

Settling Out of Court

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Institute for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Institute books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.

* * *

In this issue:

For reasons of cost and speed, 90 percent of law suits settle out of court. Should the trend toward settlement be encouraged or resisted? p. 1

“No news is good news”—is news coverage of technological issues too negative? p. 5

A scathing look at the underlying aims of mandatory AIDS testing p. 8

Covert action: its ends, its means, and the constitutional processes it appears to threaten p. 12

A spring workshop on philosophy and public policy is announced p. 15

“I would rather lose my vineyard,” wrote Montaigne, “than go to court for it.” Many Americans apparently feel otherwise. Whether or not we are, as many have charged, the most litigious nation in human history, our civil litigation rate is certainly among the highest in the world.

Most law suits — upwards of 90 percent — settle out of court before a formal jury verdict or judicial decision is rendered. This is a matter of sheer necessity. “It is a given,” according to U.S. District Court Judge H. Lee Sarokin, “that if cases did not continue to settle in roughly the same percentages, our system of justice would come to a standstill.” For reasons of cost and speed, “in rare exceptions, it must be conceded that the preponderance of settlements in the judicial system is a worthy goal.”

The imperative toward settlement rather than trial is defended on other, less purely expedient, grounds as well. Settlement is claimed to leave participants more satisfied with the resolution of their case. It is lauded as representing a voluntary agreement between the parties rather than a coercive court order, a give-a-little, get-a-little compromise rather than a lopsided black-and-white judgment in which the winner takes all. And what Harvard’s president Derek Bok has called the “gentler arts of reconciliation and accommodation” involved in negotiating a settlement are, well, kinder and gentler than the aggressive rough-and-tumble of hard-ball litigation in the adversary system. Insofar as the so-called litigiousness of the American public is

decried, a trend toward resolving rather than trying suits seems an impulse in the right direction.

This favorable attitude toward settlement shows itself in the growing willingness of judges to use the power of the bench to put considerable pressure on the parties to settle. It has launched a movement within the legal community for alternative dispute resolution (ADR), resolution of disputes either through mandatory mediation or outside the court system altogether, in neighborhood dispute resolution centers. ADR is supported by such odd bedfellows as the establishment bar, which views ADR as a way of easing the current crisis of the courts, and liberal-left reformers who welcome it as more participatory and less bureaucratic, dispute resolution of the people, by the people, and for the people.

Certainly settlement will continue to be the destiny of most civil cases brought in American courts, just as most criminal cases will continue to be disposed of through plea bargaining. But we can ask whether this trend should be encouraged or insofar as possible resisted. Should judges actively promote settlement as a core judicial function or should they concentrate their efforts elsewhere? Settlement is cheaper and swifter: is it better?

Participant Satisfaction

One criterion for comparing settlement with judgment is to look at the participants' own satisfaction with the process. For all that people sue, apparently they don't like to sue. When asked in one study how they felt in general about suing people, 77 percent of respondents thought one should settle without suit if possible or always settle without suit. What people seem to want, by and large, is just to get their problem solved (put crassly: to get some money from somebody else), rather than to achieve a legal victory for its own sake. In a survey of Detroit area residents, for example, the proportion of respondents reporting serious problems who sought "justice" or legal vindication (as opposed to a satisfactory adjustment) was tiny in all areas other than discrimination. Moreover, in a study of small claims courts in Maine, parties whose cases were mediated reported themselves satisfied with their experience more often than those whose cases were adjudicated (66.6 percent to 54 percent).

Marc Galanter, Professor at the University of Wisconsin-Madison Law School, reminds us, however, that "significant numbers of those who settle are not very happy with the outcome." The difference in levels of reported satisfaction between settlement and trial survey groups is not all that great. And satisfaction with the process does not run very deep. Galanter cautions that "the choice of settlement (or trial) is a choice in a context of limited knowledge, strategic exigency, and a limited set of perceived alternatives." Thus he is wary of equating the "choice to settle or to litigate with an informed affirmation of the quality of the process."

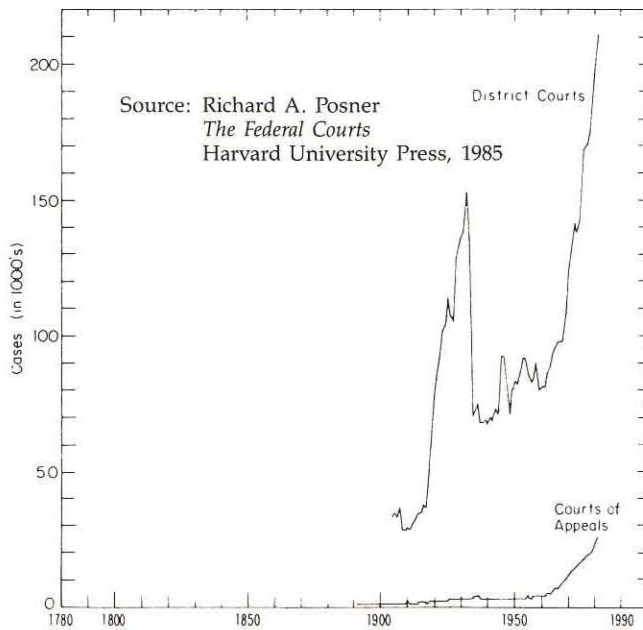
Reviewing the research on levels of participant satisfaction with settlement, David Luban, Research

Scholar at the Institute for Philosophy and Public Policy, argues that "participants aren't necessarily satisfied because the process has been a good one; they can be satisfied simply because their expectations have been illegitimately lowered." And, Luban points out, "attorneys interested in facilitating a settlement are great client-expectation lowerers." Galanter agrees: "Lawyers may spend a great deal of effort 'educating' their clients about the virtues of settlement compared to the cost, uncertainty, and arbitrariness of adjudication." The fox decides that the grapes are sour once he knows (or has been led to believe) he can't have them anyway; the client who has been convinced that she can't win at trial is then convinced to take what she can in settlement. When preferences have been carefully crafted to be easily satisfiable, their subsequent satisfaction proves little.

"Participants aren't necessarily satisfied because the process has been a good one; they can be satisfied simply because their expectations have been illegitimately lowered."

Moreover, although both parties may declare themselves satisfied with their settlement — at least satisfied enough to avoid trial — significant inequities between the parties may make the rest of us question whether satisfaction in itself is an adequate index for justice. The Biblical dictum that "for whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath" (Matt. 13: 11-12) is reflected in the dynamics of the negotiating process. Both the cost savings and the satisfaction resulting from settlement tend to be unevenly distributed, for reasons that have more to do with the parties' initial endowments than with the merits of the case.

Legal scholar Owen Fiss, of Yale University Law School, explains that "settlement is [in part] a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally. . . . In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process; and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant." Quite simply, the poorer party may be so desperate to get anything at all that he accepts whatever payment his adversary is willing to give. The more powerful and affluent party, on the other hand, already comfortably situated and with the resources to finance a protracted trial, has the luxury of choosing to bide her time, holding out for terms to her advantage.



Federal Caseload Growth, 1891-1983

Of course, the weaker party is disadvantaged in a trial as well. But, Fiss argues, in a trial "we count . . . on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities." And "there is . . . a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities."

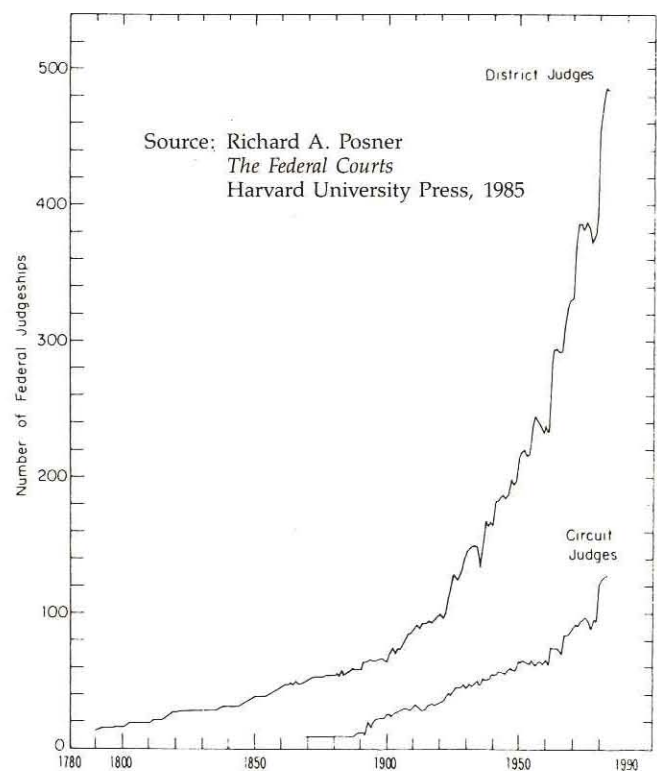
It turns out, then, that what we care about is not so much satisfaction, but justice. Is there any reason to think that settlements are more likely to lead to just results than trials? It may be hoped that as each side in a settlement proceeding has the opportunity to hear and consider the other's point of view, each will be led to appreciate the merits of the other's case. The resulting agreement may then be more just and fair, more decent and humane, than what might otherwise emerge. But Luban suggests that any advantage ADR has in this respect will be modest at best. The parties are, after all, adversaries, which is why they took each other to court in the first place. The party in a stronger bargaining position is seldom likely to accept a settlement that diverges greatly from what she could hope to get at trial.

Public Effects of Settlement

So far we have been considering whether settlement works to the interests of the disputing parties themselves. But the plaintiff and defendant are not the only ones affected by the outcome of their altercation and how it is reached; the choice between settlement and judgment may have vital ramifications for third parties as well as for the public at large.

Returning to the issue of participant satisfaction, the satisfaction of those parties present to a settlement may be achieved at the expense of other individuals or groups whose concerns their agreement flagrantly ignores. Luban, arguing that "an ADR process may well succeed because the participants are able to pass the losses and downside risks on to third parties," gives this example. "A hospital plans to build a halfway house for convalescent schizophrenics in a well-to-do neighborhood; the neighborhood's residents object and initiate legal action to prevent the construction; the hospital persists; the mayor sends in a mediator; and the disputants solve their problem by the hospital agreeing to erect the halfway house in a poor neighborhood instead." Such a "nimby" (Not In My Back Yard) problem is solved to the satisfaction of both contesting parties by thrusting it conveniently into the back yard of a third.

Civil litigation has a public as well as a private dimension. Once it enters the court system, a dispute between two private citizens raises issues that rightly concern the public at large. Of course, the taxpaying public, who foots the bill for the nation's administration of justice, has an interest in reducing costs, and all of us have an obvious stake in maintaining an efficient and orderly judicial system. These interests may be well served when cases settle out of court. But we have other values that the trend toward settlement may jeopardize.



**Number of Federal Circuit and District Judges
1789-1983**

Settlement frequently goes hand in hand with secrecy. Sarokin reports that "judges routinely... seal settlements at the request of the parties. Indeed, defendants frequently impose such secrecy as a condition of consummating the settlement and make disclosure a ground for rescinding it." Cases abound in which such "gag" orders have seriously compromised the public welfare. In recent years, reports *The Washington Post*, General Motors settled a rash of lawsuits filed by victims of fiery car crashes and then used court secrecy procedures to keep company documents about auto safety from becoming public. In another, hardly atypical case, McNeil Pharmaceutical, a subsidiary of Johnson & Johnson, was able to seal the records of hundreds of lawsuits involving fatal and life-threatening allergic reactions caused by its painkiller Zomax, thus preventing a public debate on its risks and permitting other Zomax users to continue to be jeopardized by them. The *Post* series concludes, "Every day, someone gets into a car, takes a drug, sees a doctor, or wakes up near a toxic site that has been the subject of a lawsuit covered by a confidentiality order."

Where would we be today, what progress would we have made toward making good the Constitution's pledge of racial justice, if Linda Brown had settled her case against the Board of Education of Topeka, Kansas, rather than taken it to court?

When cases settle, the judge is also deprived of the opportunity to deliver an opinion which would otherwise have added to the body of legal precedent that constitutes our "common law." Indeed, Sarokin charges, "some settlements are consummated for just that very purpose — namely to preclude the establishment of a precedent which might affect other cases or establish requirements for future conduct." But, according to Fiss, the task of the judge is "not simply to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them. This duty is not discharged when the parties settle." Where would we be today, what progress would we have made toward making good the Constitution's pledge of racial justice, if Linda Brown had settled her case against the Board of Education of Topeka, Kansas, rather than taken it to trial?

Cost Arguments

Setting cost aside, then, it is difficult to defend settlement of civil cases as demonstrably superior in some other way to trial. In facing the problems posed by our

overloaded civil court system, concerns about the sheer quantity of cases pending may have to be traded off against concerns about the quality of justice provided. Judges who pride themselves on being "settlement judges" rather than "trial judges" may earn kudos for cost-cutting, but that is all.

And even those kudos, it turns out, may be undeserved. While it is incontrovertible that settlement expedites the processing of cases, it is not clear that judicial efforts to facilitate settlement end up reducing costs or speeding dispositions. The vast majority of cases will settle anyway; little is apparently gained by judges' actively attempting to initiate or to broker settlements. Galanter observes, "That judicial participation increases the number and speed of dispositions is, for its proponents, an article of faith. But the few studies that have undertaken systematic observation have found little evidence that judicial efforts bring about production gains." The dynamics of settlement, then, seem to be relatively independent of judicial intervention.

Sarokin warns, moreover, that the trend toward settlement, while easing court dockets in the short run, may actually work to increase judicial caseloads in the long run. While it "obviously reduces the number of pending cases... it may simultaneously encourage the filing of new ones. The settlement mode of litigation makes it unnecessary to be certain of one's defense to the claims asserted. Tenuous suits may be instituted and weak defenses interposed with the confidence that neither is likely to be tested. The knowledge that the court will undertake to resolve the matter before trial may be adding to the number of cases instituted and defended." Thus is spawned a spate of nuisance suits, long decried by insurance companies — cases filed simply to settle.

Even granting the cost arguments, however, it may be that the balance between quantity and quality is being wrongly struck. Sarokin fears that "the court's interest in disposing of cases, in reducing its calendar, is becoming obsessive. Quantity has begun to compete with quality." He charges that the practice of issuing judicial "report cards," published statistics on each judge's total of dispositions and speed in rendering decisions, encourages a judicial "assembly line." Interestingly, he observes, "there are no published statistics on the number of opinions written, the number of reversals or affirmances, and obviously no analysis of the quality of a judge's performance... To be careful, thorough, thoughtful and reflective are not characteristics which the statistics reveal or encourage. The reports reveal pressure to do a lot and do it quickly."

Fiss expresses an even stronger opposition to settlement, stating, "I do not believe that settlement as a general practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated as a highly problematic technique for streamlining dockets... Although dockets are trimmed, justice may not be done. Like plea



bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."

Conclusion

The fact that most cases settle, and must settle, will continue to characterize our civil court system. We need to ask not whether it should continue, but how it should be regulated and the extent to which judges should actively intervene to encourage it. Sarokin, for one, recommends removing judges from the settlement process, leaving mediation and negotiation to specialists in that field and thereby freeing judges to concentrate on the task of judging. Other needed reforms might include legislation curbing the guarantee of secrecy as a condition of settlement; such legislation is currently under consideration in a number of states and in Congress.

The general and mounting enthusiasm for settlement

has obscured the imperative to subject it to critical scrutiny and regulatory controls. At the very least, we need to ask some new and different questions. After all, as Galanter writes, "most remedy-seeking in the vicinity of courts is going to eventuate in settlement. Ensuring the quality of these settlements is a central task of the administration of justice."

The sources used in preparing this article are: Judge H. Lee Sarokin, paper prepared for the Institute for Philosophy and Public Policy Working Group on Judicial Ethics, May 1987; Marc Galanter, "Judges and the Quality of Settlements," Institute for Philosophy and Public Policy Working Paper JE-1, March 1989; David Luban, "The Quality of Justice," Disputes Processing Research Program, Working Paper Series 8:6 (University of Wisconsin-Madison Law School, Institute for Legal Studies, June 1988), forthcoming in the *University of Denver Law Review*; Owen Fiss, "Against Settlement," *The Yale Law Journal*, vol. 93 (1984); Benjamin Weiser and Elsa Walsh, "Public Courts, Private Justice" (four-part series), *The Washington Post*, October 23, 24, 25, 26, 1988.

Is Good News No News?

No news is good news, the saying goes, carrying with it the suggestion that most news, at least as it is reported in the news media, is bad news. The charge is commonly leveled that the media place an undue emphasis on the negative, hawking papers with screaming headlines of gloom and doom, attracting television viewers with color footage of guts and gore. In recent years, in particular, critics have complained that media coverage of technological and other health risks is overly pessimistic, savoring of sensationalism.

By far the most ambitious and provocative research documenting this view is the twenty-five-year study by German sociologists Hans Mathias Kepplinger and Rainer Mathes of coverage of technology in the German print media. Kepplinger and Mathes's claim, for which they have amassed a great deal of evidence, is that media coverage of a variety of technological issues — in particular air, water, and forest pollution, radioactive fallout, and fatal traffic accidents — has become increasingly negative over the last twenty years, while the objective indicators for those issues have shown improvement or at least have not declined. For example: "The press hardly reported water pollution at all during the period of the greatest pollution of the Rhine in the late 1960s and early 1970s. . . . The press only emphasized water pollution when the pollution of the Rhine had receded and the regeneration ability of the river in terms of bio-chemical oxygen requirements had increased considerably. In relation to

the Rhine there is a contradictory development between the real pollution and reported pollution." Thus, Kepplinger and Mathes conclude, the media do not convey an accurate picture of reality. And, furthermore, "this new portrayal of reality by the media leads to a fundamental change in the public's views."

This view involves two claims: one about media content (a claim about the content of media reports on technological issues compared to "reality") and one about media effects (a causal claim about the impact of such reporting on beliefs and attitudes). Let us examine each of these, beginning with the second.

Media Effects

The evidence for the view that the media's (inaccurate) portrayal of reality changes public opinion is unclear. It is never possible to be certain, and rarely possible to be even confident, that an effect was caused by media coverage rather than by something else. Part of Kepplinger and Mathes's evidence for their conclusions seems to be that public opinion lags behind media coverage by about a year; that is, negative coverage of an environmental or technological risk is followed by negative public opinion about it. But this may be a case of *post hoc, ergo propter hoc* reasoning. Journalists and the public may both be responding to some third factor, with journalists quicker to react to events. In that case journalists would appear to be in the vanguard