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THREE THINGS TO BE AGAINST ("SETTLEMENT" NOT INCLUDED)

*Michael Moffitt**

INTRODUCTION

Owen Fiss chose a great title for his article, *Against Settlement*.¹

Without even reading the associated article, most readers are provoked into immediate sympathy or antipathy.² I blame (or credit) the word "settlement." "Settlement" has a Rorschach quality, conjuring different images and associations for different viewers. Perhaps we might even be able to derive some understanding of a person's experiences and values based on the meaning he or she makes of the idea of "settlement."

On one end of a definitional spectrum, we might imagine the reactions of some of the people one scholar has labeled "litigation romanticists."³ For many with this thorough devotion to the ideals of litigation, the word "settlement" has a distinctly negative set of implications. "Settlement" is viewed as synonymous with "compromise," or even "selling out." To these observers, the idea of being "against settlement" is thoroughly

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

2. I suspect that few readers of *Against Settlement* change their conclusions, in either direction, upon reading the article. Still, I am not suggesting that Fiss's title fully captures the complexity of the points he is making. People should read the actual article, regardless of their initial reactions.

3. I believe Carrie Menkel-Meadow coined this phrase in 1994. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 606 n.58 (1994). Although they may not self-identify as such, I might place scholars like David Luban, Laura Nader, and Stephen Yeazell in this category. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that settlement deprives the public of the litigation-driven articulation of public norms); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993) (arguing that settlement favors harmony over justice); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (arguing that settlement erodes the justice system by decreasing appellate review opportunities).

unremarkable. Of course one should be against settlement. Indeed, one can imagine these folks wondering why this proposition merits placement in the *Yale Law Journal*. What's next? An article entitled *Against Corruption*? Or maybe *Against Incompetence*?

On the other end of a definitional spectrum, we might imagine the reactions of some of the people who are so thoroughly devoted to the ideals of alternative dispute resolution (ADR) that one could fairly label them "ADR evangelists."⁴ For many with this view of the world, "settlement" is an almost unquestioned positive. Their synonym for "settlement" would be "agreement," or even "deal-making." To these observers, the idea of being against settlement is astonishing. Indeed, one can imagine them similarly questioning the wisdom of *Yale Law Journal* editors twenty-five years ago. What's next? An article entitled *Against Autonomy*? Or maybe *Against Progress*?

Many of the issues Owen Fiss raised in his article merit a more nuanced examination than either of these views of "settlement" might initially suggest. Both litigation and settlement are worthy of celebration, and both are worthy of critical examination.⁵

Litigation and settlement do not merely coexist. Instead, litigation and settlement have come to depend on each other in order to function properly. In the first Part of this essay, I briefly highlight some of the ways in which modern litigation and modern settlement intersect. The rules of civil procedure contemplate, and even encourage, settlement behavior at virtually

4. Robert A. Baruch Bush self-identified some years ago as being part of the "mediation orthodoxy." I understand that to be essentially the same as the label I suggest. See Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 7 (1989). Kenneth Cloke might fairly fall into this category as well. See KENNETH CLOKE, *CONFLICT REVOLUTION: MEDIATING EVIL, WAR, INJUSTICE AND TERRORISM—HOW MEDIATORS CAN HELP SAVE THE PLANET* (2008). Some misread Carrie Menkel-Meadow as being an alternative dispute resolution (ADR) evangelist. She does strongly defend both the theory and practice of settlement. See, e.g., Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1763 (2002) [hereinafter Menkel-Meadow, *Practicing*]. Menkel-Meadow's support for settlement, however, is more nuanced and conditional than some within the "settlement" community. See, e.g., Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) [hereinafter Menkel-Meadow, *For and Against Settlement*]; Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37 (2002) [hereinafter Menkel-Meadow, *When Litigation Is Not the Only Way*]; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) [hereinafter Menkel-Meadow, *Whose Dispute Is It Anyway?*]. I agree with Baruch Bush, however, who characterizes her instead as a member of the "process pluralists." Baruch Bush, *supra* at 7.

5. Many have made the point that litigation and settlement are independently praiseworthy, and praiseworthy in tandem. See, e.g., Jeffrey R. Seul, *Litigation as a Dispute Resolution Alternative*, in THE HANDBOOK OF DISPUTE RESOLUTION 336, 336–57 (Michael L. Moffitt & Robert C. Bordone eds., 2005); see also Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971) (arguing that we should "appraise the relative aptness, for solving a given problem, of the various competing forms of social ordering").

every stage of litigation. Similarly, the prospect of litigation today shapes both settlement outcomes and settlement behaviors. I am not convinced, therefore, that it is possible to be wholly “for” one and “against” the other, given these intersections.

In the second Part of my essay, I cautiously suggest that observers from all camps might endorse at least three of the fundamental principles Owen Fiss highlighted in his article. Ideal processes (1) deal appropriately with power imbalances, (2) minimize agency costs, and (3) ensure meaningful access to courts. Processes that consistently fail to protect these ideals deserve robust opposition.⁶

In the final Part, I suggest three enduring questions applicable both to the target of Fiss’s wrath—settlement—and to the target of his apparent devotion—litigation.⁷ First, are litigation and settlement living up to the ideals each would name as among its core values or functions? Litigation looks different today than it did when *Against Settlement* first appeared. So does settlement. We might reasonably wonder whether either of these processes is closing the gap between its ideals and the reality of its implementation. Second, are advocates for litigation and settlement articulating the values—and the limitations—of each process accurately? And third, what lessons would the last twenty-five years offer to legal educators about what students should learn about litigation and about settlement?

Settlement—like litigation—has the potential to contribute far more than the mere resolution of disputes. Settlement—like litigation—also has the potential to undermine fundamental public and private interests. It is not “settlement” we should be against.

I. FOR SETTLEMENT AND FOR LITIGATION

Both the title and the tenor of Fiss’s *Against Settlement* invite a critical response framed in absolute terms—perhaps something in the nature of *Against ‘Against Settlement.’* Others have parsed his arguments and have offered comprehensive, direct rejoinders to his theses.⁸ If one had to

6. As I note in Part II, however, in practice, even when measured against these fundamental criteria, both litigation and settlement currently fall short of their promises and ideals.

7. In his article, Fiss described “adjudication” rather than “litigation” as the object of his praise. Fiss, *supra* note 1, at 1085. With developments in modern arbitration over the past two and a half decades, I suspect that Fiss would agree that “adjudication” is overly broad, as his focus appears to be rooted in an assumption that adjudication is a state function. Arbitration is undoubtedly adjudicatory, and is undoubtedly guilty of many of the sins Fiss ascribes to settlement, because of its private nature. See *infra* Part II.C for more on arbitration’s place in Fiss’s analysis. See also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353–54 (1978) (suggesting a broad range of public and private functions that qualify as “adjudication”).

8. For examples of direct rejoinders to Fiss, see Baruch Bush, *supra* note 4; Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4; Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004).

choose a single winner in a fictional scholarly cage match on the question of the persuasiveness of *Against Settlement*, I am not sure that Fiss would emerge victorious. This is particularly true if one reads *Against Settlement* to be suggesting that litigation is always more worthy of praise than settlement.⁹ Mercifully, we need not choose. Whether Fiss is, on balance, more persuasive than his critics is not the right question.

Similarly, whether litigation or settlement is, on balance, more valuable is also not the right question. We need not choose between them in an artificially binary way. Both litigation and settlement have values and functions worthy of celebration. Both also have significant flaws and shortcomings in their ideals and in their implementation. Critical observers can point to enough of these shortcomings that it would not be difficult to write an article along the lines of *Against Settlement and Litigation*.¹⁰ Without discounting the practical limitations each process presents, I nevertheless find myself on the opposite corner of a for/against grid. I am, at the end of the day, *For Settlement and Litigation*.

Treating litigation and settlement as though they were entirely distinct processes is, of course, an oversimplification. In practice, the two are intertwined.¹¹ The fundamental rules and structure of each clearly acknowledge the importance of the other. Modern civil procedure is structured to facilitate the interaction between litigation and settlement. For example, many court systems require, as part of the routine cadence of litigation, consultation with opposing parties for the purpose of exploring settlement.¹² Many rules make discussions of settlement an explicit part of

9. One could read Fiss's article as making a less sweeping condemnation of settlement and its relative merits, as compared with litigation. Doing so, I believe, attributes nuance to Fiss's argument that I do not believe is found in the text of *Against Settlement*. *Against Settlement* is a polemic. That the polemic could have been written differently does not change how it was actually written. *But see* Amy Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143 (2009) (suggesting that Fiss's *Against Settlement* might be read as political, provisional, and contextual, rather than absolute).

10. Amy Cohen has demonstrated an intriguing alternative possibility—that one could read *Against Settlement* as neither really against settlement nor for adjudication, but rather as *Against Neoliberalism*. *See* Cohen, *supra* note 9.

11. *See, e.g.*, Marc Galanter, *Worlds of Deals: Using Negotiation To Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268 (1984). This dichotomy also mistakenly implies that these are the only two processes available to disputants. *See* Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2666.

12. Such requirements appear both at the pleadings stage and during discovery. *See, e.g.*, D. CONN. LOCAL CIV. R. 16(c)(1) ("A mandatory settlement conference will be held at or shortly after the close of discovery. Counsel have a duty to discuss the possibility of settlement during the planning conference required by Fed. R. Civ. P. 26(f) and Local Rule 16 and may request that an early settlement conference be conducted before the parties undertake significant discovery or motion practice."); S.C. R. CIV. P. 11(a) ("All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.").

judicial conferences.¹³ Civil procedure rules specifically contemplate stipulated dismissals,¹⁴ the entry and reopening of consent decrees,¹⁵ and procedures for judicial involvement in privately bargained class action settlements.¹⁶ Rules of evidence specifically protect statements made during settlement discussions.¹⁷ Even after a judgment is entered, many court systems now employ a number of strategies for promoting settlement at the appellate level.¹⁸ Modern litigation, in other words, takes place in concert with the ongoing prospect of settlement.

Similarly, settlement takes place within the confines of the parameters established by the prospect of litigation. Robert Mnookin and Lewis Kornhauser suggested years ago that disputants “bargain in the shadow of the law.”¹⁹ I am not convinced, as an empirical matter, that assessments of legal entitlements always drive disputants’ settlement behavior.²⁰ But certainly, in at least many cases, disputants compare what they might receive through a settlement with what they expect might happen in litigation. Furthermore, each disputant’s settlement behavior is bounded by the prospect of postsettlement litigation.²¹ In this manner, private law concepts like fraud, unconscionability, and duress affect negotiators’ behaviors precisely because litigation exists as a possible adjunct to settlement negotiations.²² The prospect of litigation shapes settlement behaviors and settlement outcomes.

13. See, e.g., FED. R. CIV. P. 16(a)(5) (“In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.”).

14. See, e.g., FED. R. CIV. P. 41(a)(1)(A)(ii) (permitting voluntary dismissals upon “a stipulation of dismissal signed by all parties who have appeared”).

15. See, e.g., FED. R. CIV. P. 60(b)(5) (permitting relief from an order if “the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable”).

16. See, e.g., FED. R. CIV. P. 23(e) (court must approve of terms before a class action “may be settled, voluntarily dismissed, or compromised”).

17. See, e.g., FED. R. EVID. 408 (excluding evidence of “conduct or statements made in compromise negotiations”).

18. See, e.g., Robert B. Moberly & Laura E. Levine, *The New Arkansas Appellate-Mediation Program*, 61 ARK. L. REV. 429 (2008); Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177 (2005); Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate “Path,”* 17 OHIO ST. J. ON DISP. RESOL. 379 (2002).

19. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

20. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40–81 (1991) (showing, in an empirical study, that trespass and boundary disputes among farmers and ranchers are resolved without reference to legal entitlements); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (showing, in an empirical study, that settlements in fraud cases bear no relationship to the legal merits of the underlying claims).

21. For a survey of the legal boundaries surrounding negotiators’ misbehavior in bargaining, see MICHAEL L. MOFFITT & ANDREA KUPFER SCHNEIDER, *DISPUTE RESOLUTION: EXAMPLES & EXPLANATIONS* 19–49 (2008).

22. Of course, some negotiators “behave” because they are motivated by norms beyond rationalistic risk-benefit calculations. Many even may “behave” because they perceive self-

Despite these obvious interconnections (some might say, with disfavor, “these entanglements”), the archetypal litigation and the archetypal settlement represent fundamentally different processes. And for purposes of simplicity in this essay, I consider them separately. Still, I suspect that modern litigation and modern settlement have coevolved into what biologists might call a mutually obligate symbiotic relationship—neither can function properly without the other.

A. *What Litigation Gives to Settlement*

Litigation has certain features that are often missing from settlement. In this Part, I highlight two examples of these features—law articulation and law enforcement—because modern settlement depends on both of these in order to function properly.

Within our common-law system, the court’s role in articulating the law has an obvious contribution to settlement dynamics. Put most simply, courts clarify legal rules not only for the disputants in one case, but also for other disputants or prospective disputants who may be similarly situated.²³ Whether courts consistently perform a law-clarifying function in practice is debatable. As David Luban has observed, we have such a proliferation of written judicial opinions that one is almost certain to find at least some support for almost any legal proposition.²⁴ In a state of judicial Babel, adding more judicial voices hinders the goal of clarity. And yet, at least as a theoretical matter, litigation is the mechanism that drives the courts to articulate the boundaries of the law.

The fact that disputants have access to information about the boundaries of the law affects settlements. A few economists have suggested that clear legal entitlements may make settlement less likely than a condition of greater uncertainty. But this perspective has not gained prominence among dispute resolution scholars or, if my anecdotal experience is any indication, among practitioners. I have yet to encounter any mediation parties who bemoan the existence of relevant, controlling authority. Nor have I found disputants mutually joining to celebrate the ambiguity in a legal principle. Instead, my experience with most disputants²⁵ is that they acknowledge

interested benefit as a result of doing so. See, e.g., Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002). But at least some negotiators would likely engage in negotiations differently if there were no threat of legal repercussions.

23. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979) (“A court system (public or private) produces two types of service. One is dispute resolution—determining whether a rule has been violated. The other is rule formation—creating rules of law as a by-product of the dispute-settlement process.”).

24. Luban, *supra* note 3, at 2642–46.

25. The only place I have seen evidence to the contrary has been with disputes of minor monetary value. In small claims court, on occasion, I did sometimes observe parties mutually acknowledge the unpredictability of the presiding magistrate and then proceed to settle. It is not clear to me that it was ambiguity in the law, as opposed to ambiguity in the likelihood that the law as written would be applied, that drove this behavior.

some ambiguity in the legal entitlements they bring to the table, but nonetheless use their understanding of expected court outcomes to provide at least some parameters within which to consider different settlements. The existence of litigation makes this process of establishing boundaries easier.

The other feature of litigation that has a profoundly supportive effect on settlement is the fact that courts have the ability to enforce their decisions. The assumption that courts' decisions will necessarily take effect is a given only to those whose experience is limited to relatively recent domestic litigation. Those of us who have worked internationally know that in many countries, it is far from obvious that a court's decision will translate into action on the ground. Indeed, not so long ago, it was an open question whether an unpopular court order would take effect in the United States. The compelling images of National Guard troops in Little Rock, Arkansas, helping to enforce the decision to desegregate schools are often rightly used to illustrate the triumph of law and justice. One might also reasonably use those images as a reminder of the fragile dependence of law and justice on implementation. Litigation's promise includes the promise of implementation.²⁶

This promise of enforcement affects—and largely supports—settlement in at least two ways. The first, and probably most conspicuous, way is that courts can be called upon to give effect to settlement agreements. In the event disputants decide voluntarily to resolve a matter, and subsequently one disputant reneges on the terms of that agreement, courts are available to give effect to the private settlement.²⁷ If the two neighbors Fiss describes as in a boundary dispute cannot count on courts for enforcement, the neighbors would be inclined *neither* toward litigation *nor* toward private settlement in its traditional forms,²⁸ because neither of those would be able to guarantee compliance. It is the prospect of enforcement that offers both the justice and peace from either private settlement or public adjudication of the neighbors' dispute.

Enforcement has an even bigger impact on the large-scale cases Fiss might label as "significant." Consider a mass tort, a widespread consumer

26. Some have suggested that our courts continue to lack complete enforcement abilities, and that this incomplete authority is a product of intentional constitutional design. *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 21–22 (1991) (describing the "constrained" view of courts, in contrast to the "dynamic" view of courts embraced by many who view the courts as having been central to the civil rights reforms of the 1960s).

27. The precise mechanism for giving effect to the settlement's terms will depend on the nature of the case, of course. The aggrieved party may need to assert that the agreement, as a contract, was breached and should be enforced. Alternatively, in many circumstances, settlement agreements are entered as orders of the court, for example, as consent decrees, and can be more readily enforced as one would any noncompliance with a judicial order.

28. The parties could contemplate noncontractual, self-enforcing mechanisms that would not depend on courts' enforcement mechanisms. These could include everything from self-executing bonds to vigilantism. But the traditional means of settlement—private contract—does depend on courts.

fraud case, or an institutional reform action. Now consider how unlikely either the plaintiffs or the defendants would be to contemplate voluntary settlement in any of those cases if the court were unable to guarantee that the terms of the settlement would take effect. Without the court's power to enforce contracts, without consent decrees, and without the preclusion doctrines, neither side in any significant case would see an incentive to settle.²⁹

The second way the prospect of litigation shapes settlement stems from its effect on the way in which settlement *negotiations* take place. Courts are available, through litigation, to hear postsettlement complaints about any bargaining misbehavior that took place on the road to settlement. If courts were not available to hear such complaints, I strongly suspect that we would encounter more bargaining misbehavior, more expensive bargaining, or both. If negotiators perceive no threat that misbehavior carries a risk of court-ordered rescission or sanction, would they nonetheless refrain from fraud, coercion, and the like? Although the prospect of judicial scrutiny is not the only thing³⁰ standing between us and a Hobbesian, Wild West version of settlement negotiations, it certainly helps.

Settlement works today, in part, because courts articulate legal rules, establish at least some clarity around legal entitlements, enforce private settlements, and stand ready to audit settlement behavior after an agreement is reached.

B. *What Settlement Gives to Litigation*

Just as settlement benefits from certain features of modern litigation, litigation benefits from certain features of modern settlement. To illustrate this point, I highlight below two of the things settlement offers to litigation: docket clearance and selective case filtering.

The most conspicuous of settlement's contributions to modern litigation is its capacity to reduce the number of cases demanding judicial resources and attention. Fiss appears to imagine that docket lightening is, in fact, settlement's only contribution to our judicial system. Likening settlement to plea bargaining, he declares both of them to be undeserving of praise. At best, he says, they are realities that must be suffered under the constraints of current conditions.³¹ It is not my intention to weigh into the conversation about the morality of plea bargaining, although I may be more sympathetic

29. In the most simplistic case, plaintiffs would rely on these mechanisms to assure enforcement of whatever agreement was reached in the settlement, and defendants would rely on the preclusion doctrines to protect against uncertain additional exposure on the same matter.

30. Parties could, of course, devise mechanisms for protecting themselves privately against the most egregious forms of bargaining misbehavior. They could post various forms of private bonds, take hostages, create reputational sanctions, and so on. But doing so would make the bargaining process considerably more costly than it is today, with no real corresponding benefit.

31. Fiss, *supra* note 1, at 1075.

to its functioning than Fiss. Instead, I acknowledge at least part of Fiss's point: settlement permits courts to function properly because of settlement's docket-management function.³²

Settlement is not the only way to reduce a court's caseload, of course. We could have higher filing fees.³³ We could make pleading standards more stringent.³⁴ We could have shorter statutes of limitation,³⁵ have fewer opportunities for discovery,³⁶ grant more dispositive motions,³⁷ or change fee allocation rules.³⁸ A pair of prominent economists even recently suggested that we consider simply dismissing some percentage of cases at random.³⁹ The problem with each of these suggestions for docket reduction, however, is that they risk filtering out the "wrong" cases.

Settlement offers at least the prospect of filtering out the "right" cases. Of course, one might argue that settlements are, by the virtue of party autonomy, the "right" cases, by some simplistic definition. By this logic, unless some form of coercion or other improper influence operates on disputants, causing them to settle, a private settlement is evidence that the

32. Some, like Carrie Menkel-Meadow, have argued that settlement, "both by its increased use of publicity in important cases, and its ability to remove some cases from the system, might actually improve the quality of public discourse or lawmaking in the public realm, more broadly conceived of, than in traditional adjudication." Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2682.

33. Richard Posner has suggested two choices for courts facing an increasing demand for their services: increase fees or tolerate greater delays. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 124-34 (1996). *But see* Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's The Federal Courts: Challenge and Reform*, 73 *NOTRE DAME L. REV.* 1029, 1039 (1998) (book review) ("Although Judge Posner may be right that sharply increased filing fees would marginally decrease the federal caseload and increase the quality of judging, the message that such fees would send must also be considered. It is a message I find inconsistent with the principles upon which this country was founded and which should remain a hallmark of our system of justice.").

34. Some have expressed concern that we may be on this path already, even in the absence of Federal Rules of Civil Procedure (FRCP) amendments, with the recent *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* decisions. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

35. Shorter medical malpractice statutes of limitation were a component in "tort reform" legislation in virtually every state. See R. Patrick Bedell, *The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes*, 11 *ELDER L.J.* 361, 384 (2003).

36. Since the adoption of the FRCP in 1938, there have been periodic calls for discovery reforms. For a useful history, see Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events That Have Transpired Since Its Adoption*, 21 *SETON HALL LEGIS. J.* 425 (1997).

37. Some have even gone so far as to propose mandatory summary judgment. See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 *VA. L. REV.* 1849 (2004).

38. Revoking statutory exceptions to the American Rule would surely have the effect of decreasing litigation in certain areas. For examples of statutory exceptions, see 15 U.S.C. § 26 (2006) (antitrust); 42 U.S.C. § 2000e-5(k) (2006) (civil rights).

39. See David Rosenberg & Steven Shavell, *A Simple Proposal To Halve Litigation Costs*, 91 *VA. L. REV.* 1721, 1721 (2005) (proposing that courts "select randomly for litigation only half the cases brought before them" but then award double damages in any cases that did proceed). I suspect that proposals such as these will do little to quell the persistent criticism that law professors spend too much of their time divorced from the real world.

parties judged their consensual option superior to the prospects of litigation.⁴⁰ In this mercenarily individual-rationality sense, at least, settled cases were the “right” ones to settle, and those that do not settle were the “right” ones to litigate. But Fiss’s objection is not that all parties would prefer litigation and that many are somehow being prevented from litigating. His argument is that adjudication is superior when viewed from a societal level. The suggestion that the disputants in question might prefer to settle is, apparently, of little interest to Fiss.

But my point here is not about satisfying parties’ interests. Instead my point is that litigation fulfills its public function best if it is not called upon as the method of resolving every kind of dispute. It is not that litigation *cannot* resolve every type of dispute. Virtually anything can be shoehorned into a generic set of procedures in a court system of general jurisdiction. Anything that cannot be made to fit, we can declare not to have been a legitimate lawsuit anyway. And anything that does fit, no matter how awkwardly, we can deem to have been appropriately handled by the courts as evidenced by its eventual judicial disposition. But there are some kinds of disputes for which litigation is not particularly well suited, and if litigation need not contend with these disputes, it can do a better job of addressing the ones for which it is well designed.

Three different features of settlement make this selective filtering process possible. First, settlement offers the prospect of value creation. Litigation is necessarily backward looking, focused on binary entitlements, and framed in win/lose terms. Courts allocate or reallocate resources in a zero-sum manner. But in at least some disputes, the possible solution set is broader than the litigation model suggests. More than merely splitting the difference between probabilistically adjusted expected values, settlement outcomes can make parties better off, individually and in the aggregate. Private disputants frequently discover these opportunities. Intellectual property disputes, for example, routinely culminate not in litigation, but rather in licenses or cross-licenses. Companies in disputes over the terms of supply contracts routinely renegotiate and extend contract terms. Divorcing couples routinely allocate child support and alimony in ways that minimize tax implications. Employees routinely return to work for employers with whom they have been in disputes. Private disputants often find ways to convert disputes into deal-making opportunities in which the total benefit for all parties is greater than could be achieved in litigation.⁴¹

40. We must remain vigilant, of course, that the “consent” imagined in the ideal forms of private resolution is, in fact, reflected in practice. In at least some contexts, there is reason for concern. See, e.g., Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85 (1996); Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247 (2009); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

41. See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 70–77 (2d ed. 1991); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 88–116 (1986).

Disputes involving the government present these opportunities for value creation as well. For example, an electro-pop band called The Postal Service recently found itself faced with a cease-and-desist letter from the U.S. Postal Service, which claimed trademark infringement. Rather than litigate the infringement issue, the band and the government entered a license agreement, under which the band kept its name and agreed to promote use of the U.S. Postal Service among its fan base—a demographic with which the government was particularly interested in making inroads. The band also agreed to perform at an annual U.S. Postal Service event.⁴² For more serious, or at least perhaps less generationally specific examples, consider how certain categories of land use disputes between developers and local governments are routinely resolved using creative, customized, “cash-free” settlement terms, including “transferred development rights, land swaps, and consent decrees.”⁴³ In some circumstances in which the government is predictably involved in a stream of cases, the search for creative or customized settlements has even been institutionalized. In the context of special education disputes, for example, the 1997 reauthorization of the Individuals with Disabilities Education Act requires mediation as an option for resolving disputes between parents of special needs children and school districts.⁴⁴ As their name suggests, the individualized education plans that routinely emerge from such meetings reflect highly customized agreements about the services the state will provide to the child in question.⁴⁵

It may be that Fiss would exclude these opportunities for value creation as not constituting “settlements,” because they do not necessarily represent compromises of either party’s interests. But to dismiss these cases from the relevant universe on this basis ignores the single most important concept in modern dispute resolution literature—the idea that agreeing to an outcome at odds with one’s position is not the same as compromising one’s interests.⁴⁶ Litigation need not resolve some of these cases in which a

42. See Robert C. Bordone & Michael L. Moffitt, *Create Value out of Conflict*, NEGOTIATION, June 2006, at 3; see also Fred Locklear, *The Postal Service Delivers, and Now Rocks*, ARS TECHNICA, Nov. 6, 2004, <http://arstechnica.com/old/content/2004/11/4376.ars>.

43. See Kenneth R. Kupchak et al., *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai’i*, 27 U. HAW. L. REV. 17, 62–63 (2004) (“These tools can be an effective means of giving all parties that which they desire: return on investment for the owner; cash-free solutions for the politicians; and public benefits for the taxpayers.”).

44. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 1997 U.S.C.A.N. (111 Stat.) 37 (codified as amended at 20 U.S.C. § 1415 (2006)).

45. See generally Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004) (studying special education mediation participants). For an account of special education mediations in circumstances demanding extraordinary customization, see Paul M. Secunda, *Mediating the Special Education Front Lines in Mississippi*, 76 UMKC L. REV. 823 (2008) (special education needs of incarcerated children).

46. The text most commonly credited with popularizing this understanding is Roger Fisher, William Ury, and Bruce Patton’s *GETTING TO YES*, *supra* note 41. Len Riskin has

binary decision would waste conspicuous opportunities for mutual benefit because settlement selectively filters these cases from the docket.

Second, settlement offers the prospect of addressing nonfinancial, and even nonlegal, issues. Being in a dispute is an emotional experience. Some economists' portrayal of strategic litigation analysis notwithstanding, I have yet to encounter an actual human being on either side of a legal dispute in which he or she viewed the matter with clinical detachment.⁴⁷ Having an emotional reaction to the dispute does not necessarily counsel for or against litigation. In some cases, parties welcome litigation's promise of a binary decision rendered by an emotion-free judge. In other cases, however, people need more, or at least something different. What might a family with divorcing parents need? What might labor and management leaders need as they contemplate the terms of the contract that may end the current strike? What might grieving family members need during the distribution of an estate? What might two business partners in a dispute need? In many contexts, parties must, or at least should, maintain their ability to work together, regardless of the outcome of the particular extant dispute. Litigation operates within an adversarial structure, and whatever else we might say about it, litigation is not well suited for relationship building. Settlement can help to filter some of these cases in which emotional concerns or relationship interests coexist with—or even overshadow—legally cognizable interests, and, as a result, litigation can reasonably

called this “the most important and useful idea in the field.” Leonard L. Riskin, *Eleven Big Ideas About Conflict: A Superficial Guide for the Thoughtful Journalist*, 2007 J. DISP. RESOL. 157, 161; see also Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2672 (explaining that “settlement is not necessarily unprincipled compromise”). Parties to litigation have impliedly agreed to abide by the court's eventual decision. One could say that in so doing, they have impliedly placed their interests in social stability above whatever other interests they may have in the immediate dispute. See Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 32 (2002) (“The disputants’ willingness to submit their dispute to adjudication by a recognized tribunal is itself an affirmation of community, far more so than the self-help remedies of the blood feud, duel, or riot.”); Seul, *supra* note 8, at 900 (“The parties’ choice among available means for addressing their dispute suggests they implicitly recognize that they, and the court before which they have brought their dispute, are participants in a larger social system that, overall, is worth maintaining and attempting to enhance. The disputants, like the rest of us, inhabit a social context in which many of their other cherished values are aligned, even though those that are the subject of their current dispute are not.”); Martin Shapiro, *Compromise and Litigation*, in COMPROMISE IN ETHICS, LAW, AND POLITICS 163, 168–69 (J. Roland Pennock & John W. Chapman eds., 1979).

47. Cognitive and social psychology, psychiatry, and psychotherapy have much to offer our understanding of disputants. And none of those disciplines suggests that perfect rationality is possible, much less the norm in the context of disputes. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* (3d ed. 2008); Max H. Bazerman & Katie Shonk, *The Decision Perspective to Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 5, at 52, 52–65; Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted To Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420 (1996); Daniel Shapiro, *Enemies, Allies, and Emotions: The Power of Positive Emotions in Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 5, at 66, 66–82.

concern itself more exclusively to the narrow purpose for which it is crafted.⁴⁸

Third, settlement offers the prospect of more fluid problem definition than litigation. Many of the most challenging and important cases of the modern world are ones in which litigation's rigid, and often narrow, joinder and standing rules risk excluding people who will be fundamentally affected by the case's outcome. I do not suggest that joinder and standing rules are necessarily too restrictive. Instead, I merely point out that these rules exist in their current form because they focus on the prospect of litigation. They are, to state the obvious, rules of litigation. Not everyone can, or should, be at the litigation table. But we should acknowledge the cost of excluding people from the table.

Those without a voice in the process by which a dispute will be resolved stand at risk.⁴⁹ Yet litigation rules frequently exclude interested parties and even their representatives from the room. Whether a party has a right to be involved turns on the question of how one draws boundaries around a dispute. Who should be involved in a case adjudicating the water rights for the Snake River? Who should be involved in a case regarding threats to the Spotted Owl's habitat? Who should be involved in a series of claims involving tensions between a city's police force, its African-American citizens, and its Latino citizens?⁵⁰ Litigation offers an answer to each of these questions that is legally correct, but contextually dangerous, as it excludes legitimately interested people. One of settlement's contributions is that it can ask, "Who should be at the table?" and offer a more inclusive

48. Carrie Menkel-Meadow correctly suggests that "appropriate dispute resolution" allows parties to choose how they want their dispute resolved." Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2689–90; see also Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 *FORDHAM URB. L.J.* 1073, 1083 (2001) ("ADR or conflict resolution practices acknowledge a greater human variability of action than do the ritualized or overly stylized forms of litigation practice. This allows values other than being 'right' to be imagined and enacted. Portia's plea for mercy or forgiveness, the granting of an apology and human acknowledgment of wrongfulness, if not legal fault or blame, all allow the fuller expression of a richer gamut of human actions, emotions, and feelings and we hope, a more humane set of responses." (footnotes omitted)).

49. This basic idea appears not only in literature principally focused on the law, but also in descriptions of democratic discourse and procedural justice. See, e.g., TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 87 (2002) (presenting empirical support for the idea that "people focus more directly on whether they have an opportunity to present their arguments than they do on whether they think they are influencing the decisions made"); James Bohman, *Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität und Geltung*, 28 *LAW & SOC'Y REV.* 897, 917 (1994) (describing a deliberative democracy as one in which "All members must be able to take part in discourse, even if not necessarily in the same way" (quoting JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 224 (William Rehg trans., MIT Press 1996) (1992))).

50. For a description of a nonlitigation approach to answering this question, see Robert Ricigliano et al., *Problems Without a Process: Using an Action Dialogue To Manage Racial Tensions*, 4 *HARV. NEGOT. L. REV.* 83 (1999) (describing the use of "action dialogue" to help a city and its communities address widespread racial tensions).

answer than litigation. When that occurs and a more comprehensive settlement ensues,⁵¹ litigation is improved because it can proceed with cases in which the risk of de facto exclusion is less serious.

C. *Future Coevolution Opportunities for Litigation and Settlement?*

Litigation and settlement have coevolved into their current forms. I feel safe in asserting that neither has reached the apex of its evolutionary process. Each will continue to change, and not all of the changes will ultimately be judged to have been improvements.

The difficult question is not whether litigation and settlement will continue to change—they will. The difficult question is how each will change. In this final Part, I suggest two possible ways in which litigation and settlement may continue their coevolution.

One aspect of modern litigation and settlement that may present an opportunity for future evolution relates to pleadings. To the extent that modern litigation has a triggering event—a moment at which it “begins”—that moment revolves around pleadings. We continue to see considerable litigation over just what modern litigation rules require litigants to include in their pleadings.⁵² But pleadings represent an area of litigation that has remained relatively untouched by the prominence of settlement in modern litigation. Pleadings’ content requirements fly in the face of virtually all of the prescriptions about how to assure an efficient and wise settlement. Pleadings explore the past, rather than the future. Pleadings assume a limited solution set. Pleadings favor formulaic recitations and preclude expansive problem definitions. As I wrote in an article entitled *Pleadings in the Age of Settlement*,

The process of drafting and receiving initial pleadings invites disputants to frame disputes as binary clashes, to conceive of past events in absolute terms, to base solutions solely on entitlements stemming from prior events, and to filter out as irrelevant a vast body of information related to the circumstances underlying the dispute.⁵³

Pleadings, in short, contemplate only litigation, even though trials on the merits represent the method by which only a small fraction of cases are resolved.

In what ways might pleading rules evolve to reflect settlement’s role more helpfully? At least two possibilities emerge. First, if pleading rules require information that is unhelpful, or if pleading rules preclude information that would be helpful in an initial exchange, perhaps the

51. For an extensive treatment of consensus building dialogues, their inclusive nature, and the durable agreements they produce, see *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind, Sarah McKernan & Jennifer Thomas-Larmer eds., 1999).

52. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

53. Michael Moffitt, *Pleadings in the Age of Settlement*, 80 *IND. L.J.* 727, 737 (2005).

content of pleading rules will change.⁵⁴ Len Riskin and Nancy Welsh, for example, have suggested that courts ought to engage actively with disputants to work or rework their conceptions of the problem(s) they are bringing to litigation. A second possible change to pleading rules would target not their content but, rather, their timing. Perhaps pleading rules are just fine as they exist, but they happen at the wrong time. What if courts required disputants to engage in settlement conversations, or some other kind of exchange, prior to filing pleadings? The aspects of pleadings required for the functioning of modern litigation are not so time sensitive that the litigation cadence would be meaningfully disrupted. And there would be at least some chance that disputants' perceptions of potential settlement options would not be skewed by pleading rules structured for other purposes. Pleading rules have undergone fundamental changes a number of times in modern memory. Perhaps more changes are on the way.

A second possible aspect of litigation and settlement that may present an opportunity for experimentation and evolution is the way in which modern litigation's rules are treated as nonnegotiable, inflexible, and beyond the control of disputants.

Henry Ford once said, in reference to his Model T automobiles, "Any customer can have a car painted any colour that he wants so long as it is black."

Our judiciary has unfortunately embraced Henry Ford's sense of consumer choice. Courts today essentially tell disputants that they can have any color of litigation they want, so long as it is the one that already exists.⁵⁵

What if the rules of litigation were customizable or negotiable? In some sense, arbitration's ascendancy suggests that disputants have an interest in structuring at least some aspects of the adjudication in which they will participate. But arbitration takes prospective litigants and makes them parties to arbitration, no longer litigants. It diverts disputants from litigation in the court. What if, within constitutional and statutory constraints, disputants could remain within the realm of litigation, while also customizing their experience? What might they do differently with joinder, discovery, evidence, or appeals? Today's courts are not ideally

54. Len Riskin and Nancy Welsh have, for example, noted the disconnect between pleading rules' relatively narrow problem-definition requirements and the broader problem-definition that is often possible—and preferable. They even describe the active role some judges in the Netherlands take on with respect to problem-definition during the cadence of litigation. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 929–30 (2008) ("Dutch judges, who may meet with the parties and lawyers several times to investigate and attempt to resolve the case, are taught to ask, 'Will my decision solve your problem?'").

55. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (quoting HENRY FORD, *MY LIFE AND WORK* 72 (1922)); see also Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579 (2007); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181.

designed for every possible dispute, every possible configuration of disputants, every possible clash of principles and rights. No court system could be. Our litigation system is designed well for certain kinds of disputes, and less well for others. Perhaps litigation will evolve in a way that maintains its public character, while providing greater private influence over the details of how litigation unfolds.

Again, I do not suggest that either of these adaptations is necessarily going to occur. And I certainly do not suggest that these are the only two ways in which litigation and settlement might evolve. But I am confident that these and other similar considerations will continue to press both litigation and settlement to refine their coexistence.

II. THINGS TO BE AGAINST

Owen Fiss invited his readers to join him in opposition to “settlement.” As I explain in the first Part of this essay, I am not convinced that settlement merits such summary or wholesale rejection. Indeed, I find many aspects of settlement fundamentally valuable—perhaps even critical to the success of our ongoing human experiment in living under the rule of law.

Still, there is something seductive about naming the things for which one does *not* stand. In that spirit, therefore, in the Part that follows, I offer a list of three things worthy of opposition. To be clear, this list is not exhaustive from my perspective. I am also against, *inter alia*, illiteracy, malnutrition, and the New York Yankees.

The three things I list below are inspired by the central concerns I understand to have motivated Fiss’s declaration that he is against settlement. Each describes an aspect of a regrettable present reality. Each also presents a frame through which to observe not only settlement, but also litigation. None of them, however, presents a basis for opposing settlement.

A. *Power Imbalances*

Disputants do not always have identical “power,” however one constructs the concept of power. And in some circumstances, one disputant has vastly more power than the other disputant. At some level, this is inevitable. No mechanism exists for assuring that I will only commit torts against people within my own tax bracket. We want large corporations to enter commercial or employment relationships with individuals. We need the government to engage with individuals, groups of people, and other governments. As long as these kinds of interactions take place, we must assume that disputes will arise. We must assume, therefore, that now and forevermore, power imbalances will mark at least some disputes.

Not all power imbalances are worthy of opposition, of course. The law creates entitlements. Those entitlements are, themselves, one source of power. In fact, I’m not sure that any of us would want the law to play a

power-balancing role in many circumstances.⁵⁶ We often want certain people to have a surplus of power, at least when we want them to have it—that is, when the law provides them with a set of rights.

I have a friend whose wife was recently about to have their first child. A public sector employee, my friend approached his boss and indicated that he intended to take paternity leave a few months after the baby was born. The conversation, as my friend tells the story, went something like this:

Boss: Well, I don't know. Nobody in our office has ever taken paternity leave. I'll have to think about it.

Friend: What do you mean, "think about it"?

Boss: Well, there are all sorts of complications, and I'm just not sure it will make sense or be workable.

Friend: State law says that I'm entitled to this.

Boss: [Silence]

Friend: My wife is a law professor.

Boss: Oh. Um. OK. When were you thinking of starting your paternity leave?

"Power" in this exchange was in no way balanced. On the one hand, the state agency for whom my friend works has vastly more resources, and the combination of impending fatherhood and a lousy economy made my friend's alternatives unattractive. On the other hand, the relevant legal entitlements tilted entirely in favor of my friend. And for purposes of this conversation, at least, my friend had virtually all of the relevant power, not merely some balance or share of the power.

Fiss might respond, "Right, but see? Even in the story you chose, it was the barely veiled threat of litigation that caused the change in the otherwise more powerful party's behavior. Litigation is the vehicle for assuring the public value embodied by the paternity leave law." And I would not disagree in the least, except to celebrate the existence of a

56. There may be some contexts in which we would actually have a policy preference for power—however one defines that—to be relatively balanced, rather than tipping entirely one way or the other. For example, labor laws frequently have as a policy goal the preservation of industrial peace. This leads not only to the promotion of mediation and arbitration, but also to the idea of a reasonable balance of power as a precursor to collectively bargained contracts. In the context of election-related speech, as well, we might have concerns if one party had such a surplus of power, in the form of resources that translate to access to the public's ear, that it could effectively shut out other viewpoints. On this latter point, see Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411–12 (1986) ("The risk posed to freedom of speech by autonomy . . . occurs whenever speech takes place under conditions of scarcity, that is, whenever the opportunity for communication is limited."). I am grateful to my colleague Stuart Chinn for helping me to understand this aspect of Fiss's understanding of power balancing.

mechanism—settlement—that enabled my friend to enjoy his paternity leave while his daughter was still an infant.⁵⁷

Or Fiss might respond, “I’m talking about disparities in resources. That’s the power imbalance that is the real threat.”⁵⁸ Clearly, resources matter, regardless of the process in question. I would always prefer to be the one with more resources. And yet, treating resources and power as coterminous is problematic. By virtually every measure, the United States had more resources than its enemies in Vietnam. The New York Yankees have set payroll records each of the last eight seasons but have enjoyed less success on the field than many teams with more limited resources.⁵⁹ Following the story of Lysistrata, groups of women in several African countries have recently launched initiatives to withhold sex from their partners until they cease participating in wars.⁶⁰ In his thoughtful, and sometimes gut-wrenching exploration of power dynamics in the context of divorce cases, Scott Hughes suggests that “power is not monolithic; it can be divided into five areas: economic, intellectual, physical, emotional, and procedural.”⁶¹ A meaningful understanding of power in virtually all contexts must be more nuanced than just access to resources.

What Owen Fiss and others would have us pay attention to—and rightly so—is the skewing effects these differences in resources can have on the process(es) by which disputes are resolved. And neither settlement nor litigation, in our current system, deals adequately with the problems posed by this form of power imbalance.

In its idealized form, litigation provides protections aimed against having outcomes determined by the resources of the disputants. A cash register appears nowhere in the traditional image of blind justice, holding the scales aloft, weighing the merits of each circumstance against the relevant law. In

57. I celebrate, also, that my friend could enjoy those rights without having to incur the inevitable transaction costs associated with litigation—particularly because he would recover few of those costs even if he were successful with his claim.

58. This was, in large measure, Fiss’s first response when I posed this question at the symposium from which this essay stems. *Against Settlement* presents a third possible response: that Fiss would decry the settlement between my friend and his employer because my friend got paternity leave without the public having been involved.

59. For a fascinating economic analysis of baseball teams’ payroll efficiency, see Rich Lederer, *MLB Payroll Efficiency, 2006–2008*, BASEBALL ANALYSTS, Mar. 2, 2009, http://baseballanalysts.com/archives/2009/03/20062008_payrol.php. See also David Sweet, *The ‘Smart’ Choice To Win the Series? Tampa*, MSNBC.COM, Oct. 8, 2008, <http://www.msnbc.msn.com/id/27089678> (reproducing the “cost-per-win index”).

60. In Aristophanes’s play, Lysistrata schemed with other women to withhold sex from their husbands as a means of compelling them to end the Peloponnesian War. ARISTOPHANES, *LYSISTRATA* 24–25 (Douglas Parker trans., New American Library 1964) (411 BC); see also BBC News, *Would You Withhold Sex To Get Your Way?*, http://news.bbc.co.uk/2/hi/talking_point/8033695.stm (last visited Oct. 31, 2009).

61. Scott Hughes, *Elizabeth’s Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 574–75 (1995) (citing JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICE GUIDE FOR THERAPISTS AND COUNSELORS* 49 (1981)).

modern litigation, the judges are professional and impartial.⁶² Filing fees represent a tiny fraction of the cost of administering the judicial function, and courts are empowered to waive even these modest fees for parties without adequate resources.⁶³ Pleadings, the gateway to accessing the machinery of the court, aim to minimize formalism and complexity, in favor of having issues resolved on their merits.⁶⁴ Many statutory claims contain provisions that permit fee shifting in the event of successful litigation, creating an incentive for attorneys to accept representation in cases that would be financially unattractive absent these provisions.⁶⁵ Even juries, whose makeup is consistently more representative of the population as a whole than is the makeup of the bar or the bench, might be seen as democratic protectors of those with fewer resources.⁶⁶ Litigation, in its perfect form, dispenses justice without reference to disputants' resources.

These protections fail often enough, however, that we should not imagine that litigation has "solved" the power imbalance problem. Much of the action in modern litigation takes place in discovery—and therefore outside of whatever protections a judge might practically provide to a litigant with fewer resources.⁶⁷ The trend in courts appears to be toward more restrictive

62. Whether, as an empirical matter, judges live up to the commonly accepted ideal of impartiality is a different matter. Judicial recusal mechanisms present the most obvious safeguard against perceived or actual bias on the bench. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257–67 (2009) (requiring a state supreme court justice to recuse himself from a case involving a party who had made \$3 million in campaign contributions to the judge). For a different theoretical view of the principle of judicial impartiality, see OFER RABAN, *MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY* 83 (2003) (“[S]ome legal questions *must* be answered by the use of preferences. Partiality . . . is sometimes *unavoidable* in perfectly valid legal determinations.”).

63. *See* 28 U.S.C. § 1915 (2006).

64. This was Charles Clark's vision of how pleading rules would function when he drafted the FRCP. We know this from both his scholarly work and from opinions he authored once he became a judge. *See, e.g.*, *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (calling a 12(b)(6) motion “a mere formal motion”); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459 (1941) (suggesting that under the new pleading rules, “even a child could write a letter to the court telling of its case”); Moffitt, *supra* note 53, at 768. Cases like *Twombly* and *Iqbal* raise questions about whether Clark's vision remains in practice.

65. *See, e.g.*, 15 U.S.C. § 26 (2006) (antitrust); 42 U.S.C. § 2000e-5(k) (2006) (civil rights).

66. *See, e.g.*, ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 52–65 (2001); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974 (2004) (expressing the de Tocqueville observation that juries are “political institution[s],” placing “the real direction of society in the hands of the governed,” with juries as “the whole community's spokesman” (citing ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 291 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835))).

67. The structure of modern discovery rules rests on the idea that full disclosure of information leads to greater justice. *See, e.g.*, *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (stating that discovery “make[s] a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent”); Alexander Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 577 (1954) (“[T]he purpose of litigation is not to conduct a contest or to oversee a game of skill, but to do justice as between the parties and to decide controversies on their

access to juries, whether by heightened pleading standards⁶⁸ or more expansive summary judgment practice.⁶⁹ The funding for legal aid lawyering has been reduced, restricted, and in some cases eliminated.⁷⁰ The financial incentives for private lawyers to take on these cases has not fundamentally changed the fact that pro se navigation of the court system is the only option many poor would-be litigants see for themselves. In short, no reasonable observer would suggest that a disputant's resources are actually irrelevant to the outcome that disputant can expect to get in court.

In its idealized form, private settlement occurs without the influence of power imbalances. A significant portion of the law of contracts aims to protect against the injustices that would arise from enforcing agreements struck under inappropriate conditions. The law of duress targets contexts in which one party to a contract entered the contract without meaningful volition—for example, because of physical coercion or improper threat.⁷¹ In modern times, the law of coercion is most commonly applied not in situations in which one party is physically stronger than the other, but instead in contexts in which one party enjoys a considerably more favorable

merits.”). These reforms have increased discovery's prominence, and the opportunities for its misuse. See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE 15 (1997) (finding that discovery represented, on average, half of the total cost of litigation); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703 (1989) (“Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules.”).

68. The Supreme Court's *Twombly* decision, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007), has resulted in a fair amount of confusion within lower courts and within the academy. See, e.g., *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“We are not alone in finding the opinion confusing.”); *Iqbal v. Hasty*, 490 F.3d 143, 155–57 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009) (noting uncertainty in interpretation because of “conflicting signals”); Lee Goldman, *Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem*, 2008 BYU L. REV. 1057, 1058 (“The Court's discussion of general pleading standards also generated great confusion.”). By all accounts, however, it made it easier for at least some defendants to prevail on 12(b)(6) motions.

69. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016 (2003) (“Summary judgment . . . has moved to the center of the litigation stage as plaintiffs struggle to survive the motion in order to reach trial as defendants increasingly invoke it in an attempt to prevent them from doing so.”).

70. Since 1980, federal funding for the Legal Services Corporation (LSC) has varied. Although LSC receives approximately the same number of actual dollars as it received in 1980, when inflation is factored in, its effective federal support is less than half of what it was in 1980. See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 38–39 (2007), available at http://www.clasp.org/publications/legal_aid_history_2007.pdf. Meanwhile, restrictions on its operations have proliferated. See *id.* at 29–37.

71. RESTATEMENT (SECOND) OF CONTRACTS §§ 174–175 (1981).

economic position.⁷² The law of unconscionability invites courts to examine not only the process by which an agreement was reached, but also the substantive terms of that agreement. Disparities in bargaining power are an explicit part of a court's unconscionability calculation.⁷³ Settlement, in its perfect form, is the vehicle through which parties can arrive at mutually preferred outcomes, regardless of their resources.

Settlement in practice, like litigation, too often also fails to protect against the possibility that power imbalances will skew the result in ways that deviate from settlement's underlying ideals. Poorer disputants often have insufficient access to relevant information.⁷⁴ Poorer disputants typically have a harder time understanding the implications of legally complex settlement terms.⁷⁵ Those with fewer resources are susceptible to being "outlasted" by a counterpart with a longer time horizon, a larger bankroll, or fewer opportunity costs. Poorer disputants are probably also more susceptible to agency costs in settlement, because they have less information, fewer opportunities for effective monitoring, and less ability to negotiate a more favorable retainer agreement than disputants who have more resources.⁷⁶ In short, no reasonable observer would suggest that a disputant's resources are irrelevant to the outcome that disputant can expect to get through settlement.

Power imbalances create problems in the real world. The on-the-ground practices of litigation and of settlement present pictures of sloppy, imperfect efforts at overcoming the worst aspects of power imbalances. We might reasonably compare the ideals of each process—ideals that largely assume away the persistence of power imbalances. We might also compare the sloppy reality of litigation with the sloppy reality of settlement.

72. Grace Giesel calls these contexts "the paradigm for almost every modern duress claim." Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 445 (2005).

73. See *Martin v. Joseph Harris Co.*, 767 F.2d 296, 301 (6th Cir. 1985) ("[R]elative bargaining power is an appropriate consideration in determining unconscionability . . ."); *Kinney v. United HealthCare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 353 (Ct. App. 1999) ("The oppression component [of unconscionability] arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party." (citations omitted)); E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 584 (4th ed. 2004).

74. Historically, the information asymmetries based on wealth were often profound, and we continue to see these disparities today in many contexts. Insurers still know more than their insured about trends, costs, and probabilities. Manufacturers still know more about their products than consumers. And so on. I wonder, though, whether the Internet and the ease with which information today flows will, at some point, dampen at least this aspect of resources' skewing effects.

75. It is not clear that we cure this problem by assuming away the pro se problem. Unless the market for attorneys' services is utterly dysfunctional, we probably should assume that some counsel are more competent than others and that those with greater resources have access to better representation.

76. For a helpful primer on the dynamics of agency in the context of settlement, see Scott R. Peppet, *Six Principles for Using Negotiating Agents to Maximum Advantage*, in *THE HANDBOOK OF DISPUTE RESOLUTION*, *supra* note 5, at 189, 189–201.

The one thing we cannot responsibly do is compare the idealized vision of one practice against the sloppy reality of the other. Proponents of litigation must not present the question as, “Which is better, (a) having a judge protect the powerless litigant through the promotion of public values as articulated by the law, or (b) sending that powerless litigant alone into the hallway to compromise away her rights?”⁷⁷ Proponents of settlement must not present the question as, “Which is better, (a) employing fully inclusive deliberative discourse to reach an elegant, fair, and creative resolution, or (b) sending disputants into a formalistic process navigable only by the rich?”⁷⁸ The idealized visions of both processes are beautiful. The practices of both processes are flawed. If power imbalances skew one process, they skew the other, even if perhaps they do so in different ways.

B. Agency Costs

Anytime we hire anyone to do anything for us, there is at least a chance of agency costs. Agents have different information. They have different expertise or technical ability. Monitoring their behavior is difficult, costly, or both. The financial and other incentives of principals and agents are almost never perfectly aligned. And this is all true whether we are talking about lawyers, landscapers, babysitters, or bureaucrats.

Owen Fiss articulates at least one piece of the broader concern about agency costs when he warns about the possibility of an “absence of authoritative consent” in settlements.⁷⁹ At its heart, Fiss’s concern with authoritative consent is the risk that a principal will, upon learning the terms of settlement agreed to by an agent, say, “I didn’t want to settle on *those* terms!”

Agents sometimes negotiate settlements with which their clients are disappointed.⁸⁰ In an ideal world, agents would understand and represent fully their principals’ views of the relevant interests, parameters, tradeoffs, and opportunities. In practice, agents do not always understand their clients’ priorities and underlying interests. In practice, agents sometimes have incentives at least partially at odds with some of their clients’ interests. And, as a practical matter, agents cannot always bring every decision back to their clients for a new round of consultation. People do not merely hire agents for the agents’ skill sets. Sometimes, a client hires an agent because the client does not have the bandwidth to do everything himself or herself.

77. I adopt Erica Fox’s phrase “alone in the hallway” from her article by that title. Fox, *supra* note 40, at 11.

78. Cf. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (suggesting that the basic structure of litigation is such that the “Haves” (wealthy, professional, repeat-players) will consistently enjoy more favorable norms, rules, institutions, and outcomes).

79. Fiss, *supra* note 1, at 1078.

80. To be clear, I am not just talking about clients who are disappointed that circumstances prevented their agents from achieving perfect outcomes. Instead, I am talking about clients who are disappointed because their agents made agreements on their behalf, when the client himself or herself, would not have agreed to such terms.

With the delegation of a task to an agent comes the risk that the agent will behave differently than the client would prefer.

When a dispute involves groups of people, agency risks are even more pronounced for at least two reasons. The first reason is that scale makes it even harder for an agent accurately to discern relevant interests. Even when a group of people has some loose affiliation of conspicuous interests, understanding their diverse perspectives becomes unmanageably difficult. Fiss uses the example of people who bought Cuisinart food processors during a particular decade, bound together as members of a single class action. These members may share an interest in compensation, but an agent representing them in settlement must know more than that in order to represent them effectively. Do they need cash right away? Are they hoping to make a public statement of some sort? Would they prefer a structured settlement, with payment over time? Would they want the settlement to include contingency arrangements? What kind of release? What, if any, value would they place on a commitment by Cuisinart to change practices? What are their privacy or confidentiality expectations? And so on. As classes of plaintiffs rise into the hundreds of thousands,⁸¹ we must acknowledge that agents will have an increasingly hard time accurately discerning a unified set of interests.

Second, even if an agent representing a group were confident that she or he understood what each member of the group wanted, deciding what actually to do often involves tradeoffs. An agent is left to weigh one set of interests against other sets of interests. Should the union negotiators, who represent a diverse workforce, push for better retirement benefits or more paid holidays, a more comprehensive health plan or more salary? Should the city attorney settle the claim in a way that allocates costs to the maintenance department or to the police department? Should those who represent people exposed to a potentially harmful chemical push for more extensive monitoring or more compensation in the event an illness develops, if there is a limited fund from which to draw the settlement?

In these ways, agency makes settlement potentially problematic in practice. And no mechanism can fully “resolve” the prospect of these agency complications. Lawyers’ codes of ethics can insist that attorneys defer to their clients’ interests, adhere to their clients’ interests regarding the scope of settlement authority, and communicate settlement decisions to their clients.⁸² Courts can review prospective class representatives and

81. One ongoing gender discrimination class action involves even more parties than that. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 144 (N.D. Cal. 2004) (“[B]oth parties estimate that the proposed class numbers over one million women.”). The certification in this case is under en banc review by the U.S. Court of Appeals for the Ninth Circuit. See Rachel Tallon Pickens, *Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions*, 83 U. DET. MERCY L. REV. 71, 72 (2006).

82. Legal ethics standards require attorneys to “abide by a client’s decisions concerning the objectives of representation,” to “consult with the client as to the means by which they are to be pursued,” and to “abide by a client’s decision whether to settle [the] matter.”

weigh their fitness to represent the class effectively.⁸³ Courts can review the substance of proposed settlements in class actions, and can look carefully for evidence that class representatives have not advanced their own interests at the expense of those of class members.⁸⁴ At most, even this combination of measures guards against only some of the agency costs that arise in the context of settlement.

Unfortunately, agency costs are unavoidable in litigation as well. For example, every structure for attorneys' fees is fraught with the prospect of mismatching incentives.⁸⁵ Few clients have the capacity to monitor attorneys' behavior in any meaningful way, both because of the cost associated with such monitoring and because of asymmetries in information and expertise. Even if a client were to monitor an attorney's actions, and even if a client were to detect behavior of which the client disapproves, the client's options are limited and unattractive. Firing an attorney is enormously costly, because the client would then need to pay another attorney to get up to speed.⁸⁶ Filing a malpractice action against an attorney is possible, but malpractice actions are successful only in the most egregious cases. Courts are hesitant to second-guess an attorney's strategic decisions about how to craft the complaint, how to navigate joinder, whether and how to file a dispositive motion, how to navigate various trial decisions, or whether to file a particular sort of appeal.⁸⁷ Furthermore, because so much of litigation behavior now takes place in discovery, outside of the immediate view of the courts, few formal constraints on

MODEL RULES OF PROF'L CONDUCT 1.2(a) (1999); see also *In re Brown*, 453 P.2d 958 (Ariz. 1969) (en banc); *In re Ragland*, 697 N.E.2d 44 (Ind. 1998) (per curiam).

83. See FED. R. CIV. P. 23(a).

84. See FED. R. CIV. P. 23(e); see also 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE* § 1797.1 (3d ed. 1998) ("The main judicial concern [of FRCP 23(e)] is that the rights of the passive class members not be jeopardized by the proposed settlement. The court also must be sensitive to the possibility of collusion between the parties actively participating in the action.").

85. An attorney operating on a contingency basis often has a stronger incentive to settle more quickly, even if it is for less, than clients. An attorney operating on an hourly basis often has an incentive to overinvest hours in the representation, billing more hours than the expected return on those marginal hours of work might be justified in the client's view. An attorney operating on a flat-fee basis often has an incentive to underinvest hours in the representation, because he or she receives no additional compensation for marginal hours spent on the case. Fee arrangements skew settlement behaviors of both attorneys and their clients. See Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 LAW & SOC'Y REV. 341 (1987).

86. This is one of the principal criticisms of the Collaborative Law movement, because its disqualification agreements put parties in the position of having to replace existing attorneys with new attorneys—all of whom have to be educated about the nature of the lawsuit. See, e.g., Rebecca A. Koford, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827, 838–40 (2008); John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 117–21 (2008).

87. See, e.g., J. Mark Cooney, *Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims*, 52 WAYNE L. REV. 1051 (2006).

attorneys' discretion exist.⁸⁸ As a result, few formal mechanisms dampen the possibility that attorneys will engage in behavior at odds with the interests of her or his client.

Furthermore, litigation involves tradeoffs in much the same way as settlement. Although one simplistic picture of litigation is one in which each adversary advances his or her position in absolute terms, the reality of modern litigation is that parties must often navigate complicated decisions about how to conduct the litigation. Some of the decisions are strategic. Should we do additional discovery at this point? Should we file this motion? Should we join this party? These decisions call for tradeoffs based on the expected costs and benefits of each approach.

Some litigators' decisions, however, call for tradeoffs involving interests or principles. "[I]nterest groups that supposedly are represented through the parties to litigation—whether African-Americans, abortion opponents, evangelical Christians, or Libertarians—are seldom monolithic in their views. Litigants often purport to express the unified perspective of groups that, in fact, are often internally heterogeneous."⁸⁹ Furthermore, the complex realities of real-world litigation sometimes demand that groups struggle with tradeoffs they would prefer, in theory, not to have to make. As a board member of the ACLU once remarked in the context of litigation that surfaced internal divisions within the organization, "[f]or a civil libertarian, choosing between constitutional guarantees is 'Sophie's Choice.'"⁹⁰

We see examples of this even within the federal government. The U.S. Department of Justice is *the* representative of the United States in litigation, and it presents *the* position of the United States in that capacity.⁹¹ But of course, in any complex piece of litigation, different branches of the government, and even different agencies within the same Executive, will have differing and sometimes opposing interests about whether and how a particular action is litigated. The decision to litigate does not cause these differences to disappear. Instead, it merely requires that they be resolved internally, in advance of the litigation.⁹² Even if its conduct of the actual

88. For a thoughtful and creative proposal regarding an approach to curbing abuses of the discovery process, see Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1620 (1996) ("One problem with current law is that many judges are reluctant to pull out the big strap of discovery sanctions except when convinced that the lawyers involved are so utterly recalcitrant that they deserve a serious whupping. . . . [A] major improvement in the moral education of litigators would be effected by increased sanctioning of smaller, more annoying discovery abuses with smaller, more annoying punishments.").

89. Seul, *supra* note 8, at 940.

90. Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 611 (1994) (describing the ACLU's internal debates about the stance it would take on double jeopardy questions in the Rodney King police officer cases).

91. See 5 U.S.C. § 3106 (2006); 28 U.S.C. §§ 516, 519 (2006).

92. See Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1359–71 (2000) (surveying some of the

litigation did not involve compromises, the Department of Justice's fundamental position will be viewed with disappointment by at least some of the people it represents.

Even if we focus only on the question of "authoritative consent" Fiss raises about the role of agents, litigation does little to cure the problem. Modern malpractice standards and ethical standards almost uniformly assume that a client wants to abdicate any and all decisions about litigation conduct to her or his attorney. The rules do not require an attorney to defer to a client on how to prosecute or defend a case. Instead, they treat the decision to litigate as though it were a binary decision, after which the client has no substantial interests.⁹³ There may be good reason for this deference to attorneys' decisions. My point is not that we should—or even could—demand that an attorney consult with her or his client before asking a question on cross-examination, before responding to a motion, or before making a particular discovery demand. Instead, my point is that each of those decisions is one about which a client may have particular interests—interests that will not necessarily be addressed by the attorney's decisions.

Just as attorneys risk settling in ways that clients subsequently dislike, attorneys risk litigating in ways that clients subsequently dislike. In the most egregious cases of each, the attorney's behavior may be the product of malpractice. An attorney may exceed the boundaries of the settlement authority a client has given, or an attorney may make litigation decisions so at odds with industry standards that the attorney risks professional sanction. Most of the time, however, an attorney's behavior—even behavior that may be self-interested—is *de facto* shielded from review or sanction. In short, the risk of agency problems plague both settlement and litigation.

C. *Barriers to Court Access*

Because courts are purely reactive, they function properly only if disputants have access to the courthouse. In an idealized vision of litigation, any aggrieved person would not only know his or her rights, but also would understand and have access to the state machinery designed to give effect to those rights. In practice, modern disputants encounter a number of different barriers to court access. The most conspicuous reason disputants might not perceive themselves to have access to the courthouse stems from financial concerns. In short, litigation is expensive, and many—accurately—perceive litigation's justice as beyond their price range. Litigation can also be costly in terms of time,⁹⁴ reputation,⁹⁵ and emotion.⁹⁶

complications of the U.S. Department of Justice's role as singular representative of multiple agencies).

93. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) cmt. 1 (1999).

94. I have a former student who spent considerable time studying and working with nursing homes and other care facilities on disputes involving patients nearing the ends of their lives. I find it difficult to read court systems' typical time-to-disposition statistics with her clients in mind.

Even those who can afford its financial costs may perceive other litigation costs to be prohibitively high. In short, litigation's ideal assumes that disputants have unfettered and costless access to the courts—a level of access no disputants currently enjoy in practice.

One piece of Fiss's opposition to settlement might be understood as stemming from his concern over ADR's effects on court access. What if settlement-promotion efforts created barriers, hurdles, and pressures that prevent disputants from accessing courts?

At the time of *Against Settlement*, some of the settlement-promoting measures under consideration might have provided a basis for such a fear. Frank E. A. Sander famously described a possible restructuring of the modern courthouse as a forum in which disputants would be faced with an array of different dispute resolution mechanisms.⁹⁷ Dubbed “the multi-door courthouse,”⁹⁸ one model of this vision would have the decision of process allocated to a government official, rather than remaining the disputants' choice. In that sense, the multi-door courthouse might reasonably be understood as a barrier to court access. One might similarly read the transition to a stance for managerial judges as one that would threaten parties' access to the courtroom.

As an empirical matter, Fiss's concern about these aspects of settlement's potential to prevent disputants from litigating was, at a minimum, overstated. The number of jury trials has remained relatively constant over the past twenty-five years, although the rate of jury trials has decreased. Settlement's role in the disposition of cases is difficult to track, although most observers see a greater effect stemming from changes in courts' treatment of dispositive motions, for example. We have seen the institutionalization of many forms of ADR in many places and, along with it, an increasing concern about the mechanisms by which court systems are

95. We might intuitively understand the reputational concerns of a small-town doctor accused of malpractice. The reputational costs of litigation apply in larger contexts as well. See, e.g., WILLIAM D. BRADFORD, *DISCRIMINATION, LEGAL COSTS AND REPUTATIONAL COSTS* 25–27 (2005) (estimating that the reputational costs to publicly traded firms accused of gender or race discrimination by the U.S. Equal Employment Opportunity Commission or in other high-profile cases is more than forty times the estimated legal damages claimed in the litigation).

96. Being part of litigation is emotionally costly, as anyone who has spent sleepless nights with a litigation party—or even a litigation witness—will attest. In some circumstances, those emotional costs are necessary, and the litigation represents the prospect of the end of the emotional tolls associated with the underlying dispute. For others, however, it is easy to understand why they might judge the emotional costs of litigating too high, and therefore forego the litigation alternative.

97. Frank E. A. Sander, *Varieties of Dispute Processing*, 77 F.R.D. 111 (1976).

98. Although virtually universally attributed to him, Frank Sander did not coin this phrase during his presentation at the Pound Conference, nor does it appear in the text of the proceedings reprinted in the *Federal Rules Decisions*. Instead, the phrase appeared as a companion to a graphic on the cover of a magazine reporting on the Pound Conference. See Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOTIATION J. 437, 437–38 (2006).

“encouraging” settlement. But as a numerical matter, settlements have not displaced litigation in the way Fiss feared.

The real risk to court access over the past twenty-five years does not appear in *Against Settlement*.⁹⁹ The real risk to court access in recent years has been arbitration.

Arbitration has gained a prominence in modern dispute resolution that was almost unimaginable at the time *Against Settlement* was written. At the time Fiss wrote his article, arbitration was the mechanism of choice for many labor disputes and for certain commercial or maritime disputes.¹⁰⁰ By contrast, the U.S. Supreme Court, at the time, expressly excluded from arbitration entire categories of disputes that are routinely submitted to arbitration today.¹⁰¹ Today, arbitration agreements are enforced in a staggering array of contexts. In employment agreements, in health care agreements, in consumer purchases, even in contexts in which statutory rights protect against various forms of discrimination, arbitration clauses

99. Owen Fiss considered the role of arbitration in at least one of his earlier works. Readers of *Against Settlement* would not be surprised to find that he categorized arbitration as private, and therefore, in his view, incapable of articulating or enforcing public norms. Such readers might be surprised, however, to read of Fiss's apparent embrace of arbitration for certain private disputes—an embrace that finds no articulation in *Against Settlement*, even though it was written only a few years after Fiss's foreword regarding *The Forms of Justice*. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (“Of course, some disputes may not threaten or otherwise implicate a public value. All the disputants may, for example, acknowledge the norms and confine their dispute to the interpretation of the words of the contract or the price of a bumper. Such disputes may wind their way into court, and judges may spend time on these purely private disputes—private because only the interests and behavior of the immediate parties to the dispute are at issue. That seems, however, an extravagant use of public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators (though courts may have to act as background institutions enforcing or maybe even creating obligations to arbitrate). Arbitration is like adjudication in that it too seeks the right, the just, the true judgment. There is, however, an important difference in the two processes arising from the nature of the decisional agency—one private, the other public.” (citing MARTIN P. GOLDING, *PHILOSOPHY OF LAW* 106–25 (1975); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979))).

100. Arbitration has a long history of application in commercial contexts, particularly those with international components. See, e.g., William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193; Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961). Labor arbitration, with its strong foundation in the Labor Management Relations Act of 1947, has enjoyed consistent support from the Supreme Court since at least the 1950s. See, e.g., *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

101. For example, securities disputes under the Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)), or the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78nn (2006)), were deemed inarbitrable until 1989. Compare *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that the Federal Arbitration Act (FAA) is inapplicable to securities claims), with *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (overturning *Wilko v. Swan*).

are routinely enforced.¹⁰² Regardless of the scale of the dispute, courts today consistently stay litigation in favor of arbitration when an arbitration agreement even arguably encompasses the dispute.¹⁰³

Some states have perceived this policy “favoring arbitration” as having gone too far. Perhaps they have done so for Fissian reasons, or perhaps they perceive other undesirable effects of the proliferation of arbitration agreements. In most cases, however, the Supreme Court’s interpretation of the Federal Arbitration Act’s (FAA)¹⁰⁴ preemptive scope has blocked these state efforts at curtailing arbitration’s reach.¹⁰⁵ Despite the language of the FAA,¹⁰⁶ the federal policy “favoring” arbitration reaches down even into state courts and demands that arbitration clauses be given effect. As a result, arbitration displaces litigation.

Unlike settlement, which I argue above has become inextricably intertwined with the cadence of modern litigation, arbitration is a true barrier to the courthouse. Arbitration is an alternative path, and once disputants head down that path, they are quite unlikely to return to litigation. If an arbitration clause even arguably covers the dispute in question, courts force parties to arbitrate.¹⁰⁷ If an arbitration clause covers some, but not all of the relevant issues, courts force the case to arbitration first.¹⁰⁸ If a party challenges the enforceability of a contract, which happens to contain an arbitration clause, an arbitrator decides the enforceability question.¹⁰⁹ If a party is unhappy with an arbitrator’s

102. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding arbitration clauses even in cases alleging unlawful employment discrimination under federal statutes); Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in THE HANDBOOK OF DISPUTE RESOLUTION, *supra* note 5, at 318, 321; Jane Spencer, *Signing Away Your Right To Sue*, WALL ST. J., Oct. 1, 2003, at D1 (suggesting that consumers must often “forget about joining a gym, getting a cellphone or even seeing [their] doctor” unless they agree to arbitrate).

103. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (extending “generous[] constru[al] as to issues of arbitrability” beyond labor-management agreements); *Warrior & Gulf Navigation Co.*, 363 U.S. at 583 (stating that “[d]oubts should be resolved in favor of [arbitral] coverage” in the context of labor agreements).

104. Federal Arbitration Act of 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16 (2006)).

105. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempts Montana state law requiring arbitration clauses to appear in a particular format); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the FAA preempts a California statute disallowing arbitration in franchise agreements).

106. For an articulation of the view that the FAA should not be given effect in state court, see Justice Thomas’s dissent in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting).

107. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83.

108. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Mem’l Hosp.*, 460 U.S. 1.

109. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967) (declaring arbitration clauses “separable” such that an arbitrator decides enforceability

decision, there are virtually no meaningful opportunities to appeal the decision to a court, even if the parties mutually would prefer to have the courts review the decision.¹¹⁰ In short, arbitration creates a far greater threat to litigation than anything settlement has been able to muster.

III. QUESTIONS TO KEEP ASKING

The most provocative, interesting pieces of scholarship are not those with all of the answers. The best examples of legal scholarship are the ones that ask good questions. Owen Fiss's *Against Settlement* continues to be required reading in law school courses across the country not because it presents the final word on whether we ought to celebrate settlement. Indeed, many who read the article disagree fundamentally with the conclusion Fiss urges. Instead, *Against Settlement* has an enduring quality because it demands that we wrestle with important questions.

In this final Part, I suggest that Fiss presented readers with at least three separate categories of questions: about the practice of settlement, about the ideals of settlement, and about the implications of all of this on legal education. I applaud all three of these questions. Each is certainly good enough that no answer could claim to be definitive.

My suggestion is that, while we are exploring these aspects of settlement, we also ask the same questions of litigation. Litigation and settlement are linked in practice. The values they seek to promote are often linked. And they are linked, at least in part, in the challenges they present. Our understanding of each will be richer for understanding the other, and these three lenses provide useful perspectives on each.

A. *In What Ways Are Litigation and/or Settlement Failing To Live up to Their Ideals?*

The practice of settlement often fails to live up to settlement's ideals. In this regard, settlement is not different than most human endeavors. We aspire to certain moral ideals, and we fall short.¹¹¹ Most of us talk a good game about physical fitness, about patience with our children and colleagues, and about dental hygiene. And most of us fall short on those endeavors, too. It is not surprising, therefore, that as we go about settling cases, our actions do not always fulfill settlement's highest ideals.

Settlements *can* be autonomy-enhancing. As Carrie Menkel-Meadow explains,

questions, unless the challenge is specifically directed only at the enforceability of the arbitration clause itself).

110. See *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

111. Dominican Priest Father Dominic Holtz has said, of humans, "We are 1000 watt lamps, with 40 watt bulbs." Letter from Sheila Heen to author (May 20, 2009) (quoting Father Holtz, Seminar: Dialogue on Truth, Aquinas Institute, St. Louis, Missouri (Feb. 27, 2009)) (on file with author).

To the extent that certain kinds of settlement processes include more participation by the parties, they may also facilitate greater democratic participation in the legal system than the stylized ritual dominated by lawyers that is the formal adjudication system. To the extent that at least some forms of facilitated settlement, including mediation, minitrials, and some settlement conferences, involve greater, rather than lesser, participation from the actual disputants, “control” of the dispute by the parties involved may make some forms of dispute resolution more responsive to parties’, rather than professionals’, interests.¹¹²

In practice, we have indications that at least some settlements come about in ways that reflect poorly on the value of party autonomy. We hear stories of judges or mediators strong-arming parties in ways that remove, rather than add, choices.¹¹³ Jackie Nolan-Haley explains that, on the ground, “[r]eports of duress and coercion . . . bring a dose of reality to the romanticized version of the mediation story.”¹¹⁴ Nancy Welsh argues that “the originally dominant vision of self-determination [in mediation], which borrowed heavily from concepts of party empowerment, is yielding to a different vision in the court-connected context.”¹¹⁵ As far back as 1991, some within the ADR community have been sounding warnings about the end of “good mediation,” and in large measure, what they were talking about was the loss of settlements in which party autonomy was a primary driver.¹¹⁶ Those who promote settlement’s potential should be worried if, in practice, settlement does not fulfill its promise of enhancing disputants’ autonomy.

Settlements *can* also be value-creating. The idea of efficient trades, based on individualized preferences and available information, is not the only thing that motivates people to settle. Nor is it the only good thing about settlement, but it is certainly one of settlement’s promises. If, in practice, settlements are not, in fact, value-creating, then we have reason to

112. Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2689.

113. See, e.g., Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994); Menkel-Meadow, *For and Against Settlement*, *supra* note 4, at 509–11; Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995); Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 43 (1981) (“It should also be borne in mind that forced or coerced settlements, imparted by the judge, are encountered occasionally.”); John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices*, DISP. RESOL. MAG., Summer 2006, at 16, 17 (reporting “complaints of judicial coercion and intimidation in settlement conferences”).

114. Nolan-Haley, *supra* note 40; see also Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999); Jacqueline M. Nolan-Haley, *Consent in Mediation*, DISP. RESOL. MAG., Winter 2008, at 4, 4–5.

115. Welsh, *supra* note 40, at 3–4 (footnotes omitted); see also Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do with It?*, 79 WASH. U. L.Q. 787 (2001).

116. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 47 (1991) (quoting Albie Davis from a 1988 ADR workshop in Tallahassee, Florida).

be concerned about settlement. And candid observations suggest at least some reason for concern. Orley Ashenfelter and David Bloom, for example, in their famous study entitled *Lawyers as Agents of the Devil*,¹¹⁷ examined a series of disputes in which some pairs were represented by lawyers on both sides, some pairs were pro se on both sides, and some pairs included an attorney on one side but not the other. The legal community received one piece of the Ashenfelter and Bloom study as good news: in those pairs in which only one side was represented, the side with the attorney did comparatively better. The potentially embarrassing news came with the finding that the outcomes for those with lawyers involved on both sides were indistinguishable from the outcomes for those with no lawyers involved at all—except that those who had lawyers were worse off because they had to pay lawyers' fees. In short, the lawyers did nothing to help their clients find value-creating options, and instead acted as mere transaction costs. If attorneys involved in disputes are unable to find value-creating, non-zero-sum options, then an important piece of the justification for settlement is missing.

Settlements *can* be values-promoting, *can* be community-enhancing, and *can* be community-enabling. Why have disputants been voluntarily bringing disagreements to their religious or spiritual leaders for millennia? Why do some members of tribal or other close-knit communities often raise disputes before elders, or people serving the functional equivalent of elders? Why do gay and lesbian couples often bring disputes to mediators from their own communities? These third parties have no enforcement authority or claim to a uniquely accurate understanding of each party's formal legal entitlements.¹¹⁸ Instead, they bring a perspective on their communities' fundamental values, experiences, and practices that can strengthen both the disputants and the relevant communities. Settlement through such means can enhance, rather than threaten, the perpetuation of these values.¹¹⁹

117. Orley Ashenfelter & David Bloom, *Lawyers as Agents of the Devil in a Prisoner's Dilemma Game* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 4447, 1993) (concluding, after studying employment and family claims that "the data all imply that it is individually rational for the parties to retain costly agents so as to increase the likelihood that they will prevail, even though there is little evidence that the result will be any different from what would occur if both parties did not retain agents").

118. For a thoughtful treatment of these community-enabling aspects of settlement, see Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1762 (1997) ("A community-enabling mediation would encourage parties to consider the range of possible values and practices that could affect how they resolve a dispute or structure an agreement. This would include active consideration of the ways that others, including communities that the parties find valuable, have resolved similar disputes or reached similar agreements." (footnotes omitted)).

119. McThenia & Shaffer, *supra* note 8, at 1664 ("The soundest and deepest part of the ADR movement . . . rests on values—of religion, community, and work place—that are more vigorous than Fiss thinks."); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 52 (arguing that public values are routinely "developed outside the formal organs of the state" and that settlement can "institutionalize a mechanism for this kind of normative development").

Settlement can even enhance our capacity to engage in an active democratic society.¹²⁰ If in practice, however, settlements represent nothing more than valueless, standard-free private ordering in which disputants externalize costs on nonparticipants, then the justification for settlement is weak.

Settlement is an eclectic practice, with perhaps almost as many forms as there are disputants. No simple characterization would accurately capture the full range of things going on today under the umbrella of “settlement.” And yet, a careful and honest observer would note that at least some of the time, settlement in practice fails to achieve its ideals. Some percentage of settlements are crude in their creation, inelegant in their structure, and shoddy in their implementation. We must not give settlement a “pass” solely on the basis of its lofty ideals, if those ideals are not reliably borne out in practice.

As with settlement, the practice of litigation presents a mixed picture, particularly when litigation is compared with its lofty ideals. And as with settlement, litigation’s implementation shortcomings should be seen as an understandable product of the human actors who form the core of the activity. Litigants have partial, and sometimes flawed, information. Litigants and their lawyers operate under a complex set of incentives, not all of which support the public values to which Fiss would have us pay attention.¹²¹ And because people are people, litigation does not always unfold exactly by design.

Litigation *can* be navigable and comprehensible to the average citizen. In many jurisdictions, for example, small claims court proceedings often resemble the impromptu verbal free-for-alls that appear on popular daytime television.¹²² Litigants in these proceedings need no sophisticated

120. See *Seul*, *supra* note 8, at 942 (“When we litigate conflicts, we undertake our most difficult conversations in a way that is overly mediated—mediated, that is, through the impersonal strictures of the judicial process, where our primary conversation partner is the Court—rather than having these conversations directly with other affected parties . . . through a facilitated, non-binding negotiation process. As a result, we practice a weaker form of democracy than we otherwise could.”).

121. Many suits are brought by plaintiffs who were genuinely injured and who seek only appropriate compensation from those they believe to be responsible for their injuries. Some plaintiffs bring strike suits, nuisance suits, and others merely because they perceive a tactical advantage or opportunity to extract settlement value from scared defendants. Compare Kozel & Rosenberg, *supra* note 37, at 1850 n.1 (“The problem of litigation aimed at obtaining a nuisance-value settlement has long concerned legal policy makers and analysts, though seemingly never more so than in recent years.”), with Lance P. McMillian, *The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 279 (2008) (“Nuisance litigation is frequently complained about, yet seldom proved. The perception of a crisis outpaces any documented reality.”). Many litigants engage in discovery exactly as it is intended—a self-regulated exchange of relevant information, with no need for judicial involvement. Some litigants engage in discovery abuse, demanding information for the sole purpose of harassing or driving up litigation costs for the other side. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 682 (1998).

122. One of the court mediation programs I used to supervise in the 1990s was a source of cases and disputants for television’s *Judge Judy*. As anyone who has spent years mediating

understanding of the law, and few of them even need lawyers. The picture is quite different today in courts without jurisdictional caps on the amount in controversy. Despite Charles Clark's vision of a set of civil procedure rules that would prioritize resolving cases on their merits, rather than on the basis of formalistic filters, modern litigation is navigable only by those who are highly trained. Pro se litigants stand virtually no chance, as a practical matter.¹²³ And in many kinds of cases, one needs not just an attorney, but an attorney who is specialized in that particular area of the law.¹²⁴ Many of the developments that have created such a complicated system have been justified as necessary to protect litigants' rights or to enhance courts' efficiency. I do not suggest that these reforms have been unjustified. But an honest assessment of modern litigation demands the recognition that the process has become more Byzantine and more removed from the comprehension of the typical participant. How obvious will the courthouse be as an option for those seeking justice if they perceive the courthouse as a black box?¹²⁵

Litigation *can* be conducted by advocates of the highest caliber. From Daniel Webster to Atticus Finch, the image of the highly ethical, devoted, and talented attorney is a persistent one. Many modern-day litigators deserve much the same acclaim. In practice, of course, not all attorneys are as competent or as ethical as those of storybook tales. The discovery of attorneys near the heart of the Enron debacle and other scandals from earlier in this decade resulted in changes to certain parts of attorneys' formal ethical obligations. Without question, the single most heartbreaking moment of the time when I served as a judicial clerk was watching a group of injured plaintiffs lose their claims because of what I perceived to be the incompetence of their attorneys. State bar efforts to screen, to educate, to rehabilitate, to punish, and to exclude attorneys who fail to live up to the standards of the profession will always be necessary. We must never imagine that the presence of a licensed lawyer is a sufficient guarantor of the kind of professionalism upon which our system's functioning depends. Litigation functions properly only if everyone has highly competent counsel.

small claims cases will attest, courtroom television producers are unlikely to run out of material any time soon.

123. See, e.g., Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 646 (2006) (reporting on a study finding that in medical malpractice claims, pro se plaintiffs succeeded in less than two percent of cases, while plaintiffs represented by counsel succeeded in more than one third of the cases).

124. See Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2110 (2008) ("[S]ome types of technical legal work may require such intense specialization that only a handful of lawyers in a particular practice area or geographical region can provide adequate services.").

125. I can easily imagine why people might opt for the mysterious or even mystical in many realms of their lives. But I thought that the abolition of trials by ordeal signaled a rejection of the idea that one ought to trust the fates, the Divine, or other unknowns to dispense justice in the kinds of disputes likely to appear in court.

Litigation *can* be a process in which a professional judge of the highest caliber oversees a clash of ideas, aimed at uncovering the truth and applying the law impartially. In litigation's idealized form, the judge has experience, ethics, and judgment that are beyond reproach. The ideal judge weighs the relevant evidence, arguments, and law, and, when necessary, decides on the basis of those considerations and not on any self-interest. Many judges live up to even these high standards.¹²⁶ And yet, judges are human and present human failings with regularity. Some judicial transgressions are egregious—the kinds of things that can be at least partially remedied by formal ethical mechanisms.¹²⁷ Recusal standards and procedures exist to address the context in which a judge holds an improper interest in a case.¹²⁸ Appellate bodies exist to correct conspicuous errors of law, when judges fail, in the opinion of the reviewing court, to have applied the law correctly to a particular set of facts. These sorts of intralitigation protections are probably the best we can do to assure judges' impartiality and accuracy. What about considerations that would never appear in a courtroom transcript or in a published opinion? For those judgeships that are filled by popular election, what might the impacts be of recent increases in the costs of financing a judicial election?¹²⁹ For judges with indefinite appointments, what might the impacts be of their comparatively tiny judicial salaries?¹³⁰ What might be the impact of the increasingly common practice of sitting judges "retiring" to take on highly compensated positions as private

126. The judge for whom I had the privilege of clerking is a woman I hold in the highest possible professional and personal regard. My anecdotal conversations with other former judicial clerks have confirmed my assumption that my experience was not anomalous. I am not surprised that judicial clerks—those who spend perhaps the most direct time with judges, observing their decision making in practice—often wind up saying the same of the judges for whom they worked.

127. See, e.g., Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme To Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22 (reporting on two state court judges who recently pled guilty to taking millions of dollars in kickbacks to send teenagers to privately run detention centers).

128. See 28 U.S.C. § 455 (2006). Judges can also be required to step down from a case for extrajudicial behavior that casts doubt on judicial impartiality. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 110 (D.C. Cir. 2001) (removing the district court judge presiding over the Microsoft antitrust litigation, in part for having compared Bill Gates with Napoleon during interviews with a journalist while the case was still pending).

129. See Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1468–71 (2001); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

130. See, e.g., DENISE A. CARDMAN, ABA, BACKGROUND INFORMATION ON THE NEED FOR FEDERAL JUDICIAL PAY REFORM I (2007); JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2007) (discussing only the issue of judicial pay and concluding that "[t]he dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge"); Letter from Robert D. Evans, ABA Governmental Affairs Dir., to every member of the U.S. House of Representatives (Dec. 8, 2006), available at http://www.abanet.org/poladv/letters/judiciary/2006dec08_colahjr102h_1.pdf ("Judicial salaries already are so inadequate that they threaten the vitality of the judiciary . . ."). This phenomenon and these concerns are not limited to the federal bench. See, e.g., OR. JUDICIAL DEP'T, THE CHIEF JUSTICE'S 2008 REPORT ON JUDICIAL COMPENSATION (2008).

arbitrators immediately after stepping down from the bench?¹³¹ Even if we assume away these extraneous considerations, an increasing body of scholarship has helped us to understand that the intellectual mechanisms, the cognitive heuristics through which judges make decisions, are routinely flawed in predictable—but largely unreviewable—ways.¹³²

The point of all of this is not to suggest that litigation is so flawed that it should be jettisoned. The practice of litigation sometimes fails to live up to the highest ideals of litigation. It shares this imperfection with the practice of settlement. What matters is that we continue to observe and report honestly on the gaps between both processes' ideals and their implementation. The more honest and accurate a picture we have of the shortcomings of each, the better positioned we will be to craft changes aimed at bringing each process closer to its ideals.

B. *In What Ways Are Litigation and/or Settlement Overselling Their Legitimate Potential?*

Owen Fiss may have been a useful buzz-kill in 1984. The landscape appeared exuberant for alternative dispute resolution at the time he wrote *Against Settlement*. The 1976 Pound Conference on the Popular Dissatisfaction with the Administration of Justice, widely hailed as the “big bang” moment in the development of ADR in the United States, was a recent memory.¹³³ The Chief Justice of the Supreme Court was issuing calls for systematic reforms, largely along the lines of increased ADR.¹³⁴ Mediation centers, once concentrated in a few cities, began to proliferate across the country.¹³⁵ It is quite likely that, at the time Fiss authored *Against Settlement*, ADR was being oversold. Mediation was advertised as a way to discover quicker resolutions, greater customization, and better understanding. Mediation would bring justice, peace, and harmony not

131. Justice Alito, for example, raised concerns about the practice of judges retiring to join private arbitration firms, “where they have the potential to earn the equivalent of the district judge salary in a matter of months.” *Oversight Hearing on “Federal Judicial Compensation” Before the Subcomm. on the Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 19 (2007) (testimony of Samuel Alito, Associate J., Supreme Court of the United States).

132. The best and most extensive literature on this topic of which I am aware comes from Chris Guthrie. See, e.g., Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2008); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistkch, *Heuristics and Biases in Bankruptcy Judges*, 163 J. INSTITUTIONAL & THEORETICAL ECON. 167 (2007); Andrew J. Wistkch, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

133. The ADR movement was not, of course, “born” during the Pound Conference. For more on the antecedents of the figure most prominently associated with ADR’s “birth,” see Moffitt, *supra* note 98, at 437.

134. See Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274 (1982).

135. In 1976 the number of community mediation centers was estimated at ten. By 1986, that number had risen to approximately one hundred. Ten years later, the number was approximately 550. Larry Ray, *Community Mediation Centers: Delivering First-Class Services to Low-Income People for the Past Twenty Years*, 15 MEDIATION Q. 71, 73 (1997).

only to individual disputants, but also to the communities in which they lived.¹³⁶ Furthermore, mediation participants could expect to find inner harmony, reduced cholesterol, and more lustrous hair.¹³⁷

Against this backdrop, some of Fiss's cautionary notes were almost certainly helpful. Some of the specific proposals he described came to pass. For example, Rule 16 of the Federal Rules of Civil Procedure was amended to make settlement an explicit part of the managerial functions of judges.¹³⁸ As a result, we have been wrestling with the implications of having a judge who is presiding over litigation entangled in the exploration for its possible settlement ever since.¹³⁹ Some of the proposals Fiss feared at the time of *Against Settlement* were only partially adopted. For example, although many court systems have ADR offerings of one sort or another, none has fully adopted Frank E. A. Sander's vision of a multi-door courthouse. And some of the settlement-expansion proposals Fiss feared were never adopted. For example, Rule 68 of the Federal Rules of Civil Procedure was never amended to require unsuccessful plaintiffs to compensate defendants for attorney fees incurred after offers of judgment, although it is understandable why the proposal gave Fiss concern.¹⁴⁰ Whether Fiss deserves credit—or blame—for putting the brakes on ADR's expansion, I do not know. But in at least some of the cases listed above, his concern that ADR might be overstating the possible extent of its positive contributions appears to have been well founded.

136. See, e.g., Steven H. Goldberg, "Wait a Minute. This Is Where I Came In." *A Trial Lawyer's Search for Alternative Dispute Resolution*, 1997 BYU L. REV. 653, 658 (describing the migration of the ADR movement from nonlawyers to lawyers "seeking kinder processes, empowerment of disputants, and better, longer-lasting relationships between disputants"); Stuart Taylor Jr., *Justice System Stifled by Its Costs and Its Complexity, Experts Warn*, N.Y. TIMES, June 1, 1983, at A1 (quoting Chief Justice Warren E. Burger as contrasting ADR with the "almost irrational focus—virtually a mania—on litigation as a way to solve all problems").

137. I confess that I cannot find support for the last of these assertions, but I stand by its basic sentiment.

138. Order Amending the Federal Rules of Civil Procedure, 461 U.S. 1097 (1983).

139. See *supra* note 111 and accompanying text.

140. See Fiss, *supra* note 1, at 1074. Scholars disagree about the ongoing effects of Rule 68 in its current form. Most agree that it is virtually never employed, but it still may have effects on cases in which the plaintiff may be statutorily entitled to attorney fees. See, e.g., *Marek v. Chesny*, 473 U.S. 1 (1985); Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (2007); Cynthia L. Street, *Rule 68: Erie Go Again—Costs, Attorneys' Fees, and Plaintiffs' Offers—Substance or Procedure?*, 20 MISS. C. L. REV. 341, 345 (2000); Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006). For the interesting suggestion that Rule 68 was never intended to encourage settlement, see Robert G. Bone, "To Encourage Settlement": Rule 68, *Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1562 (2008) (suggesting instead that Rule 68 was "designed to prevent plaintiffs from imposing costs unfairly when the defendant offered what the plaintiff was entitled to receive from trial, and to enable defendants to avoid paying those costs when the plaintiff persisted with the suit").

We should remain vigilant today about the distinction between what settlement can offer and what it cannot. In Part I of this essay, I list out a number of things settlement *might* or even *can* produce. Settlement *can* produce lighter dockets. Settlement *can* produce outcomes that are efficient, value-maximizing, customized, and more far-reaching than litigation. The process of exploring settlement *can* enhance parties' autonomy, *can* improve relationships, and *can* encourage moral deliberation and growth.¹⁴¹ If ever these sentences are reworded to suggest that settlement *does* produce these benefits, warning alarms should be sounded. Settlement's ideals include these possibilities. Its practice on the ground, at best, sometimes produces these results.

Furthermore, settlement's *potential* must not be oversold. For all of the benefits settlement provides, and I believe there are many, there are some things it cannot provide in the same way as other processes. For example, settlements produce fewer precedents. Settlements rarely bind nonparticipants. Settlements do not explicitly protect the interests of those who are absent from settlement discussions. It is no indictment of settlement as a practice to acknowledge the limits of its contributions. Indeed, I think those who are clearest about the boundaries of settlement's capacities are among its most successful advocates.¹⁴²

Similarly, we should remain vigilant about the distinction between litigation's promise and what it can legitimately be expected to deliver. Litigation's promise includes the rule of law, equal treatment under the law, dispassionate assessment of the evidence, and so on. Litigation can provide such a process, sometimes. We have appellate courts precisely because we have come to accept that errors will occur in the hectic practice of litigation. And we must also accept that litigation does not always produce results consistent with the highest ideals to which one might aspire. Gay and lesbian citizens still wait in most jurisdictions, for example, for an equivalent to the *Brown v. Board of Education* ruling. It is not that litigation has not occurred, but rather that litigation has produced, for a variety of reasons, a less uniform set of protections for gays and lesbians than other groups today enjoy.¹⁴³

141. For an outstanding treatment of these aspects of settlement's potential, see Seul, *supra* note 8. See also Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 4, at 2669–70.

142. For example, each of the three Harvard professors most closely associated with ADR in recent decades has made explicit the process pluralistic idea that settlement is one among many possible processes. See, e.g., Roger Fisher & William Jackson, *Acquiring the Tools of ADR: Two Views, Teaching the Skills of Settlement*, 46 SMU L. REV. 1985 (1993); Robert H. Mnookin, *When Not To Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077 (2003); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide To Selecting an ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

143. In some cases, of course, the avenue to justice does not run through the courthouse, or at least does not initiate there. Legislative initiatives, popular ballots and referenda, executive decisions, and administrative decisions can all lead to the expansion— or erosion—of rights, as we have seen in recent years on the question of gay marriage.

As with settlement, litigation's promise can be overstated. Litigation exists as a possibility in virtually any dispute, but that does not mean that it can legitimately claim to be an uber-process, providing everything to everyone. For example, litigation virtually never enhances disputants' relationships. Litigation delivers little creativity, customization, or confidentiality in most cases.¹⁴⁴ Litigation makes little space for emotions, for narratives, or for deal-making.¹⁴⁵ Litigation's promise is rich and admirable, and it is limited.

Articulating a vision of an idealized process can be helpful. My point in this Part is not like the joke about the chemist, the physicist, and the economist, stranded on a desert island with cans of food but no can opener. The chemist proposes a method of using various indigenous compounds to dissolve the cans' lids; the physicist proposes using tree branches and shells to create enough leverage to crack the cans; and the economist proposes, "First, assume we have a can opener." There is nothing wrong with assuming away present conditions and constraints as a mechanism for clarifying each process's ideals. Owen Fiss's collection of works, *The Law as It Could Be*, is normative, rather than descriptive.¹⁴⁶ Proponents of various forms of settlement have similarly written extensively about its promise.¹⁴⁷ Each articulation of the ideal is surely useful. We must simply remember that a description of an ideal is just that—an idealized picture, rather than a description of a current reality. And we must remember that settlement and litigation are necessarily limited in what they can deliver, even in their idealized forms.

144. See Moffitt, *supra* note 55 (describing the limited contexts in which litigants have the opportunity to customize their litigation experiences).

145. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1995) (exploring the role of narratives and emotions in litigators' case theories); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 151 (2003) (singling out class actions as exceptional because they are processes "not ultimately for adversarial litigation but for dealmaking on a mass basis").

146. See generally OWEN FISS, *THE LAW AS IT COULD BE* (2003). Fiss's essays sometimes describe law as it once was, with the days of *Brown v. Board of Education* as the moment he names as the judiciary's zenith. The essays sometimes describe law as it has not (yet?) been. In either case, his essays are aspirational when read today.

147. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 24 (1994) (suggesting that transformative mediation would lead to "change or refinement in the consciousness and character of individual human beings . . . connot[ing] individual moral development"); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 710 (1988) (describing "three analytically distinguishable projects within community mediation: the delivery of dispute resolution services, social transformation, and personal growth," with clear links between community justice and consensual justice); Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 236 (1995) (stating that mediation can lead to the "creation of more human compassion, understanding, and moral decision making").

C. *Are We, in Law Schools, Preparing Our Students Appropriately To Engage the Legal Landscape?*

At the time he wrote *Against Settlement*, Fiss appears to have been shocked at the growth of what he referred to as the ADR “movement.”¹⁴⁸ He noted, for example, that it had already given rise to a professional journal and to a section of the American Association of Law Schools.¹⁴⁹ The ten years prior to *Against Settlement* did, indeed, mark a phenomenal growth period for academic initiatives aimed at promoting settlement.¹⁵⁰ Following the Pound Conference, the publication of *Getting to Yes* brought negotiation theory to the mainstream population.¹⁵¹ Howard Raiffa brought negotiation theory more directly to the business community.¹⁵² Carrie Menkel-Meadow had begun what would become a prolific set of theoretical contributions to the legal academy’s understanding of conflict.¹⁵³ Those years also saw an explosion of ADR initiatives in practice, such that it is not easy to say whether it was scholars or practitioners who were in the lead.

Law school curricula gradually began to reflect this changing landscape as well. There is evidence of negotiation courses being offered at a law school as early as the 1950s,¹⁵⁴ and a small minority of schools offered one such course during the decades before the early 1980s. By the end of the century, however, every accredited law school offered at least one course in ADR.¹⁵⁵ Today, many schools offer multiple specialized courses. Some law schools even offer LL.M. or Master’s Degree programs in dispute resolution.¹⁵⁶

These curricular changes track many of the recommendations of the most prominent, recent examinations of modern legal education. The MacCrate

148. Fiss, *supra* note 1, at 1073.

149. *Id.* Despite my recent service as Chair of the Association of American Law Schools (AALS) Section on Dispute Resolution, I can report that the section continues to thrive today.

150. Ray, *supra* note 135, at 73.

151. *Getting to Yes* was originally published in 1981, and it is now in its second edition. FISHER, URY & PATTON, *supra* note 41. As of 2005, it had sold more than five million copies worldwide and has been translated into more than thirty languages. See Letter from Bruce Patton to author (May 24, 2009) (on file with author).

152. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1982). Integrative bargaining soon saw even greater inroads among business audiences with the publication of *The Manager as Negotiator*, LAX & SEBENIUS, *supra* note 41.

153. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLAL REV. 754 (1984).

154. See Robert E. Mathews, *Negotiation: A Pedagogical Challenge*, 6 J. LEGAL EDUC. 93 (1954); Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 4 AM. B. FOUND. RES. J. 905, 908 (1983); James J. White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL EDUC. 337, 337–38 (1967).

155. See Michael Moffitt, *Lights, Camera, Begin Final Exam: Testing What We Teach in Negotiation Courses*, 54 J. LEGAL EDUC. 91 (2004).

156. Examples of such programs can be found at the University of Oregon, the University of Missouri-Columbia, Pepperdine University, Creighton University, and Marquette University.

Report, for example, extols the merits of skills training, and specifically highlights the need for “problem-solving,” “communication,” “counseling,” and “negotiation.”¹⁵⁷ The Carnegie Report faults law schools for providing a “subordinate place . . . [to] the practical legal skills, such as dealing with clients and ethical-social development,” and specifically encourages law schools to teach students negotiation skills.¹⁵⁸ In many regards, these “modern” recommendations are in no way new. Many decades earlier, for example, Lon Fuller, one of the most prolific and thoughtful scholars of legal education, argued that law schools should be teaching both the analytic skills that one acquires through traditional Socratic instruction *and* the negotiating and counseling skills that Derek Bok would later call “the gentler arts.”¹⁵⁹

Depending on the timeline one examines, the growth of ADR in law schools can appear meteoric. In a few short decades, we have gone from essentially nothing to having more than five hundred faculty self-identifying as teachers of dispute resolution.¹⁶⁰ Does this trend suggest that, within my lifetime, every law professor will be a professor of dispute resolution? Clearly no. In fact, the data reveal a flattening of the number of tenure-track law faculty teaching ADR during the past decade, compared with earlier growth.¹⁶¹

As I explain in an article that will appear in the *Ohio State Journal of Dispute Resolution* later this year, many law schools appear to be at a crossroads with respect to the ways in which they teach dispute resolution to future generations of lawyers. Some law schools today offer a handful of stand-alone ADR courses, providing those students who are able to take the courses with a set of skills aimed at improving settlements. Some law schools today require at least a small amount of training in settlement skills, much as they require training in legal research and writing. Some law schools today seek to integrate dispute resolution into what are often called “doctrinal” courses, a label commonly used to distinguish them from “skills” courses. And some law schools today invest heavily in dispute

157. See generally ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AN EDUCATIONAL CONTINUUM—REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

158. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7 (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf. The report specifically highlights teaching negotiation in law schools. See *id.* at 111–14.

159. Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582–83 (1983); Robert S. Summers, *Fuller on Legal Education*, 34 J. LEGAL EDUC. 8, 11–14 (1984).

160. The 2006–2007 *AALS Directory of Law Teachers* lists 569 law faculty who self-identify as teaching dispute resolution. ASS’N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 1176–81 (2006).

161. Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools*, 25 OHIO ST. J. ON DISP. RESOL. (forthcoming Dec. 2009) (listing AALS ADR membership in 1997–1998 (456), in 2002–2003 (510), and in 2007–2008 (569)).

resolution, making it one of their prominent foci, with specialized programs and extensive curricular and cocurricular offerings.¹⁶² Given the existence of each of these curricular approaches to dispute resolution, and given the reluctance of the legal academy to make dramatic changes quickly, I doubt that we will see any consolidation or agreement on a single approach anytime soon.

Whatever imperialistic aims Fiss may have feared from the ADR “movement,” it appears that he can rest with some assurance that ADR’s expansion has slowed or even ceased. The legal academy may forever be influenced by those who specialize in settlement, but the demise of litigation’s role in the law school curriculum has at least thus far been greatly exaggerated. Law school instruction still revolves primarily around the role of lawyers in litigation. The primary materials from which law students typically learn remain appellate court decisions. Courses that teach skills—for example, negotiating, counseling, drafting, deal-making, or lobbying—remain the exception.¹⁶³

Perhaps the future of law school curricula will be one in which the line between litigation-focused courses and settlement-skills-focused courses will be blurred. Litigation and settlement are so intertwined in practice that I would think it difficult to teach them as though they were distinct. Those drafting a contract must think about what the litigation might look like down the road, if one party believes the other has breached. Those engaged in litigation must contemplate other avenues for satisfying the legitimate interests of those involved in the dispute. Those contemplating settlement must think about what litigation, or other nonsettlement alternatives, will look like in the event no deal is reached. Skilled lawyering today demands an understanding of all of these processes.

Just as I am for settlement and for litigation, I am for teaching future lawyers about both.

CONCLUSION

Against Settlement deserves robust praise and gratitude from those who care about settlement and about litigation. This essay helpfully suggested at least three perspectives from which to examine each of those processes. It focused attention on power imbalances and their potentially destructive effects. It raised questions about the pitfalls of agency dynamics,

162. I describe each of these models in significantly greater detail in the article cited immediately above, *supra* note 161.

163. See SULLIVAN ET AL., *supra* note 158, at 47 (“The legal-case method, in all its variations, has dominated the first year of most legal education through much of the past century.”); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 602 (2007) (“What [law students] most crucially lack . . . is the ability to generate the multiple characterizations, multiple versions, multiple pathways, and multiple solutions, to which they could apply their very well honed analytic skills.”). For an interesting example of a “transactional lab” approach to teaching transactional lawyering skills, see Robert C. Illig, *The Oregon Method: An Alternative Model for Teaching Transactional Law*, 59 J. LEGAL EDUC. 221 (2009).

particularly in cases involving significant numbers of disputants. It demanded that we wrestle with what it means for people to have access to the court system and to the justice it promises. All three of these perspectives remain at least as vital today as they were in 1984.

Against Settlement deserves robust opposition to the extent it suggests a binary choice between settlement and litigation. If Fiss urges such a choice, the question he poses is not merely a “Which of your children do you love most?” kind of question. Instead, it is one for which neither answer could possibly be adequate: “Which is better, food or water?” Perhaps it is a misreading of Fiss to think that he demands a binary choice. Perhaps he was merely urging us to dampen our enthusiasm for settlement, in the face of what he perceived to be important shortcomings in its implementation at that time and in that context. Certainly, many commentators have re-read Fiss to be suggesting that we ought to be asking more nuanced questions. Many, for example, have suggested that Fiss merely urges us to think hard before necessarily embracing settlement in all cases. Such a thesis would find many modern supporters, both among those whose primary focus is litigation and among those whose primary focus is settlement. But the title Fiss chose and the language he uses in his article make more nuanced readings like these difficult. If *Against Settlement* means what its language implies—that one could do away with settlement, retain litigation, and be better off for the change—then the article’s thesis is flawed both as a theoretical and as a practical matter.

We should celebrate the beauty in each process’s internal narrative of justice, of truth, of efficiency, of predictability, and even of morality. Proponents of settlement believe not merely in settlement’s efficiency, but also in its ability to bring justice, to discover truth(s), and to provide stability. Proponents of litigation embrace the same values. We might usefully engage the empirical question of whether one process or the other does a better job of promoting each of these values. Both settlement and litigation fail on each of these measures with some reliability, and both processes continue to undergo reforms aimed at improving their performances as measured by these values. But to characterize either as unconcerned with any one of these values is simply false.

If we set out to compare settlement with litigation, we should do so responsibly. We should compare the idealized vision of settlement with the idealized vision of litigation. Or we should compare the sloppy reality of settlement in practice with the sloppy reality of litigation in practice. But more than anything, we should recognize that settlement and litigation are no longer separate—in practice or in theory. Because settlement and litigation are coevolved, symbiotic processes, to stand against one is to stand against the other. I choose, instead, to be for litigation and for settlement.

Notes & Observations