

# Comment

## Against Settlement

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In a recent report to the Harvard Overseers, Derek Bok called for a new direction in legal education.<sup>1</sup> He decried “the familiar tilt in the law curriculum toward preparing students for legal combat,” and asked instead that law schools train their students “for the gentler arts of reconciliation and accommodation.”<sup>2</sup> He sought to turn our attention from the courts to “new voluntary mechanisms”<sup>3</sup> for resolving disputes. In doing so, Bok echoed themes that have long been associated with the Chief Justice,<sup>4</sup> and that have become a rallying point for the organized bar and the source of a new movement in the law. This movement is the subject of a new professional journal,<sup>5</sup> a newly formed section of the American Association of Law Schools, and several well-funded institutes. It has even received its own acronym—ADR (Alternative Dispute Resolution).

The movement promises to reduce the amount of litigation initiated, and accordingly the bulk of its proposals are devoted to negotiation and mediation prior to suit. But the interest in the so-called “gentler arts” has not been so confined. It extends to ongoing litigation as well, and the advocates of ADR have sought new ways to facilitate and perhaps even pressure parties into settling pending cases. Just last year, Rule 16 of the Federal Rules of Civil Procedure was amended to strengthen the hand of the trial judge in brokering settlements: The “facilitation of settlement”

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1. Bok, *A Flawed System*, HARV. MAG., May–June 1983, at 38, reprinted in N.Y. ST. B.J., Oct. 1983, at 8, N.Y. ST. B.J., Nov. 1983, at 31; excerpted in 33 J. LEGAL EDUC. 570 (1983).

2. Bok, *supra* note 1, at 45.

3. *Id.*

4. See, e.g., Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93–96 (1976).

5. The *Journal of Dispute Resolution*, published by the University of Missouri-Columbia School of Law, is scheduled to begin publication in June, 1984.

became an explicit purpose of pre-trial conferences, and participants were officially invited, if that is the proper word, to consider "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."<sup>6</sup> Now the Advisory Committee on Civil Rules is proposing to amend Rule 68 to sharpen the incentives for settlement: Under this amendment, a party who rejects a settlement offer and then receives a judgment less favorable than that offer must pay the attorney's fees of the other party.<sup>7</sup> This amendment would effect a major change in the traditional American rule, under which each party pays his or her own attorney's fees.<sup>8</sup> It would also be at odds with a number of statutes that seek to facilitate certain types of civil litigation by providing attorney's fees to plaintiffs if they win, without imposing liability for the attorney's fees of their adversaries if they lose.<sup>9</sup>

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6. FED. R. CIV. P. 16. In a similar spirit, the Second Circuit has instituted a Civil Appeals Management Plan (CAMP), which empowers a court officer to direct the parties to a civil appeal to appear at a pre-argument conference "to consider the possibility of settlement," before their case is scheduled for argument. CAMP ¶¶ 4-5, *reprinted in* 2D CIR. R. 54. Conferences are held in approximately 90% of the cases assigned to CAMP; staff counsel grant requests by the parties not to hold pre-argument conferences because of "unsettleable issues" in fewer than one in ten cases. Letter from Vincent Flanigan, Management Analyst, Second Circuit Judicial Conference, to Owen M. Fiss (Apr. 12, 1984). For a review of the debate over CAMP's success, see Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 70 & nn.42-44 (1982). For a discussion of the problems which arise when judges become deeply involved in pre-trial attempts to facilitate settlement, see Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7. In pertinent part, Rule 68 currently provides:

At any time more than 10 days before the trial begins, a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued . . . . If [the offer is rejected and] the judgment finally obtained by the offeree is not more favorable than the offer, the offeror must pay the costs incurred after the making of the offer.

FED. R. CIV. P. 68. The term "costs" has been interpreted not to include attorneys' fees. *Roadway Express v. Piper*, 447 U.S. 752, 759-63 (1980); *Chesny v. Marek*, 720 F.2d 474, 480 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (U.S. Apr. 23, 1984) (No. 83-1437).

The proposed amended rule would provide, in pertinent part:

At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly . . . .

If the judgment finally entered is not more favorable to the offeree than an unaccepted offer . . . , the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer . . . . The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.

. . . . This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

Committee on Rules of Prac. & Proc. of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361-63 (1983).

8. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

9. The Civil Rights Attorney's Fees Awards Act of 1976 provides that, in a variety of civil rights

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The advocates of ADR are led to support such measures and to exalt the idea of settlement more generally because they view adjudication as a process to resolve disputes. They act as though courts arose to resolve quarrels between neighbors who had reached an impasse and turned to a stranger for help.<sup>10</sup> Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power. The very fact that the neighbors have turned to someone else to resolve their dispute signifies a breakdown in their social relations; the advocates of ADR acknowledge this, but nonetheless hope that the neighbors will be able to reach agreement before the stranger renders judgment. Settlement is that agreement. It is a truce more than a true reconciliation, but it seems preferable to judgment because it rests on the consent of both parties and avoids the cost of a lengthy trial.

In my view, however, this account of adjudication and the case for settlement rest on questionable premises. I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and 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.

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actions, a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976 & Supp. V 1981). The Supreme Court has read the Act to mean that prevailing plaintiffs should normally recover their attorneys' fees, while prevailing defendants are not normally entitled to such awards. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-18 (1978).

In *Delta Air Lines v. August*, 450 U.S. 346 (1981), the Court held that Rule 68 does not allow a prevailing defendant to recover any costs (including attorney's fees) from a Title VII plaintiff even though the defendant had proposed a settlement prior to trial. The Court found that such an application of Rule 68 would be contrary to the concept of the private attorney general underlying Title VII. *Id.* at 360 n.27. Given the Court's insistence in *Alyeska Pipeline* that any expansion of the concept of the private attorney general would require specific statutory authorization, 421 U.S. at 263-64, and given Congress' response—the 1976 Act—it would be ironic for the Supreme Court to use its rulemaking power to constrict the use of private attorneys general by amending Rule 68. In *Chesny v. Marek*, 720 F.2d 474, 479 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3770 (U.S. Apr. 23, 1984) (No. 83-1437), Judge Posner interpreted the "costs" provision of current Rule 68 to exclude attorney's fees. He found that including them would deter private attorneys general, would thus involve "substantive" not "procedural" effects, and would therefore exceed the bounds of the Rules Enabling Act, 28 U.S.C. § 2072 (1976). Judge Posner also noted that by the mid-1970's, Congress had enacted between 75 and 90 separate fee-shifting statutes. *Id.* at 477.

For statutes in other fields of law that award attorney's fees to prevailing plaintiffs but not to prevailing defendants, see, e.g., 5 U.S.C. § 552a(g)(B) (1982) (Privacy Act); 15 U.S.C. § 15 (1982) (antitrust).

10. Martin Shapiro provides one formulation of the dispute-resolution story. See M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1-2 (1981).

## THE IMBALANCE OF POWER

By viewing the lawsuit as a quarrel between two neighbors, the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties. It treats settlement as the anticipation of the outcome of trial and assumes that the terms of settlement are simply a product of the parties' predictions of that outcome.<sup>11</sup> In truth, however, settlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally. Many lawsuits do not involve a property dispute between two neighbors, or between AT&T and the government (to update the story), but rather concern a struggle between a member of a racial minority and a municipal police department over alleged brutality, or a claim by a worker against a large corporation over work-related injuries. 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.

The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment. Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery. It might seem that settlement benefits the plaintiff by allowing him to avoid the costs of litigation, but this is not so. The defendant can anticipate the plaintiff's costs if the case were to be tried fully and decrease his offer by that amount. The indigent plaintiff is a victim of the costs of litigation even if he settles.<sup>12</sup>

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11. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

12. The offer-of-settlement rule of the proposed Rule 68 would only aggravate the influence of distributional inequalities. It would make the poorer party liable for the attorney's fees of his adver-

There are exceptions. Seemingly rich defendants may sometimes be subject to financial pressures that make them as anxious to settle as indigent plaintiffs. But I doubt that these circumstances occur with any great frequency. I also doubt that institutional arrangements such as contingent fees or the provision of legal services to the poor will in fact equalize resources between contending parties: The contingent fee does not equalize resources; it only makes an indigent plaintiff vulnerable to the willingness of the private bar to invest in his case. In effect, the ability to exploit the plaintiff's lack of resources has been transferred from rich defendants to lawyers who insist upon a hefty slice of the plaintiff's recovery as their fee. These lawyers, moreover, will only work for contingent fees in certain kinds of cases, such as personal-injury suits. And the contingent fee is of no avail when the defendant is the disadvantaged party. Governmental subsidies for legal services have a broader potential, but in the civil domain the battle for these subsidies was hard-fought, and they are in fact extremely limited, especially when it comes to cases that seek systemic reform of government practices.<sup>13</sup>

Of course, imbalances of power can distort judgment as well: Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.<sup>14</sup> These measures are likely to make only a small contribution to-

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sary, which are likely to be greater than the plaintiff's own legal fees when the defendant retains higher-priced counsel. Thus, fee shifting presents a greater risk to plaintiffs than to defendants. In cases where the prevailing plaintiff is entitled to attorney's fees pursuant to a specific statute, the defendant already has an incentive to settle, namely, to avoid becoming responsible for the plaintiff's legal expenses at trial. (He would still be liable for the plaintiff's pre-trial expenses if the court found that the settlement was sufficiently favorable to make the plaintiff a prevailing party, see *Maier v. Gagne*, 448 U.S. 122, 129-30 (1980), but these expenses are presumably significantly lower than the expenses of actually completing pre-trial preparation and proceeding to trial.) Rule 68 thus does not make the defendant more amenable to settlement. It does, however, place additional burdens on plaintiffs, because under Rule 68 they would risk incurring the attorney's fees of the defendant. See *Bitouni v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 898, 901-02 (D. Conn. 1983).

13. See 42 U.S.C. § 2996f(b)(3), (6), (8), (9) (Supp. V 1981) (restricting use of Legal Services Corporation funds for, *inter alia*, political, abortion-rights, and desegregation litigation).

14. In a case challenging conditions in Texas' state prison system, for example, Judge Justice ordered the United States to appear as an *amicus curiae* "[i]n order to investigate the facts alleged in the prisoners' complaints, to participate in such civil action with the full rights of a party thereto, and to advise this Court at all stages of the proceedings as to any action deemed appropriate by it." *In re Estelle*, 516 F.2d 480, 482 (5th Cir. 1975) (quoting unpublished district court order), *cert. denied*, 426 U.S. 925 (1976). The decree which was eventually entered found systemic constitutional violations and ordered sweeping changes in the state's prisons. See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *motion to stay order granted in part and denied in part*, 650 F.2d 555 (5th Cir. 1981), *add'l motion to stay order granted in part and denied in part*, 666 F.2d 854 (5th Cir. 1982).

ward moderating the influence of distributional inequalities, but should not be ignored for that reason. Not even these small steps are possible with settlement. There is, moreover, 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. Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.

#### THE ABSENCE OF AUTHORITATIVE CONSENT

The argument for settlement presupposes that the contestants are individuals. These individuals speak for themselves and should be bound by the rules they generate. In many situations, however, individuals are ensnared in contractual relationships that impair their autonomy: Lawyers or insurance companies might, for example, agree to settlements that are in their interests but are not in the best interests of their clients, and to which their clients would not agree if the choice were still theirs.<sup>15</sup> But a deeper and more intractable problem arises from the fact that many parties are not individuals but rather organizations or groups. We do not know who is entitled to speak for these entities and to give the consent upon which so much of the appeal of settlement depends.

Some organizations, such as corporations or unions, have formal procedures for identifying the persons who are authorized to speak for them. But these procedures are imperfect: They are designed to facilitate transactions between the organization and outsiders, rather than to insure that the members of the organization in fact agree with a particular decision. Nor do they eliminate conflicts of interests. The chief executive officer of a corporation may settle a suit to prevent embarrassing disclosures about his managerial policies, but such disclosures might well be in the interest of the shareholders.<sup>16</sup> The president of a union may agree to a settlement as a way of preserving his power within the organization; for that very reason, he may not risk the dangers entailed in consulting the rank and file or in subjecting the settlement to ratification by the membership.<sup>17</sup> More-

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15. In *Glazer v. J.C. Bradford & Co.*, 616 F.2d 167 (5th Cir. 1980), for example, the court held that the plaintiff was bound by his attorney's offer of settlement simply because he had earlier instructed his attorney to investigate the possibility of settling the case.

16. In *Wolf v. Barkes*, 348 F.2d 994 (2d Cir. 1965), *cert. denied*, 382 U.S. 941 (1966), Curtis Publishing Company, one of whose stockholders had brought a derivative suit against several corporate officers alleging mismanagement and waste, settled privately with those officers. This settlement effectively eliminated the stockholders' ability to get an accounting of managerial behavior.

17. For a general discussion of how unions often bind their members to collective bargaining agreements without allowing members any role in the negotiating process or any right to ratify the contract eventually agreed to, see Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).

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over, the representational procedures found in corporations, unions, or other private formal organizations are not universal. Much contemporary litigation, especially in the federal courts, involves governmental agencies,<sup>18</sup> and the procedures in those organizations for generating authoritative consent are far cruder than those in the corporate context. We are left to wonder, for example, whether the attorney general should be able to bind all state officials, some of whom are elected and thus have an independent mandate from the people, or even whether the incumbent attorney general should be able to bind his successors.<sup>19</sup>

These problems become even more pronounced when we turn from organizations and consider the fact that much contemporary litigation involves even more nebulous social entities, namely, groups. Some of these groups, such as ethnic or racial minorities, inmates of prisons, or residents of institutions for mentally retarded people, may have an identity or existence that transcends the lawsuit, but they do not have any formal organizational structure and therefore lack any procedures for generating authoritative consent. The absence of such a procedure is even more pronounced in cases involving a group, such as the purchasers of Cuisinarts between 1972 and 1982, which is constructed solely in order to create funds large enough to make it financially attractive for lawyers to handle the case.<sup>20</sup>

The Federal Rules of Civil Procedure require that groups have a “representative”;<sup>21</sup> this representative purports to speak on behalf of the group, but he receives his power by the most questionable of all elective procedures—self-appointment or, if we are dealing with a defendant class,

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18. According to Judge Gilbert Merritt, almost half of the cases in the Sixth Circuit involve suits against government agencies or officials. Merritt, *Owen Fiss in Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 *YALE L.J.* (1983) (forthcoming).

19. In March of this year, the Civil Rights Division announced its intention to support the position of white municipal employees in Birmingham, Alabama, who are attacking the city's affirmative action policy, even though that policy was initiated under a consent decree that the Division had previously negotiated and obtained in a suit to eliminate discrimination against blacks, *United States v. Jefferson County*, Civ. Act. No. 75-P-0666-S (N.D. Ala. Aug. 21, 1981) (approving consent decree). See *U.S. to Support Whites in Suits On Bias Decree*, *N.Y. Times*, Mar. 5, 1984, at A1, col. 2.

In the fall of 1982, the Reagan Administration announced that it would not defend the Internal Revenue Service's policy of withholding tax-exempt status from private educational institutions that discriminated on the basis of race. The IRS had initiated the policy after a three-judge district court had issued an injunction prohibiting the IRS from exempting such schools. *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970). The Supreme Court appointed a private attorney, William Coleman, essentially to defend the decree when the Reagan Administration announced its position. See *Bob Jones Univ. v. United States*, 102 S. Ct. 1965 (1982) (“invit[ing]” Coleman to brief and argue case “in support of the judgments below”), 103 S. Ct. 2017 (1983) (affirming IRS' policy); *N.Y. Times*, Apr. 20, 1982, at A1, col. 5; *id.* at D21, col. 1 (describing government's actions and Coleman's appointment).

20. See *In re Cuisinart Food Processor Antitrust Litig.*, [1982-83 Transfer Binder] *TRADE REG. REP.* (CCH) ¶ 65,680 (D. Conn. Oct. 24, 1983).

21. *FED. R. CIV. P.* 23(a).

appointment by an adversary. The rules contemplate notice to the members of the group about the pendency of the action and the claims of the representative, but it is difficult to believe that notice could reach all members of the group, or that it could cure the defects in the procedures by which the representative gets his power. The forces that discourage most members of the group from stepping forward to initiate suits will also discourage them from responding to whatever notice may reach them. The sponsors of the amendment to Rule 68 recognize the nature of class actions and exempt them from its special procedures.<sup>22</sup> But this exemption does little more than create an incentive for casting all civil litigation as class actions, with their attendant procedural complexities, and leaves the problem of generating authoritative consent for organizational parties unsolved. The new Rule 16 does not even recognize the problem.

Going to judgment does not altogether eliminate the risk of unauthorized action, any more than it eliminates the distortions arising from disparities in resources. The case presented by the representative of a group or an organization admittedly will influence the outcome of the suit, and that outcome will bind those who might also be bound by a settlement. On the other hand, judgment does not ask as much from the so-called representatives. There is a conceptual and normative distance between what the representatives do and say and what the court eventually decides, because the judge tests those statements and actions against independent procedural and substantive standards. The authority of judgment arises from the law, not from the statements or actions of the putative representatives, and

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22. 98 F.R.D. at 363; *see supra* note 7. The Advisory Committee Note explains that Rule 23 class actions are exempted from new Rule 68's scope because "the offeree's rejection [of an offer] would burden a named representative-offeree with the risk of exposure to heavy liability for costs and expenses that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class." 98 F.R.D. at 367. The danger the Committee points to, however, is not confined to class actions, but would exist whenever an individual plaintiff represents a group, for example, as a private attorney general.

The failure of the Committee to comprehend fully the concept of the private attorney general is further revealed by its insistence that the result at trial be "more favorable to the offeree than an unaccepted offer . . ." 98 F.R.D. at 362 (emphasis added). Private attorneys general vindicate important societal interests as well as their own private concerns, *see, e.g., Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968) (per curiam), and yet, any benefits of an individual plaintiff's suit that rebound to the public at large rather than to the named plaintiff may not be weighed in the Rule 68 determination. For example, in an employment discrimination case, an individual plaintiff might seek \$25,000 in damages for past harm and an injunction against the continuation of discriminatory practices. He may reject the defendant's offer to settle for \$5000, go to trial, and receive an injunction and \$1000. Under Title VII, he would be able to recover attorney's fees as a prevailing party. *Cf. McCann v. Coughlin*, 698 F.2d 112, 128-29 (2d Cir. 1983) (nominal damages of \$1 sufficient to justify attorney's fees). By contrast, under the proposed Rule 68, he stands in danger of incurring liability for his opponent's attorney's fees on the theory that the injunction he obtained is of less value to him than the defendant's offer of settlement.

thus we allow judgment to bind persons not directly involved in the litigation even when we are reluctant to have settlement do so.

The procedures that have been devised for policing the settlement process when groups or organizations are involved have not eliminated the difficulties of generating authoritative consent. Some of these procedures provide a substantive standard for the approval of the settlement and do not even consider the issue of consent. A case in point is the Tunney Act. The Act establishes procedures for giving outsiders notice of a proposed settlement in a government antitrust suit and requires the judge to decide whether a settlement proposed by the Department of Justice is in “the public interest.”<sup>23</sup> This statute implicitly acknowledges the difficulty of determining who is entitled to speak for the United States in some authoritative fashion and yet provides the judge with virtually no guidance in making this determination or in deciding whether to approve the settlement. The public-interest standard in fact seems to invite the consideration of such nonjudicial factors as popular sentiment and the efficient allocation of prosecutorial resources.<sup>24</sup>

Other policing mechanisms, such as Rule 23, which governs class actions, make no effort to articulate a substantive standard for approving

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23. Antitrust Penalties & Procedures Act of 1974, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1707 (codified at 15 U.S.C. § 16(e) (1982)). In pertinent part, the Act provides:

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

24. In *Maryland v. United States*, 103 S. Ct. 1240 (1983), the Supreme Court summarily affirmed the district court’s approval of a consent decree proposed by the government in the AT&T antitrust case. In dissent, Justice Rehnquist, joined by the Chief Justice and Justice White, questioned the constitutionality of § 16(e). The District Court had interpreted § 16(e) to mean that the proposed consent decree should be accepted “if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest . . . .” *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983) (per curiam). Justice Rehnquist, however, said: “It is not clear to me that this standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution.” 103 S. Ct. at 1242. He continued:

The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the executive by Article II. There is no standard by which the benefits to the public from a “better” settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department’s resources for other cases.

*Id.* at 1243.

settlements, but instead entrust the whole matter to the judge.<sup>25</sup> In such cases, the judge's approval theoretically should turn on whether the group consents, but determining whether such consent exists is often impossible, since true consent consists of nothing less than the expressed unanimity of all the members of a group, which might number in the hundreds of thousands and be scattered across the United States. The judge's approval instead turns on how close or far the proposed settlement is from what he imagines would be the judgment obtained after suit. The basis for approving a settlement, contrary to what the dispute-resolution story suggests, is therefore not consent but rather the settlement's approximation to judgment. This might appear to remove my objection to settlement, except that the judgment being used as a measure of the settlement is very odd indeed: It has never in fact been entered, but only imagined. It has been constructed without benefit of a full trial, and at a time when the judge can no longer count on the thorough presentation promised by the adversary system. The contending parties have struck a bargain, and have every interest in defending the settlement and in convincing the judge that it is in accord with the law.

#### THE LACK OF A FOUNDATION FOR CONTINUING JUDICIAL INVOLVEMENT

The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. It supposes that the judge's duty is to declare which neighbor is right and which wrong, and that this declaration will end the judge's involvement (save in that most exceptional situation where it is also necessary for him to issue a writ directing the sheriff to execute the declaration). Under these assumptions, settlement appears as an almost perfect substitute for judgment, for it too can declare the parties' rights. Often, however, judgment is not the end of a lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. In these cases, settlement cannot provide an adequate basis for that necessary continuing involvement, and thus is no substitute for judgment.

The parties may sometimes be locked in combat with one another and view the lawsuit as only one phase in a long continuing struggle. The entry of judgment will then not end the struggle, but rather change its terms and the balance of power. One of the parties will invariably return to the court and again ask for its assistance, not so much because condi-

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25. "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e).

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tions have changed, but because the conditions that preceded the lawsuit have unfortunately not changed. This often occurs in domestic-relations cases, where the divorce decree represents only the opening salvo in an endless series of skirmishes over custody and support.<sup>26</sup>

The structural reform cases that play such a prominent role on the federal docket provide another occasion for continuing judicial involvement. In these cases, courts seek to safeguard public values by restructuring large-scale bureaucratic organizations.<sup>27</sup> The task is enormous, and our knowledge of how to restructure on-going bureaucratic organizations is limited. As a consequence, courts must oversee and manage the remedial process for a long time—maybe forever. This, I fear, is true of most school desegregation cases, some of which have been pending for twenty or thirty years.<sup>28</sup> It is also true of antitrust cases that seek divestiture or reorganization of an industry.<sup>29</sup>

The drive for settlement knows no bounds and can result in a consent decree even in the kinds of cases I have just mentioned, that is, even when a court finds itself embroiled in a continuing struggle between the parties or must reform a bureaucratic organization. The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favorable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request. He cannot, to use Cardozo's somewhat melodramatic formula, easily decide whether the "dangers, once substantial, have become attenuated to a shadow,"<sup>30</sup> because, by definition, he never knew the dangers.

The allure of settlement in large part derives from the fact that it avoids the need for a trial. Settlement must thus occur before the trial is complete and the judge has entered findings of fact and conclusions of law. As a

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26. Domestic relations cases form the largest subject-matter category of cases on state court dockets. See NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART 53 (1978). Much of this litigation occurs after the entry of initial decrees. See Oldham, Book Review, 54 U. COLO. L. REV. 469, 478-80 (1983) (reviewing L. WEITZMAN, *THE MARRIAGE CONTRACT* (1981)).

27. I define the relationship between structural reform and the dispute-resolution story more fully elsewhere. See Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121 (1982).

28. See, e.g., *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983) (continuation of Little Rock desegregation case); *Brown v. Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979) (seeking intervention in original Topeka desegregation case on behalf of class represented by Linda Brown's daughter).

29. In *United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968), for example, the government successfully reopened a decade-old decree because competition in the shoe machinery market had not yet been attained.

30. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

consequence, the judge confronted with a request for modification of a consent decree must retrospectively reconstruct the situation as it existed at the time the decree was entered, and decide whether conditions today have sufficiently changed to warrant a modification in that decree. In the Meat Packers litigation, for example, where a consent decree governed the industry for almost half a century, the judge confronted with a request for modification in 1960 had to reconstruct the "danger" that had existed at the time of the entry of the decree in 1920 in order to determine whether the danger had in fact become a "shadow."<sup>31</sup> Such an inquiry borders on the absurd, and is likely to dissipate whatever savings in judicial resources the initial settlement may have produced.

Settlement also impedes vigorous enforcement, which sometimes requires use of the contempt power. As a formal matter, contempt is available to punish violations of a consent decree.<sup>32</sup> But courts hesitate to use that power to enforce decrees that rest solely on consent, especially when enforcement is aimed at high public officials, as became evident in the Willowbrook deinstitutionalization case<sup>33</sup> and the recent Chicago desegregation case.<sup>34</sup> Courts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers.

Sometimes the agreement between the parties extends beyond the terms of the decree and includes stipulated "findings of fact" and "conclusions of law," but even then an adequate foundation for a strong use of the judicial power is lacking. Given the underlying purpose of settlement—to avoid trial—the so-called "findings" and "conclusions" are necessarily the products of a bargain between the parties rather than of a trial and an independent judicial judgment. Of course, a plaintiff is free to drop a lawsuit altogether (provided that the interests of certain other persons are not compromised), and a defendant can offer something in return, but that bargained-for arrangement more closely resembles a contract than an injunction. It raises a question which has already been answered whenever

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31. See *United States v. Swift & Co.*, 189 F. Supp. 885, 904, 910-12 (N.D. Ill. 1960), *aff'd* 367 U.S. 909 (1961). For a history of the Meat Packers' consent decree over a fifty-year period, see O. FISS, *INJUNCTIONS* 325-99 (1972).

32. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.9, at 93-94, 99 n.25 (1973).

33. *New York State Ass'n for Retarded Children v. Carey*, 631 F.2d 162, 163-64 (2d Cir. 1980) (court unwilling to hold governor in contempt of consent decree when legislature refused to provide funding for committee established by court to oversee implementation of decree). The First Circuit explicitly acknowledged limitations on the power of courts to enforce consent decrees in *Brewster v. Dukakis*, 687 F.2d 495, 501 (1st Cir. 1982), and *Massachusetts Ass'n for Retarded Citizens v. King*, 668 F.2d 602, 610 (1st Cir. 1981).

34. In *United States v. Board of Educ.*, 717 F.2d 378, 384-85 (7th Cir. 1983), the Court of Appeals found that the district court had acted too hastily in ordering the United States to provide additional financial support for Chicago's voluntary desegregation program pursuant to the consent decree which the federal government and the school board had entered into with the plaintiffs. The Seventh Circuit instead instructed the district court to give the federal government time to comply voluntarily with its obligations.

an injunction is issued, namely, whether the judicial power should be used to enforce it. Even assuming that the consent is freely given and authoritative, the bargain is at best contractual and does not contain the kind of enforcement commitment already embodied in a decree that is the product of a trial and the judgment of a court.

### JUSTICE RATHER THAN PEACE

The dispute-resolution story makes settlement appear as a perfect substitute for judgment, as we just saw, by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment—peace between the parties—but at considerably less expense to society. The two quarreling neighbors turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.

In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor 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 into accord with them. This duty is not discharged when the parties settle.

In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be “forced” to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be

a necessary precondition of justice,<sup>35</sup> and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.

I recognize that judges often announce settlements not with a sense of frustration or disappointment, as my account of adjudication might suggest, but with a sigh of relief. But this sigh should be seen for precisely what it is: It is not a recognition that a job is done, nor an acknowledgment that a job need not be done because justice has been secured. It is instead based on another sentiment altogether, namely, that another case has been "moved along," which is true whether or not justice has been done or even needs to be done. Or the sigh might be based on the fact that the agony of judgment has been avoided.

There is, of course, sometimes a value to avoidance, not just to the judge, who is thereby relieved of the need to make or enforce a hard decision, but also to society, which sometimes thrives by masking its basic contradictions. But will settlement result in avoidance when it is most appropriate? Other familiar avoidance devices, such as certiorari,<sup>36</sup> at least promise a devotion to public ends, but settlement is controlled by the litigants, and is subject to their private motivations and all the vagaries of the bargaining process. There are also dangers to avoidance, and these may well outweigh any imagined benefits. Partisans of ADR—Chief Justice Burger, or even President Bok—may begin with a certain satisfaction with the status quo. But when one sees injustices that cry out for correction—as Congress did when it endorsed the concept of the private attorney general<sup>37</sup> and as the Court of another era did when it sought to enhance access to the courts<sup>38</sup>—the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayal of our

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35. Some observers have argued that compliance is more likely to result from a consent decree than from an adjudicated decree. See O. FISS & D. RENDLEMAN, *INJUNCTIONS* 1004 (2d ed. 1984). But increased compliance may well be due to the fact that a consent decree asks less of the defendant, rather than from its creating a more amicable relationship between the parties. See McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 *LAW & SOC'Y REV.* 11 (1984).

36. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-99 (1962) (discussing "the passive virtues"). For an analysis of the doctrines of vagueness and overbreadth as techniques for avoidance, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 *U. PA. L. REV.* 67 (1960).

37. For a discussion of the role of the private attorney general, see *supra* notes 9 & 22. The Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (Supp. V 1981)), which eliminated the jurisdictional amount in federal question cases, reflects a similar sentiment: A claim's significance cannot be measured simply by the amount of money involved. See H.R. REP. NO. 1461, 94th Cong., 2d Sess. 2, reprinted in 1980 U.S. CONG. CODE & AD. NEWS 5063, 5063-64.

38. For a discussion of the Supreme Court's decisions during the 1960's and early 1970's suggesting that access to the courts and the opportunity to litigate are essential due process rights, see Michelman, *The Supreme Court and Litigation Access Fees* (pts. 1 & 2), 1973 *DUKE L.J.* 1153, 1974 *DUKE L.J.* 527.

deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition.

### THE REAL DIVIDE

To all this, one can readily imagine a simple response by way of confession and avoidance: We are not talking about *those* lawsuits. Advocates of ADR might insist that my account of adjudication, in contrast to the one implied by the dispute-resolution story, focuses on a rather narrow category of lawsuits. They could argue that while settlement may have only the most limited appeal with respect to those cases, I have not spoken to the “typical” case. My response is twofold.

First, even as a purely quantitative matter, I doubt that the number of cases I am referring to is trivial. My universe includes those cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents; those in which the court must continue to supervise the parties after judgment; and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law. I imagine that the number of cases that satisfy one of these four criteria is considerable; in contrast to the kind of case portrayed in the dispute-resolution story, they probably dominate the docket of a modern court system.

Second, it demands a certain kind of myopia to be concerned only with the number of cases, as though all cases are equal simply because the clerk of the court assigns each a single docket number. All cases are not equal. The Los Angeles desegregation case,<sup>39</sup> to take one example, is not equal to the allegedly more typical suit involving a property dispute or an automobile accident. The desegregation suit consumes more resources, affects more people, and provokes far greater challenges to the judicial power. The settlement movement must introduce a qualitative perspective; it must speak to these more “significant” cases, and demonstrate the propriety of settling them. Otherwise it will soon be seen as an irrelevance, dealing with trivia rather than responding to the very conditions that give the movement its greatest sway and saliency.

Nor would sorting cases into “two tracks,” one for settlement, and another for judgment, avoid my objections. Settling automobile cases and leaving discrimination or antitrust cases for judgment might remove a

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39. See *Crawford v. Board of Educ.*, 46 Cal. App. 3d 872, 120 Cal. Rptr. 334 (Ct. App. 1975), *aff'd*, 17 Cal. 3d, 551 P.2d 28, 130 Cal. Rptr. 724 (1976). For a recent recounting of the history of the 20 years of litigation, see *Crawford v. Board of Educ.*, 103 S. Ct. 3211, 3214-15 (1982).

large number of cases from the dockets, but the dockets will nevertheless remain burdened with the cases that consume the most judicial resources and represent the most controversial exercises of the judicial power. A "two track" strategy would drain the argument for settlement of much of its appeal. I also doubt whether the "two track" strategy can be sensibly implemented. It is impossible to formulate adequate criteria for prospectively sorting cases. The problems of settlement are not tied to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of law. The authors of the amendment to Rule 68 make a gesture toward a "two track" strategy by exempting class actions and shareholder derivative suits, and by allowing the judge to refrain from awarding attorney's fees when it is "unjustified under all of the circumstances."<sup>40</sup> But these gestures are cramped and ill-conceived, and are likely to increase the workload of the courts by giving rise to yet another set of issues to litigate.<sup>41</sup> It is, moreover, hard to see how these problems can be avoided. Many of the factors that lead a society to bring social relationships that otherwise seem wholly private (e.g., marriage) within the jurisdiction of a court, such as imbalances of power or the interests of third parties, are also likely to make

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40. 98 F.R.D. at 362.

41. It is far from clear that either the current offer-of-judgment rule or the proposed amendments are likely to reduce the overall volume of litigation. Although such a rule increases the potential costs a plaintiff faces should he lose, and thus means a plaintiff will be willing to settle for a smaller amount than he would demand if there were no potential liability for the defendant's expenses, it also increases the potential benefits a defendant will receive should his offer exceed the amount the plaintiff recovers at trial (since the defendant will both retain the difference between the offer and the amount actually recovered and will recover his expenses), and thus means a defendant will offer less in a settlement. There is no reason to assume that the gap between the plaintiff's demand and the defendant's offer will be relatively smaller because of the offer-of-judgment rule. *See* Priest, *supra* note 11, at 171.

Moreover, Rule 68 makes no exception for cases seeking non-monetary relief, such as injunctions. It thus requires the court to decide whether the injunction actually obtained was in fact "better" or "more favorable" than the decree the defendant was willing to enter prior to trial.

The "reasonability" language of the proposed rule, *supra* note 7, creates potential attorney-client conflicts that may also spark litigation. By implication, a court which grants an offeror all of his expenses has decided that the offeree was unreasonable in his refusal. If the offeree based that refusal on the advice of counsel, then that advice was unreasonable, and a malpractice suit can be expected to recover fees assessed against the client in the original case.

The proposed rule's exclusion of costs and attorney's fees from the assessment of whether an offer is more or less favorable than an eventual judgment, 98 F.R.D. at 362, may cause additional conflicts between plaintiffs and their attorneys. Suppose that a defendant offers a plaintiff \$100,000 as full relief including attorney's fees and costs. If the plaintiff accepts this offer, then his attorney forfeits the right to attorney's fees under a statutory fee-shifting scheme. If, however, the plaintiff refuses the offer, then the plaintiff may be liable to the defendant for the defendant's attorney's fees and costs, even though the plaintiff's total "recovery" at trial—for example, \$80,000 on the merits and \$30,000 in attorneys' fees—exceeds the defendant's offer because the plaintiff recovered less on the merits. In these circumstances, the lawyer may press his client to litigate because this will assure the lawyer his fee, even though the client will thereby be exposed to possible liability for the defendant's costs and expenses.

settlement problematic. Settlement is a poor substitute for judgement; it is an even poorer substitute for the withdrawal of jurisdiction.

For these reasons, I remain highly skeptical of a “two track” strategy, and would resist it. But the more important point to note is that the draftsmen of Rule 68 are the exception. There is no hint of a “two track” strategy in Rule 16. In fact, most ADR advocates make no effort to distinguish between different types of cases or to suggest that “the gentler arts of reconciliation and accommodation” might be particularly appropriate for one type of case but not for another. They lump all cases together. This suggests that what divides me from the partisans of ADR is not that we are concerned with different universes of cases, that Derek Bok, for example, focuses on boundary quarrels while I see only desegregation suits. I suspect instead that what divides us is much deeper and stems from our understanding of the purpose of the civil law suit and its place in society. It is a difference in outlook.

Someone like Bok sees adjudication in essentially private terms: The purpose of lawsuits and the civil courts is to resolve disputes, and the amount of litigation we encounter is evidence of the needlessly combative and quarrelsome character of Americans. Or as Bok put it, using a more diplomatic idiom: “At bottom, ours is a society built on individualism, competition, and success.”<sup>42</sup> I, on the other hand, see adjudication in more public terms: Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals. We turn to the courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help secure all that the law promises, not because we want them to become gladiators or because we take a special pleasure in combat.

To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country—including Japan, Bok’s new paragon<sup>43</sup>—has a case like *Brown v. Board of Education*<sup>44</sup> in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our

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42. Bok, *supra* note 1, at 42.

43. *Id.* at 41. As to the validity of the comparisons and a more subtle explanation of the determinants of litigiousness, see Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 389 (1978) (“Few misconceptions about Japan have been more widespread or as pernicious as the myth of the special reluctance of the Japanese to litigate.”); see also Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 57–59 (1983) (paucity of lawyers in Japan due to restrictions on number of attorneys admitted to practice rather than to non-litigiousness).

44. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

ideals, but that we alone among the nations of the world seem willing to do something about it. Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

# The Yale Law Journal

Volume 93, Number 6, May 1984

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