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## Some Thoughts About the Economics of Settlement

### Cover Page Footnote

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# SOME THOUGHTS ABOUT THE ECONOMICS OF SETTLEMENT

John Bronsteen\*

## INTRODUCTION

Owen Fiss's piece *Against Settlement* was a response not only to the Alternative Dispute Resolution (ADR) movement, but also more broadly to "the dispute-resolution story that underlies ADR."<sup>1</sup> When Fiss described that story, he attributed it to several canonical articles about the economics of civil procedure written by Richard Posner, George Priest, and Steven Shavell.<sup>2</sup> Although everyone is familiar with *Against Settlement*, one might nonetheless lament that it has not been fully integrated into this economic literature—not to mention that its warnings against the danger of vanishing trials have not been heeded in practice.<sup>3</sup> I suspect that these disappointments can be traced to two related sources. One is the concern that if trial rather than settlement were promoted, the result would be so costly and time-consuming for courts as to render the civil justice system unworkable.<sup>4</sup> The other is the view that Fiss and the economists are speaking different languages, one about justice and the other about utility, and cannot address one another on their own terms.

Neither of these assumptions is self-evidently true, and a primary goal of this essay is to call attention to the need to question them. Those of us who agree with Fiss's arguments must respond to the concerns about costs that seem to resonate so strongly with economists, judges, and policymakers. I will sketch some of these concerns and then consider the extent to which they might be answerable on their own terms.

But the story should not end on those terms, because much has changed since 1984 in the literature on the economics of settlement. No longer do

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1. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

2. *Id.* at 1076 & n.11. See generally Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

3. E.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 tbl.1 (2004).

4. Cf. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 526 (2007) (questioning the widespread assumption that "the system would be crushed under the weight of innumerable trials if summary judgment disappeared"). The title is, of course, an homage to Fiss's essay, the subject of this symposium.

models of settlement behavior begin with the assumption of rational, wealth-maximizing action on the part of the litigants.<sup>5</sup> Instead, behavioral law and economics focuses on values other than wealth that can shape decision making. One of those values is fairness, so behaviorism offers the prospect of opening a new avenue of dialogue between Fiss and the economists.<sup>6</sup> Trials cannot be deemed deadweight losses if they satisfy a preference for fairness, given that preference satisfaction is the economists' own yardstick for measuring value.

Finally, the recent psychological literature on human happiness presents further insights relevant to civil settlement.<sup>7</sup> It calls into question the link between wealth and well-being and suggests, like the behavioral studies, that other values, such as the right to participate in public decisionmaking processes, may be more important to people.

#### I. DEONTIC AND CONSEQUENTIALIST APPROACHES TO VALUE

Before evaluating the arguments for and against settlement on economic grounds, it is worthwhile to step back briefly to consider the ultimate goals of legal policy. Only if we know what we are trying to achieve can we sensibly consider how best to pursue it. For Fiss, "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."<sup>8</sup> For an economist, civil litigation is part of a larger network of societal institutions aimed at improving people's lives by satisfying whatever preferences the people may have.<sup>9</sup> Litigation effects such improvement by deterring future misdeeds and compensating the victims of past ones.

To the extent that the economic view differs from Fiss's regarding the ultimate goals of legal policy, the magnitude and contours of the difference

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5. Compare, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) ("The most important assumption of the model is that potential litigants form rational estimates of the likely decision . . ."), with Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 79–80 (1997) ("The list of reasons litigants might not behave in accordance with the [classic economic] model's predictions is impressively long: Litigants litigate not just for money, but to attain vindication; to establish precedent; 'to express their feelings'; to obtain a hearing; and to satisfy a sense of entitlement regarding use of the courts . . . ." (footnotes omitted) (quoting Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 346 (1976))). Relatedly, see also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) [hereinafter Korobkin & Guthrie, *An Experimental Approach*]; Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996).

6. Cf. Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992 (2002) (reviewing LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002)).

7. See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008).

8. Fiss, *supra* note 1, at 1089.

9. Cf. DANIEL M. HAYBRON, *THE PURSUIT OF UNHAPPINESS: THE ELUSIVE PSYCHOLOGY OF WELL-BEING* 34 (2008) (describing this category of normative theory as "preference satisfaction" or "desire-fulfillment").

are unclear. There would be a significant difference if Fiss's approach were interpreted to mean that certain values are objectively important, no matter whether the citizenry cares about them and no matter the consequences of promoting them. Fiss does not characterize his own view that way, though, referring not to inherent value but rather to "our chosen ideals"<sup>10</sup>—a phrasing that gives a nod to the relevance of choice and preference in defining the ends promoted by law. Moreover, in other work Fiss has memorably affirmed, "[T]he fairness of procedures in part turns on the social ends that they serve. Due process does not write into law the ethical theories of Professor Immanuel Kant."<sup>11</sup> This acknowledgment accords with that of even the most committed and prominent modern deontologists. In *A Theory of Justice*, John Rawls notes, "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."<sup>12</sup>

Conversely, many leading proponents of law and economics do not argue for maximizing utility but rather accept the importance of how that utility is distributed. In a four-hundred-page article titled *Fairness Versus Welfare* claiming to argue that the latter alone should count in policy making, Louis Kaplow and Steven Shavell explicitly disavow the goal of wealth maximization on the ground that it "ignor[es] distributive concerns."<sup>13</sup> Relatedly, Matthew Adler and Eric Posner endorse only a limited version of welfarism, acknowledging that "[m]orality may encompass a plurality" of factors rather than overall utility alone—factors such as "moral rights, the fair distribution of welfare, and even moral considerations wholly detached from welfare, such as intrinsic environmental values."<sup>14</sup>

There is thus common ground between Fiss and the intellectual movement underlying the pro-settlement view. They have overlapping, and potentially even similar, conceptions of what law should ultimately aim to achieve. To be sure, they respectively focus on different aspects of that aim. I would like to focus, though, on the convergence, and to explore the extent to which each's points might resonate with the other.

## II. SKETCHING THE PRO-SETTLEMENT ARGUMENT

Before Fiss wrote *Against Settlement*, a standard economic account of litigation would treat a trial as both a curiosity and a deadweight loss.<sup>15</sup> It was a curiosity because trials create transaction costs that can be avoided

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10. Fiss, *supra* note 1, at 1089.

11. Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 979 (1993).

12. JOHN RAWLS, A THEORY OF JUSTICE 30 (1971); cf. Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 331–32 (1989).

13. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 968 (2001). They explain, "[O]ur critique is limited to notions of fairness that give weight to factors unrelated to individuals' well-being . . ." *Id.* at 968 n.5.

14. MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 53 (2006).

15. See, e.g., William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Posner, *supra* note 2.

via settlement, to the advantage of both the plaintiff and the defendant.<sup>16</sup> The value of a lawsuit was conceived as the plaintiff's odds of victory multiplied by the amount to be won, minus transaction costs.<sup>17</sup> By agreeing to settle for a sum approximating that value, the parties would both benefit; so why would they ever eschew that option? A trial was thus also a deadweight loss, due to the failure to secure such a mutually advantageous outcome: everyone loses and no one gains.

Fiss called attention to the fact that the relative wealth of the parties could influence their respective bargaining positions and affect the settlement amount.<sup>18</sup> This variable is exogenous to the underlying truth of the claims asserted in a lawsuit, and its presence could disconnect a settlement from the value the suit would otherwise have.<sup>19</sup> It could further indicate that a settlement does not necessarily constitute a fair or socially desirable outcome. In addition, Fiss noted that trials can have what an economist would call positive externalities. By articulating and refining the law, trials can benefit countless people who are not parties to the lawsuit.<sup>20</sup>

After Fiss's contribution, it would no longer be sufficient for a pro-settlement economist merely to point out that parties save money by settling. Nevertheless, the cost savings of settlement still constitutes a value to be weighed against other values. Someone seeking to remain pro-settlement notwithstanding Fiss's points might argue in the following way, emphasizing first the cost of trial to parties and then its cost to society.

The first argument, regarding cost to parties, would go as follows. Even if a trial can be a vehicle for justice that benefits the plaintiff and nonparties in ways beyond those possible via settlement, our system has chosen to rely on individual plaintiffs to make that result possible by filing suit and refusing to settle. The system is further structured so as to give those plaintiffs a strong personal incentive *not* to achieve that outcome, because

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16. It should be noted that the early law and economics scholars provided reasons to account for the phenomenon of trials—i.e., to explain what would otherwise be a curiosity. Indeed, that was their primary project in the context of applying economics to litigation. Some of these reasons are discussed *infra*.

17. For a description of this mode of analysis, see Bronsteen, Buccafusco & Masur, *supra* note 7, at 1519–22; Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 7 (2002); and see also Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 101–03 (1990).

18. Fiss, *supra* note 1, at 1076–78.

19. One type of reason Fiss gives—that the poorer party will be less able to pay for discovery and trial—would harm that party at trial as well as in settlement and could therefore be characterized by an economist as being part of the expected value of the litigation. (Of course, Fiss is criticizing precisely this view that such expected value constitutes the relevant worth of the lawsuit.) Another type of reason Fiss gives—that an indigent plaintiff's "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," *id.* at 1076—is specific to settlement and arguably separates the monetary sum of a settlement from the expected value (as expressed simply in a dollar amount) of an adjudication.

20. *E.g.*, *id.* at 1086–87.

settling will always be the economically rational decision.<sup>21</sup> This structure, it would be argued, reveals that our system does not primarily envision litigation as a means of “bring[ing] a recalcitrant reality closer to our chosen ideals.”<sup>22</sup> It would be peculiar and dangerous to rely for something so important on litigants who may well have nothing to gain and much to lose by delivering it. There are other avenues, including those involving the legislative and executive branches, for pursuing social justice. Litigation, however, is the domain of the parties, and we should respect the prevalence of settlement as an indication that they are legitimately pursuing their private interests. Or so the claim would be.

The second argument addresses societal costs. Although settlement advocates would presumably accept that adjudication can serve the public in the ways Fiss emphasizes, they might accuse Fiss of assigning insufficient weight to the social costs of trial. More trials would mean more public money spent to pay jurors and judges, as well as to buy, construct, and maintain courthouses. More trials would also cost society the revenue that would have been generated by jurors and litigants had they spent the time at their jobs rather than in court, and such trials would redirect to lawyers funds that might otherwise have been used more productively.

These social costs might seem a small price to pay for a decision like *Brown v. Board of Education*.<sup>23</sup> But not every trial is *Brown*, and not every dollar spent to finance a trial would otherwise have been spent on a wasteful or frivolous enterprise. The same government fisc that pays for judges and courthouses finances the systems of welfare and public education, among many other crucially valuable programs. When a recalcitrant reality must be brought closer to our chosen ideals, it is not always due to tortfeasors whose behavior must be changed by court-ordered injunctions. Important problems are often addressed through other means, and the public money spent on trials may decrease the amount available for those other means to be employed.

### III. CAN A NEOCLASSICAL ECONOMIST BE AGAINST SETTLEMENT?

Fiss could respond to the point about the social costs of trial, of course, by contending that they are exceeded by its social value. Or he could argue that the costs and benefits of trial are incommensurable. I would like to suggest, however, an additional rejoinder—one that speaks to the proponents of settlement on their own cost-centered terms.

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21. See Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575 (1997). I bracket here the canonical impediments to settlement—e.g., hard bargaining, information asymmetry, and agency costs—that could prevent a mutually beneficial settlement from being offered or accepted. For a discussion of these impediments, see generally, for example, ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* (2003).

22. Fiss, *supra* note 1, at 1089.

23. 347 U.S. 483 (1954).

Although the vast majority of the economic literature on settlement takes a wholly positive view, there are a few exceptions. Some scholars have noted that settlement might suboptimally deter unlawful conduct, but their proposed remedy is to impose increased payouts on defendants rather than to encourage trial.<sup>24</sup> A recent article by Ezra Friedman and Abraham Wickelgren does, however, argue against settlement on economic grounds.<sup>25</sup> Friedman and Wickelgren demonstrate that informational asymmetries can lead to settlements that underdeter defendants and, crucially, that these problems cannot be solved by increasing damage awards because doing so would create the opposite problem of overdeterrence (i.e., chilling behavior that is lawful and socially desirable).<sup>26</sup> They therefore oppose settlement and favor trial in the relevant class of cases.<sup>27</sup>

To these contentions may be added another, closely related, point. As Fiss explains, trial rather than settlement offers an opportunity for a court to articulate the law.<sup>28</sup> Not only may this articulation be valuable for its own sake; not only may it do justice for the parties and for other members of society; not only may it deter future wrongdoing by this defendant and others; but also it may *reduce the number of future lawsuits by clarifying the law*.<sup>29</sup>

A disputed point of law could give rise to lawsuits indefinitely, so long as they all settle. But when a judgment makes clear what behavior is and is not lawful, that clarity can increase efficiency by directing would-be defendants how to act. The efficiency created by bright-line rules can thus be compromised by settlement. If true, this point would answer the primary concern of those who remain “for settlement” even after acknowledging Fiss’s arguments—i.e., the concern that more trials would be too costly and time-consuming for the system to bear.

Some might question whether this sort of argument counts as a point in favor of settlement. Is there not some inconsistency in arguing that a good thing about litigation is that it could decrease the amount of litigation? I do not, however, see this as an inconsistency. Litigation is used to thwart and deter injustice. If it succeeds in one context and is no longer needed there, that result counts as a major success for litigation. If trials produced such clear understandings of legal rules that unlawful behavior diminished, then

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24. E.g., Shavell, *supra* note 21; Kathryn E. Spier, *A Note on the Divergence Between the Private and the Social Motive To Settle Under a Negligence Rule*, 26 J. LEGAL STUD. 613, 614–16 (1997); see also A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INT’L REV. L. & ECON. 109 (1988).

25. Ezra Friedman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System’s Ability To Induce Efficient Behavior*, 61 SMU L. REV. 1355 (2008).

26. *Id.* at 1361–70.

27. *Id.* at 1373.

28. Fiss, *supra* note 1, at 1085.

29. The best examples of such clarification are appellate decisions and written opinions issued by trial judges. But even a jury verdict could signal to potential defendants whether certain conduct that they are considering engaging in would be adjudicated unlawful.



society would benefit greatly. Not only would the diminishment in illegality be its own reward, but also there would be the bonus of saving the large public and private transaction costs of litigation. Whether trials actually have this clarifying and litigation-reducing effect is, of course, an empirical question. But it seems likely that in the long run, they must be preferable to settlements on this dimension. It seems inevitable that a law never interpreted will, over time, be the source of increasing confusion and disagreement. Adjudications spell out the law's meaning in different situations as they arise.

If an increase in the percentage of lawsuits that ended in trial resulted in a decrease in the overall number of lawsuits filed, then the standard economic arguments for settlement would become arguments against settlement. Settlement might be less costly than trial for litigants and for the public in an individual case, but by preventing the law from being explicated via adjudication, settlement would be more costly in the long run by creating the need for more future lawsuits. The many costs of litigation, both public and private, would be increased rather than decreased in the aggregate by settlement.

It might be objected that trial is so expensive that an increase in trials would create more costs than would be saved by the attendant decrease in lawsuits (lawsuits that, had they been filed, would themselves have been settled). But given the number of suits that a single trial might be able to prevent, such an argument seems unavailing. Moreover, the popular assumption that the cost of paying lawyers to go to trial dwarfs that of paying them for pretrial litigation may not accurately describe most cases. In a thorough study published at about the same time as Fiss's article, attorneys were found to charge far less for the trial phase of ordinary cases than for their pretrial phase.<sup>30</sup>

The increased use of summary judgment in recent years might lead some to ask whether we can have our cake and eat it too, i.e., whether pretrial adjudication gives us the norm articulation of trial without the attendant costs. My opinion on this score is no secret.<sup>31</sup> First, summary judgment generates discovery costs by, among other things, incentivizing parties to litigate to the summary judgment phase rather than to settle early.<sup>32</sup> Second, the norms articulated in summary judgment opinions may be influenced by a judge's incentive to clear the docket by granting the motion.<sup>33</sup> Such perverse incentives for a decision maker can severely undercut the value of the decisions.

Let me return finally to the initial claim raised in the previous section. The claim was that our system contemplates litigation primarily as a means of resolving private disputes rather than vindicating public values via

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30. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 104 (1983).

31. Bronsteen, *supra* note 4.

32. *Id.* at 530-32.

33. *Id.* at 539-43.

adjudication; otherwise why would it leave the decisions whether to sue and then whether to litigate through trial up to plaintiffs whose personal monetary incentive is to avoid adjudication by settling?

The answer is that this formulation of the question arguably dodges Fiss's underlying point. In some sense, every lawsuit is both public and private. It is a public forum for resolving a dispute between private citizens; an opportunity for the articulation and enforcement of public values, but one that depends upon the possibly self-interested choices of private individuals; and an enterprise whose funding is divided between public and private sources. Litigation thus plays a dual role that can at times seem an uncomfortable compromise. We recognize its potential for groundbreaking adjudications that move us closer to justice, while also acknowledging the countless instances in which such adjudications do not materialize. We rely on litigants to pay certain costs and attorneys' fees, yet we publicly subsidize the considerable costs of operating the courts themselves.

It would be wrong, therefore, to conclude that the civil justice system is aimed solely or even primarily at pursuing private ends. The private and public are inextricably linked. And although litigants do face monetary incentives to settle, they can also face nonmonetary incentives that cut in the opposite direction, as the following sections will discuss. A settlement with no admission of wrongdoing by the defendant can be a far less satisfying result than a victory at adjudication, independent of the pecuniary costs and benefits involved.

The question, then, is the one Fiss poses: given that there are public and private aspects to litigation and that there will be both adjudication and settlement, which do we encourage or praise?<sup>34</sup> When judges or rulemakers act to promote settlement, are they improving or worsening the civil justice system? Should we welcome settlement or regret it?

The answer to those questions relates back to the societal costs discussed above. It relates also to considerations that go beyond monetary cost, and it is to such considerations that I now turn.

#### IV. BEHAVIORISM AND SETTLEMENT

A major purpose of this symposium is to discuss developments in civil procedure since 1984 and to reconsider *Against Settlement* in light of those developments. No doubt there will be much focus on the rise of aggregate settlement and on forms of aggregate dispute resolution that avoid litigation altogether. There may also be a focus on the vanishing trial and the rise of pretrial adjudication, as well as the current state of ADR. Those issues will rightly take center stage. But it is also worthwhile to discuss the most significant development in the scholarly literature on settlement behavior in the past twenty-five years: the influence of behavioral psychology.

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34. See Fiss, *supra* note 1, at 1075.

In the same year that Fiss published *Against Settlement*, George Priest and Benjamin Klein advanced their famous hypothesis that plaintiffs and defendants should each win fifty percent of the cases that go to adjudication rather than settle.<sup>35</sup> The Priest/Klein hypothesis was grounded in the dominant model of settlement at the time, a model that assumed rational, wealth-maximizing behavior by litigants.<sup>36</sup> According to the model, the value of a lawsuit is the probability of the plaintiff's victory multiplied by the amount to be won, minus transaction costs.<sup>37</sup> If a lawsuit is worth \$50,000 (probability times amount), but each litigant must pay \$10,000 in attorneys' fees to go to adjudication, then the lawsuit's value to the plaintiff is \$40,000 whereas its cost to the defendant is \$60,000.<sup>38</sup> This state of affairs results in a bargaining zone between \$40,000 and \$60,000: within that range, any settlement will be better for both parties than the expected value of a trial, due to the savings from avoiding the transaction costs (attorneys' fees).

This model suggests that trials should be rare. They cost more than settlements while providing no monetary benefits, and litigants are assumed to care about nothing other than such costs and benefits. Only if the parties have different information about the likely result (a situation that should be cured by discovery), or if they each try to capture too much of the bargaining zone by engaging rigidly in hard bargaining,<sup>39</sup> would it be possible for a case to go to trial.

This conception of settlement, which was the only serious model in 1984, has since been amended dramatically by groundbreaking findings in the social sciences. At about the time of *Against Settlement* and the Priest/Klein hypothesis, Daniel Kahneman and Amos Tversky were conducting experiments for which Kahneman would eventually be awarded the Nobel Prize in Economics. The experiments gave rise to prospect theory, which holds that people do not act as rational wealth maximizers but rather make choices based in part on the way their options are framed. Specifically, people are risk-averse with respect to potential gains and risk-seeking with respect to potential losses.<sup>40</sup>

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35. Priest & Klein, *supra* note 5, at 5.

36. *E.g.*, Landes, *supra* note 15, at 61; Posner, *supra* note 2, at 417–18; Priest & Klein, *supra* note 5, at 4.

37. *E.g.*, Posner, *supra* note 2, at 418.

38. *See* Bronsteen, Buccafusco & Masur, *supra* note 7, at 1521; Korobkin, *supra* note 17, at 7.

39. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972–73, 975–76 (1979).

40. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 344 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268–69 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).

Jeff Rachlinski changed the standard economic literature on settlement by applying to it the findings of Kahneman and Tversky.<sup>41</sup> Rachlinski's experiments indicated that when a settlement reflects the expected value of a lawsuit, plaintiffs will be far more likely to deem the settlement acceptable than will defendants.<sup>42</sup> A likely explanation is that plaintiffs view the money as a gain whereas defendants view it as a loss. This makes the plaintiffs risk-averse, preferring a certain settlement to the risk of a trial; but it makes defendants risk-seeking, preferring a possible payout after adjudication to a certain but smaller one in settlement.

Although prospect theory undermines the claim that people act rationally, it does not alter a related feature of the traditional economic model: the assumption that people value only their economic self-interest when they make settlement decisions. Other insights in behavioral psychology do, however, call the latter assumption into question. The most famous such insight comes from the ultimatum bargaining game, wherein one person chooses how to divide a sum of money between herself and another, then the other person accepts or rejects the distribution. Rejection leaves both participants with nothing, so it is always rational to accept the distribution if the game will not be repeated. Yet people nonetheless reject distributions they view as unfair.<sup>43</sup>

Several scholars have reached similar conclusions in the context of settlement.<sup>44</sup> In one experiment, subjects were far more likely to accept a settlement offer if it exceeded the amount they had lost as a result of the tort, even if the probability of victory and the sum to be won remained constant.<sup>45</sup> Such a result seems directly to contradict the assumption of the standard model that wealth maximization is a litigant's only goal.

Thus, since 1984, substantial empirical evidence has emerged to support the view that human beings in general, and parties to litigation in particular, care not just about money but also about fairness. The leading models of settlement now take this preference into account. This development may be interpreted as a vindication of Fiss's argument in *Against Settlement*: by contesting the original premises of the economic model of dispute resolution and arguing instead for justice as a core goal of litigation, Fiss anticipated many of the findings of behavioral economics that are now incorporated into even the economic approach.

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41. Rachlinski, *supra* note 5, at 118–19.

42. *See id.*

43. Werner Güth & Reinhard Tietz, *Ultimatum Bargaining Behavior: A Survey and Comparison of Experimental Results*, 11 J. ECON. PSYCHOL. 417, 447 (1990); Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000).

44. Korobkin & Guthrie, *An Experimental Approach*, *supra* note 5, at 110–11; George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 139 (1993) (“[S]ubject disputants seemed more concerned with achieving what they considered to be a fair settlement of the case than maximizing their own expected value.”).

45. Korobkin & Guthrie, *An Experimental Approach*, *supra* note 5.

Of course, one might see a difference between Fiss and the behaviorists in that he emphasized justice as a public good whereas they take account only of justice's value to private litigants. This difference is important, but it does not eliminate all commonality between Fiss's outlook and the results of the empirical studies. The reason that private litigants care so much about justice is the same reason that justice is a primary public good.<sup>46</sup> To value it is central to our identity and perhaps even to our nature as human beings.<sup>47</sup> We choose it as one of our most cherished ideals in both the private and public sphere, for the same reasons.

The experiments showing that litigants care about fairness, not just money, provide a further response to a pro-settlement argument discussed above. The argument was that the civil justice system's purpose must be simple dispute resolution rather than some more grand notion of public justice, because it would be nonsensical to trust the latter value to litigants who are incentivized to ignore it. As the behaviorists have shown, a litigant's incentives are more complicated; they include values other than wealth maximization. In light of this understanding, it does not seem so naïve or bizarre to expect that litigants can be counted on, at least in some cases, to pursue justice rather than merely to accept a deal that is the economically rational choice in private terms. And the greater the wrong, the more likely a plaintiff would be to care about righting it, all else being equal.

## V. HAPPINESS AND SETTLEMENT

The most recent development in the literature that models settlement behavior is the incorporation of new psychological findings about human happiness or hedonics.<sup>48</sup> Most of the early articles have focused on people's capacity to adapt to injuries and on the implications of that adaptation for litigation. Cass Sunstein, for example, has suggested that jurors may be awarding excessive damages to plaintiffs who have suffered injuries that are shocking but susceptible to adaptation, while undercompensating plaintiffs for injuries that are less dramatic but also less adaptable.<sup>49</sup> Chris Buccafusco, Jonathan Masur, and I have argued that a plaintiff's perception of what constitutes fair compensation may decrease as

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46. Cf. RAWLS, *supra* note 12, at 3 ("Justice is the first virtue of social institutions, as truth is of systems of thought.").

47. See generally MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* (2006); ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE* (1994).

48. See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005); Bronsteen, Buccafusco & Masur, *supra* note 7; Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157 (2008).

49. Sunstein, *supra* note 48.

she adapts to her injury, and that delays in the litigation process could therefore increase the probability of settlement.<sup>50</sup>

But the literature on happiness goes beyond the issue of adaptation. The research indicates that when people have the opportunity to participate in political processes, it increases their subjective well-being far more dramatically than might be thought.<sup>51</sup> One possible implication for litigation could be that trials, which create opportunities for citizens to participate in public decision making as jurors, have an underappreciated value.<sup>52</sup> Another, and perhaps more likely, implication is that settlement-promoting procedures may frustrate and deject plaintiffs. A plaintiff who wants to participate in a trial and to seek an impartial judgment that she has been wronged—along with, possibly, an injunction that would secure justice going forward—will be harmed by the coercive tactics of a judge who tries to influence her to settle.

Our well-being thus depends on our not being discouraged from participating in political processes, and litigation is a public process by which law is interpreted and produced. Models of litigation that focus only on outcomes can miss this point. As Bruno Frey and Alois Stutzer note, “People are likely to experience happiness not only from the actual outcomes but also from the process itself . . . . Individuals may, for instance, experience a higher subjective well-being when they are treated in a way they consider to be just and fair . . . .”<sup>53</sup>

If the civil justice system’s rules, or the figures of authority (judges) who administer those rules, make it more difficult for litigants to pursue fully the process of litigation, that will undermine the litigants’ trust in the system and satisfaction with it. People evaluate procedures in terms of “assessments of impartiality, trustworthiness of superiors and authorities, and the extent to which individuals feel they are treated with dignity.”<sup>54</sup> None of those considerations are fulfilled via settlement-promoting rules or behavior that is viewed by parties as coercive, whereas they may well be embodied in the adjudication of an impartial decision maker.

In serving justice, trials therefore may also promote the well-being of the participants. There are costs but also benefits, and these benefits apply to the public as well because everyone—not just those who participate—gains

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50. Bronsteen, Buccafusco & Masur, *supra* note 7. The text is actually a slight oversimplification, because our claims in that article are supported by two independent explanations of the empirical studies, only one of which is that litigants value fairness. The phenomenon we identify, and the predictions we make, would be unchanged if a plaintiff’s settlement decision making were characterized entirely in terms of gain/loss framing rather than in terms of an attachment to fairness. *Id.* at 1525.

51. BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING 143, 149–50 (2002).

52. Drawing these sorts of inferences is complicated, admittedly, by the fact that Bruno Frey and Alois Stutzer find the right to participate to be far more important than actual participation. *See id.* at 167.

53. *Id.* at 153.

54. *Id.* at 154.

from being governed by a system that offers broad rights of participation.<sup>55</sup> The classic pre-1984 view of trial as a deadweight loss and of settlement as an unalloyed good has thus undergone the need for serious revision since Fiss initially voiced opposition to it.

#### CONCLUSION

Even now, and perhaps now more than ever, judges and policy makers assume that more trials would crush the civil justice system under the weight of the cost and time that those trials entail. They might appreciate Fiss's arguments in *Against Settlement* and might even agree that settlement has significant undesirable features, but they would view this "capitulation to the conditions of mass society"<sup>56</sup> as unavoidable and far better than the alternative.

I have suggested that this concern might be met on its own terms by the point that trials may decrease the total amount of litigation by clarifying legal principles and, thus, making it easier for potential tortfeasors to understand and comply with the law. A procedure that diminishes law breaking and thereby also reduces societal litigation costs would have much to commend it. These possibilities merit empirical exploration. Based on the results, it is possible that the traditional economic view of trial should be reversed in certain respects.

Moreover, the benefits of trial and costs of settlement may not be captured fully by pecuniary assessments. The psychological findings that have emerged in the past twenty-five years indicate how important fairness is to people. This desire for fairness affects individual decision making in litigation, as well as the perceptions (of participants and the public alike) of the legitimacy and value of the civil justice system. Pro-settlement rules or activities could thus potentially create harm by pressuring litigants to cut short their participation in the system and their pursuit of an impartial adjudication.

These developments in the social sciences support Fiss's original contention that trial is not simply a costly, inefficient version of dispute resolution. It can have great public and private value, in both monetary and nonmonetary terms.

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55. This is Frey and Stutzer's core finding, as discussed above.

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

*Notes & Observations*