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Quality of Settlements, The

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I. WHAT'S SO GOOD ABOUT SETTLEMENTS? AN ANTHOLOGY OF "QUALITY" ARGUMENTS

When I was a law student, some 30 years ago, I don't recall hearing much about settlement. I am sure that my teachers knew there were a lot of settlements, but they were not worthy of much attention. They were part of the realm of practical nuts and bolts detail that lay outside learning about the law; law school was about cases that were adjudicated.

Today, "most cases settle" has become commonplace in discussions of civil justice, even in law schools. This is a welcome corrective to the naive tendency to speak as if every case were tried and subjected to appellate review. But this overtly descriptive observation lends itself to a variety of rhetorical uses. It is used to indicate that settlement is the natural outcome of litigation, to imply that settlement is what litigants want, and to justify efforts to maintain or increase the portion of cases that settle. I want to examine the approbation of settlement that is linked to these connotations. But first, it should be

* Evjue-Bascom Professor of Law and South Asian Studies, University of Wisconsin-Madison. This paper was originally prepared for the Working Group on Judicial Ethics of the Center for Philosophy and Public Policy of the University of Maryland. An enlarged version will appear in THE USE AND ABUSE OF JUDICIAL POWER (David Luban ed.). I am indebted to Leonard Riskin and John Esser for helpful comments on an earlier draft.

Galanter: Glaanter: Quality of Settlements

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noted that even as a simple description, this observation requires some qualification.

It is indeed true that settlement is the modal disposition of civil cases in most courts in the United States and probably has been so for a long time. However, we should not exaggerate its predominance. Oft-cited figures of 85% or 90% or 95% are misleading; they represent the portion of civil cases that do not go to trial. But that is not quite the same as "settled" if settlement means resolved by agreement between the contending parties, rather than by the decision of an authoritative decision-maker. Cases may be disposed of by authoritative decisions in other ways than by trial. My colleague, Bert Kritzer, analyzing some 1,649 cases in federal and state courts in five localities, found that although only 7% terminated through trial, another 15% terminated through some other form of adjudication (arbitration, dismissal on the merits), and in a further 9% settlement followed a ruling on a significant motion.

Settlement of civil cases has long been praised as desirable in individual cases. In the past, settlement has also been appreciated for its salutary effects on the judicial system—relieving congestion and saving court resources. Settlement has gained acceptance as something that courts, as well as others, legitimately strive to produce. A large number of judges do participate actively in the settlement of some cases. This judicial intervention meets with the general approval of lawyers.

Let me begin with a little anthology of assertions about the estimable qualities of settlements drawn from judges and legal scholars. Since a number of current attacks on the Alternative Dispute Resolution (ADR) "movement" seem to identify it as the promoter and popularizer of settlement, it is worth noting that this catalog of praise is drawn from those who are professionally concerned with adjudication and that most of these views predate the modern ADR movement.

A. At a 1976 seminar for newly-appointed federal district judges, they were counselled by a veteran judge that "[o]ne of the fundamental principles

1. See Annual Report of the Administrative Office of the Courts, Table C-4 (1986). For example, in the federal district courts in 1986, the portion of civil cases that were terminated "during or after trial" was 4.2% of all terminations. It should be noted that this includes cases that settled after the commencement of trial. Id.

2. Kritzer, Adjudication to Settlement: Shading in the Grey, 70 Judicature 161, 163 (1986). Default judgments were omitted from this computation.


of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little take a little settlement."

B. An outline distributed to the new judges reiterated that:

In most controversies, most court cases, the highest quality of justice is not the all or nothing, black or white end result of a trial, but is in the grey area—in most cases a freely negotiated settlement is a higher quality of justice which is obtainable earlier and at less cost. Approximately 90 percent of all suits filed in federal courts are disposed of without trial.

C. Chief Judge William J. Campbell of the Northern District of Illinois is cited by a sympathetic observer as holding that "[w]hat just requires . . . is a settlement acceptable to both sides, not a determination that one side is at fault and must compensate the other for damages inflicted." Judge Campbell points to the preference of parties for settlements, taking their prevalence as evidence of their desirability and hence of the quality of the courts' performance.

D. Chief Judge Noel Fox of the United States District Court for the Western District of Michigan identifies himself as among those who "accept settlement as a preferred means of disposition." Among the many advantages of settlement are:

Promotion of a result closely related to the merits of the parties' position: the parties and their lawyers have more accurate knowledge of the value of their respective cases than does the court or a jury. An agreement on settlement can thus be expected to reflect the parties' evaluation of the actual merits of the case. This produces results which are probably as close to the ideal of justice as we are capable of producing.

Thus, settlement avoids the harsh and extreme judgments that may be ordained by the law in favor of a middle course.

E. The Draft of the Model Rules of Professional Conduct contained the observation that "although litigation is wholly legitimate as a means of resolving controversy, a fairly negotiated settlement generally yields a better conclusion."

8. Id. at 144.
10. Id. at 142. Judge Fox is sensitive to the concern that compromise may reflect different bargaining advantages unrelated to the merits. Id. at 143.
11. ABA Comm. on Evaluation of Professional Standards, MODEL RULES OF
F. Robert Mnookin and William Kornhauser, in their noted "Bargaining in the Shadow of the Law,"¹ discuss the advantages of bargained outcomes in divorce disputes:

There are obvious and substantial savings when a couple can resolve distributional consequences of divorce without resort to courtroom adjudication. The financial cost of litigation, both private and public, is minimized. The pain of a formal adversary proceeding is avoided. Recent psychological studies indicate that children benefit when parents agree on custodial arrangements. Moreover, a negotiated agreement allows the parties to avoid the risks and uncertainties of litigation, which may involve all-or-nothing consequences. Given the substantial delays that often characterize contested judicial proceedings, agreement can often save time and allow each spouse to proceed with his or her life. Finally, a consensual solution is by definition more likely to be consistent with the preferences of each spouse, and acceptable over time, than would a result imposed by a court.¹⁸

G. Melvin Eisenberg, contrasting the negotiation of disputes with their adjudication, concludes that negotiation can take into account a richer array of normative principles, while adjudication typically excludes at least some of the principles that the disputants themselves regard as relevant.¹⁴ Thus, "traditional adjudication may actually be a less principled process than dispute negotiation."¹⁶ This is because, "[i]n most cases of dispute-negotiation the outcome is heavily determined by the principles, rules, and precedents that parties invoke."¹⁶ In negotiation, "a broad spectrum of norms can be taken into account in a wide variety of ways;"¹⁷ adjudication, on the other hand, is less principled since some principles are excluded from consideration.¹⁸

Eisenberg also believes that some of the desirable features of pure negotiation of disputes are preserved when opposing lawyers negotiate in the shadow of formal litigation:

The lawyers are not only able but likely to take all colliding principles into account; they may take account of subordinate principles; their fact finding procedures have the simplicity and open texture of all negotiation; they may be more flexible in their choice of remedies; and within the leeway left by principles, rules, and precedents, their decisions may turn partly on such fac-

¹ Professional Conduct 35 (Discussion Draft, Jan. 30, 1980) (emphasis added). The proposed ethical regulation of lawyers negotiating was dropped from the Model Rules as enacted.


¹³ Id. at 956-57.


¹⁵ Id. at 657.

¹⁶ Id. at 639.

¹⁷ Id. at 655.

¹⁸ Id. at 657.
tors as prominence, personal force, and risk preference. On another level, since each disputant stands in at least a rudimentary interpersonal relationship to... [one of] the lawyers, the parties are likely to perceive adjudication-by-lawyers as more human and less threatening than formal adjudication.16

H. Carrie Menkel-Meadow, after examining the efficiency arguments for settlement and finding them wanting, observes that:

[what] settlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication. Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent. In addition, settlement offers a different substantive process by allowing participation by the parties as well as the lawyers. Settlement fosters a communication process that can be more direct and less stylized than litigation, and affords greater flexibility of procedure and remedy.20

II. COMPARED TO WHAT? SOME PROBLEMS OF ESTIMATING THE QUALITY OF SETTLEMENTS

The anthology of testimonials listed above could be indefinitely extended. Clearly many lawyers, judges, scholars, disputants, and onlookers think settlements are pretty good things. In Section III, I will attempt to sort out the dimensions of goodness attributed to settlements and examine the evidence for the presence of these virtues. The praise of settlements implies not only that they display admirable features, but that: (1) they enjoy these features in greater abundance than at least some of the alternative ways of processing disputes, and (2) some settlements display these features to a greater extent than other settlements. Hence, it may be useful, before turning to assertions about quality, to consider some of the problems of making such comparisons.

Arguments about the relative quality of various instances or species of dispute processing involve different designs of inference. First, the simplest design for measuring the quality of a settlement is to compare the settlement of case X to the adjudication of the same case X. Such one dispute/two process comparison faces the immediate difficulty that real life does not offer nicely matched pairs of cases; there is no judicial counterpart of identical twin research. One solution is to compare real adjudication X with imaginary settlement X' (e.g., Texaco v. Pennzoil) or real settlement Y with imaginary adjudication Y' (e.g., Agent Orange).21

19. Id. at 665 n.81.
21. One dispute/two process comparisons suffer from the same problems when the processes being compared are not settlement and adjudication, but two modes of settlement—e.g., bilateral settlement compared with settlement with the aid of a medi-
One dispute/two process comparison suffers from another problem. Even if we had matched pairs, the possible outcomes of a given process applied to a given situation are variable—different negotiators may produce very different outcomes in negotiating the same dispute; different lawyers, judges, and juries can lead to very different results in the same adjudication. Hence, the real instance that we wish to compare must be certified as somehow typical of the genre or fully expressive of its potentialities, not an outlier or freak.

And what about the imaginary term of the comparison—the Agent Orange adjudication that did not take place? The attribution of features to this imaginary instance gives enormous discretion to the impresario of the comparison. What is attributed may be typical (in the sense of modal or median) or ideal-typical (in the sense of expressing what are thought to be the essential traits of the dispute-processing mode). The imaginary resolution can display the optimal or heroic or catastrophic. There may be some admixture of empirical generalization or projection from the known features of the dispute in question. Some of these attributes will be fairly uncontroversial—e.g., the time and expense of adjudication—but others are based on much thinner supposition—e.g., effects on the parties, the perceptions of wider audiences, and so forth.

To avoid comparison with an imaginary instance, we can compare X with a case that is similar in all important respects. But this involves the obvious difficulty of matching cases. This takes us right back to the problem of variability within types and the typicality of the outcome.

Second, there is the two instances/one process comparison. If we recognize that successive instances of the same mode of dispute resolution applied to the same (or similar) case(s) will result in a range of different outcomes, we can compare the outcome in one of these instances, X₁, with the outcome in another, X₂. That is, we can compare one settlement of a case of a specific type with another settlement of a similar case and talk about a good settlement as opposed to a not-so-good settlement. Here we are not talking about the virtues inherent in the species, but about what gives individual members their virtuous qualities.

For the most part, the literature that we shall examine does not address this intra-species comparison directly. But the possibility of such comparisons is implied by discussion of what is good about settlement in general. For example, if settlement is preferable to adjudication because it is cheaper and leads to greater party satisfaction, then presumably in two similar cases, settlement Z₁ is better than settlement Z₂ because it involves fewer costs and produces more party satisfaction. What is good about settlement in general

ator, or with settlement promoted by a judge at a settlement conference, or settlement after summary jury trial.


23. The problems of assuring similarity are the same here as in the two disputes/
provides us at least some guidance as to what is good about particular settlements.

Third, to escape the difficulties of matching cases for purposes of comparison by either of these models, we can compare institutional regimes for handling a whole class of cases that exemplify or constitute a particular type of dispute. That is, we can compare the set of outcomes produced by application of one dispute resolution mode to one type of dispute (settlements X₁, X₂, etc.) with the set produced by another mode applied to a similarly constituted class (adjudications Y₁, Y₂, etc.). But this strategy encounters the matching problem on a larger scale. Particularly where one of the processes being compared serves as a screening device for use of the other, there is the danger that the groups will be systematically different in important respects. Thus, for example, Neil Vidmar found that cases that were resolved by mediation in an Ontario small claims court where “mediation hearings” were mandatory differed from adjudicated ones in the degree to which defendants admitted liability.24

Once we move from comparing a single instance to comparing a class of cases of a given type of dispute, we encounter the further problem that “types of dispute” is not entirely independent of the mode of dispute resolution. The characteristics of disputes are not fixed and unchangeable, but may be influenced by the way that actors undertake to resolve them.25 Thus, a set of disputes that are settled may, in the process, be defined by the actors quite differently than a set that are adjudicated.

Finally, comparisons of settlement to adjudication are confounded by the fact that settlement of lawsuits is not really an independent and self-subsistent institution. One can think of negotiation as a free-standing process, in which the counters (principles, precedents, arguments about fairness, utility, threats of adverse consequences) are drawn from the situation of the parties in a world in which the parties and their audiences see this process as plenary and independent. Many kinds of negotiation have this relatively free-standing character—e.g., my negotiation with the dean about teaching assignments, or dispute resolution among the businessmen described in Stewart Macaulay’s classic study.26 But when we move to the settlement of a dispute in which a lawsuit has been filed or where a threat to do so is implicit, negotiation does

one process model discussed above.


not enjoy this kind of free-standing, plenary character. It now takes place "in the shadow of the law." 1

The outcomes in particular instances of dispute processing are influenced both by the process and the distribution of entitlements (and strategic resources and cultural models) radiating from the law-adjudication complex. The outcomes of negotiation are not the product of negotiation per se but of negotiation by particular negotiations in a particular legal setting. Hence, the comparison of adjudicated case X' with settlement X, negotiated in the shadow of the legal setting L, cannot tell us whether negotiation per se is superior to adjudication per se as a way of dealing with cases of type X. At most it could tell us whether, once we have a legal setting (including adjudication institutions) of a given type, settlement in its shadow is preferable to full adjudication in a given case. And of course, even if it is preferable in a given case, that does not imply that it is better in all cases. Hence, comparisons between adjudication and cases negotiated in its shadow say nothing about negotiation versus adjudication as plenary ways of resolving disputes.

We see that each strategy of comparison is subject to serious problems. We might reach the despairing conclusion that these difficulties rule out any possibility of judging the quality of dispute processing. Yet we find that the world is full of people who think they know when an instance or bundle of processes/results are better than another instance or another bundle. Disputants and their profession advisors cannot avoid choosing dispute processes; nor can policy makers avoid judgments about what processes are best suited to what kinds of disputes. Comparative judgments of the "quality" of the process/outcome are unavoidable in practice as well as difficult in theory. An examination of the grounds for such judgments will not give us definitive answers, but it may lead us to ask some useful questions.

III. THE CATALOG

My little anthology (Section I, supra) suggests that there are lots of distinct if entangled reasons for thinking that settlements are good. I try in this "Catalog" to extract the leading contenders and group them into several clusters.

A. The Party Preference Arguments

1. Party pursuit, i.e., that settlement (rather than adjudication) is what the parties seek. In other words, they "vote with their feet";
2. Party satisfaction, i.e., that settlement leads to greater party satisfaction;

3. **Party needs**, i.e., that settlement is more responsive to the needs or underlying preferences of parties;

**B. The Cost Reduction Arguments**

4. **Party savings**, i.e., that settlement saves the parties time and resources, spares them unwanted risk and aggravation;

5. **Court efficiency**, i.e., that settlement saves the courts time and resources, conserving their scarce resources (especially judicial attention); it makes courts less congested and better able to serve other cases;

**C. The Superior Outcomes Arguments**

6. **Golden mean**, i.e., that settlement is superior because it gravitates to a position between the original positions of the parties; because it involves a process of compromise that gets the parties to such an intermediate position;

7. **Superior knowledge**, i.e., that settlement is based on superior knowledge of the facts and the parties' preferences;

8. **Normative richness**, i.e., that settlements are more principled, infused with a wider range of norms, and permit the actors to be loyal to a wider range of normative concerns;

9. **Inventiveness**, i.e., that settlements display a wider range of outcomes, greater flexibility in solutions, and admit more inventiveness in devising remedies, etc.;

10. **More compliance**, i.e., that parties are more likely to comply with dispositions reached by settlement; and

11. **Superior general effects**, i.e., that the radiating effects of settlement on other actors will be preferable to those of adjudication.

I have divided these claims about quality into three clusters, which I have labelled "Party Preference Arguments," "Cost Reduction Arguments," and "Superior Outcomes Arguments." The latter two represent the two basic ways of arguing about the quality of settlements. Cost reduction arguments claim that settlements achieve what adjudication achieves but sooner, cheaper, and with less aggravation. Superior outcomes arguments claim that settlements entail richer processes and/or more felicitous outcomes. Cost reduction arguments take settlements as (happily) truncated adjudications; superior outcomes arguments take adjudications as failed settlements. For the former, settlement is an answer to high transaction costs; for the latter, it is an answer to the inherent limitations of adjudication. The party preference cluster offers a series of measures which are for the most part taken to be indicators of either lower cost or superior product. But there are some readings of party preference that identify it as a species of superior product.
IV. IS IT SO? WHAT WE KNOW AND DON'T KNOW ABOUT THE QUALITY OF SETTLEMENTS

A. The Party Preference Arguments

1. Party pursuit. Parties often seek settlement or satisfactory adjustment rather than justice. Analyzing a survey of Detroit area residents, Leon Mayhew found that the proportion of respondents reporting serious problems who sought "justice" or legal vindication (as opposed to a satisfactory adjustment) was tiny in all areas other than discrimination. Only 4% of those with serious problems connected with expensive purchases sought "justice" as did 2% of those with neighborhood problems. But 31% of those reporting discrimination problems sought "justice." Likewise, Sally Merry and Susan Silbey found that residents of a New England city turn to courts only as a last resort in addressing neighborhood problems. Alfred Conard and his associates found that among those injured in automobile accidents, very few thought it was generally a good thing to sue. Asked, "How do you feel in general about suing people . . .," only 16% replied that one should "sue whenever possible" or "sue when one cannot collect otherwise." Seventy-seven percent (77%) thought one should "settle without suit if possible" or "always settle without suit." We know, too, that in a vast number of cases, filing is a tactical move to pressure the other party to negotiate or to grant appropriate relief.

The existence of a general preference for settlement does not mean that the pursuit of settlement in any particular instance is an informed and uncoerced expression of such a preference. The selection of settlement in a particular instance may be based on incomplete or faulty information about alternatives. Or, it may be based on accurate information that indicates that adjudication or some other alternatives that might be preferred are so flawed that settlement, though unsatisfactory, is the best of the available evils. In some settings, lawyers expend a great deal of effort in "educating" their clients about the virtues of settlement when compared to the cost, uncertainty,
and arbitrariness of adjudication.88

Hence, the "voting with their feet" argument—that the goodness of settlement is evidenced by the fact that a lot of cases are settled—carries little persuasiveness unless it is accompanied by some evidence that settlements produce results that are better in some ascertainable way. Or, if such evidence is unavailable, then it should be shown that settlement was chosen by knowledgeable parties in preference to viable and affordable alternatives.

2. Party satisfaction. It is often asserted that parties are more satisfied with settlements than with adjudicated outcomes. This is plausible in the light of greater party participation and control, the possibility of individualizing outcomes to suit the needs of the parties and so forth. But even so, significant numbers of those who settle are not very happy with the outcome. David Caplovitz asked debtors in three cities whose wages had been garnished whether the settlements they reached had been fair.86 Among the "314 debtors who ... [settled] their debt out of court, only 53 percent considered the settlement to be fair."87 And in a study of persons injured in automobile accidents who filed suit but then settled, Conard and his collaborators found that among 226 claimants who received settlements in serious or litigated automobile accident claims, 54% thought the settlement was inadequate.88 Indeed, of those with serious injuries who had filed suit, 66% thought their settlements were inadequate.89

Howard Erlanger, Elizabeth Chambliss, and Margo Melli interviewed 43 parties to 25 stipulated (that is, settled) divorce cases, closed in 1982 in Dane County, Wisconsin.40 They found that,

[s]ixteen of the forty-three respondents [37%] in our study are extremely dissatisfied with their stipulations, and in only seven cases (28%) do both parties report being satisfied with the result. For most of our cases, then, the settlement does not equate with a mutually derived agreement; instead of reflecting the parties' interests, settlements more typically reflect the parties'

35. Sarat and Felstiner, who observed the interaction of divorce lawyers with their clients, found that judicial proceedings were represented as an arbitrary, capricious, accident-prone process that "cannot be counted on to protect fundamental rights or deal in a principled way with the important matters that come before it." Sarat & Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 L. & Soc'y Rev. 93, 105 (1986). See also Erlanger, Chambliss & Melli, Participation and Flexibility in Informal Processes: Cautions from the Divorce Context, 21 L. & Soc'y Rev. 585 (1987).


37. Id. at 245.

38. See CONARD, supra note 32, at 274. Fifty-three percent (53%) of the respondents thought that a larger settlement could have been obtained if they "had done things differently." Id.

39. Id.

40. Erlanger, Chambliss & Melli, supra note 35.
relative stamina and vulnerability to the pressures of a prolonged dispute.\textsuperscript{41}

It is not only these hapless one-shot players who are unhappy with their settlements. In recent years, we have heard a litany of complaints from insurers and corporate and governmental defendants, telling us that they were forced to give nuisance settlements or very large settlements that were not deserved. Nevertheless, one survey of business people found that senior executives, entrepreneurs, and risk managers estimated that businesses were more satisfied with lawsuits "settled out of court" than with those "brought to trial."\textsuperscript{42} Roughly six of ten of these groups thought businesses were "very satisfied" or "somewhat satisfied" with out-of-court settlements; roughly four of ten reported satisfaction where lawsuits were brought to trial.\textsuperscript{43}

But all the express discontents with settlements (and with trial outcomes, for that matter) afford a weak basis for comparative judgment. The judgments proferred are not necessarily comparative across modes of resolution; the benchmark against which an actual settlement outcome is measured is not necessarily an outcome in another mode of resolution; it may be, for example, a better settlement rather than an adjudicated outcome. Where there is actual comparison with another dispute, the disputes compared are not necessarily matched in important respects. In many cases, the other term of the comparison is imaginary.

Recently a few investigators have attempted to measure party satisfaction in populations of small cases resolved by different modes. Craig McEwen and Richard Maiman compared small claims courts in Maine in which cases were mediated with courts where cases were adjudicated.\textsuperscript{44} They report a higher level of satisfaction and sense of fairness among those whose cases were mediated (less intimidating, more understandable, and afforded more opportunity to explain their side, explore all issues, and vent and dissipate anger).\textsuperscript{45} Sixty-six percent (66\%) of the mediated parties reported that they were completely

\textsuperscript{41} Id. at 592.

\textsuperscript{42} GALLUP ORGANIZATION, ATTITUDES TOWARD THE LIABILITY AND LITIGATION SYSTEM: A SURVEY OF THE GENERAL PUBLIC AND BUSINESS EXECUTIVES 198 (1982). It should be noted that the question did not ask for a reading of their own satisfaction, but for a surmise based on "what you know or may have heard [about] how satisfied . . . businesses that have been sued generally are. . . ." Id. So we get only a reading of the respondents' views of others' satisfaction. Id. It should also be noted that the terms "settled out of court" and "brought to trial" do not demarcate precise alternatives; they are neither exhaustive nor are they mutually exclusive, for a case may be decisively adjudicated without trial and a case may be "settled" during or after trial. Id.

\textsuperscript{43} Id.


\textsuperscript{45} McEwen & Maiman, Small Claims Mediation, supra note 44, at 256-57.
or mostly satisfied with their overall experience, compared to only 54% of the adjudicated parties. Mediated parties deemed their settlements fair 67.1% of the time; adjudicated parties only 59.0% of the time. These comparisons, it should be noted, are of adjudicated cases with mediated ones, not with cases that were settled by the parties themselves, so we do not know to what extent the findings apply to settlements that were not obtained by this treatment.

Neil Vidmar analyzed small claims cases in an Ontario county that were subjected to a pre-trial "resolution hearing," comparing those that settled in hearing and after hearing with those tried. He found that neither for plaintiffs nor defendants was satisfaction significantly related to whether the case was settled or adjudicated; instead, satisfaction depended in large measure on whether the hearing was perceived as fair.

In each of these pioneering and careful studies—the most systematic and thorough that are available—the cases analyzed have been subjected to a specific form of intervention and it remains unclear how much the findings apply to cases that settle after other processes. As in the other studies whose findings are reported above, it remains uncertain how much any of these judgments of satisfaction or fairness are attributable to differences in the process as opposed to differences in the parties, their relations, and their disputes.

If discontent does not prove low quality, the occurrence of settlement (or trial) cannot be taken as establishing that it is what the parties preferred or that they see the outcome as optimal. The choice of settlement (or trial) is a choice in a context of limited knowledge, strategic exigency, and a limited set of perceived alternatives. These limitations should caution us against equating party choice to settle or to litigate with an informed affirmation of the quality of the process itself.

3. Responsiveness to party needs. The argument that settlement is "more responsive to the parties' needs than adjudication" implies that settlement does more than maximize party preferences or satisfaction. In the passage

46. Id. at 257.
47. Id.
48. McEwen and Maiman provide no separate data on the satisfaction of the small sub-sample that settle on their own. A later paper of theirs presents data about compliance which suggest that mediated cases behave differently than those which settle without mediation. See McEwen & Maiman, Mediation in Small Claims Court, supra note 44, at 28.
49. See Vidmar, supra note 24, at 138-39.
50. Id.
51. Consider the suggestive finding of McEwen and Maiman of an "intriguing negative relationship between the length of mediation and the proportion of cases in which both parties believe the settlement fair . . . . This proportion drops by half as mediations increase roughly from an average of twenty minutes to an average of forty minutes in length." McEwen & Maiman, Small Claims Mediation, supra note 44, at 259.
52. Menkel-Meadow, supra note 20, at 504.
cited above, Carrie Menkel-Meadow, the chief proponent of the needs argument, suggests some of the mechanisms by which settlement fulfills needs—by engaging participation and consent in a more flexible procedure, promoting direct communications, avoiding binary win/lose results, and accommodating non-monetary claims. Settlement is commended because these features provide a setting within which “problem-solving negotiation” can achieve optimal results. That settlement is more responsive to needs is part of a prescriptive argument for this style of negotiation. It asserts that good negotiation can achieve the satisfaction of parties’ needs. It is not clear how far its proponents would assert that, holding case characteristics equal, the settlements negotiated by the negotiators who populate the world today actually achieve such results to a greater degree than cases that are adjudicated.

To mount such a showing would involve many of the difficulties of matching cases that plague all these comparisons. But the needs argument requires, in addition, that the needs which are being responded to be ascertained. Indeed, such a specification of needs is necessary not only for the investigator, but for the negotiator herself, who must inventory her client’s needs, including social, psychological, and ethical needs as well as economic ones, and latent as well as stated ones. It is not superficial preferences that must be identified, but the “basic needs” or “actual needs” or “underlying human needs” of the parties. In order to engage in problem-solving negotiation, the lawyer must first ascertain her clients’ underlying needs or objectives. In addition, the lawyer may want to explore whether there are unstated objectives, pursue those which she thinks appropriate to the situation, or probe the legitimacy and propriety of particular goals.

Thus, the claim that settlement is superior asserts that it is more responsive to needs that are “appropriate” and “legitimate” and “proper.” We are not told how the problem-solving negotiator is going to select these authentic needs from inappropriate, illegitimate, and improper ones. In short, insofar as the needs argument implies departure from getting for people more of what they think they want, it implies a vision of what they ought to want. Until that vision is revealed, it is difficult to assess the needs argument as such. But some of the features connected with it (e.g., avoidance of binary results) turn up in the other headings that we consider.

B. The Cost Reduction Arguments

Settlement is sometimes favored as the source of an outcome that is intrinsically superior to that produced by adjudication. But there is another fam-

53. Id.
55. Id. at 795-96.
56. Id. at 804.
ily of arguments for the attractiveness of settlement—that it can achieve comparable results at lower cost—taking cost broadly to include expense, delay, uncertainty, aggravation, and all the negative features that come with disputing.

4. Party Savings. Cost savings are probably the benefit most widely attributed to settlements and most commonly used to judge the quality of settlements. It seems probable that settlement generally does involve less expenditure of resources than adjudication. But does settlement achieve results or outcomes that are “comparable” to the outcome of adjudication? Suppose that, for the moment, we ignore any wide “public” effects and define a “comparable” outcome as an outcome that leaves the parties in the same position as if the matter had been pursued to verdict and judgment. Under this condition, the claimant receives the present value of the expected judgment, appropriately discounted for uncertainty, delay, and cost avoided. The defendant gives up what he would have given at judgment with appropriate discount for cost and risk avoided and appropriate premiums for earlier payment and elimination of uncertainty. Each party comes out approximately where he would have been had the adjudication been fully played out with existing barriers of cost, delay, and uncertainty in place. Adjudication with its existing transaction costs is taken as providing the standard of quality. A settlement is of higher quality than adjudication if at least one of the parties would prefer it to such an adjudication, the other being indifferent.

Take the following numerical example: suppose we have a claim for $100 made by A against B. Suppose the claim is so certain to be upheld that we can for the moment ignore uncertainty. Suppose it will cost each party $20 to adjudicate the claim and $0 to settle it; and suppose that it will take one year to reach a result by adjudication and that having the $100 for that year represents a gain of $5 to B and a corresponding loss of $5 to A. The net position after adjudication is thus:

<table>
<thead>
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<th>A</th>
<th>B</th>
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<tr>
<td>+100</td>
<td>-100</td>
</tr>
<tr>
<td>-20</td>
<td>-20</td>
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<tr>
<td>-5</td>
<td>+5</td>
</tr>
<tr>
<td><strong>+75</strong></td>
<td><strong>-115</strong></td>
</tr>
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</table>

Since A’s expected net outcome from litigation is only $75, any amount greater than that is a preferable result (putting aside for the moment other components of A’s preference, such as wanting official vindication or maximum injury to B or public benefit, such as warning or precedent). And since B’s expected expenditure if there is adjudication is $115, any amount less than that is preferable to B (making the same diminishing assumptions about preferences). Hence, for both parties, each point between $76 and $114 is preferable to the result of adjudication.
In real life, parties' estimates of the value of the claim typically do not coincide. Where they do not overlap, we would, in the absence of transaction costs, not expect that settlement would occur. But the presence of transaction costs can create a "settlement range" even in the absence of overlapping estimates. Suppose we modify our example, so that A believes he has a 100% chance of receiving $110 and B believes he has a 100% chance of being liable for $90. In a world without transaction costs, there is no "settlement range" of points that both parties would prefer to adjudication. But if we introduce the transaction costs we had above, we see the following:

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>expected claim</td>
<td>- 90</td>
</tr>
<tr>
<td>+110</td>
<td>expenses</td>
<td>- 20</td>
</tr>
<tr>
<td>- 20</td>
<td>interest on $</td>
<td>+ 5</td>
</tr>
<tr>
<td>- 5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>+ 75</td>
<td>NET OUTCOME</td>
<td>-115</td>
</tr>
</tbody>
</table>

The settlement range is smaller than in the earlier example, but unlike the imaginary world without transaction costs, there is a settlement range—one produced entirely by the presence of transaction costs. If those costs increased, the settlement range would increase correspondingly. Thus, we see that there is an important link between transaction costs and settlement. If we increase transaction costs—by more delay, more expensive lawyers or experts, etc., the area of overlap and the settlement range is extended. Not only does settlement become theoretically possible in more cases, but the range of possible settlement points is extended.

But why should we define the quality of settlements against a standard that incorporates existing transaction costs? Imagine instead a full entitlement or just deserts standard in which the measure of a quality settlement would be that the parties receive/relinquish their full legal entitlements without the discounts imposed by the transaction cost barriers. (Recovery of lawyers' expenses by winning parties is one instance of such a principle). The highest quality settlement in this view would be one that gave the parties what they were entitled to, but spared them or compensated them for the cost of getting it (i.e., that secured a just claim net or saved one free of the cost of defeating an unjust claim).

But this "full entitlement" or "just deserts" standard leads us to a paradox. In a world with transaction costs that consume the private resources of the parties, adjudication cannot produce such results. We can adjust the rules to produce such a result for one of the parties—by a capacious application of the principle of having the losing party bear the expenses of the winner. But if we try to imagine such a result for both parties, we encounter a paradox. In our example, A should get $100 and B should pay $100. The $5 interest could be taken care of simply by a transfer payment (this is pre-judgment interest), but the expenses pose a problem. If we have an expense shifting statute, then
A achieves his full recovery of $100, but B is -$140, $20 or $40 below what he "deserved" to lose—unless we believe he deserved to bear all the expense incident to resisting A's claim.\footnote{57} The presence of transaction costs means that we can move one party closer to the "full" position only by either moving the other party further away or by getting a third party to bear these costs.

Transaction costs mean that legal remedies will never leave the parties taken together in as good a position as their substantive legal entitlements/obligations entitle them. Settlement can reduce the amount of transaction costs, but it cannot eliminate the paradox they introduce—that the distributive outcome always involves some departure from full legal entitlements/obligations. That is, in a world of transaction costs, adjudication imposes a new "departure from equity" in the very act of curing a larger departure.

The question is does settlement merely reproduce the "departure from equity" that pervades adjudication or does it redistribute it? Imagine our example again. Suppose A and B settle for $80. Both parties are better off than they would be by adjudicating in a world of transaction costs. But if we compare their positions to the paradoxical world of full entitlements (just deserts), we see that A is $20 worse off than he deserves, but B is $20 or $40 or $60 better off than he deserves, as measured by the notion of full entitlements/obligations.\footnote{58} Thus, settlement has the paradoxical quality of improving the position of X in terms of his real world expectations of recovery, while worsening his position vis-a-vis Y in terms of the relation of the outcome to their respective undiscounted deserts. The real position of both parties has improved relative to their expectations of recovery/expenditure, but there is a sharp difference in the way this improvement is related to their underlying deserts. X achieves a small improvement of results at the cost of accepting an outcome far short of his deserts; Y achieves a large improvement of results that puts him much better off than indicated by the underlying deserts.

Settlements involve what Ian MacNeil refers to as the division of the "exchange surplus"—which he defines as "the total gain in utility perceived by the two parties from the exchange itself as compared to not trading."\footnote{59} Each party who enters a settlement has presumably perceived a gain for itself in settling rather than continuing to litigate. In trading generally "[t]he availability of alternative arrangements . . . tends to bring about evenness in the

\footnote{57. $20 on the assumption that the notion of deserts includes making up to X for the expense of obtaining recovery. But does our notion of "deserts" stretch to include all the costs incident to determining those deserts—costs which are influenced by the expenditures of one's antagonist and largely independent of the merits of those deserts?  
58. $60 if we think B's "deserts" include bearing all of the costs of the dispute; $40 if we think they include only his own costs; $20 if they include bearing none of the costs.  
division of exchange-surplus." But settlements are exchanges under conditions of bilateral monopoly—plaintiff is the only plaintiff that defendant can deal with and vice versa. The dissatisfied party cannot turn to an alternative trading partner. So markets cannot be relied upon to produce evenness or mutuality in the division of the exchange surplus. The only recourse is to adjudicate—that is, to ask the court to prescribe the deal—a course with well-known risks and costs which the parties have different abilities to bear.

Various factors may influence the way in which the "savings" are divided between parties arranging settlements. The distribution of these savings may reflect differences in experience, information, bargaining skill, and/or risk averseness. There is reason to think that some classes of litigants may capture a greater share of the benefits of settlement than others. Thus, Ross in his study of the negotiation of automobile injury claims finds that, overall, claimants must yield substantial discounts to insurers, who enjoy the advantages of being able to invest in principle, use commitment tactics, and be risk-neutral in any given case. Finally, the distributive consequences of settlement may be affected by parties' differing relations to their bargaining agents, who may capture a greater or lesser portion of the party's share of the savings from settlement. Thus, lawyers working on a contingency fee may capture a disproportionate share of the savings afforded by a settlement that obviates the need to prepare for trial. So, while there are savings from settlement, the ability to appropriate them is unevenly distributed.

Legal remedies are sought to overcome a present distribution that is out of line with the parties' claimed entitlements; but the process of securing an authoritative determination of those entitlements consumes resources so that the resulting redistribution differs from that authoritative determination; settlement permits the parties to reduce the exactions of transaction costs, but because parties differ in their ability to secure shares of these savings, settlement may add another layer of departure from equity.

5. Court savings. There has been a tremendous push in recent years to encourage settlement with an eye to lowering the demands on courts. By definition, settlements mean there is less that courts have to do. Settlement may, however, entail hidden costs for courts, for example, by depleting the supply of precedents that facilitate decisions and induce settlements in later cases. These costs are discussed below under the heading of general effects. But, if settlements on the whole represent a gain for courts, it does not follow that judges

60. Id. at 45.
63. Id. at 211-15.
spending their time in promoting settlements leads to such gains. Simply, since most cases will settle anyway, the results of applying judge time to settlement promotion are hard to discern.

The few systematic studies provide no assurance that judicial promotion of settlements produce more settlements or make courts more productive. Although any increase in the portion of cases settled remains to be demonstrated, it does appear that there has been a move toward more judicial involvement. Cases that might have settled by negotiation between opposing counsel are not settled with the participation of the judge, or other court functionary. Does that make any difference? Do settlements promoted by judges differ systematically from those produced by bilateral negotiation? Do they display more of the qualities that makes one settlement “superior” to another or to adjudication? These questions have remained largely unexplored and these assertions of superior quality have remained largely unexamined.

Measurement of the effects of judicial intervention is rendered difficult, perhaps confounded beyond all hope, by the patterning effect of institutionalized judicial settlement participation. If judges regularly participate in settlements, it is likely that some patterning will take place—“benchmarks” for liability and damages will be established; common lore will circulate; notions of what sort of cases deserve to be tried and which do not will be communicated to (and perhaps internalized by) the lawyers. One imagines much of this would carry over into bilateral settlement negotiations, for lawyers in these negotiations would not tolerate less favorable deals than they believe would emerge in a readily-available, judicially-supervised settlement session. Thus, institutionalized judicial settlement has effects which radiate and affect bilateral settlement. Comparison of cases in a given court between those settled in judicially-sponsored conferences and those settled bilaterally is not a comparison with what the latter would be like in the absence of the institutionalized judicial settlement. Even a random assignment strategy would not fully obviate this obstacle to experimental comparison. Thus, any ascertainment of the net effects of judicial intervention is both difficult and tenuous in the conclusion that it will support.

C. The Superior Outcomes Arguments

6. Golden mean. Settlement typically involves arrival at a position be-


66. Comparison could be made with other research designs: interrupted time series or comparison of otherwise similar jurisdictions, but these carry all the burdens of matching that are discussed above.
between the original offer and demands of the parties. As such, it involves a process of compromise in the sense that each has sacrificed some part of his claim in order to secure part. Is this a mark of superiority?

Ultimately, the persuasiveness of such an assertion depends on believing that the underlying merits are not wholly or overwhelmingly on one side and, in addition, that the outcome should reflect the proportional distribution of those merits rather than a predominance. Alternatively, it may be asserted that the process of compromise in itself introduces a value that outweighs any loss in proportionality of outcome to "merits."

It is easy, however, to be deflected from the need to supply a deep justification for compromise in a setting inhabited by professional advocates whose stock in trade is exaggerating claims. Where the negotiating game is played by the parties making extreme claims, a decision maker may ordinarily assume that the solution lies between the stated positions of the parties. The results of adjudication as well as those of settlement usually fall between the most extreme claims of the parties. But this pervasive exaggeration provides no assurance to the proponent of settlement that any given point between those extremes reflects a solution that bears a proportional relationship to the underlying merits of a "mutual" division of the savings generated by the settlement itself. As we noted above, there may be systematic disparities in the capacity to influence the location of outcomes along a settlement range. Therefore, the golden mean argument has to be supplemented with some suggestion of the mechanism by which settlements reflect the merits or a fair division of the "exchange surplus."

7. Superior knowledge. One means by which settlement might reflect the merits is suggested by the notion that it is based on superior knowledge of the facts and the parties' preferences. Presumably each of the parties who negotiate a settlement knows its own preferences better than a third-party decision maker. One might imagine that the negotiation process would give some indication of the other side's priorities (although there are instances of tactical use of deliberate deception about priorities). But what reason is there to think that settlement negotiation would produce more knowledge of the facts? Eisenberg suggests that "the modes of fact-determination associated with traditional adjudication may be not only less efficient but actually less reliable than those associated with dispute-negotiation." Fact determinations associated with adjudication are expensive and wasteful, and constricted by rules of privilege and evidence that effectuate other policies; but they make available to the parties a


68. Something like this seems to be the position of McThenia and Shaffer who see settlement as part of "a process of reconciliation" that draws on and gives expression to values that lie beyond those embodied in the law. See McThenia and Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1975).

69. Eisenberg, supra note 14, at 658.
broad inquisitorial power to conduct "detailed and sustained inquiry into the facts"70 and the results can be tested by adversarial contention. Of course, dispute-negotiation under the shadow of adjudication benefits from use of these devices. It is possible to point to richly-informed settlements and poorly-informed adjudications, but there is no intrinsic reason why the former should be more typical.

8. *Normative richness.* Another candidate for the linkage of settlement to the merits is the notion that settlements are more principled, i.e., that they are infused with a wider range of norms and permit the actors to be loyal to a wider range of normative concerns. Eisenberg, contrasting the negotiation of disputes with their adjudication, concludes that negotiation can take into account a richer array of normative principles, while adjudication typically excludes at least some of the principles that the disputants themselves regard as relevant.71 Thus, "traditional adjudication may actually be a less principled process than dispute-negotiation."72

Eisenberg asserts that "in most cases of dispute-negotiation the outcome is heavily determined by the principles, rules, and precedents that parties invoke."73 In adjudication, he argues there is a distinction between the process of reaching an outcome and the justifications used to rationalize it, but in negotiation "a broad spectrum of norms can be taken into account in a wide variety of ways."74 Adjudication is less principled since some principles are excluded from consideration.75 If a greater range of authoritative normative learning is invoked and the outcome is "heavily determined" by this learning, then presumably that outcome can be taken to reflect "the merits." Thus, Eisenberg tells us that "such factors as prominence, personal force, and risk preference" affect the outcome "within the leeways left by principles, rules and precedents."76

I have not encountered any attempt to verify this by systematic observation. Eisenberg himself gives two examples of the richly principled outcomes produced by negotiation. Both his examples, one taken from an incident in Indonesia reported by Dan Lev77 and the other from Gulliver's account of the

72. *Id.*
73. *Id.* at 639. Fisher and Ury's prescriptive program for "principled negotiation" might be taken as advice for learning how to give principle this determinative effect. But such an undertaking presumably starts from an assumption that this effect is not already present in "most cases." R. FISHER & W. URY, *GETTING TO YES: NEGOTIATION AGREEMENT WITHOUT GIVING IN* 11-14 (1981).
75. *Id.* at 657.
76. *Id.* at 665 n.81.
77. *Id.* at 647-48.
Arusha, involve continuing and multiplex relations between at least some of
the parties—a factor which he does not identify as a variable. We may then
wonder how strongly we can generalize from these cases in which bargaining
is under the shadow of threatened loss of valued relationships to instances in
which bargaining is under the shadow of threatened legal sanctions. In any
event, these examples invite us to examine Eisenberg’s claim that normative
learning “determines” outcome. Is this a “strong” claim of determina-
tion—i.e., that the full repertoire of principles invoked led inexorably to this
result? Or, is he making a much weaker claim of “determination”—that an
Arusha looking at a negotiated outcome could see each element as application
of a respectable norm (i.e., one approved for use in some circumstances).

It seems to me that it is only the “weak” determination claim that can
plausibly be made. The outcome of these negotiations is determined by the
principles invoked in the same way that this paragraph is determined by the
rules of English grammar and composition. Users of English would recognize
it as an application of accepted rules. It cannot be understood without taking
those rules into account. But, at the same time, the existing body of rules
could have been applied in many other ways. The rules of baseball “deter-
mine” and constitute the game in this sense, but they do not determine the
outcome of individual games.

The norm-centered view of dispute negotiation is not susceptible of direct
testing. But there is some suggestive evidence to show that it exaggerates the
determinative power of norms. Simulations of negotiations and case evalua-
tions display the enormous variation of results when legal norms (and known
facts) are held constant. In simulated negotiations of a personal injury case by
fourteen sets of experienced Des Moines attorneys, Gerald Williams found
that “the outcomes ranged from a high of $95,000 to a low of $15,000; the
average outcome was just over $47,000; and the remainder of the outcomes
are scattered almost randomly between the two extremes.”

A similar varia-

78. Id. at 646.
79. Id.
80. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 6 (1983). Williams re-
ports that he:
obtained the cooperation of 40 practicing lawyers in Des Moines, Iowa, who
agreed to be divided into 20 pairs and to prepare and undertake settlement
negotiations in personal injury case. Approximately two weeks in advance of
the negotiations, the attorneys were randomly assigned to represent either the
plaintiff or the defendant (as counsel for his insurance company). Attorneys
assigned to represent the plaintiff were given identical case files, as were at-
torneys assigned to the defense. Under the facts it was assumed that the case
arose in Iowa, Iowa law applied, and if the case went to trial it would be tried
to a jury in Des Moines, Iowa. To assure comparability of predicted jury
awards, photocopies of comparable jury awards from the Des Moines area
were included in the case files for both sides, [and] participating lawyers
were informed that results of the negotiations would be published, with attor-
bility is evident in Douglas Rosenthal's research on personal injury settlements in New York City. Rosenthal asked a panel of five experts to estimate from a file what each of 59 actual settled cases was worth in terms of settlement at various stages and at the time of the jury award. Panelist estimates varied considerably among themselves and from the actual settlements, which ranged from more than twice the panel consensus to just one-sixth of it. Again, this suggests that information about norms and facts did not, in and of itself, produce convergence on outcome.

A similar looseness in connection between norms and outcomes was found by Robert Condlin, who examined transcripts of arguments by approximately one hundred teams of law students in simulated negotiation of a lawsuit. He concluded that negotiators' experience, preparation, and intellectual abilities "along with tolerance for conflict, stamina, ruthlessness, oratorical skill, and emotional force, play as large a role in determining the extent to which norms are invoked and elaborated as do qualities inherent in the norms themselves." Accounts of the negotiation that takes place in connection with litigation in the contemporary United States raises doubts about the claim of normative richness as well as the claim of strong determination. My examples are the Agent Orange settlement described by Schuck and the settlement of the Buffalo Creek disaster cases described by Stern. In each case, the settlement avoided definitive resolution on causation, responsibility, degrees of blame, norms for future conduct and so forth in favor of summation of all unresolved matters in terms of a single sum of money. These are large and complex cases involving multiple parties and issues and might be thought unrepresentative of smaller and simpler cases. But Ross' study of automobile accident settlements reports a reduction of normative complexity in negotiation, an abandonment of the individualized proof demanded by the law, and a substitution of mechani-

Id. (emphasis in original). After the attorneys negotiated their settlements, 14 of the 20 pairs were willing to submit a signed statements of results. The full table of results can be found id. at 7.

81. See Rosenthal, supra note 64.
82. Id. at 36-37.
83. Id. at 202-07.
84. Condlin, 'Cases on Both Sides': Patterns of Argument in Legal Dispute-Negotiation, 44 Md. L. Rev. 65, 66 (1985). He detected "no strong correlation" between argument and outcome. Id. at 132.
85. Id. at 131.
86. P. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986).
cal formulas (like “three times specials” as a measure of damages for pain and suffering or which car hit the other from the rear as a formula for assigning fault). Distinctions and subtleties are washed out.

9. Inventiveness. Settlement is credited with the availability of a wider range of outcomes. It permits various intermediate outcomes rather than the “all or none” result specified by the law. But there is an additional and important claim: that settlement permits greater flexibility and inventiveness in devising outcomes and remedies. Where antagonists are involved in continuing relations, settlement is more likely, it is claimed, to lead to restoration of maintenance of the relationship. And beyond this, settlement may lead to an “integrative” solution. This refers to various kinds of solutions in which the original “pie” is enlarged rather than divided. Donald Gifford, drawing on the work of Pruitt, lists several types:

[1]The most dramatic integrative solution emerges when the parties “brainstorm” and develop a new option that satisfies the significant needs of both parties. The second type... is often referred to as “logrolling.” In logrolling, each negotiator agrees to make concessions on some issues while his counterpart concedes on other issues; the agreement reconciles the parties’ interests to the extent that the parties have different priorities on the issues... Another form of integrative bargaining is described... as “cost cutting.” A negotiator... may find ways to diminish the tangible or intangible costs to the opponent.

There is extensive literature on integrative or problem-solving bargaining styles and the extent to which they can be utilized in negotiating legal disputes. It is generally conceded that integrative bargaining strategies are

89. Id. at 134-35. Kritzer found that the median amount of time lawyers spend on settlement negotiations in ordinary civil cases was about three hours. This varied little by area of law.

[O]nly 15% of lawyers reported that ‘their case’ involved three or more exchanges [of offers and demands.] (17) Lest Ross’s accident cases be thought to involve unrepresentatively simple bargaining, it should be noted that Kritzer found that tort cases involved the most intensive bargaining. More than twice as high a portion of tort cases involved three of more exchanges than did cases in any other area of law.


90. According to Friesen, “[t]rials are subject to positive right and wrong conclusions. Settlements can take into account the broader range of potential just results.” Friesen, Internal Organizations and Procedures of the Court, in STATE COURTS: A BLUEPRINT FOR THE FUTURE 186 (T.J. Fetter ed. 1978).
92. Id. at 55-56.
93. See FISHER & URY, supra note 73; Menkel-Meadow, supra note 54, at 754-
more readily applicable "where either an identifiable mutual gain option is available or multiple issues which can be traded off against one another exist." On the other hand, "it is less useful when the parties disagree only about a single issue and the parties' interests are inherently opposed." This suggests that the opportunities for integrative solutions may be rare in many kinds of legal claims, such as personal injury claims or debt actions. Inventive minds can find integrative possibilities even in such unpromising soil. But settlement can be institutionalized without availing of these possibilities very often. Thus, McEwen and Maiman report that in their Maine small claims court mediations:

[contrary to the expectation that flexible and creative settlements would occur, few mediation agreements (only 12%) in Maine have involved any conditions besides payment. This is not because other issues were never present in these disputes; respondents in 40% of the mediated cases reported the presence of "other issues" besides money in their dispute. It appears, however, that with few exceptions such matters were converted into dollars and cents for purposes of the agreement.]

Even where integrative solutions are theoretically available, the organization of legal services may discourage recourse to them. Kritzer points out that where the claimant is represented by a lawyer who is paid a portion of the recovery, there is a tendency to avoid outcomes that do not create a fund of cash out of which the lawyer can be paid (e.g., reinstatement, agreement to desist, etc.).

If genuine integrative solutions are less frequent than we might hope, high transaction costs and broad settlement ranges make it increasingly easy to meet the test of what might be called a weak integrative solution—one in which, because of transaction costs, both parties come out better by settling than by litigating. But as we have seen, these bring in their train a new set of distributive problems among claimants and between claimants and their agents.

10. More compliance. For a dispute resolution to elicit the compliance of the parties is a virtue. McEwen and Maiman conclude that parties are more likely to comply with dispositions reached by consensual process (negotiation and mediation) rather than by a coercive process like adjudication. Vidmar,

842.
94. Gifford, supra note 91, at 56.
95. Id. at 56-57.
96. See Menkel-Meadow, supra note 54.
99. The prevalence of weak integrative solutions, easily conflated with highly prized true integrative solutions, helps nourish the ideology that settlement is intrinsically good.
100. McEwen & Maiman, Small Claims Mediation, supra note 44, at 261.
who also finds lower rates of compliance in adjudicated cases, argues that this is best understood as an effect of selection—i.e., that cases in which defendants admit partial liability are more likely to comply and these are the cases that tend to be successfully mediated.\footnote{101} For our purposes, we should note that hardly any of this compliance data isolates settlement per se from mediation. Where McEwen and Maiman separate negotiated settlements from mediated and adjudicated results, we see they have a pattern that is distinct from either negotiated outcomes displaying lower rates of full compliance than mediated outcomes, but lower rates of non-compliance than adjudicated outcomes.\footnote{102} Finally, we should recall that the consensual processes examined in these studies are not free-standing, but work in the shadow of the coercive process.

If settlement does indeed succeed in fostering compliance to the agreed outcome, we might ask what it does to the underlying norm whose alleged violation gave rise to the dispute (pay your debts, take precaution to injuring others, and so forth). Does a dispute mechanism that produces more compliance with the dispute outcome by a particular defendant also produce more compliance with the underlying norm by that defendant or by others? Until now all of the supposed good features of settlement in our catalog have been virtues located within the universe made up of the "case" and the "disputants." But courts (and other dispute resolvers) do more than resolve disputes; they broadcast messages to various audiences about the conduct of disputes and about the norms of conduct underlying those disputes. Any evaluation of settlement must take account of the effects of these messages as well as effects on the immediate parties.

11. \textit{Superior general effects}. Most of the contributions to our anthology focus on the way that settlements affect individual cases and their participants; they measure the "special effects" of the settlement process. By special effects I refer to the effects produced by dispute processing on the parties immediately involved—such effects as compensation, avoidance of expense, satisfaction, and compliance. But in addition to a variety of effects on the actors involved in a dispute, there may be other effects on wider audiences through the communication to others of information about that dispute processing (and about responses to that information). These I call "general effects."\footnote{103}


\footnote{102} McEwen \& Maiman, \textit{Mediation in Small Claims Court}, supra note 44, at 28.

\footnote{103} This notion of "general effects" takes off from the very helpful discussion of general preventive effects of punishment by J. Gibbs, \textit{Crime, Punishment and Deterrence} (1975), as usefully elaborated by Feeley, \textit{The Concept of Laws in Social Science: A Critique and Notes on an Expanded View}, 10 L. \& Soc'y Rev. 497, 517-21 (1976). It is simply a generalization from the illuminating and now familiar (if not
Every case has possible general effects—as a precedent, deterrent, reinforcement, etc. In assessing the quality of different instances or rival modes of dispute processing, we should enlarge our focus from consideration only of the results among the two parties (and the forum) to consider the kinds of effects they have on others—on parties in other cases, parties in similar situations who have not brought suit, parties who will be affected by the patterns of activity of those in the plaintiff and defendant classes, and so forth. Thus in assessing the quality of a settlement or a pattern of settlements, there is a question of whether the settlement or the pattern radiates general effects of a scope and magnitude comparable to those of an adjudicated outcome or pattern of outcomes. This notion is easy to grasp in the case of a bargained plea—does it have a deterrent effect comparable to trial and sentence after trial? Indeed in plea bargaining, the Federal Rules of Criminal Procedure instruct the judge to employ such a standard.\footnote{104} A comparable assessment is sometimes undertaken in the settlement of antitrust or other cases where the private right is clearly thought to be invested with a public interest.

Adjudication produces general effects at least some of which are public goods. If we view the production of these public goods as a valued component of the dispute process, we may ask whether settlement does not deprive the public of these goods, allowing the coercive power of state to be used to generate private goods (special effects) without the accompanying public goods (general effects)? Outcomes may have effects as precedents or signals even if arrived at by settlement rather than adjudicating. Settlements may have general effects—for example, when they become known as “benchmarks,” broadcasting guidelines about liability and damages.

The production of general effects depends on the flow of information. Where information about the existence or terms of a settlement is prevented from circulating publicly, as by the typical agreement that the terms of settle-
ment are confidential, the general effects are weakened. Where parties and lawyers receive benefits in exchange for the suppression of information about settlements, we have what amounts to the appropriation for private benefit of the public goods produced by the dispute process.

V. CONCLUSION

Settlement is not an “alternative” process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a single process of strategic maneuver and bargaining in the (actual or threatened) presence of the adjudicative forum, to which I have attached the fanciful neologism “litigotiation.”

We began with the observation that most litigation ends with settlement. This seems to be largely independent of self-conscious efforts to promote settlements. It seems unlikely that the portion of disputes ending in settlement will decrease in the near future. Demand for adjudication-backed remedies is increasing faster than the supply of facilities for full-blown adjudication. More generally, the costs of litigotiation are rising and this tends to produce settlements.

As the society gets richer, the stakes in disputes become higher and more organizations and individuals can make greater investments in litigation. Expenditures on one side produce costs on the other. Again, as the law becomes more voluminous, more complex, and more uncertain, costs increase. Virtually every “improvement” in adjudication—refinements of due process that require more submissions, hearings, and findings; elaborations of the law that require research, investigation, and evidence; provision of additional services by specialized experts—increases the need and opportunity for greater expenditures. As transaction barriers (time, resources, uncertainty about recovery and its amount) rise, there is more chance of overlap in the bargaining position of the parties. There is more of a “settlement range” in which both parties are better off than in running the full course of adjudication.

As settlement ranges are extended, actors face the problem of how to reach agreement within the settlement range. The recent proliferation of settlement brokers (judges, mediators, special masters) and devices (mini-trials, summary jury trials, etc.) testifies to the increasing demand for signals to identify points of convergence within the broad settlement ranges created by higher transaction costs.

Settlements are not intrinsically good or bad, anymore than adjudication is good or bad. Settlements do not share any generic traits that commend us to avoid them per se or to promote them. Which does not mean that some settlements are not preferable to some adjudications—and to some other settle-

106. See Galanter, Settlement Judge, supra note 3, at 8-9.
When we think about trials, we are concerned not only that trials occur, but that they be of high quality, meeting standards of fair procedure and beneficial outcome. The occurrence of a settlement is in itself no more a guarantee of a quality result than is occurrence of a trial per se. So, it is necessary to take thought how to produce settlements of high quality. This is a task not only for those who negotiate settlements, but for those who intervene in them (e.g., mediators) and those who formulate policy that affects the settlement process.

The task for policy is not promoting settlements, or discouraging them, but regulating them. How do we encourage settlements that display the qualities we favor? In large measure the answer is that we don't know and that developing reliable knowledge of the quality of settlements is fraught with difficulties. That there is a lot we don't know about settlement is not an excuse for doing nothing until the results of further research are in. Existing knowledge supplies some useful ideas about where to look and what to look for.

Because settlement is intimately bound to litigation, settlement outcomes reflect in some measure the potential results and costs of litigation. Substantive and procedural rules, and the practices of courts and lawyers, confer bargaining endowments upon the parties in settlement negotiations. Power to achieve an attractive settlement may be dependent on having adjudication as a viable alternative. Even those who emphasize the power of principle in negotiation concede that “the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement.”

Settlements depend not only on the bargaining endowments that parties

107. The concept of bargaining arenas (i.e., more or less bounded constellations of negotiators) “who interact with one another in connection with the settlement (and occasional adjudication) of particular kinds of cases in a particular locality . . . [and] share (more or less) expectations and understandings about procedures, applicable norms, outcomes . . .” is sketched in Galanter, Worlds of Deals, supra note 105, at 272.

108. See generally Galanter, Justice in Many Rooms, supra note 27; Mnookin & Kornhauser, Bargaining in the Shadow of the Law, supra note 12.

109. McEwen and Maiman observe that good settlement opportunities may depend on availability of adjudication.

[T]he most important cost of rules and procedures that deny the poor and weak access to adjudication may be that the disadvantaged are thus effectively denied the opportunity to settle claims informally. The expansion of legal rights and resources for disadvantaged parties enhances their ability to impose costs and risks and thus to bargain effectively.

McEwen & Maiman, Mediation in Small Claims Court, supra note 44, at 46.

110. Fisher & Ury, supra note 73, at 106.
bring to the negotiating arena, but on the institutions of the particular bargaining arena that translate endowments into outcomes. The features of the arena also offer possibilities for policy intervention: the skills and styles of the negotiators, the ethical constraints under which they operate; the presence of mediators or other settlement facilitators; the review of negotiation results by third parties (as, for example, in the fairness hearings held in class actions and in cases involving minors); requirements about publicity and disclosure, and so forth.

How does the presence or absence of these devices affect the costs of the process? How does it affect the distribution of the "savings" produced by the settlement? How does it affect the "general effects" or "public goods" produced by the settlement? Are settlements in a particular arena improved by detaching them from litigation, for example by removing them into different institutions? Or, are they improved by coupling them more closely to litigation, for example by summary jury trials before the fact or fairness hearings afterward?

Most remedy-seeking in the vicinity of courts is going to eventuate in settlement. Assuring the quality of these settlements is a central task of the administration of justice. It is time to move beyond uncritical celebration and equally uncritical condemnation of settlement and to grapple with the complex dynamics of the various species of settlements in different bargaining arenas.