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The Policy in Favor of Settlement in an Adversary System

by

STEPHEN McG. BUNDY*

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It is a truism that the law favors a policy of settlement and compromise. Traditionally, American courts have invoked this policy to enforce past settlements against unwilling disputants and to approve tentative settlements. In such cases, the parties agree, or at one time did agree, on settlement terms. Over the past two decades, however, this policy preference for settlement has been extended to pending lawsuits in which the parties have not settled or even expressed interest in doing so.

This extension of the policy favoring settlement has spawned many procedural innovations that seek to bring about earlier resolution of civil disputes. In the federal courts, these innovations include revision of the rule governing pretrial conferences to emphasize the court's role in settlement negotiations, proposed modifications to the rules governing offers of judgment, more frequent appointment of special masters for settlement purposes, establishment of both court-annexed arbitration and neutral evaluation programs, and increased use of ad hoc dispute resolution procedures such as summary jury trial. With the passage of the Civil Justice Reform Act of 1990, Congress gave qualified endorsement to such reforms. The Act requires each federal district court to prepare a "civil justice expense and delay reduction plan." In formulat-

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2. FED. R. CIV. P. 16.
ing such plans, the courts "shall consider" the expanded use of settlement conferences and certain alternative dispute resolution procedures and "may include" them in the plan. Collectively, these programs represent perhaps the most substantial reform of federal trial court practice since the adoption of the Federal Rules of Civil Procedure.

Those who believe that "a bad settlement is almost always better than a good trial" may find little to criticize in these developments. Few have taken that view, however, and in consequence the increase in enthusiasm for settlement has been accompanied by considerable judicial and academic debate, some strongly supportive of the trend and some highly critical of it. Nevertheless, no systematic contextual account of the possible grounds for favoring settlement has emerged. The lack of such an account is a serious liability. Without one, it is impossible to evaluate the general increase in enthusiasm for settling federal cases. Nor is it possible to fairly assess procedural reforms intended to promote settlement through direct intervention in pending litigation, or to compare such reforms to other reforms intended to achieve similar policy goals by different means. This Article aims to provide the missing comprehensive account, to assess its plausibility in federal court litigation, and to show how it may be used to critically examine institutional reforms designed to promote settlement.

Part I of this Article argues that the policy favoring settlement of pending disputes stems largely from a particular set of judgments regarding the adversary system. That system has traditionally favored strong party control of litigation, broad party freedom to press weak claims, and

a passive tribunal as the best means of ensuring outcomes that serve both private and public interests. The system's design reflects the presumption that parties are competent both to discern where their respective interests lie, and to guide the tribunal to the correct decision on the merits through competitive presentations. At the same time, it reflects deep distrust of the tribunal's—particularly judges'—competence and neutrality.

Traditional policies favoring enforcement of past or proposed settlements are broadly consistent with the traditional premises of adversary justice. The new policy favoring settlement of pending litigation, however, reflects a darker vision of adversary justice, a vision that might be described as "pathological adversariness." According to this new critical account, adversary justice reflects a destructive bias against settlement. One version of the account rejects the presumption of party competence. From this perspective, settlement is preferred to continued litigation because it better serves the parties' interests, and decisions not to settle are accordingly characterized as unwise, inefficient, or even self-destructive. A second version of the critique rejects the premise that party competition serves the public interest, favoring settlement because it may produce a more just outcome between the parties, better protect non-parties, or improve the overall health of the civil justice system. From this public interest perspective, party decisions not to settle are seen as selfish, harmful, or perhaps even morally wrong.

Parts II and III of this Article probe the claim that party decisions to continue litigation disserve the parties' interests or the public interest. Part II.A explores the ways in which parties make decisions about settlement that do not serve their interests. It distinguishes between two kinds of settlement decisions. A decision is pragmatically irrational when it fails to serve a party's interests due to lack of conformity to basic standards of informed and deliberate decision-making. The failure may be the fault of either the client or the lawyer. Pragmatically rational decisions conform to those basic standards and hence tend to serve the parties' interests.

Part II.B then asks whether the quality of settlement decision-making has actually declined in federal court litigation. It briefly considers whether excessive litigiousness might be a culprit, but rejects that possibility as underdefined and implausible. It then examines how party decision-making has been affected by three basic changes in federal court

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litigation over the past twenty-five years: an increase in novel, complex claims involving inexperienced institutional disputants; an increase in the variability of judges and juries; and an increase in the size and a reduction in the experience of the litigation bar. While several of these changes may have caused ill-advised decisions to continue litigation, it is doubtful that their cumulative effects justify general, continuing skepticism about the prudence of party decisions to continue litigation. It is also true, however, that some of these changes have enhanced the risk of bargaining failures that may prevent pragmatically rational parties from settling even when both would benefit from doing so. Thus, while governmental intervention to promote informed and deliberate settlement decisions appears weakly justified at best, more limited intervention to prevent bargaining breakdowns might well increase the private value of litigation outcomes.

Part III examines three public interest arguments for preferring settlement to continued litigation: that settlement generally produces more just results between the parties, that it is procedurally fairer, and that it benefits non-parties and the justice system. I argue that settlement will not generally serve those goals. The public interest in settlement may, however, be especially strong in the (perhaps growing) class of cases in which litigation continues because the parties are reluctant to commence or sustain bargaining.

Part IV analyzes issues on the current reform agenda in the federal courts, focusing on the mandatory pretrial conference, the judicial role in settlement, and the scope of the judge's power to compel participation in judicial mediation and Rule 16. This Part identifies and describes three different models of judicial intervention: facilitator, counselor, and optimizer. Each model is associated with a different rationale for promoting settlement. The facilitator aims to prevent bargaining breakdowns. The counselor seeks to ensure prudent party decisionmaking. The optimizer seeks to attain the result that best serves the public interest.

Of the three approaches, only facilitative intervention appears clearly justified. Continued litigation resulting from bargaining breakdowns is unlikely to serve either private or public interests, and such litigation has probably increased in recent years. The costs of facilitative intervention also seem relatively low. The overall case for facilitation seems sufficiently strong to justify granting judges some authority to require limited participation by lawyers or parties in such mediation. Judicial participation as a counselor or optimizer, however, seems likely to do more harm than good. The private and public benefits of such interventions are far less clear and the costs far higher. Parties should not be
compelled to participate in such mediation, and it is doubtful whether judges should provide counseling or optimizing mediation even to parties that seek it.

I. Adversary Justice and Settlement

A. The Premises of Adversary Justice

This Article focuses on civil litigation of moderate to severe complexity in federal trial courts.\(^{15}\) In such cases, litigants normally are represented by lawyers, and the conduct of litigation reflects an adversary conception of justice. Adversary justice is a complex subject,\(^{16}\) but for this Article's purposes it is sufficient to focus on three of its central features. First, the parties control and bear responsibility for decisions about both commencing and terminating litigation and about assembling and presenting evidence and arguments. Second, within broad limits the parties may press losing claims without fear of sanction. Third, the litigation proceeds before a neutral, passive tribunal—often a jury—that plays a very limited role in the gathering and presentation of evidence.

Notwithstanding recent changes, these elements still characterize most litigation conducted in federal court. Parties control decisions to commence or terminate litigation.\(^{17}\) Although reforms have narrowed the range of nonmeritorious claims that may be presented without fear of sanction, parties still retain substantial freedom to press doubtful factual

\(^{15}\) This focus excludes criminal cases, which are subject to a broad range of distinctive considerations making bargained settlements socially undesirable. See generally Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 J. LEGAL STUD. 43 (1988). It also excludes several areas in which the case for settlement may be unusually strong, such as minor disputes among neighbors and acquaintances, small claims, and divorce and custody litigation.

Limiting the inquiry to federal courts vastly reduces the size and difficulty of this project without significantly reducing its intrinsic interest. Federal courts utilize a single procedural system. In addition, the federal judiciary has generally supported reforms designed to promote settlement. Moreover, in recent decades many procedural innovations, including the Federal Rules themselves, have migrated from federal to state court systems. See Jack H. Friedenthal et al., CIVIL PROCEDURE § 5.1, at 238-39 & nn.14-15 (1985). There is, therefore, value in studying federal settlement policies before the state courts move to adopt them.


\(^{17}\) Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1056 (Fed Cir. 1986) (court may not impose settlement on the parties); In re International Business Machs. Corp., 687 F.2d 591, 603-04 (2d Cir. 1982) (court may not continue lawsuit that the parties have dismissed).
and legal theories. Finally, although the increase in managerial judging has reduced judicial passivity, federal trial judges are not nearly as involved in their cases as judges in inquisitorial legal systems.

Adversary justice rests on two complementary political commitments: limited government and trust in party knowledge, competence and resourcefulness. An adversary system lowers direct governmental costs. It also limits the power of judges. In significant part this limitation reflects that, as compared with judges in inquisitional systems, American judges are more likely to achieve their position because of their political loyalties, rather than training and expertise. To that extent, their competence and neutrality are suspect. Hence their involvement in dispute resolution is a necessary evil, which should occur only when the parties cannot work out a solution among themselves.

The adversary system also depends on substantial and relatively equal party competence. Party competence justifies the tribunal’s passivity. If parties generally make prudent decisions about whether and how to litigate, then judicial intervention in those decisions will not improve them. Equal competence also makes it possible for passive tribunals to...

18. Until 1983, sanctions for filing a frivolous or harassing claim were available only when the action reflected subjective "bad faith." Fed. R. Civ. P. 11 advisory committee's note (describing 1983 revisions). This standard reflected the scope of common-law liability for malicious prosecution or abuse of process.

Rule 11 now forbids a lawyer from presenting claims or defenses that she could not have reasonably believed, after investigation, to be both well grounded in fact and supported by a plausible legal argument. Fed. R. Civ. P. 11. The express terms of the Rule also require the imposition of sanctions for bringing a nonfrivolous claim with an improper purpose, but courts have often refused to award sanctions in such cases. See, e.g., National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees, 844 F.2d 216, 224 (5th Cir. 1988); Zaldívar v. City of Los Angeles, 780 F.2d 823, 831-32 (9th Cir. 1986).


20. For example, Germany's inquisitorial system has roughly four times as many judges per capita as the United States. See David Luban, Lawyers and Justice: An Ethical Study 100-01 (1988).

21. This point is illustrated in John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 853-54 (1985); see also Luban, supra note 20, at 101. Federal judges may be less politically responsive because they are granted life tenure, but they also remain generalists with little formal professional training beyond their law school educations. Moreover, over the past two decades the criteria for their selection have become increasingly political. See infra text accompanying notes 118-119.

22. From this perspective, Lon Fuller's defense of adversary procedure as "the only effective means for combatting [judges'] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known," Lon L. Fuller & John D. Randell, Professional Responsibility: The Report of the Joint Conference, 44 A.B.A. J. 1159, 1160 (1958) [hereinafter Fuller & Randell, Professional Responsibility] (emphasis added), might be seen as resting covertly on a distinctively American view that genuinely professional judging is not possible.
be adequately informed. With adequate legal advice, parties will conduct appropriate investigations, make well-informed decisions about settlement based on the merits and their own interests, and if no settlement occurs, make effective, balanced presentations that will allow even a passive tribunal to make an informed decision.\textsuperscript{23} Judicial passivity also provides additional incentives for parties to competently argue their cases, since they cannot rely on the tribunal to protect their interests.

Adversarial justice has many attractive features, especially in a society attached to traditional liberal values.\textsuperscript{24} It allows for an inexpensive, relatively egalitarian, and politically representative judiciary while minimizing the resulting dangers of incompetence and bias. At the same time, it ensures that decisions about commencing and resolving lawsuits respond to the parties’ distinctive interests, social situations, and moral and political views. Moreover, by opening the courthouse to claims of doubtful legal merit, adversary justice defines the realm of legal controversy so that it corresponds to the broad contours of social and political controversy. Finally, because adversary justice leaves so much of dispute resolution up to the parties, it encourages the development of diverse litigation-related skills that collectively constitute a valuable social resource.

These attractive features, however, come at a price. Adversary justice has a strong constitutive element of contentiousness and gaming. In part, this contentiousness results from the decision not to sanction those who press losing claims. In part it results from the system’s emphasis on party control and initiative. The desire to protect party autonomy and to encourage parties to fully explore the available sources of information has led to the development of confidentiality doctrines that sometimes permit or encourage strategic withholding and suppression of information.\textsuperscript{25} The fact that parties and their lawyers play a strong role in locating, refining, and presenting evidence decreases the presumptive reliability of evidence and requires that it be strongly tested, by hostile


\textsuperscript{24} The best brief account of the connection between traditional liberalism and adversary justice is Feeley, \textit{supra} note 16, at 761-62.

\textsuperscript{25} Confidentiality doctrines include the attorney-client privilege, the attorney’s ethical obligation of confidentiality, the work-product doctrine, and doctrines governing the selection and presentation of expert witnesses. For more extensive discussion, see Bundy & Elhauge, \textit{supra} note 23, at 401-13.
cross-examination or otherwise, in the courtroom.\textsuperscript{26} The tribunal's passivity encourages contentiousness because it increases both the advantages of attack and the need for self-defense. Many contend that adversarial contentiousness too often leads to waste and injustice.\textsuperscript{27}

The second great difficulty with adversary justice is its assumption of equality. Critics claim that gross differences in disputing competence may well be common because of disparities in parties' wealth or litigation experience.\textsuperscript{28} When party competence is seriously unequal, critics argue that a system of party-controlled and funded prosecution is incapable of serving either public or private interests.\textsuperscript{29}

B. The Relationship Between Adversary Justice and the Policy in Favor of Settlement

Many proponents of alternative dispute resolution claim that adversary justice is inconsistent with a policy that treats settlement as a preferred outcome.\textsuperscript{30} This is a mistake, at least in cases in which the parties have chosen to settle on their own terms. When represented parties have chosen to settle, both the preference for limited government and the presumption of party competence argue against interfering with that decision. The argument for giving effect to tentative settlements presented for court approval is weaker. The presumption of equal competence normally is not applicable, because the limited competence of one or both parties is the reason for requiring court approval.\textsuperscript{31} The preference for limited government, however, still applies. Giving effect to the settlement provides some savings in resources. More important, the absence of a live dispute deprives the court of the competitive presentation that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} Mirjam Damaška, Of Hearsay and Its Analogues, 76 Minn. L. Rev. 425, 430-31 (1992).
\item \textsuperscript{27} See Jerome Frank, Courts on Trial: Myth and Reality in American Justice (1947) (asserting that the adversary system retards discovery of truth); Marvin E. Frankel, Partisan Justice (1980) (same); Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. Rep. 395, 404-06 (1906) (decrying "the sporting theory of justice").
\item \textsuperscript{28} The classic account of the causes and consequences of litigation inequality is Marc Galanter, Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95 (1974).
\item \textsuperscript{29} This critique is found both in the literature of legal ethics, Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 608-12 (1985), and in the literature of comparative procedure, Langbein, supra note 21, at 843.
\item \textsuperscript{30} See, e.g., Menkel-Meadow, Pursuing Settlement, supra note 3, at 7, 35-36; Riskin, supra note 3, at 1078-79.
\item \textsuperscript{31} This is true under statutes requiring court approval of settlements involving minors or incompetents, see, e.g., Cal. Civ. Proc. Code § 372 (West 1992), and of class action settlements, see Fed. R. Civ. P. 23(c).
\end{enumerate}
\end{footnotesize}
normally informs, checks and legitimates its intervention,\textsuperscript{32} greatly enhancing the risk that intervention will misfire.

The policy in favor of enforcing past settlements is also broadly consistent with traditional adversarial premises. The presumption of party competence favors treating past settlements by represented litigants as well-judged choices deserving of respect. The policy of encouraging party competence ordinarily dictates that parties should not be relieved of these choices, even if such choices were mistaken. Finally, enforcing the settlement is normally the course most likely to minimize judicial involvement in the matter.\textsuperscript{33}

In contrast to a policy favoring past settlements, a policy favoring settlement of pending cases in which the parties have not expressed interest in settling appears to conflict with basic assumptions of adversary justice.\textsuperscript{34} When represented parties seek a ruling from the court on a non-frivolous contention, the presumptions of party competence and judicial passivity would ordinarily seem to dictate that the court should provide that ruling. Some proponents of settlement, however, reject the presumptions of party competence and judicial passivity. They argue that decisions to continue litigation too often do not reflect the parties' informed self-interest. These self-destructive decisions are sometimes attributed to the client's misplaced idealism, wishful thinking, or failure to consider the costs of contentiousness (particularly when damage to valuable commercial and personal relationships is involved).\textsuperscript{35} More commonly, imprudent decisions to continue litigation are blamed on lawyers. Some say that lawyers' professional orientation to conflict blinds them to

\textsuperscript{32} See Coleman & Silver, \textit{supra} note 13, at 127 (noting that without an adversarial presentation, judges cannot accurately gauge the size and strength of class members' claims when determining fairness of class action settlements).

\textsuperscript{33} Arguments against judicial involvement will be stronger to the extent that the passage of time has rendered stale the evidence underlying the settled claims.

\textsuperscript{34} One might also argue that the basic design of adversary justice hampers the resolution of civil conflict by settlement. The contentious character of adversary litigation presumably impedes settlement bargaining, making it more difficult for parties who would both benefit from settling to reach an agreement. The argument's flaw is that it ignores litigation costs. In an adversary system, the parties bear more of those costs, and the state less. Thus in an adversary system it is more likely that parties will find themselves in a situation in which each would benefit from settling by avoiding litigation costs.

\textsuperscript{35} See, e.g., Warren E. Burger, \textit{Isn't There a Better Way?}, 68 A.B.A. J. 274, 275 (1982) (arguing that litigants often turn to the courts for relief from "personal distresses and anxieties," that "commercial litigation takes business executives and their staffs away from the creative paths of development and production," and (citing Abraham Lincoln) that lawyers should "[p]ersuade [their] neighbors to compromise ... [by pointing] out to [them] how the nominal winner [of litigation] is often a real loser—in fees, expenses, and waste of time"); see also ROBERT FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 6-7 (1981).
opportunities for cooperation that would benefit their clients. Others accuse lawyers of misadvising their clients because they do not understand the inherent weaknesses of their clients' cases. Still others allege that lawyers give their clients bad advice or intentionally frustrate settlement negotiations so that they can pad their fees or advance their own ideological agendas.

Other proponents of settlement question whether continued litigation serves the public interest. Some claim that the tribunal's decisions are too often unjust because legal rules require "all or nothing" decisions while justice often demands an intermediate result. Others contend that some of the new problems presented by adjudication are too complex or difficult to be justly resolved by generalist fact finders, and that the contentious, lawyer-dominated world of the adversary process is procedurally less fair and satisfying than the world of settlement.

This new critique of adversary justice raises doubts about the wisdom of a passive tribunal. If parties are mistaken in continuing litigation or if the outcomes that result from continued litigation are less just than settlements, then perhaps it is wrong to defer to decisions to continue litigation. Moreover, if continued litigation consumes significant judicial resources, perhaps the more effective route for preserving those resources is to actively intervene in decisions about settlement.

II. Favoring Settlement in the Best Interests of the Parties

One might adopt a general policy favoring settlement of pending lawsuits if in most cases in which both parties apparently want to continue litigation the parties' "true" interests would be better served by settling. Even if mistaken decisions to continue litigation were relatively infrequent, one might still favor selective intervention to correct them, if an outsider could identify those decisions reliably. To determine whether either of these conditions prevails, we must consider how party decision-

37. See, e.g., BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 9.
38. See, e.g., PROVINE, supra note 12, at 17 (describing lawyers who "work the file" to build fees).
41. Id. at 430; Menkel-Meadow, Toward Another View of Legal Negotiation, supra note 36, at 793-94.
making can fail to reflect party interests. Part II.A examines those issues. Part II.B then asks whether the available evidence about federal court litigation supports either the claim of general decisionmaking failure or the claim that failures, while relatively infrequent, can be accurately identified by outsiders.

A. How the Decision to Settle or Sue Can Go Wrong

1. How Rational Parties Decide Whether to Sue or Settle

A party decides to sue or settle by comparing the value of the two alternatives—settlement and continued litigation. Continued litigation may lead to a “fight to the finish” in which there is a judgment after a contested hearing or trial, an opinion on the merits, an appeal, and perhaps postjudgment resistance to the court’s decree. But the choice is not always so stark. Because settlement is always permitted, even during and after trial, often the choice is not between settlement and judgment, but between settlement now and settlement later. A rational party will not contest a claim unless her expected net gain from continued litigation is greater than her expected net gain from settlement. Thus, for settlement to occur, the defendant must be willing to make an offer the plaintiff believes is superior to the result of any continued litigation. When the plaintiff’s expected gain from litigation is less than the defendant’s expected loss, settlement is possible because there is a “settlement gap,” a range of values between the parties’ respective estimates at which a settlement will benefit both parties.

The existence of a settlement gap does not, however, guarantee that settlement will occur. The parties must still reach agreement within that gap. They can do so by bargaining, but bargaining is risky. A bargainer may convey information that can be used against her if bargaining breaks

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42. Of course, continuing the dispute is not the only alternative to settlement. If settlement does not occur, each party can still surrender, either by dropping a claim or by granting the remedy demanded.

43. See, e.g., Fiss, supra note 13; Menkel-Meadow, For and Against Settlement, supra note 13.


down. By making concessions, a party also risks foregoing more of the joint gains from settlement than are necessary to reach agreement. These risks may prevent either party from commencing bargaining or from making an offer within the settlement gap. Even when a party receives such an offer, she may reject it if she thinks her opponent will later sweeten it, thereby running the danger that no better offer will be forthcoming and that the litigation will continue.

Numerous factors influence the likelihood of a settlement gap. When the plaintiff views her prospects more optimistically than does the defendant, the settlement gap will be small or nonexistent, and cases will therefore tend not to settle. This state is sometimes referred to as “excessive optimism.” Excessive optimism is more likely to prevent settlement as stakes increase because modest differences of opinion translate into larger differences in the expected value of the outcome. A settlement gap is more likely when litigation costs are high and less likely when they are low.

The parties’ preferences and values strongly influence the likelihood of a settlement gap. When the outcome is uncertain, risk-averse parties will assign a lower value to an adjudicated outcome than risk-neutral parties, increasing the likelihood of a settlement gap. Parties may also differ in their valuation of other consequences of litigation. For example, settlement is less likely when parties place an especially high value on the opportunity to have their day in court, to gain public vindication, or to obtain a favorable precedent.

46. Sometimes the information communicated will be admissible as harmful evidence, such as a party admission. But parties may often be reluctant to communicate even information favorable to their case. For example, a party may fear that if she discloses a devastating line of cross-examination that will certainly succeed at trial, her opponent will be able to avoid that line of examination through trial preparation.


48. Cooter et al., supra note 47, at 225. This may occur because the plaintiff assigns a higher probability of prevailing on the issue of liability than does the defendant or because she expects more substantial relief following a finding of liability. “Excessive optimism” is more likely to be present when the case is close, in the sense that both sides have substantial grounds for optimism. See Priest & Klein, supra note 44, at 15-16.


50. E.g., Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 28-30 (1983) [hereinafter Galanter, Reading the Landscape].
Complex factors determine the likelihood of a bargaining breakdown. Familiarity or a continuing relationship with an opponent may reduce a party's fear that the opponent will ruthlessly exploit concessions. In addition, disputants who have dealt with each other previously are less likely to mistake each other's values, preferences, or likely courses of action, and hence are less likely to stumble mistakenly into litigation.51

2. Limitations of the Rational Actor Account

Even within the confines of a simple rational actor account, parties can make mistaken decisions to sue or settle. All that a rational actor model requires is that people use rational methods of calculation and be right on average. The potential sources of error in party decisionmaking, however, run deeper. The conventional rational actor account of settlement decisionmaking assumes that rational actors calculate accurately, that party preferences are well understood, stable, and autonomous, and that parties are monolithic, or at least well served by their agents. In ordinary litigation, however, those assumptions may frequently fail, producing new sources of error in decisions to litigate.

a. Problems of Calculation

Rational actor accounts are subject to important limitations, limitations that have special relevance to choices between settlement and further litigation.52 Those accounts assume that parties choose between alternatives whose expected values have been calculated on the basis of previously gathered information. But the accounts contain no criteria for deciding how much information to gather before calculating the value of each alternative. In practice, rational actors must make these critical decisions about information gathering by using "good enough" or "satisficing" rationality, based on "rules of thumb" derived from experience, folklore, and intuition.53 This problem is endemic to decisions to sue or

52. A weakness in rational actor accounts is that presently economic theory cannot predict how often two parties will bargain to agreement in cases where a settlement gap exists or what the terms of any resulting settlement will be. The bargaining process and its outcomes are largely a "black box," about which little is known. See, e.g., Geoffrey P. Miller, Some Agency Problems in Settlement, 16 J. LEGAL STUD. 189, 189-93 (1987). But given that no alternate theory of bargaining generates strong predictions of settlement outcomes, this objection is scarcely decisive.
settle, in which parties have to decide whether to invest resources in obtaining additional information before deciding on a course of action.

Parties who have gathered the "right" amount of information may also make systematic errors in calculating the value of outcomes. Rationality requires a combination of aptitude, training, and appropriate skepticism that many actors lack. Even for simple decisions, many people rely on simplifying information-processing heuristics that sometimes result in erroneous choices. For example, people often rely excessively on evidence about the particular case before them, while giving inadequate weight to base rate data about the distribution of outcomes in similar situations. Inexperienced decisionmakers are more likely to make such erroneous decisions. The risk of failures of calculation is disturbingly relevant to decisions to sue or settle because most individual (and many organizational) litigants are very inexperienced.

b. Problems with Preferences

Preferences may not always reflect the welfare of the party holding them. Sometimes a party's preferences are unstable or uninformed, and hence subject to change as the result of experience. For example, an

54. JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter HEURISTICS]. See generally RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980). Nisbett and Ross define heuristics as "cognitive strategies, or rules of thumb" used by laypersons to solve "a variety of inferential tasks." Id. at 7.

55. Nisbett & Ross, supra note 54, at 24-28. This is the so-called "representativeness" heuristic. Decisionmakers are also prone to giving excessive weight to information that is "available," because it is public or memorable. Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, in HEURISTICS, supra note 54, at 163. In addition, decisionmakers habitually overestimate the accuracy of their judgment. Stuart Oskamp, Overconfidence in Case-Study Judgments, in HEURISTICS, supra note 54, at 287.

56. Marc Galanter suggests that at any given time "a sizeable minority—probably less than one-fifth—of American adults have some time in their lives been a party to civil litigation." Galanter, Reading the Landscape, supra note 50, at 21. Given that most civil disputes are settled short of litigation, the percentage of individuals who have settled at least one litigable claim is undoubtedly much higher, but it is unlikely that most individuals have substantial experience in settling such claims. In a survey of interorganizational disputants, 31% of all respondents reported that none of their disputes went to court. Id. at 22 & n.100.

57. ELSTER, supra note 53, at 112-13. Elster implies that the phenomenon of inexperienced preference might also arise from a lack of information about the consequences of one's actions. Id.; see also Mark Kelman, Choice and Utility, 1979 Wis. L. REV. 769, 781.
inexperienced litigant's preference for harmony may reflect ignorance of the pleasures of vindication and justice. Other preferences may reflect bad habits, addictions, or adaptation to the range of alternatives that the actor believes to be feasible. A litigant who has suffered injustice may, as a means of reducing her unhappiness, have lost her taste for justice precisely because it seems unattainable. In litigation, this adaptive preference may well bias her toward settlement. Alternatively, a long-deprived litigant may develop a dysfunctional hunger for that which is unavailable or is in someone else's possession, biasing her toward continued litigation.

The process by which preferences and values are identified and ranked is also potentially imperfect and prone to error. Some preferences and values may loom large, while others are lost or ignored. Rational actor theory explains neither the nature of the internal deliberation used to identify and weigh preferences, nor how much effort the decisionmaker should invest in determining whether those preferences are stable, well informed, and autonomously derived.

Difficulties remain even when calculation is perfect and preferences are well worked out. A rational actor is not always reasonable. Some preferences, especially those connected to one's sense of personal integrity and justice, are too fundamental to trade off. Nor is rational action necessarily moral. Some maximizing actors will give no weight to the harms they impose on opponents, the judicial system, or third parties, while others will give substantial weight to altruistic or public-spirited concerns.

60. Elster describes such preferences as counteradaptive. ELSTER, supra note 53, at 22-23.
62. ELSTER, supra note 53, at 9 & n.17.
63. Rational actor models that leave no room for altruism or public concern are seriously limited. This limitation can be characterized as: (1) an unrealistic denial of the possibility of altruism (all preferences are selfish), see Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 Phil. & Pub. Aff. 317 (1977), or (2) an unrealistic assumption that everyone has her price (all preferences are continuous), see, e.g., ELSTER, supra note 53, at 9 n.17. There is, of course, considerable evidence that many litigants are more concerned with their economic self-interest, narrowly defined in terms of the amount of money paid or recovered, than with seeking justice. See, e.g., Leon H. Mayhew, Institutions of Representation, 9 Law & Soc'y Rev. 401, 413 (1975). Some litigants, however, have broader concerns. For examples of rational actor accounts of legal behavior that incorporate more realistic assumptions about altruism, see Bundy & Elhauge, supra note 23, at 313, 322-23, 366-
c. Agency Problems

For organizations, the disloyalty of agents also threatens the quality of litigation decisions. Organizations can decide whether to settle or litigate only through agents: government officials, officers, directors, managers, and employees. Whenever a party acts through an agent, the agent may seek to further her personal interests rather than the party's. In order to minimize this risk, principals can monitor agents.\(^6^4\) Realizing that their loyalty is suspect, agents make bonding commitments to their principals that minimize their apparent incentive to act disloyally.\(^6^5\) But even an optimal system of monitoring and bonding normally will leave opportunities for agents to profit from disloyalty, in part because designing controls upon agents is itself a task for imperfect, satisficing rationality.

Disloyalty can prevent good settlements and cause bad ones. Agents who were involved in disputed events may continue litigation to vindicate their personal positions\(^6^6\) or settle to cover up their own wrongdoing.\(^6^7\) When a claim profoundly threatens the agent's organization, agents may settle because they fear an adverse result will end their careers (perhaps because they are risk averse),\(^6^8\) or litigate to shift responsibility for a difficult decision to the tribunal.\(^6^9\) Even an agent's view of fairness or morality may disserve institutional interests, either because it


\(^{65}\) Id.


\(^{67}\) See generally Fiss, *supra* note 44, at 1078 & n.16 (citing a chief executive officer who settles a shareholder derivative suit to avoid disclosure of management policies where such disclosure might be beneficial to shareholders).


\(^{69}\) See, e.g., Stephen B. Goldberg et al., *Dispute Resolution* 276 (1985) (explaining that a mini-trial may be attractive to in-house counsel or retained lawyers because of "internal corporate politics, such as a desire to shift or focus responsibility for the outcome of the litigation").
inclines the agent to make more generous offers of settlement or because it stiffens the agent's resolve to pay "not one cent for tribute."

3. **Lawyers and the Problems of Professionalism**

The decision to sue or settle belongs to the party, but the parties normally receive legal advice in making the decision. Professional knowledge will generally improve client decisionmaking. Parties with lawyers should be able to make better estimates of the likelihood that they will prevail, of probable remedies, and of expected costs. Professional knowledge is not, however, a panacea. Some lawyers are not competent. Equally important, professional competence is a form of "satisficing" rationality that is traditional, experimental, intuitive, and pragmatic in all the senses described above. Moreover, lawyers—like other professionals—are not immune to basic failures of calculation based on heuristics or framing effects.

a. **More Agency Problems**

Hiring a lawyer also creates an additional set of agency problems. The interests of clients and lawyers can diverge for a host of reasons.

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70. Ross, supra note 47, at 65. Ross points out that devotion to fairness on the part of the insurance adjusters whom he studied was generally "in harmony with the short-run business interest of the organization" in clearing its own files promptly. Id.

71. See, e.g., Bundy, Rational Bargaining, supra note 44, at 359-60 (describing how Texaco management viewed settlements as capitulation to judicially sanctioned "terrorism").

72. Under both agency law and the standard understanding of the lawyer's role, lawyers must seek the client's instructions regarding the "objectives" of the representation and obey those instructions unless they call for conduct forbidden by law. In contrast, lawyers enjoy professional discretion with respect to the "means" by which those objectives are accomplished. Broadly speaking, a decision is more likely to be seen as involving an objective when it has a major impact on the client's well-being, when its correct resolution depends heavily on knowledge of the client's preferences and values, when the circumstances allow for extensive consultation between client and lawyer, and when the risk that the attorney may be tempted to act disloyally is high. By all four measures, the decision whether to settle or litigate involves a client "objective," and the professional rules reserve it to her. See Model Rules of Professional Conduct Rule 1.2 cmt. (1991).

73. See Bundy & Elhauge, supra note 23, at 365-66.


76. Among those reasons are fee arrangements, personal identification with or revulsion for the client or her cause, obligations to other clients, desire to curry favor with prospective clients, or concern for reputation, whether with other lawyers, the tribunal, or the wider public.
Because lawyers are experts, clients have a hard time detecting attorney disloyalty, and most clients have no effective way to punish it. These difficulties are especially acute for inexperienced litigants. In theory, the lawyer's professionalism should make up for the imbalance of knowledge and power between the lawyer and her client, but in practice, disloyalty may be frequent.

Whether the lawyer's interest will favor or disfavor settlement varies depending on the kind of case, the economics of the attorney-client relationship, and the stage of litigation at which the conflict arises. For example, contingent fee lawyers may have strong financial incentives to oversell the benefits of litigation at the commencement of the case in order to persuade their clients to retain them and file claims. Once retained, however, these lawyers may have strong incentives to underinvest in investigation and to oversell the benefits of settlement to their clients. Conversely, hourly fee lawyers, who typically represent organizational parties, may have an incentive to advise continuing litigation in order to increase their billings, at least when they have no comparably lucrative case in hand. Nonfinancial conflicts may also affect the lawyer's position on continuing litigation. Lawyers who wish to avoid unpleasant confrontations with potential clients or other influential community figures may strongly urge

77. E.g., Lestor J. Mazor, Power and Responsibility in the Attorney-Client Relation, 20 STAN. L. REV. 1120, 1121 (1968) ("The same inconveniences of time and distance that required representation, the very barriers of language and technicality that deterred direct participation, undermined the litigant's ability to judge accurately the qualifications of his lawyer.").

78. Unless the client is a frequent litigant who can withhold repeat business, discharge may be the only practical sanction. Discharge, however, is often prohibitively costly. Among other things, it may require that a new lawyer be hired and brought up to speed.


80. See, e.g., DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO IS IN CHARGE? 96-99 (2d ed. 1977). For economic analyses of this phenomenon, see Miller, supra note 52, at 198, and Murray L. Schwartz & Daniel J.B. Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 STAN. L. REV. 1125 (1970). Of course, there are also cases in which the contingent fee lawyer wishes to proceed to trial but the client does not because she is more risk averse than her lawyer. Miller, supra note 52, at 200.

81. Miller, supra note 52, at 202-03.

82. Herbert M. Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort, 19 LAW & SOC'Y REV. 251 (1985).
settlement.\textsuperscript{83} Other lawyers may counsel settlement late in the case because they want to avoid the hard work and reputational risks of a trial.\textsuperscript{84}

\textbf{b. Limits of Professionalism}

Even competent, loyal attorneys cannot guarantee a good settlement decision, because professional knowledge is limited and because the client retains the ultimate decisionmaking power. When the client's decision involves information-gathering and calculation about matters outside the lawyer's professional expertise, professional training will not equip the lawyer to recognize client errors.

Nor do lawyers necessarily resolve problems resulting from the client's uninformed, transient, non-autonomous, or ill-considered preferences. While professional rules clearly state that the client's will governs, they provide little guidance for the lawyer when the client's preferences are misguided. Is the lawyer bound by the client's initial statement of objectives or is she permitted or obliged to take a more active role in the client's deliberative processes? The question divides the profession.

Those who want to limit the lawyer's role in client deliberations stress the risk of unwanted intrusion, error, and manipulation.\textsuperscript{85} The lawyer is often a stranger to the client, and her professional expertise does not extend to the client's life situation or her deliberative processes. Intimate deliberative counseling also increases the risk that the lawyer will consciously or unconsciously steer the client's decisionmaking to serve the lawyer's interest. By contrast, those who argue for deliberative counseling stress that the client's initial expression of preferences is likely to be incomplete or poorly formed, that clients in litigation are often "not themselves," that clients want "nonlegal" advice, and that lawyers often have experience with the kinds of mistakes parties make in deciding whether or not to litigate.\textsuperscript{86}

Controversy also attends the question of the lawyer's obligation when confronted with client choices that are immoral or contrary to pub-


\textsuperscript{84} See Alexander, \textit{supra} note 68, at 543-44 (lawyers for plaintiffs in securities class actions).


lic policy. Professional rules forbid the lawyer to counsel or assist in the prosecution of claims that are known to be fraudulent, frivolous, or brought principally to harass or harm the opponent. But these restrictions leave much conduct untouched, in part because the lawyer is not required to inquire into her client's motives. The limits imposed by external law are not significantly more burdensome. In many cases in which the client's proposed actions are harmful, the lawyer need not oppose them.

If the lawyer is not legally required to challenge most morally questionable client decisions, what are her moral obligations as a professional? Again, the profession is divided. Many believe that attorney activism is a prescription for disaster. Public policy is unknowable or inherently contestable, and the lawyer has no special expertise in this area. In addition, there is a great risk that the lawyer will mistake her own views or her selfish interests for the common good. An opposing view sees the lawyer as an independent force for compliance with societal norms, whose training, rather than being limited to predicting outcomes, also enables her to divine the result that represents the law's spirit. Sometimes client autonomy will be promoted by providing such advice. Clients who want to make the morally correct decision may desire such advice, and others who have not reflected on the relation between their expressed desires and their moral views may benefit from receiving it.

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88. See supra text accompanying note 18 (discussing FED. R. CIV. P. 11).
89. The present professional rules permit lawyers to raise nonlegal considerations with their clients, but do not require them to do so. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1991). Such considerations include "moral, economic, social and political factors." Id. The Rule does not state, however, whether the lawyer's role in raising those questions is to assist the client in determining her own preferences or to counter the client's pursuit of preferences that the lawyer regards as antisocial. For views on the propriety of advice that seeks to prevent arguably legal but antisocial actions, compare Simon, supra note 61, at 130-40 (advocating active involvement in the client's deliberations) and Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. REV. 1 (1988) (arguing that such involvement is both inevitable and beneficial) with Abe Krash, Professional Responsibility to Clients and the Public Interest: Is There A Conflict?, 55 CHI. B. REC. 31 (1974) (arguing that once lawyers have agreed to represent a party, they should scrupulously avoid imposing their view of the public interest on the client).
90. Even when the client will not benefit, many argue that the lawyer's professional obligation to represent the public interest may require that the lawyer use her rhetorical skills, personal prestige, and if necessary, the threat of withdrawal to force the client into the path of the law.
4. Conclusion

This Part has identified several ways in which decisions to sue or settle can fail to reflect the parties' best interests, even when both parties are represented by lawyers. A practical criterion for rational settlement decisionmaking should honestly reflect these complexities. This Article proposes that the test should be whether the party was adequately informed of the available options and able to reach a deliberate decision in accord with her own preferences and values. A party is adequately informed when she obtains the same information that a party represented by a competent and loyal professional exercising her best judgment would have obtained. A party is able to reach a deliberate decision when she is able to see and analyze the choices relatively clearly, relatively free of wishful thinking or distorting heuristics, and can reflect on her preferences sufficiently to determine when they are likely to be subject to alteration or are adaptive. The test assumes that rationality is the product of "rules of thumb" based on the experience and intuition of the parties and professionals who represent them. Decisions that fail this test may be described as pragmatically irrational.

When a decision is pragmatically irrational and can be identified with confidence, intervention to correct it might be justified as a form of paternalistic regulation. Without reliable access to confidential information about a party and her lawyer, however, it often may be difficult for an outsider to determine whether a decision either to continue litigation or to settle is pragmatically irrational. The concept of rational settlement decisionmaking is neither neat nor well defined. It involves significant elements of trial and error and "rule of thumb." Moreover, pragmatically rational decisions may sometimes be unreasonable, immoderate, or out of harmony with the public interest. The lawyer's role in settlement counseling is also loosely defined and contested. The flexible and intuitive character of professional knowledge, the risk of conflicts of interest, and the deep intraprofessional divisions regarding the lawyer's counseling obligations all indicate that a range of settlement decisions may be consistent with appropriate professional performance. Thus, many decisions that appear irrational to an outsider may actually be pragmatically rational.

Finally, it is worth stressing that a pragmatically rational decision is not a perfectly informed decision. It may not be as good as the decision the parties might have reached with additional information or further opportunity to deliberate. In some cases a tribunal or other observer may therefore be able to improve the party's decision, if it can identify
and supply the missing information. Of course, in some cases the decision to litigate will be rational under either standard, because both parties would benefit from continued adversarial litigation.

B. The Impact of Changes in Federal Civil Litigation on the Quality of Decisions to Sue or Settle

We can now evaluate the claim that parties to federal court litigation increasingly decide to continue litigation even when settlement would be in their best interest. I first briefly consider and reject the claim that mistaken decisions to continue litigation result from undue litigiousness. I then examine three major trends in federal litigation that appear to have had more substantial influence upon party decisions to sue or settle: new and larger claims involving inexperienced disputants and lawyers, increased variability of judge and jury decisionmakers, and growing numbers of lawyers with decreasing experience.

1. Excessive Litigiousness

A considerable body of literature advances the claim that Americans are too “litigious.”\(^9\) Normally litigiousness is identified as a characteristic of individuals, rather than organizations, and of plaintiffs, rather than defendants.\(^9\) Proponents of this view offer three related accounts of the effect of “excessive litigiousness” on the wisdom of party decisions to sue or settle.\(^9\) The first is that some individual litigants are subject to a kind of preference disorder: either an ill-informed taste for litigation that will change as soon as they experience its costs or a hunger for justice or personal redemption that is based precisely on its unat-

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91. For example, there might be some information about the strength of a party’s case or about her willingness to consider settlement that the party will not communicate to her opponent because of her reasonable fear that it would be used to her disadvantage. Although such a decision may be pragmatically rational, an intervenor might be able to facilitate the communication of that information in order to raise the probability of settlement.


93. For example, the sources cited in Galanter, Reading the Landscape, supra note 50, at 5-11, consistently refer to claims by individual plaintiffs.

94. Many commentators who argue that American society is excessively litigious are concerned that parties’ decisions to bring suit (or not to settle claims) harm the public interest, not that those decisions are harmful to the parties making them. This view treats litigiousness as a problem of antisocial, rather than self-destructive, behavior. See, e.g., OLSON, supra note 92, at 7 (“Litigation and its threat have begun to metastasize to virtually every sector of the economy.”); Bayless Manning, Hyperlexis: Our National Disease, 71 NW. U. L. REV. 767, 770 (1977) (“Hyperlexis is not a nuisance. It is a heartworm that has a literally fatal potential for the body politic of this country.”). Claims of this kind are discussed infra Part III.
tainability. The second focuses on calculation: parties fail to see benefits and costs clearly because their decisionmaking process is clouded by anger. The third centers on inexperience: parties underestimate the costs of litigation, particularly costs to valued relationships.

These accounts, however, cannot withstand close examination. Although little is known about individual plaintiffs’ decisions to pursue litigation, the available information suggests that self-destructive litigiousness is not a widespread cause of mistaken decisions to continue litigation. Far from being hypersensitive to violations of their rights, many potential claimants do not even recognize they have been wronged, and when parties do recognize a wrong, decisions to sue appear to be deliberate and attentive to costs and benefits. This is not surprising: for most individuals suing is a once-in-a-lifetime decision.

Even if self-destructive litigiousness were an influential factor in some cases, it would be difficult for outside observers to reliably determine whether particular decisions to continue litigation are based on self-destructive litigiousness or pragmatic rationality. The preference disorders or failures of calculation identified by critics of litigiousness may closely resemble a normal sense of justice or righteous indignation. If a party’s lawyer cannot reliably identify ill-formed or adaptive preferences, it will clearly be much more difficult for a stranger to do so. Similarly, outsiders unfamiliar with a party’s economic or social circumstances will have a hard time deciding whether she has accurately identified and weighed the costs and benefits of bringing a lawsuit.


96. This is the substance of the claims that Americans have “hair-trigger” sensibilities. See, e.g., Rosenberg, supra note 95, at 153 (arguing that American litigants can be viewed as “taut, testy, even ill-tempered”).

97. This is the view reflected in Chief Justice Burger’s citation of Abraham Lincoln’s advice to clients. See Burger, supra note 35, at 275.

98. Recent studies of medical malpractice claims, for example, show that only a small fraction of negligently inflicted injuries give rise to claims. Paul C. Weiler, Medical Malpractice on Trial 12-13 (1991).

99. The evidence is summarized in Galanter, Reading the Landscape, supra note 50, at 19-26.

100. See supra text accompanying notes 85-86.
2. Changes in the Kind and Magnitude of Claims Being Brought

a. Novel, Large, and Technically Complex Claims

Over the past twenty-five years, there have been marked changes in claims of moderate to high complexity brought in the federal courts. The newer cases involve novel legal and factual claims, higher stakes, multiple parties, and greater technical complexity. In 1960, civil dockets were dominated by contract and tort litigation involving the federal government and tort actions arising under diversity jurisdiction. Together, these two categories of cases made up 66% of the moderate- and high-complexity cases filed. Of the diversity tort actions, 55.6% were automobile personal injury cases. In 1986, however, these two categories of cases represented only 34.33% of the moderate and high complexity cases, and within the category of diversity tort cases, the percentage of motor vehicle cases had declined to 23.1%.

What replaced government tort and contract litigation and diversity automobile personal injury cases as the dominant cases in federal courts? Primarily, the growth came in three areas: diversity contract cases, civil rights cases, and products liability actions. In 1960, those claims made up about one-tenth of the moderate- to high-complexity cases. In 1986, they constituted about one-third of a vastly increased caseload.

101. I exclude from this category cases seeking recovery of Veterans Administration benefits, cases involving student loans, prisoner cases, social security cases, and forfeiture and penalty cases. Significantly, only a tiny fraction of these cases go to trial. Marc Galanter, The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days, 1988 Wis. L. REV. 925, 948-50 [hereinafter Galanter, The Life and Times]. What is more, none of the judicial or scholarly literature dealing with settlements contains any discussion of settlement of such cases.

102. Id. at 925. Government contract and tort litigation made up 32% of the total caseload and diversity torts made up 24.8%. When the cases excluded in note 101 are eliminated, the resulting figure is 66%.

103. Id. at 937.

104. Id. at 925, 937.

105. According to Galanter, diversity contract actions constituted 7.6% of 1960 filings and civil rights cases constituted 0.5%. Id. at 925. Products liability cases were not analyzed as a separate category, but must have been less than 2%. In 1975, after fifteen years of growth in products liability filings, they constituted only 10.2% of all diversity tort claims. Id. at 937. In 1960, products liability filings presumably represented less than that percentage of the tort claims filed.

106. In 1986, diversity contract actions constituted 12.5% of all cases filed (18% of moderate to high complexity cases), and civil rights cases constituted 7.9% of all cases filed (12% of moderate to high complexity cases). Id. at 925. Galanter did not report products liability figures for 1986, but assuming that, as in 1985, they constituted about 30% of diversity tort filings, they would make up about 4% of the caseload (6% of moderate- to high-complexity cases). Id. at 925, 937.
Much of this new caseload involves novel factual and legal issues. The law of civil rights, employment discrimination, wrongful termination, products liability, and toxic torts was largely embryonic in 1960. New areas of law generate uncertainty because they involve unresolved legal questions. In addition, it is difficult to predict how finders of fact will respond to the new kinds of claimants and fact situations presented. Such uncertainty may fuel disagreement and reduce the likelihood of early settlement.

The new wave of litigation has been marked by an increase in the technical complexity of the factual issues to be decided. Automobile cases, in which liability is typically determined according to the "rules of the road," have been supplanted by products liability and toxic tort cases that require the resolution of difficult scientific and engineering issues. Environmental and intellectual property cases also increasingly involve difficult technical questions. In civil rights cases, a detailed evaluation of the policies, practices, and structure of large private and public institutions is often required. This increase in technical complexity has not, however, been matched by an increase in the technical training afforded judges and jurors. The mismatch between lay decisionmakers and technical issues should reduce the predictability of outcomes, because the strength of the connection between the evidence presented and the tribunal's evaluation is reduced.

The new wave of litigation involves higher stakes. For example, William Nelson's study of diversity contract litigation in the Southern District of New York suggests that on the average such cases filed in the 1970s involved stakes that were five times as great as the stakes in similar cases filed in the 1960s, a rate of increase far surpassing the overall rate of inflation. The number of high-stakes cases arising under federal law has also increased, and those cases are now based on a broader range


109. The precise magnitude of the increase in such cases is not known. It is suggestive, however, that the number of federal civil trials requiring more than 20 days to try increased from twenty-three in fiscal year 1964 to eighty-six in fiscal year 1989, a nearly fourfold increase during a period when the total number of civil trials increased by less than 100%. See ADMINISTRATIVE OFF. OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 208, tbl. C-9 (1965) [hereinafter 1965 ANNUAL REPORT]; ADMINISTRATIVE OFF. OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 165, tbl. C-9 (1990) [hereinafter 1990 ANNUAL REPORT]. Similarly, from 1965 to 1984 the annual number of civil trials lasting four to nine days in the federal courts has increased more than 150% and the number of trials lasting more than ten...
of substantive legal theories. Moreover, in some of these newer cases, the high stakes are not only a function of money, but also of the political content of the proposed remedy. Particularly in civil rights and environmental litigation, federal court remedies increasingly involve direct involvement in the ongoing operations of state and local government.

Finally, although there is little data on this issue, more new cases appear to involve multiple parties. For example, products liability and malpractice cases seem more likely to involve multiple defendants than automobile personal injury cases or Federal Tort Claims Act cases. The same is true of many civil rights claims, such as claims against municipalities under § 1983.

Almost all these changes in the character of federal litigation are consistent with a pragmatically rational increase in the duration of litigation. Whether due to novelty or complexity, uncertainty ought to increase the duration of litigation, at least for risk-neutral parties. Higher stakes should have the same effect because a greater amount in controversy justifies a greater investment in investigation, and because higher stakes magnify the effect of excessive optimism about liability.

These changes should also influence the cost of bargaining. Even for pragmatically rational parties who expect the same outcome, it should be more difficult to settle cases because multiparty cases increase bargaining cases. Moreover, higher stakes and greater complexity should increase the opportunity and incentive to invest in more complex bargaining strategies involving more rounds of negotiation. This too may exacerbate the risk of strategic breakdowns.

b. New Institutional Parties

The shift in the federal caseload reflects, in part, a greater number of suits involving institutions that previously had little contact with litigation and therefore may have lacked institutional competence in handling it. For example, civil rights claims have involved commercial, nonprofit, and government employers in massive amounts of unprecedented litiga-

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110. For example, in 1964 eleven of twenty-three trials lasting longer than twenty days were in antitrust or patent cases. 1965 ANNUAL REPORT, supra note 109, at 208, tbl. C-9. In 1989, only eleven of eighty-six cases trials of that duration involved patent or antitrust claims. 1990 ANNUAL REPORT, supra note 109, at 165, tbl. C-9.

tion. Products liability and large-scale contract cases brought into court businesses with little prior exposure to litigation.\textsuperscript{112}

Institutions without any significant litigation experience were presumably vulnerable to a wide variety of errors. Initially, they could not accurately predict the nonlegal benefits and costs of litigation, including costs to relationships with opponents or the community, in part because they often lacked the means for gathering and evaluating information about such costs. Such organizations may also have been ill-equipped to control employees whose interests in venting their own anger, vindicating their own decisions, or avoiding blame for a bad result differed from the organization's interest. Finally, inexperienced organizational disputants often lacked mechanisms for evaluating and controlling the work of their lawyers. Moreover, when providing advice about aspects of the client's operations not previously the subject of litigation, lawyers for those institutions may have often lacked sufficient knowledge of the client's business to counsel effectively about nonlegal costs and benefits of further litigation. For all these reasons, such institutions may well have made unusually severe or frequent mistakes in deciding how to prosecute and defend new types of claims.

c. New Problems of Professionalism

The new federal caseload also placed novel burdens on lawyers. Of course, they had to learn new areas of law. They were also required to learn a new professional skill: management. Complex cases with high stakes resist handling by one or two lawyers. The range of required tasks often calls for an organizational structure or hierarchy.\textsuperscript{113} To prepare and present such cases efficiently and to make accurate cost estimates, the lawyer handling the case must know how to plan and delegate, how to define responsibilities, tasks, and goals for the other lawyers working on the case, and how to establish effective routines for communication and monitoring.

Formal professional training for lawyers, however, has never included exposure to management skills, and opportunities for on-the-job training have historically been limited. Prior to 1960 there were few complex cases, and only a few firms, located for the most part in New York and Washington, gained experience in management-intensive litiga-

\textsuperscript{112} For a discussion of the factors underlying increased business litigation, see Marc Galanter et al., The Transformation of American Business Disputing 3-4 (Jan. 5, 1989) (unpublished manuscript, on file with author).

\textsuperscript{113} See Mary Twitchell, The Ethical Dilemmas of Lawyers on Teams, 72 MINN. L. REV. 697, 714-15 (1988).
The new high stakes cases arise and are venued in many more communities. As such litigation spread to new communities and to new fields of law, many litigators learned management skills by trial and error. Prediction of costs in such cases was undoubtedly exceptionally inaccurate, and clients may have found it especially difficult to monitor the managerial decisions made by their lawyers. When there was a combination of new causes of action, inexperienced institutional parties, and lawyers undertrained for dealing with complex litigation, the impact on the quality of settlement decisionmaking was undoubtedly severe.

3. Increased Variability of Outcome

The predictability of federal court trial outcomes has been affected by an increase in the number and variability of decisionmakers. Since 1965, for example, the number of federal trial judges has increased by eighty-seven percent. In some jurisdictions, the ethnicity, gender, and professional experience of appointed judges span a significantly broader range than in the recent past. In addition, selection for the federal judiciary, even at the trial court level, has increasingly been based on the judge's perceived ideological views. At the same time that judges' pro-

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114. The most notable example is the law firm of Cravath, Swaine & Moore. Robert Swaine's famous description of the "Cravath System," in which junior lawyers are given a component piece of a complex problem to perform and a central skill of partnership is the ability to delegate reflects the beginnings of managed litigation. In the early part of this century, the firm's "big" case practice, which featured railroad reorganizations, antitrust disputes, and patent disputes, was as unusual as the mode of practice that it spawned. 2 ROBERT T. SWAINE, THE CRAVATH FIRM 1-12 (1948).

115. During 1964, in cities other than New York, Chicago, Philadelphia, Detroit, and Washington, D.C., there were only twelve federal trials of more than twenty days, and five of these were patent or antitrust cases. 1965 ANNUAL REPORT, supra note 109, at 208, tbl. C-9. In 1989, there were sixty-seven such trials of which fifteen were patent or antitrust cases. 1990 ANNUAL REPORT, supra note 109, at 165, tbl. C-9. The data suggest a vast increase in complex litigation in new subject areas and in communities in which the lawyers lacked substantial experience in managing such litigation. In commercial cases, this increase can be attributed to the growth of the economies of the South and West and to the migration of major corporate headquarters from the Northeast and the Rust Belt. In civil rights and environmental cases, this increase reflects the fact that every state and local government is potentially the subject of such litigation.

116. To the extent that the lawyers may have been inclined to overstate the benefits or to underestimate the costs of continued litigation in order to line their pockets, they probably found it easier to do so.

117. See 1965 ANNUAL REPORT, supra note 109, at 92; 1990 ANNUAL REPORT, supra note 109, at 45. Increases in some important urban districts have been even more pronounced (e.g., S.D. Fla. 300%; N.D. Ga. 233%; S.D. Cal. 250%).

118. See, e.g., Elaine Martin, Women on the Federal Bench: A Comparative Profile, 65 JUDICATURE 306, 311 (1982) (showing, for example, that no women judges appointed during the Carter Administration came from large law firms).

119. See, e.g., Elaine Martin, Gender and Judicial Selection: A Comparison of the Reagan
fessional and personal backgrounds have become more varied, the
Supreme Court has expanded the range of unreviewable discretion afforded to trial judges in deciding both preliminary procedural issues and disputed questions of fact at trial. When the disputed issue is legal, the court of appeals’ decision may depend on the identity of the panel, which cannot be predicted at trial.

There is also greater variation in the composition of and the results obtained from juries. In most federal courts, juries are now smaller—six persons instead of twelve. Inevitably, six-person juries are less representative of the community from which the jury is drawn. In larger cases, which take longer to try, the problem of representativeness becomes acute because very few persons can serve without severe economic hardship. Juries in such cases are frequently drawn from very narrow segments of the community. The decisions of smaller juries are also more variable than those of larger juries. While juries have become less representative and more volatile, the legal trend—recently reversed in part—has been to increase the range of cases in which there is a right to jury trial and to make it more difficult for trial courts to take cases from the jury by granting motions for summary judgment, for directed verdict, or for judgment notwithstanding the verdict.


120. See, e.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (holding that a motion to disqualify counsel is not a collateral order subject to immediate appeal).


123. ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978), aff’d sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981); In re Boise Cascade Sec. Litig., 420 F. Supp. 99, 104 (W.D. Wash. 1976); see also Carrington, supra note 122, at 65-66 (noting that long trials exclude highly educated jurors because they are not willing and/or able to serve as jurors for a substantial period of time).

124. Hans Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971); Carrington, supra note 122, at 53-54. For some striking anecdotal evidence on jury variability, see Huber, supra note 107, at 277-86.

125. The leading cases include Ross v. Bernhard, 396 U.S. 531 (1970), Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Beacon Theaters v. Westover, 359 U.S. 500 (1959). In several cases, the Court has extended jury trial rights to claims arising under new regulatory statutes. In another significant series of cases, the lower federal courts have refused to recognize an exception to the Seventh Amendment right to a jury trial for unusually complex cases. E.g., In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980).

126. The policy against disposition without a trial is reflected in cases like Adickes v. S.H.
The increased number and variability of decisionmakers should decrease predictability and prolong litigation. When cases are tried before a jury, it may be more difficult to agree on the expected outcome, both because more outcomes are possible on the same facts and because it is increasingly unlikely that lawyers' experience with juries in past suits will provide them with a common basis for prediction. When triable issues are determined by a judge, the parties are less likely to have tried a similar case before the judge and hence have had fewer opportunities to become familiar with her views.127

4. Expansion of the Litigation Bar

A final factor bearing on the quality of settlement decisions is the exceptionally rapid growth of the litigation bar. The profession has nearly doubled in size since 1970.128 In some communities, particularly in the South and West, the rate of growth has been much higher. Many of these new lawyers have become litigators.129 As a consequence, there are more litigation lawyers with fewer years of professional experience than their predecessors.

Less experienced lawyers may produce more pragmatically irrational settlement decisions because they have less experience in trying cases and predicting their outcomes. The experience deficit may be even more severe because younger lawyers are likely to have participated in trial less frequently than their forbears.130 A lawyer who lacks trial expe-

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127. In the federal system, where cases are assigned to single judges for pretrial and trial, the greater number and variability of judges may also encourage parties to file cases, rather than abandon them or settle before filing, because of uncertainty about whether the case will be assigned to a judge who would be likely to favor or disfavor one's position.


129. Id. at 855 n.89 (citing Qualifications for Practice Before the United States Courts in the Second Circuit, Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 69 F.R.D. 159, 167 (1975)).

130. Assume, for example, that the number of lawyers engaged in litigation paralleled the 90% increase in the size of the profession between 1960 and 1980 or the 200% increase in the size of the profession between 1960 and 1985. See Barbara A. Curran, American Lawyers in the 1980s: A Profession in Transition, 20 LAW & SOC'Y REV. 19 (1986). No evidence exists on the number of lawyers engaged in litigation during that period, but many believe that there was more than a proportional increase in the number of litigators. Between 1965 and 1989, the number of civil cases tried in the federal courts increased from 7305 to 12,085, roughly 66%, and the number of civil jury trials increased from 2991 to 5207, about 80%. See 1965 ANNUAL REPORT, supra note 109, at 202, tbl. C-7; 1990 ANNUAL REPORT, supra note 109, at
rience may make more mistakes in estimating both how the evidence will unfold and how the court or jury will respond to the evidence and to the lawyer's advocacy. Inexperience may also feed disloyalty to clients. Some lawyers may fear trial unduly, either because it is an unknown or because they fear that their inadequacies will be exposed. Others may be unduly eager to gain trial experience when the opportunity presents itself. A less experienced lawyer may also be more reluctant to commence bargaining for fear of being "taken" by a more experienced opponent.

A larger and less experienced bar may affect litigation even if clients and lawyers do not depart from pragmatic rationality. In a larger bar, lawyers deal with each other less frequently. Outcomes may be more difficult to predict because lawyers are less familiar with the trial skills of their opponents. Outcomes may become even harder to predict as the bar becomes increasingly composed of lawyers who have not tried a sufficient number of cases to establish a reputation.

In a larger and more diverse bar, lawyers will also have difficulty commencing or sustaining bargaining because they have had fewer past dealings and have reduced expectations of future dealings. Lack of past experience with opposing counsel reduces knowledge and trust while the reduced expectation of future dealings diminishes concern about developing or preserving a reputation for trustworthiness. The consequence is

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221, tbl. C-7. This crude measure suggests that a litigator's experience in predicting trial outcomes declined during the period under review. While more recent trials were almost certainly longer and hence may have provided more days on trial, they did not provide more experience in predicting outcomes before a jury.

With some hesitancy, I also offer some evidence from my career as a practicing lawyer. From 1979 to 1984, I served as a litigation associate at a New York law firm with a nationally renowned litigation practice. During this time the firm had about 20 partners and 80 associates doing exclusively litigation work. During my five years at the firm, the lawyers there tried one civil case to verdict before a jury. A senior partner and three associates were involved. Since the case was pending in another state, it provided the firm's lawyers with no insight into the behavior of jurors in New York City, its practice base. In two other cases defended by the firm, juries were impaneled and heard evidence, but the judge dismissed the cases on motions for directed verdicts. During the same period the firm tried two cases to verdict before a judge. Both were pro bono civil rights actions outside the firm's central area of expertise. The most frequent form of trial-type adjudication involving proof of disputed facts consisted of cases in which the relief sought was a preliminary injunction.

131. See McMunigal, supra note 128, at 860. Inexperience affects not only decisions to settle or go to trial, but all decisions to continue litigating. Reduced trial experience does not necessarily translate into reduced experience in handling pretrial work. Lawyers who do not try cases may still understand the improved settlement position that can be achieved by filing a complaint, conducting discovery, or seeking adjudication of selected issues. But their inexperience may still increase errors in estimating outcomes and costs.


133. Robert Axelrod, The Evolution of Cooperation (1984) (describing how re-
likely to be an increase in the contentiousness and incivility of litigation. In an environment of increased contentiousness, both sides are more likely to see initial overtures or concessions as risky, reducing the likelihood of real bargaining. If they do bargain, their ignorance of each other increases the possibility of underestimating the opponent's resolve, which in turn may lead to a failure to settle.

5. Assessing the Wisdom of Decisions to Continue Litigation

How does this account of changes in federal court litigation fit with the view that party decisions to continue litigation increasingly disserve the parties' interests? Certainly, some changes support the claim that in recent decades an increasing number of decisions to continue litigation were pragmatically irrational. Some new institutional litigants had little experience in gauging the nonfinancial costs of litigation and were in a poor position to monitor their managers and lawyers, especially in complex cases. The lawyers for those institutions were often compensated on an hourly-fee basis that, in theory at least, gave them an incentive to prolong litigation. Even those lawyers who did not yield to that temptation may not have known enough about managing complex litigation to give accurate predictive advice about outcomes and costs. In addition, because institutions were often new to litigation, their lawyers may initially have been unable to provide advice informed by an understanding of the institutions' long-term interests.

It would be a mistake, however, to place too much weight on this evidence as a basis for policy-making in the 1990s. Most of the other changes in federal court litigation described earlier are consistent with a pragmatically rational tendency to continued litigation. New and complex claims naturally give rise to uncertainty. Reduced predictability of tribunals and lawyers will also provide rational parties with grounds to disagree. Higher stakes should increase risk-neutral parties' willingness to invest in discovery, and to the extent the parties are excessively optimistic, should also decrease the likelihood that they will settle.

Equally important, the fact that institutional litigants made imprudent decisions to continue litigation in the 1970s and 1980s does not nec-

134. Such an increase is described (and decried) in both academic commentary, see Arthur R. Miller, The Adversary System: Dinosaur or Phoenix, 69 MINN. L. REV. 1, 17 (1984), and judicial opinions, see, e.g., Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) ("valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers").
essarily provide a basis for distrusting such decisions today, unless institutional litigants do not learn from their mistakes. The available evidence suggests, however, that institutional repeat players develop disputing competence rather rapidly. For example, institutions who have floundered in litigation quagmires have, among other things, fired the responsible outside lawyers, improved the quality of inside lawyers, increased both the amount and sophistication of monitoring by those lawyers, taken some disputes in-house, and developed institutional expertise in and mechanisms for alternative dispute resolution. Lawyers for such sophisticated repeat players obviously have significant incentives to improve the quality of their performance and their increased experience in complex litigation enables them to do so.

Even if pragmatically irrational decisions to continue litigation have increased, it may be increasingly difficult to identify such decisions with confidence. In a time of change, decisions that appear imprudent may be pragmatically rational. A strong concept of pragmatic rationality requires a stable framework for evaluation. In new types of cases involving inexperienced institutional parties and new professional challenges, what are the “rational” rules of thumb? Trial and error—or something very much resembling it—may be the pragmatically rational strategy. An apparent increase in doubtful litigation decisions may be a necessary condition for the institutional and professional learning that will ground more effective decisionmaking in the future. Repeat players may indeed have significant advantages in prosecuting or defending recurrent litigation, but they cannot realize those advantages without undergoing the awkward initial “plays” required to become experienced.

The evidence also suggests, however, that there is a growing class of cases in which both parties have acted prudently and a settlement gap exists, but the parties still cannot reach agreement because of strategic behavior. Three phenomena indicate that strategic failures are increas-

138. Among other things, they are aware that they may have to justify their performance in the case not only to their institutional client, but also to other potential purchasers of their services. Rosen, supra note 135, at 484 (describing bidding wars and “beauty contests” in which sophisticated clients shop for lawyers). A staple of such contests are descriptions of results achieved in other cases.
ingly common: higher stakes, which make complex bargaining strategies possible and desirable; more multiparty cases; and the greater size and reduced experience of the bar, which adds to the number of cases in which lawyers are, and expect to remain, relative strangers to each other. Because strategic impediments to settlement may be both easier to identify than imprudent decisions to continue litigation and less subject to advance control even by sophisticated parties, removing those impediments may represent a more important regulatory opportunity than reducing imprudent failures to settle.

Finally, the changes in federal litigation described in this Part may have varying effects in different kinds of cases. The problem of increased strategic barriers to settlement seems likely to operate uniformly across much of the caseload. Problems of imprudent decisionmaking, however, may not do so. Twenty years ago, in cases pitting institution against institution, both parties may have been very vulnerable to pragmatically irrational failures to settle, because of both institutional inexperience and lawyer incompetence or disloyalty. But today the principal obstacles to settlement (apart from bargaining costs) seem more likely to be high stakes and uncertain outcomes, both factors consistent with pragmatically rational decisions to continue litigation.

The situation in cases in which an individual opposes an institution, such as civil rights, employment, and products liability cases, may well be quite different. All other things being equal, the likelihood of a settlement gap seems higher. Because individuals tend to be more risk-averse than institutions, high stakes and uncertainty ought to reduce the expected value of the claim to individual plaintiffs, increasing the likelihood they will assign a lower value to the claim than do their institutional opponents.

There may also be a higher likelihood of pragmatic irrationality in actions between individuals and institutions, but such irrationality does not seem likely to reflect a bias in favor of continued litigation. The risk of pragmatically irrational decisions favoring continued litigation has never been as great among individual plaintiffs as among institutions. To be sure, individual plaintiffs generally lack the ability to monitor their lawyers effectively, but the widespread use of contingent fees means that those lawyers often have strong incentives to settle rather than to litigate. Institutional defendants, in contrast, may have been especially vulnerable

139. The main exception would seem to be classes of cases in which the bar is highly specialized and the attorneys on either side therefore deal with each other frequently, such as the securities class action cases described by Professor Alexander. See Alexander, supra note 68, at 521-22 (describing the "small world" of securities lawyers).
to pragmatically irrational decisions to continue litigation twenty years ago, but seem less likely to be vulnerable to them now.

III. Favoring Settlement in the Public Interest

Settlement might also be preferred to continued litigation because it better serves the public interest. This Part examines three versions of that claim: that settlement produces better substantive justice as between the parties, that it is procedurally fairer, and that it better protects the interests of nonparties and the justice system.

A. Better Substantive Justice Between the Parties in a Single Case

Claims that settlement permits more precise substantive justice between the parties rest on a common premise: case outcomes for each party should depend on the moral or legal rights and wrongs of the conduct giving rise to the litigation. During the resolution of the case, the parties and tribunal make decisions about the parties' conduct that determine whether each party will receive appropriate treatment. For example, the defendant may be ordered to pay money or to engage in other conduct (or she may escape any such order), and the parties may incur (or fail to incur) the costs of litigation. Claims that settlement produces superior justice uniformly assert that the cumulative consequences of settlement produce more appropriate treatment for the parties than the cumulative consequences of continued litigation.

Claims that settlement achieves more precise justice, however, differ in their conceptions of what justice entails. Some proponents of settlement argue that settlement allows the parties to improve the result when the governing law is unjust, producing a less lawful, but more just outcome. Most, however, stress the capacity of settlement to achieve results that conform more closely to those contemplated by the substantive law. Of course, these different visions of justice cannot be true in the same case.

I. The Arguments

a. Avoiding Predictable Injustice to a Party

Settlement can sometimes avoid predictable injustice. The most dramatic cases are those in which the tribunal would be required to apply an unjust rule of decision, and settlement achieves a more just result by departing from the law. A rule of decision may be generally unjust because it contravenes widely accepted principles of morality or public policy in all or most cases. More frequently, a law is generally just, but
would be unjust as applied in the case at issue.\textsuperscript{140} In either case, negotiation can more closely approximate the result that would occur in a just system.\textsuperscript{141} The basic logic of this argument also applies in cases in which the law would be just if applied accurately, but a biased tribunal or imbalance of party resources guarantees that accurate application of the law will not occur.\textsuperscript{142}

Settlements that reduce or eliminate predictable injustice or illegality depend on the existence of favorable conditions that may not be present in many cases. What will prevent the favored party from exploiting the shadow that an unjust rule or procedural failure casts on the bargaining process? Sometimes she will think it immoral to exploit her advantage by trading on an unjust or unlawful outcome.\textsuperscript{143} Alternatively, if litigation is costly to the favored party, the disfavored party may be able to capture enough of the surplus to offset the effect of the unjust rule or procedural failure and achieve indirectly a result approximating that based on just principles.\textsuperscript{144} These situations may be difficult to distin-

\textsuperscript{140} Injustice in particular cases may result from the need to have a rule in order to avoid the fact or appearance of unwarranted discretion. See, e.g., MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 7-8 (1981) (stressing the delegitimizing effect of discretion); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 112 (1961) ("rules cannot become too specific and still fulfill their most important function as rules"); Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 HARV. L. REV. 637, 655 (1976) (arguing that judges will limit discretion by complying with the principle of objectivity). The court's application of a rule may also be unjust because the norm that must be used in order to render a just decision is not one the tribunal can reliably formulate or apply. This can occur when identification or application of the just norm depends on having "intimate familiarity" with the parties. John E. Coons, Approaches to Court Imposed Compromise—The Uses of Doubt and Reason, 58 NW. U. L. REV. 750, 782 (1964) (drawing on the example of family court).

\textsuperscript{141} Professor Melvin Eisenberg has offered the most compelling description of the way in which negotiation can avoid predictable injustice to one party. Eisenberg, \textit{supra} note 140, at 655. His example involves a dispute between Kadume, a wealthy Arusha tribesman, and Soine, his poor relation, concerning the ownership of land formerly owned by Kadume's father. Soine had cared for Kadume's father for some time prior to his death. \textit{Id.} at 640-41. The dominant norm—and the law that a court would have been obliged to enforce—prescribed that "sons inherit," but the parties met before the local council of elders and negotiated a division of the property. \textit{Id.} at 640-42, 656. Eisenberg interpreted the outcome as accommodating the conflicting principles that "sons inherit," that a "well-off relative should not begrudge means of sustenance to a needy relative," and that "[o]ne who voluntarily cares for an aging relative until the latter's death should share in his estate." \textit{Id.} at 645-46. Both Eisenberg and an Arusha magistrate, whose testimony he cited, presented the settlement as reconciling the relevant norms more fully than any result achievable in litigation. \textit{Id.} at 656-57.

\textsuperscript{142} For a description of how imbalances of resources and expertise can distort outcomes, see Bundy & Elhauge, \textit{supra} note 23, at 364-65, 372, 379, 383-92.

\textsuperscript{143} This echoes Eisenberg's interpretation of Kadume's case, given his working assumption that in a norm-centered model of negotiation "the verbal behavior of negotiating disputants can to a considerable extent be taken at face value." Eisenberg, \textit{supra} note 140, at 639.

\textsuperscript{144} A more cynical interpreter of Eisenberg's presentation of life among the Arusha
guish, particularly when the dispute arises among prospective litigants who are close social affiliates.145

When moral or prudential constraints are absent, negotiation can exacerbate injustice. Unjust norms that would be firmly rejected by the tribunal in adjudication are more likely to be relied on in negotiation because in a private setting there are fewer social sanctions for relying on them.146 For example, a party may interpose private norms that seemingly command reasonableness or reconciliation in order to defeat just claims. Consider, in the negotiated settlement of a sexual harassment case, the invocation of a frequently voiced social norm that women should not "overreact" to bantering comments with sexual content.147 In cases such as these, only the immediate threat of access to the tribunal can prevent the application of an unjust norm.148 Similarly, a party's willingness and ability to exploit the costs and risks of litigation or the weakness of opposing counsel can exacerbate as well as offset the effects of unjust norms.

b. More Lawful Outcomes Through Greater Consistency or Avoided Costs

One way that settlement can produce outcomes that conform more closely to the law is by increasing consistency in cases in which the tribunal frequently makes significant errors that cause some plaintiffs to recover less than they should and some defendants to pay more than they

145. Cf. Galanter, Quality of Settlements, supra note 13, at 75-76 (questioning Eisenberg's "claim that normative learning determines outcome").

146. A classic example of the way that the privacy of negotiation encourages shameless reliance on evil norms was presented by Thucydides in the Melian dialogue. The Athenian negotiators relied on a purported "standard of justice," stating that "the strong do what they have the power to do and the weak accept what they have to accept." Thucydides was careful to note that this negotiation was not conducted before the people, but in private, "in front of the governing body and the few," and that the Athenian negotiators made express mention of that fact before introducing the norm on which they sought to base the negotiation. THUCYDIDES, THE PELOPONNESIAN WAR bk. 5, paras. 84-89, at 400-02 (Rex Warner trans., 1954).

147. Of course, judges and jurors may also accept and apply such norms. To the extent that they do so, there will be no reason to favor adjudication with respect to that norm.

should.\textsuperscript{149} In such cases, injustice is foreseeable, but its precise extent and particular victim are not. Settlement can moderate this variance to the extent that it allows the parties to focus their deal on the average outcome.

Settlement may also produce results conforming to the law by avoiding the costs of litigation.\textsuperscript{150} Imagine a case resolved by adjudication in which the tribunal will hand down the correct result, but without taking account of the parties' costs.\textsuperscript{151} In a personal injury suit, for example, the jury might award $10,000, by coincidence the precise amount that plaintiff deserves as compensation and the precise amount required to deter the defendant.\textsuperscript{152} But if further litigation to achieve that result will cost each party $1,000, then plaintiff will be undercompensated and defendant overdeterred. Settlement for the amount of the judgment would produce a more just outcome by allowing the parties to avoid these costs.

The foregoing arguments in favor of settlement depend on restrictive conditions. First, the expected judgment on which the negotiation is focused must be just. If not, there is no strong reason to think that basing the negotiation on that judgment will improve the outcome.\textsuperscript{153}

\textsuperscript{149} These errors may be due to incompetence, bias, simple random variation on the part of the tribunal, or to variable performances by the parties and their advocates. Cases in which the tribunal contributes nothing to the substantive accuracy of the decision are rare. A possible example of such a case is the adjudication of a child custody dispute between two non-abusive parents under the "best interests of the child" standard. In these cases there is no consensus on the norms that should govern the decision and the relevant facts are indeterminate and speculative. Robert H. Mnookin, \textit{Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy}, 39 LAW & CONTEMP. PROBS. 226, 282-87 (1975).

\textsuperscript{150} \textit{See}, e.g., Galanter, \textit{Quality of Settlements}, supra note 13, at 69-70; Easterbrook, \textit{supra} note 13, at 24-25. Litigation costs include attorney's fees, opportunity costs, risk-bearing costs, injury to the parties, and harm to their relations with others resulting from the litigation. The argument that settlement is more just because it avoids litigation costs is analytically distinct from the argument that settlement is more just because it produces more consistent outcomes. Even if litigation were costless, settlements might reduce inconsistency by focusing on the average outcome.

\textsuperscript{151} This is essentially what occurs under the so-called American rule for allocating attorney's fees. This rule leaves the vast bulk of litigation costs where they fall, rather than requiring the loser to pay the winner's costs.

\textsuperscript{152} In the real world, of course, there will not necessarily be a match between these numbers. Full compensation may produce too much or too little deterrence, or appropriate deterrence may mean inadequate or excessive compensation.

\textsuperscript{153} Thus, it is by no means obvious that costs incurred in pressing and defending a non-frivolous claim detract from the justice of the result. It is possible to view the parties' obligation to pay those costs as just, either because costs constitute part of a party's just sanction (this seems more plausible with respect to defendants) or because it is fair for people to pay for the proof of disputed claims. For example, an award that sufficiently compensates the plaintiff may not adequately punish or deter the defendant unless the defendant also pays some litigation costs. \textit{See}, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, \textit{The Deterrent Effects of}
Second, the expected judgment must provide a focal point for the parties’ negotiations and the division of the cost surplus must yield an outcome tolerably close to that focal point. The result at judgment will tend to guide the settlement bargain only if the parties have done enough competent investigation to bring the trial outcome into focus. There also must be a credible threat that if settlement does not occur, the trial will. \textsuperscript{154} If the expected outcome is not sufficiently clear and imminent to direct the parties’ bargaining, then their estimates of the value of the case may be too high or too low, creating a broad range of possible settlements. The most likely settlements may then fail the test of appropriate compensation or deterrence by even more than an adjudicated outcome in which each party paid litigation costs. \textsuperscript{155}

Congruence with the expected outcome at judgment also depends on the division of the surplus. If the parties’ expected costs are relatively equal, their bargain will not center on the expected outcome unless they negotiate a relatively even division. Normally this will not occur unless the parties are well matched in bargaining skills and resources, well disposed toward each other, or attached to relevant moral norms. Otherwise they are likely to divide the cost savings in a way that increases injustice. Even well-matched bargaining skills may not ensure justice if one party expects to bear a disproportionate share of total costs. Equal division of those costs will reduce the injustice to that party, but only by giving an unjust reward to the opponent who insists on receiving some share of the cost savings as a condition of settlement.

2. Better Substantive Justice in Individual Cases: The Realities of Federal Court Litigation

It is difficult to test the claim that settlement frequently prevents predictable injustice by avoiding the result mandated by law. One would

\textit{Settlements and Trials}, 8 \textsc{Int'l Rev. Law & Econ.} 109 (1988). The risk of inadequate deterrence may be particularly great if, as many studies suggest, very few persons injured by wrongful conduct choose to bring suit. Michael J. Saks, \textit{Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?}, 140 \textsc{U. Pa. L. Rev.} 1147, 1185 (1992) (explaining that “a large number of potential plaintiffs with valid claims never initiate a claim and thereby become instant false negatives”).

\textsuperscript{154} For example, in the securities class actions studied by Professor Alexander, the absence of a credible threat of adjudication caused the strength of the case on the merits to drop out of the settlement calculus altogether. Alexander, \textit{supra} note 68, at 524. In such cases, any conformity of the settlement to the merits will be purely accidental.

\textsuperscript{155} Suppose that the plaintiff expects an award of $6,000, the defendant expects an award of $11,000, and both parties expect costs of $1,500. The range of acceptable settlements now extends from $4,500 to $12,500. Many of those settlements may over (or under) compensate the plaintiff and over (or under) deter the defendant by more than the result at judgment.
first need to specify the criterion of substantive justice involved, and then find cases in which judges, parties, or lawyers agreed that the criterion had been better served by settlement. Even then, those who disagreed with the chosen criterion could deny that justice was served. At a minimum, then, it is fair to say that the recent changes in federal litigation described in Part II.B have not obviously increased the frequency of cases in which settlement prevents predictable injustice.

A number of those changes may, however, have increased the frequency with which settlement could generate more “lawful” outcomes by increasing consistency or avoiding needless costs. The argument that settlement can improve consistency gains support from the increased variability of smaller juries. The apparent increase in cases in which lay tribunals are called upon to resolve unfamiliar issues may also contribute to increased variability.156

The claim that settlement can improve outcomes by avoiding needless costs gains support from the apparent increase in cases in which the parties do not reach agreement because they fail to commence or to sustain bargaining. Because there is a settlement gap in such cases, the parties are more likely to have a reasonably clear picture of the expected outcome. When that is so, further expenditures are less likely to generate a real improvement in the accuracy of the expected outcome or the clarity with which the parties perceive it.

The argument that settlement avoids needless costs is also strengthened to the extent that institutional and professional inexperience, coupled with the temptations of hourly fee billing, has prolonged some litigation beyond the point where pragmatically rational litigants would have seen the expected trial outcome with sufficient clarity to reach a settlement agreement. Institutions, however, are learning how to control such problems.157

Given the extensive resources devoted to litigation,158 these changes suggest that settlement could often result in more precise justice as between the parties. Settlement will not be preferable, however, in cases in which one party loses out too badly in the bargaining game. Among the

156. E.g., Stephen D. Sugarman, The Need to Reform Personal Injury Law Leaving Scientific Disputes to Scientists, 248 SCIENCE 823, 823-24 (1990) (addressing lay juries’ abilities to resolve complex scientific controversies); see also Carrington, supra note 122; Huber, supra note 107.
157. See supra text accompanying notes 135-138.
158. See, e.g., JAMES S. KAKALIK ET. AL, COSTS OF ASBESTOS LITIGATION at vii, tbl. S-2 (1983) (showing that prior to August 26, 1982, only 37% of total outlays by defendants and insurers went to plaintiffs); Thomas D. Rowe, Jr., Study on Paths to a “Better Way”: Litigation. Alternatives and Accommodation, 1989 DUKE L.J. 824, 842-43.
new classes of litigation, complex business disputes seem more likely to involve relatively even distribution and division of costs, because the parties are relatively competent and evenly matched. Moreover, in business cases a normative community is more likely. The parties may be united by business relationships, common technical expertise, and shared professional values. They are therefore perhaps more likely to forego extreme claiming tactics that could produce unjust outcomes.

In civil rights and tort cases, it is less likely that costs will be appropriately divided. Most of these cases pit individual plaintiffs against institutional defendants. Individual litigants are often more risk-averse, less able to bear the costs of litigation, and less willing to tolerate delay. In addition, lawyers for both individual and class plaintiffs often have incentives and opportunities to adopt a "soft" bargaining strategy. Institutional defendants may be less risk-averse, more tolerant of cost, and better able to hire vigorous bargainers.

Civil rights and tort cases are also less likely than contract cases to involve parties who share common norms. In civil rights cases, for example, plaintiffs will often challenge the internal norms and practices of an institution by relying on an external principle of nondiscrimination. Lack of normative community is therefore implicit in the structure of the claim. The communal element may be even weaker in products liability cases. In many civil rights cases, such as actions for wrongful discharge, the plaintiff was once a member of the institution she is now suing. By contrast, in products liability cases there is usually no affective tie between the plaintiff and defendant. Nor are products liability plaintiffs likely to share the scientific, technical, and bureaucratic norms of the defendant's agents. The lack of common norms or affective ties heightens the risk that the division of any bargaining surplus will reduce, rather than increase, the justice of settlements in those cases.

B. Procedural Fairness and Dialogic Negotiation

Settlement may also be preferred to continued litigation if it improves upon the basic elements of fair procedure in an adversary system: reasoned presentation and consideration of the merits and control of outcome and process. For example, settlement negotiations may offer the

159. The lack of community is strongly suggested in Huber, supra note 107, at 276-77 (suggesting that many products liability claimants rely on expert views that are not "widely accepted" in the scientific community).

160. Cf. Galanter, Quality of Settlements, supra note 13, at 72 (listing the various factors that may influence the division of savings among settling parties).

161. This version of procedural fairness incorporates elements from Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 363-64 (1978) (adjudication is a
parties an opportunity to discuss the governing law and the facts face to face, to understand the merit of their respective positions, and to offer their reasoned consent to the resolution contemplated by law. As a shorthand, I will refer to this kind of process as dialogic negotiation.

Some argue that the virtues of dialogic negotiation extend beyond procedural fairness to serve substantive purposes. When the purpose of law is to alter behavior, dialogic negotiation can constitute a kind of moral education, in which the parties' understanding of their conduct is transformed and harmonized with the purpose of the law. The reflection sparked by dialogic negotiation may also cause parties to recognize that they prefer the law's solution. When a remedy results from reasoned, voluntary consent, the parties may view the outcome as more valid and legitimate than one imposed after adjudication and enforced by the sheriff. All of these factors may lead to more precise, timely, willing, and inexpensive compliance with the preferred legal remedy. Thus, the substantive claim for dialogic negotiation sometimes merges with the arguments that settlements allow parties to achieve more precise justice by avoiding needless costs.

But how often will settlement negotiations approximate this ideal in real lawsuits? Take the element of reason first. Dialogic negotiation requires some internal drive or external force that motivates the parties to discuss the law and facts in good faith and to reason their way to the just outcome. The parties may trust each other because of their past dealings or membership in the same community, they may value each other's form of social ordering in which the affected party participates through the "presentation of proofs and reasoned arguments"), and Frank I. Michelman, Formal and Associational Aims in Procedural Due Process, in DUE PROCESS (J. Roland Pennock & John W. Chapman eds., NOMOS XVIII, 1977) (listing "participation" and "revelation" as nonformal goals of the process).

162. See, e.g., Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 Yale L.J. 1660, 1665 (1985) (contrasting justice that "people get from the government" with justice that "people give to one another" and analogizing settlement negotiation to Socratic dialogue); cf. Lon L. Fuller, Mediation—Its Forms and Functions, 44 S. Cal. L. Rev. 305, 325 (1971) ("The central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.").

163. McThenia & Shaffer suggest that negotiation might be the preferred method of dispute resolution when governing norms give "priority to restoring the relationship." McThenia & Shaffer, supra note 162, at 1666.

164. For versions of the argument that parties are more likely to comply with negotiated resolutions because they "consented" to them, see Menkel-Meadow, For and Against Settlement, supra note 13, at 487, and Menkel-Meadow, Toward Another View of Legal Negotiation, supra note 36, at 807.
good opinion or continuing commerce, or they may share a commitment to vindication of the same norms. When a suit has been filed, however, these forces have proven inadequate to generate agreement or perhaps even principled discussions. Filing the suit may provoke discussion, but only by threatening the defendant with state coercion. Indeed, when the parties are deeply divided there may be no serious discussion of the merits in the absence of that threat. Any subsequent legal dialogue will be played out “in a field of pain,” shadowed by the prospect of additional costs and the court’s ultimate remedy.

The threat that initiates discussion on the merits thus ensures that those discussions will rarely have the open, good faith character required by the ideal dialogic account. Instead, participation in any dialogue that does take place will likely be partisan and strategic, characterized by rhetoric, silences, evasions, or half-truths. Moreover when the dispute is predominantly one of fact, when costs and risks are high or unequally distributed, or when the lawyers are unevenly matched, the minimum requirements of objectivity and balance may be unattainable in negotiation. Negotiations that center on costs, risks, and delays are unlikely to conform to the ideals of reasoned dialogue.

Consider next the party’s control over the outcome. Settling involves a promise to comply with the agreed-upon remedy, while a party who continues to litigate does not promise to obey the court’s final order. Despite this distinction, consent in settlement may often lack the element of voluntary and reasoned choice that gives rise to a felt moral obligation to comply. When parties bargain over disputed claims, there is nor-

165. Eisenberg, supra note 140, at 646-49.
166. Cf. Owen M. Fiss, Out of Eden, 94 YALE L.J. 1669, 1670 (1985) (“People turn to courts when they are at the end of the road.”).
167. See Kritzer, supra note 111, at 61.
169. These considerations also demonstrate the limits of the claim that negotiated outcomes are superior because the disputant is treated with dignity, while adjudication leaves the party feeling “inferior” and “judged.” Eisenberg, supra note 140, at 659. If she has to concede too much of her claim on account of risks, delay, and transaction costs, negotiated settlement can leave a party feeling abused and violated. See, e.g., Hazel Genn, Hard Bargaining (1988); Howard S. Erlanger et. al, Participation and Flexibility in Informal Processes: Cautions from the Divorce Context, 21 LAW & Soc’y REV. 585, 590-94 (1987).

In a controlled comparison of parties whose cases were tried or arbitrated with parties whose cases were settled in lawyer-only settlement conferences, parties whose cases settled found the negotiation process to be less dignified and less careful than the processes based on adjudication. E. Allen Lind et. al, The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences 62-63, 65 (Institute for Civil Justice, Rand Publication Series No. 3708, 1989).

170. The empirical evidence that consent generates lower compliance costs is shaky at best. Some empirical studies purport to show that in small claims court there is more compli-
mally only one seller and one buyer.\textsuperscript{171} The plaintiff would rather obtain what she claims without suing but has no other way to obtain it. The defendant would rather keep what she has, but cannot escape. This situation is therefore unlike marriage or the market, where the number and variety of possible contracting partners make consent a comfortable standard of justice. In addition, one party—or perhaps both—may be vulnerable to exploitation because she is upset, injured, or in dire need, perhaps due to the actions of the other. A party is unlikely to view her consent as voluntary if she believes the underlying claim is unjust or if she settles in large part because of her concerns about the costs and risks of litigation.

The experience of a voluntary and reasoned choice of outcome may therefore often be more effectively realized through adjudication than through settlement. In adjudication, the parties have a chance to present their evidence to the tribunal and to have their “day in court.” The adjudicatory process itself may be cathartic. Often it is both financially and emotionally exhausting.\textsuperscript{172} Sometimes it is intensely satisfying. Even the losing party may find adjudication to be preferable to settlement, for a concession that would have seemed unacceptable or even degrading if agreed on directly may be acceptable if ordered by a judge. Parties may reconcile themselves to the judgment and comply with it on the ground that they freely chose to submit to the tribunal’s judgment rather than yielding to the opponent’s demands.

Party control of the process might also be superior in settlements. Certainly adjudication can often fail by that standard. In the courtroom, effective control of one’s case is necessarily low, because one must delegate the presentation of evidence and arguments to an expert who is familiar with the language of the law. In negotiations, a party may be able to participate more directly in the determination of the dispute.\textsuperscript{173} Even

\textsuperscript{171} Galanter, \textit{Quality of Settlements}, \textit{supra} note 13, at 72; \textit{cf.} KRITZER, \textit{supra} note 111, at 66-67 (discussing bargaining in bilateral monopolies).

\textsuperscript{172} Simon, \textit{supra} note 61, at 125 (“[t]he design of adversary advocacy in terms of stylized aggression well serves the task of conflict sublimation”).

\textsuperscript{173} Eisenberg, \textit{supra} note 140, at 658-59.
if a party is represented by a lawyer, direct participation in negotiations is never barred. To be sure, the nature of the subject matter often limits a party's ability to manage the negotiation single-handedly, and the opponent's sophistication or insistence on using a lawyer negotiator may make it too risky to do so. Nonetheless, it may be more feasible for clients to participate directly in negotiations by consulting with and directing counsel.

For the client to exercise effective control in negotiation, however, either the client must be sufficiently motivated to bargain with her lawyer in order to obtain control, or her lawyer must adhere to a "client-control" approach to practice. For clients who are not that effective or fortunate, negotiation may pose greater risks of loss of control than adjudication. While the need to delegate may be lower in negotiation, the client's ability to monitor the lawyer's performance may be lower as well. In contrast to negotiation, the lawyer's actions on her client's behalf during litigation, including court filings and participation in conferences, hearings and trials, are public and on the record. Therefore, the client, and sometimes the tribunal, has a guaranteed means of monitoring the lawyer's conduct and gauging the wisdom of the lawyer's advice.

In federal court litigation today, the strategic impediments to settlement resulting from greater stakes, more multiparty cases, and a larger, less experienced bar probably reduce the likelihood that settlement bargaining will approach ideals of reasoned procedure across a wide range of cases. Apart from that general effect, negotiation seems more likely to satisfy the requirements of procedural justice in cases that pit institution against institution than in cases that pit individuals against institutions. In disputes between institutions, the parties' power to compel and risk aversion may be more closely matched. In addition, the likelihood of common understandings, whether based on shared norms or common expertise, may be significantly greater. For both prudential and moral reasons, negotiation may therefore focus more on the merits of the case. Institutions are also better able to participate directly in negotiations and to control lawyer disloyalty. By contrast, these elements are usually absent in cases that pit individual against institution, suggesting that un-

174. See, e.g., sources cited supra note 85.
175. For descriptions of such clients, see Erlanger et al., supra note 169, at 600-02.
176. Rand's study of litigants in tried, arbitrated, and settled cases suggests that trials may not reduce litigant control. Plaintiffs perceived the same level of control in settlement conferences and trial, while defendants believed that they had more control at trial. Lind et al., supra note 169, at 69-71. Both plaintiffs and defendants felt they had a higher level of participation in trial than in settlement. Id. at 72.
aided settlement negotiations are unlikely to be procedurally superior to adjudication.

C. Benefits to the System of Justice

The choice between settlement and continued litigation can result in harm or benefit to nonparties and to the system of justice as a whole. These consequences may be immediate and direct, or more remote and indirect.

1. Immediate Consequences

A civil dispute may cause direct and immediate harm or benefit to nonparties. While nonparties can sometimes protect themselves against these consequences by intervening in pending actions or by bringing their own suits, often enough they cannot. Settlement may eliminate those costs. Settlement may also reduce the burden on the system of justice by reducing the demand for courthouses, judges and judicial personnel, juries, and marshals. In a judicial system where resources are fixed and demand for court services exceeds the supply, however, these immediate savings to nonparties and the system are often marginal at best. If there is any tangible benefit from settlement, it likely takes the form of a reduction in the queue for other litigants. The dramatic increase in both the number of cases filed per federal judge and in the percentage of those cases that impose severe time demands on judges may suggest that individual settlements could substantially reduce the federal backlog.

Unfortunately, steps that shorten the queue do not necessarily dramatically reduce court workload or delay. There are two explanations for this result. First, if litigants have other fora available to them, such as state courts or commercial arbitration, shortening the federal court queue may simply draw other litigants who would have gone elsewhere. Second, as George Priest has argued, in a system that does not

177. See, e.g., Cotton v. Hinton, 559 F.2d 1326, 1330-31 (5th Cir. 1977) (“In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources.”).


180. This effect may be more pronounced if other claims about settlement are correct—that is, if settlements achieved in federal court also improve litigants’ welfare or the perceived justice of the outcome. See also infra text accompanying notes 200-203.
award prejudgment interest reducing the litigation queue increases the effective amount in controversy in every case. This in turn increases the likelihood that small differences of opinion about the outcome will lead to litigation.\textsuperscript{181} Thus, earlier settlement of cases may simply pave the way for additional litigation. This may explain why studies of court based programs designed to promote settlement have found few positive effects on caseload or delay.\textsuperscript{182}

2. \textit{Remote Consequences}

Settled disputes may fester or give rise to new disputes between the same parties, creating further costs for nonparties and the judicial system. Moreover, settled disputes may have implications for the resolution of related disputes, whether pending or merely potential.

a. Compliance and Recidivism

Often the method of dispute resolution has no effect on the likelihood that a party will comply with the result or that the dispute will recur. In most complex actions for money damages the defendant is solvent or insured and concerned about her credit rating or commercial reputation.\textsuperscript{183} In these cases, compliance with a judgment or settlement is inexpensive and straightforward, incentives to comply are strong, and the lack of a continuing relationship between the two parties means the dispute is unlikely to recur.

Noncompliance becomes an issue principally when remedies are injunctive and must be carried out over time, and when nonlegal incentives, such as concern for reputation or for damage to an important relationship, are inadequate to deter wrongdoing. In federal court, injunctive remedies are typically ordered in environmental, civil rights, or antitrust cases, or in cases arising out of a complex ongoing commercial relationship. Resolution by settlement rather than adjudication may produce increased voluntary compliance with the judgment, and therefore reduce judicial burdens associated with enforcement.\textsuperscript{184}

\begin{thebibliography}{99}
\bibitem{182} See PROVINE, supra note 12, at 38-40; Menkel-Meadow, \textit{For and Against Settlement}, supra note 13, at 493-97.
\end{thebibliography}
Apart from cases in which the parties fail to settle on account of strategic behavior, the claim that settlement induces better compliance largely derives from earlier arguments about the superiority of settlement, and is subject to the same challenges. Participants in settlement negotiations must comply with the agreed remedy. Litigants who lose must comply with an imposed resolution, the losing half of their bet. Settlements will increase compliance only if settlers comply more readily with the settlement than do litigants with the result of the continued litigation. This proposition seems unlikely, unless settlement better reflects the true interests of the parties or provides superior substantive or procedural justice. If litigation decisions tend to be pragmatically irrational, then willing litigants who would lose if their case were tried might be more satisfied with, and more likely to comply with, an engineered settlement that better serves their interests. Similarly, if willing litigants who would lose at trial perceive settlement as more just or fair, their tendency to comply with settlements might be greater than their tendency to comply with litigated judgments. However, the general pattern of litigation is relatively consistent with rational self-interest, and the substantive and procedural superiority of settlement is contingent on favorable conditions that often may not be realized.

b. Effects on Other Disputes

All legal disputes produce information that can alter both the course of later disputes and the behavior of real world actors. Settling pending litigation can influence the amount and social value of information generated. A frequent assertion is that the informational effects of continued litigation are superior to those of settlement. This view is surely oversimplified and may well be wrong.

Most discussions of the informational effect of settlement focus on two direct effects. The first is that there will be no further adversary proceedings in the case, and hence no further rulings on issues of law and fact. Settlement thus alters the kind and amount of information that the case will generate in the future. The second is that in settling, the parties may gain greater freedom to control the dissemination and use of information generated in their case up to and including the point of settle-

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185. Certainly the empirical evidence is not compelling. See supra note 170.
186. The compliance argument may have a darker side. Perhaps institutions subject to continuing obligations choose to comply with settlements because they used threats of non-compliance to escalate their opponents' expected litigation costs and then bargained for a large share of the resulting surplus. While such settlements may improve compliance, that compliance comes at the cost of justice.
187. E.g., Coleman & Silver, supra note 13, at 116; Fiss, supra note 13, at 1085.
ment. Such rules may allow the parties to vacate prior rulings, to seal the terms of settlement, to obtain the return of information previously disclosed in discovery, and to limit the use of settlement terms and statements made in settlement bargaining in any later dispute.

Looking solely at the direct effects of settlement, it might be argued that settlements will deprive parties to other cases of valuable information. Every additional settlement will deprive the public of the additional information generated in continued litigation, and may also deprive the public of information generated prior to settlement.

This argument is mistaken for two reasons. First, not all the information lost in settlement is socially valuable. Second, additional settlements will also indirectly affect prospective parties' willingness to pursue litigation. When indirect effects are taken into account, the overall informational effects of settlement may well be positive.

To develop this argument, it is necessary to identify the different kinds of information generated in both settlement and continued litigation and to establish criteria for determining their social value.

**What Kinds of Information Are Generated?** Litigation and settlement generate two kinds of information. The first kind is potentially admissible in later cases. Such information includes the fruits of investigation and discovery and any court record, including pleadings, materials offered in evidence, the parties' arguments, and the tribunal's rulings. It also includes the record of the parties' arguments and concessions in negotiation, and any settlement terms. The negotiation record, like the court record, sometimes provides information about expected litigation outcomes or about what is lawful or fair.

The second kind of information is not admissible, but affects lawyers' and parties' disputing competence. Both continued litigation and

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188. Whether parties in federal court can settle on terms that require vacation of a judgment is contested. Compare Nestle Co. v. Chester's Market, Inc., 756 F.2d 280 (2d Cir. 1985) (enforcing such a settlement) with In re Memorial Hosp., Inc., 862 F.2d 1299 (7th Cir. 1988) (refusing to do so). Strictly speaking, of course, a rule permitting vacation of a prior judgment does not make that judgment confidential. To the extent that parties can vacate judgments, however, the *ex ante* effects on party behavior ought to parallel those for confidentiality rules.


191. See, e.g., FED. R. EVID. 408 (forbidding use of "conduct or statements made in compromise negotiations" to prove "liability for or invalidity of the claim or its amount"). See generally BRAZIL, EFFECTIVE APPROACHES, *supra* note 12, at 305-90 (discussing Rule 408).

192. This information is not necessarily stated expressly. It often must be inferred from the terms of the settlement.
settlement can improve participants' understanding of the subject matter, their own preferences and capacities, and those of other participants. Both settlement and continued litigation can also enhance the basic technical skills of lawyers and parties. Continued litigation enhances skills involved in preparing, managing, evaluating, and presenting cases. Settlement enhances problem solving, negotiation, and drafting skills.

When is Information Socially Valuable? Information is useful only if it is relevant to later cases and will improve future outcomes. Almost every case has some relatives. Both settlement and continued litigation will enhance the competence of the parties and lawyers in handling similar subject matters, tribunals, parties, or lawyers, even when parties will have no further dealings and the dispute concerns a non-recurring issue of fact. If later cases involve similar factual or legal issues, the potential for improved competence will be greater for both settlement and continued litigation. The existence of related disputes, however, is not sufficient to establish that the information is relevant. If the information produced in litigation or settlement duplicates other readily available information, it is redundant. Redundant information has no social value.

To be valuable, information must also improve outcomes in later cases. It can do so either by improving accuracy or by lowering costs. For example, potentially admissible information can suggest the correct outcome in a later case and reduce the cost of reaching that outcome. Improved competence can have similar effects, enabling parties and lawyers to make more accurate predictions and more effective presentations at a lower cost. But beneficial effects are not inevitable. Giving effect to an erroneous prior ruling may do grave harm.

The relative value of admissible information for later cases varies greatly. Rulings on questions of law are more valuable than rulings on questions of fact. They are more accurate because they are less sensitive to the tribunal's identity or location, the stakes in the prior dispute, the parties' resources, and their lawyers' competence. Rulings of law also

194. Contra BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 2-3 (suggesting that most cases have no significant analogues).
196. This is so for several reasons. First, unlike factual information, the information relevant in deciding questions of law is ordinarily equally available to both parties. Accordingly, legal decisions are less likely to be skewed because one party controls more information or because the parties have unequal costs of investigation. Second, because information about disputed questions of law is also fully available to the tribunal, the tribunal can conduct legal investigations without the parties' assistance. Consequently, the tribunal can ordinarily correct for imbalanced presentations resulting from differences in the parties' lawyers or re-
create greater savings for future litigants. The published ruling on a question of law is relatively inexpensive to retrieve because it is public, in writing, and formally segregated from other case information.\(^{197}\) In contrast, factual findings are often unpublished or difficult to determine from the record.\(^{198}\) They are therefore more costly to obtain and to interpret accurately.

The terms of settlement also contain potentially admissible information about both the law and the facts, but such information has much less value than the normative information generated in adjudication. The accuracy of settlement-generated information depends on whether settlements actually reflect the merits. As discussed above, the claim that settlements are generally an accurate representation of the merits is doubtful. It is doubtful that settlements generally reach this ideal. Moreover, later inquiries into how the settlement terms were influenced by the merits in the earlier action will normally be costly and prone to error.

In contrast, the effects of improved disputing competence on the accuracy and cost of later litigation ought to be generally desirable, unless the benefits are very unequally distributed among future litigants. Moreover, the perceived unfairness of preventing parties and lawyers from using their experience and skill is very great.

**Informational Effects of Settling Pending Cases.** We can now assess the effects of settling additional pending lawsuits on the generation of sources. Third, questions of law are ordinarily resolved by the judge and the lawyers, rather than by the jury. Judges are subject to professional and political controls, including the threat of appellate review, to which jurors are not subject. Accordingly, decisions on questions of law, such as whether assumption of risk is a defense in a products liability claim brought by a two-pack a day smoker, likely will have greater general application than decisions on questions of fact, such as the extent to which heavy smoking increases the risk of cancer. The doctrine of stare decisis reflects this view, creating a working presumption that propositions of law decided in prior cases are binding in later cases. It is also true, of course, that safeguards on the generation of legal rules are adopted precisely so that later courts can feel comfortable giving effect to a rule. Otherwise the benefits flowing from party planning in reliance on a legal rule could not be realized.

197. Retrieving cases may not always be inexpensive. When there are many potentially relevant cases, the cost of identifying those that speak directly to the problem reduces the likelihood that the information will reach and influence other cases. Richard A. Posner, *The Federal Courts: Crisis and Reform* 125-26 (1985) (describing the risk that the increasing stock of federal precedents will create information overload due to search costs).

198. A judge must render separate written findings, but need not support them with reasons. The jury need not provide written findings and may render general verdicts that rest on any of several possible factual theories, making it extremely difficult to determine the basis of the decision. Thus, a verdict may show only that the evidence fell within a range in which the jury was permitted to find as it did. The parties and their lawyers may be able to learn more by interviewing the jurors, but outsiders will not have that option.
admissible information and on party competence in light of the changes in federal litigation identified in Part II.A.

Depending on which additional cases settle, settlement may result in few direct losses of useful information. Many federal cases will not have relatives in which the admissible information generated in continued litigation would be useful. This seems especially true in the commercial contract disputes that make up an increasingly important portion of the docket. In such cases, any informational cost of settlement will be limited to its impact on disputing competence. In contrast, civil rights, toxic torts, and products liability cases frequently have important legal and factual links, increasing the likelihood that any particular case will have near relatives.

Direct losses of information are not harmful if the information involved is redundant. The growing number of cases in which settlement is frustrated by barriers to bargaining or by pragmatic irrationality suggests that much information generated in continued litigation is redundant. In such cases, either there is a settlement gap or there would be one if one or both parties had not made pragmatically irrational errors. All other things being equal, cases with settlement gaps will be those in which existing information permits the parties to predict the outcome with relative clarity. Therefore, the information generated in the continued litigation of such cases is more likely to be redundant.

Finally, settlement does less harm when the information foregone is less accurate or more costly to retrieve. If most cases that generate non-redundant information turn on disputed questions of fact (surely a plausible hypothesis), the accuracy and efficiency losses from settlement will be much smaller than if those cases involved disputed legal questions.

Some changes in federal litigation have increased the risk that continued litigation may not generate accurate information. The main culprit appears to be the increased variability of judges and juries. The variability of tribunals reduces the value of a litigation outcome as an accurate guide to the resolution of later cases. If federal juries increasingly vary in their evaluation of similar evidence, or federal judges increasingly vary in their evaluation of legal issues, then the presumptive value of the information lost on account of settlement is reduced accordingly.

For similar reasons, the claim that settlement will result in harmful losses of disputing competence also appears doubtful. When cases go to trial, lawyers and parties gain training in presenting cases and predicting the tribunal's reactions. Settlement will deprive them of this opportunity. Given the decline in trial experience among the bar, this may be a
significant social cost.\textsuperscript{199} But the same factors that reduce the likelihood that further adjudication will generate useful admissible information also reduce the value of trial experience. If a trial results from a bargaining failure, for example, the parties may not learn much at trial beyond what they already knew. Similarly, if juries and judges are increasingly variable, a trial may not give the parties and their lawyers reliable insight about their own skills or the likely behavior of different tribunals in later cases.

The more fundamental point is that the direct informational costs of additional settlements, however severe, are not the true measure of the informational effects of a policy favoring settlement. Additional settlements of pending cases—and their associated confidentiality provisions—may heighten the value of litigation for the parties entering into them. From an \textit{ex ante} perspective, the prospect of being able to enter into such settlements may therefore increase the expected value of litigation for prospective parties, adding to both the amount of litigation and its overall informativeness.

This basic insight emerges most clearly from examining settlement confidentiality rules.\textsuperscript{200} The major effect of those rules is to encourage candor, information-sharing, and the seeking of rulings from the court (in the case of rules allowing the vacation of prior judgments) by reducing the expected downside risks of those activities.\textsuperscript{201} For parties who have already exchanged information and sought rulings, the rules encourage them to negotiate frankly on the basis of their newly gained knowledge of the merits. It may be that the net effect of these rules on those who are already before the court is to encourage settlement. But for parties deciding whether to go to court, these rules encourage both more and better informed litigation, because they reduce its overall cost.\textsuperscript{202} Moreover, unless these better informed cases settle under conditions of complete confidentiality, the additional litigation and information generation encouraged by confidentiality will have beneficial effects on other cases.

\textsuperscript{199} McMunigal, \textit{supra} note 128, at 854-55.

\textsuperscript{200} Such rules matter to both plaintiffs and defendants. Even a one-time plaintiff may want information about her case to remain confidential in order to protect her privacy. But confidentiality rules are most important to "repeat players": parties who can anticipate future litigation about the same or similar issues. Repeat players may worry that information generated in settled actions will come back to haunt them later, whether that information concerns the merits or their own preferences and values.

\textsuperscript{201} Cf. Marcus, \textit{supra} note 190, at 484-85 (arguing that discovery confidentiality rules reduce costs of cooperative exchange of information).

\textsuperscript{202} Cf. id. at 486 ("opening up the discovery process could have the ironic effect of deterring claimants from seeking relief in court in order to avoid the resulting publicity").
This basic framework also applies to the settlement of cases without confidentiality. If additional settlements of pending cases actually serve the parties' interests better than continued litigation, they will increase the overall attractiveness of bringing cases to court. Some parties will file, conduct discovery, and seek rulings when they would not otherwise have done so. The outcomes in those cases will be better informed. Moreover, some of those cases will generate information that proves useful in other cases.

Thus, to the extent additional settlements better serve the parties' interests, their direct informational effects may well be a misleading measure of their actual informational costs. First, some additional settlements will be reached in cases which would not have been pursued so far had the parties perceived a greater risk of failing to strike a settlement bargain. Since the information in those cases would not have been generated absent the expectation of settlement, its disappearance cannot be counted as a cost of settlement. Second, some of the additional cases brought because of the reduced risk of failing to settle either will not settle or will settle on terms that preserve some of the information generated. To the extent this information is valuable, it is properly counted as a benefit of settlement.

Part II.B examined a number of factors, including the increased risk of bargaining breakdowns and the risk of pragmatic irrationality on the part of institutional disputants, which suggest that as to federal courts, continued litigation increasingly disserves the parties' interests. In such cases, the informational benefits of settlement may be substantial. Much of the information generated in such cases will be redundant. Moreover, a policy that encourages postfiling settlements in such cases will increase the incentive to come to court and hence the generation of useful information in other cases.

The informational case for settling cases when the parties would benefit from continued litigation, however, is weak. Because settlement will not add to the private value of litigation, it will not heighten overall incentives to conduct discovery or seek rulings. When the parties will benefit from further litigation, that is also strong circumstantial evidence that existing information is insufficient to provide a clear predicted outcome and that continued litigation will therefore generate information useful in other cases.

203. See supra text preceding note 199.
3. **Political Costs**

Settlement may allow a court to avoid the expenditure of political capital associated with making and enforcing an unpopular decision.\(^{204}\) The court spends such capital whenever it reaches a result that some regard as unjust or contrary to their interest. Political costs increase when the result requires the court to act outside its accustomed social role, when the court is likely to be wrong, or when the decision encroaches on the interests of numerous or powerful political actors.

Even in its simplest form, the claim that settlement reduces political costs is not obvious, for it assumes that settlements increase the likelihood that the court can escape blame for its expected decision because the parties consented to the settlement outcome.\(^{205}\) This in turn requires either that: (1) the tribunal's intended decision be ambiguous or unclear; or (2) if the intended decision is clear, observers must be unable to determine how the expected judgment influenced the decision to settle or the terms of settlement. When pending litigation settles, these conditions may be infrequently satisfied, especially since litigation is often filed to make the threat of state intervention real to recalcitrant opponents and settles only when that threat is overwhelmingly apparent.

Settlement may also *increase* political costs. A majority may regard the tribunal’s decision as just. If the settlement appears to grant more or less than the court would have granted on the merits, the court may take the blame, especially if the failure to achieve a just result can be attributed to the judicial system’s reluctance or inability to hear cases in a timely manner, to curb abuse of process, or to risk opprobrium from the loser.\(^{206}\)

The recent changes in federal court litigation have no clear implications for the political costs of settlement. The recent rise in institutional reform cases, for example, may involve a departure from the traditional role of the court, a high risk of error, and direct conflict with powerful state government actors. Thus, the political prestige of federal trial

\(^{204}\) Political capital is reflected in support for the state and the court among the parties to litigation, their adherents, and the general public. For varied accounts of adjudication which reflect an awareness of political costs, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962), LON L. FULLER, THE ADVERSARY SYSTEM, in TALKS ON AMERICAN LAW 34, 40 (HAROLD J. BERMAN ED., 2D ED. 1971), and SHAPIRO, supra note 140, at 2, 52.

\(^{205}\) See SHAPIRO, supra note 140, at 1-8 (stressing the importance of apparent consent in legitimizing outcomes).

courts may be enhanced by settlement. On the other hand, many such settlements occur only after judges have issued controversial rulings outlining the probable contours of a decision on the merits and have assumed extraordinary roles in mediating the terms of the decree. Moreover, the prevalence of settlement in such cases frustrates observers who desire a more clear-cut solution.

IV. The Policy Favoring Settlement as a Guide to Regulation: Federal Rule 16 and the Civil Justice Reform Act

The most visible product of the policy favoring settlement is the increased enthusiasm for and use of the Rule 16 settlement conference. That development has generated significant controversy about the judge's role in settlement and about the appropriate limits on her power to compel participation in settlement conferences. Part IV.A describes that controversy. Part IV.B applies this Article's account of the policy favoring settlement to the question of the appropriate judicial role in settlement. Part IV.C applies the account to the question of the appropriate limits on the judge's power to compel participation in settlement conferences.

A. The Arena of Controversy

Rule 16 was amended in 1983 to encourage federal district judges to promote settlement and to empower them to do so. The drafters recognized judges' long-standing informal use of pretrial conferences to promote settlement and endorsed increased judicial settlement efforts. The amended rule also plainly contemplates more coercive regulation of settlement bargaining. While the Advisory Committee notes expressly disclaim any purpose "to impose settlement negotiations on unwilling litigants," the amended rule expressly authorizes a court to impose sanctions for failure to appear at a Rule 16 conference, for "substantial" failure to prepare, or for failure to participate "in good faith." Practice under the amended rule has led to controversy about both the appro-

208. See, e.g., Fiss, supra note 13.
209. The amendment added the stated purpose of "facilitating settlement of the case," FED. R. CIV. P. 16(a)(5), and listed among the "[s]ubjects to be [d]iscussed" "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute," FED. R. CIV. P. 16(c)(7). For an extended discussion of the amendments, see Shapiro, supra note 3.
210. FED. R. CIV. P. 16(c)(7) advisory committee's note.
211. FED. R. CIV. P. 16(f).
priate role of the settlement judge and the limits of judicial power to compel participation.

Amended Rule 16 does not specify the appropriate judicial role in settlement conferences, and that role has sparked heated debate. Amended Rule 16 does not specify the appropriate judicial role in settlement conferences, and that role has sparked heated debate.212 Judges differ greatly in how much they participate in settlement negotiations and party deliberations. Some provide a forum that the parties may use if they choose and deal only with the parties' lawyers. At the other extreme, some provide detailed analyses of each party's bargaining position, meet with parties in order to guide or monitor their deliberations, and lobby forcefully for concessions. The Rule also does not state whether a judge who has decided or will decide disputed issues should participate in settlement procedures. Again, judicial practice varies.

Controversy also surrounds the question of judicial power to compel participation in settlement conferences. One issue is who can be compelled to attend. The Rule explicitly authorizes compelled attendance of unrepresented parties and of lawyers for represented parties, but says nothing about represented parties themselves. Courts have divided on whether represented parties can be compelled to attend. A second issue is what attendees can be compelled to do. While the judge clearly may not impose a specific settlement on an unwilling party, courts disagree on whether the court may compel participation in alternative

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212. Much of this debate has arisen from the unusual and highly visible role of certain well-known trial judges in settling some notorious mass tort cases. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 143-167 (1987) [hereinafter SCHUCK, AGENT ORANGE]; RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 60-69 (1991); Peter H. Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337 (1986) [hereinafter Schuck, The Role of Judges]. For further discussion of these cases and their relevance to the broader debate, see infra text accompanying notes 253-264.


214. Shapiro, supra note 3, at 196.

215. See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415, 1421 (7th Cir. 1988) (holding that Rule 16 does not authorize the compelled attendance of represented parties), rev'd, 871 F.2d 648, 652-53 (7th Cir. 1989) (compelled attendance is within the "judge's inherent authority"); Lockhart v. Patel, 115 F.R.D. 44, 46-47 (E.D. Ky. 1987) (court has authority under Rule 16 to impose sanctions for failure of party's insurer to send a representative from the "home office").

216. See, e.g., Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1050 (Fed. Cir. 1986) (imposing a settlement to which the parties had not agreed was improper), cert. denied, 482 U.S. 913 (1987).
dispute resolution processes,217 and whether a party may be sanctioned for failure to make or respond to a settlement offer.218

When differing views on the appropriate scope of compelled participation intersect with differing views on appropriate judicial involvement, the potential range of approaches becomes still broader. At one extreme, there are judges who avoid both close involvement with the negotiations and compelled participation. At the other, there are judges who favor intensive judicial involvement and free use of compulsion.

The Civil Justice Reform Act of 1990 has not fully clarified these issues. The Act's endorsement of judicial involvement in settlement is less comprehensive and informative than that of Rule 16.219 The issue of compelled participation, the Act implies that a local expense and delay reduction plan that authorizes judges to compel represented parties to participate in settlement conferences or in alternative dispute resolution processes is lawful,220 but it does not require adoption of such a plan and provides no criteria for deciding whether to do so. Nor does the Act address the question of when such power, if conferred under a local plan, should be exercised by individual settlement judges.

B. Modes of Judicial Involvement in Settlement

What role should the judge play in a mandatory settlement conference when parties participate under formal or informal compulsion? A first consideration is what the judge is trying to accomplish. Three possible suggestions suggest themselves: preventing strategic breakdowns, en-


218. Compare Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114, 116 (2d Cir. 1988) (no power under Rule 16 to compel a "bona fide offer" of settlement) and Kothe v. Smith, 771 F.2d 667, 670 (2d Cir. 1985) (no power to sanction litigant for failing to offer adequate settlement until after trial began) with Eash v. Riggins Trucking, Inc., 757 F.2d 557, 568 (3d Cir. 1985) (en banc) (dictum) (court has inherent authority to impose sanctions for failure to settle in a timely manner).

219. The Act requires that district courts formulate an expense and delay reduction plan. This plan must consider whether the court should include a “principle” or “guideline” dictating that in “complex” or otherwise “appropriate” cases officials presiding at pretrial conferences should “explore[ the parties’ receptivity to, and the propriety of, settlement or proceeding with the litigation.” 28 U.S.C. § 473(a)(3)(A) (Supp. II 1990).

suring pragmatically rational decisionmaking, and promoting the public interest, either in just outcomes between the parties or systemic justice.

Each of these goals can be associated with a mediative style: preventing strategic breakdowns with distributive facilitation, ensuring pragmatically rational decisionmaking with counseling, and promoting the broader public interest with optimizing. These three styles of mediation differ greatly not just in their aims, but also in their potential benefits and potential costs, including the amount of judge, lawyer, and party time they consume. This section argues that of the three styles, only compelled facilitation seems likely to generate benefits exceeding its costs.

1. Preventing Strategic Bargaining Breakdowns: The Judge as Facilitator

Distributive facilitation is the least intrusive and least costly mode of judicial intervention. Nonetheless, facilitation involves a core element of coercion: the lawyers, and perhaps the parties, are required to appear, state their position on settlement, hear their opponent's position, and submit to an informal judicial critique. The goal of the process is to make bargaining less costly in cases in which a settlement gap already exists. The facilitator's knowledge of the merits is limited. The judge relies largely on the parties' presentations, rather than on her independent analysis of the facts and the law. Moreover, that knowledge is deployed carefully. A facilitative judge avoids expressing her views on the merits, however accurate those views may be, unless she thinks that doing so will enhance the likelihood of reaching an agreement. Similarly, while the facilitator may cast doubt on the parties' views about expected outcomes and costs, the principal goal of substantive analysis is to motivate and justify party concessions. The facilitator usually limits her involvement with the parties. In most cases, she deals primarily with the lawyers for the parties, and her conversations with the lawyers focus

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221. The best account of facilitative involvement is that provided by Judge Will. Will et al., supra note 12, at 203-12. Magistrate Brazil's account also has facilitative elements. Brazil, Effective Approaches, supra note 12, at 449-538.

222. See, e.g., Eugene F. Lynch et al., California Negotiation and Settlement Handbook § 10:13, at 15 (1991) (“the primary job of the judge is to listen and gather information from the attorneys about the dynamics of the case”); Wayne Brazil, A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, 1990 U. Chi. Legal F. 303, 326 [hereinafter Brazil, A Close Look] (“judges . . . who participate in settlement negotiations often rely heavily on what the lawyers tell them about the nature of the evidence and the other real-world factors that could effect the settlement in the case”).

223. See Brazil, Effective Approaches, supra note 12, at 505-07 (discussing the risk of derailing bargaining with too clear a statement of views); Lynch et al., supra note 222, § 10:6, at 9 (“The worse [sic] thing a judge can do is to give too quick and too early an evaluation of where the parties should be or what the judge thinks is the value of the case.”).
on the legal merits of the case, a subject that the client is often poorly
equipped to discuss.

On balance, the benefits of compelled facilitation outweigh its costs. Facilitative intervention responds to changes in federal court litigation—the growth of the litigation bar, higher stakes, and the rise in multiparty cases—that have increased the cost of bargaining in a wide range of cases. Reducing bargaining breakdowns plainly serves private interests. Moreover, the fact that participation is compulsory may often be critical to maintaining facilitation's private value. Litigants may increasingly welcome an instruction to bargain emanating from a neutral source, because it allows them to approach the bargaining table without signalling weakness. Similarly, although neither party would say so, both parties may prefer to bargain before a judicial officer whose authority and expertise seem likely to inhibit extreme claims. Thus, the enforced presence of the tribunal may create an artificial, but highly valuable, substitute for trust between the parties.

Reducing bargaining breakdowns should also serve the public interest. Ordinarily, a settlement gap is more likely when the existing information points to a relatively clear outcome. Settlement of such cases may lead to more precise justice between the parties by avoiding additional costs. The presence of the judge may also reduce extreme bargaining claims, increasing the likelihood that settlement negotiations will conform to the ideals of reasoned discussion. Finally, settling such cases will have positive effects on the judicial system. This does not necessarily mean, however, that there will be a reduction in litigation backlogs. Indeed, to the extent that the prospect of facilitated settlement increases the expected private value of litigation, either by increasing the effective stakes or by reducing postfiling bargaining failures, it will draw more litigants to court. The point, rather, is that the direct informational costs of such settlements should be low, while the indirect informational benefits of the additional litigation encouraged are relatively high.

224. Survey findings on lawyers' enthusiasm for judicial intervention are consistent with this conclusion, reflecting greater enthusiasm among lawyers in larger legal communities and among less experienced lawyers. Brazil, Effective Approaches, supra note 12, at 435-38, 443-45.

225. Brazil, A Close Look, supra note 222, at 329 (describing lawyers as "grateful to the court for compelling them to participate").


228. See supra text accompanying note 181.
Facilitation does impose costs on the parties and the courts. In general, however, direct costs should be lower than for more intensive forms of mediation. Political costs should also be lower: the judge is less involved in determining the terms of settlement, and facilitation involves a relatively modest interference with adversary ideals of party control and judicial neutrality.\(^{229}\) Facilitative mediation's major weakness is that it often limits client participation and control of the process, because it emphasizes communication between the lawyers and the use of legal language.\(^{230}\)

This favorable assessment of facilitative mediation rests on some important hidden premises. First, facilitative mediation's value depends on the existence of a settlement gap. If the parties' independent evaluations of their respective cases do not overlap, the facilitative judge, whose knowledge of the case is limited and derivative of the parties', is in a poor position to shift those judgments. Second, the attractiveness of facilitation also depends on the assumption that parties' assessments of their cases are pragmatically rational. If the existence of a settlement gap is due to pragmatically irrational failures of investigation or deliberation then the party concessions produced by facilitation may commence from a distorted baseline, reducing the likelihood that settlement will improve party or public welfare. Here again, the facilitative judge's partial and derivative knowledge of the merits will limit her ability to recognize situations in which her intervention will be harmful.

2. Improving Party Deliberations: The Judge as Counselor

Some settlement judges have apparently adopted the role of counselor to one or both of the parties in order to correct pragmatically irrational settlement decisionmaking.\(^{231}\) Some counseling aims at improving the quality of the advice reaching the client. For example, a judge may review each party's legal and factual analysis of the claim with the party or her lawyer in order to expose analytic shortcomings, gaps in preparation, or wishful thinking. She may puncture a lawyer's inflated view of a

\(^{229}\) For further discussion of the tensions between intrusive mediation practices and adversary values, see infra text accompanying notes 235-245.

\(^{230}\) Brazil, A Close Look, supra note 222, at 327-28.

\(^{231}\) Professor Riskin's approach to settlement mediation, which emphasizes the risks of inadequate deliberation and of lawyer incompetence or disloyalty, clearly reflects a counseling perspective. Riskin, supra note 3, at 1097-1108. Elements of a counseling role appear in Brazil, Effective Approaches, supra note 12, at 449-538. Wall and Rude identify judicial counseling as "paternalistic" intervention. Wall & Rude, supra note 213, at 52, 55-59.
or reinforce legal advice that a client might otherwise reject if the lawyer were to offer it to the client outside the judge's presence. Some commentators have suggested that judicial intervention can improve the lawyer-client deliberative process by, for example, exposing or controlling lawyer conflicts of interest that impede settlement. The judge can also identify nonlegal advantages of settlement that lawyers and clients have overlooked or undervalued due to simple error, poor lawyer-client communication, or the lawyer's habitual orientation to conflict.

a. Will Counseling Improve Party Decisions? Redundancy and Error

Counseling involves greater judicial involvement, both with the substance of the case and with the client. Deeper involvement in both the merits of the case and the parties' circumstances is required in order for the court to be confident that its advice will actually improve party deliberations. More intensive involvement with the client—including compelled client participation—may be required in order to reinforce good legal advice that is being ignored or to bypass and control lawyers whose financial interests or adversarial mind-set pose an obstacle to judgment.

Compelled judicial counseling is a much less promising strategy than facilitation. The general private benefits of counseling are doubtful. There is no strong evidence supporting the claim that individual parties regularly or frequently continue litigation as a result of pragmatic irrationality. While some institutional parties may have made errors in commencing and continuing litigation in the 1970s and 1980s, many of those institutions have now significantly improved their disputing competence. As a general strategy, then, counseling will often be redundant.

A counseling strategy therefore only makes sense if judges can both reliably identify cases in which intervention will improve party decision-making and can provide better advice themselves. Most federal district judges or magistrates, however, may have a difficult time with this task.

Accurate judgments that particular party decisions are pragmatically irrational require accurate identification and application of the relevant professional standards and accurate knowledge of the advice the party is receiving and of her preferences and values. The relevant profes-

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232. BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 470, 495; PROVINE, supra note 12, at 25 (describing the process as "throwing cold water" on the party's case).
234. These concerns plainly underlie many proposals to require client participation in settlement. See Menkel-Meadow, Pursuing Settlement, supra note 3, at 42; Riskin, supra note 3, at 1099-1103.
235. See supra notes 135-138 and accompanying text.
sional standards are open-textured and their content is controversial.236 Given the increasing diversity of practice backgrounds from which they are drawn, federal judges and magistrates may not be able to reliably identify or apply those standards to the full range of cases brought in federal court.

Judges may also have difficulty obtaining reliable factual information that will enable them to determine whether a party's decision is pragmatically irrational. Information about the lawyer's advice or the party's values and preferences is normally hidden, and often protected by attorney-client confidentiality. Obtaining this information from the attorney threatens attorney-client confidentiality, and ultimately the quality of the mutual deliberation between the lawyer and the client.237 Moreover, to the extent that the lawyer's own interests create a bias for or against settlement, the information provided by a lawyer may not be reliable.238 Obtaining this information directly from the party by interrogation, however, will often be perceived as intimidating or invasive.

To improve party decisions, counseling must also be candid. It may difficult, however, for a judge to fulfill an obligation of candor to both sides. Candor may also require judges to convey information that tends to discredit the system of justice. Suppose, for example, that the settle-

236. What is the "correct" level of investment in information? Informal professional standards may provide a guide, but in more complex actions and in rapidly developing areas of practice, standards may be undeveloped or controversial. What constitutes the proper deliberative weighing of consequences, preferences, and values, and what should the role of a party's lawyer be in stimulating and guiding that deliberation? Again, there is no answer that commands wide professional acceptance. Finally, when—short of actionable misconduct—does the proper exercise of professional autonomy by a lawyer, or of delegated authority by the agent of an institution, become unwarranted disloyalty? The answers undoubtedly vary for different types of lawyers and clients. See supra text accompanying notes 85-90.

237. For example, Magistrate Brazil reports that one advantage of having the settlement judge confer privately with each attorney, out of the presence of the parties, is that it "permits a lawyer who is having client control problems or who knows that his client is especially sensitive to certain matters to alert the judge to these difficulties and, where appropriate, to enlist the court's assistance." BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 468. Such a communication to the judge could well violate attorney-client confidentiality, since the apparent need for the communication to take place out of the presence of the client suggests that if consulted the client would not have authorized it. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1991) (prohibiting lawyer from disclosing information "relating to the representation" without express or implied client consent).

238. Consider again a situation in which the judge is informed in confidence by a party's lawyer that the party is being unreasonable. See supra note 237. All the judge's information about the case is based on what he has been told by the party's opponent and the party's lawyer. Given the possibility that an earlier settlement would serve the lawyer's own interests, given the party's lack of knowledge that the lawyer has made such an accusation to the judge, and given the fact that the party cannot meet the accusation directly, the judge's decision to intervene in support of the lawyer's view might easily be mistaken.
ment judge knows a party should succeed, and would do so before most judges, but that the party is likely to lose before the judge who will try the case. Candid advice calls for the harsh criticism of a colleague. It is doubtful that judges regularly resolve this conflict in favor of providing full information.

b. Will Counseling Improve the System? Tainted Outcomes, Incentive Effects, and Political Costs

Even if judicial counseling could be selectively applied so that it reliably improved party decisionmaking, it would have other costs that would make it unattractive. First, to the extent that mediation is performed by the trial judge, counseling transgresses an important barrier between the tribunal and the litigants' private deliberations. Consequently, there is a greater risk that decisions on the merits will be influenced by prejudgment or by irrelevant or inadmissible information about the parties' character, values, and preferences.

Second, counseling creates undesirable incentives that increase judicial workload. The greater the tribunal's role in regulating professional judgment or private deliberation, the weaker the incentive for lawyers and parties—particularly parties who are repeat players—to develop their own judgment and deliberative competence. For example, if lawyers expect careful, honest, and dispassionate case analysis from the settlement judge, they will be less inclined to perform that analysis at an earlier date. The net effect of counseling may therefore be an overall shift in workload from the parties and lawyers to the courts.

239. See, e.g., BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 418-25; Resnik, supra note 13, at 426-31; Will et al., supra note 12, at 211, 224-26.

240. Cf. Resnik, supra note 13, at 427 (arguing that private interchange creates "a fertile field for the growth of personal bias").

241. Cf. Wall & Rude, supra note 213, at 48 (reporting one judge's observation that increased mediation reduces party preparation). This point is not necessarily inconsistent with the observation that lawyers appear to prepare more for settlement conferences with an active judge. Active preparation by lawyers may demonstrate either that very few judges actually engage in candid counseling (as opposed, for example, to facilitation) or that very few can do it effectively. A candid counselor seeks to produce the decision that best serves the party's interest, even if that decision reduces the likelihood of settlement. Lawyers who expect to appear before a candid and effective judge should have less incentive to prepare, because the judge will reaffirm those parts of a party's analysis that are accurate and correct those that are not, all with a view toward improving that party's welfare.

If the judge is not motivated by a desire to improve party decisionmaking or is an ineffective advisor, then vigorous preparation is essential. For example, if judges routinely challenge party analyses in order to increase the likelihood of settlement, then parties must prepare both to defend their own analyses against judicial attacks and to avoid errors that may bias them toward an unwise settlement. Similarly, if the judge's advice is likely to be unreliable because
Finally, counseling intensifies political costs. The court breaches a critical political separation when it moves from helping presumptively competent parties strike a deal to helping presumptively incompetent parties decide whether to sue or settle. To see why, we need to return to the political premises of the adversary system. Adjudication is an instrument of governance, and its public, political character is most apparent when the tribunal is engaged in social control or legislation. In an individualistic and democratic society, government action is suspect. In an adversary system, party control over the initiation and termination of litigation legitimizes government action, because the court acts in response to claims generated by independent actors with concrete grievances.\(^{242}\) When adjudication is viewed as an instrument of governance, limited regulation of party decisions about beginning, continuing, or settling litigation can also be justified on principles akin to those that protect political speech under the First Amendment. Marginal but nonfrivolous claims and defenses express the litigant's political autonomy and help to frame, check, and legitimate mainstream legal discourse.\(^{243}\)

Judicial involvement in choices to sue or settle thus threatens the legitimacy of adjudication, party autonomy, and the integrity of a party-initiated political discourse on which the sound operation of the legal system depends. Even benign judicial involvement may be harmful. Requiring a lawyer or a party to candidly discuss the benefits and costs of her chosen political action with the judge is potentially intimidating. The risk of intimidation is greater if the settlement judge believes that settlement is generally in the public interest or that particular types of claims or defenses are generally well founded.

Some might say this account overemphasizes the political character of litigation decisionmaking or the political nature of judges. After all, many litigants are concerned primarily with financial consequences and

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242. In cases involving nongovernment litigants, party control of decisions to commence and terminate litigation maintains the distinction between private and public. In cases involving state agencies, it preserves the principle of federalism, and in cases involving federal agencies, the principle of separation of powers.

many settlement negotiations focus on the amount that will be paid.\textsuperscript{244} The absence of a political motive, however, establishes only that the litigant's personal expressive interest is not implicated. It does not reduce the threat to the integrity of litigation as an instrument of social control. In many cases the amount of money paid is itself politically significant because it determines whether the purposes of the relevant laws are well served and whether other similar claims will be encouraged or deterred. That a litigant wishes only to increase her monetary recovery, therefore, does not make her legal and factual claims nonpolitical, any more than an individual's financial motive for opposing social security cuts makes her arguments in opposition nonpolitical. The instrumental political objection to judicial intervention remains.

Moreover, the political content of federal court litigation and the political character of federal court judging are increasing rather than declining, particularly in civil rights, employment, products liability, toxic tort, and medical malpractice cases. These cases have a strong hierarchical character because they tend to pit individual against institution rather than individual against individual. They often involve plaintiffs who appeal to public norms in order to challenge private arrangements. These classes of litigation are increasingly seen as part of a system of regulation, rather than a means of addressing isolated acts of wrongdoing, and hence are evaluated in terms of their collective impact on the subjects of regulation. For all these reasons, judges are likely to have strong views about such cases, especially because the federal bench has itself become more ideologically polarized. These elements suggest that the political costs of counseling may be high across a fairly broad spectrum of the federal docket.

There may, however, be relatively little political motivation or content in the large commercial contract disputes that make up an increasing share of the federal caseload.\textsuperscript{245} The parties themselves may be relatively equal actors concerned only with how much will be paid, and the governing norms may be noncontroversial because they grow out of the parties' relationship. In such cases, the political costs of a more intensive counseling approach may be relatively low. Nonetheless, requiring counseling in such cases still involves a high risk of redundancy or of undesirable effects on parties' incentives to prepare.

\textsuperscript{244} Brazil, \textit{A Close Look}, supra note 222, at 317 ("much of the litigation in our court is about only one thing: money").

\textsuperscript{245} Cf. \textit{id}. (much litigation "pits two commercial entities against each other").
3. **Promoting the Public Interest: The Judge as Optimizer**

An optimizing judge seeks the settlement that represents the best attainable mix of private and public goals. Unlike the counseling judge, she will countenance some reduction in the litigants' well-being to achieve public aims that she views as important. Such judges are likely to be eclectic and pragmatic in choosing strategies. They may rely on facilitation, on more or less honest counseling, or on manipulation of the timing and substance of important decisions in the case.

The objections to a judicial counseling approach apply with even greater force to an optimizing strategy. Since the public interest is not generally served by settling cases, an optimizing judge must identify the cases that should settle and determine the appropriate settlement terms. Since there are no recognized criteria for a "just settlement," the standards applied are likely to be subjective and colored by the judge's political views.

Judges are also unlikely to have the information needed to accurately apply any particular settlement standard. Depending on the criterion selected, a busy judge or magistrate may have to assess, on an ad hoc, informal basis, the range of potential outcomes and costs; the parties' interests, values, bargaining skills, or preexisting social and market relations; and the improvement in judicial workloads or the stock of precedents that would be achieved by the settlement. There is evidently rich potential for error and bias in these assessments.

The use of optimizing mediation also necessarily magnifies judicial conflicts of interest. An optimizing judge may be strongly tempted to take actions that are detrimental to party welfare or that depart from the law. Consider the pressures on an optimizing judge who engages in counseling. In some cases that reach pretrial, the parties' best estimates will be skewed in favor of settlement rather than litigation. The lawyers may have incompetently failed to identify critical favorable evidence, or intentionally understated the strength of the claim to encourage their clients to settle. In such cases, if the court corrects the error or disloyalty, the likelihood of further litigation is increased.

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246. For example, settlement may produce more "just" results than litigation because it enables the parties to bargain on the basis of a predicted outcome based on existing law, while avoiding the costs of adjudication. At other times, settlement may produce more "just" outcomes than litigation because it can produce results that depart from existing law. See supra Part III.A.

247. Settlement judges know that plaintiffs' counsel are often biased in favor of settlement. Will et al., supra note 12, at 208 ("most plaintiff[s'] lawyers don't want to try the case if they can avoid it").
An optimizing judge who favors settlement may therefore be tempted to forgo candid counseling. As a result, a lawyer who has given her client an unduly dismal prognosis may find that picture uncorrected or even reinforced by the judge.\textsuperscript{248} This form of conflict may be a significant systemic problem. Of course, judges do not readily admit to selling parties on settlements that are not in their best interest; instead, evidence for this phenomenon lies in what settlement judges do not say and in what lawyers report about their reasons for valuing judicial involvement. Thus, leading settlement judges frequently discuss both the need to "throw cold water" on the parties to reduce unwarranted optimism and the measures designed to achieve that purpose,\textsuperscript{249} but there are no comparable discussions of the need to correct unwarranted pessimism. This omission is telling. If the optimizing judge's goal were to promote informed decisionmaking, one would expect some recognition of the need to "stoke the fire" when parties appear to be stumbling into an unwise settlement. The evidence from plaintiffs' lawyers also suggests that judicial counseling is available only when it seems likely to bring about settlement. Many plaintiffs' lawyers apparently value direct judicial contact with the client because it helps them deal with clients who refuse to accept their advice to settle.\textsuperscript{250} There is no similar evidence that counseling judges have sought to rescue clients whose lawyers irrationally feared trial or were disloyally inclined toward settlement.

The optimizing approach also provides temptation to depart from the law. That temptation is explicit in some accounts of "just settlement." For example, the claim that settlement can improve justice by avoiding an unjust decision would seem to require an optimizing judge to postpone a decision on the merits even when the law is clear, and to steer negotiations away from the result dictated by the law. An optimizing judge may also be tempted to bend the law in other ways, by delaying rulings on intermediate issues or shading them toward a result that en-

\textsuperscript{248} Cf. id. ("plaintiff's lawyer is happy to have an analysis he can take back to his client as an evaluation of the case with the judge's imprimatur on it").

\textsuperscript{249} PROVINE, supra note 12, at 25-26. Similarly, the leading treatise on settlement judging emphasizes the need to skew the analysis toward pessimism in order to increase the likelihood of settlement. See BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 496 (stressing the ineffectiveness of posing "questions that encourage counsel to focus at great length on the strong points in their case"); id. at 505 (stressing the danger that candid opinions that are more optimistic than those of the parties may hinder settlement). This imbalance in the tenor of judicial advice may also reflect that most judges view themselves as engaged in facilitation, rather than counseling. If that is so, then these accounts illustrate the dangers of applying a facilitative approach in cases in which the existence of a settlement gap is due to pragmatic irrationality. See supra text following note 230.

\textsuperscript{250} BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 468-69.
hances the likelihood of settlement, whether or not it conforms with law.251

The dangers of an optimizing approach are illustrated on a large scale by the highly publicized role of Chief Judge Jack Weinstein of the Eastern District of New York in settling the massive products liability lawsuit brought by Vietnam veterans claiming injury from exposure to Agent Orange during their military service.252 Judge Weinstein committed his time, judgment, and judicial and personal prestige to creating a settlement.253 His strategy had three basic elements. First, he made legally questionable, but effectively non-appealable, rulings apparently designed to improve the climate for settlement by reducing the apparent amount in controversy without eliminating the possibility of a substantial plaintiffs' judgment.254 Second, relying in part on appointed mediators, he initiated and controlled a “conflicted counseling” strategy, pursuant to which he and his representatives met with each side separately and analyzed their respective cases. To defendants, they stressed the financial and reputational risks of a plaintiffs' verdict.255 To plaintiffs, they stressed the risk of a directed verdict on their claims.256 Recognizing that counsel for plaintiffs were risk-averse, Judge Weinstein played on that risk aversion in order to encourage settlement.257 Third, the judge closely monitored the ultimate settlement amount, vetoing one settlement that both sides were apparently prepared to accept on the ground that it would stimulate subsequent tort suits of doubtful merit.258 The result was a $180 million settlement of the class plaintiffs' claims. Yet when some class plaintiffs opted out, the judge promptly granted a motion for summary judgment against them on the ground that their claims presented no triable issue of fact.259

Judge Weinstein's strategy vividly illustrates the risk that an optimizing judge will adopt a mistaken view of the public interest. From Judge Weinstein's perspective, the veterans' claims were without merit and a suitable subject for summary judgment, but the “just outcome” nonetheless required some payment on account of plaintiffs' service to

251. Elliott, supra note 13, at 325 (noting that judges can alter “the shape of the playing field” to promote settlement).
252. See supra note 212.
254. Id. at 343-44.
255. Id. at 346.
256. Schuck, AGENT ORANGE, supra note 212, at 160-61.
257. Id. at 163-64.
258. Id. at 159.
259. Id. at 226-44.
Because the settlement would inevitably be public, precedential effects were important. Thus, the amount paid could not be too large, lest it encourage others to file meritless mass toxic tort claims. In effect, Judge Weinstein adopted the view that settlement of the Agent Orange litigation could improve justice between the parties by departing from the letter of the law, provided that the adverse informational effects of settlement could be limited. This alternate standard of justice, however, was wholly subjective and was never tested in litigation. Nor is it clear how the judge determined, as a matter of fact, that settlement of a meritless claim at $240 million would create inappropriate incentives for litigation while settlement at $180 million would not. The judge's mediation strategy thus lacked any strong normative or empirical foundation.

The Agent Orange case also demonstrates the moral and political risks of an optimizing strategy. The negotiations conspicuously failed to honor basic notions of party autonomy. To the contrary, the judge sought to drive a wedge between the highly ideological plaintiff class and its lawyers. The negotiations were conducted in private, with no plaintiffs present, and the judge consistently played on the lawyers' fatigue, risk aversion, and lack of ideological interest. The separate sessions with the lawyers did not emphasize honest counseling, but rather strategic distortion, with heavy emphasis on costs, risks, and delay.

The judge's settlement strategy also arguably did not respect the law. The departure from law was explicit in the sense that the settlement did not and was not intended to address the merits of the case. The departure from law was also reflected in the pattern of doubtful rulings and failures to rule that created the "climate for settlement." Finally, to the extent that an advantage of settlement is avoiding government responsibility for the outcome, the court's involvement in the Agent Orange settlement dissipated that advantage.

The dangers of optimizing are present in any case in which the judge encourages settlement based on her firm view that the case "ought" to settle, either generally or for a particular amount. The Agent Orange case was a large, complex, politically visible case involving a distinguished trial judge, but it is not unique. Other accounts of complex liti-

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260. Id. at 159.
261. Id.
262. It seems quite plausible that plaintiffs would have benefited more from losing their case on summary judgement or at trial and relying on the resulting publicity to strengthen their moral claim with Congress. The defendants, tort policy, and the court system may also have gained more from a summary judgment or directed verdict that demonstrated the limits of the courts' tolerance for doubtful claims.
gation describe equally troubling conduct, and the lack of detailed accounts of optimizing in smaller cases may demonstrate only that smaller cases are rarely subjected to careful observation.

4. Summary

Compulsory judicial settlement conferences appear more likely to be productive and fair if they are conducted in a facilitative mode. The goal of such conferences should be to ensure that obvious settlement opportunities are not missed because of the perceived costs and risks of bargaining. This limited form of intervention may well provide substantial private and public benefits at a relatively low cost. Judges should abandon the more ambitious goals of settlement—promoting wise decision-making or the public interest—except to the extent that facilitative mediation achieves them indirectly.

The rationale for judicial mediation also suggests limitations on its use. In general, facilitation will be more useful later in the case, after discovery has narrowed differences in the parties' perception of the outcome. Facilitation will also tend to be more beneficial in cases or jurisdictions where bargaining costs are high. A general preference for facilitation is therefore more strongly justified in districts with higher numbers of lawyers and judges or with more high-stakes cases in which the negotiations are likely to be complex. This preference should be weaker in districts with fewer lawyers, with less complex caseloads, or with specialized bars that handle substantial portions of the caseload. And whatever the strength of the presumption in favor of judicial mediation in any given district, settlement conferences are of little benefit in cases with no settlement gap.

C. Compulsion and Consent in Judicial Mediation

The private and public benefits of facilitation may well depend on its being compulsory for both parties. A blanket condemnation of compelled participation in settlement conferences would therefore be a grave mistake. The question remains, however, what the extent of compelled participation should be.

The goal of preventing bargaining breakdowns suggests some general limits on what should be demanded of "good faith" participants in

263. See Sobol, supra note 212, at 338-39 (describing Judge Merhige's contested vision of the optimal settlement in the Dalkon Shield bankruptcy and concluding that he achieved that vision by precluding "the effective presentation of opposing positions").

264. For example, Judge Will and Judge Merhige, two widely known settlement judges, described exploiting the reluctance of plaintiffs' lawyers to try cases and their eagerness for early payment in order to cause cases to settle. Will et al., supra note 12, at 208, 216.
settlement conferences and on who should be required to participate in them. The aim of such conferences is to lower the cost of making concessions and to allow the parties to assess each other's resolve. Therefore, a logical first step is to require each party to state his initial bargaining position and some supporting reasons. The statement of position provides a starting point for the bargaining process, while the statement of supporting reasons provides the basic framework within which concessions will occur. The "good faith" language of Rule 16 counsels against requiring too much candor or close reasoning in this initial statement. If the rulemakers had wanted more candor or rigor, they could have imposed a requirement of reasonableness. A more relaxed approach also serves the purposes of the conference. Requiring too much candor or too substantial an analysis might destroy the parties' bargaining ability or threaten party autonomy.

The logic of the bargaining process requires that each party hear her opponent's position and statement of reasons, either directly or through the judge acting as intermediary. Once both sides have been presented, each party must submit to questions and criticisms from the judge in order to determine whether there is a basis for concessions. If the parties want to explore settlement without appearing to be weak, this procedure would seem to give them sufficient "hooks" on which to hang initial concessions.

Treating facilitation as the preferred form of judicial mediation helps in determining both whether courts should be granted the power to compel represented parties to attend settlement conferences and how that power should be exercised if granted. Rule 16 expressly authorizes compelled attendance only of attorneys and unrepresented parties. The lead-

265. Rule 16's requirement of "good faith" participation echoes the language of former Rule 11, and not the more demanding standard of legal and factual plausibility imposed under the 1983 amendments to Rule 11. See supra note 18. Rule 16 implies that bargaining positions need not be plausible, so long as they do not disclose an obvious abuse of process. Some have suggested that the "good faith" obligation under Rule 16 should be construed by reference to the "good faith" bargaining standard under section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d) (1988). See Menkel-Meadow, Pursuing Settlement, supra note 3, at 18 & n.79. In view of the tangled and inconsistent history of that provision, see Robert A. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 399-495 (1976), and of the very different actors, policies, and regulatory schemes at issue in civil litigation and collective bargaining, the suggestion does not seem promising.

266. Thus, it would normally go too far to require an individual plaintiff to state the values or emotions that underlie her refusal to accept a monetary offer in a weak case or to require an institutional defendant to describe the reputational concerns that have caused it to adopt a "no offer" or "lowball" strategy in a case where it faces a serious risk of liability. For a discussion of lowball strategies, see Gross & Syverud, supra note 47, at 348-52.
ing decision, *G. Heileman Brewing Co. v. Joseph Oat Corp.*,\(^{267}\) nevertheless holds that federal judges may compel represented parties to attend settlement conferences. While the *Heileman* court’s interpretation of Rule 16 was questionable,\(^{268}\) the Civil Justice Reform Act effectively authorizes individual federal district courts to grant judges power to compel the attendance of represented parties pursuant to their expense and delay reduction plans under the Act.\(^{269}\) The open issue, then, is whether trial judges should be granted that power, and if so, how it should be exercised.

Allowing courts to compel represented parties to attend settlement conferences seems most likely to improve outcomes if the absence of represented parties is a frequent barrier to bargaining in cases in which a settlement gap already exists. Suppose, for example, that parties frequently absent themselves from the conference simply so that their lawyer can assert their unavailability as a basis for refusing to make concessions. If this practice is common, concessions may not be offered in settlement conferences for fear they will not be promptly reciprocated, and the bargaining process may therefore be significantly impaired. The

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267. 871 F.2d 648 (7th Cir. 1989) (en banc).
268. This holding has received approval from commentators. See, e.g., Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 603-04 (1989); Riskin, *supra* note 3, at 1106-07.

As a matter of doctrine and policy, the *Heileman* decision seems wrong. The court relied on the “broadly remedial . . . purpose” of Rule 16 that allows courts “to actively manage the preparation of cases for trial,” *Heileman*, 871 F.2d at 652 (citing *In re Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc), cert. denied, 471 U.S. 1014 (1985)), and the provision of Rule 1 that the rules be “'construed to ensure the just, speedy, and inexpensive determination of every action,”' *id.* (quoting FED. R. CIV. P. 1). The *Heileman* court was mistaken to rely on the general power to manage litigation to justify expanding coercive regulation of settlement decisionmaking. Concerns for efficient management of ongoing litigation might ordinarily justify a broad construction of Rule 16 or a broad delegation of power under a local civil justice plan; these concerns, however, cannot be translated automatically to questions of terminating litigation. Settlement decisions differ from other party decisions that are subject to judicial management because they are more likely to turn on information that is not available to the court and because the moral and political legitimacy of both settlement and litigation depends on whether the parties (rather than the court) chose between them. The *Heileman* decision fails to recognize these distinctions.

269. Recognizing that the Civil Justice Reform Act invited experimentation in the area, the Advisory Committee on Civil Rules recently decided against recommending changes in Rule 16 that would have explicitly empowered courts to order the attendance of represented parties. *See* Letter from Honorable Samuel C. Pointer, Chairman, Advisory Committee on Civil Rules, Judicial Conference of the United States, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States (May 1, 1992) and Attachment B at 6 (discussing proposed revisions to the Rule and the reasons for withdrawing it) (on file with author). The original text of the proposed amendment, reflecting the provision for compelled attendance, can be found at 137 F.R.D. 53, 82 (1991).
client’s presence might also facilitate striking a deal by increasing the speed with which concessions can be made and “bottom lines” reformulated. Ordinarily, a requirement that the client be available by telephone would accomplish much the same result at much lower cost. Party attendance may be more important, however, if avoiding a bargaining breakdown requires one of the parties to make a personal assessment of the other’s bargaining resolve.

Compelled party attendance in the service of a counseling or optimizing strategy, however, seems much less likely to be worthwhile. In particular, it is difficult to see why coerced client attendance is necessary to address problems of inadequate client deliberation or attorney conflict of interest. There are two kinds of clients in federal court: individuals, who are mostly plaintiffs represented on a contingent fee basis, and organizations, who are both plaintiffs and defendants. Lawyers representing individuals are seldom biased in favor of trial: contingent fee arrangements and risk aversion normally provide them with sufficient incentives to extol the benefits of settlement. Accordingly, such lawyers normally want to have their client at the settlement conference so that the judge can “cool her out” if she refuses the lawyer’s advice to settle. Hourly fee lawyers who represent organizations may have a litigation bias, but those organizations are increasingly skilled at controlling those biases. It is therefore difficult to see why an invitation from the court, rather than an order, would not fully protect most institutional parties against lawyer disloyalty.

The analysis thus far has assumed that parties participate in settlement conferences under compulsion. Many judges claim that they do not become intensively involved in settlement negotiations without both parties’ consent. These claims, however, may understake the extent of informal compulsion. Both trial and settlement judges have considerable coercive power that might lead parties to offer nominal consent to participation in settlement conferences even when they have serious misgivings. That power is greatest when the settlement conference is conducted by the trial judge, because parties may fear “punishment” if they fail to

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270. Many commentators suggest that compelling represented parties to attend might serve such ends, by enhancing the client’s understanding of the evidence or improving her ability to monitor the attorney’s (presumed) disloyal desire to continue the litigation. Richey, supra note 268, at 604; Riskin, supra note 3, at 1099-1103.

271. Of course, in some cases risk-neutral plaintiffs’ lawyers may favor trial while risk-averse clients may favor settlement. See Gross & Syverud, supra note 47, at 352. If this agency problem can be identified in individual cases, it might provide a basis for compelled attendance. Cf. Elliott, supra note 13, at 331-32 (describing such a case).

272. BRAZIL, EFFECTIVE APPROACHES, supra note 12, at 430-32.
participate in a settlement conference or to accept suggestions made in it.\textsuperscript{273} When coupled with the risk that participation by the trial judge will taint the outcome of the trial, this risk of coercion may be so severe that trial judges should be barred from performing even nonintrusive facilitative mediation\textsuperscript{274} and from communicating with the settlement judge about what took place at the conference.\textsuperscript{275} Separating the trial and settlement functions moderates informal compulsion, but does not eliminate it. The trial judge remains free to make or delay key rulings so that the suggestion of a settlement conference becomes an “offer that can’t be refused.”\textsuperscript{276} In addition, although the settlement judge may lack the power to punish parties for their conduct in negotiations, many parties may fear their conduct will “leak” to the trial judge. Finally, even if there is no fear of such leaks, for lawyers who frequently appear before the same settlement judge or magistrate, deference may appear prudent even if it does not serve the client’s interests.

Not all informal coercion is bad. Just as formal coercion may make it easier for parties to begin bargaining, informal coercion may make it possible for them to continue to do so. In facilitative negotiation, for example, fear of offending the judge may prevent parties from attempting to exploit initial concessions by their opponents, increasing the likelihood that such initial concessions will be made. The real danger of informal coercion is not that it exists, but that it may lead parties to consent to forms of mediation that are much less likely than facilitation to have beneficial effects.

With these caveats, reports that many parties consent to or even request judicial mediation remain very plausible. Some lawyers and parties are too powerful or sophisticated to be overreached by judges. Many lawyers and parties want a facilitator or a second opinion,\textsuperscript{277} and parties who cannot agree on settlement may still be able to agree to consult a neutral facilitator.

That parties consent to some mediation, however, does not establish either that they consent to intrusive mediation, or that courts would be

\textsuperscript{273} See, e.g., Resnik, supra note 13, at 425, 429 n.209.

\textsuperscript{274} Cf. Menkel-Meadow, Pursuing Settlement, supra note 3, at 43 (stating that mediating judge should not later serve as finder of fact); Resnik, supra note 13, at 427-31; Shapiro, supra note 3, at 1996 (questioning whether mediator should preside at trial).

\textsuperscript{275} This is the “unwritten local convention” in the Northern District of California, as described by Magistrate Brazil. Brazil, A Close Look, supra note 222, at 312.

\textsuperscript{276} Elliott, supra note 13, at 325; Schuck, The Role of Judges, supra note 212, at 351-52. Leading settlement judges distinguish between rulings that disturb an “emerging agreement” and coercive rulings. Provine, supra note 12, at 33-34. This seems to be a fine line indeed.

\textsuperscript{277} Brazil, Effective Approaches, supra note 12, at 391-447 (reporting a survey of lawyers in four federal districts).
well advised to provide it when parties request it. Much of the evidence about why parties desire intervention is consistent with limiting intervention to a facilitative role, and none suggests that parties would freely consent to mediation before a judge whom they knew would adopt an optimizing role whether or not it served their interests.

Nor is it clear why courts should provide more intensive mediation at public expense. Given the limitations of judicial counseling, there is little reason to think that ordinary federal judges can regularly improve on what the parties could achieve, either on their own or with the assistance of a private neutral mediator. Given the cost in judicial time and the adverse effects of judicial counseling on parties' incentives to prepare, there is little reason to favor a counseling approach even if the parties consent to it. If parties need to improve the quality of their legal advice, they ordinarily ought to do so in the marketplace.

V. Conclusion

This Article has attempted to outline a via media on the question of settlement, one that allows federal courts to respond to important changes in the nature of their caseload while respecting the continued practical and moral force of arguments for adversary justice. As befits a moderate approach, the conclusions are mixed. Settling pending cases is not an unqualified good. Often the parties and the public interest will be better served by continued litigation. In a significant number of federal cases, however, the increased costs and risks of bargaining may be preventing settlements that have more private and public value than continued litigation.

Judicial mediation is also not an unqualified good. Facilitative mediation aimed at cases in which bargaining is costly promises genuine improvements in the system of justice at relatively small cost. Ambitious uses of judicial mediation to improve parties' decisionmaking or to vindicate the broader public interest, however, appear likely to be at best unproductive and at worst actively harmful.

Finally, compelled mediation is not an unqualified evil. In many of the cases where mediation is most likely to improve private and public outcomes, compulsion to mediate may be highly desirable. The danger of compulsion, then, is that not that it will be used, but that it will be used outside its proper sphere.

278. Enthusiasm for judicial intervention is highest in districts with more lawyers and among lawyers with less experience. See Brazil, Effective Approaches, supra note 12, at 392, 443-44.