) (discussing the problem of asymmetric stakes).



After correcting these fallacies, the Article concludes that proof of classwide injury should not be required to certify a class. Instead, a class action should be certified if, along with the other prerequisites of Rule 23, the class shares common questions of liability, not common answers of injury. Accordingly, the trend of requiring proof of classwide injury, most strikingly seen in the *Wal-Mart* decision and its interpretation of the commonality requirement, should reverse course. Otherwise, to insist on such barriers to class certification would “impair the deterrent effect of the sanctions which underlie much contemporary law.”<sup>28</sup>

The Article further argues against adopting the class action as a common answer in other jurisdictions. As discussed below, clarifying the function of the class action in the U.S. context suggests a number of factors other jurisdictions should consider in importing the class action device. This is not to say that the class action can only work in the United States. Instead, the goal of the Article is to ensure that other jurisdictions learn from the United States’ mistakes.

This Article proceeds as follows. Part I discusses in more detail the requirement of proof of classwide injury. Part II then discusses each of the three fallacies of class actions reflected by the requirement of proof of classwide injury: (1) the all-at-once fallacy, (2) the extraordinary remedy fallacy, and (3) the individualist fallacy. The Article concludes by arguing that common questions, not common answers, should be the standard for class certification, both in the United States and abroad.

## I. PROVING CLASSWIDE INJURY

Before discussing the requirement of proof of classwide injury, it is worth discussing the class action law that applies. Federal Rule of Civil Procedure 23 governs federal class actions.<sup>29</sup> Rule 23 requires a proposed class action to satisfy four prerequisites defined under subsection (a) and fit within one of three categories defined under subsection (b).<sup>30</sup> The four requirements are that “(1) the class is [sufficiently] numerous” (the “numerosity” requirement); “(2) there are questions of law or fact common to the class” (the “commonality” requirement); “(3) . . . the representa-

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28. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941).

29. FED. R. CIV. P. 23; *see also* Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (noting that Rule 23 governs all federal class actions).

30. FED. R. CIV. P. 23(a), (b); *see also* Shady Grove, 130 S. Ct. at 1437 (“[a] class action may be maintained’ if two conditions are met: the suit must satisfy the criteria set forth in *subdivision (a)* . . . and it also must fit into one of the three categories described in *subdivision (b)*.” (quoting FED. R. CIV. P. 23(b)).

typical parties are typical” (the “typicality” requirement); and “(4) the representative parties will fairly and adequately protect” the class (the “adequacy of representation” requirement).<sup>31</sup>

Rule 23(b)(3) defines a residual category of class actions which applies generally to litigation involving monetary remedies.<sup>32</sup> Rule 23(b)(3) permits a class action only if common questions “predominate over any questions affecting only individual members” (the “predominance” requirement) and the “class action is superior to other available methods” (the “superiority” requirement).<sup>33</sup>

Proving classwide injury primarily implicates the predominance requirement of Rule 23(b)(3). Courts have concluded that a failure to show that every class member was injured would necessarily result in individualized determinations of injury, and such “individual issues . . . would . . . overwhelm[] the common ones.”<sup>34</sup>

In *New Motor Vehicles*, for example, the plaintiffs alleged that an unlawful horizontal conspiracy among car manufacturers restricted the flow of Canadian cars into the U.S. market.<sup>35</sup> The restriction allegedly raised the negotiating range—the lower “dealer invoice price” and the higher “Manufacturer’s Suggested Retail Price (“MSRP”)”—for new U.S. cars.<sup>36</sup> The plaintiffs’ experts relied on what the First Circuit considered a “novel and complex theory” to show an increase in the negotiating range caused by the alleged conspiracy.<sup>37</sup>

The district court certified a class of indirect purchasers harmed by the alleged conspiracy under various state antitrust laws, but the First Circuit vacated the certification order. Among other things, First Circuit expressed skepticism that the plaintiffs could prove that all members of the class paid higher prices, because the class contained both “hard bargain-

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31. FED. R. CIV. P. 23(a)(1)–(4).

32. See Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 103 (1966) (discussing creation of Rule 23(b)(3) category); Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (noting that the then-newly created Rule 23(b)(3) category for damage class actions is the “most adventuresome of the new types”).

33. FED. R. CIV. P. 23(b)(3).

34. *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988).

35. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 8 (1st Cir. 2008).

36. *Id.* at 10. The reason for this range is that, until recently, federal antitrust law considered vertical price-fixing per se unlawful. *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (holding that vertical price-fixing is only subject to rule of reason review).

37. See *New Motor Vehicles*, 522 F.3d at 26.

ers” and “poor negotiators.”<sup>38</sup> The court noted that some of the poor negotiators may have avoided an injury because they paid the same or less in the actual world, as compared to world that would have existed but for the alleged antitrust violation (the “but-for” world).<sup>39</sup> Given this variance among the class members, the First Circuit concluded that issues of law or fact common to the class did not “predominate.”<sup>40</sup>

The lack of predominance in *New Motor Vehicles* was caused, in part, by the variation among the class members. But the actual variation among the class members was not the primary cause of the difficulty in proving classwide injury. After all, if the plaintiffs could determine who the poor negotiators were who suffered no injury, they would have excluded them from the class. Instead, the primary cause is the *potential* variation of the plaintiffs, which arises from uncertainty as to who should be excluded. The plaintiffs in *New Motor Vehicles* had yet to propose a method of determining who the poor negotiators who suffered no injury were,<sup>41</sup> or at least had not proven that there were no such poor negotiators.<sup>42</sup>

The uncertainty as to whether each plaintiff was injured is itself caused by the uncertainty of the plaintiffs’ positions in the but-for, or counterfactual, world. In *New Motor Vehicles* a potential plaintiff could negotiate over the price, and thus could choose to accept the higher, MSRP price, bargain to the dealers’ invoice price, or bargain somewhere in between. The poor negotiators may have been stuck paying the MSRP in both worlds, suffering no loss. However, because no one can know what would have happened in the but-for world, no one can determine if any poor negotiator would have paid the MSRP in the absence of the alleged anticompetitive conduct.

The ability to negotiate, while sufficient, is not necessary to create the uncertainty in the counterfactual world that prevents common proof of injury. In *McLaughlin v. American Tobacco Co.*,<sup>43</sup> for example, the plaintiffs alleged that the defendant tobacco companies engaged in a scheme to fraudulently market “light” cigarettes as healthier, despite their knowledge that light cigarettes can expose the smoker to the same

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38. *Id.* at 29.

39. *Id.*

40. *Id.* at 29–30.

41. *Id.* at 28 (noting that plaintiffs’ expert had not devised a model for determining injury and damages).

42. *Id.* at 29 (providing no proof that “the entire negotiating range” was greater in the actual world as compared to the but-for world).

43. 522 F.3d 215 (2d Cir. 2008).

amount of nicotine through compensation.<sup>44</sup> The facts concerning the defendant's marketing scheme and knowledge were largely undisputed.<sup>45</sup> The district court certified a class of light cigarette purchasers harmed by the scheme, with potential damages running "billions of dollars."<sup>46</sup> The district court recognized that the plaintiffs' civil RICO claims required proof of reliance on the fraud, which may raise individual issues, but concluded that the plaintiffs' proffered methodologies for determining reliance were sufficient.<sup>47</sup>

The Second Circuit disagreed. It noted that the civil RICO statute,<sup>48</sup> which served as the basis for the plaintiffs' claims, required a showing of "transaction or 'but-for' causation."<sup>49</sup> Accordingly, the Second Circuit concluded that the proposed class had to show that each plaintiff "relied on the defendant's misrepresentation."<sup>50</sup> However, the Second Circuit concluded that transaction causation could not be proven on a classwide basis, because

[i]ndividualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative—for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style.<sup>51</sup>

The Second Circuit cited a recent Ninth Circuit case, *Poulos v. Caesars World, Inc.*,<sup>52</sup> involving alleged fraudulent representations made

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44. *Id.* at 220.

45. In related litigation, a district court found "overwhelming evidence" that the defendants' intentionally used deceptive brand descriptors to market light cigarettes. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 27 (D.D.C. 2006).

46. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1018 (E.D.N.Y. 2005) (Weinstein, J.), *overruled by McLaughlin*, 522 F.3d 215.

47. *Id.* at 1044–46.

48. The Racketeer Influenced and Corrupt Organizations ("RICO") Act provides, among other things, that "[a]ny person injured in his business or property by reason of a violation of [RICO's substantive provisions] may sue . . . and shall recover threefold the damages he sustains." 18 U.S.C. § 1964(c) (2006). The Second Circuit noted that the "by reason of" language in the statute requires a showing "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *McLaughlin*, 522 F.3d at 222 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). Since then, the Supreme Court has held that proof of reliance by the plaintiffs is not necessary. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 645–59 (2008) (holding that plaintiffs are not required to prove reliance to assert a civil RICO claim, but still requiring a showing of proximate cause).

49. *McLaughlin*, 522 F.3d at 222.

50. *Id.*

51. *Id.* at 223.

52. 379 F.3d 654 (9th Cir. 2004).

concerning video poker and electronic slot machines.<sup>53</sup> There, the Ninth Circuit found no predominance because the plaintiffs could not prove reliance on a common basis. The Ninth Circuit noted that “[g]amblers do not share a common universe of knowledge and expectations—one motivation does not ‘fit all.’”<sup>54</sup>

Unlike in *New Motor Vehicles*, the plaintiffs in both *McLaughlin* and *Poulos* did not negotiate over prices. Nevertheless, the same counterfactual uncertainty arose in both contexts because of the discretion the purchasers could exercise in whether to purchase *at all*. As noted in *McLaughlin*, a cigarette purchaser may purchase light cigarettes for lifestyle reasons—she enjoys the flavor or thinks that “smoking Lights [is] ‘cool.’”<sup>55</sup> Such “lifestyle” purchasers would not have suffered injury because they would have purchased light cigarettes even in the absence of the fraud. Likewise, video poker players would not be injured if they would have gambled in the absence of the fraudulent representations. Because the plaintiffs in both cases could not ascertain the true motivation for all counterfactual purchase decisions, they could not prove that all purchasers in the class were in fact injured.

The above three cases suggest that the difficulty in proving classwide injury arises mainly from the discretion a plaintiff can exercise. In *New Motor Vehicles*, the plaintiffs could exercise discretion in negotiating prices and thus avoid (or not avoid) injury. Likewise, in *McLaughlin*, the plaintiffs could exercise discretion and also avoid (or not avoid) injury in choosing to purchase the cigarettes at all.<sup>56</sup>

But consider, by way of contrast, *Klay v. Humana, Inc.*,<sup>57</sup> in which the plaintiffs, all doctors, alleged civil RICO claims that major health maintenance organizations (“HMOs”) “conspired with each other to program their computer systems to systematically underpay physicians for their services,” and fraudulently misrepresented their reimbursement practices to the plaintiffs.<sup>58</sup> The HMOs argued that the doctors could not satisfy predominance because, as in *McLaughlin*, “each individual plain-

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53. *Id.* at 659–60; *McLaughlin*, 522 F.3d at 225 (discussing *Poulos*).

54. *Poulos*, 379 F.3d at 665.

55. *McLaughlin*, 522 F.3d at 225.

56. Indeed, the discretion that a party can exercise to avoid an injury, such as by purchasing or not purchasing a product, is an off-shoot of the Coase Theorem, which posits that in the absence of transaction costs, parties can bargain to the most efficient allocation of legal entitlements. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–15 (1960) (setting forth the Coase theorem).

57. 382 F.3d 1241 (11th Cir. 2004).

58. *Id.* at 1246.

tiff must specifically show that he, personally, relied on the misstatements at issue.”<sup>59</sup>

The Eleventh Circuit disagreed. After emphasizing that the existence of an alleged unlawful conspiracy was itself common to the class, it noted that, while the defendants used a variety of communications to defraud the physicians, “they all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled.”<sup>60</sup> The court explained,

[i]t does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants’ representations and assumed they would be paid the amounts they were due. A jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them.<sup>61</sup>

Accordingly, the Eleventh Circuit concluded that each plaintiff’s reliance could be proven through common evidence, in this case “through legitimate inferences based on the nature of the alleged misrepresentations at issue.”<sup>62</sup>

*Klay* contains the same discretionary conduct found in cases such as *New Motor Vehicles* and *McLaughlin*. The doctors in *Klay* exercised discretion in entering contracts with HMOs over reimbursement practices, similar to the exercise of discretion in negotiating the price of a car or buying a light cigarette. But the same difficulty in proving classwide injury does not arise because the Eleventh Circuit concluded that the discretionary conduct in *Klay* did not lead to counterfactual uncertainty as to the fact of injury. In both *New Motor Vehicles* and *McLaughlin*, the ability to exercise discretion created uncertainty as to the counterfactual baseline. Would a poor negotiator have done any better without the alleged antitrust violation? Would a plaintiff have bought a light cigarette anyway for “lifestyle” reasons?

By contrast, the *Klay* court concluded that the plaintiffs’ discretion did not create similar counterfactual uncertainty. Unlike in *McLaughlin*, it was difficult for the *Klay* court to imagine a counterfactual where the doctors would have assented to the exact same contract terms with full

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59. *Id.* at 1258.

60. *Id.*

61. *Id.* at 1259.

62. *Id.*

knowledge of the defendants' real reimbursement practices.<sup>63</sup> The analogue in *New Motor Vehicles* would be proof that the entire negotiating range increased, leaving no doubt that everyone was injured.<sup>64</sup>

As shown by *Klay*, the availability of discretion only causes counterfactual uncertainty if it creates an uncertain link in the causal chain that leads to counterfactual uncertainty as a whole. Indeed, the state of mind of a party is notoriously a black box in the absence of overt manifestations of it. Consequently, the difficulty of proving classwide injury extends to situations where there are similar uncertain links in the causal chain that lead to counterfactual uncertainty.

For example, in consumer fraud litigation involving the seizure drug Neurontin, the plaintiffs alleged a widespread scheme to fraudulently induce doctors to prescribe Neurontin to their patients for off-label use as a general pain reliever, even though Neurontin had no efficacy in treating pain.<sup>65</sup> The plaintiffs showed that, since the start of the alleged fraudulent marketing scheme, the number of prescriptions of Neurontin for pain relief and similar off-label indications skyrocketed.<sup>66</sup>

The district court, however, found no predominance of common issues because, among other things, the court found that the plaintiffs could not prove classwide injury.<sup>67</sup> The court noted that the plaintiffs' proposed econometric models for classwide injury could not "identify which prescribing physicians were exposed to defendants' fraudulent statements." Thus, the court could not "determine *which* consumer class members' Neurontin prescriptions were caused by defendants' alleged fraud," as opposed to those prescriptions "which would have occurred even in the absence of the fraud."<sup>68</sup> As the district court correctly pointed out, only the class members whose prescriptions were caused by the fraud "had a cognizable injury."<sup>69</sup>

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63. As an aside, the contrast presented here is not meant to endorse the *Klay* court's conclusion that it was reasonable to infer that every doctor relied upon the HMO's contract provisions. In fact, it is troubling that the *Klay* court would give the benefit of the doubt to doctors in inferring classwide injury but other courts would not do so for less sympathetic (and probably lower-income) smokers and gamblers.

64. See, e.g., *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 262 F.R.D. 58, 69 (D. Mass. 2009) (finding predominance satisfied since plaintiffs showed that the "entire negotiating range" . . . was higher than the prices in the but-for world").

65. See *In re Neurontin Mktg. & Sales Pracs. Litig.*, 244 F.R.D. 89, 91 (D. Mass. 2007).

66. *Id.* at 96–103 (providing charts and data demonstrating such changes).

67. *Id.* at 110–12.

68. *Id.* at 111–12 (emphasis in original).

69. *Id.*

In *Neurontin* the uncertain link in the causal chain was not the discretion of the plaintiffs, but the discretion of a third party—a doctor—to prescribe the drug. Indeed, as suggested in the *Wal-Mart* case, it can also arise from the discretion of the defendant. Would the defendant (or, as in *Wal-Mart*, one of its subordinates) have discriminated against the plaintiff if she were male?<sup>70</sup>

Similar uncertain links in the causal chain arose in products liability litigation involving the drug Vioxx.<sup>71</sup> There, the plaintiffs provided epidemiological evidence demonstrating that Vioxx increased the risk of heart attacks and strokes. Nevertheless, the district court denied class certification. The district court recognized that “the majority of plaintiffs in this case allegedly suffered a heart attack or stroke as a result of ingesting Vioxx.”<sup>72</sup> However, as in *Neurontin*, the court noted that individual issues predominated as to, among other issues, “whether the plaintiffs’ physicians would still have prescribed Vioxx had stronger warnings been given.”<sup>73</sup> Moreover, the court concluded that it would have to engage in “the highly individualized inquiry of whether Vioxx specifically caused the injury alleged by each plaintiff in light of his or her medical history, family history, and other risk factors, and the use of the drug.”<sup>74</sup>

In *Vioxx*, the counterfactual uncertainty did not arise exclusively from the discretion of the plaintiffs or third parties, but from biological uncertainties in the causal chain. It is unclear whether, given individual “risk factors,” a particular plaintiff would have suffered a heart attack or stroke in the counterfactual world of not taking Vioxx. Indeed, because issues of specific causation always arise in cases involving pharmaceuticals, the court noted that “courts have almost invariably found that common questions of fact do not predominate in pharmaceutical drug cases.”<sup>75</sup>

## II. THREE CLASS ACTION FALLACIES

The previous Part discussed the difficulty of proving classwide injury in different substantive areas of the law. It showed that the difficulty in proving classwide injury arises from links in the causal chain that lead to uncertainty as to what would have happened had the alleged legal viola-

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70. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2547 (2011); see also D. James Greiner, *Causal Inference in Civil Rights Cases*, 122 HARV. L. REV. 533, 559–65 (2008) (noting that the central causation issue in employment discrimination cases is whether the decision would have been different if the gender or race was different).

71. *In re Vioxx Products Liab. Litig.*, 239 F.R.D. 450, 452 (E.D. La. 2006).

72. *Id.*

73. *Id.* at 461.

74. *Id.* at 462.

75. *Id.* at 461.



tion not occurred. It is this counterfactual uncertainty that prevents plaintiffs from showing that every plaintiff in the class was injured because of the defendant's alleged unlawful conduct.

This Part discusses the premises that underlie the requirement of proof of classwide injury. It argues that the requirement arises from three fallacies about the class action: (A) the all-at-once fallacy, (B) the extraordinary remedy fallacy, and (C) the individualist fallacy.

#### A. *The All-at-Once Fallacy*

As noted above, the primary source of the requirement of proof of classwide injury is the predominance requirement, which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.”<sup>76</sup> The concern is that in the absence of proof of classwide injury, individual issues of injury would “overwhelm” any common issues.<sup>77</sup> As put by the Third Circuit in a securities fraud case involving allegedly fraudulent representations that brokers made trades at the “best reasonably available price”:

Whether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested.<sup>78</sup>

The Third Circuit concluded that “[t]his Herculean task, involving hundreds of millions of transactions, counsels against finding predominance.”<sup>79</sup>

It is easy to miss the premise of the seemingly common-sense observation that, in the absence of common proof of injury, the court will face the “Herculean” task of determining injury on an individual basis. The premise is that the class action requires an all-at-once assessment of the issues. As put by the late Richard Nagareda, “class certification does not turn upon the mere raising of common questions by way of expert submissions or any form of evidence. Class certification instead turns on *the capacity of a unitary proceeding to yield common answers*.”<sup>80</sup>

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76. FED. R. CIV. P. 23(b)(3).

77. *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988).

78. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001).

79. *Id.*

80. Nagareda, *Common Answers*, *supra* note 19, at 154 (emphasis added); *see also Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Nagareda, *Class Certification*, *supra* note 19, at 132) (same).

Consider, for example, *General Telephone Company of the Southwest v. Falcon*,<sup>81</sup> a case involving a Mexican-American plaintiff who was allegedly denied a promotion on the basis of his race.<sup>82</sup> In *Falcon*, the plaintiff sought to certify a class of all Mexican-Americans injured by any of the defendant's allegedly discriminatory employment practices, even though the plaintiff himself was only affected by the defendant's promotion practices. Nevertheless, the plaintiff was permitted to certify a class due to the across-the-board rule then followed by the Fifth Circuit, which permitted an alleged victim of racial discrimination to bring suit on behalf of all similarly situated victims. The Fifth Circuit premised the across-the-board rule on the fact that "racial discrimination is by definition class discrimination."<sup>83</sup> As the case proceeded, the only class claim that survived was a disparate impact claim concerning the defendant's hiring practices, which had little to do with the plaintiff's own case of disparate treatment in his promotion.<sup>84</sup>

The Supreme Court vacated class certification largely because the plaintiff failed to satisfy the "typicality" and "commonality" requirements.<sup>85</sup> The Court noted that

[c]lass relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." For in such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."<sup>86</sup>

But the Court concluded that the complaint "provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans."<sup>87</sup>

The premise of *Falcon*, that the function of the class action is to determine all issues "in an economical fashion under Rule 23," is pervasive.<sup>88</sup>

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81. 457 U.S. 147 (1982).

82. *Id.* at 149.

83. *Id.* at 157 (discussing the Fifth Circuit's "across-the-board rule").

84. *Id.* at 152.

85. *Id.* at 158. The Court noted in passing that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge," which also "tend to merge with the adequacy-of-representation requirement." *Id.* at 157 n.13.

86. *Id.* at 155 (emphasis added) (citations omitted) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

87. *Id.* at 158.

88. *Califano*, 442 U.S. at 701.

Consider *Wal-Mart Stores, Inc. v. Dukes*, which the Court decided this past term.<sup>89</sup> In *Wal-Mart*, the plaintiffs alleged a disparate treatment claim against Wal-Mart that did not center on any one specific pay or promotion policy, but the lack of one.<sup>90</sup> Specifically, the plaintiffs alleged that the defendant's lack of criteria for such decisions, coupled with a uniform corporate culture, led to excessive subjectivity that caused discriminatory pay and promotion decisions by regional and store managers against over a million of Wal-Mart's female employees.<sup>91</sup>

The plaintiffs emphasized that the core issue of whether the policy of excessive subjectivity supports an inference of discriminatory intent is common to the class.<sup>92</sup> The Court, however, noted that the commonality of discriminatory intent was beside the point, since, quoting Nagareda,

[w]hat matters to class certification . . . is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.<sup>93</sup>

The Court concluded that the plaintiffs sought "to sue about literally millions of employment decisions *at once*."<sup>94</sup> But, according to the Court, "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."<sup>95</sup>

The plaintiffs in both *Falcon* and *Wal-Mart* sought to certify a class under Rule 23(b)(2), which does not require a finding of predominance.<sup>96</sup> Both cases turned on the commonality requirement of Rule 23(a)(2),<sup>97</sup>

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89. 131 S. Ct. 2541 (2011).

90. *Id.* at 2547–48.

91. *Id.* at 2548.

92. *Id.*

93. *Id.* (emphasis in original) (quoting Nagareda, *Class Certification*, *supra* note 19, at 132).

94. *Id.* at 2552 (emphasis added).

95. *Id.* (emphasis in original).

96. See FED. R. CIV. P. 23(b)(2) (providing that a class action may be certified if, along with satisfying the requirements of Rule 23(a), the plaintiff shows that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole").

97. *Falcon* also concerned the "typicality" requirement of Rule 23(a)(3), but noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

and as the Court has recognized in other contexts, the “predominance criterion is [a] far more demanding” requirement than commonality.<sup>98</sup>

Nevertheless, the Court’s insistence on “common answers” has as its source the predominance requirement. This is particularly true in *Wal-Mart*, where the very text quoted by the Court is a criticism by Nagareda of the *predominance* requirement’s focus on common questions. In Nagareda’s view, the predominance requirement should focus on “dissimilarities,” not “similarities,” since “[h]eaps of similarities do not overcome dissimilarities that would prevent common resolution.”<sup>99</sup> Other scholars, most notably Allan Erbsen, have similarly stressed the importance of “[s]imilarity among claims” since it “facilitates crafting a judgment that specifies the rights of all class members.”<sup>100</sup> In contrast, according to Erbsen, “dissimilarity may necessitate fact-intensive case-by-case inquiries into the propriety of judgment that would make class litigation difficult, if not impossible.”<sup>101</sup> Erbsen has gone so far as to suggest that “it is time to excise ‘predominance’ from the vernacular of class action discourse and replace it with a more practical ‘resolvability’ approach.”<sup>102</sup>

The class action, however, does not require “a classwide proceeding to generate common answers”<sup>103</sup> so that “a judgment . . . specifies the rights of all class members.”<sup>104</sup> In fact, if that were the case, then no antitrust, securities fraud, or employment discrimination class action would ever be certified. This is because individual issues of damages are always present in cases involving damage remedies, and thus always require the very case-by-case inquiries that, as suggested by *Falcon* and *Wal-Mart*, would preclude class certification. Nevertheless, there is a consensus that “individual damage questions do not preclude a Rule 23(b)(3) class action when the issue of liability is common to the class.”<sup>105</sup>

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98. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997).

99. Nagareda, *Class Certification*, *supra* note 19, at 132; *see also Wal-Mart*, 131 S. Ct. at 2556 (Ginsburg, J., concurring in part and dissenting in part) (noting that “Professor Nagareda, whose ‘dissimilarities’ inquiry the Court endorses, developed his position in the context of Rule 23(b)(3)”).

100. Erbsen, *supra* note 19, at 1027.

101. *Id.*

102. *Id.* at 1088.

103. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting Nagareda, *Class Certification*, *supra* note 19, at 132).

104. Erbsen, *supra* note 19, at 1027.

105. 6 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 24:124 (4th ed. 2002) (quoted by *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008)) [hereinafter *NEWBERG ON CLASS ACTIONS*]; *see also In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008)

Courts typically address the problem of individual damage issues by, in essence, denying that the class action requires a “classwide proceeding to generate common answers” to all issues.<sup>106</sup> One common solution is bifurcation, or dividing the class action into a single trial on common issues of liability, followed by individual trials on damages. This approach, in fact, was commonly used in employment discrimination cases prior to *Wal-Mart*,<sup>107</sup> and is currently used in antitrust<sup>108</sup> and civil RICO cases.<sup>109</sup>

Another approach, typically taken in the securities fraud and antitrust contexts, is to paper over individual issues by viewing the determination of damages as “a mechanical task involving the administration of a formula.”<sup>110</sup> The use of such formulas to determine damages may result in an inaccurate assessment of individual damages, but courts have not required precision “where such a formula may be used to eliminate the

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(“Predominance is not defeated by individual damages questions as long as liability is still subject to common proof.”); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”).

106. *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *Class Certification*, *supra* note 19, at 132).

107. *See, e.g.*, *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 168–69 (2d Cir. 2001) (holding that district court abused its discretion in “denying partial certification” of a class as to liability only, with individual issues of damages determined separately); *see also* 8 NEWBERG ON CLASS ACTIONS, *supra* note 105, § 24:124 (“The majority of courts have held the bifurcation of class liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims.”). In fact, Rule 23 permits certification as to common issues. *See* FED. R. CIV. P. 23(c)(4) (“When appropriate, an action may be maintained as a class action with respect to particular issues.”). However, *Wal-Mart* puts the use of bifurcation in Rule 23(b)(2) class actions in serious doubt. *Wal-Mart*, 131 S. Ct. at 2558–59 (rejecting such bifurcation).

108. *See, e.g.*, *New Motor Vehicles*, 522 F.3d at 28 (noting that “the class action can be limited to the question of liability, leaving damages for later individualized determinations”); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001) (Sotomayor, J.), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (“In the event that the district court does find conflicts [as to damage calculation] . . . there are a variety of devices available to resolve the problem [including] . . . the possibilities of bifurcating liability and damage trials.”).

109. *See, e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (citing *Visa Check*, 280 F.3d at 141) (affirming RICO class certification and suggesting procedural mechanisms available at a later stage for individual issues such as damages and bifurcation).

110. 7 NEWBERG ON CLASS ACTIONS, *supra* note 105, § 22:65; *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (“[S]hould the class prevail the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task.”).

need for individual proof of damages and thus serve the ends of both justice and judicial economy.”<sup>111</sup>

But why can a court permit bifurcation or imprecision for the *amount* of damages, but-for not the *fact* of damages? After all, one could, in theory,<sup>112</sup> define an inchoate class of individuals and determine both the fact and amount of damages during an individual issue phase. One reason why courts distinguish between the fact of damage and the amount of damages arises out of Article III concerns.<sup>113</sup> Although the Supreme Court has not addressed the issue, it has recognized that a class member who cannot show injury-in-fact may lack Article III standing to sue.<sup>114</sup>

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111. 6 NEWBERG ON CLASS ACTIONS, *supra* note 105, § 18:53 (noting that “the court should not reject” class actions in the antitrust context due to inaccurate methods of assessing and distributing damages).

112. I say “in theory” because, along with proof of classwide injury, courts also require plaintiffs to identify all class members, and cite “the bedrock principle that members of a class must be identifiable.” *In re Neurontin Mktg. & Sales Pracs. Litig.*, 244 F.R.D. 89, 113 (D. Mass. 2007); *see also* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 309 (2010) (criticizing the requirement of “ascertainability” in small claims class actions). I criticize this ascertainability requirement below. *See infra Part II.C.2.*

113. Another reason for the insistence on classwide proof of injury arises out of due process concerns. For example, the Second Circuit in *McLaughlin*, quoting *Newton*, noted that since “actual injury cannot be presumed, . . . defendants have the right to raise individual defenses against each class member.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191–92 (3d Cir. 2001)) (rejecting use of fluid recovery procedures for determining and distributing damages). Similarly, in *Wal-Mart*, the Court rejected the use of sampling to determine damages, concluding that such a “Trial by Formula” is inappropriate because “Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Thus, if plaintiffs cannot establish the fact of injury on a common basis, courts conclude that the individual rights of the parties, particularly the defendants, must be protected. I discuss these due process concerns in more detail in a separate article. *See Campos, supra* note 27, at 1088–1121 (discussing and criticizing due process for procedural rights such as individual defenses). Nevertheless, it should be noted that while the use of imprecise procedures for assessing damages may undermine a defendant’s individual defenses, bifurcation keeps intact a defendant’s right to assert individual’s defenses.

114. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (acknowledging, but not deciding, issue of whether exposure-only claimants have standing to sue); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (same); *see also* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 503–04 (discussing standing and mootness issues). The Court recently denied certiorari over the issue of standing in class actions. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1013 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 1970 (U.S. 2012) (holding that proof of classwide injury is not necessary for the class to have standing for Article III purposes).

This standing issue is of particular relevance because it strikes at the core of the function of the class action. Requiring each class member to demonstrate an injury-in-fact suggests that the class action is a “joinder” device in which the class action merely aggregates disparate plaintiffs together in one suit.<sup>115</sup> In fact, Justice Scalia, who wrote the majority opinion in *Wal-Mart*, has suggested that the class action is a joinder device in other settings.<sup>116</sup> If so, then the class action would require proof of classwide injury to get off the ground for Article III purposes.

One could also view the class action as a “representation” device, in which the only party for purposes of the litigation is the class representative.<sup>117</sup> Understood in this way, each of the absent class members would not have to independently establish standing so long as the representative did so. In fact, as Judge Diane Wood has argued previously, the existing case law supports the “representational” view over the “joinder” view, and the American Law Institute’s *Principles of the Law of Aggregate Litigation* (of which Richard Nagareda was a reporter) has explicitly endorsed the “representational” view.<sup>118</sup>

However, the class action is neither a “joinder” device nor a “representational” device. Instead, the class action is a trust device, which becomes apparent once one examines why class actions are preferable in small claims litigation like the antitrust, securities fraud, civil RICO, and employment discrimination cases discussed thus far.<sup>119</sup> The Supreme Court noted in *Amchem Products v. Windsor*,<sup>120</sup> a mass tort case, that:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry po-

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115. See Hutchinson, *supra* note 114, at 459–60 (discussing class actions as a “joinder” device).

116. See, e.g., *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (Scalia, J.) (describing Rule 23 as only “allowing multiple claims (and claims by or against multiple parties) to be litigated together.”).

117. Hutchinson, *supra* note 114, at 503–06 (discussing historical vacillation between viewing class actions as “joinder” and as “representational” devices, but arguing in favor of the “representational” view).

118. See ALI, *supra* note 19, § 1.01 cmt. c.

119. In what follows I summarize the argument that the class action is a de facto “trust” device. For a more extended argument in favor of the trust function of the class action, see Campos, *supra* note 27, at 9. I also discuss the class action trust function and the issue of Article III standing in much more detail in a separate article. See Sergio J. Campos, *The Trust Function of the Class Action* (June 20, 2012) (unpublished manuscript) (on file with author).

120. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

tential recoveries into something worth someone's (usually an attorney's) labor.<sup>121</sup>

This rationale for the class action for small claims litigation has been invoked repeatedly by the Court<sup>122</sup> and by scholars.<sup>123</sup>

It is worth unpacking this rationale. In small claims litigation an individual plaintiff lacks an “incentive . . . to bring a solo action prosecuting his or her rights” because the stakes are too small.<sup>124</sup> It would be irrational for a plaintiff to spend his or her own money, or secure financing, when the investment would cost more than the expected return. Put more bluntly by Judge Posner, “only a lunatic or a fanatic sues for \$30.”<sup>125</sup>

The class action solves this problem of insufficient individual incentive to sue by “aggregat[ing] the paltry potential recoveries” of the plaintiffs.<sup>126</sup> The class action collects together the expected recoveries of the plaintiffs so that the costs of bringing an action, as well as other common investments, are spread among the plaintiffs. In doing so, the class action lowers the average per-plaintiff costs of common investments by increasing the scale of the expected recovery. Put another way, the class action exploits economies of scale to give the plaintiffs incentives both to bring and to invest in the litigation.<sup>127</sup>

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121. *Id.* at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

122. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1985) (noting that “[r]equiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit”); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”).

123. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046 (2010); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105–06 (2006); William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC. L. REV. 709, 710 (2006).

124. *Mace*, 109 F.3d at 344; Campos, *supra* note 27, at 1079 & n.79 (quoting *Mace*).

125. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (discussing a civil RICO small claims class action).

126. *Amchem*, 521 U.S. at 617 (quoting *Mace*, 109 F.3d at 344).

127. The source of this insight is David Rosenberg in his work on mass tort litigation. *See* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 902–03 (1984). Recent work by Rosenberg clarifying the problem and how a mandatory class action resolves it include David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19; David Rosenberg, *Mandatory-Litigation Class Action: The*



But it is important to be precise about how the class action creates incentives to invest in the suit through economies of scale. As the *Amchem* Court noted, the aggregation of expected recoveries makes the individual actions “something worth someone’s (usually an attorney’s) labor.”<sup>128</sup> The “usually an attorney’s” caveat is crucial. The class action is worth an attorney’s labor, in part because class attorneys are typically assigned a percentage of the plaintiffs’ aggregate recovery.<sup>129</sup> Moreover, under the common fund doctrine, any investment costs are spread among the class members, even those plaintiffs who do not collect.<sup>130</sup> Accordingly, the expected return of the class attorney is a function of the plaintiffs’ aggregate net expected recovery. In other words, the class attorney is given a beneficial interest in the recovery that is consistent with owning the total net expected recovery of the plaintiffs.<sup>131</sup>

In addition to an interest in the plaintiffs’ net expected recovery, class attorneys are given control over the plaintiffs’ claims. This control is exemplified by one of the most controversial aspects of the class action—the ability of class attorneys to settle the claims of all plaintiffs without their consent. A settlement requires a judicial hearing on its fairness and permits individual class members to raise objections to the settlement, but does not require the consent of the class.<sup>132</sup>

Many scholars have criticized this aspect of the class action as a taking of the plaintiffs’ property without their consent.<sup>133</sup> Others have suggested

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*Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002); Rosenberg, *Mass Tort Class Actions*, *supra* note 27; David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); *see also* Campos, *supra* note 27, at 1064 n.19, 1076–79 (discussing Rosenberg and the function of the class action in allowing the plaintiffs to exploit economies of scale).

128. *Amchem*, 521 U.S. at 617 (quoting *Mace*, 109 F.3d at 344).

129. ALI, *supra* note 19, § 3.13(a) cmt. b (noting that “most courts and commentators now believe that the percentage [of the fee] method is superior” to the “lodestar method”).

130. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (permitting a district court to apportion costs, including attorneys’ fees, against the unclaimed portion of a class action judgment under the “common-fund doctrine”).

131. Campos, *supra* note 27, at 1077–78.

132. *See* FED. R. CIV. P. 23(e) (permitting a class action to be settled subject to a fairness hearing).

133. *See, e.g.*, MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 149–51 (2009); John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 904–07; John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1419–22 (2003).

mechanisms by which the plaintiffs can still exercise their control (or autonomy) over their claims in a class action, such as by opting out of the class<sup>134</sup> or through voting mechanisms.<sup>135</sup>

But the “taking” caused by the class action can be understood as the transfer of an entitlement to exercise dispositive control over the claims for the benefit of the class. Thus, this transfer is functionally an assignment of “title” over the claims, which is analogous to the title that trustees own over trust assets for the benefit of the beneficiaries.<sup>136</sup>

More importantly, this assignment of title to the class attorney should not be considered *per se*<sup>137</sup> problematic because the assignment is necessary to make the litigation worth an attorney’s “labor.” Although the class attorney has a percentage interest in the plaintiffs’ net expected recovery, the attorney will not have a reason to invest in common issues unless she has dispositive control over the claims, including the power to sell the claims through settlement. Otherwise, any investments can be thwarted by the independent actions of the plaintiffs, who can bring suit separately and deny any share of the recovery to the class attorney.<sup>138</sup> If the class attorney has nothing, he or she has nothing to lose (or win, for that matter).<sup>139</sup>

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134. ALI, *supra* note 19, § 2.07 cmt. e.

135. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 921–22 (1998); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376–77 (2000).

136. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (defining a “trust” as a “fiduciary relationship” which “subject[s] the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee.”); *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 278–80 (2008) (defining, and distinguishing, the “beneficial interest” in a claim from the “legal title” to the claim, and noting that those with only a “legal title” to the claim have sufficient standing to sue, even if they remit all of the “beneficial interest” to another party). I have posed this argument before, see Campos, *supra* note 27, at 1076–79 (discussing the dispositive control the class attorney receives through the class action).

137. I say “*per se*” because there are, of course, concerns with agency costs, which have preoccupied class action scholars. See ALI, *supra* note 19, § 3.13(a) cmt. b. But, as I have argued previously, these agency concerns can be addressed without requiring the consent of the class members. See Campos, *supra* note 27, at 1115–17.

138. For a formal discussion and model of this, see Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle For Too Little*, 48 HASTINGS L.J. 479 (1997) (arguing that class attorneys may suboptimally settle claims if they do not have dispositive control and a sufficient beneficial interest over all of them).

139. The converse is also true, since owning legal title without a beneficial interest also would not amount to much. Cf. *Sprint*, 544 U.S. at 300–01 (Roberts, J., dissenting) (questioning whether plaintiffs with legal title but no beneficial interest in a claim have sufficient standing for Article III purposes, since “[w]hen you got nothing, you got noth-

Consequently, the class action cannot be understood as a device that solves the problem of insufficient stakes in small claims litigation without also being understood as a trust device. Indeed, courts generally recognize that it is not the representative who controls investments, but the class attorney. This is because the class attorney, “unlike the representative plaintiff[,] receive[s] compensation reflecting any benefits conferred on the class as a whole,” thus making her “willing to underwrite the costs.”<sup>140</sup> In essence, the class attorney is the “real party in interest,”<sup>141</sup> and locating standing among the various plaintiffs is, for the most part, a fiction to assuage concerns about the Rules Enabling Act.<sup>142</sup>

More importantly, the trust function of the class action does not entail an all-at-once determination of any issues. The trust function of the class action facilitates investment in common issues by providing sufficient incentive for the class attorney to invest in the case. This trust function, however, does not require the resolution of all common issues in one fell swoop. In fact, so long as the class attorney can make common investments and maintain overall control over the claims, a class action can proceed through completely individual actions. Just like an attorney who expressly represents all of the plaintiffs in a case, a class attorney could choose to file individual suits rather than file a class action, while investing in common issues in the background. Indeed, a court could determine

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ing to lose” (quoting BOB DYLAN, *Like A Rolling Stone*, on HIGHWAY 61 REVISITED (Columbia Records 1965)).

140. See *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) (Easterbrook, J.) (rejecting district court finding that the class representative was not adequate because he or she would not bear the total costs of the litigation, noting that “[t]he very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs. Only a lunatic would do so. A madman is not a good representative of the class!”).

141. FED. R. CIV. P. 17(a) (providing that “[a]n action must be prosecuted in the name of the real party in interest,” including “a trustee of an express trust”).

142. Specifically, courts have interpreted the assignment of a cause of action as a matter of “substance” that cannot be modified by rules of civil procedure like Rule 23. See 28 U.S.C. § 2072(b) (2006) (prohibiting any rule that “abridge[s], enlarge[s], or modify[ies] any substantive right”); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (“Whether a plaintiff is entitled to enforce the asserted right is determined according to the substantive law.”). Cf. 6A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1545 (4th ed. 2010) (concluding that substantive law relating to the assignment of claims is the basis for the real-party-in-interest rule). I address this concern in a prior work and in a current project on the Rules Enabling Act. See Campos, *supra* note 27, at 1117–21; see also Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. (forthcoming 2012) (on file with author).

both common issues and each plaintiff's damages in individual suits, allowing the common issues to "mature" over time.<sup>143</sup>

The trust function of the class action shows that the class action can provide many of the beneficial features of consolidation procedures such as multidistrict litigation. Scholars have praised the use of multidistrict litigation as a substitute for class actions because it allows for separate suits while permitting better coordination among the plaintiffs for common benefit work.<sup>144</sup> A class action, however, can mimic these same features. In fact, multidistrict litigation, like the class action, often results in the assignment of collective control to attorneys, with some scholars going so far as to call such multidistrict litigation "quasi-class actions."<sup>145</sup>

### *B. The Extraordinary Remedy Fallacy*

In *New Motor Vehicles*, the First Circuit found no predominance of common issues because of the potential variance among the class members' injuries, which, in the court's view, would necessitate individualized trials.<sup>146</sup> The court added, however, that without a "searching inquiry" of the plaintiffs' "novel and complex" theory of injury, "many resources will be wasted setting up a trial that plaintiffs cannot win."<sup>147</sup> Indeed, earlier in the opinion, the First Circuit noted that

[i]nterlocutory appeals from class certification under Rule 23(f) are especially appropriate where the plaintiffs' theory is novel or where a doubtful class certification results in financial exposure to defendants so great as to provide substantial incentives for defendants to settle

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143. See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (discussing the benefits of having common issues "mature" through separate actions); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748–49 (5th Cir. 1996) (same); *In re Dow Corning Corp.*, 211 B.R. 545, 576, 579 (Bankr. E.D. Mich. 1997) (same).

144. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2206 (2008); see also Roger Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 820–22 (1985).

145. See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 109–10 (2010) (noting that multi-district litigation in which judges have unfettered discretion to appoint lead counsel are recognized as "quasi-class actions"); see also ALI, *supra* note 19, § 1.05 cmt. a ("[A] common structural feature of all aggregate proceedings [is] the loss of control of litigation by persons whose interests are at issue.")

146. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 26–28 (1st Cir. 2008).

147. *Id.* at 26, 29.

nonmeritorious cases in an effort to avoid both risk of liability and litigation expense.<sup>148</sup>

The First Circuit is not alone. Nearly all circuits have emphasized “[t]he effect of a class certification in inducing settlement to curtail the risk of large awards.”<sup>149</sup>

One of the strongest examples of this concern can be found in *Oscar Private Equity Investments v. Allegiance Telecom Co.*,<sup>150</sup> where the Fifth Circuit reviewed the denial of a securities fraud class action.<sup>151</sup> As background, plaintiffs in securities fraud class actions are required to prove their reliance on the alleged fraudulent statements in buying or selling their shares.<sup>152</sup> Like the reliance requirement in *McLaughlin*, the reliance requirement in securities fraud litigation is an individual issue that could prevent the plaintiffs from satisfying the predominance requirement.<sup>153</sup> However, unlike in cases like *McLaughlin*, the parties can satisfy the predominance requirement by establishing the “fraud-on-the-market” presumption, which is a rebuttable presumption that every member of the class relied on the alleged fraud if the security was traded on an efficient market.<sup>154</sup>

148. *Id.* at 8 (citing *Tardiff v. Knox Cnty.*, 365 F.3d 1, 3 (1st Cir. 2004); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000)).

149. *Id.* (quoting *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (Easterbook, J.)); *see also Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *overruled by Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (“We cannot ignore the *in terrorem* power of certification.”); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (noting that class actions may “create unwarranted pressure to settle nonmeritorious claims on the part of defendants.” (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001))); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (noting that “[p]ossible recoveries [may] run into astronomical amount [and] generate more leverage and pressure on defendants to settle” (quoting *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973))); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (noting potential of “*in terrorem*” suits to induce settlements in the context of antitrust class action).

150. 487 F.3d 261.

151. *Id.*

152. Specifically, “reliance is an element of a Rule 10b-5 cause of action” based on fraud because reliance “provides the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.” *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988); *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (reaffirming that “reliance” or “transaction causation” is an element of a § 10(b) and Rule 10b-5 claim).

153. *Basic Inc.*, 485 U.S. at 227–30 (noting the difficulty of satisfying the predominance requirement of Rule 23(b)(3) in securities fraud class actions given the need to prove reliance on an individual basis).

154. *Id.* (discussing the presumption). I discuss the presumption in more detail below. *See infra* Part II.C.2. In addition, and as I discuss below, in *McLaughlin* the Second Cir-

Prior to *Oscar*, the Fifth Circuit held that proof of loss causation, or proof that the alleged fraudulent statement caused a change in the stock price, was a prerequisite for establishing the fraud-on-the-market presumption for purposes of summary judgment.<sup>155</sup> In *Oscar*, the Fifth Circuit considered whether the plaintiffs had to prove loss causation to obtain certification of a securities fraud class action in the first place.<sup>156</sup> This is of particular significance to securities fraud class actions because loss causation is also an element of a securities fraud claim.<sup>157</sup> Thus, requiring the plaintiffs to prove loss causation to establish the fraud-on-the-market presumption at the class certification stage would, in effect, require the plaintiffs to prove the merits of their claims to certify a class.

The Fifth Circuit concluded that the plaintiffs did have to prove loss causation, noting that it could not “ignore the *in terrorem* power of class certification.”<sup>158</sup> The *Oscar* court did not stop there. It went on to point out numerous limitations to the class action caused by amendments to Rule 23 and the Private Securities Litigation Reform Act, noting that these changes “recognize that a district court’s certification order often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it.”<sup>159</sup>

Scholars have also commented on or criticized the extraordinary leverage a class action bestows upon plaintiffs, which may place undue settlement pressure on defendants.<sup>160</sup> In fact, shortly after the passage of the 1966 amendments permitting damage class actions under Rule 23,<sup>161</sup> the great Judge Friendly lambasted the “blackmail settlements” caused by the class action.<sup>162</sup>

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cuit rejected the use of a similar fraud-on-the-market presumption in civil RICO litigation. *See id.*; *see also McLaughlin*, 522 F.3d at 224 n.5 (rejecting use of the fraud-on-the-market presumption in civil RICO litigation).

155. *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 662, 665–66 (5th Cir. 2004).

156. *Oscar*, 487 F.3d at 266.

157. *Dura*, 544 U.S. at 341.

158. *Oscar*, 487 F.3d at 267.

159. *Id.*

160. *E.g.*, Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyers’ Rates of Return*, 15 CARDOZO L. REV. 1755, 1780–82 (1994); Peter H. Shuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995); *see also* Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378 nn.4–6 (2000) (citing the scholarly literature on “blackmail” class action settlements).

161. *See generally* Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 103 (1966) (discussing creation of Rule 23(b)(3) category).

162. HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118–20 (1973); *see also* Milton Handler, *The Shift from Substantive to Procedural Innovations in Anti-*

This concern with the extraordinary leverage of the class action is partially due to the all-at-once fallacy. For support of the view that class actions put undue pressure on defendants to settle, courts have cited *In re Rhone-Poulenc Rorer, Inc.*<sup>163</sup> There, the Seventh Circuit reviewed a petition for a writ of mandamus challenging the certification of a class action of claims related to blood allegedly tainted with the HIV virus.<sup>164</sup> The district court proposed certifying a class action to decide common issues of liability, with the remaining issues decided in individual trials.<sup>165</sup>

The Seventh Circuit court granted the writ of mandamus, ordering the district court to vacate the class certification order. In an opinion by Judge Posner, the Seventh Circuit pointed out that the plaintiffs had lost twelve of thirteen individual actions, and the defendants “are likely to win most of the remaining ones as well.”<sup>166</sup> Since the class could run well into the thousands, the Seventh Circuit concluded that a writ of mandamus was warranted given “the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, expose[d]” the defendants.<sup>167</sup> According to the court, separate actions reduce this error risk because they provide “a pooling of judgment . . . of many different tribunals.”<sup>168</sup>

As argued above,<sup>169</sup> the class action does not require an all-at-once resolution of common issues. Thus, the class action can take advantage of the pooling of judgment of many trials. In fact, a class action do so by allowing the plaintiffs, under the direction of the class attorney, to sue separately in their preferred forums.

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*trust Suits—the Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8–9 (1971) (discussing “blackmail” class actions in the antitrust context, and inspiring Judge Friendly’s views on the topic).

163. 51 F.3d 1293 (7th Cir. 1995) (Posner, J.); *see, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that “[i]n addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not” (citing *Rhone-Poulenc*, 51 F.3d at 1298)). *Cf.* *Klay v. Humana, Inc.*, 382 F.3d 1241, 1274–75 (11th Cir. 2004) (citing *Rhone-Poulenc*, but noting that “[m]ere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit”).

164. *Rhone-Poulenc*, 51 F.3d at 1294. Rule 23 has since been amended to permit the interlocutory appeal of class certification orders. *See* FED. R. CIV. P. 23(f).

165. *See* Fed. R. Civ. P. 23(c)(4)(A) (permitting issue only class actions).

166. *Rhone-Poulenc*, 51 F.3d at 1298.

167. *Id.* at 1297 (emphasis in original).

168. *Id.* at 1300.

169. *See supra* Part II.A; *see also* Hay & Rosenberg, *supra* note 160, at 1382 (noting the availability of multiple trials in a class action to reduce error risk in deciding common issues).

But the Seventh Circuit echoes a widely shared view that the class action is analogous to extraordinary remedies, such as the preliminary injunction, that should only be awarded based on a likelihood of success on the merits.<sup>170</sup> The writ of mandamus at issue in *Rhone-Poulenc* is itself a remedy that is “issued only in extraordinary cases,” and is only awarded when the challenged order would, among other things, cause “irreparable harm.”<sup>171</sup> The *Rhone-Poulenc* court concluded that irreparable harm would result from the class certification order because the plaintiffs’ claims were *not* likely to be meritorious, yet would likely lead to, among other things, a “blackmail settlement” that could not be undone by appellate review.<sup>172</sup> In fact, some scholars have argued explicitly for a merits inquiry prior to class certification precisely because of the class action’s extraordinary ability to significantly increase the leverage of the plaintiffs.<sup>173</sup>

Many courts follow similar logic in concluding that the class action, like a preliminary injunction, should only be certified based on a likelihood of success on the merits for the plaintiffs. But they do so somewhat clandestinely. In *Eisen v. Carlisle & Jacquelin*,<sup>174</sup> a fairly early decision concerning Rule 23(b)(3), the district court assigned notice costs to the defendant based on a finding that the plaintiffs were likely to succeed on

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170. *E.g.*, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (noting that preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief”); *see also* *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (“It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” (quoting 11A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995))).

171. *Rhone-Poulenc*, 51 F.3d at 1294–95.

172. The court ultimately concluded that the “irreparable injury” here was sufficient given that, along with the undue settlement pressure that would be created by the class action, the proposed class action could lead to a reexamination of issues in violation of the parties’ Seventh Amendment rights. *Id.* at 1299. But, as I have argued previously, bifurcation along the lines proposed by the district court in *Rhone-Poulenc* would not result in any reexamination of issues. *See* Campos, *supra* note 27, at 1073.

173. *See* Bone & Evans, *supra* note 19, at 1254; Hazard, *supra* note 19, at 3–6. Others have at least noted the potential for class actions to lead to the settlement of nonmeritorious claims, although many disagree as to the precise effect. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991); Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest’s “Disimplying Private Rights of Action under the Federal Securities Laws: The Commission’s Authority,”* 108 HARV. L. REV. 438 (1994).

174. 417 U.S. 167 (1974).



the merits.<sup>175</sup> The district court did so by explicitly analogizing the class action to a “preliminary injunction.”<sup>176</sup> The *Eisen* Court, however, vacated the district court’s order because it “[f]ound] nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”<sup>177</sup> Thus, under *Eisen*, a district court deciding to certify a class action cannot review the merits unless it has authority to do so under Rule 23.

As it turns out, courts have found a way to review the merits at the class certification stage by insisting on proof of classwide injury to satisfy the predominance requirement of Rule 23(b)(3). After all, to provide proof of “common answers” as to injury, plaintiffs must prove a common injury. Accordingly, this “overlap” between the predominance requirement and the merits permits courts to review the merits without running afoul of *Eisen*.<sup>178</sup> In *New Motor Vehicles*, for example, the court held that the district court must test the plaintiffs’ “novel and complex” theory of common impact, both to satisfy the predominance requirement of Rule 23(b)(3) and to avoid “a doubtful class certification” that puts undue pressure on the defendants to settle.<sup>179</sup> Similarly, in *Oscar*, the court concluded that proof of loss causation was both “central to the certification decision,” as well as necessary given the “*in terrorem* power of certification.”<sup>180</sup>

In some cases the overlap between the “predominance” requirement and the merits leads to overreaching. In *Oscar*, for example, the insistence on proof of loss causation to support a finding of predominance is unwarranted for at least two reasons. First, proof of loss causation is

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175. *Id.* at 179.

176. *Id.* at 168.

177. *Id.* at 177; see also Nagareda, *Class Certification*, *supra* note 19, at 100 (discussing *Eisen* and acknowledging that “Rule 23 does not require proponents of class certification to satisfy a preliminary injunction-like standard cast in terms of the likelihood of success on the merits”).

178. See, e.g., *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33–34 (2d Cir. 2006) (concluding that requiring proof of classwide injury in a securities fraud class action does not violate *Eisen* because such proof is required to satisfy the predominance requirement); see also Nagareda, *Class Certification*, *supra* note 19, at 100 (noting, and approving, trend by courts to “make a ‘definite assessment’ that the [class action] requirements have been met, even if that assessment entails the resolution of conflicting proof and happens to overlap with an issue—even a critical one—on the merits”).

179. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 8, 28 (1st Cir. 2008).

180. *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *overruled by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

common to the class. Either the fraud affected the share price or it did not. Second, and more importantly, proof of loss causation is unrelated to proof of transaction causation, because proof of any price change caused by the fraud (as opposed to other causes) does not necessarily imply proof of reliance by each investor. Indeed, the Supreme Court focused on this reason in reversing *Oscar*.<sup>181</sup> In fact, insofar as the fraud-on-the-market presumption establishes loss causation by permitting an inference that any fraud in an efficient market would affect the price, insisting on proof of loss causation would “requir[e] the plaintiffs to prove . . . the very facts that are to be presumed.”<sup>182</sup>

More generally, the extraordinary remedy fallacy, like the all-at-once fallacy, is itself flawed because it takes a mistaken view of the function of the class action. As discussed earlier, the class action can be understood as a trust device that assigns dispositive control over the plaintiffs’ claims, plus an interest in any potential net recovery, to the class attorney.<sup>183</sup> In doing so, the class action allows the class attorney to spread the costs of investments in common issues among all of the plaintiffs.<sup>184</sup> Moreover, the class attorney will have an incentive to invest in common issues because he or she will have a partial interest in the plaintiffs’ total net recovery.

But why go through the ordeal of certifying a class action to economize on common investments? It may turn out that, from the plaintiffs’ perspective, the costs of litigation simply fail to justify the litigation, even when they are spread across the entire class.<sup>185</sup> Admittedly, much has been said about increasing access to justice, particularly in light of other developments in civil procedure doctrine.<sup>186</sup> In small claims litiga-

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181. *Halliburton*, 131 S. Ct. at 2186, *overruling Oscar*, 487 F.3d 261 (noting that proof of loss causation “has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory”).

182. *Oscar*, 487 F.3d at 274 (Dennis, J., dissenting); *see also* Nagareda, *Class Certification*, *supra* note 19, at 140 (criticizing *Oscar* on these grounds).

183. *See supra* Part II.A.

184. Campos, *supra* note 27, at 1077–79; *see also* Rosenberg, *Mass Tort Class Actions*, *supra* note 27, at 395.

185. For an extreme example, *see Kamilewicz v. Bank of Bos.*, 92 F.3d 506, 508, 512 (7th Cir. 1996) (upholding a state-court class action settlement in which a class member received \$2.19 but was assessed a fee of \$91.33).

186. *See, e.g.*, A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010) (criticizing a “restrictive ethos” among courts in which rules pertaining to pleading, case management, and the class action, among others, are “being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court”).

tion, however, the stakes for an individual plaintiff do not seem to justify the extraordinary measures needed for the class action. In fact, most small claims plaintiffs never bother to collect whatever the class attorney happens to recover.<sup>187</sup>

The trust function of the class action makes more sense once one considers the defendant's incentives to invest in common issues. Unlike the plaintiffs, the defendant owns all of the expected liability associated with any common issue.<sup>188</sup> Thus, the defendant does not need a class action to aggregate the stakes and spread the costs of investments in common issues. It follows that, in the absence of a class action, the defendant will invest more in common issues than the plaintiffs because the defendant has more at stake.

Moreover, the plaintiffs cannot voluntarily match the stakes of the defendant, such as through joinder or informal aggregation, because of collective action problems caused by market limitations, transaction costs, and strategic behavior.<sup>189</sup> Put another way, legal limits on selling a claim, the costs of coordinating the plaintiffs' common investments, and the potential for free-riding and hold-outs, make it impossible for the plaintiffs to match the stakes of the defendant, at least voluntarily.

Consequently, the class action is utilized in small claims litigation because of the asymmetry of stakes.<sup>190</sup> The class action, in effect, equalizes the stakes between the plaintiffs and the defendant by incentivizing the class attorney to invest in common issues as if he or she had the entire amount at stake. It does so to correct the bias in favor of the defendant in the litigation. Otherwise, the defendant in small claims litigation can escape significant liability because of its advantage in investing in common issues. Thus, even if the plaintiffs are indifferent to recovering in a small claims class action, the class action at least prevents the defendant from enjoying the fruits of its illegality.<sup>191</sup>

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187. See Gilles, *supra* note 112, at 315 (noting that “[i]nvariably, in small-claims consumer class actions, less than twenty percent or so of class action damages funds are distributed to plaintiff claimants” (citing Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 120 (2007))).

188. This expected liability is the flipside of the expected recovery for the plaintiffs. See Campos, *supra* note 27, at 1074–76.

189. See *id.* at 1079–81.

190. See *id.* (discussing the asymmetry). Cf. ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 246–48 (2003) (discussing the problem of “asymmetric stakes” in the context of nonmutual offensive collateral estoppel).

191. This concern with preventing the defendant from escaping its liability has an obvious deterrence function, which I will discuss in more detail later when I discuss the defendant's ex-ante conduct. See *infra* Part II.C.

Admittedly, the class action increases the leverage of the plaintiffs, but the whole point of the class action is to do precisely that. In the absence of the class action, the defendant has an inherent advantage in leverage that can allow it to avoid some or all of the liability associated with any common issue. As noted by Richard Nagareda, even if the class action increases the plaintiffs' leverage and increases the settlement pressure on the defendant, it does not necessarily mean that this increase is unjustified.<sup>192</sup> This is particularly so when the claims are small and the alternative to a class action is no litigation at all. In fact, ensuring the parties negotiate on a level playing field is necessary to prevent the class attorney from selling out the plaintiffs' interests by accepting a too-low, "sweetheart" settlement with the defendant.<sup>193</sup>

Accordingly, a merits determination prior to class certification defeats the purpose of the class action. The class action is designed to permit the plaintiffs to invest in the merits on equal terms with the defendant. Thus, a class action only works if it is available before a court decides the merits, not after. As put by Judge Torruella's dissent in *New Motor Vehicles*:

In this case, an inquiry that tests each stage of the plaintiffs' theory is, in effect, an assessment of the case's merits. As such, *we are putting the cart before the horse* and turning the class certification stage into a motion for summary judgment proceeding—the appropriate juncture at which to fully vet the viability of the plaintiffs' theory.<sup>194</sup>

In fact, in putting the cart before the horse by examining the merits before class certification, courts are allowing defendants to escape some or all of their liability.

### *C. The Individualist Fallacy*

The all-at-once fallacy presumes that the class action requires an all-at-once determination of all issues. But the all-at-once fallacy relies on a further premise. It presumes that separate actions are required to resolve issues that are specific to each individual plaintiff. Thus, if the fact of injury cannot be proven on a classwide basis, then it must be determined separately for each plaintiff. This further premise is what I call the individualist fallacy.

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192. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 43–48 (2007).

193. Hay & Rosenberg, *supra* note 160, at 1379–82 (discussing sweetheart settlements and the need for a mandatory class action to curtail them).

194. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 32 (1st Cir. 2008) (Torruella, J., dissenting) (emphasis added).

The individualist fallacy is motivated by the need to prevent uninjured plaintiffs from recovering.<sup>195</sup> In *Neurontin*, which is discussed earlier, the district court denied class certification of a class allegedly harmed by the fraudulent marketing of the drug Neurontin as a pain reliever.<sup>196</sup> The court was persuaded by the evidence of the plaintiffs' expert, which showed the aggregate damages caused by the fraudulent marketing scheme.<sup>197</sup> However, the district court rejected the plaintiffs' proposed procedure for distributing the damages.<sup>198</sup> The court recognized that a "fluid recovery" or "cy pres" process, in which the aggregate amount of damages is assessed and then later distributed to the class, can be permissible in a class action even if the procedure does not guarantee "absolute precision."<sup>199</sup> According to the court, however, a "fluid recovery" procedure cannot "circumvent the bedrock principle that members of a class must be identifiable."<sup>200</sup> Thus, the proposed procedure was fatally flawed because it "failed to articulate a method of identifying *any* members of the consumer class."<sup>201</sup>

Like the previous fallacies, the individualist fallacy appears to be a matter of common sense. Shouldn't individual issues be determined in individual trials? Why should uninjured plaintiffs recover? But like the previous fallacies, the individualist fallacy is mistaken. This is so for three reasons.

### 1. Accuracy

First, the individualist fallacy is mistaken because individual trials are not necessarily more accurate than common, all-at-once trials in determining whether each plaintiff was injured. As an initial matter, the individual evidence of injury may be unreliable. Eyewitness testimony, for example, is notoriously unreliable—memories fade, individuals often color past events when recalling them, and the plaintiffs are far from disinterested parties.<sup>202</sup> Moreover, given the low monetary amounts at stake

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195. Gilles, *supra* note 112, at 310 (discussing, and criticizing, courts' "[u]neasiness with disunity—with the possibility of compensating uninjured parties").

196. *In re Neurontin Mktg. & Sales Pracs. Litig.*, 244 F.R.D. 89, 91 (D. Mass. 2007); *see also supra* Part I (discussing *Neurontin*).

197. *Id.* at 111 ("Based on this preliminary record, I conclude that [the] proposed methodology is a plausible way of determining aggregate class-wide liability.").

198. *Id.* at 111–13.

199. *Id.* at 112 (quoting 3 NEWBERG ON CLASS ACTIONS, *supra* note 105, § 10:5).

200. *Id.* at 113.

201. *Id.* (emphasis in original).

202. This point has been made extensively in the criminal context. *See* Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189, 196–202 (2006); *see also* *State v. Hender-*

in small claims litigation, it is unlikely that any individual plaintiff would preserve relevant evidence.<sup>203</sup>

More importantly, individual trials are not necessarily more accurate than common ones because the evidence of each plaintiff's injury may not be unique to each plaintiff. As argued above, the difficulty in proving classwide injury arises from counterfactual uncertainty.<sup>204</sup> The plaintiffs cannot prove that every plaintiff was injured by the defendant's alleged conduct because there is uncertainty as to whether some of the plaintiffs were in the same position or better off in the absence of the alleged legal violation. If the plaintiffs could identify which plaintiffs were, in fact, not injured, they would simply exclude them from the class. Thus, proving classwide injury requires evidence of the counterfactual that would demonstrate which specific plaintiffs were, in fact, injured.

If establishing classwide injury turns on proof of the counterfactual, it may turn out that evidence of the counterfactual may be common to some or all of the class members. In *Klay*, for example, the Eleventh Circuit concluded that it did not "strain credulity to conclude" that each of the plaintiff doctors relied on the HMOs' representations that the plaintiffs would be paid in accordance with the terms of their contracts.<sup>205</sup> In so concluding, the Eleventh Circuit relied on its judgment and experience as to how a doctor would behave in negotiating contracts with HMOs, both with and without the fraud.<sup>206</sup> In contrast, the Second Circuit could not provide the same benefit of the doubt to the smokers that comprised the class in *McLaughlin*. There, the court could imagine some smokers in the class who would have smoked light cigarettes even in the absence of the fraud. Indeed, the district court in *McLaughlin* acknowledged that possibility as well.<sup>207</sup> But the larger point is that the evidence of the

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son, 27 A.3d 872, 894–922 (N.J. 2011) (overruling, in a criminal case, previous rule on eyewitness testimony based on recent research on the unreliability of such testimony).

203. Gilles, *supra* note 112, at 316 (noting that in small claims consumer class actions "[n]o one keeps the receipt for a pineapple").

204. See *supra* Part I.

205. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004).

206. Greiner, *supra* note 70, at 560 (noting that "[t]he trier of fact in individual cases uses the evidence presented at trial and its own understanding of how the world works to fill in the missing potential outcome and, subject to other relevant legal principles, decides the case accordingly").

207. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1021 (E.D.N.Y. 2005) (Weinstein, J.), *overruled by* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (noting that "the amount of economic damages it suffered appears to be quite weak—and plaintiffs have been less than candid in failing to acknowledge that deficiency in their proof").

counterfactual may point in the direction of similarity (reliance by doctors) rather than dissimilarity (reliance by smokers).

In fact, individual actions utilize common evidence all the time. In individual mass tort actions, for example, plaintiffs often prove injury by analogizing to other cases, in effect importing the counterfactual from one case to another.<sup>208</sup> Indeed, a classwide proceeding could improve upon the use of common evidence in individual actions by using statistical techniques to avoid any biases.<sup>209</sup>

## 2. Avoiding Compensating Uninjured Plaintiffs

As noted above, the individualist fallacy demands accurate measures of injury for each individual plaintiff to prevent uninjured plaintiffs from recovering. But the individualist fallacy is further mistaken because there is, in fact, no “bedrock principle” prohibiting uninjured plaintiffs from recovering.<sup>210</sup>

Consider, for example, the fraud-on-the-market presumption in securities fraud litigation.<sup>211</sup> The Supreme Court first blessed the presumption in *Basic Inc. v. Levinson*,<sup>212</sup> a case in which the plaintiffs alleged that the defendant “made three public statements denying that it was engaged in merger negotiations,” but nevertheless announced a merger about three months after those statements.<sup>213</sup> The plaintiffs were shareholders who sold their stock in the period between the statements denying the merger talks and the announcement of the merger, when the price of the stock was “artificially depressed.”<sup>214</sup> To recover, the plaintiffs were required to prove their reliance on the fraudulent misstatements in selling their shares.<sup>215</sup> Nevertheless, the district court certified the class by permitting

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208. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 967 (1993) (noting that “[i]n mass litigation, the likely amount that one plaintiff will receive for a claim depends upon the values of other claims”).

209. Alexandra D. Lahav, *The Case for “Trial By Formula,”* 90 TEX. L. REV. 571, 612–18 (2012) (arguing for the use of statistical methods in aggregate proceedings to avoid outcome bias among plaintiffs); see also Greiner, *supra* note 70, at 534 (discussing “potential outcomes” approach that seeks to approximate a randomized experiment to produce strong inferences with respect to issues of fact in civil rights cases).

210. *In re Neurontin Mktg. & Sales Prac. Litig.*, 244 F.R.D. 89, 113 (D. Mass. 2007) (identifying the “bedrock principle” of preventing uninjured plaintiffs from recovering).

211. *Basic Inc. v. Levinson*, 485 U.S. 224, 247–48 (1988) (discussing the presumption); see also *supra* Part II.B (same).

212. *Id.*

213. *Id.* at 227–28.

214. *Id.* at 228.

215. *Id.* at 243.

the plaintiffs to presume reliance based on the fact that the shares were traded on an efficient market.

The Supreme Court found no error in establishing such a fraud-on-the-market presumption. The Court stated that

[t]he fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.<sup>216</sup>

The Court further noted that the defendants could rebut the presumption but suggested that any such showing should occur at trial.<sup>217</sup>

Admittedly, the fraud-on-the-market presumption only presumes classwide reliance, not “economic loss.”<sup>218</sup> However, once the presumption has been established, courts have further presumed injury, since “the price at which the stock is traded is presumably affected by the fraudulent information, thus injuring every investor who trades in the security.”<sup>219</sup>

The Supreme Court recently reaffirmed the availability of the fraud-on-the-market presumption.<sup>220</sup> Few courts, however, have extended the use of such a presumption beyond the securities context. In *McLaughlin*, for example, the court went to great lengths to disavow the use of a fraud-on-the-market presumption for the plaintiffs' civil RICO fraud

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216. *Id.* at 241–42 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160–61 (3d Cir. 1986)). For support of the “fraud on the market theory,” the Court noted that then “[r]ecent empirical studies” concerning the efficient capital markets hypothesis (“ECMH”) “have tended to confirm Congress’ premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations,” although it disclaimed from adopting the efficient capital market hypothesis (at least in its strong form) completely. *Id.* at 246, 246 n.24; see also Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. FIN. 1575, 1575 (1991) (discussing ECMH).

217. *Basic Inc.*, 485 U.S. at 248.

218. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005) (noting that “reliance” and “economic loss” are two separate elements of a securities fraud claim); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 179–80 (3d Cir. 2001) (vacating certification of securities fraud class action where classwide reliance was presumed, but economic loss could not be established through common proof).

219. *Newton*, 259 F.3d at 179 (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1419 n.8 (3d Cir. 1997)).

220. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011).



claims.<sup>221</sup> The court stressed that “*Basic* involved an efficient market” while “the market for consumer goods . . . is anything but efficient.”<sup>222</sup>

But despite its name, the fraud-on-the-market presumption does not actually establish classwide reliance, at least not in the sense understood in cases such as *McLaughlin*. Instead, it only shows that the fraudulent statements would cause a change in the price of the security.<sup>223</sup> Accordingly, the only reliance established by the fraud-on-the-market presumption is the plaintiffs’ “reliance on the integrity of th[e] price.”<sup>224</sup> Neither courts nor scholars pretend that such reliance is a presumption “that all investors actually read, heard, or were otherwise aware of the alleged misrepresentation.”<sup>225</sup> An investor can get a tip from his uncle, rely on the “integrity of the price,” and recover without having any knowledge of the misrepresentation. In *McLaughlin*, a lack of classwide proof of such knowledge was fatal to class certification. In *Basic*, this lack of knowledge was irrelevant.<sup>226</sup>

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221. In fact, the Second Circuit accused the plaintiffs of “invok[ing] the fraud-on-the-market presumption set forth in *Basic*” when the plaintiffs explicitly represented that they “are not advocating the same ‘fraud-on-the-market’ presumption applicable in a securities case.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 224, 224 n.5 (2d Cir. 2008).

222. *Id.* at 224.

223. In fact, if the fraud-on-the-market presumption establishes anything, it demonstrates “loss causation,” or “a causal connection between the material misrepresentation and the loss.” *Dura*, 544 U.S. at 342. Even then, the fraud-on-the-market presumption does not conclusively establish loss causation since it only establishes that an efficient market would have been sensitive to the fraud. The presumption does not show that any price adjustment was in fact caused by the fraud as opposed to other causes. *Cf. Halliburton*, 131 S. Ct. at 2168 (noting that fraud-on-the-market presumption should not be confused with a showing that a “misrepresentation that affected the integrity of the market price also caused a subsequent economic loss.”).

224. *Basic v. Levinson, Inc.*, 485 U.S. 224, 247 (1988).

225. Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 158 (noting that the fraud on the market presumption does not presume actual reliance by the plaintiffs); *Stark Trading v. Falconbridge Ltd.*, 552 F.3d 568, 572 (7th Cir. 2009) (Posner, J.) (“[A] fraud affects the price of a publicly traded security [because] investors will be affected *even if they trade without knowledge of the misrepresentations* that influenced the price at which they traded.”) (emphasis added); Merritt B. Fox, *After Dura: Causation in Fraud-on-the-Market Actions*, 31 J. CORP. L. 829, 839 (2006) (noting that “[f]raud-on-the-market actions are distinctly different from actions based on traditional reliance,” since they do not require a plaintiff “to show that she would have acted differently but for the wrongful misstatement”).

226. In fact, the *Basic* court came close to eliminating the reliance requirement altogether. Langevoort, *supra* note 225, at 162, 162 n.45 (noting that Justice Brennan pushed Justice Blackmun to adopt a position “in which all persons trading at a distorted price were entitled to the presumption, and found little reason to create grounds for rebuttal”). Moreover, early articulations of the fraud-on-the-market presumption did not invoke reliance at all. *See Blackie v. Barrack*, 524 F.2d 891, 906–07 (9th Cir. 1975) (holding that

A similar presumption is employed in antitrust price-fixing cases, where plaintiffs allege that competitors conspired to fix the price of a good above the competitive price.<sup>227</sup> As in cases that permit the fraud-on-the-market presumption, courts have permitted plaintiffs to presume classwide injury in price-fixing cases because “an illegal price-fixing scheme presumptively damages all purchasers of a price-fixed product in an affected market.”<sup>228</sup> In fact, a court is permitted to calculate damages for each plaintiff based simply on the “overcharge”—the difference between the inflated price and “what prices would have been without the unlawful conduct.”<sup>229</sup>

The price-fixing context seems to avoid the counterfactual uncertainty found in cases like *New Motor Vehicles* because the shift in the “baseline” of the price—from the competitive price to the fixed price—is the same for every class member. Accordingly, courts have consistently refused to use such “baseline” damages where, as in *New Motor Vehicles*, the parties have the option to negotiate or contract around prices to avoid any loss.<sup>230</sup> Courts have refused to presume impact even in price-fixing cases where the “baseline” price is not the same for the entire class, suggesting that such variation reintroduces the counterfactual uncertainty traditional price-fixing cases avoid.<sup>231</sup>

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“proof of subjective reliance on particular misrepresentations is unnecessary to establish a 10b-5 claim for a deception inflating the price of stock traded in the open market,” requiring instead only “proof of purchase and the materiality of the misrepresentations”).

227. Horizontal price-fixing among competitors is per se illegal under Section 1 of the Sherman Act. See 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 228 (1940) (“[P]rice-fixing combinations . . . are illegal per se; they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils.”).

228. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 179 n.21 (3d Cir. 2001) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 526 (S.D.N.Y. 1996)); see also *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 93 (D. Mass. 2005) (accepting plaintiffs’ argument that “it may be assumed in [price-fixing] cases that by preventing competition in a typical market defendants have raised prices to all purchasers”).

229. 6 NEWBERG ON CLASS ACTIONS, *supra* note 105, § 18:53 (noting that this method can be used to determine “classwide damages” in price-fixing cases).

230. *Pharm. Indus.*, 230 F.R.D. at 94 (rejecting a “baseline-impact” method for determining damages for civil RICO claims given that “the PBM, wholesale, and pharmacy markets for the procurement of prescription drugs are highly-competitive; therefore, unlike in a price fixing conspiracy, payors can leverage this competition to dissipate the effects of the alleged AWP scheme”).

231. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325–26 (3d Cir. 2008) (vacating class certification where court erroneously presumed antitrust impact in

But looks are deceiving. Suppose that a plaintiff would have bought a widget for \$10 a unit, the fixed spot price for the widget is \$9 a unit, and the competitive spot price is \$8 a unit. Further suppose that given his willingness to pay,<sup>232</sup> the plaintiff would have negotiated a contract with the seller to buy the widget for \$10 a unit, and would have negotiated such a contract in both the actual world and the counterfactual world because he is a poor negotiator.

If the plaintiff did, in fact, enter into a \$10 contract, would he have been injured if the spot price had been \$8 in the counterfactual world and \$9 in the actual one? According to the *New Motor Vehicles* court, the answer is no, since the plaintiff would pay a \$10 price in both worlds.<sup>233</sup> But what if the plaintiff had the same willingness to pay but simply bought at the spot price? In both contexts the buyer faces the risk that the spot price may be less or more than his willingness to pay. If he chooses to assume the risk and only pay the spot price, he can recover. However, if he chooses to avoid the risk and lock in his preferred price ex ante through a contract, then he cannot.

The only relevant difference between the contract context and the spot price context is that the contract context allows the plaintiff to memorialize his ex ante preferences. In the spot price context, by contrast, the plaintiff can have the same ex ante preferences but simply stay quiet about having them in the first place.<sup>234</sup> In essence, the baseline method of

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price-fixing case, because the evidence suggested that some plaintiffs paid divergent prices, and some even paid lower prices, during the class period).

232. Admittedly, introducing the concept of “willingness to pay” raises the possibility of endowment effects, where an individual’s “willingness to pay” and “willingness to accept” the same good may depend on whether the individual already has the good or is acquiring it. See RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 63–68 (1994). While I acknowledge the effect, it is independent of the basic point I am making here, that a more refined focus on a plaintiff’s ex-ante preferences may reveal that he or she is not injured.

233. *In re New Motor Vehicles Can. Export Antitrust Litig.*, 522 F.3d 6, 29 (1st Cir. 2008) (noting that poor negotiators may not have been injured since they may have paid the same price in both worlds).

234. Indeed, the same method of ignoring the ex-ante preferences of the plaintiff arises in the securities context, where most plaintiffs are effectively purchasing securities at spot prices. Because we seldom have accurate evidence about investors’ willingness-to-pay, we permit recovery for an overcharge caused by fraud even if the investor would have paid for the security at the artificially inflated price, or sold at the artificially depressed price, despite the fraud. I thank David Rosenberg for clarifying my thinking on the possibility that ex-ante expectations may vary among the class, leading to situations in which some plaintiffs are not, in fact, injured.

proving classwide injury avoids counterfactual uncertainty by ignoring any uncertainty in each plaintiff's ex ante preferences.<sup>235</sup>

As shown above, the use of presumptions and baselines in the securities and antitrust contexts may permit uninjured plaintiffs to recover. Because of presumptions and baselines, plaintiffs in securities fraud cases may recover without necessarily relying on the fraud, and plaintiffs in price-fixing cases may recover even if they would have paid the same price in the absence of the price-fixing conspiracy.

Although the use of presumptions and baselines in securities and antitrust litigation permit courts greater "flexib[ility]" in processing securities and antitrust claims, they are not necessarily intended to operate in other substantive areas.<sup>236</sup> According to Nagareda, courts permit the use of economic and statistical theories to support presumptions and baselines only in contexts where "economics is one with legal doctrine," such

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235. The ignorance of ex ante expectations becomes clear when one considers the possibility of price discrimination in the counterfactual world. Imagine, for example, a market in which the price is fixed at \$6, the competitive average price would be \$5, but a seller in a competitive market could engage in some price discrimination. Under this scenario, a plaintiff could pay \$9 (his willingness-to-pay) in the competitive world, but only \$6 in the actual world. I thank Fred McChesney for clarifying my thinking on these points. Cf. MICHAEL D. WHINSTON, LECTURES IN ANTITRUST ECONOMICS 6–7, 7 n.5 (2008) (asking "should a merger of competitors that creates a perfectly discriminating monopolist that leads to a small increase in productive efficiency be allowed? While such a merger raises aggregate surplus it will also make consumers who are not shareholders worse off"). Admittedly, perfect price discrimination is impossible in a perfectly competitive market, and in most cases is otherwise illegal under the Robinson-Patman Act. See 15 U.S.C. § 13 (2006) (prohibiting, with some exceptions, "any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality"). But some amount of price discrimination occurs in sufficiently competitive markets, such as markets that provide student discounts.

236. See Nagareda, *Class Certification*, *supra* note 19, at 172 (arguing in favor of a context-specific approach since "[a] securities fraud claim is different from an employment discrimination claim. Each, in turn, differs from an antitrust or RICO claim"). *But see* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1654 (1999) (suggesting that the use of different standards and presumptions for proving reliance in some contexts but not others is a reflection of "ongoing uncertainty as to the true state of substantive law," and suggesting that the same standards should apply transubstantively). These doctrines could be justified by a preference by Congress to vigorously enforce antitrust and securities fraud law, but the Congressional preference for vigorous enforcement of at least the securities laws has been cast in doubt by the passage of statutes in the late 1990s to limit the use of class actions for securities fraud claims. See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227–28 (codified as amended in scattered sections of 15 U.S.C.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

as securities fraud and antitrust litigation.<sup>237</sup> Indeed, other features of antitrust and securities law, particularly the direct purchaser rule, which explicitly permits noninjured parties to recover,<sup>238</sup> suggest that the procedures that apply in antitrust and securities litigation are unique to those contexts.<sup>239</sup>

But these economic and statistical doctrines are not, in fact, limited to certain substantive areas. The difficulty of proving classwide injury can be understood as a problem of inferential reasoning—to what extent can a court infer causation when it cannot directly compare the actual with the counterfactual. Indeed, recent developments in statistics have returned to the common sense notion of “but-for causation with a special focus on time.”<sup>240</sup> Since the problem of proving facts through inferential, or circumstantial, evidence is as old as the law itself, one can view the fraud-on-the-market presumption or the use of baseline damages in price-fixing cases as variations on common legal techniques for dealing with counterfactual uncertainty.

For example, the fraud-on-the-market presumption is analogous to presumptions of reliance used for common law fraud claims, which, similar to securities fraud claims, are based on “entitlement[s] to rely on representations of fact by strangers whether or not there is any reason to trust them, because doing so facilitates economic exchange.”<sup>241</sup> Likewise, the use in the antitrust context of “baseline” damages as a “just and reasonable” inference of damage is no more different than the doctrines used to establish “general” damages that are the “foreseeable” and “natural consequences” of the legal violation.<sup>242</sup> Indeed, the use of reasonable infer-

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237. Nagareda, *Class Certification*, *supra* note 19, at 106–07 (noting that in the antitrust and securities context, “economics is one with legal doctrine,” and thus competing expert testimony “ultimately convey competing accounts of law,” while in the civil RICO and employment discrimination context “the integration of legal doctrine and social science is still a tentative, contested enterprise”).

238. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492–94 (1968) (rejecting “passing on” defense for purposes of challenging standing); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729–36 (1977) (holding that only direct purchasers have standing to sue for violations of the federal antitrust laws).

239. *But see* Gilles, *supra* note 112 (arguing that the direct purchaser rule and the availability of punitive damages argues against requiring a showing of ascertainability of the plaintiffs).

240. Greiner, *supra* note 70, at 537 (discussing the recent “potential outcomes” statistical approach to establishing causation, which focuses on but-for causation over time).

241. Langevoort, *supra* note 225, at 161 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 111 (7th ed. 2007)).

242. *See, e.g.*, RESTATEMENT OF CONTRACTS § 330 cmt. e, Special Note (1932) (defining “general” damages as those that are “foreseeable” and the “natural consequence” of the breach); RESTATEMENT OF TORTS § 904 (1939) (same).

ences is at work in a case like *Klay*, where the court permitted a finding of common proof of reliance since it “d[id] not strain credulity” that each of the doctors relied on the representations of the HMOs.<sup>243</sup>

The ignorance of a plaintiff’s ex ante expectations, which is crucial to the operation of the fraud-on-the-market presumption and the use of baseline damages in antitrust law, is pervasive. Consider a modern, run-of-the-mill personal injury case. Suppose that a plaintiff purchases a car with a defective accelerator<sup>244</sup> and sues to recover from the manufacturer for any design or manufacturing defect.<sup>245</sup> If one takes a *New Motor Vehicles* approach to the issue of injury, one would focus on the ex ante expectations of the plaintiff in purchasing the car. Would the plaintiff have purchased the car for the same price had he or she known of the defect? Or would the plaintiff have negotiated a lower price in the but-for world because of the risk created by the defect? If so, what would the plaintiff have been willing to pay for a defect-free car (assuming, of course, some modicum of negotiating skill)? Isn’t the real injury the imposition of an additional risk that the plaintiff would not have accepted in the counterfactual world at the price he or she paid?

In tort litigation involving personal injuries, U.S. courts explicitly reject such “loss of value” claims<sup>246</sup> and typically ignore the “expectancies” of the plaintiff altogether.<sup>247</sup> Instead, courts presume that, in the

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243. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004).

244. *E.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1381–82 (J.P.M.L. 2010) (ordering transfer of actions concerning alleged “sudden, unintended acceleration” defect in Toyota cars for consolidation in the Central District of California pursuant to 28 U.S.C. § 1407 (2006)).

245. *See* RESTATEMENT (THIRD) OF TORTS § 2 (1998) (providing for liability for design defects, manufacturing defects, and failures to warn).

246. *See In re Bridgestone/Firestone, Inc. Tire Products Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (Easterbrook, J.) (rejecting claims of breach of implied warranty due to defect in tire, noting that “most states would not entertain the sort of theory that plaintiffs press”).

247. *See* DOUGLAS LAYCOCK ET AL., MODERN AMERICAN REMEDIES 50 (4th ed. 2010) (“The conventional wisdom is that expectancy damages are recoverable only in contract, not in tort.”). There are exceptions, most notably in the fraud context. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 549 (1977) (“The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.”). This exception in the fraud context, especially carved out for “business transaction[s],” makes it odd that the *McLaughlin* Court expressed skepticism over whether “expectancies” like the benefit of the bargain are recoverable in the civil RICO context. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008) (noting, without deciding, that “benefit of the bargain” damages “are generally unavailable in RICO suits,” relying upon the “business or property” language of the civil RICO statute); *see also Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1063–65 (E.D.N.Y.

absence of the negligence, the plaintiff would not have accepted the ex ante risk associated with a defective product. Furthermore, we provide, in effect, tort insurance for any actualized harm, rather than compensate for the cost of bearing the additional risk.<sup>248</sup> Thus, one could imagine situations where the plaintiff is not injured because he would have assumed the same risk of harm in the absence of the tort. Ignoring the plaintiff's ex ante preferences to avoid counterfactual uncertainty is not limited to exceptional doctrines like the fraud-on-the-market presumption and the baseline damages awarded in price-fixing cases. As demonstrated by the hypothetical above, it is an everyday feature of tort law.

### 3. Deterrence

Third, the individualist fallacy is mistaken given the commonality of the conduct that gives rise to the litigation and the deterrence function of the litigation. Courts and scholars insist on proof of classwide injury in part because they consider it necessary to prove a common legal violation. The Court in *Wal-Mart* illustrates this view. There, the Court concluded that, without proof of classwide injury, the plaintiffs failed to provide "convincing proof of a companywide discriminatory pay and promotion policy," and thereby failed to "establish[] the existence of any common question."<sup>249</sup> Likewise, Nagareda has argued that the use of "aggregate proof" of classwide injury is circular, since it presumes "some doctrine in governing law that unites all class members as victims of the same wrong."<sup>250</sup>

But the existence of a common wrong does not require common proof of injury. Instead, the commonality of the wrong stems from the defendant's ex ante conduct, which, in all of the above cases, is common to the class. In these cases, the defendant necessarily treats the population affected by its conduct as an undifferentiated whole because the defendant cannot know who will be affected by its actions prior to committing a legal violation.

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2005) (Weinstein, J.), *overruled by McLaughlin*, 522 F.3d 215 (concluding that "benefit of the bargain" damages are available in civil RICO claims involving fraud).

248. See *Bridgestone/Firestone*, 288 F.3d at 1017, 1017 n.1 (rejecting "loss of value" claims for defective tires, noting that "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation," and showing that recovery for loss of value and recovery for actualized harm add up to the same amount).

249. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

250. Nagareda, *Class Certification*, *supra* note 19, at 129; *see also id.* at 101 (defining "aggregate proof" as proof "that presumes a view of the proposed class in the aggregate").

This can be difficult to conceptualize,<sup>251</sup> so consider the disparate treatment claim in *Wal-Mart*. There, the plaintiffs alleged that Wal-Mart's hiring and promotion practices contained excessive subjectivity, which, combined with its uniform corporate culture, permitted an inference that Wal-Mart discriminated against women.<sup>252</sup> The plaintiffs alleged a "disparate treatment pattern-or-practice" claim under Title VII, which requires a showing of discriminatory conduct that "is repeated, routine, or of a generalized nature" rather than "sporadic discriminatory acts."<sup>253</sup> The conduct at issue in *Wal-Mart*, however, appears to be sporadic acts of discrimination, since it involved the thousands of discrete pay and promotion decisions made by Wal-Mart's store, district, and regional managers.<sup>254</sup>

But suppose, for example, that Wal-Mart adopted the practice described above, but is deciding whether to add a checklist that store managers must use in making pay and promotion decisions. The checklist is designed to avoid biases based on gender and thus would decrease Wal-Mart's Title VII expected liability. Wal-Mart, of course, cannot predict the checklist's future effects on specific female employees, but it can estimate its effects over the affected female employee population. In fact, Wal-Mart may intentionally refuse to adopt a checklist given its animus towards its female employees.

The Title VII claim in *Wal-Mart* is, in essence, that Wal-Mart intentionally decided not to impose measures like a checklist to reduce any gender disparities.<sup>255</sup> That allegedly discriminatory decision would be common to the class, even though the effects of that decision were not.<sup>256</sup> Moreover, the claim in *Wal-Mart* does not presuppose any novel theories

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251. See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (en banc) (Kozinski, J., dissenting) (noting that the plaintiffs "have little in common but their sex and this lawsuit."), *rev'd*, 131 S. Ct. 2541; see also *Wal-Mart*, 131 S. Ct. at 2557 (quoting Judge Kozinski's dissent with approval). I briefly discuss the common violation in *Wal-Mart* in Campos, *supra* note 27, at 1070–71, although I discuss it in more detail here.

252. *Wal-Mart*, 131 S. Ct. at 2548.

253. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 336 n.16 (1977) (defining disparate treatment pattern-or-practice claims as claims that concern conduct that "is repeated, routine, or of a generalized nature," where plaintiffs must prove "more than sporadic acts of discrimination").

254. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146–47 (N.D. Cal. 2004).

255. *Wal-Mart*, 131 S. Ct. at 2548.

256. *Dukes*, 603 F.3d at 600–12 (concluding that the plaintiffs' evidence "provide[s] sufficient support to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies" which violated Title VII) (emphasis in original).



of Title VII liability. It is no more circular than alleging a legal violation that you intend to prove later. The claim simply alleged “discriminate[ion] in the old-school, intentional sense,” albeit on a much larger scale.<sup>257</sup> In fact, in *Falcon*, the Court previously conceded that plaintiffs could bring a Title VII class action “if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.”<sup>258</sup>

The same can be said of a number of legal wrongs that are common to the class but involve differentiated conduct. One example is the fraudulent mass marketing campaign in *McLaughlin*, which relied on retailers selling cigarettes to individual consumers. Another is the alleged horizontal anticompetitive conspiracy in *New Motor Vehicles*, which relied on dealerships negotiating car prices with buyers.

The commonality of the defendant’s ex ante conduct is crucial to understanding why accuracy as to each individual’s injury is unnecessary to fulfill the deterrence function of the litigation. In general, liability rules deter misconduct because the defendants seek to avoid or reduce their expected liability.<sup>259</sup> For example, in *New Motor Vehicles*, the litigation would deter the defendants only if the prospect of any liability would have affected their decision to engage in the conspiracy in the first place. In this way the litigation affects the defendant’s ex ante decision making even though the litigation occurs after the violation.

If the deterrence function arises from the effect of the expected litigation on the defendant’s ex ante conduct, then accurate proof of each plaintiff’s individual injury is unnecessary. All that is needed is an accurate assessment of the aggregate liability caused by the defendant’s conduct because the defendant will only consider its aggregate expected liability in deciding how to act. The defendant cannot base its actions on a more fine-grained determination of the effects of its conduct on individual plaintiffs because in cases like *New Motor Vehicles* and *McLaughlin*, a defendant cannot know ex ante how its classwide conduct will specifically affect each potential plaintiff.

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257. Nagareda, *Class Certification*, *supra* note 19, at 155. That is why Richard Nagareda is incorrect in concluding that the claim in *Wal-Mart* is only that Wal-Mart “enable[d] discrimination.” *Id.* at 153. Rather, the plaintiffs took great pains to allege that the Wal-Mart itself engaged in intentional discrimination. Nagareda further criticizes the proof of such discrimination, calling it “startlingly inept,” *id.* at 155, but that is a merits inquiry as to whether there was a wrong at all. Inept proof of a common wrong does not transform a common wrong into an individual one.

258. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

259. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (discussing the deterrence function of liability rules); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987) (same).

Moreover, determining the defendant's aggregate liability does not depend on an accurate determination of each plaintiff's injury. In theory, the individual injuries of each plaintiff could be summed up to provide an assessment of the aggregate damages. But, as noted above, an assessment of damages at the individual level may lead to significant error as well as significant underreporting, which can bias the result. More importantly, many statistical methods, most notably the use of random sampling, can approximate the aggregate amount of damages with far greater accuracy than the summing up of individual injuries.<sup>260</sup> In fact, the district court in *McLaughlin* mentioned the benefits of random sampling in approving a procedure for determining aggregate damages.<sup>261</sup>

Admittedly, the deterrence function of the liability does not obviate the need to determine each individual's damages. But the deterrence function of the litigation does show that the determination of individual injury and damage is of secondary importance, such that it should not be a relevant factor in determining class certification. The failure to certify a class in small claims cases like *New Motor Vehicles* and *McLaughlin* would result in the suboptimal imposition of aggregate liability on the defendant. Again, that is because the class action corrects for the asymmetric stakes between the plaintiffs and the defendant. These asymmetric stakes lead to the defendant investing more in common issues, which ultimately result in the skewing of the defendant's ex ante aggregate liability in its favor.<sup>262</sup> In fact, given that in small claims litigation no individual plaintiff would bring suit, the absence of a class action means that a defendant avoids its ex ante expected liability altogether.<sup>263</sup>

Accordingly, the failure to certify a class in cases like *New Motor Vehicles* and *McLaughlin* would not only lead to no recovery for the plaintiffs, but permit the defendants to commit the same legal violations with

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260. In fact, the *McLaughlin* court's conclusion that an inaccurate determination of individual damages would taint a classwide determination of damages suffers from a fallacy of composition. By envisioning instances in which the plaintiffs would not recover, they assume that the group as a whole would be reflective of those examples. But one cannot infer population-based statistics like aggregate loss from individual statistics like individual injury, at least not in the absence of procedures like random sampling to avoid biases. See Greiner, *supra* note 70, at 563 (noting that "[r]andom assignment assures that, in the absence of bad luck, units who receive one treatment are not systematically different from those who receive the other treatment").

261. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1244-46 (E.D.N.Y. 2005) (Weinstein, J.), *overruled by* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

262. See *supra* Part II.B. (discussing the problem of asymmetric stakes).

263. See, e.g., David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible Remedies,"* 79 GEO. WASH. L. REV. 542, 546, 562 (2011).

impunity. The relevant trade-off is not between the deterrence provided by the class action and the accuracy provided by the individual trial. The trade-off is between optimal deterrence and imperfect compensation versus no deterrence and compensation at all.

I want to conclude by emphasizing the *private* interest the plaintiffs have in deterrence. Many scholars have correctly noted the public interest in the enforcement of the law provided by deterrence.<sup>264</sup> But the plaintiffs themselves have an interest in preventing the unlawful violation from occurring and would have personally benefitted from a class action rule that, among other things, did not require a showing of class-wide injury. Such a rule would have likely deterred the defendant from committing the wrong in the first place.

The litigation admittedly occurs after the legal violation has occurred, when nothing can be done about it. Unfortunately, we never address the effect of the class action rule when the defendant is considering its conduct *ex ante*, as we do with injunctions or other *ex ante* enforcement mechanisms. Instead, we have a vicious cycle of ignoring the deterrent effect of procedure, imposing suboptimal liability, causing more legal violations, ignoring the deterrent effect of the procedure, and so on.

To break this vicious cycle, courts should consider the counterfactual of the effect of the class action on the defendant's *ex ante* conduct.<sup>265</sup> Accordingly, we need to not only consider the compensatory interests of the plaintiffs after the legal violation has occurred, but also the *ex ante* effects of the procedure before the violation, since it is the type of consideration that is "capable of repetition, yet evading review."<sup>266</sup> Indeed, this counterfactual, *ex ante* inquiry is of paramount importance because most, if not all, plaintiffs would prefer to avoid the unlawful conduct than to suffer it and receive compensation, no matter how accurate the compensation would be.

### III. AGAINST COMMON ANSWERS

It follows from the above that I am against requiring proof of "common answers" as to each plaintiff's injury to certify a class action. The requirement of proof of common injury arises, in part, from a trend by circuit courts to require proof of each of the requirements of Rule 23 by a "preponderance of the evidence," even if such proof would overlap with

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264. See, e.g., Gilles, *supra* note 112, at 309; Rubenstein, *supra* note 123, at 723–28.

265. I argue for such an inquiry in more detail in Campos, *supra* note 27, at 1104–10.

266. See *Roe v. Wade*, 410 U.S. 113, 125 (1973) (citing cases discussing this mootness exception).

the merits.<sup>267</sup> The trend is largely justified because many of the class certification requirements of Rule 23 require factual findings by the court, particularly the “preponderance” requirement of Rule 23(b)(3).<sup>268</sup> As put by Judge Easterbrook, “[t]he proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.”<sup>269</sup>

Nevertheless, both the predominance requirement of Rule 23(b)(3) and the commonality requirement of Rule 23(a)(2) merely require a finding of common “questions,” not common answers, and for such a finding the pleadings are more than sufficient.<sup>270</sup> The class action prevents the defendant from using its greater stakes to invest more on common issues than the plaintiffs. Thus, a class action should be certified once common issues are present to allow the plaintiffs to invest in these issues on a level playing field, regardless of whether all issues are amenable to common resolution. Requiring more to certify a class, particularly a showing of likelihood of success on the merits, would frustrate the function of the class action and the substantive areas of the law that utilize it.<sup>271</sup>

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267. See *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676–77 (7th Cir. 2001) (Easterbrook, J.); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *overruled by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011).

268. *E.g.*, FED. R. CIV. P. 23(a)(1) (requiring a finding by the court that “the class is so numerous that joinder of all members is impracticable”); *Id.* 23(a)(4) (requiring a finding by the court that “the representative parties will fairly and adequately protect the interests of the class”); *Id.* 23(b)(3) (requiring that “the court *finds* that the questions of law or fact common to class members predominate over any questions affecting individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”) (emphasis added).

269. *Szabo*, 249 F.3d at 675.

270. See FED. R. CIV. P. 23(b)(3) (requiring only a “find[ing] that the *questions* of law or fact common to class members predominate over any questions affecting only individual members”) (emphasis added); *Id.* 23(a)(2) (requiring only that “there are *questions* of law or fact common to the class”) (emphasis added).

271. If there is a factual showing that a court should scrutinize, it is the numerosity requirement of Rule 23(a)(1), which requires a court to find that “the class is so numerous that joinder of all members is impracticable.” *Id.* 23(a)(1). Current law sets the bar for numerosity as low as forty. *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001) (“No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.”). However, a higher numerosity threshold, perhaps in the thousands, would ensure that the stakes are so asymmetric that class treatment is more than justified, as well as cut down on the costs associated with class certification. This is not to say that courts should require precise proof of numerosi-

I am also against common answers in another importance sense. The class action has garnered interest from other jurisdictions as a supplement to law enforcement, particularly the use of class actions for the type of small claim, consumer litigation discussed above. For example, the European Union has proposed the increased use of class actions to enforce conduct in violation of its anti-competition and consumer protection laws.<sup>272</sup> Mexico has also recently passed a statute that allows for class action procedures to “help consumers challenge companies that overcharge for goods and services and that fail to meet quality standards.”<sup>273</sup> Class action procedures have also been proposed or utilized in Asia.<sup>274</sup>

In discussing the class action, this Article recognizes that the collective procedures adopted or proposed in other countries may differ in material ways. It also recognizes that the legal and social context of the United States also differs from other jurisdictions.

Nevertheless, in adopting, designing, or implementing a class action procedure courts should consider at least three factors, which roughly track the three fallacies discussed above. These factors are by no means exhaustive. However, they are important because the fallacies that lead to doctrines such as the requirement of proof of classwide injury may unduly influence other jurisdictions. If anything, the goal of this Article is to ensure that other jurisdictions learn from the United States' mistakes.

First, and as shown by the all-at-once fallacy, the primary function of the class action in the United States is not to realize savings in adjudicating claims all-at-once. Instead, the function of the class action is to correct what can be called a Coasean problem in U.S. law.<sup>275</sup> Because the private entitlement to bring a cause of action is initially assigned to each

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ty along the lines of listing identifiable plaintiffs, as that would replicate the problem of classwide injury all over again.

272. Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 142 (2010) (discussing the use of class actions in the European Union, noting that “[w]ithin Europe, consensus is emerging that competition law requires private enforcement if it is to be collective.”).

273. See Nathan Koppel, *Class Actions Head South of the Border*, WALL ST. J. LAW BLOG (Sept. 2, 2011, 11:06 AM), <http://blogs.wsj.com/law/2011/09/02/class-actions-head-south-of-the-border/> (discussing an article in “Mexico’s Official Gazette” about the new class action procedure adopted by Mexico).

274. E.g., Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998); Dae Hwan Chung, Note, *Introduction to South Korea’s New Securities-Related Class Action*, 30 J. CORP. L. 165 (2005).

275. See Coase, *supra* note 56, at 2–15 (setting forth Coase theorem). I have similarly argued that the problem is functionally analogous to a “tragedy of the commons.” See Campos, *supra* note 27, at 1085–87.

individual victim to recover his or her own damages, it can result in asymmetric stakes situations when a defendant engages in common conduct that injures a large number of dispersed victims. The class action is needed in the United States because it allows the plaintiffs in these situations to avoid easily predictable collective action problems, which otherwise would allow the defendant to escape some or all of its liability.

Accordingly, the utility of a class action in other jurisdictions will depend on the extent to which the assignment of causes of action leads to the type of collective action problems that arise in the United States. For example, one feature of U.S. law that leads to collective action problems is restrictions on the selling of claims under the law of champerty and maintenance. In essence, a victim can sell a claim only if the claim has accrued, and even then, only to the defendant through a settlement.<sup>276</sup> But if a jurisdiction allows for greater freedom in the selling of claims, then plaintiffs may not be as disadvantaged relative to the defendant. Although the defendant, again, owns a monopoly in the defense of its liability, plaintiffs may be able to sell their claims to an entity<sup>277</sup> or, perhaps, to an insurer via subrogation,<sup>278</sup> thereby substantially lessening any asymmetric stakes between the parties.

Moreover, the class action arises in the United States because of gaps in public enforcement. Thus, a jurisdiction considering the use of the class action must also consider how to coordinate such private enforcement with public enforcement. In many cases the use of private enforcement and public enforcement may be complementary, such as the use of private rights of action to supplement ex ante regulation.<sup>279</sup>

In other cases, however, public and private enforcement may be at cross-purposes. Somewhat ironically, in the securities fraud and antitrust contexts in the United States, public enforcement through liability is inevitably followed by private actions, leading to significant overdeter-

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276. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 107–20 (2011) (discussing, and criticizing, the law of champerty and maintenance).

277. See, e.g., Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 320–23 (2011) (discussing the adoption of measures in such countries as the Netherlands in permitting “third-party funding” of litigation, which functionally allows third parties to own equity interests in claims).

278. For one such proposal, see Kenneth S. Reinker & David Rosenberg, *Unlimited Subrogation: Improving Medical Malpractice Liability by Allowing Insurers to Take Charge*, 36 J. LEGAL STUD. S261 (2007). Indeed, given the proliferation of government-financed health care systems, one could imagine the government suing to recoup the costs of treating the victims of a tort.

279. SHAVELL, *supra* note 259, at 279–84.

rence.<sup>280</sup> In these contexts the “title” to bring and dispose of claims can be understood as a license granted by the government to enforce. Understood in this way, the class action is a type of “qui tam” or “bounty hunter” procedure that assigns the license (plus an interest in any sanction) to an uninjured party.<sup>281</sup> Consequently, the issue for any policy maker is whether a private license to enforce can peacefully coexist with a public enforcer. This is not to say that ex post liability actions by both public enforcers and private enforcers are substitutes for each other. Instead, a jurisdiction has to be careful in designing both private and public enforcement to take advantage of their comparative advantages.<sup>282</sup>

Second, and as suggested by the extraordinary remedy fallacy, jurisdictions should not flinch given the size of the class or the amount of the liability at stake. The impulse to engage in a “likelihood of success” inquiry when the liability is large is understandable, particularly when class certification could result in the bankruptcy of the defendant. But it is important to recognize that the liability itself is not a function of the class action. Instead, it is a function of mass production, since many of the cases discussed, particularly the *Wal-Mart* case, arise from activities taken by the defendant at a very large scale. To limit liability based on the scale of the conduct at issue would effectively provide one strategic technique a company can use to avoid liability, similar to judgment proofing or using subordinates to commit wrongdoing. There may be reasons to limit the liability of large-scale activities, but the sheer magnitude of the liability should not be one of them, particularly when the liability could equally arise from many defendants instead of one.

Third, and as suggested by the individualist fallacy, jurisdictions should not lose sight of the objectives of the litigation. In the United States, courts and scholars have been preoccupied with protecting both the plaintiffs’ rights in their causes of action and the defendant’s defense rights.<sup>283</sup> But in the United States, and presumably elsewhere, the func-

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280. RICHARD A. POSNER, *ANTITRUST LAW* 266–86 (2d ed. 2001) (discussing over-deterrence caused by “follow on” suits in antitrust law).

281. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 35–42 (2009) (discussing, but criticizing, the delegation of enforcement power to private parties like class attorneys who are not otherwise victims).

282. For one such proposal, see David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159 (2006).

283. See, e.g., Nagareda, *Aggregate Litigation across the Atlantic*, *supra* note 5, at 10–11 (arguing that one of key issues in any aggregate litigation is “who is to be precluded thereby?”); see also *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (noting due process and Rules Enabling Act concerns with proposal to have mandatory class action

tion of private rights of action is to deter potential defendants from committing legal violations in the first place.<sup>284</sup> It makes little sense to restrict class actions out of a respect for the litigation rights of the parties when they would undermine the purpose of those rights. Consequently, courts should not deny a class action out of a concern for accuracy as to individual injury. Not only is such accuracy unnecessary, but, as shown in the cases above, it would lead to the very legal violations for which the plaintiffs seek compensation.

#### CONCLUSION

One cause of the requirement of proof of classwide injury is the reluctance of courts to utilize exceptional procedures like the class action. Although the American litigation model is itself exceptional, the class action is even more so because it is the great exception to the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”<sup>285</sup> This reluctance is, in turn, a reflection of the humility of U.S. courts, which recognize that other institutions may be better equipped to handle the policy considerations that underlie the class action. Such humility has its virtues, but not in all cases. The class action is itself “‘an invention of equity . . . mothered by the practical necessity’ of providing a practical procedure to enable large numbers of litigants to enforce their common rights.”<sup>286</sup> After all, and as noted by Judge Weinstein in the *McLaughlin* litigation, it is also a principle of general application in U.S. law that “every right, when withheld, must have a remedy, and every injury its proper redress.”<sup>287</sup>

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with sampling of claims, since it would undermine the litigation rights of the plaintiffs and the defendant).

284. Indeed, it is the essential function of all liability rules. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, & Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–92 (1972).

285. *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

286. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1023 (1973) (Hays, J., dissenting) (denial of rehearing en banc), *aff'd*, 417 U.S. 167 (1974) (quoting *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948)).

287. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2005) (Weinstein, J.), *overruled by* *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).