

Judging Consent

Judith Resnik[†]

| | | |
|------|--|----|
| I. | Mapping the Landscape | 45 |
| A. | The Terminology | 45 |
| B. | The Typology | 47 |
| C. | The Possible Roles for Judges | 48 |
| II. | Some History, Law, and Practice | 50 |
| III. | Evaluating Consent Decrees | 63 |
| A. | The Praise | 63 |
| B. | The Assumptions | 67 |
| 1. | Economy | 67 |
| 2. | Certainty and Increased Compliance | 69 |
| 3. | Autonomy, Efficiency, and Flexibility | 71 |
| 4. | Court Control | 75 |
| IV. | Consent Decrees and Adjudication | 85 |
| A. | Approving Consent Decrees in Class Actions ... | 87 |
| B. | Generalizing the Adjudicatory Form | 93 |
| C. | Negotiating and Approving Consent Decrees ... | 96 |
| D. | The Quality of Judicial Action | 99 |

[†] Professor of Law, University of Southern California Law Center. My thanks to Ellen Davis, Deborah Cantrell, and Rosario Herrera for exceptionally able research assistance; to Al Alschuler, Bob Bone, Terry Dungworth, Owen Fiss, Marie Provine, Burt Neuborne, Steve Schulhofer, Steve Yeazell, and especially to Richard Craswell and Denny Curtis, for thoughtful discussions of the problems raised here. This article was supported, in part, by a grant from the USC Law Center's Faculty Research Fund and was improved by discussion at a USC Faculty Workshop and at the symposium on consent decrees held by the University of Chicago Legal Forum.

Articles are not typically "dedicated," but I cannot write acknowledgements without thanking Bob Cover, with whom I discussed this essay shortly before his death. His thoughts—on the nature of law, on the role of courts, and on judges—enrich my work, and I am deeply grateful.

The subject of this symposium is consent decrees, and I have been asked to think about judges and consent decrees. I have begun to wonder about the very act of a judge entering a consent decree. What is the meaning, for the court, the parties, and the public, of judicial endorsement of parties' agreements? What do we understand that a judge does when she or he transforms an agreement of the parties into a court decree?

To explore these questions, I describe the forms of judicial involvement in the consent decree process; I identify the various roles created by custom, rule or statute for judges in formulating, approving, entering, and enforcing consent decrees. Thereafter, I examine the possible reasons for providing consent decrees, and I explore whether and what kind of judicial involvement in the consent decree process is appropriate. My primary interest is in the role of federal judges during the negotiation and entry phases of the consent decree process. Other commentators in this symposium will address questions of implementation, enforcement, and modification of decrees.

The examination of the judicial role during the negotiation and entry of consent decrees reveals a problematic, tension-ridden, and vague conception of that role. When entering a consent decree, a person (bearing the title "judge") declines to adjudicate but nonetheless files—and sometimes blesses—parties' agreements, thus giving them a special status. Judging consent is a difficult and, in some instances, impossible task. As a consequence, I have some skepticism about reliance upon judicial role to validate the practice of providing consent decrees. However, my concerns about the role of the judge do not decide the ultimate issue of the propriety or utility of having consent decrees as an option when concluding some or all kinds of cases. Other commentators—in this symposium¹ and elsewhere²—have made claims for consent decrees. What I offer is analysis of whether judicial involvement with consent decrees can be the source of their legitimacy.

¹ Burt Neuborne and Frederick A. O. Schwarz, Jr., *A Prelude to The Settlement of Wilder*, 1987 U. Chi. Legal F. 177; Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. Legal F. 19; Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy making*, 1987 U. Chi. Legal F. 327. But see Owen M. Fiss, *Justice Chicago Style*, 1987 U. Chi. Legal F. 1.

² Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 956-59 (1979).

I. MAPPING THE LANDSCAPE

A. The Terminology

I will use the terms "consent decrees" and "consent judgments" to denominate agreements that parties have consented to and that a judge has entered (typically by writing "so ordered" and by signing her or his name) as an order of the court. Although "decrees" formerly described only those orders issued from courts of equity while "judgments" were those orders rendered by courts of law,³ the merger of equity and law has blurred this distinction.⁴ My use of the terms consent decree and consent judgment therefore includes instances when parties have agreed upon monetary payments as well as when parties have agreed to structure their interactions without money changing hands.

I am interested in judicial behavior vis-a-vis these agreements in both civil and criminal contexts; plea bargains are, of course, consent decrees by another name. In addition to consent decrees and plea bargains, terms to describe these agreements vary; some jurisdictions call such agreements "consent judgments," while in other places, "stipulated judgments" or simply "settlements" are the words used.⁵ "Settlements," however, comprise a larger species;

³ See Robert Millar, *Civil Procedure of the Trial Court in Historical Perspective* 356 (1952). According to one nineteenth century treatise writer, "a decree differs from a judgment both in the process which precedes and determines it and in its contents. . . . [In addition to the differences between courts of law and equity,] a judgment at law is usually, . . . in contested cases, determined by the verdict, . . . [whereas] a judge in equity is called upon to decide upon the whole merits of the controversy. . . . Hence while a decree is, equally, with a judgment, the deliverance of the *law* it is also . . . the decision of the *man* who frames it. . . ." Henry Black, *A Treatise on the Law of Judgments* 3-4 (1891) (emphasis in the original). But, as Black noted, the "distinction between decrees and judgments has not always been strictly preserved in American practice." *Id.* at 4.

⁴ The Federal Rules of Civil Procedure have adopted the term "judgments" as the generic. See Fed. Rules Civil Proc. 54 and 58. The Second Circuit has recently attempted to distinguish between a "true 'consent judgment'" (in which "all of the relief to be provided by the judgment and all of the wording to effectuate that relief is agreed to by the parties") and a "settlement judgment" (in which "the parties have agreed on the components of the judgment . . . but have not agreed on all the details or the wording of the judgment [and] . . . the judge is obliged to determine the detailed terms of the relief and the wording . . ."). *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986).

⁵ California terms them "settlement agreements." See *Corkland v. Boscoe*, 156 Cal. App. 3d 989, 203 Cal. Rptr. 356 (1st Dist. 1984). Dick Craswell tells me that the Federal Trade Commission called them "consent orders." For a discussion of agency rule making by "consensus," see Douglas H. Ginsburg, *Regulation of Broadcasting: The Regulated Emergence of Cable* 343-89 (1979) (quoting, inter alia, Commissioner Nicholas Johnson's statement: "In future years, when students of law . . . wish to study the decision-making process at its worst, when they look for examples of industry domination of government . . . , they will look to the [Federal Communications Commission's] handling of the never-ending saga of cable television. . . .").

not all settlements of cases result in consent decrees. Often, when parties agree to terminate lawsuits, they file "notices of dismissal."⁶ Such notices simply request that the court record that cases have been dismissed by stipulation of the parties. Currently, federal court statistical data do not indicate how many notices of dismissal are prompted by plaintiffs who decide to withdraw cases without obtaining any relief, and how many dismissals are the functional equivalents (in many respects) of "consent judgments"—agreements negotiated by the parties and requiring specific remedial action, but lacking court endorsement.⁷ We do know that some 269,848 dispositions occurred in federal court in 1985; of these, 15,661 were "consent judgments" while 127,919 were "dismissals" that include but are not limited to dismissals predicated upon consent.⁸

A critical distinction—and one of import here—between a notice of dismissal (based upon a contractual agreement) and a con-

⁶ Fed. Rule Civil Proc. 41. Compare Fed. Rule Crim. Proc. 48(a) (dismissals in criminal cases may not occur without "leave of court") and Fed. Rule Civil Proc. 23(e) (a class action cannot be "dismissed or compromised without the approval of the court").

⁷ Federal court clerks compile data in each federal district court on each federal case. Dispositions of cases are coded pursuant to instructions from the Administrative Office of the United States Courts, which has provided ten subcategories including one described as "dismissed, discontinued, settled, withdrawn, etc." and another described as "judgment on consent." The current categories do not capture the distinctions between (for example) notices of dismissal based upon consent and notices of dismissal based upon a plaintiff's decision not to pursue a case. My understanding of the available data has been greatly advanced by conversations with Terry Dungworth, who, in conjunction with the Federal Judicial Center, is working on the preparation of a public-use Federal Court Data Base and who provided me with information from the Rand Corporation's version of this data base (Rand Federal Court Data Base) (excerpts on file with the University of Chicago Legal Forum and with the author). According to a staff member of the Administrative Office, pilot projects are under way to revise the coding of dispositions so as to distinguish among dismissals for "no prosecution," dismissals for want of jurisdiction, "voluntary" dismissals, dismissals based upon "settlement," and others. Conversation of September 25, 1986. One difficulty in data collection is that typical notices of dismissal do not describe what prompted the dismissal.

Given the predominance of settlement as a disposition mode, learning the forms the parties choose would be helpful in terms of understanding more about the parties' assumptions and the use of consent decrees. For example, does use of consent decrees vary by region or state? By the nature of the claim? By the relief provided? For one effort to ascertain some data, see Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 381-83 (1970). For a review of the empirical work done on shareholder derivative actions (which also require judicial approval prior to their dismissal or compromise), see Bryant G. Garth, Ilene H. Nagel, and Sheldon J. Plager, *Empirical Research and the Shareholder Derivative Suit: Toward A Better-Informed Debate*, 48 L. & Contemp. Probs. 137 (Summer 1985).

⁸ Rand Federal Court Data Base (cited in note 7).

sent decree is that, if the agreement between the parties subsequently sours, the litigants who have a dismissal may enforce their "private contract" (a term that appears with some frequency in the case law and commentary) by filing a new lawsuit, based upon that contract. In contrast, those litigants who have terminated their lawsuit by a consent decree have a contract that is something more (how much more is not clear) than a "private contract." A judge has signed the contract, and that contract can be enforced as a continuation of the original lawsuit and, in other jurisdictions, as a judgment. The dissatisfied party may seek compliance and, ultimately, contempt. Hence, the questions for this paper. What do judges actually do when signing such contracts? What does the law understand judges to be doing by signing such contracts? Do we want judges to sign such contracts?

B. The Typology

Three phases of litigation—negotiation, entry, and compliance—are part of the consent decree process. Consent decrees come into being because of the existence of a dispute that has been negotiated to conclusion. That negotiation may conclude at one of three points: either (a) a lawsuit is filed and the parties reach an agreement prior to adjudication of contested issues; (b) a lawsuit is filed, is actively contested and, after the court rules on some issues (and in some cases, on central questions such as liability),⁹ the parties reach an agreement; or (c) the parties settle their dispute prior to the filing of the lawsuit and they file, simultaneously, a lawsuit and a request that the court agree to the entry of judgment.¹⁰

The next phase is the entry of the consent decree. In many kinds of cases, the parties' request for entry of a consent decree prompts judges simply to sign the documents presented. However, in cases filed under certain statutes, in criminal cases, and in those

⁹ See, for example, *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980) (two trials on liability); *Officers for Justice v. Civ. Serv. Comm.*, 473 F. Supp. 801, 803 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (six years of litigation, two weeks of trial).

¹⁰ See, for example, *Swift & Co. v. United States*, 276 U.S. 311, 320 (1928) (parties filed complaint, answer, and request for entry of judgment on same day). According to one commentator, almost one-third of the 93 Title VII decrees, agreed to by the Department of Justice and by state and local governments and entered into from 1972 to 1983, were signed by the court the day the complaint was filed. Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 913. It would be helpful to know how often consent decrees are filed in this manner as well as in the other two ways described in the text.

involving receiverships or class actions, the request for entry of a consent judgment obliges the judge to do something more—to make some assessments as a predicate to the court’s entry of the agreement as a consent decree.¹¹ In these instances, we speak of judicial “approval” or “acceptance” of the consent agreement.

The final phase, post-decree compliance, has three aspects: implementation, enforcement, and modification. Implementation requires the parties to transform their agreements from paper to reality. The judge may have no involvement with implementation, or consent decrees may specify that a judge or judge surrogate (master, magistrate, special committee appointed by the court and the like) monitor implementation. Enforcement is prompted by a party complaining to the court that an opponent has failed to perform as required by the consent decree, whereas requests for modification seek court permission to alter all or some of the obligations imposed by the decree.

C. The Possible Roles for Judges

The simplest way to delineate the many roles for judges in the consent decree process is to chart the possibilities and then to discuss those central to this essay. As the chart below indicates, there may be almost no role for a judge to take in the process, or that role may be optional (within the judge’s discretion) or mandated by rule or custom. Further, the parties have some degree of control over what role, if any, a judge may play. For example, if they conclude their negotiations prior to filing a complaint, parties can foreclose the possibility of judicial involvement in the negotiation phase.

As the chart demonstrates, judicial involvement can occur at all stages of the consent decree process. In certain instances, judges may have more than one possible role while, in other instances, the judicial role may be unclear. For purposes of this discussion, I will focus upon only three of the variants that are analytically possible.

¹¹ See, for example, the Tunney Act, 15 U.S.C. § 16(b)-(h) (1982); Fed. Rule Crim. Proc. 11; Fed. Rule Civil Proc. 23.1; Fed. Rule Civil Proc. 23(e).

| <u>Phases of the Consent Decree Process</u> | <u>Role of the Judge</u> | | |
|---|--------------------------|-----------------|-----------------|
| | <u>None</u> | <u>Optional</u> | <u>Required</u> |
| NEGOTIATION | | | |
| negotiated without litigation | x | | |
| negotiated with litigation but no adjudication | x | x | |
| negotiated after adjudication | | x | x* |
| ENTRY | | | |
| no procedural rule or statutory obligation for approval | | x | |
| procedural rule or statute requires approval | | | x |
| COMPLIANCE | | | |
| implementation | x | x | |
| enforcement | | x** | x |
| modification | | x** | x |

* The adjudication may have a critical impact on negotiations or may relate to issues that have little or no effect on negotiations.

** The parties may seek court assistance but then, either with or without the court's help, may reach an agreement obviating the need for judicial involvement.

My shorthand for Variant I is Party Control, and it assumes that a consent decree has been negotiated solely by the parties, with no judicial participation whatsoever. The case involves neither a class action, nor a criminal proceeding, nor a special statute requiring the judge to treat the entry of a consent decree in any particular manner. Compliance with the agreement may occur with or without judicial involvement. This example is premised upon maximum party control and minimal judicial involvement.

Variant II, Party Control/Judicial Approval, assumes no judicial role in the negotiation of a consent decree but a more active judicial role in approving the consent decree than under the previous example. Here, examples include the acceptance of guilty pleas by federal judges under Rule 11 of the Federal Rules of Criminal Procedure and the approval of class action settlements under Rule

23(e) of the Federal Rules of Civil Procedure,¹² two instances in which judges have been given specific roles at entry of consent decrees.

Variant III, Judicial Control, assumes that a judge is active both in the creation of the agreement and then in its approval. Again, class actions provide an example but, in contrast to Variant II, the judge not only approves the settlement, the judge participates in the settlement negotiations and helps to engineer the settlement. Under any of these approaches, compliance problems may subsequently emerge and one of the parties may return to the judge who approved the decree to obtain assistance in its enforcement or to seek modification.

II. SOME HISTORY, LAW, AND PRACTICE

Agreed-upon judgments have been around for a long time, although their ancestral forms may have gone by different names. For example, Pollock and Maitland describe the "seisin under a fine," which was the "final concord levied in the king's court" provided during the twelfth century.¹³ The "fine" was akin to a court order,

roughly as being in substance a conveyance of land and in form a compromise of an action. Sometimes the concord puts an end to real litigation; but in the vast majority of cases the litigation has been begun merely in order that the pretended compromise may be made.¹⁴

Pollock and Maitland provide explanations of the advantages that flowed from "fines," as contrasted with land conveyances made without court entry. ("The parties are merely doing by fine what they could have done, though not so effectually, by a deed."¹⁵) First, the "fines" provided "indisputable evidence of the transaction"¹⁶ in an era when forgeries "were common."¹⁷ Second,

¹² In both cases, dismissals as well as consent decrees are subjected to court scrutiny. See Fed. Rule Crim. Proc. 48(a) and Fed. Rule Civil Proc. 23(e).

¹³ Frederick Pollock and Frederic Maitland, 2 *The History of English Law* 94-97 (1898) ("Pollock and Maitland"). Pollock and Maitland believe that "fines" were an ancient form: "for the antiquity of fines," says Coke, "it is certain that they were very frequent before the Conquest." We do not think that this can be proved for England, but in Frankland the use of litigious forms for the purpose of conveyancing can be traced back to a very distant date.

Id. at 95 (citations omitted).

¹⁴ *Id.*

¹⁵ *Id.* at 104.

¹⁶ *Id.* at 95. See also S.F.C. Milsom, *Historical Foundations of The Common Law* 181-

by obtaining seisin under a fine, the parties were bound to perform; a party who failed in its obligations could be sued and imprisoned—powerful remedies at a time when “contractual actions, actions on mere covenants, were but slowly making their way to the royal court.”¹⁸ Third, a “fine” gave the claimant protection “by the court’s ban,”¹⁹ establishing rights against “parties, privies and strangers.”²⁰ Those who contested such rights were supposed to make their challenges during the court’s term (often “a year and a day”).²¹ Belated claims were either barred or otherwise disadvantaged,²² although the preclusive effect of fines rested upon the fact of one of the parties having been seised.²³

While a fine’s evidentiary power was important, there were other methods of obtaining proof of possessory rights. Apparently, landowners paid “money to the king for the privilege of having their compromises and conveyances entered among the financial accounts rendered by the sheriffs.”²⁴ But, the seisin under a fine gave more protection, and to obtain it,

men . . . allowed a simulated action to go as far as a simulated battle. The duel was “waged, armed and struck”; that is to say, some blows were interchanged, but then the justices or the friends of the parties intervened and made peace. . . . This had the same preclusive effect as a duel fought to the bitter end. All whom it might concern had notice that they must put in their claims at once or be silent for ever.²⁵

Pollock and Maitland also have something to teach us about the role of the court in the entry of fines. After 1175, fines became increasingly frequent.²⁶ Parties commenced actions by a variety of writs; occasionally fines ended “serious litigation,” but “in general, as soon as [the parties] were both before the court, they asked for

82 (1981).

¹⁷ Pollock and Maitland at 100 (cited in note 13).

¹⁸ *Id.* at 100-01.

¹⁹ *Id.* at 95.

²⁰ *Id.* at 101.

²¹ *Id.* at 95.

²² *Id.*

²³ *Id.* at 101. According to Philbrick, being “seised” loosely accorded with what today is called possession. Francis S. Philbrick, *Seisin and Possession as the Basis of Legal Title*, 24 *Iowa L. Rev.* 268, 271-72 (1939).

²⁴ Pollock and Maitland at 96).

²⁵ *Id.* (citations omitted).

²⁶ *Id.* at 97-98.

leave to compromise their supposed dispute.”²⁷ Compromising without permission was an offense. The king made money from the licenses sold to justices, and removing cases from dockets required permission.²⁸ With that permission, the parties then recited “the terms of their compact.”²⁹

Throughout the middle ages the justices exercise a certain supervision over the fines that are levied before them. When a married woman is concerned, they examine her apart from her husband and see that she understands what she is doing. In other cases they do not inquire into the subject matter of the compromise; they have not to protect the material interests of the parties or of strangers, but they do pretty frequently interfere to maintain the formal correctness and the proprieties of conveyancing: they refuse irregular fines. Even the formal correctness of the arrangement they do not guarantee, but they are not going to have their rolls defaced by obviously faulty instruments.³⁰

I do not want to force historical antecedents or historical truths. The fine might better be understood as the forerunner of the declaratory judgment or in connection with the development of confessions of judgment rather than as an example of a consent decree. But the description that Pollock and Maitland provide is parallel to the process followed today in the entry of some consent decrees. Their description is in many ways like the Party Control example (Variant I) sketched above. The judge seems to have had no involvement with the negotiation of the fine; there may or may not have been some highly stylized jousting, but ultimately the parties worked out an agreement, and the court accepted that agreement—checking only for facial defects.

Jumping centuries and continents, commentary and case law in the United States generally assumed the availability of consent decrees without much analysis of why courts provided them. Several nineteenth and twentieth century legal treatises included consent decrees in their list of the kinds of judgments courts rendered.³¹ There was, however, some dispute about the nature of a

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 99 (citations omitted).

³¹ A. C. Freeman, *A Treatise of the Law of Judgments* (5th ed. 1925); Black, *Judgments* (cited in note 3); William Meade Fletcher, *A Treatise on Equity Pleading and Prac-*

consent decree. Some writers claimed that the decree was to be understood as a private contract between the parties,³² whereas other writers stated that a consent decree was more than a contract; the decree was a "judicial act."³³ As one treatise writer explained, the consent judgment is "the act of law, invoked by the parties, in *executing* the agreement. . . . [T]he defendant merely submits to what would, presumably, be done with or without his assent."³⁴ Occasionally, practical effects flowed from the conceptualization adopted. For example, in the days of more stringent pleading rules, calling a consent judgment a "contract" permitted its inclusion in a suit for breach of contract.³⁵

The treatise writers expressed a view that the role of the judge, when entering the consent decree, was limited. One commentator asserted that the court had a "duty" to enter judgment upon the parties' agreement³⁶ and that the court had "no power to supplement or construe the agreement."³⁷ Even under this "duty" model, however, the court did have some role to play other than simply signing off. First, the court could only enter judgment in actions over which subject matter jurisdiction existed; the court presumably had authority to inquire into its own jurisdiction.³⁸ Second, the court could only enter judgment if consent in fact existed. The court could hold a hearing to obtain information on the fact or validity (whether the signatories were capable of binding themselves) of the consents given.³⁹ What the court did not do was

tice (1902). Compare American Law Institute, Restatement of Judgments (Second) (1982) (no separate listing for consent judgments; discussed only as part of § 13 (former adjudication) and § 73 (relief from a judgment)).

³² Freeman, Judgments § 1350 at 2773 (cited in note 31). Note that the dispute about whether a judgment was to be understood as a contract was not limited to the case of consent judgments but included all judgments. *Id.* at 8. See William Blackstone, 3 Commentaries on the Laws of England 159-61 (Joseph Chitty, ed. 1826).

³³ Black, Judgments at 14-15 (cited in note 3) ("The judgment is not the agreement; it is the act of the law, invoked by the parties in executing the agreement."). While Black accused Blackstone of undue "love" of categories, and hence of a desire to call a consent judgment a "contract," Black had a penchant for categorization as well. One of his reasons for rebelling against calling a consent judgment a contract was because "it would be rash to conclude that a tort is a contract." *Id.*

³⁴ *Id.* (emphasis in original).

³⁵ *Id.* at 12-13.

³⁶ Freeman, 3 Judgments § 1350 at 2764 (cited in note 31).

³⁷ *Id.*, § 1350 at 2771.

³⁸ *Id.*, § 1350 at 2772. The assumption was that consent decrees could address matters related to but beyond the pleadings; thus, the jurisdictional proposition was somewhat fuzzier than this statement suggests. See, for example, *Fletcher v. Holmes*, 25 Ind. 458, 463 (1865); *Kentucky Utilities Co. v. Steenman*, 283 Ky. 317, 141 S.W.2d 265 (1940).

³⁹ Freeman, 3 Judgments § 1350 at 2772 (cited in note 31).

make any determination of the merits. Consent judgments involved “no judicial inquiry into, or preliminary adjudication of, the facts or the law applicable thereto.”⁴⁰ But, because the court had entered the agreement as its judgment, the judgment stood as would any other—with preclusive effect and protected from collateral attack.⁴¹ Like Pollock and Maitland, the writers of treatises describe a process that echoes the behavior sketched as Variant I. Parties drafted agreements, and the court played only a minor role, yet entry of those agreements gave them a power akin to that of judgments rendered after adjudication.

Given the ambiguous nature of consent decrees, the source of their power has always presented conceptual difficulties. As *Corpus Juris Secundum* puts it, a consent decree “is not the judgment of the court” but, because the court “allows it to go upon the record,” a consent judgment has the “force and effect of a judgment.”⁴² Consent decrees have “judicial character” and “efficacy” but no judicial judgment.⁴³ Rather, the entry of the judgment is a “mere ministerial” act.⁴⁴

The case law underscores the tensions suggested by the treatises. The United States Supreme Court’s descriptions of consent decrees are illustrative. On one hand,

[p]arties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings.⁴⁵

Further, courts must be circumspect when considering modification of consent decrees.⁴⁶ When interpreting a decree, judges are to enforce the bargain made by the parties rather than the purposes of the legislation that gave rise to the underlying action.⁴⁷ Interpre-

⁴⁰ *Id.*, § 1350 at 2773.

⁴¹ *Id.*, § 1350 at 2774. The judgment was “judicial . . . and . . . conclusive.” *Id.* at 2775.

⁴² 49 *Corpus Juris Secundum*, Judgments, § 173 at 308 (1947). See also *Badgley v. Santacrose*, 800 F.2d 33, 38 (2d Cir. 1986), cert. denied, 107 S. Ct. 955 (1987).

⁴³ 49 *Corpus Juris Secundum*, Judgments, § 173 at 308.

⁴⁴ *Id.*, § 176 at 312. See also *State v. Jones*, 252 Ala. 479, 41 So. 2d 280 (1949). In contrast, another legal encyclopedia reminds us that consent judgments were not to be treated as “mere contracts.” 47 *Am. Jur.* § 1082 at 140 (1969).

⁴⁵ *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1879). The cases expounding upon consent decrees are examples of federal common law in the making.

⁴⁶ See generally *Swift & Co. v. United States*, 276 U.S. 311 (1928); compare *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

⁴⁷ *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 237-38 (1975).

tation and modification, when permissible, are supposed to depend upon the written document—the “four corners” of the parties’ contract.⁴⁸ Finally, judges may not require parties to accept provisions within settlement agreements to which the parties have not consented.⁴⁹ In sum, there is a strand of the case law strongly committed to the party-control variant of the typology.

On the other hand,

parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. [At least insofar as consent decrees based upon statutory rights are concerned,] . . . the court is free to reject agreed-upon terms as not in furtherance of statutory objectives, [and] . . . to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives.⁵⁰

Moreover, when law and equity were distinct, a consent decree was sometimes viewed as less powerful than “a judgment of the court” and thus, at least under the equity practice, a court had the ability to decline to give a consent decree *res judicata* effect.⁵¹ And, of late (again in certain kinds of cases), courts have declined to enforce civil consent decrees when the decrees required government officials to comply with requirements courts have subsequently held not to be constitutionally mandated.⁵² Despite claims of reliance

⁴⁸ *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). But see Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1029-30 (1986) (lower courts have not applied anti-modification doctrine as strictly to consent decrees in institutional reform cases). For a general discussion of the two standards, see Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987), and Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101 (1986).

⁴⁹ *Evans v. Jeff D.*, 106 S. Ct. 1531, 1538 (to be reported at 475 U.S. 717) (1986); *United States v. Board of Educ. of City of Chicago*, 799 F.2d 281, 292-96 (7th Cir. 1986).

⁵⁰ *System Federation v. Wright*, 364 U.S. 642, 651 (1961). See also *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (a court of equity has the power “to modify an injunction in adaptation to changed conditions though it was entered by consent”).

⁵¹ *Lawrence Manufacturing Co. v. Janesville Cotton Mills*, 138 U.S. 552, 561 (1891). See also Black, *Judgments* at 4-5 (cited in note 3) (decrees are more flexible than judgments), and *United States v. City of Jackson, Miss.*, 519 F.2d 1147, 1152 (5th Cir. 1975) (courts appreciate the limits of consent decrees and give them less weight insofar as they affect third parties).

⁵² See, for example, *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985) (jail officials not required to obey restrictions on double bunking as set forth in consent decree entered into prior to Supreme Court cases that did not impose such restrictions). Compare *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986) (also an overcrowding case; “The strong policy encouraging settlement of cases requires that the terms of a consent judgment, once approved by a federal court, be respected as fully as a judgment entered after trial.” (citation omitted)). In general, the standard for enforcement of consent decrees appears to differ

upon bargains, courts do not always enforce the bargains made. Thus, there is a line of cases that bespeaks some fidelity to the judicial-control variants described above.⁵³

One of the most recent Supreme Court pronouncements in this area, *Local Number 93 v. City of Cleveland*,⁵⁴ aptly sums up the doctrinal tensions.

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 contracts. . . . More accurately, then, . . . consent decrees "have attributes of both contracts and of judicial decrees," a dual character that has resulted in different treatment for different purposes.⁵⁵

In short, just because a consent decree "looks like a judgment" doesn't mean that it is one.⁵⁶

Before examining the recent Supreme Court discussions of judicial role in the consent decree process, I need to provide a bit of description about other legal developments relevant to understanding the current state of the doctrine. First, as is familiar, in 1938 the Federal Rules of Civil Procedure became effective. The Civil Rules were—and are—relatively silent about consent decrees. Indeed, the Civil Rules provide no specific information on the consent process, and litigators must improvise when submitting de-

from that imposed when the underlying issues have been litigated. See Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. Rev. L. & Soc. Change 1201, 1212-13 (1986); Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1082-85 (1983). See also, Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. Chi. Legal F. 241, 245-46, 268-70.

⁵³ An advocate of the judicial-control approach is Professor Moore:

. . . the fact remains that the judgment is not an *inter-partes* contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication.

1B James Moore, Jo Desha Lucas & Thomas Currier, *Moore's Federal Practice* § 0.409[5] at 330-331 (1984).

⁵⁴ 106 S. Ct. 3063 (1986).

⁵⁵ *Id.* at 3074 (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975)). See also, *United States v. Armour & Co.*, 402 U.S. 673 (1971). At issue in *Local Number 93* was whether a trial judge could enter a consent decree in a Title VII action that arguably went beyond a court's authority, under § 706g, 42 U.S.C. § 2000e-5(g) (1982), to order relief after adjudication. The Court held that an "order" based upon a consent decree was not an "order" for purposes of the statutory limitation. *Id.* at 3072.

⁵⁶ 106 S. Ct. at 3076.

crees for entry.⁵⁷ Further, the 1938 Civil Rules do not deal directly with the general question of settlement, although mention is made of cost-shifting penalties for failure to settle⁵⁸ and of the requirement that class actions not be “dismissed or compromised without court approval.”⁵⁹ While the class action rule was substantially revised in 1966, no additional discussion of the criteria for court approval of class action settlements has been provided.⁶⁰ Nevertheless, court interpretation of that rule has been a major source of information about the judicial role in consent decrees.⁶¹ Coupled with the suggestions of the Manual for Complex Litigation,⁶² Rule 23 case law has provided a framework for judicial behavior in the consent decree process.⁶³

Second, in 1983, the Civil Rules were amended in a manner that has proved to be significant for this inquiry. For the first time, the Rules gave judges express permission to facilitate “settlement.”⁶⁴ While judges had expressed interest in that topic before, the 1983 amendments have encouraged them to articulate their

⁵⁷ Fed. Rule Civil Proc. 54 and 58 discuss entry of judgment; Rule 41 provides for notices of dismissal. Neither mentions judgments by consent.

⁵⁸ Fed. Rule Civil Proc. 68 (1938).

⁵⁹ Fed. Rule Civil Proc. 23(c) (1938).

⁶⁰ 1966 Advisory Committee Note to Fed. Rule Civil Proc. 23(e) (“Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.”). The question of the role of the judge in approving class action settlements seems not to have been of much interest to the drafters of the 1938 rules or to subsequent revisers, who left the original language intact: “a class action shall not be dismissed or compromised without approval of the court.” See, for example, the minimal note to Rule 23(c) in the 1938 rules, the lack of additional exposition in the 1966 revisions, and the recent American Bar Association proposal to amend Rule 23—including the notice requirements of 23(e)—but not to describe with any more particularity the role of the court in approving class action settlements in American Bar Association, Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195 (1986) (“ABA Proposed Revisions”). Compare §§ 3475, 3068, 95th Cong., 2d Sess. (Aug. 25, 1978) (proposed statute for “reform of class action litigation procedures” and for “public and class compensatory actions” would have required a judicial determination of the “fairness” of a settlement as well as the “adequacy of representation”).

⁶¹ See, for example, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462-64 (2d Cir. 1974); *Cotton v. Hinton*, 559 F.2d 1326, 1330-32 (5th Cir. 1977); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123-25 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1975).

⁶² Manual for Complex Litigation, Second, §§ 30.4-30.47 at 235-48 (West 1985).

⁶³ Title VII litigation has also been an important source of description about a court's role in consent decrees. Further, there has been some borrowing from discussions on the role of courts when approving reorganizations under the Bankruptcy Act. See, for example, 11 U.S.C. § 1129(a)(3) (1982), and *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

⁶⁴ Fed. Rule Civil Proc. 16(a)(5) lists, under the objective of the pretrial conference, “facilitating the settlement of the case.” Rule 16(c)(7) includes “the possibility of settlement” under the subjects to be discussed at the pretrial conference.

role as case "settlers" and to pursue that function with vigor.⁶⁵ Today, judges openly participate in settlement discussions of civil cases and claim abilities to provide important insights into the kinds of agreements reached.⁶⁶

Third, Congress has enacted legislation giving trial judges a specific role in approving certain kinds of consent decrees; a few statutes require judicial approval prior to the dismissal or compromise of lawsuits.⁶⁷ While some of these statutes are silent on the question of how courts should discharge that task, a few, such as an amendment (the Tunney Act) to the antitrust statutes, provide some guidance. The Tunney Act requires judges to ascertain whether, in antitrust suits brought by the government, a consent decree serves the "public interest."⁶⁸ Antitrust consent decrees have long provided the occasion for court (and commentator) consideration of consent decree issues,⁶⁹ but the cases tended to arise after the entry of consent decrees—when one side's consent had evaporated and requests for modification or nullification were made.⁷⁰ Similarly, a good deal of the case law on consent decrees in general developed not at the time of the entry of the decree (after all, both sides were championing it at that time) but subsequently—either when third parties claimed negative effects flowed from the decree or when the parties attempted to rely upon a decree in a second lawsuit. However, with the advent of the class ac-

⁶⁵ See D. Marie Provine, *Settlement Strategies for Federal District Judges* (Federal Judicial Center, 1986); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253 (1985); Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States, 12 J.L. & Soc'y 1 (1985); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 U.C.L.A. L. Rev. 485 (1985).

⁶⁶ See Peter H. Schuck, *The Role of Judges in Settling Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337 (1986). But see Hon. H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 Rutgers L. Rev. 431 (1986) (expressing skepticism about judicial settlement activities).

⁶⁷ See, for example, 15 U.S.C. § 16 (1982) (antitrust); 8 U.S.C. § 1329 (1982) (aliens and nationality); 12 U.S.C. § 67 (1982) (banking).

⁶⁸ 15 U.S.C. § 16(b)-(h). Note that the statute has been held only to apply to settlements by consent decree; despite a district judge's efforts to retain control, the Second Circuit concluded that parties who agree to the dismissal of an action otherwise subject to the Tunney Act are beyond its purview. *In re International Business Machines Corp.*, 687 F.2d 591, 601 (2d Cir. 1982).

⁶⁹ See, for example, *Swift & Co. v. United States*, 276 U.S. 311 (1928), and *United States v. Armour & Co.*, 402 U.S. 673 (1971); Milton Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. 415 (1940); Sigmund Timberg, *Recent Developments in Antitrust Consent Judgments*, 10 Fed. Bar J. 351 (1949).

⁷⁰ For example, *Swift & Co.*, 276 U.S. at 311; *United States v. Board of Educ. of City of Chicago*, 799 F.2d 281 (7th Cir. 1986).

tion rule and statutes such as the Tunney Act, courts have also been required to speak about their role at the time of the entry of the decrees.

Fourth, when litigating statutory rights cases such as Title VII,⁷¹ environmental cases, and constitutionally based institutional reform cases, parties have turned to consent decrees with renewed interest.⁷² Because many of these cases involve either class actions or intervention by third parties, the consent decree process has become more visible. In contrast to the cases in which all the parties consent and no one litigates, the multiple-party, multiple-claim cases typical of Title VII, class action, and public law litigation often include someone with interests that conflict with those of the settlers. That someone—an intervenor, a dissatisfied member of a class—may appear in court to argue against settlement.

Hence, contemporary judges who discuss the role of the court in the consent decree process must respond to more issues than did the writers of past generations. *Local Number 93* again proves instructive. In that case, the Court described a series of tasks for judges to complete prior to entry of a consent decree. Under *Local Number 93*, courts may not enter a consent decree if they lack subject matter jurisdiction over the dispute that gives rise to the decree, if the decree is not within the “general scope” of the pleadings, or if the decree does not “further the objectives of the law upon which the complaint was based.”⁷³ Moreover, parties may not obtain consent decrees that require action in violation of the statute under which the case was brought or is otherwise unlawful.⁷⁴ And, under *Firefighters v. Stotts*,⁷⁵ one party cannot obtain modification of a consent decree over the objections of another party, if that modification would not have been within a court’s power to order, had the underlying claim been adjudicated. In short, under these cases (and even when no class action or other special statutory scheme is involved), federal judges have—at least in theory—several legal issues to resolve prior to the entry or modification of consent decrees. A judge cannot simply “sign off” without

⁷¹ Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5 (1982).

⁷² See generally Schwarzschild, 1984 Duke L.J. at 888 (cited in note 10); Note, 99 Harv. L. Rev. at 1026-28 (cited in note 48); and Percival, 1987 U. Chi. Legal F. at 328 (cited in note 1).

⁷³ 106 S. Ct. at 3077. This statement may reflect a change in the law to expand the role for the court, or the statement might be understood as explication of the long-held view that consent decrees cannot be entered in violation of “public policy.” See text at note 140.

⁷⁴ *Id.*

⁷⁵ 467 U.S. 561 (1984).

examining some of the underlying claims and the basis of the court's authority. There appears to have been a shift in emphasis in the case law to increased judicial control over consent decrees; the contemporary world provides many examples of cases falling within Variants II and III of the typology.⁷⁶

Yet the consent decree process still gives parties a substantial arena in which to work, for the consent decree can be used to obtain from courts that which could not have been achieved by litigation. In *Local Number 93*, the issue was whether a court could enter a consent decree that required more by way of relief than a federal court is permitted to order under Title VII. Justice Brennan answered in the affirmative, thereby authorizing courts, at least in some cases, to enter consent decrees that give "broader relief than the court could have awarded after trial."⁷⁷

It would be wrong to leave the discussion of the state of the law and the practice without underscoring how ultimately muddy it all is. One source of confusion is the ambiguity about how much a judge may participate in shaping a consent decree. As noted, since 1983, when the Federal Rules of Civil Procedure were amended to authorize expressly judicial involvement in civil settlement discussions,⁷⁸ judges have become increasingly vocal about their role in helping the parties to reach an agreement. The Supreme Court, however, has taken two inconsistent positions on the subject. On the one hand, in *Evans v. Jeff D.*,⁷⁹ the Court recently reiterated the rule that judges have no power to insist upon any particular provision in a settlement. On the other hand, in *Local Number 93*, the Court discussed with apparent approval the pivotal role of the trial judge in shaping the parties' agreement. The trial judge there held hearings on a proposed settlement and then sent the parties back to the drawing board with his suggestions about what would be acceptable. The judge "persuaded the parties" to consider a plan to which they eventually consented.⁸⁰

⁷⁶ This is part of a general trend towards increased judicial control of litigation. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985); compare Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

⁷⁷ 106 S. Ct. at 3077. Parties may also obtain, via consent decrees, agreements to have specific performance of contracts—a remedy not often provided by the common law. See Alan Schwartz, *The Case for Specific Performance*, 89 Yale L.J. 271 (1979).

⁷⁸ Fed. Rule Civil Proc. 16(a)(5) and (c)(7). Compare Fed. Rule Crim. Proc. 11(e)(1) (judges may not participate directly in bargaining for settlement of criminal cases) and *United States v. Werker*, 535 F.2d 198 (2d Cir. 1976). However, under Fed. Rule Crim. Proc. 11(e)(2)-(4), bargains can be conditional upon acceptance by a federal judge.

⁷⁹ 106 S. Ct. 1531, to be reported at 475 U.S. 717 (1986).

⁸⁰ *Local Number 93*, 106 S. Ct. at 3069. The Agent Orange litigation provides another

Thus, a sophisticated trial judge may exert substantial control by carefully timing her or his views on the propriety of a given settlement. A judge who tries, informally, to dictate terms before an agreement has been finalized may convince the parties of the wisdom of the court's opinions, whereas a judge who responds within the formal contours of a hearing on a proposed settlement is less likely to receive appellate approval for the intervention.

A second source of confusion comes from a series of comments by (now Chief) Justice Rehnquist. Dissenting from the summary affirmance in a case challenging the trial court's activities in the AT&T antitrust settlement, Justice Rehnquist (joined by Justices White and Chief Justice Burger) argued that once the parties had agreed to withdraw or to settle a lawsuit, no "case or controversy" existed; therefore, judges lacked the power to insist upon any particular agreement.⁸¹ Presumably, under this view, legislation such as the Tunney Act or court rules like Rule 23(e) of the Civil Rules are unconstitutional grants of authority to federal courts, and judges cannot inquire into any terms of parties' agreements.⁸² At one level, this claim appears to be a version of the old "duty" argument; the parties make their deal and the court dutifully enters it. But conceptually, there seems to be a problem. While Justice Rehnquist did not so state, a logical but radical application of his view is that, if there is no case or controversy, courts have no power to enter a consent decree at all.⁸³

example. Chief Judge Jack Weinstein, to whom the case had been assigned, was an active participant in the settlement negotiations. Schuck, 53 U. Chi. L. Rev. at 348-50 (cited in note 66); Ralph Blumenthal, *How U.S. Judge Forced Agent Orange Pact*, New York Times (May 11, 1984), part 1, p. 1, col. 2. Thereafter, Judge Weinstein presided at Rule 23(e) "fairness" hearings and upheld the settlement over some class members' challenges. In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), 611 F. Supp. 1396 (E.D.N.Y. 1985), *aff'd in part and rev'd in part*, 818 F.2d 226 (2d Cir. 1987) (settlement was "in the best interests of the class").

⁸¹ *Maryland v. United States*, 460 U.S. 1001, 1004 (1983).

⁸² The practice of obtaining judicial approval on the criminal side may survive such a position. The Supreme Court has held that the Constitution requires that criminal defendants may only waive their rights to trial if they have done so knowingly and voluntarily. *McMann v. Richardson*, 397 U.S. 759, 766 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969). One might conceptualize a criminal controversy as extant until after court determination of a defendant's waiver of rights. See also Justice Rehnquist's dissent in *Rinaldi v. United States*, 434 U.S. 22, 34 (1977) (assuming the legality of Fed. Rule Crim. Proc. 48(a), which permits indictments to be dismissed only "by leave of court").

⁸³ *Schwarzchild*, 1984 Duke L.J. at 902-03 (cited in note 10) notes the absence of adverseness but concludes that consent decrees are like other anomalous procedures such as uncontested bankruptcy proceedings and naturalization and that Article III limitations are not problematic. Further, *Schwarzchild* takes comfort in congressional affirmation of the federal courts' role in settlement of Title VII actions. *Id.* at 904. Of course, Congress cannot

Finally, in *Local Number 93*, Justice Rehnquist muddled the waters even further. Protesting a court's entry of a consent decree that the parties had negotiated but to which an intervenor objected, Justice Rehnquist suggested that some new form of judgment might be available. In an unclear reference, he stated "*a judicial decree* to which the parties agree may be entered over the objections of an intervenor as of right; but the question is whether such a decree is properly called a 'consent decree' or a coercive court order."⁸⁴ Intervenors are not the only people who may object to proposed consent decrees; many class action consent decrees are approved over the objections of class members. Justice Rehnquist may thus have called into question a relatively common practice. It is not clear whether he was signalling doubts only about intervention, consent decrees, and nomenclature, or whether he was continuing to raise questions about the propriety, in general, of entering such decrees.

In sum, we do not have a much firmer grip upon the meaning of the consent decree process than did treatise writers fifty years ago. That something is a judicial act but not a judicial judgment is intrinsically troubling and has caused not only conceptual confusion but also practical complexity. Neither judges, lawyers, nor parties know exactly what they give or get when a consent decree is entered. The history of the last six years of litigation about the "consent" decree between the federal government and the Chicago Board of Education bears testimony to the negative consequences of the ambiguity that surrounds consent decrees.⁸⁵ Hence, it is necessary to return to the initial questions.

Given the possible modes of judicial behavior during the consent decree process, given the ambiguous status of the judgments entered, should anything be done about the consent decree process? Should courts be in the business of offering consent decrees? In all kinds of cases? What interests are served by the continuing provision of consent decrees? Does the availability of consent decrees facilitate private agreements or serve the judiciary's needs?

confer power on the federal courts beyond that provided by Article III.

⁸⁴ *Local Number 93*, 106 S. Ct. at 3084-85 n.* (Rehnquist, J., dissenting) (emphasis in original).

⁸⁵ *United States v. Board of Educ. of City of Chicago*, 799 F.2d 281 (7th Cir. 1986). The appellate court instructed the district court not to adjudicate but to "settle" the case (whatever that means). *Id.* at 290 ("[I]t was and still is imperative that the district court make every effort to settle this dispute before imposing its own determination of appropriate relief."). The appellate opinion was frank in its discussion of the confusion spawned by the consent decree entered in 1980.

Or, are we simply following—without much reflection—a historical form that, with the advent of sophisticated recordation devices, has outlived its utility? In short, can the continued availability of consent decrees be justified on the basis of judicial role during the consent decree process? If so, are all variants of the typology equally acceptable as modes of litigant-judge interaction?

III. EVALUATING CONSENT DECREES

A. The Praise

Despite the ambiguities that surround consent decrees, many litigants (or their lawyers) continue to seek them, and many judges and commentators continue to praise them. Thus, it should be acknowledged at the outset of this evaluative discussion that whatever the theoretical and conceptual difficulties, the literature generally assumes that consent decrees are desirable forms. Before providing an analysis of assumptions made in support of consent decrees, I set forth some of the advantages ascribed to them.

The perceived benefits of consent decrees are several, some reminiscent of Pollock and Maitland and others part of a general contemporary celebration of settlement. First, consent decrees are frequently assumed to save both litigants and courts the expenses of litigation while enabling results akin to those produced by litigation.⁸⁶ Second, statements are made about the utility of consent decrees in diminishing risks. One kind of risk is the unknown outcome that those in the midst of adjudication face. Hence, “[c]ertainty and reasoned reliance have always been the *sine qua non* of the consent orders that terminate about 70% to 80% of the antitrust complaints . . . filed by the Justice Department.”⁸⁷ A second kind of risk is that the outcome reached will not be implemented. Some courts and commentators believe that agreements founded upon consent will be voluntarily implemented more readily and easily than those founded upon force.⁸⁸

These assumptions about compliance are rooted in symbolism

⁸⁶ Katz, 53 Harv. L. Rev. at 418 (cited in note 69).

⁸⁷ *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 249 (1975) (Stewart, J., dissenting) (footnote omitted) (emphasis in original).

⁸⁸ “[W]hen agreement is reached by consent, voluntary compliance is more likely . . .” *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1333 (5th Cir. 1980), rev’d in part on unrelated grounds, 664 F.2d 435 (5th Cir. 1981) (en banc). See also *Local Number 93*, 106 S. Ct. at 3072 (“Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII.”); *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983); *Menkel-Meadow*, 33 U.C.L.A. L. Rev. at 504 (cited in note 65) (settlement “offers . . . substantive justice that may be more responsive to the parties’ needs than adjudication”).

and practice. Consent judgments (or at least some kinds of consent judgments) seem weightier and more portentous than do contracts. Some of the notions of solemnity, of import to Pollock and Maitland, endure in both the case law and the commentary. The symbolic import flows both from the relative infrequency of judgments, as compared to contracts, and from the nomenclature. Although consent judgments may be judicial "acts" without judicial "judgment," the terminology helps to confuse us—to lull us into an assumption that a judge has had something meaningful to do with the obligations imposed. Failing to perform under a consent decree is a violation of the "law," whereas failing to perform as required by a contract—even though a transgression of the law of contracts—is somehow less obviously a breach of the law. Parties to a judgment are thought to understand themselves as more "bound" than those obliged "only" by contract, and nonparties are assumed to understand the violation of a consent judgment as more egregious than is a breach of contract.⁸⁹

The apparent authoritativeness of consent decrees is reinforced by practice. Parties to a consent decree have (at least in theory) a priority in the court queue and, with their "court order" in hand, may seek the remedy of contempt. Moreover, consent judgments continue to function as recordation devices and mechanisms by which those who have judgments—rather than "mere" contracts—are given priorities not only in their return to court but in other contexts; "judgment creditors" may be treated differently than other categories of creditors, and judgments are readily enforceable across jurisdictional lines.⁹⁰

A third line of support celebrates consent decrees as exercises of parties' autonomy. Because the parties, not the court, determine the remedy, the assumption is that the remedy is better suited to the parties' needs. For example, Robert Mnookin and Lewis Kornhauser have written about the utility of consent decrees in divorce

⁸⁹ Schwarzschild, 1984 Duke L.J. at 899 (cited in note 10), speaks of the "moral authority" of court orders, including those entered by consent. See also *United States v. City of Miami, Fla.*, 664 F.2d at 439-40 (a consent decree has "greater finality than a compact"), and Mnookin and Kornhauser, 88 Yale L.J. at 992 (cited in note 2) (ceremonial benefits). But see text at note 103 (the problem of nonenforcement of alimony and child support orders).

⁹⁰ Consent judgments, unlike contracts, are afforded full faith and credit in other jurisdictions. See generally Hiroshi Motomura, *Using Judgments as Evidence*, 70 Minn. L. Rev. 979 (1986); American Law Institute, *Restatement of Judgments (Second)* § 13 (1982). Judgments may constitute liens for purposes of the bankruptcy laws. See 11 U.S.C. § 547. The Uniform Commercial Code also recognizes judgments as the basis for claims. See, for example, Cal. Commercial Code § 9-501(5).

and custody disputes. Mnookin and Kornhauser believe that the parties have more information than would a judge, can assess their own needs with greater accuracy, can plan for future contingencies, and can shape agreements with less pain than would be required if adjudication had occurred.⁹¹ A related theme is flexibility; consent decrees may provide what courts cannot order. Further, consent decrees permit court orders without going through a lawsuit that neither party wants.

A flip side of the autonomy argument is one that conceives of consent decrees as useful vehicles for court control over parties. For example, when one party fears noncompliance, that party may prefer a consent decree to a contract. In cases involving agreements that structure parties' relations over a period of years, litigants may anticipate problems during the compliance phase. "[C]ontinuing oversight and interpretation by the court" are seen as critical.⁹² Given the individual calendar system in the federal courts, signatories to consent decrees have a right-of-return and preferred access not only to the federal courts but perhaps to the very judge who participated in the negotiation of, approved and, in any event, entered the decree.

Court control may be seen as desirable for reasons other than fear of noncompliance. Involvement of a judge may be used to supervise the parties—to ensure that the parties are treating each other or third parties appropriately. The court-as-parent may, for example, inquire into the adequacy of the consent given to an agreement while avoiding the task of actually deciding the merits of a dispute. In criminal cases and in civil cases in which court approval of consent decrees is required, courts speak of themselves as "guardians" of the interests of the parties and/or of the public. But, by virtue of the consent decree, that guardianship need not be translated into an obligation to adjudicate.⁹³ A framework that regulates behavior has been created without the issuance of a court decision on what societal norms require in a given situation. The resultant uncertainty about those norms may be viewed as a safety valve; consent decrees could be among the panoply of devices enabling "passive virtue."⁹⁴

⁹¹ Mnookin and Kornhauser, 88 Yale L.J. at 956-58 (cited in note 2). See also Easterbrook, 1987 U. Chi. Legal F. at 21-30 (cited in note 1).

⁹² Schwarzschild, 1984 Duke L.J. at 899 (cited in note 10), quoted in Local Number 93, 106 S. Ct. at 3076 n.13.

⁹³ The protective rationale is often used in the class action context. See, for example, *Liebman v. J.W. Petersen Coal & Oil Co.*, 73 F.R.D. 531, 534 (N.D. Ill. 1973).

⁹⁴ Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Vir-*

Such are the benefits ascribed to consent decrees. But that list does not end the inquiry into either the fact of such benefits or the propriety of judges bestowing them. Consent decrees, after all, are contracts transformed because the parties to the contract have the resources—in terms of dollars and power—to get the seal of the court. To provide that seal, judges spend some time. While that time may be minimal in many cases,⁹⁵ the time investment can be substantial when numbers of people are affected. Further, once the court's seal has been attached, parties may successfully invoke the court's name and resources to enforce the decree.⁹⁶ While the courts are in the business, generally, of enforcing contracts, should the courts give priority and sanctity to this subset of contracts? Are we inappropriately permitting some litigants to purchase court powers? Are we asking judges to enter judgments based upon intrinsically suspect information? Or are we properly empowering judges to discharge a task to which they are well suited?

Consent judgments need to be scrutinized to decide whether judicial "action without judgment" remains a valuable form. What benefits are in fact conferred by consent decrees on the parties, the courts, and the public? One way to approach this issue would be to attempt to understand the advantages that the availability of consent decrees provide for those who would otherwise be left to contract, and then, to consider the advantages provided for those who would otherwise be left to litigate. However, because both private contract and adjudication are often the alternatives, this approach builds in redundancy. Another analysis might proceed by considering first the benefits to individuals, then to groups, to courts, and

tues, 75 Harv. L. Rev. 40 (1961). I have borrowed Professor Bickel's phrase, but consent decrees do not fit exactly within his meaning. Bickel discussed the Supreme Court's decisions to decline to exercise jurisdiction, so as to avoid deploying its "prestige, the spell it casts as a symbol." *Id.* at 48. Consent decrees are not quite as "passive" (within Bickel's terms) as justiciability doctrines, for consent decrees do place the power and prestige of courts behind certain outcomes. On the other hand, principled articulation is left for another time.

⁹⁵ Commentators on the function of consent decrees in antitrust enforcement note that court review (prior to the Tunney Act) was pro forma and that judges made no changes in the detailed documents presented to them. See Milton Goldberg, *The Consent Decree: Its Formulation and Use* (Occasional Paper No. 8, Graduate School of Business Administration, Michigan State University 1962) at 20. For discussion of court review in other contexts, see Schwarzschild, 1984 Duke L.J. at 913 (cited in note 10), and William McDonald, *Judicial Supervision of the Guilty Plea Process: A Study of Six Jurisdictions*, 70 *Judicature* 203, 211 (1987) (judges spent average of 7 to 8 minutes per guilty plea accepted).

⁹⁶ As Fleming James put it, a consent decree commits society's resources to enforcement and implementation of the contractual agreements made by the parties. See Fleming James, Jr., *Consent Judgments as Collateral Estoppel*, 108 U. Pa. L. Rev. 173, 175 (1959).

to the public at large, but again the overlapping benefits would entail repeated analysis, and these categories may not, in fact or theory, be distinct. I have chosen a third route (with less, but still some overlap)—to examine the list provided above, to group justifications so as to articulate specific arguments in favor of judicial provision of consent decrees, and then to consider the factual assumptions and implications of each claim.

B. The Assumptions

1. *Economy*. This argument assumes that the provision of consent decrees enables courts to clear their dockets because more lawsuits end—and end less expensively—than would have, were consent decrees unavailable. This approach, relying upon the assumed advantages of risk reduction, diminution of expense, and the symbolic power of decrees, claims that consent decrees benefit private individuals, the courts, and the public at large. Further, the concern here is relatively narrow; economy is translated as saving only dollars and time.

Critical to endorsing consent decrees as a form of settlement to be encouraged is the premise that, in some set of cases, parties will agree to a consent decree but would have been unwilling to conclude their dispute without a consent decree. In other words, this argument compares consent decrees both to adjudication and to contract and finds reasons to prefer consent decrees. While proponents of this view cannot identify with any empirical precision the cases for which consent decrees are desirable,⁹⁷ there are a se-

⁹⁷ The Rand Federal Court Data Base (cited in note 7) using data gathered by the Administrative Office of the U.S. Courts, provides some information about what kinds of cases are concluded most frequently by consent judgments. Of approximately 270,000 reported cases concluded in 1985, 5.8% (or some 15,700) were disposed of with what the Administrative Office designated "consent judgments." In addition, the Administrative Office reported that another 47.4% of the total caseload ended in "settlement." The Administrative Office also codes lawsuits by the "nature of the suit." The data are obtained in each jurisdiction by court clerks, who review the civil cover sheets that plaintiffs' attorneys must complete. Boxes are provided to describe the lawsuit; only one "nature of suit" designation is permitted per case. Thus, the accuracy of the data base depends upon two sets of coders—attorneys and court clerks—and on their shared perceptions of the meaning of the categories provided, of the most important description of a given lawsuit, and of the kind of termination achieved.

A quantitative analysis to determine which variables (such as identity of party, identity of opponent, nature of suit, region in which a lawsuit is filed, nature of relief, presence of third parties) are critical to the kind of disposition (consent judgment versus settlement with a dismissal) must await refinement of the data base—to ascertain whether the "consent judgment" and "settlement" categories are in fact discrete and uniform across coders and to disaggregate from the "settlement" category those cases concluded with an agreement that

ries of possible candidates. For example, parties who anticipate post-contract enforcement failures could view consent decrees as essential. In fact, reported decisions of (not to be confused with aggregate data about) public law cases, in which the government is a party, feature consent decrees with some regularity. Opponents of the government may well be concerned about the ability of officials to bind future administrators.⁹⁸ Consent decrees offer some protection against changes in policy and make plain that, at least in the instance in question, a specific member of the government has on behalf of the government promised that other government officials will behave in a particular way.⁹⁹ Another visible set of

is functionally similar to a consent judgment.

On the basis of the data in their present state, cases described as "veterans' benefits" have the highest percentage of consent judgments (31.65%). These cases were also the most frequent type of suit concluded in 1985, the year analyzed (17% of the total caseload). Student loan and contract cases have the next highest percentage of consent judgments—with 13.4% and 10% respectively. In 1985, student loan cases were 3% of the total caseload, and contract cases were 9% of the caseload. Civil rights cases, including voting, job discrimination, accommodations, and welfare cases (which may be statutorily or constitutionally based) comprised 4.8% of all consent judgments recorded—and were 7.6% of the total caseload concluded. Antitrust cases were 0.44% of the total caseload concluded, and such cases were 0.35% of the total number of consent judgments.

Another set of relevant comparisons is the kind of disposition by nature of suit. For example, of all veterans' benefits cases concluded, 11% ended with consent judgments; of all student loan cases concluded, 28.1% ended with consent judgments; of all contract cases, 6.3% ended with consent judgments; of all civil rights cases, 42.2% ended with consent judgments; of all antitrust cases, 4.5% ended with consent judgments.

Another cut through the data is by the identity of the litigant. For example, in those cases in which the United States was a party, 4.2% ended in consent decrees as opposed to 1.8% of the cases in which the United States was not involved. The federal government is a litigant in veterans' benefits and student loan cases, thus raising the possibility that the identity of a litigant may be a significant factor in explaining the method of termination of a lawsuit.

The numbers suggest that, despite the dominance of injunctive cases as our images for the prototypical consent judgment, cases involving monetary relief conclude with some frequency with consent judgments as well. On the other hand, our perception of the frequency of civil rights consent judgments is reaffirmed by the high percentage of that form of conclusion within that category of case (plus the high visibility of that kind of case). But no firm impressions should be drawn from the data. A percentage may only be an artifact of sample size. For example, 40% of all liquor cases ended in consent judgments but there were only five reported liquor cases concluded. An analysis that controls for sample size is necessary to compare the uses of consent judgments within and among the various types of cases.

⁹⁸ See Neuborne and Schwarz, 1987 U. Chi. Legal F. at 186-87 (cited in note 1).

⁹⁹ Concerned about being bound by consent decrees, Attorney General Meese has issued guidelines that prevent federal agency officials from entering into consent decrees that limit official discretion. Departures from the guidelines must be approved by high-ranking members of the Justice Department. Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (March 13, 1986), reprinted in part at Department of Justice Guidelines, 54 U.S.L.W. 2492 (April 1, 1986). Discussion by Justice Department officials at the Legal Forum symposium suggested that the current ad-

consent decree cases involve antitrust; the government—here a frequent plaintiff—has had an express policy of using the consent decree as a tool of enforcement less expensive, and sometimes more far-reaching, than adjudication.¹⁰⁰

What we do not know is what would have happened to these cases if consent decrees were not available—if the parties had had to choose between the risks and costs of private contracts or the risks and costs of adjudication. We also do not know how many case filings are inspired by the availability of consent judgments. How many contemporary litigants, like Pollock and Maitland's medieval combatants, are simply trying (with some half-hearted jousting) to obtain court recordation of their rights but have no interest in full-fledged adjudication? If consent judgments were not an option, would we have more private consensual agreements? Or more "lumping it"—not seeking to have one's rights vindicated?¹⁰¹ Or more adjudication?

At least at a general level (as contrasted with case-specific information), we have no current means to determine whether the availability of consent decrees reduces the total number of cases to which courts must respond. Further, given the extensive litigation in some of the reported cases involving "consent" decrees, we cannot say with certainty that the net costs of disputing in a world with consent decrees are less than the net costs of disputing in a world without consent decrees. While money is saved in some instances (and makes a claim of "cheaper" tempting), post-decree litigation (on both the civil and criminal sides) requires caution in pronouncements on economy.

2. *Certainty and Increased Compliance.* Another set of endorsements of consent decrees comes from the assumption that those bound by consent decrees in fact behave differently than

ministration is unhappy with some of the consent decrees entered into during the Carter administration. See Shane, 1987 U. Chi. Legal F. at 242, 279-90 (cited in note 52).

¹⁰⁰ The United States' active antitrust enforcement efforts in the 1930s prompted commentators to express concern about the ability of the government to file criminal and civil prosecutions simultaneously and to use the criminal action to "bludgeon" a defendant into assenting to a consent decree far broader than the antitrust laws would have required. Katz, 53 Harv. L. Rev. at 424 (cited in note 69). Commentators praising the vigor of government antitrust enforcement also noted that the preference for consent decrees was sometimes prompted by the uncertainty of legal parameters. William J. Donovan and Breck P. McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws, 46 Harv. L. Rev. 885, 911-12 (1933).

¹⁰¹ William L. F. Felstiner, Influences of Social Organization on Dispute Processing, 9 L. & Soc. Rev. 63, 76 (1974) (the variable costs of avoidance); William L. F. Felstiner, Avoidance as Dispute Processing: An Elaboration, 9 L. & Soc. Rev. 695 (1975).

those bound by contract or by adjudication. The symbolic power of consent decrees, their certainty, the assumed ease of enforcement, and the participation of the litigants in the formulation of the orders are presumed to yield greater fidelity to the agreement. As a consequence, we all benefit.

While there is some intuitive appeal to believing that consent decrees have greater meaning than private obligations and have more persuasive force than court decrees imposed after adjudication, we have meager data to validate our intuitions.¹⁰² Moreover, we know that, at least in certain kinds of cases, people violate court decrees with regularity. Compliance with alimony and child support orders is notoriously low.¹⁰³ The voluminous post-decree litigation in school desegregation and in prison and mental hospital conditions cases bears testimony to the lack of fidelity to court decrees in general¹⁰⁴ and, in some cases, to parties' willingness to vio-

¹⁰² One of the few studies of which I am aware reviewed compliance with mediated outcomes in small claims court and concluded that "consensual solutions are more likely to be complied with than those imposed by adjudication . . ." See Craig A. McEwen and Richard J. Maimon, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & Soc. Rev. 11, 47 (1984). Note that the participants in the mediations helped to shape the solutions and may not have been willing to agree to "solutions" with which the participants would not have been able to comply. See also note 103.

¹⁰³ "Of the 4 million women due child support payments in 1981, 45% received the full amount due." Ruth Sanders, *Child Support and Alimony: 1981* (Advance Report) (Bureau of the Census, May 1983); Lenore J. Weitzman, *The Divorce Revolution* 283-85 (1985). A subsequent report describes two kinds of payment arrangements, "court-ordered" and "voluntary." U.S. Bureau of the Census, *Current Population Reports, Series p-23, No. 141, Child Support and Alimony: 1983*, U.S. Government Printing Office, Washington, D.C. (1985). The two categories are not defined. From the report, one cannot know if consent decrees were included under the "court ordered" or the "voluntary" category. Forty percent of the women surveyed received full payment of "court-ordered" alimony, while 69% received full payment of "voluntary" alimony. Thirty-two percent of the women awarded "court-ordered" alimony received none of the payments, while only 9% of the women with "voluntary" arrangements received no payments. Whatever "voluntary" means, those who fall within that category receive more payments than those in the "court-ordered" group—thus supporting a compliance-is-better-with-consent theory but not necessarily supporting a compliance-is-better-with-consent-decrees theory.

¹⁰⁴ For example, litigation against the Arkansas prison system began in 1968 and resulted in findings of unconstitutional conditions in 1972. See *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); 309 F. Supp. 362 (E.D. Ark. 1970) (Holt II), *aff'd in part, rev'd in part*, 442 F.2d 304, 307-08 (8th Cir. 1971). Efforts to bring the prison into compliance with court orders lasted beyond 1978. See *Hutto v. Finney*, 437 U.S. 678, 681 (1978). The Court did not relinquish jurisdiction until 1982. *Finney v. Mabry*, 546 F. Supp. 628 (E.D. Ark. 1982). See generally M. Kay Harris and Dudley P. Spiller, Jr., *After Decision: Implementation of Judicial Decrees in Correctional Settings* (1976). For description of the difficulties of implementation in cases involving mental hospitals, see Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 Yale L.J. 1338 (1975); for school desegregation cases, see generally, United States Civil Rights Commission, *Desegregation—1976, Twenty Years After* (1976), and Norman Dorsen, Paul Bender, Burt

late consent decrees as well.¹⁰⁵

We do not know how often parties obliged by adjudication fail to perform, or how often parties obliged by consent decree fail to perform, or how often parties obliged by contract fail to perform. We do not know how often, in instances of any of these failures, the other party does not seek to insist upon compliance. In short, we do not know whether we would have more or less or the same amount of compliance in a world without consent decrees.¹⁰⁶ Litigants, judges, and the public may be in search of certainty, but we cannot say with assurance that consent decrees provide safe haven.

3. *Autonomy, Efficiency, and Flexibility.* Consent judgments may be understood as “better” than adjudication. While “better” may sometimes simply mean cheaper and quicker, “better” also has a qualitative theme: that consent is a preferable basis for action because the parties are exercising their own powers, because the parties have better information than courts can ever have, because the parties may do voluntarily what they may not do under compulsion, or because state authority will be conserved rather than deployed. These claims are at the heart of the pro-settlement movement,¹⁰⁷ but do not, by their own force, result in a pro-consent decree view. One can obtain settlements without consent decrees; moreover, consent decrees do pose the threat of state force and thus do not celebrate individual autonomy as much as do pri-

Neuborne, and Sylvia Law, *Political and Civil Rights in the United States* ch. XXVIII (4th ed. 1979).

¹⁰⁵ See, for example, *United States v. Paradise*, 107 S. Ct. 1053 (1987) (repeated failures to comply with consent decree on discriminatory employment practices); *United States v. Board of Educ. of City of Chicago*, 799 F.2d 281, 281-82 (7th Cir. 1986) (six years of post-consent decree litigation contesting the meaning of the agreement); *Badgley v. Santacroce*, 800 F.2d 33 (2d Cir. 1986) (violations of a consent decree; district judge's refusal to enforce decree reversed). Compare *Gomes v. Moran*, 605 F.2d 27 (1st Cir. 1979) (prison officials transferred inmates in violation of a consent decree; court declined to enforce the bargain since the law no longer required the defendants to behave in the manner to which they had consented). For a brief time, the Department of Justice's Antitrust Division had an enforcement unit, whose purpose was to monitor implementation. That unit was disbanded in 1982, but perhaps study of its work might inform the issues raised in the text. See Owen M. Fiss, *Injunctions* 409 (1972).

¹⁰⁶ For discussion of increased compliance after mediation, see McEwen and Maimon, 18 L. & Soc. Rev. at 47 (cited in note 102). If consent were the critical variable, then one would expect to find comparable compliance rates under contracts and under consent decrees.

¹⁰⁷ Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 536-38 (1986). See also Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161 (1986); *Raymond Lloyd Co. v. District Court for the 20th Judicial District*, 732 P.2d 612 (1987) (local rule imposing \$500 fine for settling on eve of trial is impermissible but settlement itself is a laudable goal).

vate consensual agreements.

The autonomy rationale for consent decrees is bolstered by coupling it with arguments from history and practice. Hundreds of years of practice bear witness to the fact that some litigants want consent decrees rather than “mere” contracts or “full-fledged” adjudication. Further, insisting upon full litigation may be costly—by a variety of definitions¹⁰⁸—and advantages may flow from detailing the legal rights and obligations of specific individuals in identifiable contexts.¹⁰⁹

In addition, some argue that consent decrees are more efficient. Under this view, given the information available and the costs of information exchange and presentation, the decisions of parties are always to be preferred to those of judges; when the parties choose to obtain judgments by consent rather than by adjudication, those choices should be respected.¹¹⁰ Finally, by requiring full adjudication or nothing, we might be exacting an inappropriately high price for courts’ judgments. And, if we jettisoned consent decrees, would we also have to do without consent at other moments in the adjudication process? Could parties still enter into stipulations agreeing about the applicable legal principles or about the underlying facts? Or would courts have to adjudicate every element of a judgment?

In short, what’s wrong with the flexibility of these modes? Why not offer the protection of a judgment to those who seek it, thereby saving the expense of demanding either that the parties bear the risks of private accords or that the parties engage in a series of sometimes empty charades—litigating that which they do not contest, spending their and our time and money, all to obtain a court’s judgment?

Once again, we are information-poor. We do not know how

¹⁰⁸ Costs of tort litigation, defined as the expenses of both parties and of the court system, were between 15 and 19 billion dollars in 1985. The tort system delivered, in compensation to plaintiffs, between 13 and 15 billion dollars. James Kakalik and Nicholas Pace, *Costs and Compensation Paid in Tort Litigation* 3-4 (Rand Corporation, Institute for Civil Justice 1986). That somewhat narrow definition of costs (for example, no measure of the emotional pain of the litigants is included) needs further development, as does the equation of the delivery of compensation with the benefits bestowed by litigation. For a refusal to equate the amount of money that changed hands with the value or utility of the litigation, see Justice Brennan’s majority opinion in *City of Riverside v. Rivera*, 106 S. Ct. 2686, 2694 (1986) (attorneys’ fees award may exceed the monetary compensation to the plaintiff).

¹⁰⁹ The recognition of declaratory judgments suggests their possible social utility. See 28 U.S.C. § 2201, enacted in 1948. See generally *Developments in the Law, Declaratory Judgments—1941-49*, 62 Harv. L. Rev. 787 (1949).

¹¹⁰ Easterbrook, 1987 U. Chi. Legal F. at 21-30 (cited in note 1).

much the demand for court decrees is driven by the availability of consent decrees or what kinds of practices might emerge to replace them. Might other, yet presumably more efficient modes, evolve? Or is the form indigenous? If banned, would it simply reemerge under another name? Of course, we have upon occasion altered our forms of dispute resolution—provided one sort or prohibited another. For example, before 1925, when the Federal Arbitration Act revised the common law rule, contracts to arbitrate were not enforceable in federal court because of the view that arbitration improperly divested courts of a role that belonged to them,¹¹¹ and judicial decision making is still preferred to arbitration in some instances.¹¹²

The example of changing views towards arbitration underscores the fact that consent decrees are not quite creatures of contract. The parties do not simply, in a burst of autonomy and efficiency, produce judgments. Third parties—the court as an accomplice, other litigants, individuals possibly affected by the agreement, and all of us who provide the social context in which the courts exist—have interests that may be affected when parties attach the word “judgment” to their agreements. Moreover, priority in the court queue is not the only interest at stake. Consent decrees, like arbitration, preclude judicial judgments that could inform us of the meaning and requirements of legal obligations. Perhaps consent decrees in some or all areas should be unavailable.¹¹³

On the other hand, when faced with the choice of the risks and uncertainties of contractual agreements and the risks and uncertainties of litigation, we do not know how many would opt for the former. If no lawsuits were ever filed, we (third parties) would lose all information about the existence of a dispute and the manner in which it was resolved. But would underlying behavior change if one were faced with a choice between negotiation and full-fledged adjudication? Might fewer disputes in fact arise? Finally, the absence of consent decrees would not, by its own force, require the abandonment of other forms of stipulations, narrowing the facts or

¹¹¹ The Federal Arbitration Act of 1925, 9 U.S.C. § 1 et seq. (1982). See Linda R. Hirschman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305 (1985).

¹¹² Compare *Wilko v. Swan*, 346 U.S. 427, 432-35 (1953); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); and *McMahon v. Shearson/American Express*, 107 S. Ct. 2332 (1987).

¹¹³ See Fiss, 1987 U. Chi. Legal F. at 12-17 (cited in note 1). Of course, all decisions not to file suit or to dismiss suits preclude the development of information about social conflict.

the issues to be adjudged.¹¹⁴ Courts could maintain distinctions between that which was assumed and that which the court actually adjudicated—thereby articulating, for purposes of res judicata and other preclusion doctrines, the reach of the judgments rendered.

But one should not be too quick to dismiss these autonomy-efficiency claims. We know that consent judgments are sometimes less expensive—in terms of dollars, time and pain¹¹⁵—to obtain than are judgments rendered upon adjudication. A refusal to provide consent decrees would therefore alter the bargaining chips of the parties—giving more power to those who can afford to use the threat of court judgment to strategic advantage.¹¹⁶ Because the individual or group that initiates a lawsuit holds the trigger to the threat of litigation and/or of judgment, the current availability of consent decrees may give advantage to plaintiffs—creditors, prosecutors, civil rights claimants, tort victims—rather than to defendants. Plaintiffs (or their lawyers) may be more willing to initiate suit in a context in which consent decrees are available. Defendants may be more willing to accede to plaintiffs' demands when faced with a lawsuit. For example, in prison condition cases, political concerns may prompt defendant prison administrators to prefer a consent decree, "requiring" them to provide specific kinds of housing, to a private agreement or to a trial. With such a court "order," officials may be able to obtain additional funds from legislators or obedience to the agreement from lower level employees.¹¹⁷

In practice, the impact of strategic advantages will vary depending upon the nature of the suit, the parties, their relative resources, the strength of the underlying legal claims, and the degree to which consent decrees actually empower litigants.¹¹⁸ Some of us worry that identifiable categories of litigants—the poor, for example—are already disadvantaged,¹¹⁹ any procedural "reform" that

¹¹⁴ For example, conditional guilty pleas narrow the questions to be litigated. See Fed. Rule Crim. Proc. 11(a)(2).

¹¹⁵ At the Legal Forum symposium, Burt Neuborne and Frederick Schwarz spoke movingly about the pain of the fight (among religions and races in New York City) that the *Wilder* consent decree sought to avoid.

¹¹⁶ See Mnookin and Kornhauser, 88 Yale L.J. at 951 (cited in note 2).

¹¹⁷ At the Legal Forum symposium, plaintiff civil rights and environmental litigators were proponents of the continued availability of consent decrees.

¹¹⁸ See Note, *Alliance to End Repression v. City of Chicago: Judicial Abandonment of Consent Decree Principles*, 80 Nw. L. Rev. 1675 (1987).

¹¹⁹ Frank Michelman has explored some of these problems in the context of whether filing fees should be required and if so, whether plaintiffs or defendants should be so taxed. See Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, Part I, 1973 Duke L.J. 1153 (1973).

further accentuates those disadvantages is to be greeted with suspicion.¹²⁰ Given that many of us have grave doubts about treating adjudication as an ordinary good¹²¹ and that we know of the disadvantages imposed upon those who attempt litigation with limited resources, we must pause before advocating a regime in which those already disadvantaged might suffer more.

Moreover, an important theoretical issue lurks beneath the question of whether parties are engaged in a "charade" or in a "real" lawsuit. All adjudication is a mixture of decision making by parties and judges. When filing a complaint, a plaintiff defines the limits of a court's inquiry. When answering, a defendant narrows that inquiry further by admitting certain facts or issues. By stipulations of law or fact, the parties may further delimit the arena in which the judge may speak. Consent decrees may be an extreme on a continuum but at what moment on that continuum do we decide that a "sham" adjudication has occurred? Sorting out which activities are charades and which are the "real thing" is problematic.¹²² Living with the tradition of consent decrees avoids the need to draw new lines.

4. *Court Control*. Rather than seeing consent decrees as a technique for validating litigant autonomy, one line of arguments understands consent decrees to be a tool of the courts to control parties, who might either conclude litigation by settlements that do not serve their own, third parties' and/or the public's interest or who might, once settlements have been achieved, misbehave. Distrust of litigants, assumptions about the symbolic impact of court involvement, and the need for protection of litigants and the pub-

¹²⁰ Compare some of the proposals for "tort reform" that would regulate what contingency fee lawyers (who represent plaintiffs) could charge but not what other attorneys could charge. Reagan Administration Proposal, Product Liability Reform Act of 1986 (on file with the University of Chicago Legal Forum), discussed in Stephen Gillers, *The Real Stakes in Tort Reform*, *The Nation* 41 (July 19-26, 1986).

¹²¹ See Albert W. Alschuler, *Mediation With A Mugger: The Shortage of Adjudicative Services and The Need for a Two-Tier Trial System in Civil Cases*, 99 *Harv. L. Rev.* 1808, 1816 (1986).

¹²² For example, after a bench trial, a judge may decide to rule for one of the parties and may direct the parties to file proposed "findings of fact and conclusions of law." See Fed. Rule Civil Proc. 52(a). Upon occasion, judges adopt a party's submissions in total. The practice is not typically approved. "The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges . . . because findings so made fail to 'reveal the discerning line for decision. . . .'" *Kelson v. United States*, 503 F.2d 1291, 1294-95 (10th Cir. 1974) (citation omitted). Compare *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (rejecting the argument that the judge had adopted parties' findings; the decision was held to be "the judge's own considered conclusions"). On "ghost-written" opinions, see *In re Colony Square Co.*, 819 F.2d 272 (11th Cir. 1987).

lic are the bases of these claims.

The concern that litigants will use the power of filing a lawsuit to the disservice of either their opponents, third parties, or the public has prompted legal developments that give judges responsibility for dismissal and settlement in certain kinds of cases. Rule 23's requirement that class actions and derivative suits not be dismissed without court approval stems, at least in part, from the fear that "private settlements" might cause harm to the defendant corporations, other shareholders, or other class members.¹²³ An oft-stated illustration is a collusive suit that could subsequently preclude future claims.

But is the solution to this problem permitting courts to enter consent decrees but requiring court approval of those decrees? If colluding parties had but two options, dismiss the case or try the case, the court's supervision might not be needed. If the case is dismissed as to a particular plaintiff, others are not precluded.¹²⁴ The concern, however, might be that others have relied upon a first plaintiff's filing and have not themselves pursued claims that would, due to the dismissal, be time-barred. We could respond to that problem by a doctrine of linking lawsuits one and two; if the subsequent litigant can show reasonable reliance and the defendant has been put on notice by virtue of the first lawsuit, the statute of limitations might be understood to have been tolled by the filing of the first, timely claim.¹²⁵ Further, if colluding parties make deals

¹²³ The 1938 Advisory Committee Note to Rule 23 cited only to Chester B. McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421 (1936), and offers no additional explanation of what role was envisioned for the court. See Fed. Rule Civil Proc. 23 (1938). The McLaughlin article discusses the utility of "stockholder" suits and the problems of collusive judgments. Opposing an unrestricted "right" for derivative plaintiffs, McLaughlin argued that "important reasons of corporate and judicial policy support a denial to stockholder-plaintiffs of unrestricted power to dispose of corporate claims." 46 Yale L.J. at 432. Rejecting the option of having all stockholders vote on dismissals, McLaughlin argued that permission should rest within the "discretion of the court." *Id.* at 433. See also James W. Moore and Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 321-25 (1937); William E. Haudek, *The Settlement and Dismissal of Stockholder Actions—Part I*, 22 Sw. L.J. 767, 771 (1968); William E. Haudek, *The Settlement and Dismissal of Stockholder Actions—Part II*, 23 Sw. L.J. 765 (1969).

¹²⁴ Dismissals "on the merits" could prejudice others in cases certified as class actions. To respond to that problem, one could require that all the dismissals be without prejudice or could permit subsequent filings if plaintiffs could establish that the first dismissal was not based upon the best interests of the class. Yet another option is to require notice to members of the class to ascertain whether volunteers might step forward to continue the litigation. See Haudek, 22 Sw. L.J. at 785-86.

¹²⁵ An analogous rule is in place for class actions. See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552-53 (1974) (statute of limitations tolled for all class members by the filing of a class action complaint). McLaughlin, 46 Yale L.J. at 428 (cited in note

that might do harm to others to whom the defendant or plaintiff is obliged, why not let those third parties file suit to invalidate such agreements? Is court supervision mandated only because, by virtue of the historic availability of consent decrees, court power can be enlisted?

If, on the other hand, the concern is that the underlying contract might do harm to third parties or the public,¹²⁶ then we could respond by providing judicial supervision of dismissal but not by authorizing consent decrees. A judge could inquire into the nature of the dealings between the parties and either grant or deny permission to dismiss the lawsuit. Of course, here we are only policing the tip of the iceberg; if we are genuinely concerned about contracts that do harm to third parties or fail to comply with societal norms, we need to inquire into all contracts and not only the small subset that trigger court attention by the fact of filing.

Moreover, control over dismissal represents a substantial incursion into litigant autonomy. Such an exercise of control would require a view that, by filing a lawsuit, a party has called for society's assistance or claimed that society's rules are broken and that she or he may not retract that request without society's permission.¹²⁷ We do currently have examples of such a conceptualization. In the federal system, prosecutors may not dismiss criminal cases without court permission.¹²⁸ The theory is that criminal prosecu-

123), was concerned about the filing of a stockholder suit induced by "fraudulent directors" who might collude to obtain dismissal at a strategic moment and thereby block "further action with a plea of the statute of limitations." *Id.* But see *United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984) ("As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene.") (Posner, J.).

¹²⁶ Apparently, this was Judge Edelstein's concern when he attempted to block dismissal of the IBM antitrust litigation. The court of appeals reversed, holding that, while the Tunney Act required judicial approval of consent decrees, no judicial approval was required when the parties stipulated to dismissals. *In re International Business Machines Corp.*, 687 F.2d 591, 595, 602-03 (2d Cir. 1981). See also Hon. Morris E. Lasker, *The Tunney Act Revisited: The Role of the Court*, 52 A.B.A. Antitrust L.J. 937, 940 (1983) (urging that judicial approval be required prior to dismissal of antitrust actions). Current law does not always protect third-party interests. See *Thaggard v. City of Jackson*, 693 F.2d 133 (1982), cert. denied, 464 U.S. 900 (1983); *Corley v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985). See also Douglas Laycock, *Consent Decrees Without Consent: The Rights of Non consenting Third Parties*, 1987 U. Chi. Legal F. 103, 114-116.

¹²⁷ I do not mean to suggest that the point at which the public interest emerges is readily identifiable or that the means by which to express the public's interest are obvious. Far greater exploration of these issues is required; see Judith Resnik, *Due Process: A Public Dimension*, in a Conference on Procedural Due Process: Liberty and Justice, 39 U. Fla. L. Rev. (forthcoming, 1987).

¹²⁸ Fed. Rule Crim. Proc. 48(a). See *Rinaldi v. United States*, 434 U.S. 22, 30-31 (1977)

tions implicate us all and that we fear prosecutorial misconduct or coercion. In practice, however, courts defer to prosecutorial requests for dismissal because courts have little ability to compel a prosecutor—or any litigant—to continue to litigate a case that she or he wants to drop.¹²⁹

Moving from the use of court control to police the filing and subsequent dismissals of lawsuits to the use of court control to police the settlement of lawsuits, practices on the criminal side are again instructive. Defendants are not permitted to plead guilty without court approval; judges must approve guilty pleas in part because of the desire to monitor the prosecution, whose powers and resources far outweigh those of the defense, and in part because of the fear of defendant incapacity.

But something else is at work as well. Under current practices, we do not permit parties to enter into contracts that result in the incarceration of one of them. Thus, on the criminal side, one can see with clarity an example of a consent decree providing results beyond that available by contract. The parties do not have the choices of contract or adjudication that can be functional equivalents. While the prosecution may “lump it” or make other deals (for information, diversion, or civil fines), the prosecution cannot make a deal to imprison. If criminal penalties are desired, the prosecution can either try the case—or obtain a consent decree. In this sense, the court is needed to impose and to carry out the sanction; the court is in some sense a party to the contract.

Given this special role of the court in the criminal process, the case for consent decrees in criminal cases might be the strongest. Yet it is in the criminal process only—to my knowledge—that the case for banning consent decrees (or the negotiations that result in

(absent impropriety or motives “clearly contrary to manifest public interest,” prosecutors’ motions to dismiss must be granted). See also *United States v. Carrigan*, 778 F.2d 1454 (10th Cir. 1985) (rejection of plea bargain, accompanied by proposal to dismiss charges, under Fed. Rule Crim. Proc. 11(e), not appealable pretrial); *United States v. Severino*, 800 F.2d 42, 46 (2d Cir. 1986), cert. denied, 107 S. Ct. 932 (1987) (court may reject guilty pleas and require trial if acceptance of the plea “would be contrary to the sound administration of justice”); and *United States v. Jackson*, 563 F.2d 1145, 1147 (4th Cir. 1977) (court may refuse guilty plea under Fed. Rule Crim. Proc. 11(e)(4)).

¹²⁹ *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), cert. denied sub nom. *Woodruff v. United States*, 425 U.S. 971 (1976) (district court appointment of special prosecutor to continue prosecution reversed and dismissal accepted). See also *United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981) (en banc); *United States v. Dupris*, 664 F.2d 169 (8th Cir. 1981). Compare *United States v. Krakowitz*, 52 F. Supp. 774, 784 (S.D. Ohio 1943) (prosecutor who seeks court “sanction” for *nolle prosequi* requires “active exercise of the sound judicial discretion;” the motion was denied as unjustified). See generally *Dunlop v. Bachowski*, 421 U.S. 560 (1975) (court review of executive decision to bring suit is problematic).

consent decrees) has been made.¹³⁰ Opponents of plea bargaining argue that the system corrupts its participants. Prosecutors charge that which they cannot prove; defendants are often punished for either less or for more than they in fact did; judges give discounts for those who bargain and thereby distort the criminal sanction—all of which results in the participants and the public understanding the criminal justice system as erratic and unprincipled.¹³¹

Underlying such an argument is the premise that adjudication results in relatively consistent and principled decision making; many contemporary critics evidence no such faith in the adjudicatory process.¹³² But one need not arrive at ultimate judgments about the adjudicatory process to consider the question of eliminating consent decrees on the civil side as well. If we believe that bargaining gives us judgments either in excess of or less than what the law would have required, if we know that we reward (with priorities in the litigation queue and elsewhere) those who obtain consent decrees, then we have a comparable problem of erratic and unprincipled acts passing for adjudication and potentially undermining the participants' and the public's respect for the judiciary.

¹³⁰ See Stephen J. Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 *Amer. Bar Found. Res. J.* 519. In general, the argument made focuses upon the problems caused by plea bargaining. Critics do not typically direct their energies towards the issue of whether defendants could confess to judgment or whether the government must always be put to its proof. But see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 *U. Chi. L. Rev.* 931, 950-63 (1983). For sustained arguments against plea bargaining, see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *Calif. L. Rev.* 652 (1981). Alschuler suggested in that article that his criticisms of the plea bargaining system need not spill over to embrace civil settlements. While the civil justice system is primarily a compensation system, the criminal justice system has a different goal: to influence conduct through coercion. *Id.* at 704-05. In a subsequent article, Alschuler, 99 *Harv. L. Rev.* at 1808 (cited in note 121), Professor Alschuler may have enlarged his critique of settlement. Understanding the civil system as creating useful precedents and discouraging wrongful primary conduct and violent self-help, Professor Alschuler argued that the high settlement rate in civil cases is to be deplored because civil litigants settle cases "for the wrong reasons"—the overly-expensive and too time consuming procedures of the civil courts. *Id.* at 1816-20.

¹³¹ Alschuler, 69 *Calif. L. Rev.* at 690-93 (cited in note 130); John H. Langbein, *Torture and Plea Bargaining*, 46 *U. Chi. L. Rev.* 3, 8 (1978). Compare Peter F. Nardulli, Roy B. Flemming and James Eisenstein, *Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process*, 76 *J. Crim. L. & Criminology* 1103, 1128 (1985) (data from nine counties "suggest that a rather high level of order prevailed in the informal process through which most felony cases are resolved. Important changes in charges (primary charge reductions) occurred in only about 15% of the guilty plea cases . . .").

¹³² Resnik, 53 *U. Chi. L. Rev.* at 514 (cited in note 107). See also John C. Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 *Va. L. Rev.* 139, 146-47 (1986) (critique of punitive damage awards by juries); Edmund Mantell, *A Probabilistic Assessment of the Incidence of Erroneous Verdicts in Criminal Trials: Theory and Implications*, 8 *Crim. Just. J.* 267 (1986).

The criticism of the consent decree process on the criminal side continues beyond the attack on plea bargaining. Many observers of the criminal justice process claim that the judicial "inquiry" at guilty plea hearings is a ritual devoid of content. The deal is made and the formulaic questions are posed without any purpose other than to insure that the plea will be immune from subsequent collateral attack.¹³³ Once again, a similar complaint can be made on the civil side; consent decrees in a variety of cases are adopted with virtually no genuine inquiry.

The court's role in criminal consent decrees is obvious; a judge either ratifies the agreement of the prosecution and defense or sets the terms of the sanction. Some proponents of consent decrees on the civil side see an analogous role for judges in the compliance phase of consent decrees. The assumption is that, by entering into a consent decree (rather than simply stipulating to dismiss a lawsuit), litigants have placed themselves before the court and made promises to the court as well as to the other parties. The premise of this court control argument is not that the consent decree signifies cordial settlement but rather that the decree inspires fear. The "eye" of the court¹³⁴ is upon the parties.

The problem here is that we need a reason for the court to turn its eye toward these parties. If no adjudication has occurred, why should the court care about the promises made in a consent decree case any more than the court cares about promises made in general? Is the fact that these litigants have filed but not pursued their case to conclusion sufficient to support their claim to a priority in the courthouse queue? Is the fact that the judge has signed

¹³³ McDonald, 70 *Judicature* at 204 (cited in note 95) ("Despite reforms, the judge's role in supervising the guilty plea process remains fluid and uncertain."). McDonald's study reports that the "average time for plea acceptance for all crimes (felony and misdemeanor cases combined) in all six jurisdictions [El Paso, New Orleans, Seattle, Tucson, Delaware County and Norfolk] is 7.8 minutes." *Id.* at 206. A total of 711 pleas were observed. *Id.* See also, Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, Part I, 76 *Colum. L. Rev.* 1059, 1065 (1976); *People v. Mroczko*, 35 *Cal. 3d* 86, 114, 672 *P.2d* 835 (1983) (separate counsel for co-defendants is needed because court inquiries into conflicts may be only to protect the record). Nardulli, et al. note the difficulties lower courts face in the plea bargaining process. "[T]heir mission is so undefined and their technology is so uncertain . . ." 76 *J. Crim. L. & Criminology* at 1131 (cited in note 131).

Compare the requirements in federal courts, discussed in *United States v. Allen*, 804 *F.2d* 244 (3rd Cir. 1986), cert. denied, 107 *S. Ct.* 1384 (1987) (reversing an inadequate Rule 11(f) inquiry); *United States v. Darling*, 766 *F.2d* 1095 (7th Cir. 1985), cert. denied, 106 *S. Ct.* 579 (1985) (Rule 11(f) inquiry insufficient); *United States v. Fountain*, 777 *F.2d* 351 (7th Cir. 1985), cert. denied, 106 *S. Ct.* 1232 (1986) (inadequate judicial inquiry).

¹³⁴ Sierra Baptista, *De Iusticia Pingenda* (On the Painting of Justice) (trans. and notes by James Wardrop, London, 1957) (Does one depict Justice with one eye or many eyes?).

their agreement sufficient to pledge the court to provide its resources to enforce that agreement? One response is that, by filing a lawsuit, a plaintiff asserts some claim to society's resources to assist in the vindication of rights. We may well want to reward the voluntary relinquishment of a claim on society's resources by a promise of future assistance—if and when the need arises.

Further, a judicial signature on a consent decree could—at least in theory—signify a modicum of genuine judicial involvement in the formulation of a contract. Returning to the typology of the consent decree process described earlier, the two variants involving judicial control of the agreement provide some basis for judicial validation. If the judge negotiates the settlement or if the judge makes qualitative judgments about the settlement at the time of its entry, then the court's seal of approval could provide a basis for the subsequent benefits conferred. Moreover, to the extent that the parties' ability to contract is derived from the court—as in the case of guilty pleas used to impose criminal sanctions and in class actions—the court may have a special stake in the contracts made. Hence, the claim for offering consent decrees may be at its strongest in cases, such as criminal cases, class actions or other kinds of group litigation (including when the government is a party), in which there are questions about the authority of the representatives to bind the aggregation of interests avowedly represented.¹³⁵

Take the criminal context first. The court has a defined interest in the contract between the prosecutor and the defendant because that contract is the basis upon which the court imposes sentence. As noted, the judge may be conceptualized as almost a party to the contract—carrying out the terms of the parties' contract. But the judge has an independent interest, because the judge is empowered by the state to punish. The judicial license to punish is predicated upon the imposition of punishment only on those who have broken the law. Further, since the state may use the parties' agreement to deprive individuals of property as well as of liberty, the state may have an additional interest in the propriety of the agreements made. Finally, one of the parties to the contract is the government itself; some concern about appropriate use of the power to prosecute underlies the role of the court in consensual agreements in criminal cases.

Given these many state interests in these kinds of contracts,

¹³⁵ Professor Coffee analyzes this as a problem of client inability to control entrepreneurial lawyers. See John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor of Shareholder Litigation*, 48 *L. & Contemp. Probs.* 76-77 (Summer 1985).

we might insist upon proof of the facts upon which they depend. In the federal system, we have instead opted for a less demanding requirement—that the prosecutor articulate to the judge the factual basis for the plea and that the defendant acknowledge awareness of the alternative to pleading guilty. In federal court, the trial judge is supposed to be told enough to establish the defendant's guilt.¹³⁶ Further, in both federal and state courts, the judge is supposed to inquire about whether the defendant was informed of the rights to trial by jury, of the prosecution's burden of proof, and of the possible consequences that may flow from the guilty plea.¹³⁷ (We do not, as a matter of constitutional law, demand that the individual to be punished admit to the crime.¹³⁸) We take the court's "acceptance" of the guilty plea to represent a judicial determination that the parties had the capacity to and did in fact consent. Thus, in theory, acceptance of guilty pleas posits an adjudicatory role for judges.

The class action and certain kinds of statutory claims provide other examples of lawsuits in which the set of alternatives is diminished because private negotiations cannot bring about results that mirror those that might be provided by court order. Just as

¹³⁶ The requirement of a factual basis is one imposed on federal, but not state, courts. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Fed. Rule Crim. Proc. 11(f) states that "the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." What is meant in practice varies. For example, in *United States v. Johnson*, 546 F.2d 1225, 1226 (5th Cir. 1977), the court required a factual basis "precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal. . . . [T]he district court must insure that the conduct admitted by the accused constitutes the offense charged. . . ." See also *United States v. Boatright*, 588 F.2d 471, 475 (5th Cir. 1979) (" . . . each essential element of the crime charge [must] be shown"), and *United States v. Darling*, 766 F.2d 1095, 1100 (7th Cir. 1985) ("[t]he conduct admitted [did not] constitute the offence . . . charged"). On the other hand, much is left to the trial judge's "subjective satisfaction." *United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979), cert. denied, 445 U.S. 904 (1980) (analyzing Rule 11 in general, including Rule 11(f)). The standard of proof and the degree of specificity required is unclear. For discussion of both state and federal requirements, see Wayne LaFave and Gerold Israel, 2 *Criminal Procedure* § 20.4(f) at 652-55 (1984) (commenting that the requirement of a factual basis may be explained as further substantiation that a plea is made voluntarily and knowingly) and Sanford H. Kadish, Stephen J. Schulhofer, and Monrad G. Paulsen, *Criminal Law and Its Processes* 167-68 (4th ed. 1983).

¹³⁷ Fed. Rule Crim. Proc. 11(f) requires a factual basis; 11(c) requires inquiry into the voluntariness of the plea and the state of mind of the defendant, as well as the provision of information on the consequences of the plea. Most of these inquiries are constitutionally mandated. See *McCarthy v. United States*, 394 U.S. 459, 460 (1969); *Henderson v. Morgan*, 426 U.S. 637, 647 (1976); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); and *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

¹³⁸ *North Carolina v. Alford*, 400 U.S. at 38 (court may accept a guilty plea of a defendant who claims that he did not commit the offense as long as there is a factual basis for the plea).

our rules do not currently permit a prosecutor and a criminal defendant to bargain for imprisonment, a few individuals cannot bind the members of the class that they hoped to represent.¹³⁹ Perhaps arguments analogous to those made on the criminal side can be marshalled in support of genuine judicial involvement in civil consent decrees.

If a consent decree is entered, the state will provide its resources to enforce the rights and obligations created; the state will use the parties' agreements to shift assets or to insist upon a course of behavior. As in the criminal context, the litigants who consent to judgment waive a packet of rights, of opportunities provided by the government to have the dispute adjudged in a prescribed manner. Perhaps with these concerns in mind, the Supreme Court, in its recent discussion of consent decrees, set out a task for judges that parallels the kind of inquiry supposedly made in the guilty plea context. Recall that *Local Number 93* states that, prior to the entry of a consent decree, a judge must ascertain whether: (1) a decree is within the general scope of the pleadings; (2) the decree furthers the "objectives" of the law under which the case was filed; and (3) the decree requires no action in violation of the statute.¹⁴⁰

If, in fact, judges were to undertake an analysis of a proposed decree to determine these three issues, then judicial endorsements of contracts could constitute quasi-adjudicative judgments. After the receipt of the requisite information, after exploration of the meaning of the law and the nature of the proposal, the court could reach a judgment about the proposal. The court could determine that a proposed decree fulfills the mandates of the law. If judges were to render such judgments, then the contracts entered into by consent decree would be more readily distinguished from the con-

¹³⁹ Similarly, parties to an ordinary contract may not be able to obtain specific performance of their agreement. See Schwartz, 89 Yale L.J. at 271 (cited in note 77).

¹⁴⁰ *Local Number 93*, 106 S. Ct. at 3077. Note that this inquiry does not forbid a consent decree from going beyond the requirements of the law. *Id.* The ambiguity is whether providing significantly less than the law requires would suffice to further the "objectives" of the statute involved. A further question is whether the Court's comments in *Local Number 93*, which seem to be a quite general discussion of consent decrees, are appropriately limited to cases brought under federal statutes or, more narrowly, under Title VII. Note also that courts have declined to enforce consent decrees that go beyond the requirements of constitutional law. See, for example, *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985) (declining to enforce a prohibition on double bunking of prisoners in a local facility). But see *Morris v. Travisono*, 499 F. Supp. 149, 157 (D.R.I. 1980) (refusal to modify prison consent decree to reduce defendant's obligations absent a showing of grievous injury to the defendant). Such decrees may only be of help when both parties continue voluntarily to obey them.

tracts made without the court's imprimatur. The court would have adjudicated some of the issues in the case, thus providing some justification for the subsequent priorities and special treatment accorded consent decrees.

A strong set of parallels can be drawn between criminal cases and one kind of civil consent decree, the class action. Like criminal cases, many class action litigants do not have the two alternatives of full adjudication or private accord. While corporations, unions, and other groups who litigate have identities beyond the courthouse, many groups denominated as a "class" exist as entities only because a court has said so. The purchasers of a brand of blue jeans, the customers of hotels that place additional charges on telephone calls, the past, current, and future inmates of a prison—none partake of an organization that can speak for them. The group can contract only after a court decides that a representative who has stepped forward has shown sufficient diligence and adequacy to be heard and that the group shares sufficient commonality to function as a group—at least in relationship to a specific adversary. Thus, in class actions as in criminal cases, no bargain can be made without court involvement.

One problem, however, in both criminal and civil contexts, is that such judgments—about the continued propriety of the class as a bargaining unit, about the factual basis of a plea or the congruence between a statute's objectives and a proposed course of conduct—require information. The people to whom courts normally turn for information are the parties. Courts have traditionally been skeptical of information provided by partisans. To validate the facts or law presented, courts have relied upon the adversary posture of the parties, who, when in conflict, have incentives to provide courts with a range of data that judges in turn evaluate. When both parties want either guilty pleas or civil consent decrees to be entered, neither has any incentive to offer information to contradict the propriety of entry of the decree. The court's information base is constricted.¹⁴¹

A second problem is that judges understand that their prospects are small for compelling parties to litigate cases that the parties do not want to pursue. The tradition of deferring to prosecutorial and agency discretion and declining to mandate prosecutions and agency enforcement proceedings is based, in part, upon the assumption that courts can rarely succeed in compelling

¹⁴¹ Compare Langbein, 52 U. Chi. L. Rev. at 824 (cited in note 76) (in civil law countries, the court takes an active role in collecting information).

litigation.¹⁴² As a consequence, the federal criminal rule that prosecutors may not dismiss cases without court permission has resulted in case law granting prosecutors the permission to dismiss. When a rare district judge has denied that permission, appellate courts have reversed.¹⁴³

In sum, upon an evaluation of the several rationales for consent decrees, some skepticism of and some support for the procedure emerges. We have scant empirical bases for claiming that consent decrees reduce court dockets or achieve greater compliance than would be the case in a world without consent decrees. We do know that, in some instances, consent decrees are a less expensive means by which to obtain a judgment, and we also know that, in an identifiable category of cases, private accords cannot provide full substitutes for that which courts order. Because there is no private alternative, parties to such disputes are faced with seeking adjudication, obtaining consent decrees or having no mechanism by which to change behavior or claim redress. Court control, flexibility, and autonomy have some appeal. But to say that a court is needed in some instances is not to decide the question of whether consent decrees ought to be offered in all cases. Nor is the way in which judges might carry out their role clear. To consider this aspect of the problem, further understanding of the role of the court in approving consent decrees is required. Given that a court's participation may be required, what form does, could, and should that participation take?

IV. CONSENT DECREES AND ADJUDICATION

The tradition—at least up until recently—has been for judges to do little when entering consent decrees. Variant I was the mode, with judges performing ministerial acts. To enter a consent decree was not to adjudicate. In contrast, the tradition in adjudication has been for the court to engage, for judges to render principled rulings

¹⁴² See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (deference to prosecutorial discretion and describing a "presumption" of nonreviewability of agency decisions not to commence enforcement proceedings). Compare *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (reviewing agency decisions to decline to commence enforcement proceedings). Separation of powers doctrine also influences court reticence in this area.

¹⁴³ See, for example, *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975). Judges may also refuse to enter guilty pleas. See Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 733-78 (1980) (the case for judicial control over pleas is more persuasive than judicial control over dismissals—in part because the sentencing authority of courts is at stake).

based upon independent judgments made in light of the information provided by the parties. As a consequence of that principled decision making, lives and behavior change.¹⁴⁴

In this section, I ask whether wielding court power is appropriate in instances when judges do not adjudicate but rather act without thought. But as a predicate to that question, I examine whether the entry of consent decrees intrinsically demands judicial action without thought or whether some form of adjudication might be incorporated into the consent decree process. I will consider whether we might bend the traditions to develop a mixed form: a bit of consent and a bit of adjudication. Such a mixed form might be evolving; one could understand the recent Supreme Court pronouncements, such as *Local Number 93* and some of the decisions of the last decades, as requiring judicial control predicated upon some kind of adjudication, as moving us towards Variants II and III of the typology. The questions are whether judicial involvement is possible and, if so, whether it can validate the practice of offering consent decrees. Note again that these questions about the role of judges do not decide the ultimate issue of the propriety or utility of having consent decrees. Commentators in this symposium have addressed other aspects of the consent judgment process and may have strong claims upon which to legitimate or to condemn it.¹⁴⁵

Below, I examine one kind of case, class actions, in which judges seem to have taken a greater role in assessing consent decrees than in other fields.¹⁴⁶ Looking at the law and practice pro-

¹⁴⁴ As Bob Cover so well reminds us. See Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).

¹⁴⁵ See sources cited in note 1.

¹⁴⁶ As noted, there are a few other areas in which courts must undertake analogous inquiries. See, for example, the approval of bankruptcy reorganizations, 11 U.S.C. § 1129 1982; court review of agency approval of rate increases, discussed in *United Municipal Distributors Group v. F.E.R.C.*, 732 F.2d 202 (D.C. Cir. 1984); dismissal or compromise of cases involving immigration prosecutions, 8 U.S.C. § 1329 1982; shareholder derivative actions, under Fed. Rule Civil Proc. 23.1 (discussed in Coffee, 48 L. & Contemp. Probs., Summer at 26-33 (cited in note 135)). See also, the Tunney Act, 15 U.S.C. § 16(b)-(h) 1982, discussed in *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 143-47 (D.D.C. 1982), summarily aff'd sub nom, *Maryland v. United States*, 460 U.S. 1001 (1983); Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 Hast. L.J. 133, 134 (1983); Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 Mich. L. Rev. 153, 153-55 (1983). District court disapproval of Justice Department proposals is rare; see Eric J. Branfman, *Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years under the Antitrust Procedures and Penalties Act*, 1982 Antitrust Bull. 303, 328, 354 (act had "no substantive effect in the majority of cases"); *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984) (Greene, J). For discussion of agency decision making when achiev-

vides some insight into the feasibility of demanding that, in addition to a judicial "act," there be judicial "judgment" of consent decrees. The questions are whether judges in fact do something adjudicatory when determining to accept or reject class action consent decrees, and if so, whether that mode could be adapted to other types of lawsuits. Further, I consider whether the increasing judicial role in the negotiation of the agreements that form the basis for consent decrees assists or confuses the task of judicial approval of consent decrees. Finally, I return to the underlying issue: the quality of judicial involvement in consent decrees.

A. Approving Consent Decrees in Class Actions

Rule 23(e) states only that class actions cannot be "dismissed or compromised without court approval."¹⁴⁷ No text specifies the criteria that judges are to use to determine whether or not to give their approval.¹⁴⁸ The lower courts have, however, developed a substantial body of case law addressing that issue. The question arises in one of two contexts. Either a district judge approves a class settlement and dissidents object and appeal,¹⁴⁹ or a district judge declines to approve a class action and the parties seek to overturn that decision.¹⁵⁰ The Supreme Court has never delineated a unitary approach to the issue, and there is some variation among the circuits,¹⁵¹ but guidelines—shaped by case law and the Manual for

ing settlements, see Michael J. Zimmer and Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 *Duke L.J.* 163.

¹⁴⁷ Fed. Rule Civil Proc. 23(e).

¹⁴⁸ The rule does state that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *Id.* As noted, the Advisory Committee's original discussion of this provision was cryptic and made reference only to the McLaughlin article. See note 123. Although the rule was substantially revised in 1966, no alteration (other than the notice provision and renumbering) was made to this section, and no explanation (other than a reference to the need for court approval) was provided in the accompanying notes. See the 1966 amendments. Leaving the matter simply to judicial discretion fits within the suggestions of the McLaughlin article. The expansive role for judges is also consistent with Professor Steve Subrin's thesis that the 1938 Federal Rules were drafted, in part, to rely upon judicial "expertise" to shape the procedures as needed. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. Pa. L. Rev.* 909 (1987).

¹⁴⁹ See, for example, *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7th Cir. 1980).

¹⁵⁰ See, for example, *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982).

¹⁵¹ Compare *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983), subsequent history at 761 F.2d 893 (2d Cir. 1985), cert. denied, 106 S. Ct. 1798 (1986) ("[W]e do expect [district court judges] to explore the facts sufficiently to make intelligent determinations of adequacy and fairness, . . . and we have strongly hinted that making findings of fact and conclusions

Complex Litigation¹⁵²—are generally consistent. A class action consent decree is to be approved only if it is “fair, adequate, and reasonable.”¹⁵³

When determining whether or not to approve a class action, the cases and the Manual state, a trial judge is *not* to adjudicate the merits of the lawsuit.¹⁵⁴ Nor is the judge to substitute her or his judgment for that of the parties.¹⁵⁵ The views of counsel, who negotiated the agreement, are entitled to deference.¹⁵⁶ But the judge is not to act as a “rubber stamp.”¹⁵⁷ The judge must make an independent determination of the adequacy of the settlement.¹⁵⁸ One commentator described this process as “active but nonadjudicatory.”¹⁵⁹

“Fair, adequate, and reasonable” are often used ambiguously in these cases. Some judges translate this formula as requiring an inquiry into the adequacy of the consent. Such an inquiry mirrors the traditional questions for a court confronted with a consent decree.¹⁶⁰ Given the peculiar nature of a class action, the question of

of law whenever the propriety of the settlement is seriously in dispute is desirable.” (citations omitted)); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) (“A threshold requirement is that the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise.”); with *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (“The Court has no occasion to determine the merits of the controversy or the factual underpinnings of the legal authorities advanced by the parties.”).

¹⁵² Manual for Complex Litigation, Second, § 30.4 et seq. at 235-48 (West 1985). Note that this standard is also used when courts approve Title VII consent decrees, although some courts accord presumptive validity to decrees proposed by a government agency. See, for example, *United States v. City of Miami, Fla.*, 664 F.2d 435, 440 (5th Cir. 1981) (en banc), quoting *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980). For discussion of judicial practice during the first few years after the 1966 amendments to Rule 23, see Richard F. Dole, Jr., *The Settlement of Class Actions for Damages*, 71 *Colum. L. Rev.* 971 (1971).

¹⁵³ Manual for Complex Litigation § 30.44 at 242.

¹⁵⁴ *Id.*, § 30.41 at 237.

¹⁵⁵ *Armstrong*, 616 F.2d at 315; *Cotton*, 559 F.2d at 1326.

¹⁵⁶ “[A] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel. . . .” Manual for Complex Litigation § 30.41 at 237 (cited in note 152).

¹⁵⁷ *Id.*, § 30.41 at 236 (“Court review must not be perfunctory; it is not a ministerial function.”). See also *In re Traffic Executive Ass’n—Eastern Railroads*, 627 F.2d 631, 633 (2d Cir. 1980); and *Haudek*, 23 Sw. L.J. at 801-03 (cited in note 123) (approval of settlements of stockholder actions should be based not upon the merits but upon the court’s “informed business judgment of the adequacy of the compromise”). See also Mnookin and Kornhauser, 88 *Yale L.J.* at 953-56 (judges “rubber stamp” divorce agreements) (cited in note 2).

¹⁵⁸ *Cotton*, 559 F.2d at 1330 (“boiler-plate approval” is inadequate).

¹⁵⁹ Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 *U. Ill. L. Rev.* 579, 588-89.

¹⁶⁰ These questions parallel the limited questions supposed to have been asked when courts entered consent decrees in the non-class action context. See *In re Director of Insur-*

the sufficiency of consent is more complex here than in other lawsuits. The judicial task is to learn whether those seeking settlement are in fact representative—hence capable of binding themselves and the class they represent—and whether the class may be deemed to have consented to be so bound. If a court answers both questions in the affirmative, then the consent decree might be seen as “fair, adequate, and reasonable.”

If class action consent decree approvals are understood as making only these judgments, then one could describe the consent decree judgment as a reaffirmation of the court’s initial determination that the action could be maintained as a class action.¹⁶¹ The court insures that the class representatives have not benefitted from the agreement to the detriment of other class members, that the representatives, initially certified as “adequate” and “typical,”¹⁶² have discharged their tasks properly and furthered the interests of the class. The court also reexamines the structure of the class and the procedures by which the representatives propose to bind the class to an agreement.¹⁶³

The other meaning of “fair, adequate, and reasonable” looks beyond the question of consent to evaluate the merits of the settlement—to determine whether the settlement itself is “fair, adequate, and reasonable.” Here, the judgment of sufficiency must be based upon something other than a reappraisal of the capacity of a class representative entering into a contract on behalf of the class. Here, the judge must determine that the contract itself is a fair deal.¹⁶⁴

ance, 141 Neb. 488, 496, 3 N.W.2d 922, 926 (1942).

¹⁶¹ Fed. Rule Civil Proc. 23(c) requires that the court determine whether the action can be maintained as a class action and so certify.

¹⁶² See Fed. Rule Civil Proc. 23(a).

¹⁶³ See, for example, *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1125-32 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979). Under this model, the court serves “as the guardian of the interests of the absent members of the class.” *Liebman v. J.W. Petersen Coal & Oil Co.*, 73 F.R.D. 531, 534 (N.D. Ill. 1973). Even after judgment, courts remain somewhat skeptical of the adequacy of representation; a few courts have declined to give res judicata effect to class action judgments subsequently attacked on the grounds of inadequacy of the representation. See, for example, *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979) and *Ivan E. Bodensteiner, Application of Preclusion Principles to § 1983 Damage Actions After a Successful Class Action for Equitable Relief*, 17 Val. U.L. Rev. 347 (1983).

¹⁶⁴ *McLaughlin*, 46 Yale L.J. at 433-34 (cited in note 123) raised the two possible kinds of review that a court might provide—either to inquire into whether the purported representatives of the corporation were acting in the corporation’s interests or “after examining all the circumstances, [to] reach an independent decision on the fairness of the settlement.” *Id.* See also Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 Mich. L. Rev. 308, 321-325 (1985) (conceptual-

Not only is the case law somewhat ambiguous¹⁶⁵ about which kind of sufficiency is meant, the two kinds of sufficiency are not always distinct. That is, one way to determine whether a representative of a class has discharged the obligations of that office is to review the merits of the agreement made. When judges review class action consent decrees on their merits, they do not generally indicate whether the review is intended solely for the purpose of determining the adequacy of the consent or whether the review is aimed at rendering judgment on the quality of the settlements reached.

Do we have a richer rhetoric around judicial behavior in class actions as compared with the ritualistic incantations at many guilty pleas¹⁶⁶ but with the same outcome—that the parties' agreements are almost always approved?¹⁶⁷ The case law and commen-

izing the judge's role as engaging in a "substantive inquiry" into the "fairness of the negotiated settlement" and a "procedural inquiry" into whether class members object to the settlement).

Note that some circuits require judges not to "decide unsettled legal questions." *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 320 (7th Cir. 1980). Hence the quality of the agreement is presumably not measured by what the law would have "required," although sometimes judicial discussions suggest the opposite. See, for example, *Amalgamated Meat Cutters and Butcher Workmen of North America v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971).

¹⁶⁵ See, for example, *Grunin v. International House of Pancakes*, 513 F.2d 114, 123-24 (8th Cir. 1975) (the court acts as a "fiduciary" to the class to decide if the settlement is fair, adequate and reasonable; inquiry as to adequacy requires only that the agreement not be illegal per se. The objectors' claim of the "alleged illegality of the settlement is not a legal certainty."). See also *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984) (settlement is "fair"—but to whom?), *aff'd in part and rev'd in part*, 818 F.2d 145 (2d Cir. 1987); *Anderson*, 1983 U. Ill. L. Rev. at 600 (cited in note 159).

¹⁶⁶ The image of guilty pleas as superficial, ritualistic inquiries derives from the state courts, in which the vast majority of pleas are taken. See *McDonald*, 70 *Judicature* at 211 (cited in note 95). In contrast, it appears that at least on direct appeal, the federal appellate courts exercise some supervision of the trial bench's implementation of Fed. Rule Crim. Proc. 11's requirements. See cases cited in notes 133 and 136. As a consequence, federal judges' roles in guilty pleas may come closer to adjudication than to ritual. However, as discussed in text at notes 179-186, aspects of class actions provide greater opportunities for the development of information and thus enable more adjudicatory behavior than guilty pleas.

¹⁶⁷ *McLaughlin* saw the potential problem:

"Discretion of the court" is all too frequently the solution proposed for a difficult problem. . . . Judicial supervision appears to be the best possible means of protecting the rights of other stockholders . . . , absent parties with definite and substantial interests at stake. True, when a proposed compromise is laid before the court, it is in effect being asked to make a finding on the merits . . . without the thorough investigation of facts supposed to characterize trials. But some legal mechanism for compromising a derivative action must be provided

McLaughlin, 46 *Yale L.J.* at 435 (cited in note 123). See also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (reviewing

tary suggest that judges deciding the question of class action consent decrees often go through a more elaborate process that provides appellate courts (and therefore the public) with more information than do judges when accepting guilty pleas.¹⁶⁸

Under the mandates of Rule 23, the case law, and the Manual for Complex Litigation, judges typically scrutinize proposed decrees to ascertain whether the decrees are within the ballpark of approval.¹⁶⁹ If settlement proposals are facially adequate, the courts issue notice to the members of the class that hearings will be conducted on the propriety of judicial approval.¹⁷⁰ Proponents and objectors are given the opportunity to make their claims, and then courts state reasons for approval or disapproval of the decrees.¹⁷¹ Judges do not automatically disapprove of those decrees that inspire class members—including the named plaintiffs—to object,¹⁷² nor do judges unreflectively approve of those decrees to which there is no active opposition.¹⁷³ Perhaps most importantly, approval and denial of the entry of consent decrees are often ap-

class action settlement proposals is a twilight zone in which, without "a fully developed evidentiary record, both the trial . . . and appellate court" are less capable "of making the independent assessment of the facts and law required in the adjudicatory context").

¹⁶⁸ See generally Anderson, 1983 U. Ill. L. Rev. at 592-615 (cited in note 159).

¹⁶⁹ Without a review of the docket sheets in specific cases, we cannot know how often judges refuse proposed settlements at that point.

¹⁷⁰ Courts have not required hearings in all instances. Fed. Rule Civil Proc. 23(e) states only that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." The Manual for Complex Litigation provides suggestions for the notice. See Manual for Complex Litigation 2d § 30.212 at 225-26 (cited in note 152). The ABA's proposed modification of the rule would permit the court to dispense with notice under certain circumstances. ABA Proposed Revisions of Rule 23, 110 F.R.D. at 203 (cited in note 60).

¹⁷¹ Appellate courts require such detail when determining whether to affirm; many circuits have an "abuse of discretion" standard. See, for example, *Flinn v. FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *In re Traffic Executive Ass'n.—Eastern Railroads*, 627 F.2d at 633.

¹⁷² *Flinn v. FMC Corp.*, 528 F.2d at 1174 (three of the named plaintiffs objected but settlement approval upheld). The presence of objecting class members is "relevant" but "not dispositive," even when many object. *Armstrong*, 616 F.2d at 326. See also *Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.)*, 494 F.2d 799, 803 (3rd Cir.), cert. denied, 419 U.S. 900 (1974). One might be tempted by a per se rule that the presence of objectors requires disapproval; such a rule would simplify the inquiry and would locate it squarely on the question of consent. However, the utility of class action litigation might be greatly diminished. For commentary arguing that objectors lack sufficient information to raise sophisticated complaints and therefore fail to provide adequate information to courts, see *Haudek*, 23 Sw. L.J. at 805 (cited in note 123); Note, 84 Mich. L. Rev. at 325-32 (cited in note 164) (advocating the appointment of a "guardian ad litem" for the class).

¹⁷³ See, for example, *In re Traffic Executive Ass'n.—Eastern Railroads*, 627 F.2d at 634. A small number of objections is used, however, as part of a justification for approval. See *Flinn v. FMC Corp.*, 528 F.2d at 1174.

pealable immediately.¹⁷⁴ Appellate oversight of trial judges has resulted in the trial bench explaining, in some detail, the reasons for entry or disapproval of consent decrees.¹⁷⁵

Thus, when considering consent decrees in class actions, many judges do appear to be applying at least a loose set of principles to facts in specific cases. The case law suggests that, while in some cases, the inquiry is superficial, in other instances judges go beyond the perfunctory.¹⁷⁶ Further, although the guidelines for approval are open-textured, some doctrinal constraints have emerged.¹⁷⁷ Some proposed consent decrees are found wanting and are disapproved. When reviewing a class action consent decree, trial judges might be described as adjudicating something—either the sufficiency of the consent or the sufficiency of the settlement itself. An abbreviated adjudicatory form appears to be in place in some of the reported decisions.¹⁷⁸

¹⁷⁴ *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (approval of consent decrees provides a final judgment, appealable as of right under 28 U.S.C. § 1291. Disapproval of the consent decree, if that decree involves an injunction, is appealable as of right under 28 U.S.C. § 1292(a)(1)). In cases without injunctions, appealability as of right is less clear. See *New York v. Dairylea Co-Op., Inc.*, 698 F.2d 567 (2d Cir. 1983) (no appeal permitted), and the discussion by Posner, J. in *Donovan v. Robbins*, 752 F.2d 1170, 1172-76 (7th Cir. 1985).

¹⁷⁵ See, for example, *Girsh v. Jepson*, 521 F.2d 153, 159 (3d Cir. 1975) (insufficient support in the record for approval of settlement).

¹⁷⁶ See, for example, *Costello v. Wainwright*, 489 F. Supp. 1100, 1101 (M.D. Fla. 1980) (limited discussion of inquiry). Compare, *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1322 (5th Cir. 1981), cert. denied, 456 U.S. 1012 (1982) (reviewing detailed findings of district court); *Franks v. Kroger Co.*, 649 F.2d 1216 (6th Cir. 1981) (reversing class action approval). The problem is how courts are to “make an intelligent comparison between the amount of the compromise and the probable recovery” (*In re Traffic Executive—Eastern Railroads*, 627 F.2d at 633) without trying the case. Circuits have developed case law standards on approval related to the particular kind of decree under review. One might anticipate the degree of judicial consideration varying with the nature of the underlying claim.

¹⁷⁷ See, for example, *Malchman v. Davis*, 706 F.2d at 434 (district court record inadequate to support approval of settlement); *In re General Motors Corp., Engine Interchange Lit.*, 594 F.2d 1106, 1124-27 (7th Cir. 1979) (consent decree approval reversed; district court erred when forbidding discovery into the negotiations with the subclass and failed to explore the issue of the adequacy of representation).

¹⁷⁸ A few caveats are appropriate. The Second Circuit, for example, requires district courts to compare “the substantive terms of the settlement . . . [with] the likely result of a trial” and to assess the fairness of the “negotiating process.” *Malchman v. Davis*, 706 F.2d at 433. Judicial construction of the “likely result of a trial” is, by definition, highly speculative because judges are not permitted to hold trials to decide that question. The degree of uncertainty will vary with the nature of the case and the timing of the settlement. As a consequence, I want to underscore the limits of the decisions made. See also *Coffee*, 48 L. & Contemp. Probs., Summer at 30-32 (cited in note 135) (narrow role played by court in approval of shareholder derivative actions because of unwillingness of court to compel litigation of complex cases that parties do not want to pursue); Note, 84 Mich. L. Rev. at 325-32 (cited in note 164) (urging additional safeguards because current procedures are inadequate to insure fairness to class members). For further discussion of the impact of decrees on class

B. Generalizing The Adjudicatory Form

Assuming that judicial approval of consent decrees in fact represents adjudication of a sort (rather than a ritualistic dance), the next question is whether that mode of decision making could or should be adopted in areas other than class actions. I believe the answer is probably not—for several reasons.

First, and most importantly, in many proposed class action consent decrees, members of the class object. Unlike instances in which all the voices before the court are urging the entry of a consent decree, in class actions, adversarial litigants challenge the propriety of a decree's entry. Objectors provide a source of information that would be otherwise lacking.

Second, class actions are a statistical rarity on the federal court docket; fewer than one percent of the cases filed in 1985 were class actions.¹⁷⁹ As a consequence, each federal judge has (at most) only a few of these cases.¹⁸⁰ Further, class actions often involve substantial sums of money or major legal questions. The money or the issues attract lawyers, who often have experience in the area and who have track records of which judges may be aware. The combination of low frequency, substantial resources, and high visibility might well engender special treatment of these cases—treatment that would (and perhaps could) not be provided if required over a greater percentage of judges' caseloads.¹⁸¹

Third, in many class actions, attorneys for the class return to the trial judge for approval of fees.¹⁸² Trial judges have approached

members and third parties, see Laycock, 1987 U. Chi. Legal F. at 113-121 (cited in note 126). Finally, when intervention is permitted, trial judges have discretion to shape the roles permitted to intervenors. See *Stringfellow v. Concerned Neighbors in Action*, 107 S. Ct. 1177 (1987).

¹⁷⁹ Annual Report of the Director of the Administrative Office of the United States Courts 166 (1985) ("1985 Annual Report"). In 1985, 273,670 civil actions were filed; .4 % (971 cases) were class actions. In contrast, in 1976, 2.7% (3,584 cases of a total of 130,597 cases) were denominated class actions at filing. *Id.*

¹⁸⁰ Class actions are not evenly distributed. In 1985, 89 were filed in the Southern District of New York, while 1 was filed in the District of Utah. *Id.*, table 135 at 167.

¹⁸¹ In 1985, 48.2% of the cases terminated were disposed of with "no court action." *Id.*, table 29 at 158. 4.7% reached trial. *Id.* It has been estimated that some 35% of the court docket requires federal judges to adjudicate some disputed (but not necessarily dispositive) issue. Conversation with member of the staff of the Administrative Office of the United States Courts (Spring 1985).

¹⁸² More than 100 federal statutes permit fee shifting. See generally Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237 (1985), for discussion of methods by which judges are to decide fees. In addition to the statutory bases for fee shifting, federal courts may order that all members of the plaintiff class contribute to the fees under the "common benefit/common fund" theory. See *Alyeska Pipeline Service Co. v.*

that task with care and have not always granted the sums requested.¹⁸³ The lawyers involved in class settlements have a great incentive to appear responsible, to demonstrate the adequacy of their settlement proposals and their fidelity to the interests of the class they represent. Further, dissident class members, if represented by counsel, may also have lawyers who hope to share in the subsequent award of fees.¹⁸⁴ Thus, on both sides of some battles over proposed consent decrees, counsel may have the fiscal wherewithal and the economic, ideological, or reputational investment to provide a good deal of information to the court.¹⁸⁵

Fourth, in some class actions, the question of approval arises after a substantial amount of litigation and adjudication has occurred. As a consequence, the judge who determines the adequacy of the decree may have ample information about the lawsuit. Indeed, in some instances, liability has already been adjudicated, and the parties negotiate the decree within the parameters established by the court.¹⁸⁶

In sum, the ability of judges to adjudicate something in class action settlements depends upon the presence of some or all of these factors: objectors willing to provide information; judicial time, interest, and energy to examine proposals with care; lawyers

Wilderness Society, 421 U.S. 240, 245 (1975).

¹⁸³ The Supreme Court has recently approved part of that methodology. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986). After reargument, the court addressed the question of the use of "multipliers" or enhancements of hourly fees in recognition of the risk of loss and held that, under the Clean Air Act, the lower court should not have augmented the fee as it did. 107 S. Ct. 3078 (1987).

¹⁸⁴ See *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977) (attorneys for objectors were awarded fees because they "transformed the settlement hearing into a truly adversary proceeding" that enabled the court to analyze the settlement and thus conferred a benefit on the class). Compare *United States Trust Co. of New York v. Executive Life Ins. Co.*, 602 F. Supp. 942 (S.D.N.Y. 1985) (applying *Frankenstein* standard, no fees awarded to objectors' attorneys).

¹⁸⁵ The objectors may nonetheless be hampered in many respects. In some cases, the lawyers representing objectors may have participated in settlement negotiations; in other instances, the objectors may be entering the case for the first time and lack familiarity with the case. Although I know of no statistical survey of the number of successful objections, the impression from reading the case law is that most class action settlements are approved. (Of course, reported case law is not the proper basis for obtaining baseline data.) If my impression of the difficulty of upsetting a class action consent proposal is shared by the bar, then the incentives to enter the fray may be reduced. See also Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 Yale L.J. 1811 (1986) (school cases settled without involvement of students or parents).

¹⁸⁶ See, for example, *Finney v. Mabry*, 458 F. Supp. 720 (E.D. Ark. 1978) (consent decree in Arkansas prison case presented after years of litigation). See generally Special Project: *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 809-12 (1978).

with incentives to hammer out careful agreements or to challenge them, and an information base enhanced by the level of activity within a given case.

Were we to want to import the quasi-adjudicatory function of judicial approval of class action consent decrees to other cases, we could find instances in which, even in the absence of class certification, aspects of class litigation are present. For example, many cases involve aggregations of interests, such as corporations, municipalities, unions, agencies, or the government. The Supreme Court has not required those actions to be certified as class actions,¹⁸⁷ but some of the concerns that animate court involvement in the class action consent decree are nonetheless present—as is the possibility of dissidents seeking to participate.¹⁸⁸ Given that not all members of an aggregate such as a municipality might agree about the wisdom of a consent decree, such cases could provide the adversarial context in which a court might judge the adequacy of representation or of the proposed outcome itself.¹⁸⁹

Of course, this suggestion assumes the utility of judicial supervision of the quality of representation in cases in which diverse interests are merged into the concept of “plaintiff” or “defendant.” The opposite assumption—judicial reticence to interfere with a preexisting aggregate—has recently been espoused by the Supreme Court, which declined the Secretary of Labor’s proposal that, prior to recognizing the standing of a union, the Court determine the adequacy of the representation.¹⁹⁰ Thus, building on the model of class actions to incorporate judicial inquiries into the adequacy of

¹⁸⁷ See, for example, *International Union, United Auto. v. Brock*, 106 S. Ct. 2523, 2528 (1986) (“*UAW v. Brock*”); *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

¹⁸⁸ See, for example, *County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986), cert. denied sub nom. *City of Irvine v. Orange County*, 107 S. Ct. 1605 (1987) (denying Irvine’s attempt to intervene prior to entry of a consent judgment between Orange County citizens’ groups and Newport Beach).

¹⁸⁹ See, for example, *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985). I am not suggesting that judges would be interested in creating further opportunities for adjudication, but rather that, if desired, the necessary predicates for adjudication might be available in these cases. On the other hand, some courts view the government as a litigant deserving of special deference and as rarely tempted to behave in a manner incompatible with the interests purportedly represented. See *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1332 (5th Cir. 1980), rev’d in part on unrelated grounds, 664 F.2d 435 (5th Cir. 1981) (en banc).

¹⁹⁰ *UAW v. Brock*, 106 S. Ct. at 2528-29. The potential for intrusion on the affairs of such preexisting groups evidently gave the Court pause. If the judicial inquiry sketched in the text were in place, groups might be reluctant to litigate—a position that some would greet with dismay. The majority’s solution to the potential inadequacy of the representation was to suggest that, if a judgment were subsequently challenged, due process principles would permit an inquiry at that point on the adequacy of representation. *Id.* at 2533.

representation in all kinds of group litigation brings with it a risk of intrusion into group affairs beyond the courthouse and the threat of limiting access of groups to court.¹⁹¹

Aside from cases involving aggregations, the prospects for adjudication of consent decrees seem slight. In a bi-polar action in which both parties and their counsel urge the entry of the consent decree and neither lawyer anticipates returning to the court for attorneys' fee awards,¹⁹² there is little reason to assume that a substantial judicial inquiry into the propriety of the entry of the decree will either be sought or provided.¹⁹³ Rather, the guilty plea ritual is more likely to provide a model for much of the docket.

C. Negotiating and Approving Consent Decrees

Before one endorses the current version of consent decree review even in the context of class actions, it is necessary to explore another aspect of the process: the role of the trial judge in formulating the decree that is subsequently approved. Over the last decade, the federal judiciary has become increasingly enthusiastic about settlement, and that enthusiasm has led some judges to enter into the negotiation phase of all settlements, including those that result in consent decrees.

Examples of this phenomenon are legion. One highly visible instance was the attempt of Judge John Keenan, of the Southern District of New York, to help the parties negotiate a settlement in the Bhopal litigation. Unable to generate a settlement acceptable to all, the district judge dismissed the lawsuit on the grounds that the United States was an inappropriate forum.¹⁹⁴ A second illustration involves Judge Jack Weinstein, of the Eastern District of New

¹⁹¹ Fed. Rule Civil Proc. 23.2 permits some of this intrusion but only when "unincorporated associations" bring suit or are sued "as a class." The Rule's purpose, apparently, was to enhance, not to diminish, the capacity of such associations to bring suit. *Gravenstein v. Campion*, 96 F.R.D. 137; 140 (D. Alaska 1982).

¹⁹² In some jurisdictions, court appointed criminal defense lawyers return for fee awards. However, many awards are based on preestablished (and relatively low-paying) schedules, and some have fee caps—thus not creating the same incentives for lawyers. See generally, Robert L. Spangenberg, Beverly Lee, Michael Battaglia, Patricia Smith and A. David Davis, *National Criminal Defense Systems Study* (U.S. Department of Justice, Bureau of Justice Statistics, Sept. 1986).

¹⁹³ One possibility would be to relax standing requirements and to permit anyone to challenge a consent decree. Providing notice to the relevant world might, however, be problematic and, presumably, attorneys' fee incentives would have to be added as well.

¹⁹⁴ Bhopal presents an example of a case in which a judge attempted to settle—perhaps by virtue of a consent decree—a case over which he subsequently decided he had no jurisdiction. *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), modified, 809 F.2d 195 (2d Cir. 1987), cert. filed, No. 86-1860, 55 U.S.L.W. 3810 (1987).

York, who played a major role in the settlement of the Agent Orange litigation and who thereafter presided at the Rule 23(e) "fairness" hearings.¹⁹⁵

The problem is whether a judge who helps shape a proposed consent decree can fairly adjudicate either the adequacy of the representation or the adequacy of the compromise itself. The difficulty of judicial involvement is illustrated by a case that involved neither a class action nor a consent decree. In *Edwards v. Born*,¹⁹⁶ the district judge reported that he followed his "standard" procedure of conducting settlement negotiations.¹⁹⁷ He spoke first to lawyers for both sides, then with each attorney ex parte, and was able to obtain consent to conclude the litigation by the payment of money. Subsequently, the plaintiff challenged the attorney's authority to enter into the settlement. The trial judge sought to hold onto the agreement reached; he attempted to convince the plaintiff of the adequacy of the settlement. Unsuccessful, he held a hearing and determined that, because the lawyer had "apparent" authority to settle, the settlement would be enforced.¹⁹⁸

I doubt that the district judge in *Born* displayed aberrant behavior. He had invested time in obtaining the lawyers' willingness to compromise; he may well have suggested the deal that was ultimately struck, and he was eager to hold the parties to the agreement made. How can we expect a judge who helps fashion a settlement to be open to the possibility that the bargain made is not a good one—or is simply not one a litigant wants? The conflict between settling a case and then assessing the adequacy of the settlement seems so obvious as to make the frequency of the practice surprising. Apparently, arguments about judicial economy (a judge familiar with a case can evaluate more rapidly the settlement) have, thus far, carried the day.¹⁹⁹

¹⁹⁵ In re Agent Orange, 597 F. Supp. 740. See generally Schuck, 53 U. Chi. L. Rev. at 337 (cited in note 66), and Symposium: Mass Torts After Agent Orange, 52 Brooklyn L. Rev. 329 et seq. (1986).

¹⁹⁶ 608 F. Supp. 580 (D.V.I. 1985), vacated and remanded, 792 F.2d 387 (3d Cir. 1986).

¹⁹⁷ Id. at 582.

¹⁹⁸ Id. at 585. The district court was reversed and the case remanded for further evidentiary development of the basis for defense attorney's understanding of the apparent authority of plaintiff's counsel to settle the lawsuit. 792 F.2d 387.

¹⁹⁹ For example, when affirming Judge Weinstein's approval of the consent judgment in *Agent Orange*, the Second Circuit spent little time addressing the role Judge Weinstein played in shaping the settlement. See In re "Agent Orange" Product Liability Litigation, 818 F.2d at 151, 155-56, 170. See also Huertas v. East River Corp., 813 F.2d 580, 582 (2d Cir. 1987) (reversing trial court's order of attorneys' fees after settlement but noting that "[o]n remand, undoubtedly [the judge] will be able to bring his powers of persuasion to bear one more time to assist the parties in agreeing . . .").

In the meantime, we inhabit a world in which some judges participate in negotiations and then preside to determine the fairness of those settlements. If we had some view of a special role for judges *qua* judges in the negotiation of settlements, we might conclude that their participation in the settlement negotiations brings about better, fairer, more lawful, settlements. Whatever the quality of the decision making at the subsequent hearing on the approval of the settlement, we could commit resources to enforcement of consent decrees negotiated by judges on the premise that those contracts are truly distinct from those negotiated without judicial participation. If we thought that judges had special insight or better information than did the parties or their lawyers,²⁰⁰ then judges might legitimate consent decrees by the very fact of helping to formulate them. If adjudication is blended into the development of the decree itself, then consent decrees would stand as a product of judicial judgment.

The literature on how judges settle cases provides little basis for the view that, when crafting settlements, judges engage in an activity akin to adjudication. While a good deal of variation exists, many stories from judges and commentators describe how judges "split the difference" or make rough calculations to generate numbers for compensation.²⁰¹ Given their relatively meager information base and the small amount of time judges reportedly have to work on settlements of most cases,²⁰² it would be difficult for them to do much else. Judges are in the business of pressing litigants to compromise, not of assessing—based upon probing inquiries—the quality of the bargains made. The fact of judicial involvement in negotiations, in and of itself, provides no particular information about the quality of the settlements reached.²⁰³

In sum, to the extent that we have a model for an adjudicatory role for judges in the approval of class action consent decrees, that model cannot readily be generalized to other parts of the docket.

²⁰⁰ See Schuck, 53 U. Chi. L. Rev. at 348-49 (cited in note 66) (judicial involvement in settlement enhances parties' information).

²⁰¹ See Provine, Settlement Strategies (cited in note 65), and Sarokin, 38 Rutgers L. Rev. at 434-35 (cited in note 66) (judges lack ability to predict jury verdicts but judges' suggestions are nonetheless given great weight by the parties).

²⁰² One federal district judge has estimated that, at best, he has one half hour to devote per case on all pretrial matters. Letter from the Honorable Gerald Goettel of the Southern District of New York (on file with the author).

²⁰³ But see Patricia M. Wald, Negotiation of Environmental Disputes: A New Role for the Courts?, 10 Colum. J. of Envtl. L. 1, 32 (1985) ("judicial role in negotiating settlements will not and should not be passive in important, complex cases . . ." with environmental law issues).

Further, that model is itself in jeopardy of becoming meaningless as judges adjudicate the fairness of the agreements they themselves have created. Finally, even if judges were able to evaluate the proposed settlements, frequent judicial disapproval would diminish one of the assumed advantages of negotiated settlements—certainty of outcome.

D. The Quality of Judicial Action

One final return to my basic question. What do judges do when entering consent decrees? Should judges do whatever it is that they do, so that litigants may continue to obtain consent decrees?

Of the variants described in the typology, Variant I, Party Control, is one form that has superficial plausibility. Judges are not asked to adjudicate on the basis of inadequate information presented by disinterested, nonadversarial litigants. This mode is one in which judges in fact only sign the consent decrees as requested. No pretense of decision making is involved. The legitimacy of this practice hinges upon several factors. One is the practical impact of making such decrees available (i.e., do more settlements result than would otherwise? Is compliance greater?). However, given the current state of our information, the practical impact cannot be ascertained. A second factor is the strength of the autonomy-efficiency-flexibility arguments set forth above. Another possibility is that judges need not justify their actions by adjudication. In support of the no-need-to-justify approach, one might analogize the “rubber stamp” entry of consent decrees to the many “other things” that courts do, such as naturalization of citizens or weddings.²⁰⁴ One might also find support for the practice in the current trend towards expansion of informal modes of decision making in courts. Many argue for an increasingly diffuse role for federal judges, now given tasks as “case managers” and as advocates of alternative dispute resolution.²⁰⁵ Presumably, court resources and power are not diluted (and indeed, may be enhanced) by the judiciary having multiple or blurred roles. Under

²⁰⁴ Murray L. Schwartz, *The Other Things That Courts Do*, 28 U.C.L.A. L. Rev. 438, 447 (1981) (suggesting that such judicial activities be evaluated in terms of the burdens imposed on courts and the potential threat to courts’ moral authority and political power). See also Emanuel B. Quint and Neil S. Hecht, 1 *Jewish Jurisprudence* 21-31 (1980) (the “non-judicial” functions of the Great Sanhedrin).

²⁰⁵ Peckham, 37 Rutgers L. Rev. at 267-77 (cited in note 65) (advocating judicial promotion of alternative dispute resolution).

this view, the fact that consent decrees are entered in the face of uncertainty about law and fact and in the absence of deliberation poses no bar to judicial action.

I have expressed my reservations about this vision of the federal judiciary. Keenly aware of the powers of the judiciary, I am fearful of lawless and unconstrained roles.²⁰⁶ Judges wield public power, and I worry about the use of that power. These concerns have application to the consent decree process; judges may be using the consent decree process to avoid submitting their decisions to public or appellate review. Judges may be enhancing their powers by obtaining party submission to that which judges could not order. In addition, judges may be accomplices to the issuance of court orders in derogation of legal rules.

The force of this criticism depends, in part, on the actual practice in consent decrees, a world about which we have limited information. What are the agreements made? How often do judges take an active role in their formulation? How much judicial decision making is hidden? Further, one might respond by noting that the consent decree process provides a modicum of openness in some instances. If parties opt for private settlement in lieu of a consent decree, we know little or nothing about the nature of their accord, whereas when a consent decree is issued, we learn a bit.²⁰⁷ In contrast, of course, if adjudication were chosen instead of a consent decree, we would learn more about the application of legal rules to a particular set of facts.

Variant II, Party Control/Judicial Approval, has some claims to conceptual plausibility, at least in the limited context of consent decrees in class actions and perhaps in other cases involving aggregations of competing interests. The presence of a number of interests may generate disputes about the propriety of a compromise and are likely to provide sufficient information upon which to make decisions resembling adjudication. To the extent that judgment is desired as a predicate to consent decrees, then these cases may be the occasions for judgment as well as action. At least, judges can adjudicate whether legally adequate consent to an agreement exists.

However, Variant II is a mode that appears to be dying even

²⁰⁶ Resnik, *Failing Faith*, 53 U. Chi. L. Rev. 494 (cited in note 107); Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (cited in note 76).

²⁰⁷ See *Bank of America National Trust and Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339, 344-46 (3d Cir. 1986) (papers filed in court in connection with a settlement may not be sealed absent a particular showing of a need for secrecy).

as its contours are being sketched. In its stead, Variant III, Judicial Control, is becoming increasingly common. But, as judges negotiate the settlements that must then be approved, judges undermine their ability to judge. Judges become one more party agreeing to the settlement rather than disinterested bystanders. Given the structural incentives to approve settlements—the time, energy and resources that will be required if adjudication is demanded—we cannot expect judicial disapproval of many proposed agreements. Bifurcation of the process (one judge to negotiate, a second to approve) is only a palliative, because deference to the first judge is likely to be frequent.

CONCLUSION

Many instances of “judging consent” are oxymoronic. One cannot have judgment without adjudication, and adjudication depends upon conflict, rather than upon consent. Absent the adaptation of some forms of continental procedure in which the court and its staff (rather than the litigants) develop information,²⁰⁸ judges are ill-equipped to do much other than nod when the litigants join together and seek court approval. Judges may (in a few limited situations) be able to determine the fact of consent or the adequacy of the bargaining process. We may, because of an assumption that avoiding full adjudication is desirable and some openness about settlements is valuable, encourage that activity and commit societal resources as a result of it. However, judges cannot, absent conflict, determine much about the legality or the quality of the compromises made. Our resources may flow to support bargains about which we know little.

Thus, claims for the continued availability of class action consent decrees or of plea bargaining can be based only weakly upon the coherence of a judicial role in ascertaining the adequacy of the agreements made. The stronger arguments must come from a vision that one wants—without full adjudication—that which only a court judgment enables: the distribution of funds to a class, a change in conditions at a prison, the incarceration of an individual, a priority in the court queue. Further, in civil cases in which no class action has been certified, the judicial role provides virtually no basis for validating consent decrees. The fact that a judge has entered a decree tells us nothing. Rather, other explanations—about compliance or ease of enforcement, about the capac-

²⁰⁸ Langbein, 52 U.Chi. L. Rev. at 823-26 (cited in note 76).

ity of other institutions to perform recordation services, about the desirability of generating some public information about accords reached, about the values of autonomy, efficiency, and making court judgments available less expensively, or about the utility of court orders that do not clarify legal norms²⁰⁹—must be called upon to justify using the symbolism of courts to christen the contracts made. The utility and legitimacy of consent decrees must come from explanations other than the quality of judicial involvement with consent decrees at the time of their entry.

²⁰⁹ See, for example, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).