Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century

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I. INTRODUCTION

Should a court vacate either its own decision or the decision of a lower court at parties' request so that, with such "vacatur on consent," settlement will occur? Should courts vacate decisions "as moot" when parties settle after those decisions are issued but while petitions for rehearing or certiorari are filed or notices of appeal pending? At first glance, vacatur may seem a narrow issue, of technical interest only. Yet this question, which has recently prompted an extensive debate in case law and commentary, is not for proceduralists alone. Nor is it happenstance that state and federal case law addressing this question has suddenly mushroomed and that the United States Supreme Court has agreed to hear cases with various iterations of this issue.¹

In responses to vacatur on consent lie the central problems of fin-de-siecle procedure: What value should be accorded adjudication? What limits, if any, should there be on courts' encouragement and facilitation of settlement? Who owns lawsuits, the risks they entail, and the decisions generated in their wake? What do the words "public" and "private" mean in the context of court decisions? How should one balance litigants' autonomy and third party interests in litigation?

To demonstrate that these major questions of social policy reside in the specific issue of vacatur on consent, I begin with three recent cases, Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.², Neary Regents of the University of California,³ and U.S. Bancorp Mortgage Co. v. Bonner Mall,⁴ in which judges struggle with the problem of vacatur. After sketching the contours, I turn to how the case law on vacatur illuminates contemporary values about the utility and desirability of adjudication. This is a time of transition; competing ideologies are evident in the struggle for the definition of the work and purpose of courts. Therefore, tensions exist between the burst of litigant autonomy (represented by the vacatur on consent cases of Neary, Bonner Mall, and Kaisha) and two defining characteristics of con-

¹. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 114 S. Ct. 1367, 1368 (1994) (submission of new briefs on question of whether settlement while the case was pending before the Supreme Court required vacatur of the Ninth Circuit and trial court opinions), discussed infra notes 41–51 and accompanying text; Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 114 S. Ct. 425 (1993) (per curiam dismissal of the writ as improvidently granted because the issue of petitioner's standing to intervene was not properly presented), discussed infra notes 28–40 and accompanying text.
⁴. 2 F.3d 899 (9th Cir. 1993), cert. granted, 114 S. Ct. 681 (1994), briefing on effects of stipulation of settlement ordered, 114 S. Ct. 1367, 1368 (1994). See infra notes 41–51 and accompanying text.
temporary procedural developments: the ascendancy of judicial control of litigation (embodied in managerial judging)\(^5\) and the growing interest in aggregating cases into ever larger amalgams (resulting in the subordination of individual control over cases and in formal and informal preclusion).

With the advent of managerial judges has come ever-growing pressure to control litigants and their lawyers; in contrast, with vacatur on consent, litigants gain the authority to revise judicial opinions. Aggregation techniques and preclusion doctrine demonstrate contemporary understandings of the interrelationships among cases and of the third party effects of decisions between one set of litigants. Vacatur works to undo a decision made, and hence, to attempt to limit its subsequent power.

These competing impulses—let parties settle in any way they can, yet control litigants to maximize the utility of decisionmaking—complicate even the descriptive story to be told. Although some judges and commentators write that vacatur on consent is an impermissible attempt at “rewriting history”\(^6\) and “erasure,”\(^7\) those phrases fail to capture the variety of consequences and the confusion that occurs when judgments are vacated by consent, in contrast to when vacatur is predicated upon a legal defect. Adjudication has occurred, sometimes with attendant publicity. While some federal circuits have held that opinions vacated on consent have no subsequent legal value, other circuits are more reluctant to ignore these decisions and permit case-by-case evaluation to decide whether a vacated opinion could be used subsequently as collateral estoppel.\(^8\) Further, one finds judges relying on cases vacated by consent because they offer “persuasive authority.”\(^9\) And on occasion, one can even find trial judges balking at

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9. See, e.g., In re Finley, Kumle, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) (“a logical and well-reasoned decision, despite vacatur, is always persuasive authority”); IBM Credit Corp. v. United Home for Aged Hebrews, 1994 U.S. Dist. LEXIS 4372, at *8 (S.D.N.Y. 1994) (“Once a decision has been filed and in the public
taking back what has happened and refusing appellate court mandates to vacate judgments. When judges hedge, recycling vacated decisions and muddying the effects of vacatur, judges reflect contemporary views about the value of their work, the inter-connections among different cases, and about the desirability of using the outcome in one case to affect another. Thus, enthusiasm for judicial control, aggregation, and preclusion peek through even when judges are asked to vacate judgments as part of settlement, as does judicial ambivalence towards this settlement practice.

Vacatur on consent thereby reveals the complexity of the contemporary procedural story. On the one hand, on almost every occasion, judges and lawyers extol the virtues of settlement and the desirability of enabling private accommodations among litigants to end disputes without state-authored adjudication. The bench and bar champion court houses with "many doors," in the hopes that disputants will voluntarily abandon their disputes either before adjudication is required or while an appeal is pending. Some go further and urge mandatory alternative dispute resolution and sanctions for those who insist on adjudication, but do not demonstrate its utility. On the other hand, as new allegations of harm become the subject of litigation, from tort claims of toxic substances to corporate malfeasance to the criminal docket, the links among cases and litigants are plain. Calls for aggregate processing—for state control over litigants to subordinate individual interests to those of the larger group—are also a regular feature of the current litigation landscape.

After setting forth these trends and the tensions among them, I then turn to appraise these developments. Should they be lauded, lamented, or met without much emotion? To decide whether there is anything troubling about parties' requests that judges "set aside" judgments and hold them "for domain, its influence beyond any effect on the parties is based solely upon future readers' views of its merit, whether vacated in connection with a settlement or not so vacated.")


naught," one must evaluate the current celebration of alternative dispute resolution, and particularly of settlement, and its impact on the understanding of the judicial role. That discussion forms the concluding portions of this essay.

Vacatur on consent is a vivid moment of judicial involvement in settlement. Jurists across the country are urging such involvement, and vacatur on consent could be understood as simply another tool by which to encourage settlement. Although more visible than the pretrial settlement conference in which judges advise parties on the viability of claims, vacatur on consent is not categorically distinguishable because, like other means of promoting settlement, it demonstrates a preference for parties' agreements over adjudication. As one fashions arguments for and against the practice, one constantly returns to questions about the nature and meaning of courts, the value of adjudication, and the desirability of litigant control over the shape, timing, nature of relief, and mode of conclusion of a dispute.

Opponents of vacatur on consent claim it aberrant, a sport, a species different from what courts commonly do. However, vacatur on consent is not as foreign as some portray it. Parallels can be found in the practices of expunging arrest and conviction records, in authorizing sealed judgments and records, and in depublishing opinions. Further, vacatur is not a novel presentation of the proposition that parties can, as a part of their settlement, enlist a court to provide them with what Judge Frank Easterbrook has termed a "public act of the government." When called a "consent decree," such

12. This phrase comes from a 1942 Report to the Judicial Conference of the United States. See COMMITTEE ON PUNISHMENT FOR CRIME, JUDICIAL CONFERENCE OF THE U.S. REPORT TO THE JUDICIAL CONFERENCE OF THE COMM. ON PUNISHMENT FOR CRIME 20 (1942). The Committee proposed a statute to reform sentencing, id. at 14–20, including the capacity to expunge sentences of youthful offenders. See Draft of an Act Recommended by the Committee to Provide a Correctional System for Adult and Youth Offenders Convicted in Courts of the United States, id. § 13, at 20. See also Federal Corrections Act and Improvement of Parole: Hearings on H.R. 2139 and H.R. 2140 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 78th Cong., 1st Sess. 1, 5–6 (1943) (committee proposal transmitted to Congress). In redrafting, Congress replaced the phrase "held for naught" with language stating that a youthful offender could obtain a certificate to "set aside" a conviction and that such certification would have "the same effect as a pardon." See UNITED STATES ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE OF THE SENIOR CIRCUIT JUDGES 18–19 (1946). As finally enacted, the Federal Youth Corrections Act (FYCA) authorized convictions to be "set aside." 18 U.S.C. § 5021 (1950) (repealed 1984). See infra notes 157–174 and accompanying text. Neither the Committee's Report nor the legislative history discusses the meaning of either the phrase "held for naught" or "set aside." See Doe v. Webster, 606 F.2d 1226, 1235 n.40 (D.C. Cir. 1979).

13. For discussion of other recent innovations in contemporary procedure suggesting that we as a polity have declining interest in adjudicatory judgments, see Judith Resnik, Judgment Held "For Naught," (The Levine Lecture, Oct. 1993), FORDHAM L. REV. (forthcoming 1994).

a "public act" is routinely entered either before or after adjudication of claims in trial courts across the United States.

Absent some effort to fashion a line between trial and appellate courts (i.e., that settlement efforts are peculiarly the domain of the trial level), it is difficult to distinguish the consent decree authored by the parties and routinely entered by the trial judge and the settlement agreement that courts (at any level) enable when they vacate decisions on consent. Both consent decrees and vacatur on consent avoid imposing risks on litigants of further conflict and of the uncertainty of litigation, and both accede to litigants' express desires for closure based on party-fashioned resolutions.

Another critique of vacatur argues that it is inefficient. That claim assumes the propriety of permitting vacatur on consent but argues either that it fails to bring about settlements promptly or that it imposes costs by diminishing the utility of decisions for third parties.15 Others adopt the opposite posture: that vacatur enables settlements that would not otherwise occur and thereby conserves both private and public resources for the disputes that require attention.16 The efficiency calculation is not only dependent upon different views of the effects of the availability of post-decision vacatur but also on assumptions of what use third parties may make of a decision produced in a previous litigation and of settlements that occur prior to adjudication. At issue is what obligations one imposes on disputants and courts towards potentially-interested third parties.

It is because of these third parties that vacatur on consent has been termed unfair; litigants concerned about precedent (proverbial "repeat players") may, by means of vacatur on consent, gain advantage by the possibility of shopping effectively in the "market" of trial and appellate court opinions and presumably controlling the shape of case law and precedents. However, vacatur on consent may also equip "one-shot" players with more bargaining power than they would otherwise have to buy off risky appeals and avoid facing total defeat. Further, unlike many settlements before trial, vacatur on consent is often visible and may provide third parties (including one-shotters) with information that would have been confidential, had settlement predated a published or "on line" judicial opinion.17 But this advantage, that vacated opinions have a tendency to reappear as "law" and

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17. See infra text accompanying notes 84–104.
are relied upon by other courts despite having been vacated on consent, prompts yet another critique—also related to efficiency. Given the ambiguity that can inhere in the gesture, vacatur on consent may be undone in practice.

A final challenge to vacatur on consent posits that it violates public values because it is (somehow) basically incompatible with the role of courts. That complaint is undermined not only by the existence of analogous practices, such as consent decrees, but also by a myriad of contemporary developments that promote, as a matter of public policy, the settlement of disputes and the diminution of the role of formal adjudication. Indeed, a celebration of settlement can often be heard in the judicial opinions that authorize vacatur on consent, and such celebration can also be found in both trial and appellate court creation of settlement programs. Those judges who dislike vacatur have not, thus far, broadened their critique to include other forms of promoting settlement, nor do they register objection to efforts to settle pending appellate cases.

When judges, whom we might imagine to be the most dedicated protectors of traditional judicial processes, vocally promote settlements and when many of them join in shaping rules like vacatur on consent to inspire parties to settle, we (non-judges) must pause to hear them. A host of participants—lawyers, judges, litigants—see adjudication as a second best solution. That view, that judgment itself is “for naught,” is key to understanding the reformation of civil litigation at the end of this century. If vacatur on consent is impermissible, then the concerns of those who advocate its prohibition should also prompt reconsideration of other late twentieth century innovations currently viewed as unproblematic adaptations to case loads and to litigants’ (and judges’) desires to escape the miseries of litigation.

II. SETTING THE FRAMEWORK: VARIATIONS ON VACATUR

When parties ask judges to vacate decisions because of settlement, judges often respond by making statements about the meaning and nature of the work that they do when deciding cases and when facilitating settlements. Details of three of the dozens of reported cases illuminate when such requests are made and the exchanges among judges and litigants about the propriety of vacatur on consent.

A first example is Neary v. Regents of the University of California, a libel action about why some 850 cows died. In 1979, veterinarians employed
by the University published a report claiming that those cows, owned by George Neary, died from mismanagement, rather than from being sprayed with toxaphene, a chemical provided by health officials for pregnant heifers possibly exposed to scabies mites.\textsuperscript{19} George Neary sued, alleging that he had been libeled. After extended litigation, including the grant and reversal of summary judgment for the defendants\textsuperscript{20} and a four-month trial,\textsuperscript{21} a jury awarded Neary seven million dollars. While the defendants' appeal was pending, the parties informed the appellate court of their settlement—contingent upon action by that court. All the court was supposed to do was to reverse or vacate the jury verdict.\textsuperscript{22} The intermediate appellate court said no. The Honorable J. Anthony Kline wrote that, while the parties were free to settle (and therefore dismiss the pending appeal), they could not insist that an appellate court change a jury judgment as a part of that settlement.\textsuperscript{23} In his view:

As imperfect as the process of trial may be, it is the way in which our society establishes legal truth. Because it is an adjudicative and not simply a dispositional act, the reversal of a judgment not thought to be legally erroneous simply to effectuate settlement would trivialize the work of the trial courts and undermine the integrity of the entire judicial process.\textsuperscript{24}

That decision sparked considerable controversy,\textsuperscript{25} as has the decision of the California Supreme Court, reversing the intermediate court and creating a "strong presumption" in favor of such requests. As that court explained: "[a]s a general rule, the parties should be entitled to a stipulated reversal to

\begin{itemize}
\item \textsuperscript{19} See Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 774 (Ct. App. 1991).
\item \textsuperscript{20} Neary filed his libel action in 1979 and amended it in 1982. In 1984, the trial court rendered summary judgment for defendants on the grounds that California law privileged the publication of the report. In 1986, the California Court of Appeal reversed, holding that the questions of whether the publication involved a "policy decision" and whether it was required to be published presented triable issues of fact. Neary v. Regents of Univ. of Cal., 230 Cal. Rptr. 281, 286 (Ct. App. 1986).
\item \textsuperscript{21} Neary, 278 Cal. Rptr. at 777 ("producing 63 volumes of reporter's transcripts comprising nearly 13,000 pages").
\item \textsuperscript{22} Id. at 774 ("the parties have advised the court that stipulated reversal is a condition precedent to their pending settlement of this litigation and that dismissal of the appeals will not suffice"). See discussion, infra notes 115-117 and accompanying text, on the confusion about whether the parties were seeking "vacatur" or "reversal.
\item \textsuperscript{23} Id. at 778.
\item \textsuperscript{24} Id.
\end{itemize}
effectuate settlement absent a showing of extraordinary circumstances that warrant an exception." The Supreme Court ruling, in turn, has prompted members of the California legislature to propose a statute declaring that:

judgments in civil matters are public acts which, once entered, should not be subject to alteration by private agreement and that these agreements are, therefore, violative of the public policy of this state."

The debate about vacatur on consent is by no means confined to the state courts. In 1993, in Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., the United States Supreme Court took up but then declined to rule on the merits of the issue. The Court had granted certiorari to decide whether federal appellate courts should "routinely vacate district court final judgments at the parties' request when cases are settled while on appeal," but held instead that the litigant (Izumi) objecting to that vacatur had not preserved the question of its standing to raise the issue. Kaisha brings into focus an additional aspect of the issues illustrated by Neary—third parties' interests in the outcomes of cases to which they are not named disputants.


27. Cal. 102, Cal. 1993-94 Reg. Sess. (to amend § 128 (a)(8) of the Cal. Code of Civil Procedure) (introduced Jan. 13, 1993 by Senator Lockyer). At one point, the bill was modified to permit such stipulations upon a showing of "substantial legal or factual justification." See Cal. 102, Cal. 1993-94 Reg. Sess. (1993), as amended May 13, 1993, approved by the California Senate on June 7, 1993; see also 152 CAL. SENATE WKLY HIST. 81 (Feb. 3, 1994). Thereafter, the bill was referred to the California Assembly, which first deferred consideration because the Kaisha case was pending before the United States Supreme Court and then, after comments from the California Judges Association, deleted the modification to return the bill to the text cited above. See Letter from Constance Dove, Executive Dir., California Judges Association to Assembly Member Phil Isenberg (March 29, 1994) (on file with author); Assembly amendments of May 26, 1994 (CA-BILLTXT 1993 CA.S.B. 102 (SN)). As of this writing, the bill is before the Assembly Judiciary Committee. Interview with Senator Bill Lockyer's staff in Sacramento, Cal. (Sept. 1993; June, 1994).


29. Id. at 426.

30. Id. at 426. Izumi had been a litigant at some phases of the dispute, see infra notes 32-40, 81, but was not a party to the immediate litigation, and its motion to intervene at the appellate level had been denied. Izumi had not challenged that decision in its certiorari petition. 114 S. Ct. at 426.
Kaisha involved neither ranchers nor cows but whether the distribution of electric razors violated antitrust and federal trade laws.\(^{31}\) In 1984, in a federal court in Florida, Philips sued a distributor, the Windmere Corporation, for trade dress infringement and sued both Izumi (a competing manufacturer of electric razors)\(^{32}\) and Windmere for patent infringement and unfair competition.\(^{33}\) Both defendants filed counterclaims.\(^{34}\) After partial summary judgments and jury decisions,\(^{35}\) Philips lost both the unfair competition and the antitrust claims; the jury awarded Windmere $89.6 million, plus attorneys' fees and costs.\(^{36}\) While Philips' appeal was pending, Philips and Windmere settled; Philips agreed to pay $57 million, and Windmere agreed to join Philips in seeking vacatur of the judgment, which the Federal Circuit then granted.\(^{37}\)


34. Izumi counterclaimed that Philips' patent infringed on Izumi's patent rights and was thus invalid. Windmere counterclaimed that Philips was violating antitrust, anti-dumping, and other laws. Based on a contract between Izumi and Windmere, Izumi financed the trade dress and patent defense, while Windmere financed the antitrust counterclaim litigation. See Brief for the Petitioner on the Merits at 2-3, Kaisha, 114 S. Ct. 425 (1993) (No. 92-1123) [hereinafter, Kaisha Supreme Court Merits Brief.]


37. Philips v. Windmere III, 971 F.2d at 730-31; Kaisha, 114 S. Ct. at 426. The Circuit described that, while vacatur on consent is "the general rule," courts are not required to grant it "whatever the circumstances." 971 F.2d at 731.
Whose Judgment?

Kaisha expands the problem illustrated by Neary not only because it moves from the state to the federal courts but also from litigation like Neary, which while precedent-setting, appeared to be unlikely to be relied upon by third parties, to facts that make plain the relationship between vacatur on consent and preclusion doctrine. Patent and copyright infringement have been the context for major developments in preclusion law. Not only was Izumi involved in another action with Philips but so was Sears, also a distributor of Izumi razors; the Philips-Izumi-Windmere litigation had been used preclusively in the Philips-Izumi-Sears litigation. Thus, the Federal Circuit had before it demonstrated reliance on the decision by another court and another party.

A third example of vacatur on consent moves to yet another legal context, bankruptcy, and yet another pattern of activities that prompts the question of the relationship between settlement and vacatur. In 1986, the Bonner Mall partnership bought a mall in Bonner Country, Idaho. In 1991, prompted by U.S. Bancorp Mortgage Company's foreclosure efforts, Bonner

38. While the parties in Neary had argued about the relevance of collateral estoppel to the propriety of granting vacatur on consent, the California Supreme Court refrained from addressing the issue as not properly presented. Neary v. Regents of Univ. of Cal., 834 P.2d 119, 125 (Cal. 1992).


40. In 1985 (one year after it commenced litigation against Windmere and Izumi in Florida), Philips commenced—in an Illinois federal court—another similar case, against Izumi and Sears, which also distributes Izumi razors. After Philips prevailed in the initial round of litigation in a Florida federal court, Philips sought to use that victory affirmatively, to preclude Izumi from pursuing antitrust claims in the Illinois litigation. In 1987, the Illinois federal court held that Izumi's antitrust claims were "compulsory counterclaims" that had not been raised in the Windmere litigation and were therefore barred. Philips v. Sears I, No. 85 C 5366, 1987 WL 26123, at *5 (N.D. Ill. Dec. 2, 1987). In 1988, that trial court also held that Philips could continue to pursue infringement violations against Sears but that Philips' failure to bring its patent claims against Izumi in the Florida litigation precluded it from pursuing Izumi in the Illinois case. U.S. Philips Corp. v. Sears Roebuck & Co., No. 85 C 5366, 1988 WL 64545, at *4 (N.D. Ill. June 13, 1988) [hereinafter Philips v. Sears II].

Mall Partnership filed for bankruptcy and initially obtained bankruptcy law's automatic stay of the foreclosure proceeding. The bankruptcy court later determined that Chapter 11 of the Bankruptcy Code did not permit approval, over the objection of unpaid creditors, of a reorganization plan in which the original owners would continue their ownership because of their contribution of "new value." The federal district court reversed, the Ninth Circuit affirmed, permitting this "new value exception," and the United States Supreme Court granted certiorari to review this major question in bankruptcy law.

About a month before the case was to be argued, the parties entered into a "consensual plan of reorganization," which was confirmed by the bankruptcy court. No mention was made in the agreement about vacatur of judicial decisions. Thereafter, Bonner Mall (the reorganized debtor) filed with the United States Supreme Court a request that the petition for certiorari be dismissed as moot. U.S. Bancorp (the debtor who had objected to the "new value exception") agreed but also requested that, although the "parties did not... discuss or reach any agreement relating to vacatur of the decisions below," the Supreme Court vacate those rulings. The Supreme Court responded by calling for new briefing on the question of the legal consequences of "voluntary settlement of the parties."

**Bonner Mall** offers another dimension of the problems thus far exemplified by *Kaisha* and *Neary*. What impact do settlements, subsequent

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43. See *In re Bonner Mall Partnership*, 142 B.R. 911 (D. Id. 1992), aff'd, 2 F.3d 899 (9th Cir. 1993).
44. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 114 S. Ct. 681 (1994) (granting certiorari to respond to whether the "new value 'exception' to the absolute priority rule survived the enactment of the Bankruptcy Reform Act of 1978"). The Solicitor General not only filed an amicus brief (on behalf of the FDIC and the RTC, both of whom are secured creditors in bankruptcy cases and opposed the "new value exception") but was also granted leave to participate in the oral argument. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 114 S. Ct. 1215 (1994). See Michael H. Strub, Jr., *Competition, Bargaining, and Exclusivity Under the New Value Rule: Applying the Single-Asset Paradigm of Bonner Mall*, 111 BANKING L.J. 228, 230 (1994) (reviewing issues raised by Ninth Circuit decision, which was the first circuit to "squarely address" whether the new value exception "survived" codification of the "absolute priority rule").
to adjudication, have on decisions even in the absence of parties' bargaining to vacate rulings? While the Supreme Court has held that activities unrelated to the parties—"happenstance"—can require mootness, at issue in Bonner Mall is the interrelationship between the pendency of a case (on appeal, on petition for rehearing en banc, on cert.) and settlement. Should the legal ruling of the Ninth Circuit, which has stood as the "law" on new value since August of 1993, be redacted because of an agreement made in March of 1994 to settle the underlying dispute? Should the stage at which settlement occurs, or the likelihood of appellate revision affect courts' willingness to vacate because of settlement? At issue is the relationship between litigant-borne risk, intrinsic to the pendency of litigation, and court-issued decisions.

In Neary and Kaisha, trial judges had undertaken the adjudication of legal claims and juries had found facts, one party had noticed an appeal, and then the parties requested that appellate courts vacate decisions as a part of their settlement. At that point, someone not directly a party to the deal—either another litigant or a judge—protested, and judges had to articulate the propriety of discarding an adjudicated decision. In neither Neary nor Kaisha did the parties expressly argue that the adjudications sought to be vacated were flawed legally or factually. However, in both, there are intimations that litigants are signaling by vacatur on consent weaknesses in the decisions to be vacated. In Neary, the


49. Apparently, vacatur is a phenomenon occurring with some frequency in bankruptcy cases within the Ninth Circuit, although the conditions under which vacatur occurs vary. See, e.g., In re Newberry Corp., 161 B.R. 999, 1000 (Bankr. 9th Cir., 1994) (on motion of parties to "vacate and annul," decision reported at 145 B.R. 998 (Bankr. 9th Cir., 1992), vacated); In re Specialty Plywood, Inc., 1994 Bankr. LEXIS 43 (Bankr. 9th Cir., Mar. 30, 1994), vacating 160 B.R. 627 (Bankr. 9th Cir. 1993) (while an appeal was pending before the Ninth Circuit of the 1993 decision, the parties settled; vacated on parties' settlement); In re Tucson Indus. Partners, 990 F.2d 1099 (9th Cir. 1993), vacating 129 B.R. 614 (Bankr. 9th Cir., 1991) (settlement agreement was "reached by the parties before the Bankruptcy Appellate Panel decision was issued").

50. This is the distinction advanced by Judge Amalya Kearse, in Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (distinguishing Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280 (2d Cir. 1985) as a rule permitting vacatur of trial court opinions, subject to review "as of right," as contrasted with appellate court opinions, that are final subject to review provided only at the discretion of either an appellate court's rehearing or rehearing en banc or of the Supreme Court).

51. In Bonner Mall, the argument advanced is that because district court civil decisions in "private" cases are reversed in under 20 percent of the cases, but the Supreme Court revises decisions in some 70 percent of the cases it decides, vacatur of cases settling while pending before the Supreme Court is more appropriate than at the trial court. U.S. Bancorp Merits Brief, Bonner Mall, supra note 46, at 32–33.

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litigants flirted with a request for reversal, and in Kaisha both Philips and the United States (as an amicus in the United States Supreme Court) argued that a settlement on appeal itself raises questions about the quality of the decisionmaking below. In Bonner Mall, the United States (again as an amicus) repeated that theme, that settlement "reflects . . . [an] unwillingness to insist on the rights accruing" under a judgment, and therefore that the judgment itself is not worth preserving.

III. ASSESSING THESE DEVELOPMENTS

A rich and growing body of law and practice thus debates vacatur on consent. The federal courts are split on its propriety and import. The

52. See infra text accompanying notes 115–117.

53. Philips Brief on the Merits as Respondents at 4–9, Kaisha, 114 S. Ct. 425 (1993) (No. 92-1123) (hereinafter Philips Merits Brief, Kaisha) (detailing the basis for Philips' appeal on the merits and then arguing that, by settlement, the parties "recognize . . . that the validity of the unreviewed judgments is uncertain"); Brief of the United States as Amicus Curiae Supporting Respondents at 27–28, 33, Kaisha, 114 S. Ct. 425 (1993) (No. 92-1123) (hereinafter U.S. Amicus Brief, Kaisha) (parties who seek vacatur demonstrate that they are "not willing to be bound by the district court's judgment [but have reached] a resolution that, from the combined perspective of the parties, is more just than the judgment they seek to have vacated") (emphasis in the original); see also discussion infra notes 118–121 and accompanying text.

54. U.S. Amicus, Bonner Mall, supra note 45, at 6; 12, 29; see also U.S. Bancorp Merits Brief, Bonner Mall, supra note 46, at 14–15 (participating in settlement "suggests that the decision below may be less reliable"). In some instances, parties are able to convince courts to turn litigant dislike of opinions into judicial pronouncements. See, e.g., Andrew Pollack, Big Defendants Settle in Miniscribe Lawsuit, N.Y. TIMES, Feb. 19, 1992, at D-4 (a trial judge "signed decisions that said that the [jury] verdicts were 'not supported by sufficient evidence' and were 'contrary to the great weight and preponderance of the evidence;'" the trial judge is quoted as explaining that he struck the verdicts "only as a result of the settlement, not as an independent decision that the jury verdict was bad or anything.").

55. Several different approaches exist, in part because the issue arises under varying circumstances. The Seventh Circuit rule, announced by Judge Frank Easterbrook, is that "[w]e always deny these motions to the extent they ask us to annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement." In re Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988); In re United States, 927 F.2d 626, 628 (D.C. Cir. 1991); United States v. Garde, 848 F.2d 1307, 1310–11 (D.C. Cir. 1988). A recent Tenth Circuit decision invokes the Seventh Circuit but permits case by case decision-making. See Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444 (10th Cir. 1993) (reviewing all the circuits' law).

The Second Circuit refuses to permit vacatur on consent of appellate opinions but authorizes vacatur on consent of trial court opinions. See Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384–85 (2d Cir. 1993); Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 282 (2d Cir. 1985) ("Because the policies favoring finality of judgments are intended to conserve judicial and private resources, the denial of the motion for vacatur is counterproductive because it will lead to more rather than less litigation."). Similarly, the Third Circuit has two formulations, one disapproving of vacatur on consent in strong terms (see Clarendon Ltd v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991)), and the other distinguishing Clarendon because, unlike that case
treatise writers disagree. Within the last year, both the Tenth and Second Circuits have expressed their concern about the practice.

The conflicts generated by these requests demonstrate the tension between the willingness to vacate on consent, illustrated by Neary and the Federal Circuit opinion in Kaisha, and three other critical markers of current litigation: enthusiasm for settlement, managerial judging, and societal interest in aggregation of parties and claims, with the accompanying doctrinal and practical effects of precluding repetitive litigation of related issues. Vacatur on consent is a particularly vivid moment in which, given its relative novelty and many judges' felt need to explain their decisions on such requests, judges, lawyers, and commentators articulate the values in conflict. Thus, in the construction of arguments about the propriety of vacatur on consent, one finds efforts to explain the meaning and purpose of adjudication and of the non-adjudicatory roles of courts.

A. Litigants' Revenge?

Over the past decades, judges have gained increasing authority over the pretrial process and the configuration of lawsuits themselves. One source of involving monetary damages, the trial court's injunctive order imposed a "legal bar" to settlement. See Orocare DPO, Inc. v. Merin, 972 F.2d 519, 522 (3d Cir. 1992).

The Ninth Circuit requires that a trial judge weigh "the hardships and equities... between the competing values of finality of judgment and right to relitigation of unreviewed disputes." Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982). See also Bates v. Union Oil Co., 994 F.2d 647, 650–52 (9th Cir. 1991), cert. denied, 112 S. Ct. 1761 (1992).


56. Compare 13A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3533.10, 432–34, 443–44 (2d ed. 1984 & Supp. 1994) (advocating, in 1984, flexibility to "settle pending appeal on terms that require vacatur of the district court judgment," and then in 1994, noting that this position has met with some resistance by appellate courts; reviewing the arguments and concluding that, while courts "can and should protect the precedential value of district court opinions rendered before settlement [], they need not, and should not, attempt to protect the more dangerous values of nonmutual preclusion in ways that make it more difficult to settle on appeal") (Supp. 1994 at 298), with 1B JAMES WM. MOORE, JO DESHA LUCAS, & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.41616 (2d ed. 1993) ("It would be quite destructive of the principle of judicial finality to put [an appellant who settles] in a position to destroy the collateral conclusiveness of a judgment by destroying the right of appeal." (citing In re Memorial Hosp. with approval)).

57. Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993); Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436 (10th Cir. 1993).
that control is the rise of "managerial judges." Another is the ability of judges to insist that litigants combine their actions, by consolidation and multi-district litigation, so that the judiciary can consider related problems together. This increased judicial authority has come at the expense of the autonomy of at least lawyers, if not also their clients. As judges insist on their authority to sanction, monitor, and exercise more power over the pretrial process, some complain of a loss of lawyer and litigant power to control the course of litigation. Others bemoan the loss of their own "day in court." Some academics have described the change as the incorporation of continental, and specifically inquisitorial, modes of judging into United States forums, with a concomitant diminution of lawyer and party control.

In a world in which trial judges have emerged as powerful figures who frequently override parties' choices and impose management plans, Neary and Kaisha could be seen as the "litigants' revenge." Whatever constraints judges may impose, litigants' autonomy is vindicated when courts validate the desires, wishes, and deals of the litigants by vacating on consent the opinions and verdicts of judges (and juries). To be sure, the numbers are few. Most

58. See Resnik, Managerial Judges, supra note 5, at 391-402.
63. Those who have celebrated German civil procedure for its activist judges argue that such modes of adjudication are preferable to more adversarial forms. See John H. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823 (1985).
64. Whether Bonner Mall will be cited as another example depends upon the Supreme Court's ruling, to occur in the 1994-95 term.
litigants never make it to trial, let alone to a request for vacatur of judgments. But given that I am working with Neary and Kaisha at an emblematic as well as at a literal level, their import could be understood as a major counterweight to trial judges’ powers. Depending on where one thinks we are in this story, Neary and Kaisha could be read as either the resurgence or the last gasps of litigant autonomy, and hence in conflict with contemporary trends that cabin and control the options for litigants.

B. The Nature of the Litigant Autonomy Claim: One-Shotters, Repeat Players, and the Interests of Third Parties in Litigation

Litigant autonomy is a generic assertion that demands unpacking to learn about what forms of or which litigants’ autonomy can be enhanced by vacatur of trial court adjudication. Although one might assume that every additional procedural option augments litigants’ autonomy, in a world of strategic interaction (to wit, litigation), one litigant’s autonomy may expand at the expense of that of an opponent. Further, there are other litigants, waiting in the wings, some of whom are “repeat players,” while others participate on a “one-shot” basis. Because civil procedure aspires to offer options that can inure to the benefit of all categories of litigants, were it clear that vacatur on consent distributed benefits unevenly and in a manner different from other settlement procedures, its use should be curtailed.

1. Effects on the Parties to the Dispute

Settlements that involve vacatur may be of interest to some litigants more than others; the obvious candidates are repeat players, presumably concerned about the shape of the law in general as well as in the specific application in a given case. How might vacatur on consent affect that shape?


66. Marc Galanter first explored these terms in this context in Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974) (discussing how such repeat players can “play” for the regime of rules as well as for outcomes in particular cases).

67. For discussions of two tenets of civil procedure—its claimed “neutrality,” which is in turn premised on the presumed “interchangeability” of civil litigants (appearing sometimes as plaintiffs, sometimes as defendants)—see Judith Resnik, The Domain of Courts, 137 U. PA. L. REV. 2219, 2224-26 (1989).
Vacatur of trial court opinions is a means of avoiding future deployment of a decision—assuming, for the moment, that consequence of vacatur on consent.68 In *Kaisha*, one goal was to avoid a second court from relying on the first judgment for collateral estoppel.69 In *Bonner Mall*, the United States also argued that vacatur would relieve the Supreme Court from deciding a major issue of law and “leave the questions open” for new decisions, presumably coming out the other way.70 Avoiding preclusion is not the only advantage that might flow from vacatur on consent. Litigants may feel the repercussions of verdicts not only in lawsuits but also in other contexts, such as when professional codes impose sanctions or initiate discipline because of findings of malfeasance,71 or because of other institutional rules, such as insurance companies raising premiums as the result of judgments. The very existence of a reported opinion might also be seen as an encumbrance, influencing behavior.

One can therefore assume that not all litigants care equally about the existence of recorded judicial opinions and that repeat players are more likely than one-shotters to be proponents of vacatur.72 Evidence that this strategic option inures to the benefit of these litigants comes not only from some of the cases in which such settlements have been offered,73 but also from the

68. See discussion *infra* at Section III.C, The Consequences of Vacatur: Judicial Roles in Promoting Settlement and the Sanctity of Court Judgments.
69. Under federal law, collateral estoppel is not always a consequence of a first decision; a court has discretion to assess whether reasons exist to mistrust the outcome. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).
71. See, e.g., *Cal. Bus. & Prof. Code* § 10177.5 (West 1987), which states that “[w]hen a final judgment is obtained in a civil action against any real estate licensee upon grounds of fraud, misrepresentation, or deceit with reference to any transaction for which a license is required . . . the commissioner may . . . suspend or revoke the license.” Other licensure codes may not condition the suspension, revocation, or discipline upon a “judgment” but rather on wrongdoing. See, e.g., *Cal. Bus. & Prof. Code*, § 6106 (West 1990) (“The commission of any act involving moral turpitude, dishonesty or corruption, . . . whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”). These effects of a judgment formed the basis for a refusal to vacate a judgment, under the "extraordinary circumstances" exception to the California Supreme Court’s Neary doctrine. See *Norman I. Krug Real Estate Invvs., Inc.* v. *Praszker*, 22 Cal. App. 4th 1814, 1825 (1994) (opinion not vacated insofar as it established a broker’s violation of his duty of care).
72. Litigants may also want to preserve or create precedent. See, e.g., *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875–76 (7th Cir. 1987) (Easterbrook, J.) (holding the case not justiciable and describing the “plaintiffs, satisfied with the relief they had been offered, elected to forfeit that relief to obtain a chance on a precedent that would help only strangers”).
73. See, e.g., the litigation involving Union Oil Company and its franchisees, described in *Bates v. Union Oil Co.*, 944 F.2d 647 (9th Cir. 1991), cert. denied, 112 S. Ct. 1761 (1992); a local government’s efforts to obtain vacatur of an opinion involving its liability for an illegal arrest of a citizen, in violation of 42 U.S.C. § 1983, discussed in *Clipper v. Takoma Park*, 898 F.2d 17 (4th Cir. 1989), *declining to vacate* 876 F.2d 17 (4th Cir. 1989); the insurance company’s offer, described
identities of those who have urged its legality before the United States Supreme Court and have lobbied the California legislature not to forbid such agreements. Both the United States Government (repeat player par excellence) and the Product Liability Advisory Council (whose corporate members include dozens of companies, including Eli Lilly, Dow Chemical, Johnson Controls, Philip Morris, and U.S. Tobacco) have called on the Supreme Court to authorize vacatur on consent of court opinions. In contrast, Trial Lawyers for Public Justice (TLPJ), which described itself as a "public interest law firm that represents victims of the abuse of power in our society," asked the Supreme Court to halt such practices.

On the other hand, repeat players are sometimes on the other side as well, arguing against vacatur on consent. Sears Roebuck and Izumi, both of which sought to constrain vacatur in the context of Kaisha, are no strangers to litigation. Further, several of the published decisions on vacatur include as avoiding a decision about a policy's enforcement, in Benavides v. Jackson Nat'l Life Ins. Co., 820 F. Supp. 1284, 1285–86 (D. Colo. 1993).

While the United States already enjoys the benefits of the doctrine that it is not subjected to non-mutual collateral estoppel (see United States v. Mendoza, 464 U.S. 154 (1984)), the United States has also made offers that result in the vacatur of opinions, presumably benefitting from the absence of governing precedent within a circuit or nationally and of case law that would be relevant to other circuits. See, e.g., Hendrickson v. Secretary of Health & Human Servs., 774 F.2d 1355 (8th Cir. 1985), vacating the Eighth Circuit's earlier opinion, at 765 F.2d 747 (8th Cir. 1985), which had held that the Secretary had violated a disability recipient's statutory rights. 765 F.2d at 749. At issue was the interpretation of how a self-employed individual's records of employment could satisfy the requirement of proving that one had been employed for the requisite number of quarters to receive benefits. Id. at 749–50.


75. TLPJ's Amicus Brief, Kaisha, supra note 7, at 1. The Trial Lawyers for Public Justice have also submitted an amicus brief in Bonner Mall and argued that "vacatur destroys much of the public value of a decision." Brief of Amicus Curiae Trial Lawyers for Public Justice, P.C., in Support of Respondent at 8, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 114 S. Ct. 1367 (1994) (No. 93-714).

The California Association of Professional Liability Insurers, State Farm Insurance Company, and the Personal Insurance Federation oppose California legislative efforts to ban such practices. See Memorandum from the Personal Insurance Federation (Mar. 10, 1993) (on file with author); Letter from the Professional Liability Insurers to the Honorable Bill Lockyer (Mar. 11, 1993) (on file with author); Letter from State Farm to Assembly member Phil Isenberg (Mar. 12, 1993) (on file with author).
repeat players on both sides, thus suggesting that repeat players may use this technique not only against one-shotters but also in litigation inter se. Moreover, even if repeat players initiate such settlement offers, the recipients—sometimes the proverbial one-shot player—may well benefit. The offer transfers some bargaining power from the repeat player to the one-shooter.

Two examples make this point. First, let me use the Neary case. What we know is that Mr. Neary won a $7 million jury verdict and agreed to a settlement that paid him $3 million. I do not know anything about who would have been likely to win on the merits, had the appeal been heard. But assume that Mr. Neary (stipulated here as a one-shot player) was at risk of losing all of the $7 million dollar verdict on appeal. The University of California—by offering him a $3 million settlement, which he in turn accepted—gave him sufficient funds to buy his way out of what his lawyers might have advised was a risky appeal. Second, let me turn from this hypothetical exchange to data about real exchanges; from a few cases, we know that the offer to settle for vacatur sometimes puts more money “on the table” than what was awarded at trial. Thus, in some cases, a trial court opinion works to enrich the bargaining powers of a one-shot player.

While repeat players may gain greater utility over time from the availability of vacatur as a condition of settlement, one-shotters can gain as

76. See, e.g., Clarendon Ltd. v. Nu-West Indus., 936 F.2d 127 (3d Cir. 1991), involving a contract dispute between two corporations, one of which had a subsidiary in bankruptcy; Long Island Lighting Co. v. Cuomo, 888 F.2d 230 (2d Cir. 1989) involving litigation between the utility company and New York State’s Public Service Commission; and In re Memorial Hosp., 862 F.2d 1299 (7th Cir. 1988), involving a bankrupt hospital and its creditors.


78. In the actual case, the California Supreme Court majority discussed—presumably in justification of the quality of the settlement—that Mr. Neary had spent more than twelve years in litigation and was of advanced age. Id. at 123. Further, the majority repeated that, with that settlement, the defendant University of California saved four million dollars it would have owed had the judgment been upheld. Id. at 124–25.

79. In Bankers Trust Co. v. Hartford Accident & Indem. Co., 518 F. Supp. 371, vacated, 621 F. Supp. 685 (S.D.N.Y. 1981), a trial court granted partial summary judgment against the Hartford Accident and Indemnity Company, found liable for cleaning up an oil leak. Thereafter, upon application from the Insurance Company, Judge Lasker vacated the earlier order to permit additional briefing. Bankers Trust, 621 F. Supp. at 685. According to the records in a subsequent litigation, involving the same insurance company but different policy holders, Hartford paid $2.3 million to Bankers Trust, and that sum included $200,000 more than the lower court’s value of “the victorious claim”—paid to settle the case “with the understanding that the opinion would be withdrawn.” See Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1192 n.32 (N.D. Cal. 1988). Credit for locating this example goes to the TLPJ’s Amicus Brief, Kaisha, supra note 7, at 10–11.
well. When the judicial opinion becomes available as a “bargaining chip,“ the purchasing power of litigants grows. When the assumption that repeat players are the primary movers in making offers to settle for vacatur is coupled with a second assumption, that they often have greater assets than their opponents, then the trial court’s issuance of a judgment can transfer bargaining power to the less powerful side, which gains new economic wherewithal with which to make deals.

Thus, permitting vacatur will sometimes make less well-heeled litigants possible purchasers. The trial court’s work, sometimes characterized as “wasted,” could instead be understood as serving a side that deserved to be helped—“deserved” it not because that side may be relatively poorer than its opponent but because the trial court has found that litigant’s rights violated. The practice of vacatur thus enhances the autonomy of litigants on both sides of a dispute, not just those with deep pockets. Given this evaluation, it becomes difficult to frame an argument—from the vantage point of the parties to the dispute and even with a keen awareness of the inequality of resources among litigants—that courts (or legislatures) should outlaw this form of bargaining.

2. Third Party Access to and Use of Other Litigants’ Decisions to Settle

Another form of argument about asymmetry among litigants shifts the vantage point from the immediate disputants to disputants over time. The objection here is that vacatur on consent becomes a tool with which repeat players can shape the law. Judge Sherman Finesilver, Chief Judge of the District of Colorado (and deeply critical of the practice of appellate vacatur of trial court judgments), observed:

80. See Judge Easterbrook’s opinion, In re Memorial Hosp., 862 F.2d at 1302; TLPJ’s Amicus Brief, Kaisha, supra note 7, at 10.

81. Kaisha also raised the wrinkle of how one conceptualizes the “parties.” Pursuant to its contract with Windmere, Izumi paid for Windmere to defend the trade dress and unfair competition claims; it was also a party to the patent infringement claim, which it lost and paid $6500. However, Izumi did not appeal that issue, and, while its name was carried on the caption of the pleadings, it was not a “party” to the subsequent litigation. When Philips and Windmere settled, Izumi sought, unsuccessfully, to participate in the appellate proceedings about the propriety of vacatur. Philips v. Windmere III, 971 F.2d 728, 730-31 (Fed. Cir. 1992). The appellate court rebuffed Izumi’s efforts to assert standing on appeal. Id. at 731. In the Supreme Court, Izumi’s failure to preserve the question of its standing aborted the decision on the merits. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 114 S. Ct. 425, 428 (1993) (per curiam).
In the normal . . . operation of the American justice system, each party walks to the courthouse with a compilation of opinions in its favor under one arm and a collection of opposing views under the other. . . . [O]ne or both parties may state that “the weight of authority” supports their view. A string of citations follows . . . .

. . . Vacatur allows disappointed litigators . . . to control the direction and content of the jurisprudence — to weed out the negative precedent and preserve the positive — and create an artificially weighty and one-sided estimate of what comprises “the case law.”

While Judge Finesilver’s discussion is evocative, the impact of vacatur on case law varies with the level of the court writing the judgment subject to vacatur and with the speed with which such decisions make it to case law reports and “on line services.”

In general, trial court opinions do not constitute precedent in the formal sense, although the custom of specific districts may dictate judicial invocation or distinction of trial court decisions. Granting vacatur however does not necessarily affect the subsequent use of opinions that have made their way into the reported literature, from case reporters to the popular press. To the extent that adjudication occurred, it may have attracted either press or scholarly commentary, enabling subsequent reference to it. This aspect of vacatur—that it comes after adjudication—may actually make it a form of settlement that inures to the benefit of third parties. Understanding how

82. Benavides v. Jackson Nat’l Life Ins. Co., 820 F. Supp. 1284, 1289 (D. Colo. 1993). In Benavides, the trial court found that an insurance policy’s incontestability clause was “ambiguous” and unenforceable. After the insurance company had noticed an appeal, the case settled, followed by a joint motion to vacate the trial court’s opinion. The Tenth Circuit then remanded with orders to vacate the prior judgment and to dismiss. Thereafter, the trial court declined “to vacate our prior judgment pending a reasoned and more detailed order from the Court of Appeals.” Id.; see also Clarendon Ltd. v. Nu-West Indus., 936 F.2d 127, 129 (3d Cir. 1991) (“[a] losing party with a deep pocket should not be permitted to use a settlement to have an adverse precedent vacated.”); Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (vacatur on consent “would allow a party with a deep pocket to eliminate an unreviewable [appellate] precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary’s cooperation in a motion to vacate”).

83. Opinions on vacatur include discussions by appellate judges, explaining that trial court decisions are not “precedent” (see, e.g., Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993)), and by trial judges, explaining either that their decisions are “precedent,” (see, e.g., In re Speece, Jr., 159 B.R. 314, 321 (Bankr. E.D. Cal. 1993)), or that, while not precedent (whether vacated or not), the reasoning is available to persuade other judges. See, e.g., In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993).
Vacatur on consent could be useful to third parties requires two (brief) excursions—into the rules on access by third parties to information created or collected during the litigation process and into the practices of legal publishing companies.

a) Access: First, aside from pleadings and motions, pretrial activity is often beyond public access. Although the 1938 Federal Rules of Civil Procedure created an elaborated pretrial process and a host of discovery rights, those rules have not been interpreted as requiring public access to that process. Much of discovery is not accessible. Indeed, some have noted a

84. Courts have generally interpreted the common law (and perhaps constitutional) right of access to courts to apply, in civil cases, to pleadings, motions and the documents presented in support of them, exhibits submitted at trial, and court transcripts of hearings, all of which are presumptively open to the public. Brown v. Advantage Eng’g, Inc., 960 F.2d 1013, 1014 (11th Cir. 1992) (pleadings and motions); In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1316 (7th Cir. 1984) (exhibits); Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (First Amendment right of access to civil proceedings, including hearings on motions). See generally Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (1991).

85. The rules on access to discovery are somewhat complex; the Supreme Court has never decided the parameters of either the common law or constitutional rights of access to discovery in the context of the federal rules. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33–34, cert. denied, 467 U.S. 1230 (1984) (analyzing Washington’s discovery rules). Because discovery was not traditionally part of the civil litigation regime, access to discovery materials may not be constitutionally compelled. Miller, supra note 84, at 439–441 (identifying a “two-prong analysis” by the courts, which first considers historical practice and then analyzes the role public access plays in a particular practice).

Discussion of access to discovery must distinguish between those discovery documents filed with the court and those in the possession of litigants. Discovery documents enter court records in two ways, either a) because discovery materials are submitted in support of litigation positions, or b) because of routine filing of all documents exchanged by the parties. When discovery documents are filed with courts as a part of court transcripts, entered into evidence, or attached in support of dispositive motions, those materials are generally accessible under the presumption of public access to courts. See, e.g., Poliquin v. Garden Way, Inc., 989 F.2d 527, 533–34 (1st Cir. 1993) (distinguishing “‘materials submitted into evidence from the raw fruits of discovery’” (citation omitted)); Rushford v. New Yorker Magazine, 846 F.2d 249, 252 (4th Cir. 1988) (motion for summary judgment and the accompanying exhibits previously under a protective order could not be kept sealed unless there were “some overriding interests in favor of keeping the discovery documents under seal”). In contrast, some courts do not permit access to discovery when it is attached to discovery motions themselves. See Leucadia Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 164–65 (3d Cir. 1993).

Routine filing of discovery documents with courts is affected by 1980 amendments to Fed. R. Civ. P. 5(d) [hereinafter Rule 5(d)], which provided courts with the authority to exempt “depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses” from being filed. Pursuant to Rule 5(d), many local courts have promulgated rules that, absent
"growing tendency" for parties to agree to "seal documents produced during the discovery process as well as pleadings and exhibits filed with the court."86

Second, express rights of public access have not accompanied the more recent creation of court-sponsored settlement negotiations and alternative dispute resolution techniques.87 Third, absent certain circumstances such specific court order, exempt such documents from being filed. See, e.g., United States District Court for the Central District of California, Local Rule 8.3 (Discovery Documents-Proof of Service-Filing); United States District Court, for the District of Massachusetts, Local Rule 33-36(f) (Nonfiling of Discovery Materials). According to one district, as of 1990, 54 courts had adopted such a "blanket prohibition on the routine filing of discovery material." Comment to Local Rule 107 for the United States District Court for the District of Columbia. In contrast, and in recognition of the fact that "in cases of public interest, the press or other nonparties may wish access to such materials," that district provides for filing of discovery materials with the court, absent a specific court order entered in specific cases. Id.

Parties may also request that courts protect discovery materials provided to opponents (and whether filed or not with the courts) from disclosure to third parties. See Fed. R. Civ. P. 26(c). As interpreted, both Fed. R. Civ. P. 26(c) and Fed. R. Civ. P. 5(d) make discovery available to third parties absent court orders, which should only preclude access upon a showing of "good cause." Fed. R. Civ. P. 26(c). See also Seattle Times, 467 U.S. at 32-33 (interpreting analogous state rules on discovery). See generally Richard L. Marcus, The Discovery Confidentiality Controversy, 1991 U. Ill. L. Rev. 457.


87. Congress authorized court-annexed arbitration but has made no express provision for public access to the proceedings; the awards themselves become "judgments" of the court and may thus fall under general rules of public access to court records. Congress has directed the districts to issue local rules that require the temporary sealing of awards pending expiration of the time in which to demand trial de novo. See 28 U.S.C. §§ 654(b)(2)-655. Further, local rules provide for the places at which such proceedings occur (e.g., in courtrooms or in other locations)
as class action certification, settlements need not be filed with or approved by courts; parties may simply agree to withdraw cases. These agreements are contracts between litigants and are not filed in courts. No third party access exists, save to the joint stipulation of dismissal. Further, in a few reported cases, courts have also agreed to enter consent judgments that mandate secrecy; confidentiality of settlement agreements, like vacatur, is justified as a means of enabling settlements that might not otherwise occur. Such but do not specify who may attend. See, e.g., United States District Court, N.D. Cal. Local Rule 500(5); United States District Court, W.D. Mich., Local Rule 43(h); United States District Court, W.D. Okla., Local Rule 43(l).

In the winter of 1994, I requested information from the nine districts then conducting voluntary court-annexed arbitration programs pursuant to these provisions. Of the eight responses received, seven districts had held court-annexed arbitration hearings. Clerks reported that in none of the seven do they keep transcripts or records of such proceedings. Three clerks indicated that the hearings were generally conducted in empty courtrooms; in a fourth district, hearings occurred in the courthouse's offices, while three districts held hearings outside the courthouse (including attorneys' offices). In terms of who could attend, two districts reported that anyone could attend their hearings (most of which were in courtrooms). Three districts indicated that attendance by third-parties was left either up to the parties or the arbitrator. In the remaining two districts, no information was available. 1994 Surveys of Federal District Courts with Voluntary Court-Annexed Arbitration Programs (on file with the author).

A few opinions address public access to other forms of ADR. See, e.g., Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988) (no First Amendment right of access to summary jury trials); Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 HASTINGS L.J. 955 (1988) (discussing both FED. R. EVID. 408's protection of settlement negotiations from admissibility into evidence and state laws protecting mediation from disclosure; also warning lawyers about the possibility of being forced to disclose, in discovery, information obtained through settlement negotiations).

88. See FED. R. Civ. P. 23(e).
90. See, e.g., Palmieri v. New York, 779 F.2d 861, 865-866 (2d Cir. 1985) (reversing a district judge who modified sealing orders, issued by a magistrate judge; such unsealing could occur only upon a showing of "extraordinary circumstances" or "compelling need," a burden not met by New York, intervening in a civil anti-trust action and seeking access to the settlement agreement); FDIC v. Ernst & Ernst, 677 F.2d 230, 231 (2d Cir. 1982) (settlement of litigation—about the failure of the Franklin National Bank—that entailed confidentiality avoided "what promised to be a lengthy trial"; also relying on the congressional decision not to include access to court documents in the Freedom of Information Act as evidence that public policy does not mandate disclosure in all cases). See also EEOC v. Strasurger, Price, Kelton, Martin & Unis, 626 F.2d 1272, 1274 (5th Cir. 1980) (attorney fee challenge in sex discrimination settlement that was sealed; the propriety of sealed settlements assumed, not discussed).

In contrast, while recognizing that refusing confidentiality could discourage settlements that might otherwise occur, some courts have objected to sealed settlements. See, e.g., Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1016 (11th Cir. 1992)
settlements preclude third parties from obtaining information about litigation and can impose costs on one-shotters, who may not know of the underlying alleged malfeasance or, if knowledgeable, must undertake discovery to document it anew. Moreover, not only can repeat players condition settlement on secrecy, they may also, under federal law, offer settlements in lieu of the collection of attorneys' fees.

(vacating the sealing, pursuant to a settlement, of the record of summary judgment motions in an explosion at an oil plant, even though that sealing was "an integral part of a negotiated settlement . . . [that came] with the [trial] court's active encouragement"); Bank of Am. Nat'l Trust, 800 F.2d at 343-44 ("[a] settlement agreement filed with the court is a public component of a civil trial," and thus the presumption of a right of access to court documents applies). One Second Circuit case prohibits litigants from filing one settlement agreement but having a side agreement with a different set of terms. See Janus Films, Inc. v. Miller, 801 F.2d 578 (2d Cir. 1986). Within the Sixth Circuit, courts have declined to be bound by settlement agreements that mandate sealing and/or destruction of discovery. See United States v. Kentucky Utils. Co., 124 F.R.D. 146, 150-51 (E.D. Ky. 1989) (such agreements, claimed necessary to promote the general interest in settlement, do not bind courts when faced with motions for access to documents).

A few states have begun to impose obligations of access. See, e.g., FLA. STAT. ANN. § 69.081(3) (West 1987 & Supp. 1994) ("no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard . . ."); TEX. R. CIV. P. 76a(2)(b) (sealing court records) (providing not only a presumption of access to documents filed with the court, but also a "presumption of openness" for "settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government," as well as discovery documents with similar contents).

91. See 1994 Secrecy Hearing, supra note 86, (testimony of Sybil Niden Goldrich, co-founder of Command Trust Network, an organization that provides information to women with breast implants, "the legal staffs of the manufacturers understood their power. They fought using a strategy that required each person to reinvent the wheel. They knew that an ailing woman could be coerced into unconscionable settlements. They fought until the cost of litigation increased to such a level that lawyers had to capitulate."); 1990 Secrecy Hearing, supra note 86, at 7-8 (testimony of Frederick R. Barbee, discussing the death of his wife because of what he claimed to be malfunction of the Bjork Shirley Convexo-Concave heart valve and how having known about litigation on the valve's problems would have averted the injury). Cf. Miller, supra note 84, at 484-85 (disputing that claim). See generally Brian T. FitzGerald, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J. L. & POL. 381, 383 (1990) (arguing against sealing).

Fourth, in general, lawyers have an obligation to apprise courts of information relevant to pending cases. Lawyers have an obligation to apprise courts of information relevant to pending cases. Two federal circuits have relied on this doctrine to impose a "duty" to inform judges of imminent or actual settlements so as to avoid "unnecessary work." Thus, the parties can delay adjudication by informing courts of potential settlements; repeat players can use their bargaining power to avoid the issuance of opinions and thereby also avoid third party access to legal rulings. Further, repeat players can pay losing adversaries not to appeal, thereby keeping trial court decisions perceived to be advantageous from being reviewed and possibly reversed.

b) Publication: The next side-step required is to understand the role played by database services both in publishing court opinions in the first instance and then in responding to orders of vacatur. The obvious questions are what intervals exist between court issuance of an opinion and its databasing, and what publishing services do, upon notification of vacatur on consent, with the already published or databased cases. The two key publishers in this arena are West Publishing Company, with its database WESTLAW and its "Reporter Series," and LEXIS/NEXIS Services, which includes that electronic service and is affiliated with Michie Publishing that prints decisions from several state courts.

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93. See Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); Board of License Commrs v. Pastore, 469 U.S. 238, 240 (1983) (per curiam) (advising that such duty should be discharged without delay).

94. Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993); Douglas v. Donovan, 704 F.2d 1276, 1280 (D.C.Cir. 1983). See also St. Charles Parish School Bd. v. GAF Corp., 512 So.2d 1165, 1173-74 (La. 1987). In the Seventh Circuit, while vacatur on consent is generally not available (see In re Memorial Hosp., 862 F.2d 1299 (7th Cir. 1988)), the duty to inform the court of settlement has sometimes provided grounds for vacatur and sometimes not. See Gould, 11 F.3d at 84 (affirming a trial court's vacatur upon learning of a settlement). Cf. Selcke v. New England Ins. Co., 2 F.3d 790, 791-92 (7th Cir. 1993) (refusing to vacate a circuit opinion issued on the day the settlement agreement was entered but before final payment had been made).

95. See Roger Parloff, Rigging the Common Law, AM. LAW., March, 1992, at 74 (describing efforts to keep opinions "on—or off—the books"; citing instance in which an insurance carrier, "having won a ruling from a federal district judge . . . dismissing a policyholder's case, may nevertheless pay the policy holder everything it sued for—to keep the judge's ideas on the books and untested on appeal").

96. Thompson Publishing Company produces the Lawyers' Edition reporter for Supreme Court decisions but does not have a companion on-line service. Those who have the necessary electronic equipment may also access, directly, opinions on the electronic "bulletin boards" (E-DOS) of the United States Supreme Court, nine of the United States Courts of Appeals (the First through the Ninth) and some 70 percent of the state courts; clerks' offices post such decisions upon issuance. Several United
LEXIS and West Publishing report that they put United States Supreme Court decisions on-line within an hour of release and that federal appellate decisions are on-line within 24 hours. Federal district court opinions, many received within days or weeks of issuance, are “on-line within a day.” While all decisions that make it into print are placed on-line, not

States district courts have also begun experimenting with making their opinions available on-line. Interview with Dan Wexler, of the Administrative Office of the U.S. Courts (Court Systems Division) (June 2, 1994) [hereinafter “AO conversation”].


Turning to the question of selectivity among appellate decisions marked “for publication,” LEXIS reported that it puts “almost all of what” it receives from the appellate courts on-line. However, some exclusions occur, by virtue of “guidelines” about the “substantive nature of the decisions and the importance of the court.” For example, LEXIS generally does not put procedural orders (such as those granting extensions of time to file) on-line; grants of rehearing but not denials are generally on-line. West Publishing indicated that its “lawyer-editors” review orders; that many of these orders are “selected” for on-line publication, but that absent “substantive legal reasoning,” generally are excluded from print publication. West letters, supra.

When opinions are labeled “not for publication,” West reported that upon receipt of such decisions, its “handling” varies, “depending upon what editorial decisions we have made about making the material available and the local court rule which governs publication.” Id. West expressed a desire to promote public access to these opinions and therefore places them on-line with a notation in the header that the issuing court labeled an opinion “not for publication.” LEXIS described a similar procedure. With regards to the print publication of opinions labeled “not for publication,” West noted that they generally do not publish these materials in print, although if published before designated “not for publication,” such opinions will most likely not be removed from the printed volumes. Id.

According to both publishers, they handle state court decisions at the supreme and the appellate level in a manner similar to the federal appellate courts; those states with electronic transmissions have their opinions data-based within a day of transmission; mailed copies are on-line soon after receipt. The state trial opinions offered on-line are those also published in print.

98. LEXIS letter, supra note 97; LEXIS and West conversations, supra note 97. See also Publication Guide for Judges of the United States District Courts (West Aug. 1992); Publication Guide for United States Bankruptcy Judges (West Aug. 1992); Publication Guide for United States Magistrate Judges (West Aug. 1992) [hereinafter, Publication Guide/District, or Bankruptcy, or Magistrate Judge]. In all three instances, judges send opinions to the publishers; when materials relate to procedure, they are often reported in the Federal Rules of Decision. Id. at 2-3. However, West provides more detail about its selection criteria to magistrate judges than to the other judges. See Publication Guide/Magistrate Judge at 3 (explaining that selection depends on decisions of “general interest and importance” and detailing categories).
all decisions placed on-line are printed. When LEXIS is notified that a decision has been vacated, the company "make[s] a notation in the subsequent history of that document. "The text of the opinion is only removed "if a court requests." In contrast, West stated that, depending upon the court and the stage that the vacated opinion has reached in the publication process, "we may either decide not to publish the original opinion and publish the order vacating it, put the opinion and vacating order on WESTLAW only, or utilize other procedures as deemed appropriate to inform our customers in the most timely and effective manner."100

Putting together the publication practices of these publishers and the settlement options available to repeat players, it becomes plain that, given the many means by which repeat players can avoid dissemination of information about litigation, vacatur on consent may—contrary to one's intuitions—sometimes help, not hurt, third parties who could benefit from the knowledge of a court's decision, even one that has been vacated. Once courts engage in adjudication, that "formal act of government"101 is available to the public (unless West's lawyer-editors decide otherwise). If timed so that an initial opinion has made it "on line," vacatur on consent

West also stated that it received cases from "over 600 courts and 3,600 judges," that each court sent decisions pursuant to their own local rules "regarding publication," and that the time to databasing varied "by both court and internal procedures." West letters, supra note 97. "Not every opinion that is received is put on-line. Our Editorial Department reviews each decision as it arrives and makes a determination of the treatment of the case." Id. The criteria for this determination include whether the case had nationwide appeal or extensive press coverage, whether the case involved novel issues of law, and/or involved some substantive legal reasoning by the district judge, and whether the judge is well-known or well-read within the legal specialty that the case presents. West conversations, supra note 97. Further, "a recommendation by the authoring judge . . . is afforded considerable weight." Publication Guides/all judges at 3.

100. West letter, supra note 97, at 4-5. If an opinion is kept, the fact of vacatur will be noted on that opinion. The review policy is implemented by West "lawyer-editors," who undertake a substantive analysis of the vacating order, and, if necessary, contact the issuing court for "clarification" and "guidance." In terms of its on-line database, West may either "physically withdraw" an opinion or add a note about vacatur, either to the opinion or subsequent to the opinion. Consideration is given to the court's requests on publication, if any. West conversations, supra note 97, and letter of June 6, 1994. There is a strong presumption towards providing public access to vacated opinions. Id.
101. These are Judge Ralph Winter's terms, from Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) (discussing sealing of special litigation committee reports in shareholder derivative actions and holding that, "absent exceptional circumstances," public access must be provided). See also IBM Credit Corp. v. United Home for Aged Hebrews, 1994 U.S. Dist. LEXIS 4372, at *8 (S.D.N.Y. 1994) ("once a decision has been filed and in the public domain," it can have an influence, whether vacated or not).
offers more for third parties than a relevant alternative—settlement in advance of or at trial or before appeal. If the availability of vacatur on consent works to delay settlements until after judgment, that delay may absorb the resources of both the immediate parties and the judiciary but may also produce third-party benefits. Thus, the fact that *Bonner Mall* has been a decision of the Ninth Circuit, binding on the lower courts since 1993, might be seen as aiding other litigants who invoked that rule of law, whether it remains "law" or not. Further, as discussed below, if vacated only because of litigants' settlement, some judges may still perceive the decision to be "law-like."  

Of course the conclusion is not that vacatur on consent is necessarily "good" for third parties. Rather, if one believes that an important purpose of litigation is to generate information and law for the benefit of third parties and the public in general, then objection should be made not only to the practice of vacatur on consent but also to the host of other procedural developments that promote settlement and other forms of alternative dispute resolution less accessible to the public than is adjudication. If Judge Finesilver's objection to repeat player power to control the shape of the law is well-taken, procedural rules other than vacatur are also in need of revision. Judicial and legislative promotion of settlement also diminish the dissemination of information to third parties. Appellate court settlement programs encourage litigants to drop appeals, thereby avoiding potential precedent. Delegation of factfinding and adjudication to low-visibility judges in courts and agencies limits public information about disputes and about state assessments of their validity. But these procedural reforms, with little by way of third-party information, have gained acceptance and are now so familiar as to make objection passe. In contrast, vacatur on consent has drawn both judicial attention and distress. Given the vitality of the debate about vacatur on consent, one question is why that form of settlement has drawn so much attention in contrast to other forms of repeat player advantages, many of

102. See also Oklahoma Radio Assoc's. v. FDIC, 3 F.3d 1436, 1440 (10th Cir. 1993) (quoting Martinez v. Winner, 800 F.2d 230, 231 (10th Cir. 1986)) ("We are not sure what [the] request [for vacatur of an appellate court opinion, as contrasted with vacatur of a judgment] means in practical effect. The opinions have been published in bound volumes of the *Federal Reporter, Second Series*, and no action by this or any other Court can change that fact retroactively."). Because vacatur on consent does provide such a vehicle for dissemination of information, its existence may point to bargaining errors by those repeat players who could have avoided the adjudication altogether.

103. See infra Section III.C, The Consequences of Vacatur, below.

104. See discussion of such programs, infra notes 108-110 and accompanying text.
which involve incentives for settlement. Another issue is whether courts and legislatures should rethink their other procedural innovations and either mandate public access and/or record keeping to enable dissemination of information about these activities and the agreements generated or rethink the desirability of such programs.

The hallmark of vacatur on consent is that a judge or jury has spoken. Is the bargaining that occurs once adjudication has occurred different from other forms of bargaining? Should the fact that judges and/or juries have spoken be preserved, whatever bargains are struck? To respond, several additional issues need to be parsed. Below, I first examine the consequences of vacatur on consent, to gain some sense of what parties hope for and then obtain—in fact and in law—by vacatur on consent. Thereafter, I consider other instances when settlements between litigants engender court action, including the alteration of previously-entered judgments. The questions are a) whether vacatur upon settlement is substantially different from other instances in which courts withdraw and amend opinions or accede to parties' requests for the entry of judgment as part of consent decrees and b) whether vacatur on consent might more readily be integrated into the practices of trial courts but not permitted appellate courts, including the United States Supreme Court.

C. The Consequences of Vacatur: Judicial Roles in Promoting Settlement and the Sanctity of Court Judgments

My initial exploration of litigant autonomy was premised on two immediate kinds of gains from vacatur on consent: monetary gains and the avoidance of an enduring adjudication. But litigants can obtain some aspects of both—money and avoidance of subsequent court decisions—without requesting vacatur. Because settlements after trial are neither novel nor idiosyncratic events,\(^\text{105}\) the appropriate baseline assumption is that parties

\(^{105}\) Several empirical studies document that practice. See, e.g., MICHAEL G. SHANLEY & MARK A. PETERSON, POST-TRIAL ADJUSTMENTS TO JURY AWARDS 47 (RAND, ICJ 1987) (post-trial, jury verdicts were modified in about 20 percent of the cases, overall, and in 25 percent of the cases in which plaintiffs prevailed at trial); U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States (GAO: HRD 89-99, Sept. 1989) at 39-40 (post-trial settlements sometimes increase the amount awarded to the plaintiff but more often decrease it); Ivy E. Broder, Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements, 11 JUST. SYS. J. 349 (1986) (plaintiffs received original jury award in 25 percent of the cases); Brian Ostrom, Roger Hanson, and Henry Daley, So the Verdict is In—What Happens Next? The Continuing Story of Tort Awards in the State Courts, 16 JUST. SYS. J. 97, 101-102 (1993) (tracking post-trial activity in 416 plaintiff verdicts in state court tort trials, and finding 16 percent involving
have the power to negotiate after trial. Further, parties can settle in a manner that is faster and cheaper—by bilateral negotiation culminating in a modification of a court order, agreed-upon departures from that order, or a request to dismiss a pending appeal—than by spending lawyer time petitioning (let alone having to justify to) a court to authorize vacatur. Note also that settlement options occur all along the way to the appellate courts, from the pre-trial to post-verdict stages, then upon the filing of a notice of appeal, up until and after argument of such appeals, the filing of petitions for rehearing, certiorari, argument, decision, and petition for rehearing in the United States Supreme Court.

Dismissal of pending requests for additional court action is the parties’ prerogative. Indeed, “civil appeals management programs” have sprung up around the federal circuits as evidence not only of the ability of parties to dismiss pending appeals but of appellate courts’ interest in assisting parties in this effort. Promulgated amendments to the federal appellate rules


106. See SHANLEY & PETERSON, supra note 105, at xi (in a sample of 880 cases tried in two jurisdictions—Cook County, Illinois and San Francisco, California—of the 20 percent of the jury verdicts modified post-trial, the most common method—62 percent of the cases—of modification was the negotiation of a smaller payment). While Shanley and Peterson did not explore what animated post-trial negotiation, they did learn, from the lawyers surveyed, that in 13 percent of the cases, plaintiffs agreed to a lesser amount because of concerns about collection—that defendants had insufficient insurance and could not pay the full amount. Id. at xi. They also learned that when punitive damages were awarded (which was infrequent), post-trial activity was likely to reduce them. Id. at 36–37.

107. Administrative adjudication and court review offer yet other iterations. See Reich v. Contractors Welding, 996 F.2d 1409 (2d Cir. 1993).

108. The 1967 version of FED. R. APP. P. 33 permitted an appellate court to order "a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court." In 1974, the Second Circuit established an appellate settlement process, called the "Civil Appeals Management Plan" ("CAMP"). See Irving R. Kaufman, Must Every Appeal Run the Gamut?—The Civil Appeals Management Program, 95 YALE L.J. 755, 758–61 (1986) (the encouragement of settlement is an important aspect of the program; data indicated that CAMP “reduce[d] by one-sixth the number of cases argued”); see also Irving R. Kaufman, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts, 59 FORDHAM L. REV. 1, 11 (1990) (“CAMP settles more cases than two judges would normally handle in a year at one-third the cost of two judicial chambers.”).

As of 1993, seven circuits (the District of Columbia Circuit, the First, Second, Sixth, Eighth, Tenth, and Eleventh) had active programs, some of which stressed settlement more than others. Telephone interview with staff at the Court Administration Division, Administrative Office of the U.S. Courts (Nov. 2, 1993).
go further and authorize appellate courts to require participation in such settlement conferences. State courts have parallel appellate settlement programs.110

Thus, other aspects of the problem are more clearly framed: Given that litigants can settle more cheaply and quickly without asking the court for vacatur and (if settling while an appeal is pending) can avoid the binding power of an appellate decision by dismissal, what do litigants seek that prompts them to settle more slowly and expensively by including in a settlement the requirement for court action? Further, should judicial efforts to encourage settlement change as cases move along the litigation spectrum, from the pre-trial process, through trial, and then on appeal? Are rules on vacatur on consent (and on other settlement and ADR efforts) appropriate for the trial court but inappropriate for the appellate courts? The Supreme Court?

Answering these questions would be made easier by empirical work that illuminates more than what briefs and reported opinions have to tell about what bargains were struck and why, and about what happened, after courts

of one such conference in the Second Circuit came a settlement that, with staff assistance, included the vacatur of a trial court opinion. See Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280 (2d Cir. 1985) and discussion of it in Manufacturer's Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (1993).

109. On September 20, 1993, the Judicial Conference of the United States approved, and on April 29, 1994, the United States Supreme Court promulgated an amendment to Rule 33 that permits an appellate court to:

direct the attorneys, and in the appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement .... As a result of a conference, the court may enter an order . . . implementing any settlement agreement.


110. As the majority reported in Neary v. Regents of Univ. of Cal., 834 P.2d 119, 121 (Cal. 1992), as of 1985, one half of the California appellate courts had no formal or informal settlement programs; by 1992, every court had such programs. See also Sheila Sonenshine, Real Lawyers Settle: A Successful Post-Trial Settlement Program in the California Court of Appeal, 26 LOY. L.A. L. REV. 1001, 1002 (1993) (Associate Justice Sonenshine describing the increasing use of a mandatory program, through which 95 percent of the civil cases went and by which some 40 percent of those cases settled). For discussion of the "success" of Mississippi's Court of Appeals for the Eastern District of that state, see Susan A. Fitzgibbon, Appellate Settlement Conference Programs: A Case Study, 1993 J. DISP. RESOL. 57, 106–07.
either granted or denied vacatur. To my knowledge, no such empirical work exists. Instead, I piece together from available information some of what we can assume parties seek in vacatur—to enable assessment of what courts have and should give.

1. Ambiguity and Comfort

According to one of the briefs in Neary, the defendant veterinarians took offense at the finding that they had libeled Mr. Neary. They wanted “peace of mind” and “look[ed] upon the judgment in this case as a conviction, as a finding of guilt . . . .” Presumably then, they also looked upon the stipulated vacatur or reversal as vindication that the “finding of guilt” no longer stood. On the other hand, we also know that at least at one point, Mr. Neary was not “at peace” with the agreement to vacate. He wrote a letter to the court in which he stated that

to reverse the decision would be an outrage to me and other victims and an affront to the jury system. . . . Personally, they [the defendants] should be publicly horsewhipped and driven from the company of honest men and especially teachers.

What one hears from both sides of Neary are the voices of unhappy litigants, appellant veterinarians hating the results of the trial and appellee rancher liking those results. Yet, at some later point, Mr. Neary was persuaded (by whom?) to accept $3 million and the vacatur—perhaps with the view that the

111. To my knowledge, one empirical study of vacatur exists: Professor Stephen Barnett sampled one fifth of the minutes from California intermediate appellate courts during a five year period. He found records of the appellate court dismissing appeals based on parties’ stipulations and concluded that, on average, some 240 cases settled while an appeal was pending during each of the years studied. Because the parties to the Neary appeal identified twelve instances of stipulated reversal or vacatur, he estimated that in about one percent of the cases settling while an appeal was pending, parties sought to have an appellate court do something other than dismiss. Barnett, Making Decisions Disappear, supra note 26, at 1070 & nn.205, 294. A second study, now underway, of lawyers’ appellate settlement practice may shed light on vacatur. Letter from Professor Geoffrey P. Miller about his and attorney Tom Meites’s research (Nov. 15, 1993) (on file with author).

112. Brief of Amicus Curiae in Support of the Court of Appeal’s Decision at 3, Neary v. Regents of Univ. of Cal., 834 P.2d 119 (Cal. 1992) (No. S020515) (on file with author). As described by Justice Kline, the parties claimed that “[u]nless the judgment is vacated, the veterinarians will not have achieved the peace they bargained for when they signed their settlement agreement.” Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 775 (Ct. App. 1991).

113. As he put it, he was “reluctant to burden [his] counselors with this matter.” Letter from George Neary to Justice Kline (Feb. 8, 1991) (on file with the author).

114. Id.
vacatur was not the equivalent of an appellate court declaring the finding below null and void.

These litigants' conflicting desires demonstrate the possible utility of vacatur as a source of ambiguity. Vacating a decision at the parties' behest does not negate the earlier outcome entirely. Juries and judges have still ruled, and appellate courts have not announced any legal error. Out of an amalgam of technicality and ambiguity, perhaps both sides can find the comfort they seek, comfort that would be unavailable were an appellate court to find for either one of them. In short, Neary may illustrate instances in which litigants bargain for—and appellate courts give—confusion, and with that confusion, emotional solace. Perhaps both sets of lawyers persuaded their clients that vacatur vindicated each side's position.

If vacatur on consent is understood as providing litigants with more options than the dichotomous alternatives of winning and losing, vacatur becomes responsive to the criticism of courts as offering too limited an array of remedies. Vacatur on consent can thus be seen as a form of alternative dispute resolution, augmenting courts' remedies and enhancing their flexibility.

2. Implicit and Inexpensive Reversals on the Merits

But if vacatur on consent becomes commonplace, will its status as an ambiguous, and therefore comforting, act be sustained? What exactly do parties request, by their motion for vacatur, and what exactly do courts do, when they vacate predicated on a settlement? One easy assumption is that vacatur on consent, like any other form of vacatur, nullifies the earlier opinion. But both argument about vacatur and the case law that flows from it undermine the confidence with which one can describe the actual effects of this form of vacatur.

The briefs and opinions in Neary evidence some confusion about the meaning and import of vacatur on consent, or even what to call it. The Neary litigants wanted something that they alternately described as "reversal" and "vacatur," but as they explained in briefs before the Supreme Court of California, they were not seeking a decision "on the merits." The justices,

115. See the intermediate appellate opinion, Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773, 774 (Ct. App. 1991) ("joint application for stipulated reversal . . ."). Thereafter, the litigants argued to the California Supreme Court that vacatur was sought instead. See Petitioners' Brief on the Merits at 1, n.1, Neary, 834 P.2d 119 (No. S020515) (on file with the author) ("The parties asked the Court of Appeal for 'reversal,' rather than vacatur, only because they were concerned that vacating a judgment might not be a permissible remedy under California law . . . . Because Appel-
in turn, debated the legal import of what they did as well. The majority denied that vacatur on consent was ambiguous.

There will be no inference that the jury or trial court erred. Whatever conclusions the public wishes to draw from this litigation can still be drawn after the reversal. To remove any possible doubt in a case of stipulated reversal, the appellate court can explicitly state in its order that the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment.\textsuperscript{116}

Justice Kennard, in dissent, disagreed.

The parties assert that reversal is necessary because the defendant veterinarians insist upon it to protect their professional reputations. At the same time, they assert (and the majority agrees) that a stipulated reversal would not imply that the judgment is defective on the merits \ldots The parties may not have it both ways.\textsuperscript{117}

In contrast to the position that vacatur on consent does not undermine the decision below, in both \textit{Kaisha} and \textit{Bonner Mall}, litigants and the United States government (as amicus) argued to the United States Supreme Court that, when parties request vacatur, they are communicating to the appellate court that the "parties are not willing to be bound by the district court's judgment, but have instead reached their own, often quite different, resolution of their dispute."\textsuperscript{118} As a consequence, "the validity of an unreviewed district court decision that has been compromised on appeal is open to question."\textsuperscript{119} The thesis is that the compromise "from the combined perspective of the parties, is more \textit{just} than the judgment they seek to have vacated."\textsuperscript{120}

This approach suggests that vacatur on consent furthers not only the parties' interests—in controlling the import of their dispute—but also the public's interest; weak judgments can be voided without the costs of a full

\begin{footnotes}
\item[116] Neary, 834 P.2d at 124. See also Norman I. Krug Real Estate Invs., Inc. v. Prasker, 22 Cal. App. 4th 1814, 1825 (1994) (a post-Neary case, vacating a judgment in part, and stating that "[s]aid reversal does not represent a considered rejection by this court of the judgment below.").
\item[117] Id. at 132.
\item[120] Id. at 27 (emphasis added).
\end{footnotes}
appeal. Vacatur is a short cut for either a trial or an appellate court, which can rely on parties' suspicions and dealmaking about trial verdicts or appellate decisions to eliminate them. If this position prevails, then permitting vacatur on consent can be seen not only to vindicate parties' feelings (see Neary), but also their legal and moral judgments—about the validity and justice of the trial verdicts themselves. Vacatur lets litigants undo district court decisionmaking without having to bear the economic burdens—or the risks—of an appeal. Appellate courts that authorize this practice may thus have devised not only an economical mode for the litigants (not "forced" to pursue an unwanted appeal), but also a method to have cheap appeals that destroy lower court opinions without taking much appellate court time. This savings can accrue to the appellate courts if motions for reargument are pending and to the United States Supreme Court if certiorari is pending or has been granted and the case settles.

3. Subsequent Uses and Uncertain Preclusive Effects

Litigants in Kaisha have claimed that vacatur on settlement "erases" the lower court opinion, which then has neither legal nor factual weight. That view is predicated on the general rule that "a judgment that has been vacated, reversed, or set aside on appeal [or by the trial court] is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." Note that this statement of the black letter rule folds together vacatur, reversal, and set-asides; it makes no mention of the various reasons for vacatur, and specifically of the phenomenon of vacatur by consent.

Turning from the general rule to the specifics, the black letter rule is a fair statement of the law, but only sometimes. In some circuits, vacated opinions cannot be used for collateral estoppel, at least if the parties so stipulate. But in other circuits, parties can obtain vacatur on consent,
yet nevertheless, face that vacated opinion, used as collateral estoppel in a subsequent case. Both the Ninth Circuit\(^{127}\) and the Fifth Circuit\(^{128}\) have

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\(^{127}\) See Bates v. Union Oil Co., 944 F.2d 647 (9th Cir. 1991). At a first trial (Amos v. Union Oil Co., 663 F. Supp. 1027 (D. Or. 1987)), dealers sued Unocal, charged that its “sudden switch” to a lower octane fuel constituted, inter alia, tortious breach of contract, and a jury found Unocal liable. 944 F.2d. at 648–49. While an appeal was pending, the parties settled, conditioned on vacating the judgment. On remand, the trial judge, Owen Panner, did so. Id. at 649. Thereafter, other Unocal dealers sued—in the Bates case—and Judge Panner once again presided. Using the Amos initial holding as preclusive, Judge Panner explained that his “order of vacatur says nothing about the preclusive effect of the Amos judgment, nor does it indicate my opinion on it. I vacated the Amos judgment so that the parties would settle the case.” Id. In addition to resolving liability against Unocal, Judge Panner also relied on the vacated opinion to assess $120,000 in punitive damages; the jury thereafter found compensatory damages for each of the dealer plaintiffs. Id.


Chemetron had also begun litigation, in 1967, against 57 defendants whom it claimed had violated federal and state securities laws. In its pre-trial motions before a 1979 trial, Chemetron had sought to have Bintliff collaterally estopped from relitigating certain facts found against him in the Cosmos Bank case. The trial judge refused to do so. Id. at 1187. Chemetron prevailed before the jury on its claims under Section 10(b)5 of the 1934 Act but lost on the Section 9 claims. Id. at 1155. Bintliff was again found liable. Id.

In its “cautionary cross-appeal,” id., Chemetron raised the collateral estoppel issue. Its proved apt, because the Fifth Circuit held that Section 10(b) liability was not available and ordered a retrial in which it authorized collateral estoppel use of facts found against Bintliff in the Cosmos Bank litigation. Id. at 1194.

The Fifth Circuit in Chemetron applied federal preclusion rules and used the criteria of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) to determine that it would not be “unfair” to use the earlier decision, withdrawn and set aside because of the parties’ settlement, as collateral estoppel. 682 F.2d at 1191.

Thereafter, Bintliff’s petition for review of the holding on the availability of collateral estoppel was denied. See Bintliff v. Chemetron Corp., 51 U.S.L.W. 3641 (U.S. Mar. 1, 1983); Bintliff v. Chemetron Corp., 460 U.S. 1013 (1983). Certiorari was granted on Chemetron’s question of 10(b)-5 liability, and then the decision was vacated in light of another ruling on the relationship among liabilities under the 1934 Act. See Chemetron Corp. v. Business Funds, Inc., 51 U.S.L.W. 3520 (U.S. Jan. 11,
on occasion permitted subsequent reliance on district court opinions vacated pursuant to settlement. Further, the Ninth Circuit's "rule" on vacatur is that the question of the subsequent use of a decision is to be decided in each case, as courts weigh the "equities and hardships . . . between the competing values of right to relitigate and finality of judgment."\textsuperscript{129}

In other words, "vacated" may not be "vacated"—in the sense that opinions "vacated on consent" have actually been used, despite the vacatur, as precedent, as persuasive reasoning, and as collateral estoppel.\textsuperscript{130} To be sure, the instances in which vacated opinions are used expressly as collateral estoppel are not frequent in the reported literature.\textsuperscript{131} Some of these cases may be explained by sloppy lawyering; when parties neglect to set forth—as an express term and condition of their settlements—that they intend no further use of the opinion, that failure has, upon occasion, come back to

\textsuperscript{129} Ringsby Truck Lines, Inc. v. Western Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982) (calling for district court exploration of the "consequences and attendant hardships of dismissal or refusal to dismiss" as they relate to the particular case, its facts, and the parties' motives for vacatur). See also National Union Fire Ins. Co. v. SeaFirst Corp., 891 F.2d 762, 769 (9th Cir. 1989) (finding no abuse of discretion when district court declined to vacate partial judgment entered against the insurer); Continental Casualty Co. v. Fibreboard Corp., 4 F.3d 777, 779-80 (9th Cir. 1993) (relationship between mootness stemming from the acts of one party and vacatur; remanded to trial court to apply \textit{Ringsby} rule). The Tenth Circuit has recently framed a similar rule about vacating its own opinions. See Oklahoma Radio Assoc. v. FDIC, 3 F.3d 1436, 1444 (10th Cir. 1993) (court to determine "whether vacatur of an opinion of the court is appropriate on the basis of the particular circumstances if such a request is made").

130. One form of recycling, use of trial court opinions as persuasive and/or precedential authority as distinguished from preclusion is advocated by \textsc{Wright}, \textsc{Miller}, & \textsc{Cooper}, supra note 56, at § 3533.10.

131. An unanswered question (pending empirical work) is how these vacated decisions function in the world of bargaining and of unreported adjudication.
haunt them: the "Vacated Opinion Returns." Ambivalent judging is also evident; judges have relied on vacated opinions when faced with a litigant as an alleged violator of yet another party's rights. A judge who initially consented to vacatur appears to have second thoughts about the impact of the first acquiescence. The theoretical possibility of repetition of illegal behavior turns into factual claims that it is happening again, that the very same people who benefitted from an earlier vacatur are denying anew their obligations. The talismanic "capable of repetition yet evading review" prompts a judge to put an end to the evasion by using the fact of repetition to rely on the prior vacated decision.

But even when vacatur is granted and preclusion officially destroyed, court opinions may be (in Judge Easterbrook's metaphor) under "clouds," but they have not "vanished." Not only is the public free, as the Neary court recognized, to draw what conclusions it likes from records, neither "destroyed [n]or sealed," but judges both proclaim the availability of such use when vacating decisions and also rely on vacated opinions when rendering subsequent decisions. As one judge, following an opinion of another who had ruled some seven years earlier and then vacated the opinion

132. See, e.g., Bates, 944 F.2d at 649. See also In re Otasco, Inc., 18 F.3d at 841 (10th Cir. 1994) (dismissal of claims without vacatur of order, even if order should have been vacated, does not preclude that order's use as collateral estoppel); cf. Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138, 1146 (2d Cir. 1992) (preclusion denied because parties had stipulated to the entry of an order that "the findings and conclusions embodied therein, is withdrawn, set aside and vacated, and shall be of no force or effect for use against defendant, its successors and assigns, by plaintiffs, by the Pension Fund or by third parties, for collateral estoppel or other preclusive purposes").

133. These cases may be a form of what a few courts have called "judicial estoppel"—which "prevents a party who benefits from the assertion of a certain position from subsequently adopting a contrary position in any other litigation." David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 762 (S.D.N.Y. 1988). See generally MOORE, LUCAS, & CURRIER, supra note 56, at ¶ 0.405[8] (the doctrine, which is in some tension with liberal rules of pleading that permit alternative theories, exists but is deployed "cautiously"). The estoppel is explained as preventing "unfairness" to opponents and protecting the "integrity of the judicial process." David, 697 F. Supp. at 763.

134. In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988).


136. See, e.g., IBM Credit Corp. v. United Home for Aged Hebrews, 1994 U.S. Dist. LEXIS 4372, at *8 (S.D.N.Y. 1994) ("Once a decision has been filed and in the public domain, its influence" is based on its merit, "whether vacated in connection with a settlement or not so vacated.") See also Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993) (significance of district court opinion, which is not precedent, remains upon vacatur for "supervening mootness" or other grounds; that "information" has whatever value people take from it).
on consent, explained his reliance: that "decision . . . has since been depublished but remains sound guiding analysis . . . ."\textsuperscript{137}

Vacatur generates more than confusion and quasi-law; it has upon occasion also prompted rebellion. District court judges have been in open controversy with their appellate siblings over the practice. The opinion of Judge Finesilver in \textit{Benavides v. Jackson National Life Insurance Company} demonstrates the import that he accords trial court adjudication.\textsuperscript{138} After explaining why he had issued a legal ruling finding an insurance company's refusal to pay on a policy contestable, which was then followed by settlement and a brief appellate order instructing vacatur of the judgment, the trial judge wrote a lengthy rebuttal, concluding:

Vacatur allows wealthy litigants to become, in effect, editors of their own treatises on the subjects which concern them. We have no kind words for such a practice. . . . Accordingly, we must respectfully decline to vacate our prior judgment pending a reasoned and more detailed order from the Court of Appeals.\textsuperscript{139}

Thus, parties do not always get that for which they thought they had bargained; at least upon occasion, judges openly (let alone covertly) rely on decisions that have been vacated by settlement. To the extent the events occurred, they cannot be redacted, no matter what the text of a court order. To the extent the decision is (such as \textit{Bonner Mall}) the "law" of a circuit, that ruling will be invoked and relied upon by trial courts until, and sometimes even after, it is vacated. When repeat players appear in other courts or the legal issue reemerges, the events and the case law that sprouted in their wake have ways of being remembered.\textsuperscript{140}


\textsuperscript{140.} Disparity of resources may have particular relevance in this context. Given transaction costs, one-shot future litigants may be less likely to uncover the past, vacated behavior, whereas repeat-playing opponents may have better access to such information.
One might fashion an argument against vacatur on settlement from a pragmatic stance developed out of this history and description: that courts should not offer vacatur on settlement because it is an intrinsically ambiguous act. While vacatur may, by its ambiguity, provide both comfort and implicit reversals, its absence of a base—in either law or fact—undercuts its efficacy. In future exchanges, lawyers, litigants, judges, and witnesses will find ways to retell the stories of the past findings of illegality. When everyone knows it was only smoke and mirrors (in this context, often the exchange of money) that brought about the vacatur of a decision, people will peek behind the mirror.

The persuasiveness of this pragmatic critique turns, in part, on the relationship between the ambiguity engendered by vacatur on consent and other actions of courts, some of which also alter prior adjudication and entail ambiguity. It is to those analogous practices, hardly mentioned in the vacatur case law, that I now turn.

4. Analogies: Consent Decrees, Expunction of Convictions, and Depublication

One view of vacatur by consent is that it is an aberrant judicial act, somehow different from what courts ordinarily do. To put it baldly, critics claim that vacatur on consent is a kind of legal lie (the polite term is a “legal fiction”).\(^4\) The fictive status, in turn, diminishes the force of court action and undermines the idea of courts as institutions that predicate action upon deliberation. But ambiguity is not found only in vacatur produced by settlement, and other court actions do not always entail deliberation. There are parallels in what courts already “do” that might provide precedents for vacatur on consent.\(^2\)

A first example is the practice, common at the trial court level, of entering consent judgments. According to Justice Brennan, consent judgments are a mixed phenomenon:

To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble

\(^{141}\) Some courts call it a “factual fiction.” United States v. Noonan, 906 F.2d 952, 960 (3d Cir. 1990) (citation omitted).

\(^{142}\) Murray L. Schwartz, The Other Things That Courts Do, 28 UCLA L. Rev. 438, 459–62 (1981) (detailing and analyzing the many activities of courts that are not adjudication-focused, including rule promulgation, appointment of officers, and probate administration).
contracts . . . . More accurately, then, . . . consent decrees “have attributes both of contracts and of judicial decrees,” a dual character that has resulted in different treatment for different purposes.143

While there is dispute about the nature and import of consent judgments, their availability has long been assumed144 and parties’ power to craft them widely celebrated.145

Under the “law” of consent decrees, courts have the “duty” to enter judgment at parties’ behest,146 with “no power to supplement or construe the agreement.”147 Further, sometimes parties consent to judgment after a good deal of litigation has taken place, and (as a part of the bargain) withdraw claims or deny liability already found by trial judges. As a part of consent judgments, parties can bargain over the future use of those decrees. Their bargains can prevent subsequent deployment of decisions rendered by judges or juries,148 and parties’ bargains can authorize preclusion.149

144. For a more critical appraisal, see Judith Resnik, Judging Consent, 1987 U. Chi. LEGAL F. 43 [hereinafter Resnik, Judging Consent].
145. See, e.g., Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 770 (1992) (“[A] consent decree reflects the parties’ understanding of the best remedy, and, subject to judicial approval, the parties to a consent decree enjoy at least as broad discretion as the District Court in formulating the remedial decree.”).
146. See HENRY BLACK, A TREATISE ON THE LAW OF JUDGMENTS 12–15 (1891); see also A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1350 (5th ed. 1925).
147. FREEMAN, supra note 146, at 2771.
148. Hughes v. Sante Fe Int’l Corp., 847 F.2d 239 (5th Cir. 1988), discussed supra note 128, involved a jury verdict followed by a settlement modifying the verdict. Douglas Hughes sued Brown and Root for negligence for injuries incurred while working on a company barge. After a jury had awarded $17,900 in damages, but before entry of judgment, Hughes filed a second action, based on strict liability, again against Brown and Root as well as against a prior owner of the barge, Santa Fe International Corp., and the barge’s builder. Hughes sought a retrial in the first case; thereafter, Hughes settled with Brown and Root, which paid him a total of $410,000. The trial court entered a final judgment, in which it stated that the jury had awarded Hughes $17,000, that as part of the settlement agreement, he received additional sums, and that he agreed to dismiss Brown and Root from the second case but preserved his litigation against other defendants. In the second case, a trial court granted Santa Fe’s summary judgment based on collateral estoppel of issues allegedly decided in the first action. The Fifth Circuit reversed, because the parties’ consent judgment—and not the jury’s findings—concluded the first action, and a consent judgment could not be used as collateral estoppel.
149. See, e.g., In re Pearson, 120 B.R. 396, 398 (Bankr. N.D. Tex. 1990) (“only where the parties manifest an intention to give preclusive effect to the consent judgment by including detailed recitations of findings upon which the judgment is based, is issue preclusion appropriate”); see also Hartley v. Mentor Corp., 869 F.2d 1469, 1472 (Fed. Cir. 1989) (“[T]hat a judgment is entered by stipulation does not in and of itself remove the
Consent judgments at trial therefore offer a parallel to vacatur, both because courts act at the parties' behest, because these consent decrees can include parties' decisions on the use of prior adjudications, and because there is some ambiguity about the effects of consent judgments, as evidenced in a raft of post-consent litigation in a variety of substantive areas.\(^{150}\)

The model of consent judgments is a powerful precedent that responds, descriptively, to one of the normative claims made against vacatur on consent. The proposition is that, while parties may be free to bargain among themselves, they are less free to bargain when their bargains depend on court action, because courts serve the public as well as the parties.\(^{151}\) Consent decrees document, however, that courts do act "at the behest of the parties," and both enter judgments written by those parties and enforce them. Further, within those consent judgments, parties sometimes stipulate to the meaning and permissible use of previous adjudication by judges and juries. Moreover, consent decrees suggest that, despite parties' agreement to discontinue litigation, a "case" or "controversy" exists, enabling courts to have the authority to enter judgment.\(^{152}\) A claim might have been

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150. The decision about whether to permit a consent judgment is not completely in the hands of the litigants. Prior to entering a consent judgment, a trial court must ensure that it has subject matter jurisdiction, that the judgment comes within the scope of the pleading, that it "further[s] the objectives of the law," and that the proposed agreement does not conflict with legal norms. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525–26 (1986). Further, by consent agreements, parties can contract to do more than the law requires. Id.; see also Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 760–61 (1992) (discussing standard for modification of consent decrees; under a more "flexible" standard in institutional reform litigation, the fact that the law no longer requires a particular outcome does not, in itself, mandate revision of a consent decree).

151. If vacatur on consent is analogized to consent judgments, one might attempt to import these rules; vacatur on consent could be permitted only after court scrutiny to ensure compliance with legal norms. The question is, however, whether vacating of judgment for settlement is a violation of legal norms.

152. See, e.g., In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988).
advanced that a federal court, circumscribed by Article III "case or controversy" requirements, has no authority to decide to vacate a decision when the parties have no current dispute (or to the extent that there is a dispute, it exists between the parties, seeking settlement, and the court, imposing a legal ruling).\textsuperscript{153} This form of argument appears in the \textit{Bonner Mall} case, in which, while both parties agreed to settlement, only one side has requested that the Supreme Court vacate the underlying opinions as "moot."\textsuperscript{154} The existence of consent decrees, however, refutes this jurisdictional objection.\textsuperscript{155}

\textit{of Negotiated Institutional Reform}, 1984 DUKE L.J. 887, 902-03 (noting the problem but concluding that consent decrees can be analogized to other uncontested proceedings such as naturalization). Further, if both parties agree to settle, the judiciary has little information to judge the wisdom of parties' decisions. See Resnik, \textit{Judging Consent}, supra note 144, at 85-101.

153. Intimations of this jurisdictional proposition can be found in Judge Kearse's opinion, holding that the Second Circuit will not vacate its own opinions at parties' request. See Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (to do so "would allow the parties to obtain an advisory opinion of the court of appeals in a case in which there may not be, or may no longer be, any genuine case or controversy; the federal courts of course have no jurisdiction to render such opinions").

154. See U.S. Bancorp Merits Brief, \textit{Bonner Mall}, supra note 46, at 15-27. That argument relies, in part, on a line of Supreme Court cases discussing the requirement that appellate courts vacate, either under "inherent" or express powers (see 28 U.S.C. § 2061), judgments that have become moot while an appeal is pending. See, e.g., United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision . . . is to reverse or vacate the judgment below. . . ."). Those who oppose vacatur on consent distinguish \textit{Munsingwear} as an instance in which appellate review was "prevented through happenstance." Karcher v. May, 484 U.S. 72, 82 (1987). See, e.g., Manufacturers Hanover Trust, 11 F.3d at 381 (summarizing the arguments); United States v. Garde, 848 F.2d 1307 (D.C. Cir. 1988) (distinguishing \textit{Munsingwear} from instances when litigants who were dissatisfied by outcomes could avoid cases by obtaining vacatur); Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990) (opinions debate applicability of \textit{Munsingwear}).

155. Moreover, whatever the potential force of jurisdictional objections, Article III "case" and "controversy" doctrine is sufficiently elastic—standing doctrine being a notorious example—that additional arguments are needed to shape this jurisdictional position. See, e.g., the arguments by both the United States (U.S. Amicus, \textit{Bonner Mall}, supra note 45, at 10-22) and U.S. Bancorp. (U.S. Bancorp Merits Brief, \textit{Bonner Mall}, supra note 46, at 30-41), claiming that "fairness," "public policy" and "prudential" concerns also support vacatur on consent. See also Honig v. Doe, 484 U.S. 305 (1988) (disagreement among justices as to whether the issue was moot and if so, whether mootness is a doctrine rooted in Article III as compared to a prudential limitation; Chief Justice Rehnquist urged that an additional exception to mootness permits the Supreme Court to review cases mooted after certiorari was granted so as to avoid resources having been "squandered" on briefing and argument, id. at
Consent decrees are not the only practices of courts that complicate jurisdictional and custom-based refusals to vacate on consent. The argument that courts do not try to "rewrite history" is also descriptively inaccurate; courts do "rewrite" upon occasion. One example comes from legislative instructions to set aside convictions. Legislative goals include treating the proceedings "as if they never occurred." Under Justice Department Guidelines, to expunge is "to destroy, delete or obliterate; it implies not a

331-32 (Rehnquist, C.J., concurring)).

156. See Fisch, supra note 6.


Although the FYCA has been repealed, two provisions of current federal law permit expungement. The first, 18 U.S.C. § 3607(c) (1988), provides that when a person is "found guilty of an offense under" the Controlled Substance Act, is under twenty-one "at the time of the offense," has no prior convictions relating to controlled substances, is placed on probation for under a year and commits no violations, and applies, a court "shall enter an expungement order" that directs "that there be expunged from all official records, except those nonpublic records [of the Department of Justice], all references to his [or her] arrest ...." A second provision is "civil," but derivative, in that it provides for expungement of records of civil penalties assessed under 21 U.S.C. § 844a(a) against those individuals convicted under 21 U.S.C. § 844 of possession of a controlled substance listed in 21 U.S.C. § 841(b)(1)(A) in a "personal use" amount. See 21 U.S.C. §§ 844a(a),(j) (1988). To meet the criteria of this section, one need not be under 21. The act requires that the individual is for the first time assessed and has paid the civil penalty, that the individual has no convictions under federal or state law relating to controlled substances, and is willing to submit to a drug test establishing that the person is drug-free. 21 U.S.C. §§ 844a(j) (1)-(5) (1988).

Under this legislation, the Department of Justice is supposed to keep records of expunction sealed. 18 U.S.C. § 3607(b) (1988); 21 U.S.C. § 844a(j) (1988). Empirical data on the frequency, modes, and efficacy of expunction are difficult to obtain. According to staff in the Department of Justice (Justice Management Division, Information Resources Management), from 1981 until October 1993, the Department had records of 360 expunctions under 18 U.S.C. §3607(c) or its predecessor and 646 instances of records becoming "nonpublic." No data were available from Justice on expunction under the civil statute, apparently in part because of lack of automation and coding. Memorandum of Brian Raphael, Reference Librarian, USC Law Center (Nov. 10, 1993). A subsequent memorandum from the Federal Bureau of Investigations indicated that, as of April of 1994, "920 requests for expungement .... have been directed to the FBI and are currently being processed .... To date, the FBI has finalized [in coordination with the National Archives and Records Administration] 258 expungements." Letter of Section Chief, Information Resources Division to Mr. Raphael (Apr. 5, 1994) (on file with author).

legal act, but a physical destruction.”159 Under federal law, such orders “restore such person, in the contemplation of the law, to the status he [or she] occupied before such arrest or institution of criminal proceedings.”160 With an expunction, a person does not commit perjury if that person does not “acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him [or her] for any purpose.”161

But expunction is not only a creature of the legislature. Courts, as an exercise of their “inherent powers,” also order expunction of either arrest or conviction records. To guide that decision, the circuits have formulated a range of standards.162 Some circuits describe themselves as acting under “extraordinary circumstances,”163 others as preserving rights,164 balancing

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159. U.S. Department of Justice, Order DOJ 2710.10(A) (Apr.20, 1990) (“Federal Court Orders for the Disposition of Official Records Other than Under the Controlled Substances Act”) at 4(a), and Order DOJ 2710.7D (May 3, 1993) (“Recordkeeping for Violations Committed under the Controlled Substances Act”) at 4(a) (obtained by a Freedom of Information Act request).


161. Id.

162. See United States v. Gillock, 771 F. Supp. 904, 908 (W.D. Tenn. 1991) (reviewing the cases and discussing the difficulty of establishing “specific standards” for the exercise of courts’ inherent power to expunge).

163. Many courts have invoked the Tenth Circuit’s instruction that the “power to order expungement of a state arrest record” is narrow, and appropriately done only in “unusual or extreme cases,” such as “where the arrest itself was . . . unlawful . . . or . . . represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional.” Shipp v. Todd, 568 F.2d 133, 134 n.1 (9th Cir. 1978) (quoting United States v. Linn, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)); see also United States v. Pinto, 1 F.3d 1069, 1069–70 (10th Cir. 1993); Geary v. United States, 901 F.2d 679, 680 (8th Cir. 1990); Reyes v. Supervisor of Drug Enforcement Admin., 834 F.2d 1093, 1098 (1st Cir. 1987); Allen v. Webster, 742 F.2d 153, 155 (4th Cir. 1984); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); United States v. McMains, 540 F.2d 387, 390 (8th Cir. 1976). District courts within the First, Sixth, and Eleventh Circuits have also invoked this test. See Guglielmo v. Cunningham, 811 F. Supp. 31, 40 (D.N.H. 1993); Schwab v. Gallas, 724 F. Supp 509, 510–11 (N.D. Ohio 1989); United States v. Johnson, 714 F. Supp. 522, 524 (S.D. Fla. 1989). Some of the courts that have used the “extraordinary circumstances” test have also required exhaustion of administrative remedies. See Reyes, 834 F.2d at 1098–99 (plaintiff seeking to correct records accusing him of terrorist activities).

Note that under the Neary test, “extraordinary circumstances” are required to deny a motion to vacate an opinion on consent. For discussion of the limited information available to judges, making that test very difficult to apply, see Norman I. Krug Real Estate Inv., Inc. v. Prasiker, 22 Cal. App. 4th 1814, 1826–1828 (1994) (Kline, J., concurring).

164. The D.C. Circuit, which has issued several opinions on the issue, requires expunction “when that remedy is necessary and appropriate in order to preserve basic legal rights.” Livingston v. United States Dep’t of Justice, 759 F.2d 74, 78 (D.C. 1985).
equities,\textsuperscript{165} or some amalgam thereof.\textsuperscript{166} The reported instances of
expunction are not numerous.\textsuperscript{167} Further, the Fifth and Seventh Circuits

\begin{quote}
Cir. 1985) (quoting Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973)). Circumstances held to be the basis for expunction include when a student "by happenstance" and with "no probable cause" was wrongly detained and arrested by local police, Menard v. Saxbe, 498 F.2d 1017, 1023–25 (D.C. Cir. 1974); and when mass arrest procedures made judicial determination of probable cause impossible, Sullivan, 478 F.2d at 970.

The Ninth Circuit has relied on the D.C. rule that expungement of state and local records can be an "appropriate remedy in the wake of police action in violation of constitutional rights." Maurer v. Los Angeles County Sheriff's Dep't, 691 F.2d 434, 437 (9th Cir. 1982) (quoting Sullivan, 478 F.2d at 968). See also Fendler v. United States Parole Commission, 774 F.2d 975, 979 (9th Cir. 1985) (discussing expunction of information in a pre-sentence report and stating that "[f]ederal courts have the equitable power 'to order the expungement of Government records where necessary to vindicate rights secured by the Constitution or by statute'") (quoting Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975) (emphasis added by the Fendler court)).

165. The Second Circuit has described its expunction jurisprudence as determining the "proper balancing of the equities." See United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978). See also Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975) ("Determination of the propriety of an order directing expungement involves a balancing of interests; the harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance.").

In theory and in practice, this test could be more or less exacting than the "exceptional circumstances" test. In practice, cases involving a balancing test sometimes tilt the scales against expunction. See, e.g., United States v. Rosen, 343 F. Supp. 804, 808 (S.D.N.Y. 1972) (creating a presumption against granting expunction by stating: "even in the situation where a person has been acquitted of charges against him, the arrest records and other materials of identification, no doubt, may be retained unless: (1) there is a statute that directs return of such arrest records; (2) the arrest was unlawful; or (3) the record of the arrest is the 'fruit' of an illegal seizure") (emphasis in original).

166. See, e.g., United States v. Bagley, 899 F.2d 707 (8th Cir.), cert. denied, 498 U.S. 938 (1990); Schnitzer, 567 F.2d at 539–40; see also Pinto, 1 F.3d at 1069–70 (federal courts have the power to expunge convictions upon determinations that such convictions were "unconstitutional, illegal, or obtained through government misconduct").

167. A review of reported federal cases over the 20-year period from 1974 to 1993 found 47 instances of requests for expunction under courts' "inherent powers." Of the ten requests granted, one was for the expunction of both an arrest and conviction record and the other nine were for expunction of arrest records. See United States v. Benlizar, 459 F. Supp. 614, 622 (D.D.C. 1978) (on remand from the reversal of a defendant's conviction, a district judge found that "flagrant illegal activity of the government" mandated expunction of both the arrest and the conviction record). The instances in which courts under their inherent powers expunged arrest records were: Tatum v. Morton, 562 F.2d 1279, 1283 (D.C. Cir. 1977) (expungement upheld when "mature" individuals had been arrested "wholly without cause" during a peaceful "prayer vigil" near the White House; the court awarded damages because of the violation of first amendment rights and because of tortious conduct by police officers of the District of Columbia); Washington Mobilization Comm. v. Cullinane, 566 F.2d 107, 121 n.5 (1977) (expungement of arrest records upheld..."
are skeptical of the practice. While one aspect of the critique is predicated upon separations of powers concerns,\textsuperscript{168} other criticisms parallel those raised when prosecutor could make no "showing of probable cause for arrests"); Menard, 498 F.2d at 1023-25 (student arrested with no basis); United States v. Van Wagner, 746 F. Supp. 619, 620-21 (E.D. Va. 1990) (government initiated major criminal charges against Van Wagner, then "concluded he was in fact innocent"); the arrest record prevented him from obtaining loans and government contracts); United States v. Johnson, 714 F. Supp. 522 (S.D. Fla. 1989) (after a court ordered defendant's acquittal on assault charges, it subsequently ordered expunction of the arrest record); Natwig v. Webster, 562 F. Supp. 225 (D.R.I. 1983) (former university student who had been arrested in controversy over alcohol purchase obtained expunction when evidence showed that the record might jeopardize his capacity to emigrate and pursue his profession, and the government could not demonstrate any need to maintain the record, because no indictment was ever returned); United States v. Cook, 480 F. Supp. 262 (S.D. Tex. 1979) (denied government's efforts to set aside an agreed-upon expunction after an indictment was dismissed on the government's motion; at issue was the authority of an Assistant U.S. Attorney to agree under Department of Justice guidelines on expunction); United States v. Bohr, 406 F. Supp. 1218, 1220 (E.D. Wis. 1976) (expunction granted for record of lawyer's arrest, more than eleven years earlier, which resulted in a dismissal of the indictment; the court explained the arrest as a "source of embarrassment or misunderstanding"); Urban v. Breier, 401 F. Supp. 706, 708, 711 (E.D. Wis. 1973) (class action expunction on behalf of 54 people, suspected to be members of a "motorcycle gang," all of whom were arrested in a "dragnet" arrest without "probable cause;" thereafter the police had distributed leaflets with all of their pictures).

In an additional seven cases, appellate courts instructed trial courts to consider further the request for expunction. See, e.g., Livingston v. United States Dep't of Justice, 759 F.2d 74, 75, 79-80 (D.C. Cir. 1985) (vacating a district court refusal to grant expunction and ordering a remand to a different district, in which the arrest records had been made); Maurer, 691 F.2d at 437 (federal courts have the inherent authority to order expunction of "local arrest records" and district court erred in assuming state prisoner possessed state law remedies on which he had to rely).

168. See United States v. Scott, 793 F.2d 117, 118 (5th Cir. 1986) (separation-of-power concerns raised by a federal court order directed at "expung[ing] and obliterate[ing] all records and files" of a conviction; court not "empowered" to grant expungement in a case "in which the validity of the original conviction is unquestioned."). The Fifth Circuit has, however, permitted expunction when the "only purpose" of an arrest was to "harass voting workers," United States v. McLeod, 385 F.2d 734, 744 (5th Cir. 1967), and a district court has granted expunction of an arrest record when it was unopposed by an assistant United States Attorney. Cook, 480 F. Supp. at 262.

The Seventh Circuit, in an opinion by Judge Easterbrook, has gone further in calling into question courts' inherent powers to expunge records of the Executive Branch. See Scruggs v. United States, 929 F.2d 305 (7th Cir. 1991) (opining that the Constitution does not prohibit keeping records of illegal arrests; the court also found the request untimely and arguably in conflict with statutes authorizing the Department of Justice to keep records). Cf. Diamond v. United States, 649 F.2d 496, 497-98 (7th Cir. 1981) (remanding for the government to explain the need for keeping records and concluding that an individual seeking expungement did not have to prove that the arrest "was unlawful . . . was made for purposes of harassment or where the statute under which the arrest was made subsequently was held
about vacatur on consent. As one court put it, the “judicial editing of history is likely to produce a greater harm than that sought to be corrected.”

Of course, distinctions can be drawn between the two practices. Expunction is sometimes conditioned upon a defendant’s compliance with the terms of a sentence. In Judge Gesell’s phrase, such a conviction has been “expiated by responsible conduct,” sometimes evidenced in a certificate to the court. Expunction is sometimes animated by the desire to help a deserving individual (frequently a youth) by protecting that person from a misguided moment of youthful folly. At other times, expunction is predicated on a desire to protect an individual from suffering the consequences of government misconduct. Expunction is sometimes an artifact of commitment to rehabilitation, and when interest in that goal of the criminal justice system wanes, so does legislative authorization of expunction.

Yet, like vacatur on consent, expunging records is not completely efficacious. Although sealed, records are often kept for future purposes and, of course, in practice, the events are known; they have taken place. Indeed, like vacatur, opinions themselves record the fact of expunction and supply information about individuals and events. In sum, expunction is unconstitutional”.

169. Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972) (describing the court’s “privilege to expunge matters of public record [as] one of exceedingly narrow scope” and declining to expunge a conviction found invalid because of the failure to advise the defendant of the right to counsel). See also Cavett v. Ellis, 578 F.2d 567, 568 (5th Cir. 1978) (also concerned about “editing of public records”).


171. See Zacharias, supra note 157, at 493 & n.95. The original proposal for expunction was grounded in the view that youths could be rehabilitated. See COMM. ON PUNISHMENT FOR CRIME, supra note 12, at Appendix II (discussion of the English borstal system as a model for the United States).

172. See Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975) (a youth’s conviction was set aside under the FYCA, but that set-aside did not require that court records be changed, and, therefore, the reporting of the arrest and conviction by a credit agency after the individual reached adulthood was not illegal), aff’d, 537 F.2d 384 (9th Cir. 1976); Aidan R. Gough, The Expungement of Adjudicative Records of Juvenile and Adult Offenders: A Problem of Status, 1966 WASH. U. L.Q. 147; Jay L. Schaefer, The Use of Expunged Convictions in Federal Courts, 35 FED. B.J. 107 (1976).

173. See, e.g., United States v. Bohr, 406 F. Supp. 1218, 1220 (E.D. Wis. 1976), in which the court, granting expunction because an arrest was “a source of embarrassment or misunderstanding to [a lawyer’s] professional detriment,” named the lawyer and detailed the events giving rise to the arrest.
an example of "legislative and judicial bodies finding compelling policy reasons for ignoring in law what has occurred in fact . . . "174

Another illustration of court-ordered alterations of "fact" and/or "law" is the practice of "depublishing" an opinion—commonplace in California. While an intermediate appellate court can determine that its opinion is of sufficient import to be published, the California Supreme Court may subsequently order that opinion "depublished" and not used for precedent. The court may make that decision without providing either a hearing or a statement of reasons.175 About one hundred cases a year, "more cases than the supreme court decides each year by signed written opinion," are depublished.176 That practice has also generated confusion: the signal is that something is wrong with the opinion, but exactly what is unclear.177 While California is reputed to be the court with the most extensive depublication practice, other courts both decline to "publish" decisions178 and also "withdraw" opinions.179 Further, courts amend decisions at litigants' request.180

Given consent decrees, expunction, depublication, withdrawal, and amendment of opinions, the (perhaps appealing) arguments that courts should not be viewed as servants of the parties nor in the position to revise history have less credibility. Courts sometimes act at parties' behests, and sometimes

174. Doe v. Webster, 606 F.2d 1226, 1243 (D.C. Cir. 1979) (also discussing other instances of sealing evidence, pleadings, and adoption records, and of annulling marriages).
177. Id. at 1036.
178. Each federal circuit has rules to govern the practice. See, e.g., 9th Cir. R. 36–2 (Disposition by Opinion).
179. See Fenner v. Dependable Trucking Co., 716 F.2d 598, 605 (9th Cir. 1983) (Judge Chambers, dissenting from an "Order Withdrawing Memorandum," stated that his "brothers" were "suppress[ing]" their memorandum opinion).
180. See, e.g., United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). The original opinion (filed on August 4, 1993) had named an assistant U.S. Attorney whom the court stated had misbehaved. The revised opinion referred to the individual as the "AUSA"; the list of lawyers in the case included the name of the assistant, who was also named in a newspaper story about the case. See Henry Weinstein, U.S. Attorney Asks Court to Erase Criticism, L.A. TIMES, Oct. 4, 1993, at B1, B3 (a "unanimous decision by three conservative judges" criticized the prosecution and "lambasted the U.S. Attorney's office for failing to acknowledge the extent and significance" of the assistant's misconduct). See also EEOC v. CBS, Inc., 748 F.2d 124, 125 (2d Cir. 1984) (denying request by EEOC to withdraw an opinion).
alter prior acts. Indeed, courts that have granted vacatur on consent could anchor that act by reference to the longstanding traditions of these related practices. Aside from the proposition that all of these practices should be prohibited, the question remains whether courts should add vacatur on consent to their repertoire. Should courts offer the option of vacating opinions, and thereby of confusing or clouding history, just as courts offer sometimes ambiguous, party-driven consent judgments, expunge criminal conviction records, and depublish or amend opinions?

5. Utility

Responses depend upon evaluation of three other major arguments, again elaborated in the context of vacatur but central to the general topic of what forms of process courts should provide. The first is about utility.

Judges Ralph Winter (of the Second Circuit) and Frank Easterbrook (of the Seventh Circuit), both identified as scholars of law and economics, have advanced different views of the utility of the practice of vacatur on appeal. Judge Winter, who favors the practice, wrote that refusing to vacate a judgment forces litigants “to bear the costs and risks of further litigation”—all for some speculative and “overstated” threat of future litigation that might be averted if vacatur is not permitted.¹⁸¹ Picking up this theme, judges for the Federal Circuit argued that refusal to vacate on settlement not only is “unjust” to the parties and an unfair expenditure of their resources, but also “wasteful of the resources of the judiciary.”¹⁸² In contrast, for Judge Easterbrook, who is opposed to vacatur, prohibiting vacatur on appeal will prompt parties to settle before a trial court renders its judgment.¹⁸³ If not, the “slightly higher costs” imposed on those litigants will “reduce the trouble encountered by litigants and judges tomorrow.”¹⁸⁴

This discussion quickly points out a recurrent problem of utilitarian analyses: its outcome depends upon whose utility is measured and how it is

¹⁸¹. Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985). See also Justice Baxter’s opinion for the California Supreme Court, in Neary v. Regents of Univ. of Cal., 834 P.2d 119, 121-22 (Cal. 1992) (parties who know of the option to settle on appeal will not rely on it to try cases that can be settled earlier). In December of 1993, the reach of Nestle was limited by another panel of the Second Circuit that prohibited vacatur on its own opinions as a part of a settlement. Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384–85 (2d Cir. 1993).


¹⁸³. In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988); see also Fisch, supra note 6, at 632–39.

¹⁸⁴. In re Memorial Hosp., 862 F.2d at 1303.
assessed. For Judge Winter, the utility at issue is that of the immediate parties, whose resources are (he argues) most at stake, and whom (he assumes) will spend those resources and go through with the appeal, rather than settle on other terms. The California Supreme Court implicitly agreed with Judge Winter when it enthusiastically endorsed vacatur by creating a "strong presumption in favor of allowing stipulated reversals," which can only be overcome by a "public interest" that is "specific, demonstrable, well established, and compelling." As that court explained: "parties are the persons (or entities) most affected by a judgment, which is the ultimate product of their sustained effort and expense.

Judge Easterbrook's response is to dispute title. For him, judgments are "public act[s] of government," the existence of which cannot be the subject of parties' contracts. What is the source of that ownership? Obviously, public dollars support judges and jurors; if the California Supreme Court is correct that litigants "own" the judgment, that ownership comes through public subsidies. And it is to the public that Easterbrook turns. For him, adjudication has third-party benefits, and once bestowed, those benefits become sufficiently powerful so as to outweigh the parties' "entitlement[s]." As he explained:

When a clash between genuine adversaries produces a precedent . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of

185. It may be that, given the rise of managerial judging, trial judges will be more likely to call the parties' possible bluff—more willing to refuse a settlement conditioned on vacatur and see if in fact the parties settle or pursue an appeal—whereas appellate court judges (less involved in negotiations with parties about settlement) will be more likely to accept parties' claims about the conditions of settlement at face value.
186. Neary, 834 P.2d at 125.
187. Id. at 123.
188. In re Memorial Hosp., 862 F.2d at 1300.
189. Id. at 1303. In his hat as scholar, Judge Easterbrook wrote that a "court will know less than the parties do," that judges are entitled to become involved in consent decrees, and that contracts "born in court," that is, consent decrees, do not "become suspect" because of that fact. Frank H. Easterbrook, Justice and Contract in Consent Judgments, 1987 U. CHI. LEGAL F. 19, 21, 30. As in the Memorial Hospital opinion, this essay stresses his concern with the effects of consent decrees on third parties not represented in the bargaining. Id. at 31–33.
190. In re Memorial Hosp., 862 F.2d at 1302.
settlement. The precedent, a public act of a public official, is not the parties' property.191

The weight accorded third party interests relates to one of the current procedural trends that I detailed earlier. First, public dollars fund many court programs for settlements, but third parties reap neither the benefits of judicial insights made during the course of settlement discussions about the value of claims, nor necessarily the information generated by discovery and pretrial litigation or alternative dispute resolution. Nevertheless, these processes are justified as useful both as docket-reducing mechanisms (and therefore beneficial to third parties) and as socially appropriate resolutions of disputes. Second, to the extent a refusal to vacate is linked to the future use of judgments, it is another illustration of contemporary interests in aggregation and consolidation. As each case is increasingly understood as a piece of a larger “litigation,” the third party interests become more vivid; linking the cases makes plain the utility of preclusion and of reduced judicial investment in repetitive decisionmaking on similar sets of facts.

Judge Winter’s response is that those third parties may well be disserved by forcing litigants into the role of “unwilling private attorneys general.”192 The appellants seeking settlement are individuals who, in Judge Winter’s view, would flunk Rule 23’s test to determine who can adequately represent a class. Why would future litigants want to rely on those who want to settle and have no interest in the pursuit of legal claims in appellate courts?193

One answer might be to gamble: if put to the choice of full appeal or settlement without vacatur, these litigants may well settle, and future parties will then be able to rely on trial court decisions that were the products of vigorous adversarial efforts. Easterbrook’s other comeback—were the conversation to be direct—is to move to another set of utilities: those of the

191. Id. The D.C. Circuit found this paragraph “persuasive,” applying the Seventh Circuit rule in refusing a motion by the United States to vacate an appellate court decision that was “mooted after judgment only because the parties had entered into a settlement.” See In re United States, 927 F.2d 626, 627–28 (D.C. Cir. 1991) (Judge Douglas Ginsburg for the panel). But see Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990), in which an en banc court ordered vacatur of a district court opinion that had “mooted” prior to the appellate court’s ruling. What kind of “postjudgment contingencies” should properly be understood as rendering the “underlying controversy moot” prompted a lengthy dissent from Judges Edwards, Mikva, Ruth Bader Ginsburg, and Robinson, making the D.C. rule less clear on requests for vacatur of trial court judgments as a part of consent judgments. Id. at 709–18.
“judicial branch” itself, which “retains” an independent “interest” (one he identifies as the “orderliness of its own processes”). Tidiness is an interest that the California Supreme Court also weighs, but its form of “order” is the “orderly termination of litigation”—and with that definition, orderliness cuts in favor of vacatur. Judge Easterbrook might then argue that his tidiness takes into account the discussion elaborated above—that in practice, these vacated opinions are reused. Judges cannot bear (or afford) to ignore them. Easterbrook might thus conclude that courts should not try to “rewrite history” because it is inefficient, generating confusion, not instruction.

Who’s been keeping score? How do the utilities balance? Which ones count, and how much do they weigh? Should one attempt to model the effects vacatur by consent might have on those who file suit? On the willingness to settle? At what time and under what conditions? Should one attempt to measure the changes in bargains that vacatur on consent might work over time and across cases, as in different iterations of a game? Does the substantive area of law inform the discussion, because in certain fields, repeat players are identifiable sets of litigants? Are these empirical questions, not yet informed by the requisite data, or are these questions for which data will never suffice? Does the Ninth Circuit have it right, by remitting the balancing to judge to make decisions on a case-by-case basis? With what kind of information?

The underlying question under this approach is when the usefulness to litigants of being able to buy and sell risk (of reversal on appeal, of rehearing, certiorari, or remand) outweighs social investments in the production of adjudication and often unspecified third party interests in the decisions thus produced. The calculation relies on subjective evaluation of each of the elements: the willingness to expose litigants to risk, the import of courts’

194. In re Memorial Hosp., 862 F.2d at 1303.
196. One could hypothesize that more individuals will file suit, in search of the “bounty” that might be offered when vacatur on consent is desired. A competing view posits that, with the possibility of vacatur on consent, defendants may be less willing to settle until after trial, and thus will discourage the filing of suits by those unable to afford the costs of extended litigation.
199. See Resnik, Judging Consent, supra note 144, at 85–96 (difficulty of judicial appraisal of consent judgments, when parties before them urge their approval).
decisions, and the value of those decisions to third parties and the polity. Further, converting this discussion into one that pits a model of courts as institutions for “dispute resolution” against a model that situates courts as institutions for the announcement of “public values” does not resolve the utility of issuing or declining to issue vacatur on consent. If one posits courts as dispute resolvers, the question remains whether they do it better or worse by offering or withholding the option of vacatur on consent. And if one claims that the determinative point is that courts announce public values, the question then becomes whether vacating judgments on consent is in conflict with or expressive of “public values.” That, of course, is the next issue.

6. Law, Guidance, Public Morality, and Order

In those opinions that reject vacatur on appeal, judges make an argument that can be distinguished from either utility or economy or unfair procedural advantage. Justice J. Anthony Kline, for the intermediate California appellate court in Neary, described courts as institutions that generate “legal truth,” that, once spoken, must not be “trivialize[d]” by vacatur; to do so would “undermine the integrity of the entire judicial process.” Justice Joyce Kennard, in dissent on the California Supreme Court in Neary, picked up these themes: “Public respect for the courts is eroded” when people can buy their way out of decisions, she wrote. Arguing that appellate courts would be less open to bargains that require the vacatur of their opinions, she said “the work product of our trial courts deserves respect too,” that trial courts are the “focal point of the judicial system,” whose outputs (“presumptively correct”) should not be “discard[ed] . . . without any showing of legal error.” Judge Amalya Kearse protests

201. 278 Cal. Rptr. 773, 778 (Ct. App. 1991). Judge Frank Easterbrook's complaint against rewriting history (In re Memorial Hosp., 862 F.2d 1299, 1300 (7th Cir. 1988))—which is catalogued above as an efficiency argument—might also be about integrity; that it undermines the power of the judiciary to attempt to change history.
202. 834 P.2d at 127 (citing Fisch, supra note 6).
203. Id. at 128. Moreover, in the federal courts, while the "clearly erroneous" standard protects judges' factfinding (see FED. R. CIV. P. 52(a)), juries' factfinding, cloaked with constitutional dignity by virtue of the Seventh Amendment, cannot be set aside unless it is "so clear that reasonable persons could reach no other conclusion than that asserted on appeal." See, e.g., Clipper v. Takoma Park, 876 F.2d 17, 19 note (4th Cir. 1989) (quoting McElveen v. County of Prince William, 725 F.2d 954, 958 (4th Cir.), cert. denied, 469 U.S. 819 (1984)); see also Tennant v. Peoria & P.U. Ry., 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences . . . or

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vacatur of appellate court decisions as "increasing the vulnerability of the judicial system to manipulation." Magistrate Judge Carol E. Heckman argues that agreements that include vacatur make "the court... an unwilling third-party participant in [the] settlement process, which is not an appropriate role for a court." Trial Judge Sherman Finesilver grounds his refusal to vacate on consent in part on respect for the judicial system: Judicial decisions, he says, are "not for sale."

At work here are arguments about the meaning of courts as institutions. One vision is of courts as instruments of the public, of judges as guardians of the public, and of the public as having an interest in adjudication beyond its function of concluding disputes of the parties or across a series of disputes over time. Courts are not "servants" of the parties; courts have an independence from the parties, not only as the voices of other parties' interests, but as institutions expressive of and accountable to the public. Under this vision, once public officials have undertaken to adjudicate factual and legal contentions, that act has normative weight and must be treated with sanctity. Words associated with religion are apt here, for symbolism and legitimacy are at issue. When judges and jurors have completed the task of delving through conflicting claims of rights and constructed a story framed by principles and based on the rule of law, that act must not be disturbed, except when subsequent judges or jurors, once again seriously at work, and again plowing the minutiae of the dispute, sorting, crediting and discrediting, assigning value, finding meaning, constructing narratives, come to find an error in the first judgments made.

At this symbolic level, cases protesting vacatur on consent can be linked to other contemporary developments in legal scholarship and in social policy-

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207. Catharine Wells' work on juries' role in enabling local contextual governance can be understood as expressive of this viewpoint. See Catharine Pierce Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 MICH. L. REV. 2348, 2393-13 (1990). Some of my earlier essays on adjudication contain these themes. See, e.g., Resnik, Managerial Judges, supra note 5.
208. See THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 59-71 (1935), suggested to me by Catharine Wells.
making. In the academy, some call for "standards" and for clear measures of evaluation.\(^\text{210}\) In politics, leaders proclaim their search for a "politics of meaning"—a quest for values. Some see the new source of "meaning" as religion; others hope to find it in something called "communitarian" values, still others by way of multi-cultural conversations. Depending on who is speaking, one also sometimes hears a nostalgic tone in this call for meaning, as if somehow, "we" (translated here as the polity in the United States) used to believe in something, used to have shared narratives and values, but now we don’t.

The nostalgia makes me nervous. The "old days" were deeply exclusionary and contained many narratives and values that I do not share. But nostalgia aside, I do find solace in hearing judges speak of the meaning and even the majesty of their work. I like that they lay claim not only to their own work as important but also that they take seriously the efforts of other judges and of juries as adjudicators—indeed, that they take this work so seriously that they are willing to put litigants to further expense and risk, if need be, and to constrain parties’ options, rather than have those judgments vacated without any finding of legally-cognizable “error.” In contrast, I find it disheartening to read judges who dismiss the work of these public actors, reduce it to a “product,” and then award sole ownership of judgments to the parties.\(^\text{211}\) I am depressed that many of these judges do not have much good to say about judging. When I help to pay their salaries, when I watch them in their robes, when I stand when they enter the room, I want to believe that what they do is something more than validate the wishes of the parties before them.

But those judges and commentators who insist on respect for both the practical meaning and symbolic weight of the judicial process have a problem: the last two decades of procedural developments. Trial judges have spent the last twenty years rewriting their job description so that what they now do regularly is negotiate with parties, managing them in the hopes of disposing of disputes by settlement. Congress has recently taken upon itself the task of reforming the civil justice system.\(^\text{212}\) In its legislative effort, it wrote an act

\(^{210}\) Cf. Arthur Danto, \textit{Hand-Painted Pop}, NATION, Sept. 27, 1993, at 327, 332 (in light of the array of different contemporary artistic endeavors, "there is no . . . single set of critical principles that will do for the art of our time" what critical commentary could do for Modernism); Derrick A. Bell, \textit{Introduction to Symposium, Multiple Cultures and the Law: Do We Have a Legal Canon?}, 43 \textit{J. LEGAL EDUC.} 1 (1993).

\(^{211}\) Neary, 834 P.2d at 123 (a court’s judgment is the “ultimate product of [the parties’] sustained effort and expense”).

that mentioned the word “adjudication” only once;\footnote{213}{The Civil Justice Reform Act, 28 U.S.C. § 471; Pub. L. 101-650, § 102 (“The purposes of each [Civil Justice Expense and Delay Reduction] plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil disputes.”).} Congress instructed district court planners to focus on differential management of cases, setting firm dates for proceedings, controlling discovery, exploring parties “receptivity to, and the propriety of, settlement or proceeding with the litigation,” and the desirability of alternative dispute resolution.\footnote{214}{28 U.S.C. § 473 (Supp. IV 1992).} Both Congress and the judiciary are devising rules that delegate factfinding to ever-lower level officials,\footnote{215}{See, e.g., the increasing authority of magistrate judges described in A Constitutional Analysis of Magistrate Judge Authority, 150 F.R.D. 247, 271-72 (Administrative Office of the U.S. Courts, 1993) (discussing “growing confidence in the magistrate judges system” and “little likelihood that significant elements of existing magistrate judge authority will be declared unconstitutional”); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 74-76 (April 2, 1990) (more authority for bankruptcy judges); 55-58 (proposing adjudication of disability claims by non-Article III judges). See generally Judith Resnik, Rereading “The Federal Courts*: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century, 47 VAND. L. REV. 1021, 1025-1032 (1994).} and the Supreme Court has endorsed arbitration as an alternative forum for decisionmaking on rights protected by federal statutes; arbitration is praised for its “simplicity, informality, and expedition.”\footnote{216}{See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1655 (1991) (interpreting congressional intent in the Age Discrimination in Employment Act as not precluding arbitration of the act’s claims). See also Resnik, Many Doors? Closing Doors? supra note 11.}

Importantly, efforts to engender settlement have not been confined to the trial bench. Both trial and appellate judges have been touting settlement as central to the judicial process.\footnote{217}{As California Associate Justice Sonenshine explained, the “concern over the inappropriateness of our court becoming involved in settlement conferences all but vanished as the results [a forty percent rate of settlement] became known. If litigants, the people for whom the profession exists, were better served by the program, how could it be wrong.” Sonenshine, supra note 110, at 1003.} Recall that every appellate court in the country is installing settlement programs and bragging about their success, and that some appellate courts vacate their own opinions at parties’ requests.\footnote{218}{See, e.g., Hendrickson v. Secretary of Health & Human Servs., 774 F.2d 1355 (8th Cir. 1985) (vacating its opinion at 765 F.2d 747 (8th Cir. 1985) and ordering the district court to vacate its opinion “in light of the Settlement Agreement”); see also Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Ass’n, 895 F.2d 711, 714 & n.3 (11th Cir. 1990) (vacating its own opinion, in part because the settlement included the permanent injunction called for by the court). But see Manufacturers
The celebration of party autonomy and of dispute resolution without adjudication is simply not confined to the trial level. The distinction that some have drawn—between the unreviewed trial court opinion (hence an opinion that is not yet precedent followed by a settlement that avoids the risk of reversal) and the appellate court decision (for which further review is discretionary)—is fine. Litigants continue to bear risks of continued conflict and defeat during the pendency of appeals, rehearings en banc, and petitions for certiorari. Not only do appellate courts promote settlement, the federal courts have just promulgated a rule authorizing them to mandate lawyer and litigant participation in such efforts. Appellate courts also have not been steadfast in their adherence to the written opinion; the practices of depublication, amendment, and withdrawal of opinions are now overshadowed by the frequency with which appellate courts issue rulings with unpublished opinions. The effort to draw the line of permissible vacatur on consent at the trial level is not persuasive.

Should opponents of vacatur seek to stop that practice but not these other innovations? Justice Kennard says that vacatur on settlement will “demoralize trial judges and jurors. If this court by its actions shows little regard for the work of trial courts, we can hardly expect the public to hold them in high esteem.” But how do litigants and appellate judges feel when opinions are depublished without explanation? How do litigants feel

Hanover Trust Co. v. Yanakas, 11 F.3d 381, 385 (2d Cir. 1993) (refusing to vacate appellate court opinions); Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444 (10th Cir. 1993) (case by case determination); In re United States, 927 F.2d 626 (D.C. Cir. 1991) (refusing to vacate its earlier opinion at 872 F.2d 472 (D.C. Cir. 1989), during an interval when the parties could have sought certiorari); Clipper v. Takoma Park, 898 F.2d 18 (4th Cir. 1989) (refusing to withdraw an earlier panel opinion after parties had settled pending the petition for rehearing en banc); see also Lucich v. City of Oakland, 23 Cal. Rptr. 2d 450, 455 (Cr. App. 1993) (refusing to retract its own published opinion and distinguishing Neary as creating a presumption in favor of vacatur of trial court opinions).

219. Manufacturers Hanover Trust, 11 F.3d at 384.
220. FED. R. APP. P. 33

when trial judges tell them, "settle, your case is not worth going to trial," when that judge knows only a little of the merits of the case? Or when
rulemakers propose that individuals who go to trial should be sanctioned unless they can demonstrate results at trial that are significantly better than what was offered in settlement? Are not these expressions of contemporary "public values?"  

Earlier, I discussed how vacatur on settlement expresses a form of litigant autonomy seemingly at odds with the rise of managerial judging. Yet the ideology that animates vacatur on settlement is in one respect deeply consistent with that of managerial judging and the expansion of alternative dispute resolution. In promoting managerial judging, judges have been persuasive in establishing that they should be given a greater commission, that the task of factfinder was too narrow, confining, and unresponsive to parties' "true" needs. As judges expanded their repertoires, to become sometimes mediators, sometimes senior partners to lawyers on both sides of the case, sometimes counselors to the parties, they have also demonstrated that their role as adjudicators was neither important enough to command their time exclusively nor useful enough to the parties as these other skills, which are in no way unique to judges. Once trial judges have become convinced that the activity of trying cases and deciding motions is not as central as that of being the "manager of the docket," then why should appellate courts not acquiesce when parties on appeal express the same sentiment? Since factfinding is not a special activity, why insist on its longevity by preserving the jury verdicts in either Neary or Kaisha? And, if settlement is the most-valued outcome at the trial level, why not similarly embrace it at the appellate level? At the Supreme Court?

Those who want to refuse to vacate opinions on settlement must face this deep ambivalence about adjudication. They can no longer invoke an image of "the courts" as if that image conjures up shared meanings with adjudication as the dominant mode. The purpose, nature, and shape of courts—at least in civil adjudication, and perhaps in the criminal arena as well—are up for grabs. The role of judges as speakers of law, as providers of moral guidance and as crafters of shared narratives has been diminished,

223. Cf. Fisch, supra note 6, at 629 (concerned that vacatur on consent entails the sacrifice of public values).

224. A phrase I borrow from Judge Rya Zobel, who presided at a panel on Alternative Dispute Resolution at the Annual Conference of the First Circuit (Sept. 1993).

225. In contrast, because of televised trials, courtroom exchanges and jury verdicts may still provide a source of shared cultural stories.
in large measure by judges themselves. In 1935, Thurman Arnold wrote that theology "occupies a rather precarious place in social life.... A similar result in law, however, seems unlikely unless the judicial system is to lose its prestige, or unless the faculty of 'reason' is to take a less important place in the hierarchy of ideals." Judges themselves have played a central role in diminishing this prestige and in dislodging reasoned adjudication from its place in the hierarchy.

D. Power

Like the utility argument, the claim that vacatur by settlement violates the agreed-upon institutional role of courts is problematic. I have both intuitions and preferences about both the utility and desirability of adjudication in our governing structure, but less by way of argument about why my intuitions and preferences should prevail. But there is one other (and last) facet to explore, distinct from the "public values" discussion set forth above and premised upon courts' history, traditions, and values.

In an increasingly crowded field, shared with litigants, lawyers, insurance companies, arbitrators, special masters, and other dispute resolution facilitators, judges don't quite blend in. What keeps judges distinct is that they have more power than everyone else. However much judges have blurred the lines between themselves and the host of dispute resolution providers out there, they retain this fundamental and distinguishing attribute: authority. It is that very power that is invoked to argue for the need to involve Article III judges, and not underlings, in case management and settlement. One watches that power in operation when a judge advises settlement, for he or she just might be signalling something about what the "law" requires.

226. An oft-provided explanation is that the cost of factfinding (with the particularly expensive element of fees paid to lawyers to generate that fact-finding) is simply too great. While costs are unquestionably a factor, I believe that there is more at work than costs. As I have described elsewhere, there is a deeper skepticism about the enterprise of adjudication. See Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1986).

227. ARNOLD, supra note 208, at 69.

228. Precisely because of that power edge, a group convened by Senator Biden, the Foundation for Change, and the Brookings Institution, called for "judges" and not other judicial officials, such as magistrate judges, to preside at pretrial conferences and manage cases. See Report of a Task Force, Justice For All: Reducing Costs and Delay in Civil Litigation, Procedural Recommendation 7, at 24; Procedural Recommendation 11 at 28 (1989). As enacted, the Civil Justice Reform Act of 1990 authorizes "judicial officers" (which includes both Article III judges and magistrate judges) to control that process. See 28 U.S.C §§473(a), 482 (Supp. III 1991).
Robert Cover captured it well, by entitling an essay on judging “Violence and the Word.” Vacatur on consent is an exercise of that power, and one that destroys law—made either by trial judges and juries or by the appellate courts. What is the source of judges’ power for that act of destruction? I ask this question not to provoke a discussion of jurisdiction, but to prompt a political discussion about the legitimacy of the judicial act of vacatur on consent. Vacatur on consent can be conceived to be simultaneously “jurispathic” and “jurisgenerative,” terms Cover employed to describe the activity of law destruction and of law generation. By the motion for vacatur, the litigants have come together and asked a court to remove the state’s view of the respective rights of the parties and to restore the litigants’ vision (possibly “jurisgenerative”) of how to resolve their dispute, and the court then complies. In contrast to this interpretation stands Justice Kennard’s approach; she might be understood as perceiving the act of vacatur on consent to be “jurispathic,” as engendering in trial judges and jurors a sense of demoralization because the legal regime that they determined to be “just” is discarded, without explanation other than that of the parties’ desires.

Identifying the tension between the law of the state and the law of the disputants does not, however, locate the role that a judge should take when asked to enter a motion for vacatur on consent. The parties ask that a judge (as an instrument of the state) put the state’s power behind the parties’ desire to terminate the legal regime (installed by the state’s previously expressed judgment of the merits of the dispute). Does the judge need any justification for the deployment of that power beyond parties’ preferences and accords? Are all parties’ resolutions equally valid or should the judge pick and choose among them? And how are we, who are neither parties nor judge, to view the power of judges and parties as vacatur is requested and granted?

Vacatur on consent is a particularly vivid example of judicial power unadorned by justifications external to the parties’ desires and the judges’ own views, unsupported by the act of adjudication. Of course, consent decrees, managerial judging, and judicial involvement in alternative dispute resolution raise parallels, but in the expansive pretrial phase and sometimes

230. See supra, notes 154-155 and accompanying text.
in the tumult of the trial itself, judicial action may be obscured or blurred.\textsuperscript{232} But after the morass of facts and law are—in the vernacular—"reduced to judgment," a clarity appears. And whatever the breadth or nature of the decision written, a single piece of paper, specific, concrete, definitive, the "judgment," marks both symbolically and practically that the courts have spoken.\textsuperscript{233}

Thus, crossing the proverbial Rubicon from trial to appellate court is not transformative; rather, it is the change from ambiguity to clarity that occurs whenever litigation is reduced to judgments that makes vacatur on consent so evocative. Because both trial and appellate courts cross that line—pronounce "the law"—it is distressing to see those pronouncements rejected for reasons unrelated to law, right, and fact.\textsuperscript{234}

But appellate courts do play a special role in vacatur on consent. First, because of the relatively brief window of time to file a notice of appeal (and

\textsuperscript{232} Judicial power, and its unclear boundaries, are visible in the law growing around consent decrees. The ever-more frequent amalgam of limited fact-finding followed by consent gives rise to confusion about what was adjudicated compared to what the parties negotiated. Compare the majority opinion in Martin v. Wilks, 490 U.S. 755, 759 (1989), with Justice Stevens' dissent, id. at 769 (disagreeing about what the trial court had found, as compared to what the parties had settled). See also Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 769 (1992) (Stevens, J., dissenting) (arguing that the negotiated decree had to be understood in light of the fact that prior "litigation had established the existence of a serious constitutional violation").

The fuzziness of judicial authority and party agreement may enable some compromises that might, with the clarity of factfinding, have not occurred, but those consent judgments also preclude precedential pronouncements of legal right. After consent decrees are entered, and are either challenged by third parties or the litigants themselves, the question of enforcement arises. If no facts are found, no legal rights announced, exactly why should the state's authority flow to enforce the bargains struck? Current doctrine documents that problem: consent is not always a basis equal to fact-finding for purposes of coercive enforcement. As the line between what is "law" and what is "contract" blurs, judges' capacity to enforce the "judgments" borne of the mixture may diminish. Compare the doctrine that federal court remedial authority is dependent upon the scope of liability established. See Milliken v. Bradley, 433 U.S. 267, 282 (1977).

As "judicial decisions" become increasingly based on parties' consent, and if, over time, parties either differ in their descriptions of that to which they consented or of who had consented to what, the problem of justification of the exercise of judicial authority becomes greater. See, e.g., Spallone v. United States, 493 U.S. 265, 275, 279 (1990) (reversing a district court's contempt sanction against members of the City Council who had failed to vote in favor of legislation required to implement a consent decree entered by the City of Yonkers).

\textsuperscript{233} See FED. R. CIV. P. 58 (the judgment is embodied in a separate piece of paper).

\textsuperscript{234} Thus, Judge Easterbrook's rule (In re Memorial Hosp., 862 F.2d 1299 (7th Cir. 1988)) of no vacatur of decisions on consent is more coherent than Judge Kearse's permission of vacatur of trial court but not appellate court opinions. See Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993).
thus to bargain about vacating a judgment) and because of the doctrine that, with the filing of the notice of appeal, trial courts lose jurisdiction, appellate courts become a frequent venue for much of the discussion of vacatur on consent. Second, while trial judges have spent the last few decades visibly reframing their image and admiring the results, appellate judges seem to have had a more stable role.

Of course, the last decades have witnessed enormous changes in some aspects of appellate court work. Appellate judges have dockets that are many times the size of those only a few decades ago. Further, as Professor Yeazell instructs, because so much of litigation has moved to earlier phases, appellate courts have a diminished role in supervising the trial courts in any given case. But whether harried or less in control of the trial bench, whether selecting the cases to decide, whether deciding cases without publication or by delegation, appellate judges still appear to be doing adjudication—pronouncing law, derived from some understanding of facts and principles. Even when appellate judges advocate settlement, they have maintained a disinterested stance. Unlike trial judges, they do not negotiate directly with the parties for settlement but rather assign delegates who, in theory and practice, are charged with engaging in conversations never to be heard by the appellate judges called upon to sit in judgment. Further, while alterations such as increased numbers of unpublished opinions, delegation to staff, and the curtailment of oral argument have become commonplace, appellate judges have not spoken of a major revision of their charge nor rejoiced in the reformatted appellate procedure. Rather, appellate judges continue to claim their role is the business of law announcement.

235. See Chief Justice William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 Wis. L. Rev. 1, 2–3 ("In 1958, all the federal courts together had 64 circuit judgeships... Today, those numbers have swelled to 167... Judicial business increased from 1958's 3700 appeals... to 42,000 appeals... ").


237. See S.R. Mercantile Corp. v. Maloney, 909 F.2d 79, 84 (2d Cir. 1990) ("Discussions in [Civil Appeals Management Program] conferences are confidential and are not to be revealed to members of the Court.") (citing Soliman v. Ebasco Services, Inc., 822 F.2d. 320, 324 (2d Cir. 1987), cert. denied, 484 U.S. 1020 (1988) and Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 929–30 (2d Cir. 1979) (per curiam), cert. denied, 444 U.S. 1076 (1980)).

238. See, e.g., Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1124 (7th Cir. 1987) ("the responsibility for maintaining the law's uniformity is a responsibility of appellate rather than trial judges"). One might also argue a growing divergence between the functions of trial and appellate judges and that the two sets of judges will over time be seen as in increasingly different positions. Differing rules on vacatur on consent might both reflect and create distinctions between trial and appellate court tasks.
Could one use the ostensible stability of the appellate bench’s function to resuscitate a trial/appellate court distinction with respect to the propriety of vacatur on consent? Vacatur on appeal lets that mask slip; appellate judges openly use their power as they acquiesce to parties’ demands. Vacatur on consent is thus a troubling form of judicial involvement in settlement because it makes visible a judicial act of power (whether by trial or appellate court) to “set aside” or “vacate” or “erase” or “wipe away” or “withdraw” prior adjudication (whether one’s own or that of another court). Further, when such power is deployed by appellate judges (who often offer reasons couched in law rather than in parties’ consent), that power evokes concerns greater than when trial judges, managing and settling cases or entering consent decrees, undertake fundamentally similar tasks. The problem is not so much about asymmetry of litigants’ resources, or utility, or history and tradition or trial versus appellate court than it is about sheer power and the desire both to explain and confine judicial exercises of power.

IV. CONCLUSION

Two—conflicting—evaluations of the exercise of that power and, in turn, of the mission of courts are available. With those evaluations come two competing endings to this essay. The first sees that deployment of power, without more, impoverishes the judge. Finality bows not, as it has under some regimes because “truth” or “fairness” demands it, nor because of “the incessant command of the court’s conscience that justice be done in light of all the facts,” but because parties so desire. To the extent one imagines

239. Compton v. Alton Steamship Co., 608 F.2d 96, 102 (1979) (quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927 (1970)) (emphasis in original). Rule 60(b) requires “engag[ing] in the delicate balancing of ‘the sanctity of final judgments, expressed in the doctrine of res judicata, and ... justice.’” Id. The Compton court voided the judgment for damages because it had “no basis whatsoever either in fact or law.” Id. at 107.

Rule 60(b) of the Federal Rules of Civil Procedure provides for courts to “relieve a party . . . from a final judgment” under six conditions. Unlike vacatur on consent, Rule 60(b) motions are typically sought by one party and opposed by the other. The first five bases for correction specified in the rule are “mistake,” new evidence, fraud, a judgment that is void because of jurisdictional defects, and one that has been satisfied or reversed. See FED. R. CIV. P. 60(b)(1)–(5). The sixth category authorizes relief for “any other reason justifying relief.” For analysis of case law under the Rule, see Mary Kay Kane, Relief from Federal Judgments: A Morass Unrelieved by a Rule, 30 HASTINGS L.J. 41, 69 (1978) (discussing the tradeoffs between “finality,” which entails “occasional unjust results,” and permitting relief, because “truth must be our mistress despite the degree of uncertainty that will result”); James Wm. Moore & Elizabeth B.A. Rogers, Federal Relief from Civil Judgments, 55 YALE L.J. 623 (1946) (explaining that the rule was animated by the need to provide means to respond to judicial
judges as upon occasion "speaking truth to power," vacatur on consent is an act without this possibility. It is an act of silence, of power that negates what judges and jurors have said the law requires. Further, it cuts off judicial conversation not only with the state but with the public, third parties who watch and understand both their polity and their own rights and obligations better when they hear judges speak. Thus, those who bemoan its advent might be understood as discussing the impoverishment of the judicial role. These tales of judging cannot be told when judges cease to fumble towards their best approximations of truth.

While doctrine can justify vacatur on consent, just as doctrine, legislation, and court rules can provide the bases for judicial authority to press for settlement and even suggest the terms, doctrine cannot fill the loss of greater aspirations for judges. Nor can doctrine and legislation provide the political answer to why judges have such powers. If judges know nothing about the respective legal rights and obligations between the parties, the quality of the adjudications or the deal subsequently struck, there is little basis for judicial wisdom to advise on appropriate or desirable outcomes. Only power, not wisdom, is deployed.

While Congress, the rulemakers, and state and federal courts can stipulate to such wisdom, the judges who receive such grants of authority perhaps should be less welcoming of these changes. Not only might the errors, stemming from fraud, negligence, inadvertence, as well as new circumstances, and depending upon a showing by the parties).

According to the United States Supreme Court, Rule 60(b) authorizes courts to “vacate judgments whenever such action is appropriate to accomplish justice.” Klapprott v. United States, 335 U.S. 601, 614–15 (1949) (authorizing the setting aside of a default judgment that had deprived a citizen of his citizenship; at the time of the proceeding, the defendant was incarcerated, and he was never afforded a hearing or counsel).


241. Indeed, some members of the Article III judiciary objected to aspects of the Civil Justice Reform Act of 1990 (CJRA)—arguing that Congress was inappropriately intruding on and managing the judiciary. See Diana E. Murphy, The Concerns of Federal Judges, 74 JUDICATURE 112 (1990) (systemic delays were not demonstrated; there was a failure to consider issues related to the criminal docket; and the mandatory nature of proposed legislation was inappropriate); Marvin E. Aspen, The Biden Bill, JUDGES’ J., Fall, 1990, at 23, 47 (The Judicial Conference “played a key role in opposing the Biden bill’s provisions ... that [stemmed from] a flawed committee report of the Brookings Institution .... that urged legislation to] micromanage civil litigation.”); Stephen Labaton, Business and the Law: Biden’s Challenge to Federal Courts, N.Y. TIMES, Apr. 16, 1990, at D2 (“heavy opposition from the bench”). However, in response to the legislative effort, the Judicial Conference approved a “14-point program to address the problems of cost and delay in civil litigation” and like the CJRA, emphasized case management
polity be nervous about how to constrain the managerial and vacating judge, but judges given those tasks might themselves pause to wonder what other changes in job descriptions are coming and whether those roles are ones to invite. One hundred years of managerial judging, of judicial promotion of alternatives to themselves, and of appellate court exercises of power may not provide the basis for much respect for the Third Branch. When trial and appellate judges reveal themselves as brokers and dealmakers, then there is no judgment, only power, and judges themselves may be "held for naught."

The second ending rejects the framing offered by those who object to vacatur on consent. The office of the judge is not impoverished by the invention of new procedural options, it is enriched. Defenders of vacatur on consent may understand it not as a collapse of the judicial role but as a marker of expanding judicial horizons to focus more specifically on parties' needs. Here the focus shifts. Instead of Coverian judges speaking truth to power (engaged in a conversation with the kingly or government authority that actually gives the judiciary its jurisdiction), judges are in conversation with litigants, less powerful than they, but with greater insight into their own needs. Courts see themselves as social service organizations, counseling and aiding, and whenever possible, deferring. Adjudication is a default action, undertaken only as a last resort. Wise judges, from this vantage point, are those who know the limits of their understanding and who undo their own or other judges' and jurors' actions as evidence that all third-party mandates are inferior to parties' own decisions.242 Appellate judges, like trial judges, know that litigation can continue, that risks—not only of additional appellate review but of trial court decisionmaking on remand—remain after appellate decisionmaking, and accede to parties' requests to facilitate settlement.243

Under this vision, this procedural innovation and others provide not only descriptive lessons but also a normative tale: that rebellion against the

and alternative dispute resolution, including various modes of encouraging settlement. See Judicial Conference Approves Plan to Improve Civil Case Management, THIRD BRANCH, May, 1990, at 1.

242. Recall that the Kaisha parties argued for vacatur on consent in part because their resolution was more "just" than that the courts imposed. See supra note 120. Recall also that in Bonner Mall, the argument is made that because a party is willing to settle, the inference is that the legal basis of that party's victory is vulnerable. See supra notes 118-121.

243. Under either of these visions, vacatur of the Ninth Circuit decision in Bonner Mall is not required, for no one claimed that its vacatur was a necessary element to achieve the agreement. The after-the-fact request suggests either a fear of freighting the bargain in that manner or inadvertent neglect of that issue, neither of which should be a basis for court vacatur. Cf. Bates v. Union Oil Co., 944 F.2d 647 (9th Cir. 1991), discussed supra note 127.
contours of adjudication is widespread; that perceptions of its limits are sufficient to call for reframing of the enterprise itself; that when parties to a dispute claim their resolution to be superior to that of a court, their views are not a trivial reason for deploying the power of the court but a profoundly important justification for exercising that power. To explain that an exercise of judicial power is undertaken because parties so desire is the vindication of a regime that installs preferences of the parties as the best measure of fairness available.