ARTICLES

IN FAVOR OF SETTLEMENT

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INTRODUCTION

This article first considers arguments against settlement as a means of resolving disputes.

Later, it provides arguments in favor of settlement. The arguments against are generally romantic and capable of disproof, while the arguments in favor are pragmatic.

The arguments against settlement have been most prominently set out by Professor Owen Fiss in an essay called "*Against Settlement*"[2] that has not been particularly influential[3] but has been widely cited.[4] It is surprising that the essay has been

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

3. The Rules amendments have been against *Against Settlement* too. *Cf.* FED. R. CIV. P. 16 (enabling judges to use pretrial conferences to facilitate settlement).

4. A search of "Fiss /s/ 'against settlement'" produces more than a thousand citations. *See* DOUGLAS H. YARN, GEORGIA ALTERNATIVE DISPUTE RESOLUTION § 1:7

received with such interest, because it is full of statements that cannot stand against easy analysis:[5] statements that, at places in the writing, are purely romantic.[6] Professor Fiss starts with a quotation from Derek Bok, then President of Harvard, suggesting that law schools should not limit themselves to traditional litigation methods but should also teach means of resolving disputes by alternate methods.[7] This modest statement sets off Professor Fiss, who goes into a lengthy effort to critique Bok and to inveigh against settling lawsuits.

Although there are many criticisms of *Against Settlement*,[8] its themes have persisted among some commentators.[9] There are apologists who maintain that Professor Fiss's point is misunderstood: that his thesis makes sense if properly read.[10] This essay is for the present day and contains analysis that is not to be found elsewhere. The author's conclusion is that *Against Settlement* is unpersuasive.

Professor Fiss's thesis is set out early in the article. The following three paragraphs summarize the arguments against settlement:[11]

> [Bok's] 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

(2022).

5. *E.g.*, Fiss, *supra* note 2, at 1075 ("Settlement is for me the civil analogue of plea bargaining . . . "); *see infra* Part I (showing that this allegation is sheer name calling, and not very good name calling at that).

6. *E.g.*, *id.* at 1083 ("The drive for settlement knows no bounds . . . "). Of course it "knows bounds," even if they are formed only by the limits of the ability of one party or the other to produce what is agreed to.

7. *Id.* at 1073.

8. *See, e.g.*, *supra* note 4.

9. *E.g.*, Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1157 (2009) ("Understood in this fashion, Fiss opposed U.S. ADR because it was not authorized to demand—nor was it required to aspire to produce—popular belief in collective moral values.").

10. *See id.* and accompanying text.

11. Fiss, *supra* note 2, at 1075, 1089–90.

> 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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> . . . .
>
> Someone like Bok sees adjudication in essentially private terms: The purpose of lawsuits and the civil courts is to resolve disputes . . . . 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.
>
> . . . .
>
> To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure. . . . Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

Taking apart the meaning of this chain of sentences is essential to the argument in favor of settlement. And one can show that the arguments are unpersuasive. Professor Fiss has a number of other sections in his work that attempt to expand upon and justify these ideas, but these short paragraphs express most of them.

I. PURE NAME-CALLING: SETTLEMENT AS "THE CIVIL ANALOGUE OF PLEA BARGAINING"

A. Name-Calling as Legal Argument

After a pair of sentences containing empty terms such as asserting that there are "questionable premises" for alternate resolution and condemning "wholesale and indiscriminate" settlements, Professor Fiss begins by attacking settlement as "the

civil analogue of plea bargaining . . . ."[12] This, of course, is name-calling: literally, nothing but name-calling. Yet that method of non-analysis has, in this essay, made its way into the Yale Law Journal.

And Professor Fiss is not an expert at name-calling. Plea bargaining *is* settlement.[13] It is nothing but settlement. It is the name that has been given to settlement, perhaps unfortunately, on the criminal side. Having been both an assistant district attorney and a civil and criminal defense lawyer, and having written about negotiation methods, I can say that the negotiations on the civil side are similar in technique to those on the criminal side. Neither is an analogue of the other; they are the same thing.

B. Settlement on the Criminal Side: What if It Did Not Exist?

And what about the implied argument that Professor Fiss makes here, that plea bargaining, or settlement of criminal cases, is somehow wrong, immoral, or distasteful (he never tells us which of these pejoratives, if any, ought to fit)? Well, there have been some jurisdictions that have done away with plea bargaining.[14] One can infer that there would be several unfortunate consequences. For example, prosecutions will tend to result in convictions of small fry and lessened success at trapping the really bad guys. The cost, of course, of an honest system without settlement would be enormous. Then, there will be the constant suspicion that bargaining is actually going on underground—which it almost certainly will be.

Furthermore, people like Professor Fiss should think of the public effects of trusting every criminal case to adjudication because they do not favor settlement. That process would take many more assistant district attorneys.[15] Double the present

12. *See id.*

13. *See* DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES § 14.03(A) (4th ed. 2020) (law school casebook discussing "the methods and realities of plea agreements" and describing the process repeatedly as "settlement").

14. *See* John P. Guidry II, *Some Jurisdictions Have Banned Plea Bargains*, (last visited July 9, 2021), https://jgcrimlaw.com/blog/some-jurisdictions-have-banned-plea-bargains.

15. Harris County (Houston), Texas has multiple hundreds of assistant

number would not be enough, because many multiples of current trials would be required. Many more defense lawyers would be required too.

And more courts. More associated personnel.[16] When I was trying criminal cases, we figured how many new personnel would be required for a new state district court: four probation officers, at least three clerks, a bailiff, two court reporters, as well as four prosecutors, all without thinking about general personnel who serve the office as a whole, such as additional telephone operators, supply managers, and auditors. We counted a second time and got a number lower by one. We finally figured it out: we had forgotten the judge.

Do we really want so many assistant district attorneys running around and looking for something to do?

And would The People, who after all are the most important part of the system, vote for the resulting expansion of public spending? The money for these personnel would have to come from somewhere. Would voters want to cut library services, elementary schools, or alcohol- abuse prevention? Or lower the quality, such as it is, of jails and prisons? One might consider higher taxes, but there is an early limit to that.

This "plea bargaining" point raised by Professor Fiss does not seem very persuasive.

C. Non-Encouragement of Settlement Would Apply to Purely Private Claims, Too

Professor Fiss would have courts and litigants avoid settlement in purely private litigation as well as public interest lawsuits. He does not want what he calls a "two-track" system, one that recognizes individual claims that should be settled and treats them differently.[17] A two-track system, he writes, "would drain the argument for settlement of much of its appeal." He also doubts whether the two-track strategy can be sensibly implemented,

district attorneys. The office lost 140 recently in a period of 28 months. And only small percentages of cases are tried. It would take thousands of assistants to try them all, if there were no settlements.

16. Long ago, in the 1970's.

17. Fiss, *supra* note 2, at 1087–88.

because, he explains, it is impossible to formulate adequate criteria for prospectively sorting cases.[18]

In other words, Professor Fiss would visit the same burdens as weigh on a case like *Brown v. Board of Education* on a suit brought by a family for the wrongful death of their loved one. Or, for that matter, on a suit on a promissory note with no defenses. The claimants in both of these cases would be encouraged to submit to a full trial. And the reason he gives is that forcing this kind of unnecessary loss upon some unfortunate individuals would enhance the likelihood that other cases, public interest cases, would avoid settlement too. Otherwise those cases would be "drained" of their appeal for full litigation.

And it is unclear how far the Professor would push this approach. Would every procedural step need to be fully litigated too? The parties, let us say, face the need to decide on the timing of depositions.[19] Rather than agreeing, should they be encouraged to fight this issue before the judge, who must then render a scheduling decision? Obviously, this kind of issue could sensibly be settled in some cases (judges would hope so), but Professor Fiss might say that we lack criteria for saying so.

II. THE CHARGE THAT "CONSENT IS OFTEN COERCED"

A. Are Organizations and Groups Incompetent in Litigation?

Professor Fiss writes that "[c]onsent is often coerced . . . ."[20] He

18. *Id.* at 1088.

19. I once had a case in which the order of depositions did indeed make an important difference. The plaintiffs, we suspected, were being coached in detail about how to describe the product in a strict-liability class action. We wanted to take the plaintiff's depositions before giving detailed information about the product label, because we maintained that the plaintiffs had never used our product. We lost the scheduling argument, but as sometimes happens, the system worked in spite of itself. It took so long to resolve the scheduling issue that the plaintiffs' depositions were completed before the product description was available to them.

Contrary to Professor Fiss's declaration, everybody concerned understood the "criteria" that made this issue different from routine scheduling. This case, like others referred to in this article, did not result in a court order whose citation is available.

20. Fiss, *supra* note 2, at 1075.

apparently thinks that this phenomenon is especially corrosive among organizations: groups such as the Sierra Club, or the American Civil Liberties Union, or the Democratic or Republican Parties, perhaps.[21] Public officials will act in their personal interests, he predicts, and even lawyers who represent organizations will work against their clients.[22] His concern seems to be that these conglomerations do not have sound decision-making abilities and are too inclusive of differing views to be able to steer as well at litigation—or settlement, especially—requires.[23]

It is an odd critique, since these kinds of organizations do often use adjudication as well as consent decrees to protect very clearly chosen objectives. The critique is part of Professor Fiss's theme that litigation ought to be seen in public terms, so that civil suits will result in the establishment of better public values.[24] How coercion enters into this area through the parties' representatives is left to the mystical.

B. Actually, the Adversary System Is Coercive, and It Is the Adversary System Itself That Forces Settlement

In any event, the American litigation system is itself absolutely coercive. A judgment, which Professor Fiss prefers to a settlement, is entirely coercive. The irony here is that the Professor's advocacy of adjudication rather than settlement, because of coercion, results in a system of dispute resolution that is more, not less, coercive.

Imagine that a litigant faces a trial in which he or she has substantial probability of losing and only an outside chance of winning. Of receiving a jackpot, possibly, but more likely, of recovering nothing. In this situation, it is likely in this litigant's interest to settle the case.[25] But the choice is not forced by coercion imposed by the settlement, which may be amicable and may allow

21. "We do not know who is entitled to speak for these organizations." Fiss, *supra* note 2, at 1078.

22. *Id.*

23. *See* Fiss, *supra* note 21 and accompanying text.

24. *See* Fiss, *supra* note 2, at 1089–90.

25. *See* DAVID CRUMP, HOW TO REASON 389–14 (2d ed. 2014) (explaining negotiations of this kind, including naïve belief in highest possible recovery).

the litigant room to move the outcome. Instead, what is coercive is the adjudicative system that Professor Fiss favors.

C. The Task of a Lawyer Is Unlike That Suggested by Professor Fiss

Professor Fiss distrusts the lawyers, too.[26] His biography shows little evidence of acquaintance with practice in the courts,[27] and he fails to understand that the task of the lawyer is to protect his client in a coercive system. This role requires forceful advice.

Every trial lawyer has experienced the frustration brought about by clients whose resistance to the other side's favorable settlement proposals is fueled by adherence to myths. Most people's information about the American justice system comes from fiction. They have read Grisham, whose novels show rejection of apparently sensible settlement opportunities and decisions instead to try apparently low-possibility cases.[28] These choices, which might be irrational in real life, are presented as appropriate and, indeed, the moral thing to do. Clients have seen television shows—beginning all the way back with Perry Mason, who never loses (or collects a fee)—that advance the theme of litigation over settlement. In short, people often have an exaggerated faith in the favorable resolution of their claims.

These literary devices are good methods for novels but bad prescriptions for litigation strategy.[29] Confronted with a mythical view that "my cause will prevail with good old American juries and judges," a given lawyer may find that what is called for is vigorous and forceful advocacy of the path that does not lead to litigation suicide. The lawyer's proper course in this situation is not neutrality but strong advice against the client's choice of action.

26. *See* Fiss, *supra* note 21 and accompanying text.

27. *See* DIRECTORY OF LAW TEACHERS 547 (2021).

28. *E.g.*, JOHN GRISHAM, THE RUNAWAY JURY (2012). The featured trial is "a multimillion-dollar legal hurricane" in which the jurors "have been investigated, watched, manipulated, and harassed by high-priced lawyers and consultants who will stop at nothing to secure a verdict." PENGUIN RANDOM HOUSE, https://www.penguinrandomhouse.com/books/72170/the-runaway-jury-by-john-grisham/ (last visited Dec. 20, 2022).

29. *Cf.* ALBERT ZUCKERMAN, WRITING THE BLOCKBUSTER NOVEL 12–13 (Jack Heffron ed., 1993) ("[A] novel is emotion.").

This result is coercive, possibly, but the coercion actually comes from the system of adjudication, which ultimately forces the choice by presenting a moment in time when the client must otherwise choose to submit to the probable losses of adjudication. Professor Fiss seems to see this function of the lawyer as improper.[30]

D. Reasons to Prefer Settlement

Furthermore, the Professor here omits disadvantages of adjudication, as well as advantages of settlement, that can make settlement less coercive. Alternate dispute resolution means greater party control.[31] The parties (or a mediator or arbitrator) can enlarge the pie, creating alternatives that give both parties greater rights than litigation could have.[32] Settlement is not bound by rigid litigation rules and does not have to follow even the adjective law.

And there may be greater buy-in from both sides from a settlement. The public acceptance may be greater. And the result of settlement may be better in terms of public values. Imagine a desegregation suit resulting from adjudication that decrees desegregation of public schools with "all deliberate speed." This phrase is an oxymoron, of course: the word speed means the opposite of deliberation. This unfortunate phrase resulted from adjudication of the kind preferred by Professor Fiss. It resulted in massive public non-acceptance and the loss of more than a decade of racial equality in many schools.

E. Some Glimpses of Experience in Settlement

I once represented Rick Scott and the Columbia hospital system before he became governor, and then a senator, from Florida.[33] The case was a shareholder suit. The plaintiff's demands were calculated on various assumptions that seemed far-fetched, but the litigation efforts to sort them out would have been lengthy and conducted with no assurance that the result would be

30. *See supra* note 22 and accompanying text (semble).
31. *See infra* Part VI.
32. *See infra* Part VI.
33. The settlement precluded any court ruling on the point.

appropriate under the law.

The parties began mediation with far-apart positions. The process dragged on throughout a day and into the night. At a point after midnight, a solution was reached that involved a complex buy-back of the plaintiff's stock. The parties left, if not exactly arm-in-arm, as less fierce adversaries and much more content than they would have been if they had proceeded to a crushingly expensive and unpredictable judgment.

With a client who does not appreciate the probability of loss in litigation, I have sometimes invoked mathematical expected value,[34] without calling it that. "Let us imagine that we try our case ten times," I might say. "Then, how many times will we win?" I immediately answer the question myself, with contrived modesty. "I'd say we would win, maybe, three times. I'm a good trial lawyer, but I don't want to overestimate. Well, let's call it five times." Then, a separate question: "And what damages will the jury find—what spread, actually, of numbers?" Again, I quickly answer my own question: "Perhaps between two and eight million. Let's say an average of five million."

Now comes the concluding arithmetic. "So, we can expect, on average, to get five of ten victories, or 50 percent, with five million recoverable in each, so that we can guess at recovering 50 percent of five million, or two and a half million. The devastating denouement: "You'd do well to consider the other side's settlement offer of four million dollars, then."

In summary, Professor Fiss's claim that settlement is inferior to adjudication is dubious, at least for the individual litigant or entity with an individual claim.

F. And Professor Fiss Would Impose the Same Costs, Delays, and Burdens on Purely Private Litigation Too

But why consider all of this analysis of individual cases? Aren't we talking about public interest litigation? Well, . . . No. Professor Fiss would impose his regime against settlement not only on public

34. The expected value "is a generalization of the weighted average." EXPECTED VALUE, WIKIPEDIA (last visited July 8, 2021), https://en.wikipedia.org/wiki/Expected_value.

interest litigation, but upon all litigation, including that which concerns purely private goals.[35] He rejects a "two-track strategy," in which some litigation would be encouraged toward settlement and some would not, on the ground that "[a] 'two track' strategy would drain the argument for settlement of much of its appeal."[36] He also argues that it is impossible to formulate adequate criteria for prospectively sorting cases: a dubious argument.[37]

This is a horrifying sacrifice of the individual to the commons. The claims of individuals not bearing any indicia of public interest, Professor Fiss says, should bear the same expense, delays, and burdens as a claim like that in *Brown v. Board of Education*, because to do otherwise would "drain" the argument for settlement, and by extension the Professor's theory, of its appeal.

III. THE PROFESSOR'S ANALYSIS OF POWER IMBALANCES

In another section, Professor Fiss finds that power imbalances are an argument against settlement. A relatively poor litigant facing a relatively wealthy one may be induced to settle because of limited funds.[38] For example, the lesser funded party "might be forced to settle because [it] does not have the resources to finance the litigation."[39] Furthermore, says the Professor, "[i]t 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."[40]

In the first place, this set of allegations sounds far-fetched in a time in which smaller entities can stop major construction projects (*e.g.,* pipelines) as well as major governmental programs.[41] The less-well-heeled party is not necessarily weaker, and

35. Fiss, *supra* note 2, at 1089.

36. *Id.*

37. Dubious because experience shows that lawyers can recognize important issues. *See supra* note 19 and accompanying text.

38. Fiss, *supra* note 2, at 1076.

39. *Id.*

40. *Id.*

41. *See* LOVEINRIBMAN, (last visited Nov. 1, 2022) https://bit.ly/3fopecc (explaining the issue).

contrariwise, the apparently better heeled part often is not. I cringe whenever I hear a claim that the prosecution has much greater resources than defenses do. Sometimes, but often not. The prosecution in an urban district has a limited overall budget and many thousands of cases, so that the allocation to each is likely to be small. I recall one case I tried that charged the defendant with misuse of a telephone credit card.[42] The prosecution required witnesses to be brought in from five different states. The county was not about to spend that kind of money. It couldn't and meet its other obligations. The telephone company paid to bring them all in, and that was the only way the case could be successfully presented.

In the second place, Professor Fiss acknowledges that the power imbalance would exist even if the case were not settled but tried; however, he minimizes the difference.[43] There is no real way to do so. In reality, the better heeled party would be better able to research and plead the case, brief it to the judge, use devices such as focus groups and shadow juries, find persuasive witnesses and experts, dig up dirty cross-examination material, and argue the case.

IV. THE CONJECTURE THAT "JUSTICE MAY NOT BE DONE"

A. Will Settlements Mean a Lesser Justice?

Professor Fiss also charges that "although dockets are trimmed, justice may not be done."[44] The Professor seems not to realize that justice is a loaded word. For all of those who see a victory by the ACLU favorably, for example, there will be others who see it as an injustice. The content of the word justice varies with the person.

Also, the Professor seems to assume that the result of litigation will consistently be "justice," and any deviation from a judgment reached by adjudication will not. But a jury verdict is often utterly unpredictable. And it may change if the case is retried repeatedly

42. This case, as with others set out here, did not result in an opinion that could be cited. *See supra* note 19.

43. Fiss, *supra* note 2, at 1078–79.

44. *Id.* at 1077.

owing to reversal or new trial.[45] Professor Fiss's argument also seems to assume that court opinions are justice, although settlements would not be. There simply isn't any basis for this assumption. There are many instances in which unbroken lines of victories by one side through the court of appeals level are changed by the Supreme Court.[46]

Furthermore, the Professor's trumpet call for adjudication doesn't take account of the docket of the Supreme Court. The Justices receive many thousands of petitions for certiorari every year and grant only a few more than a hundred.[47] We have more alternative dispute resolution methods today, and we make more use of them, than ever before. Does this fact mean a disastrous decrease in the volume of Supreme Court decisions, or in the type of outcomes that, to quote Professor Fiss, "us[e] state power to bring a recalcitrant reality closer to our chosen ideals[?]" Hardly.

B. A Take-Nothing Judgment: Does It Represent a Defeat for Justice?

And adjudication is often an unpredictable path toward "chosen ideals," whichever competing values we choose. Consider the Court's decision in *Brnovich v. Democratic National Committee*,[48] in which the plaintiffs wanted the Supreme Court to declare parts of Arizona's election law unconstitutional. The questioned provisions outlawed so-called ballot harvesting and voting outside one's precinct.[49] The Court majority squarely rejected the plaintiffs' arguments. The Justices said that measures such as these to protect election security were constitutional, and as for the plaintiffs' claim that Arizona had made voting inconvenient and therefore racially discriminatory, they

45. DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 678–83 (Carolina Academic Press, 6th ed. 2019) (law school casebook containing the case of Conway v. Chemical Leaman Tank Lines, 687 F.2d 108 (5th Cir. 1982), tried three times with varying verdicts and judgements, appealed four times, and urging students to consider that judgments, contrary to Professor Fiss's assumption, are not "accurate").

46. *E.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

47. *See* CRUMP ET AL., *supra* note 45, at 728–29.

48. *Brnovich*, 141 S. Ct. at 2330.

49. *See Drop the Georgia Election Lawsuit*, WALL ST. J., July 6, 2021, at A16.

responded that all voting was at least somewhat inconvenient.[50]

Commentators today point out that the Court is "cautiously conservative" and, in spite of earlier predictions of too-far-right outcomes, has upheld legislation that is more progressive than conservative.[51] Does adjudication in the Court, then, fail to bring reality toward our chosen ideals? It should be added that the holding in *Brnovich* seems to doom other suits seeking to avoid alleged racial discrimination, if indeed it exists, on a national scale.[52]

And one might ask whether plaintiffs would have had a less satisfactory result from settlement of their suit at the district court level. Perhaps they could have pointed out to the defendants pathways to better mutual results. Might some pattern of voting in a contiguous precinct within the state's largest cities have been acceptable to the defendants? Maybe doubtful, but we will never know. Perhaps an irascible federal judge could have enhanced this possibility by ordering the parties to present reciprocal settlement demands and requiring them to negotiate their positions in good faith before a forceful mediator.[53] The resulting settlement, then, might have been more akin to justice for the plaintiffs than the adjudication they ultimately received.

C. The Ambiguity of Justice Even After Successful Adjudication

Sometimes adjudication does nothing for the plaintiffs even as it affects the public sphere. The most poignant example here is *Brown v. Board of Education*,[54] the landmark desegregation decision. There were, of course, individual plaintiffs in that case. They were schoolchildren in Topeka, Kansas, where the local district court received their complaint. These children obtained no relief at all—not any removal of a particle of discrimination—from

50. *Brnovich*, 141 S. Ct. at 2338.

51. *See* David B. Rivkin & Andrew M. Grossman, *A Cautiously Conservative Court*, WALL ST. J., July 2, 2021, at A15.

52. *See supra* note 49.

53. *Cf.* CRUMP ET AL., *supra* note 45, at 530–32 (discussing power of court to order parties to mediate and limits of power to require negotiations).

54. Brown v. Bd. of Educ., 345 U.S. 972 (1953) (liability decision); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (remedy decision).

the courts.[55] Adjudication is too slow for a better kind of definitive judgment. Even with a landmark decision in the Supreme Court, this outcome hardly seems like justice. On the other hand, many plaintiffs have received timely relief through settlements.

In summary, the charge that "justice may not be done" remains mystical.

V. THE CLAIM THAT "THE BARGAIN MAY BE STRUCK BY SOMEONE WITHOUT AUTHORITY"

A. What Does This Claim Mean?

Next, Professor Fiss claims that "the bargain" underlying a settlement "may be struck by someone without authority." The argument sounds strange. And the immediate answer is simple. A bargain struck by someone without authority is a nullity.[56] The solution is for the affected party to point out the facts to the court, obtain relief from the non-settlement, and get rid of the offending interloper.

But Professor Fiss seems to have in mind something more sinister. Litigants may not understand their choices well, and they may have representatives whose goals deviate from those of the group.[57] Well, representatives are not perfect, it is true. But they are not necessarily more imperfect in settlement than in trial. The Professor points out that a leader, perhaps a CEO, may prefer to settle a case involving his own misconduct rather than see it bandied about in adversarial processes.[58] But if the CEO succeeds in advancing this solution, he will be accountable to a board of directors and to shareholders. It seems a self-limiting strategy, not one that can be repeated.

B. Are All Representatives Imperfect? Might They All Act "Without Authority?"

Furthermore, Professor Fiss downplays the fact that these

55. *Id.*
56. *See* CRUMP ET AL., *supra* note 45, at 854–55 (discussing lack of authority).
57. Fiss, *supra* note 2, at 1078–79.
58. *Id.*

kinds of plaintiffs are represented by lawyers[59] of their choosing, usually very capable ones. Lawyers who practice this craft generally are adept at explaining potential outcomes and the meanings of documents, such as settlement agreements. Lawyers may have interests that conflict with their client's interests, the Professor points out.[60] Possibly. Could they prefer to settle because that pathway consumes less of their resources? Again, possibly. But how could they succeed in this strategy in law reform litigation, where the objectives are not economical, and where goals are defined by their clients? And why are these conflicts, in law reform litigation, greater in settlement than in adjudication?

In summary, plaintiffs with law reform in their minds tend to be well protected against the particular kinds of skullduggery or incompetence that Professor Fiss fears. If in settlement they are vulnerable to threats from under the radar, they are perhaps more vulnerable in adjudication, since threats there come not only internally but from the opposition too.

This does not mean that the aims and goals of law reformers are secure in an uncertain future. No system can assure that. Settlement agreements may prove to have serious flaws because of societal changes or poorly chosen language. But this possibility is an even greater risk with adjudication. The court chooses the language, without the deeper perspectives of the litigants.

The example of *Brown v. Board of Education* again is relevant, with the Court's insistence on local bodies that were to draw up plans, who could seek more time in doing so, and who were expected to act with all deliberate speed.[61] The decision on unconstitutionality was a landmark, but the remedy was a disaster.[62] More recently, adjudications requiring the Immigration and Naturalization Service to set up separate facilities for men and women led to a situation in which children were separately housed in what both political parties have charged each other as

59. *See id.*

60. *Id.*

61. Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955) (remedy decision).

62. *See* David Crump, *From Freeman to Brown and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. (1993) (explaining how mushy language in the remedy opinion led to many years of continued segregation).

consisting of "cages."[63]

Settlement does not seem to be worse than adjudication when it comes to bargains struck by persons without authority, assuming this odd claim refers to situations that exist frequently at all.

VI. "ABSENCE OF A TRIAL AND JUDGMENT" ALLEGEDLY RENDERS "SUBSEQUENT JUDICIAL INVOLVEMENT TROUBLESOME"

A. A Settlement of Law Reform Litigation Typically Is Embodied in a Judgment

In the first place, we are not really talking about law reform litigation. Recall that Professor Fiss does not wish for there to be "two tracks" that might separate public-impact cases from cases involving purely individual claims.[64] The family that seeks a remedy for the wrongful death of a father and husband, then, will have to navigate all the cumbersome processes that would be required for a law-reform case. Both parties may wish to have their dispute resolved and move on. Professor Fiss seeks to prevent them from enjoying that kind of freedom. His view is of litigation that goes on and on, with the judge forever involved in the parties' activities.[65]

Even as to public interest litigation, the Professor's argument is fatuous. Contrary to his pronouncement, public interest litigation does not feature the "absence of a trial and judgment." As he recognizes, there are such things as consent decrees.[66] Which, of course, are judgments, even if the case is settled. Furthermore, settlements of public or private issues typically result from fact development, including inevitable skirmishes about the facts, which are a necessary basis for both sides'

63. *See The History of the Flores Settlement*, CTR. FOR IMMIGR. STUD. (Feb. 11, 2019), https://cis.org/Report/History-Flores-Settlement.

64. *See supra* Part II(F) (explaining Professor Fiss's rejection of a "two-track" system).

65. "The involvement of the court may continue almost indefinitely." Fiss, *supra* note 2, at 1082.

66. *See id.* at 1083–84.

agreement to their compromise.[67] These processes can tell more than a trial would.

B. A Settlement by Consent Decree Does Not Make Later Judicial Enforcement "Troublesome"

Actually, enforcement of a consent decree may make subsequent judicial involvement more effective—not more "troublesome." A trial would result in findings of fact and conclusions of law, or an opinion, as the main stuff of the resulting adjudication.[68] These are bits and pieces of the court's view but do not guide the parties the way a judgment, or consent decree, might. There may also be an injunctive or declaratory relief, or (more often) a take-nothing judgment,[69] all of which are limited in effect by rules of evidence, procedural issues, and principles of law that are not fitted to the situation.

By way of contrast, a consent decree can be more precise. It is supervised by the judge, who can refuse to enter a consent judgment that is deemed inadequate. And judges do not have to hold back in enforcing consent decrees, any more than they would have to pull punches after a trial and judgment. Sometimes, the enforcement of an institutional reform decree can force the judge to preside over disputes involving minutiae. United States District Judge Arthur Garrity, who had the misfortune of desegregating the South Boston schools, once held a hearing and decided issues about the allocation of ping-pong balls among campuses.[70] "By the final Garrity-decided court case in 1988, Garrity had assumed more control over a school system than any judge in American

67. *See* CRUMP ET AL., *supra* note 45, at 155–77 (providing litigation document example in which settlement occurred after a battle over contested issues that illuminated the merits).

68. These often originate in findings and conclusions provided aversely by the parties, which the court adopts after picking and choosing. *See* FED. R. CIV. P. 52; CRUMP ET AL., *supra* note 45, at 655 (explaining this issue).

69. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2–7 (1996) ("Plaintiffs lose most personal injury trials—that is, they do less well than they would have by settling . . . .").

70. John B. Wood, *Boston grand jury may probe Pentagon Leak after all*, BOS. GLOBE, Jan. 23, 1972, at A42.

history."[71]

Or, consider another desegregation decree, like the draconian order that ultimately changed the New Orleans Police Department.[72] The typical pattern is for the defendant to achieve only imperfect compliance. The plaintiffs then seek a remedy by way of contempt. The court naturally avoids this result but keeps the Sword of Damocles hanging over the defendants, who do slightly better in the next round but still remain far short of full compliance, prompting the plaintiffs to seek contempt again, and so the cycle continues.[73] There is no reason to believe that this sequence will be shorter or better with an adversary judgment instead of a consent decree. In fact, there should be more buy-in by both parties and a decree more precisely tailored to the needs and abilities of both parties.

C. A Settlement Can Follow After Public Input and Be Shaped by Public Comment, although Litigation Probably Cannot

A settlement agreement can obtain buy-in from the public by directly soliciting public input: by holding hearings or town-hall meetings, by surveys, or by other means. An example of this kind of buy-in is furnished by Justice Department negotiations in an antitrust case against the National Association of Realtors.[74] Having reached an agreement, Justice backed out of it, seeking greater assurance that the resulting settlement would protect home sellers and buyers from "notoriously high commissions" charged by brokers. Justice made this move "after seeking public comment."[75] This kind of information—public opinion—probably would be improper for a court to consider in an adjudicative resolution of such a contest. But it is an advantage of settlement.

71. *W. Arthur Garrity Jr.*, WIKIPEDIA, http://en.wikipedia.org/wiki/W. Arthur_Garrity_Jr. (last visited July 9, 2021).

72. Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984).

73. *See* CRUMP ET AL., *supra* note 45, at 813 (showing this effect in *Williams*).

74. *See* Brent Kendall, *Justice Department Withdraws From Realtor Antitrust Settlement*, WALL ST. J., July 9, 2021, at A15.

75. *See id.*

VII. BURDENING THE FEW TO CREATE PUBLIC GOODS FOR FREE RIDERS: DISCOURAGING SETTLEMENT SO LITIGANTS PRODUCE A PRECEDENT BASE

A. Public Goods and Free Riders: An Economically Inefficient Proposal

Professor Fiss's agenda, above all, minimizes individual interests in settlement to serve public values. The Professor justifies this approach by blithely overlooking the burden on litigants. He would have private entities or even individuals undertake more expense and more distraction from normal activities by calling upon litigants to try their cases rather than settle them, even if settling would make more sense to them.[76] And indeed, he presumably would have them undertake the greater expense and delay of appeal, too, because appellate opinions are what creates a precedent base.[77]

Here is how the Professor explains this goal:[78]

> [Litigation] 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 [i.e., judges] . . . 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 . . . but to explicate and give force to [public] values . . . . This duty is not discharged when the parties settle.

And thus, Professor Fiss shows why he would remove incentives to settle, even sensibly.

What the Professor wants to do is to conscript litigants into national service and exploit their wealth and effort to create value that the general public then receives for free. This arrangement is well known to economists. The wealth that is created is non-rival-use goods or public goods.[79] The entire rest of the population

76. Fiss, *supra* note 2, at 1085.

77. The Professor does not mention this consideration, but it would likely be necessary for public impact.

78. Fiss, *supra* note 2, at 1085.

79. *See Non-Rivalrous Goods—Definition and Characteristics*, CORP. FIN. INST., https://corporatefinanceinstitute.com (last visited July 9, 2021).

becomes free riders.[80] The allocation of costs to a single person or entity (or small group of persons or entities), due to the free rider problem, is inefficient because the incentives for the desired activity are misplaced.[81] At a layperson's level, the allocation of costs is simply unfair. But that is Professor Fiss's ideal.

B. Ignoring the Values of Settlement

At the same time, Professor Fiss omits to consider the long list of benefits to litigants from settlement. Here is an informal countdown:[82]

- Cost: Alternate methods of dispute resolution often enable the parties to avoid crushing costs of litigation. Professor Fiss does not take account of the enormity of these costs.
- Privacy: This is a value that is much appreciated among legal scholars, and although not encouraged by the Professor, it can be of great value to litigants. Consider a case involving intellectual property, especially trade secrets, which are at risk of deliberate or inadvertent loss through public litigation.
- Minimizing Distracted Energy: I represented Texaco, Inc. on appeal after Pennzoil Co. had obtained the largest jury verdict in history against it. I visited Texaco headquarters several times and found most activities reduced or at a standstill, other than worrying about this near-existential judgment. I have observed the same effect in individual litigants.
- Timeliness: Professor Fiss's solution would have many more litigants mired in combat for years, through appeals, when they could have resolved their dispute with much less delay.
- Accuracy: Litigants in, say, a large antitrust case, who obtain mediators or arbitrators with expertise in the

80. *See Free Rider Problem Definition*, INVESTOPEDIA, https://www.investopedia.com/terms/f/free_rider_problem.asp (last visited July 9, 2021).

81. *See id.*

82. These advantages of settlement over adjudication are developed generally in CRUMP ET AL., *supra* note 45, at 825–28.

subject, can hope for more accurate results than could ever be produced in jury trials.

- An Enlarged Pie: Arbitrators and mediators are not bound strictly by the law and can produce outcomes that could not have resulted from litigation itself but that are better for both sides.
- Expertise: The parties can obtain dispute resolution professionals who have expertise in the subject of the litigation.
- Control: The parties can decide mutually about their procedures, methods of resolution, and rules.
- Cooperation: People or entities who will encounter each other again in their affairs or industries can structure alternate methods of dispute resolution that avoid destructive patters and that leave room for cooperation afterward.

These values would be lost in Professor Fiss's world.

CONCLUSION

One can envy Professor Fiss for his accomplishment in inspiring so many responses. A catchy title, iconoclastic statements, and a theme that would appeal to academia probably have helped. But these elements of widespread readership do not guarantee quality in the thesis. Professor Fiss's work is not very persuasive, and it has had no real influence, as court rules today encourage settlement rather than being "against" it.

This is one more response to *Against Settlement*. It is probably one of the least favorable reviews. This author's conclusion is that *Against Settlement* is not a serious work, and it should be ignored by scholars who wrestle with these kinds of issues.