

# Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement

Judith Resnik\*

## I. CONTRASTING PREFERENCES

In the 1980s, as a consultant to RAND's Institute for Civil Justice, I joined Deborah Hensler, Allan Lind, Robert MacCoun, William Felstiner, Tom Tyler, and Patricia Ebener in seeking to learn how litigants viewed their experiences with court-based processes. We surveyed litigants whose cases had been resolved through trials, court-annexed arbitrations, judge-run settlement conferences, and bi-lateral negotiations between lawyers.<sup>1</sup> We found that litigants cared about process: they reported less satisfaction with processes in which they took no part and more satisfaction with processes in which they could participate. Contrary to some lore that litigants were alienated by trial-like procedures, the litigants whom we studied reported that trials and arbitrations gave them a sense of control and dignity. When coupled with and complemented by research of others, that study also demonstrates that the preference for process survives outcomes, which is to say that it exists even when litigants are not successful through a particular process.<sup>2</sup>

Contrast those data with what we know about judicial preferences -- garnered not by parallel surveys but through other sources. At meetings where judges teach other judges about how to do their work, at conferences with the bench and bar, in descriptions of their activities, and in published opinions, judges are promoting settlements rather than trials. In this brief essay, I first provide an overview of the evidence on judicial preferences for dispositions other than trial. Thereafter, I explore the puzzles presented by the contrast between judicial preferences for settlement and litigants' preferences for process. At issue is how to evaluate and what weight to give either set of preferences as the polity makes its judgments about the structure of state-based dispute resolution.

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\* All rights reserved. Arthur Liman Professor of Law, Yale Law School. This brief essay joins others in a Symposium on Mediation in a volume of the University of Missouri-Columbia School *Journal of Dispute Resolution*. My thanks to Jean Sternlight for inviting my participation, to Dennis Curtis and Lauren Robel for ever-thoughtful engagement with the issues, and to Kate Andrias, for adept and insightful research assistance.

1. See E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik, & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Society Rev.* 953 (1990).

2. For additional discussion of such work, see Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 *J. of Dis. Res.* 81, 85-93 (2002). In addition to the quantitative evidence, a good deal of qualitative discussion of litigation supports this thesis. See Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 *N.Y.U. L. Rev.* 296, 355-78 (1996).

## II. DOCUMENTING JUDICIAL PROMOTION OF MEDIATED RESOLUTIONS

Judges give voice to their attitudes towards trial and its alternatives in a variety of ways, including when they make rules for civil process. The original version of the Federal Rules of Civil Procedure, promulgated in the 1930s, created the opportunity for judges and lawyers to meet during a "pre-trial" conference. The rule, however, neither required them to do so nor specified topics for discussion.<sup>3</sup> But a small group of judges saw that such pre-trials offered opportunities for judicial superintendence of trial preparation and judicial guidance towards disposition without trial. They urged their colleagues to take on such roles but, from the 1940s through the 1960s, were met with judges reluctant to shift their posture.

Yet the proponents pressed on, seeking other means by which to garner adherents. Beginning mid-century, both state and federal courts became educational institutions, training judges about what "good judging" meant. As one jurist described his cohort of judicial lecturers, they were seeking "to proselytize,"<sup>4</sup> to convince other judges to join in their vision of how judges ought to control the course of litigation so as to help litigants settle cases. By the 1960s, in the federal system, seminars had begun to train newly-appointed judges on docket management in both civil and criminal cases. The teachers were sitting judges, instructing novices about the practices of judging. A part of the curriculum promoted judicial involvement in settling cases. For example, in one lecture, a judge instructed that:

most cases . . . are better disposed of, in terms of highest quality of justice, by a freely negotiated—settlement, than by the most beautiful trial that you can preside over.<sup>5</sup>

While part of a course of instruction, this attitude had not yet been institutionalized through procedural rulemaking, which at that time left judges free to use the pre-trial provision of Rule 16 or not. However, first in 1983 and then in 1993, the Federal Rules of Civil Procedure were amended to instruct judges at pre-trial conferences to explore settlement as well as the use of alternative forms of dispute resolution and to empower federal judges to require attendance at settlement conferences by representatives with the authority to settle cases.<sup>6</sup> At one bar association meeting sponsored to bring attention to such rule changes, a federal trial

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3. Analysis of the history and evolution of those provisions can be found in Judith Resnik, *Trial as Error, Jurisdiction as Injury, Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 935-42 (2000).

4. Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, reprinted in *Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 207 (1962).

5. Hubert L. Will, *Judicial Responsibility for the Disposition of Litigation*, in *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 117, 123 (1976). Judge Will also joined Judges Robert R. Merhige, Jr., and Alvin B. Rubin in a discussion, *The Role of the Judge in the Settlement Process*. See *id.* at 227-32.

6. See Fed. R. Civ. P. 16(a)(b)(c) (1999).

judge emphasized the import of pre-trial resolution by describing going to trial as evidence of "lawyers' failure."<sup>7</sup>

The promotion of pre-trial processes and settlement has been one of many factors that has succeeded in shifting the focus of litigation away from adjudication. For most cases, the pre-trial process is all there is. According to data from 2000 on the federal courts, of 100 civil cases begun, in fewer than three was a trial begun.<sup>8</sup> In contrast, in 1938, of 100 civil cases filed, about twenty ended with a trial.<sup>9</sup>

During the 1990s, Congress added its support, initially through legislation that had hortatory elements<sup>10</sup> and subsequently through mandates for alternative dispute resolution.<sup>11</sup> As noted, judge-made national rules followed a similar path, moving from persuasion to mandates for ADR. Some local district rules go yet further. For example, in the federal trial courts in Massachusetts, a judge is required to raise the topic of settlement at *every* conference held with attorneys.<sup>12</sup>

More recently, the judicial commitment to avoiding adjudication was publicly pronounced and widely disseminated through descriptions in the press of the efforts to settle the major anti-trust litigation of *United States v. Microsoft*.<sup>13</sup> As newspapers reported, "While Judge Jackson called the mediation effort 'voluntary,' he has made no secret of his wish that the parties settle the case."<sup>14</sup> Named as a mediator was Richard Posner, then Chief Judge of the United States Court of Appeals for the Seventh Circuit. News reports described him as well-situated to participate because of his widely-known views about law and economics.<sup>15</sup> Judge/Mediator Posner

7. See Resnik, *supra* n. 3, at 925-27. At that time, in that district, of 100 civil cases commenced in federal court, about eight started trial; the remaining 92 ended in other ways. *Id.* at 925 n. 1.

8. *Administrative Office of the U.S. Courts, Annual Report of the Director* (tbl. C-4A (U.S. District Courts—Civil Cases Terminated by District and Action Taken During the 12-Month Period Ending Sept. 30, 2000) (describing 5780 -- 2.2 percent -- of a total of 259,234 cases in which a trial was begun). However, the remaining ninety-seven did not all settle, for one should not equate adjudication -- decision making by a judge -- with trials. Estimates are that about a third of filed cases conclude through adjudication by judges on contested issues, such as whether a court has jurisdiction or whether any legal claim exists. Return also to the sixty-some cases that settle, and remember that, in some of those cases, judges have also made rulings on contested claims.

9. See Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 632-33 (1994).

10. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, codified at 28 U.S.C. § 461 *et seq.* (1994), which had a sunset provision and which expired in 1997.

11. See *e.g.* The Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (HR 3528) (Oct. 30, 1999).

12. See Dist. Mass. Local R. 16.4(A) ("The judicial officer shall encourage the resolution of disputes by settlement or other alternative dispute resolution programs.") *Id.* "At every conference conducted under these rules, the judicial officer shall inquire as to the utility of the parties' conducting settlement negotiations." *Id.* at 16.4(B).

13. An initial decision can be found at 65 F. Supp. 2d 1 (D.D.C. 1999). On November 19, 1999, District Judge Thomas Penfield Jackson issued an order of reference for mediation. See *United States v. Microsoft*, Civ. No. 98-1233, Order of Reference for Mediation <<http://www.ded.uscourts.gov/98-1232p.pdf>>.

14. John R. Wilke, *Microsoft Judge Names Mediator to Seek Accord*, Wall St. J. (New York, NY) A3 (Nov. 22, 1999).

15. *Id.*

ordered the parties to keep the process secret, met with them separately,<sup>16</sup> and pressed for settlement, while Judge Jackson delayed ruling to give more time for conciliation.<sup>17</sup> However, after a four month interval, Judge Posner announced that his "quest" to provide common ground had "proved fruitless."<sup>18</sup> Subsequently, the trial judge issued its ruling, finding anti-trust violations and requiring divestiture by Microsoft.<sup>19</sup> On appeal, while approving of Judge Jackson's fact-finding on Microsoft's liability, the circuit court was sharply critical of Judge Jackson's refusal to permit an adversarial evidentiary hearing on the remedy and of his private discussions of the pending case with journalists.<sup>20</sup>

Yet the judicial preference for settlement remained intact. After the appellate court remanded the litigation to another judge, the "quest" (to borrow Judge Posner's term) for mediated outcomes continued. The headlines of the fall of 2001 captured the process: "*Judge Orders Talks to Settle Microsoft Case*," "*Judge Asks a Mediator to Step in After Microsoft Negotiations Fail*," "*Law Professor Is Named Mediator in Microsoft Case*."<sup>21</sup> Thereafter, the United States and Microsoft entered into an agreement with which (as of this writing) some of the plaintiffs-states disagree.<sup>22</sup>

Discussions about settlement in published decisions by judges complement those displayed elsewhere. Judges repeatedly opine that "a bad settlement is almost always better than a good trial."<sup>23</sup> Further, to facilitate settlement, some courts have been willing to grant parties' requests that trial decisions of juries and judges be vacated without any finding of factual or legal invalidity.<sup>24</sup> Moreover, the growing law of

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16. Steve Lohr, *U.S. and 19 States Issue Stinging Reply to Microsoft*, N.Y. Times (New York, NY) C8 (Jan. 26, 2000).

17. John R. Wilke, *Microsoft's Talks With U.S. Accelerate*, Wall St. J. (New York, NY) A3 (Mar. 23, 2000); James V. Brimaldi, *Judge Delays Verdict on Microsoft*, Washington Post (Washington, D.C.) E3 (Mar. 29, 2002).

18. *Statement of Chief Judge Richard A. Posner Concerning Microsoft Mediation*, <[http://www.microsoft.com/presspas/trial/apr00/04-01\(posner.asp\)](http://www.microsoft.com/presspas/trial/apr00/04-01(posner.asp))> (April 1, 2000).

19. *U.S. v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. June 7, 2000).

20. *U.S. v. Microsoft*, 253 F.3d 34 (D.C.Cir. 2001) (en banc), cert. denied, 122 S. Ct. 350 (2001).

21. Stephen Labaton, *Judge Orders Talks to Settle Microsoft Case*, N.Y. Times (New York, NY) C1 (Sept. 28, 2001); Steve Lohr, *Judge Asks a Mediator to Step in After Microsoft Negotiations Fail*, N.Y. Times (New York, NY) 1A (Oct. 14, 2001); *Law Professor Is Named Mediator in Microsoft Case*, L.A. Times (Los Angeles, CA) 4 (Oct. 15, 2001).

22. See Stephen Labaton & Steve Lohr, *U.S. and Some States Split on Microsoft, Risking New Delay*, N.Y. Times (New York, NY) C1 (Nov. 6, 2001).

23. See e.g. *Hispanics United v. Village of Addison*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997). See also *Strong v. BellSouth Telecomm, Inc.*, 173 F.R.D. 167, 172 (W.D. Ill. 1997) (observing that "[i]n this case, I could hold my nose and accept the settlement, after all, it is said that a bad settlement is better than a good trial").

24. See *Neary v. The Regents of the U. of California*, 834 P.2d 119, 119 (Cal. 1992) (holding that "parties should be entitled to a stipulated reversal to effectuate settlement absent a showing of extraordinary circumstances"). A few years later, the California Legislature revised that rule. See Cal. R. Civ. P. § 128(a)(8)(A)(B) (1999) (providing that appellate courts "shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds" both no "reasonable probability" of an adverse effect on non-parties or the public and that the reasons for reversal "outweigh the erosion of public trust that might result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement"). In the federal system, the Supreme Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,

settlement is not simply hortatory. Litigants and their lawyers are required by judges to engage in a variety of settlement processes; penalties flow from failing to try to settle cases.<sup>25</sup> Moreover, the Supreme Court has been enthusiastic enough about the utility of settlement to conclude that states have the power to settle lawsuits that they lack the power to try.<sup>26</sup> Through the alchemy of settlement, judicial authority expands to preclude subsequent litigants who could never have come before their courts.

In short, judges have put their institutional authority behind settlement as the mode of disposition to be preferred.<sup>27</sup> Of course, pockets of counter-examples can be marshalled, such as recent legislation limiting the use of consent decrees in prison litigation<sup>28</sup> and decisions invalidating settlements in large class actions.<sup>29</sup> But the weight of opinion, practice, teaching, and rulemaking demonstrates that the judiciary's imprimatur is on settlement-focused processes.

Moreover, the judiciary is also enthusiastic about ADR outside of courts. During the same decades that judges promoted court-based ADR, judges also expanded their enforcement of private contractual agreements to arbitrate disputes through systems set up by the purveyors of such contracts. Although earlier decisions had been suspicious of agreements that waived access to court before disputes alleging violations of federal statutory rights had arisen, more recent rulings have upheld such agreements so long as the contractually-created arbitral forum provides an effective means to vindicate statutory rights.<sup>30</sup> Judges have enforced a host of agreements between employers and employees and between consumers and manufacturers, even when some costs may be imposed on consumers for the use of such alternatives.<sup>31</sup>

### III. PREFERENCE FORMATION: EXPERIENCES AND CULTURES

The contrast between litigant preferences for trial-like processes and judicial preferences for settlement (both inside and outside courts) requires exploration.

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513 U.S. 18 (1994) has placed some restraint on that practice. See generally, Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. Rev. 1471 (1994).

25. See Fed. R. Civ. P. 16(c), 16(f); *Dawson v. U.S.*, 68 F.3d 886 (5th Cir. 1995); *Shedden v. Wal-Mart Stores, Inc.*, 196 F.R.D. 484 (E.D. Mich. 2000).

26. See *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996) (upholding a settlement that included claims arising under an exclusive federal jurisdictional grant).

27. For additional discussion, see Judith Resnik, *Many Doors? Closing Doors? Adjudication and Alternative Dispute Resolution*, 10 Ohio. St. J. on Dis. Res. 211 (1995).

28. See Prison Litigation Reform Act of 1996, codified at various sections, including 18 U.S.C. § 3626 (1994, Supp. IV), as interpreted in *Miller v. French*, 530 U.S. 327 (2000).

29. See e.g. *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

30. See e.g. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Lower courts have been required to consider whether a specific arbitration program provides an "effective" alternative means of vindication. Upon occasion, a particular program is found not to suffice. See e.g. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999).

31. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

Before doing so, I need to underscore that this discussion requires a certain kind of simplification. In the subtitle above, I have pluralized the words "experiences" and "cultures" to capture the multitude of messages about trial-like processes and settlement that are generated in this society and to recognize the many actors and cultures that shape impressions of dispute resolution processes. Neither litigants nor judges are a homogeneous group; some litigants are one-shot players, while others are repeat players.<sup>32</sup> Judges are also differently situated, and their attitudes reflect varied experiences with trials or appellate work involving a wide and disparate set of disputes. Similarly, the modes of ADR are themselves diverse, as is illustrated by the multiplication of terms, such as "med-arb" or "summary jury trial," to denote a widening array of activities. Yet, for the analysis that follows, I need to compress those variations to identify some of the structural distinctions that give rise to the disjuncture between the preferences of litigants and of judges.

Why do litigants report a preference for process? Deborah Hensler's essay offers part of the explanation. As researchers have learned, litigants report more satisfaction with types of processes in which they understand themselves as having an opportunity to give voice to their injuries, make their defenses, be treated with dignity, and have their claims heard and evaluated by unbiased decisionmakers.<sup>33</sup>

But another question remains: why do litigants report that both trials and court-annexed arbitrations provide such opportunities? Answers come in part from the actual experiences of such processes. In contrast to decisionmaking that occurs outside their hearing, trial-like processes have an immediacy and openness. Litigants do not much distinguish between whether the presiding officer is an arbitrator or a judge, but they do distinguish between moments for exchange and the silence that, from their perspective, marks negotiations from which they are absent. Further, as legal theorists and jurists have long discussed, trial-like processes offer a chance for structured dialogue, governed by public norms.<sup>34</sup> The state becomes embodied in the person of the judge, who in turn can speak, hear, and respond. Because the format of trial is well-known through frequent media presentations, it may bring a comfortable familiarity. Because the rules for trial procedures pre-date any given dispute, they form an impersonal mechanism for resolution as contrasted with the apparent free-wheeling and individualized possibilities of settlement negotiations. A sense of efficacy can spring from those moments of contact and can endure -- as is demonstrated by researchers' findings that, even when unsuccessful in producing a desired result, the preference for process remains.

Those personal experiences interact with a culture that is, by and large, affirming of the idea of trial-like processes. Through civic classes and popular literature, the trial is proffered as a centerpiece of the judicial process. Film and

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32. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Society Rev.* 95 (1974) (first conceptualizing the litigation process as populated by "one-shot" versus "repeat players").

33. See Hensler, *supra* n. 2, at 93-96.

34. See e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that a hearing was required prior to the termination of benefits for those receiving state welfare aid and justifying that decision in part on the dialogue opportunities provided by trial-like processes).

televised court proceedings offer vivid images of trials as "law in action." Of course, the real action is more complex than the idealized versions. Some high-profile criminal acquittals have become iconic counter-images, proffered to demonstrate that trials, when shaped by well-paid defense lawyers, are sources of distortion. In parallel fashion, the efforts of investigative reporters, law students, and lawyers (working together in what have come to be known as "innocence projects") have ferreted out a significant number of failures of process, which have resulted in wrongful convictions. Turning to the civil side, the accuracy and wisdom of jury verdicts have been challenged through energetic efforts of institutional defendants who have advertized jury excesses, criticized punitive damages, and claimed that findings of liability often rest on "junk science."<sup>35</sup> Across the litigation spectrum, problems of inequality of resources, of excessive and of under-investment, of unwise and sometimes intemperate judges and juries, and of erroneous outcomes cast shadows on the results of trials.

Yet that very debate is itself evidence of another source of the legitimacy of trial-like-processes. The dominance of trials in the popular landscape intertwines with a political conception that laws' processes must be accessible to the public. In the United States, the public's presumptive right of attendance at trials identifies adjudication as a particular form of decision making, performed in a public venue that brings with it accountability for the judge and status for the disputants as properly claiming that their conflict is governed by public norms. Return to the *Microsoft* example. When disapproving of the district court's refusal to hold an evidentiary hearing on factual disputes about a remedy, the en banc D.C. Circuit Court explained:

It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary "to the spirit which imbued our judicial tribunals prohibiting decision without hearing."<sup>36</sup>

Those words have added weight as I write in the fall of 2001. A debate has now emerged about the legitimacy of using military commissions as contrasted with courts-martial and federal courts to determine the guilt of those involved in the attack of September 11.<sup>37</sup> As dozens of politicians and commentators discuss the

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35. See generally Marc Galanter, *An Oil Strike In Hell*, 40 *Ariz. L. Rev.* 717 (1998) (detailing the efforts to attack the litigation system by providing the media with examples of cases that become popularized shorthand for a litigation system run amok but whose facts may not actually support that proposition).

36. *Microsoft*, 253 F.3d at 101-03.

37. See President George W. Bush, *Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 *F.R.* 57, 831 (Nov. 16, 2001) (subjecting non-citizens to detention if, "from time to time" the President "determines" they should "in the interest of the United States, be subject to the order" and authorizing their trial "by military commission" for such alleged offenses, on the basis of rules different from courts-martial or from criminal trials). The individuals potentially subject to the order include members of "the organization known as Al Quida," or who have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism . . .

mode of process required for those accused, trials become emblematic of both the possibility of knowledge and the risk that trials could develop information that might affect one's views of those accused. The profoundly emotional response to the tragedy and horror of September 11, 2001, has created an environment in which many are afraid of deliberation. The effort to abort public processes stems from a desire neither to gain nor to disseminate detailed knowledge. Skipping a trial in either federal courts or the military justice system enables a leap over understanding to ensure punishment.

Given this melange of personal, legal, political, and popular connections to trial-like processes, the question that comes into focus is how to account for judicial promotion of settlement in lieu of trial. If litigants' experiences of trial help them to generate a preference for process, why do judges not respond the same way? Why are "trial judges" -- whom one might have assumed to be the champions of trial -- skeptical or leery of it?

An antecedent question is whether judges really are trial skeptics or whether the judicial promotion of alternatives stems from a pragmatic view that trials cannot be held at the volume requisite to meet the demand. A judicial preference for ADR could be understood as providing a second-best solution to the problem of the inadequate resources provided by the state *for* trials and investments required of the parties to participate *in* trials. Under that account, some forms of ADR (such as court-annexed arbitration) provide trial-like activity at less cost by "outsourcing" the job of full-time judge to lawyers working on a contract basis and by lowering the cost of process by relaxing evidentiary strictures. Mediation moves yet further away from trial and presumably lowers the costs again. The enforcement of private contractual agreements to arbitrate can offer other savings by removing judicial superintendence over the terms of delegation and taking the dispute off-site completely.

But the possibility of judicial promotion of settlement and other forms of ADR as a second best alternative to trial is undercut by the rules and the rhetoric of judges pressing for settlement. What we have heard from them through their rulemaking, teaching materials, informal practices, and in decisionmaking over these past decades is that they have developed a negative attitude toward trial, finding it wasteful. The sources of waste are not much specified but include views that the marginal utility of trial is not worth its costs, or not worth the judicial time investment, or that the trial process itself is unduly constraining and limiting to generate useful remedies.

That press of business -- the docket -- is typically proffered as the central variable in the story of judicial promotion of alternatives. While I believe it to be an important variable, it does not provide a complete explanation of what animated the self-styled "prostylizing" judges who came to dominate judicial rulemaking and governance and who have formed such powerful advocacy networks promoting

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or have as their aim to cause injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy" or who "have knowingly harbored" such individuals. *Id.* at § 2.

alternatives to trial. These judges were not speaking solely on behalf of litigants but rather were also speaking about their own preferences and experiences.

#### IV. LAWYERS, JUDGES, AND THE CHALLENGE OF JUDGMENT

What then do judges know about trials that has lead them away from that form of decision-making? Judges gain most of their knowledge of litigation through their own first-hand experiences as lawyers or as judges. They too are "repeat players," unhappy with what they perceive, and like repeat player litigants, also able to "play for the rules."<sup>38</sup> For example, judicial enthusiasm for ADR is often accompanied by claims of its efficacy as compared to trial in lowering costs and saving time. But as other studies from RAND's Institute for Civil Justice have documented, trials are not the only metric against which to measure the utility of ADR. Given that so many cases end through negotiations between lawyers, judge-run settlement conferences and managerial efforts increase cost and time for many lawsuits.<sup>39</sup> Social scientists have gained this information by analyses of data sets that include all the cases, including the many that end without "any court action," to use a phrase from the federal data base collection system.

In contrast, the cases that judges know well are those very ones in which they play a role -- the subset not only with some "court action" but with a lot of it. Thus, to understand more of what prompts judicial preferences for settlement, the account of process from the perspective of the judge needs to be thickened -- first, by the introduction of the effects of lawyers on judicial experiences of trials and second, by greater attention to the problems that judging poses for judges.

Lawyers may be a key variable in explaining the disjuncture between judicial and litigant accounts of process. We know that lawyers are the conduit of information to litigants about what transpires outside litigants' view, and we know that at least in some instances, lawyers distort information to protect their own interests and forward their own goals.<sup>40</sup> Hence, processes in which litigants can participate provide clients with a means of monitoring lawyers' fidelity. That

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38. Galanter, *supra* n. 32.

39. RAND's Institute for Civil Justice evaluated judicial case management and found that many judicial managerial efforts are time and resource consumptive. For example, because attorneys bill clients when preparing for and attending judicial conferences, increasing the number of such conferences adds costs to some cases. Because attorneys might well believe that strategic advantage could be gained at such conferences, holding them may delay bi-lateral settlement negotiations. See James S. Kakalick, Terence Dunworth, Laura A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Just, Speedy and Inexpensive? An Evaluation of Case Management Under the Civil Justice Reform Act?* (1996); James S. Kakalick, Terence Dunworth, Laura A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (1996). While attorney investment of such time may, in some cases, inure to a client's benefit and while some negotiations superintended by judges may yield "better" (on some scale) results, some of the investment may be wasted.

40. Scholars of lawyering report failures of loyalty and even deceptive reports to litigants about what transpires in courts. See e.g. William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1447 (1992).

litigants report more satisfaction in trial and court-annexed arbitration may stem in part from the fact that such procedures give litigants a chance to control their own lawyers.

Inside courts, lawyers are the spokespersons for litigants. Lawyers are thus central to judicial experiences of court-based processes. Return to the last seventy years of civil procedural innovation. The creation of a pre-trial process in the 1930s provided the occasion for judges and lawyers to be in contact in advance of trial and to do so in settings less structured than trial. As judges saw more of lawyers, they became increasingly distressed about what lawyers were doing.

Although many cases entail few or no problematic interactions among lawyers, those are not the cases that judges see. Rather, as judges watched discovery battles, as judges presided at contentious hearings, as judges were called upon to award attorneys' fees, they gained a growing sense of under-investment or over-investment in cases by lawyers, misuse of court time, inadequate preparation, and unnecessary litigation. If a first leitmotif of decades of procedural rulemaking has been the growing focus on using the rules to promote dispositions without trials, a second recurrent pattern has been the increasingly insistent effort to use the rules to curb lawyer excesses. Judicial management of the pre-trial process is sometimes termed "case management."<sup>41</sup> I think "lawyer management" better captures the goals of judicial superintendence, as judges strive both to serve as super-senior partners, instructing lawyers on how to prepare cases, and as super-egos, seeking to curb lawyer misbehavior.

Those experiences account for the persistent difference between what social scientists understand about litigation in the aggregate and what judges believe about litigation based on their first-hand knowledge. Even when judicial rulemakers learned from commissioned research on discovery that the difficulties resided in only a small subset of the cases,<sup>42</sup> they could not desist from seeking to curb discovery in all cases. Amendments in 2000 to rules on discovery, as well as the growing case law on class action practices and newly-proposed amendments to Rule 23,<sup>43</sup> must be read not only as rules of procedure but also as an effort to use procedural rules as ethical rules and practice guides, aimed at reigning in lawyers. Indeed, judges have even limited the role of lawyers in procedural rulemaking. As Stephen Yeazell has documented, at the time when the federal rules were first drafted, lawyers dominated the process. Now judges predominate on the committees that propose new rules.<sup>44</sup>

A first source, then, of judicial distress with trial-based processes is lawyers. Another is the very real challenge that adjudication poses for judges. Disputes of fact and law are often difficult to resolve, and the remedial capacity of courts (as well as other institutions) is limited. Judges must find the job of judging painful, yet

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41. See e.g. Robert Peckham, *The Federal Judges as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Cal. L. Rev. 770 (1981).

42. See generally Symposium, *Conference on Discovery Rules*, 39 B.C. L. Rev. 517 (1998).

43. See Standing Committee on Rules of Practice and Procedure, *Report of the Civil Rules Advisory Committee, Class Action Rule*, <<http://www.uscourts.gov/rules/comment2002/8.01CV.pdf>> (revised July 31, 2001).

44. See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & Contemp. Probs. 229 (1998).

little in the literature of judging makes space for expression of such discomfort. Rather than speak about and engage in exploration of the disquietude occasioned by judging, judges have instead tried to break out of the role of judge in favor of the less constraining and possibly more comfortable posture of mediator. Return to the example of the *Microsoft* litigation: the person appointed to mediate the first round was a sitting federal judge. While, in that instance, the presiding trial judge assigned the role of mediator to another judge, in many cases the judges to whom cases are assigned serve as settlement judges.<sup>45</sup> And when those cases settle, judges routinely attribute that outcome to their interventions, thereby gaining a sense of efficacy.

For those not steeped in judicial processes, it may sound odd to talk about judges seeking efficacy. Judges are posited as uniquely powerful actors. But many judges report frustration with role constraints and with available remedies. Recall that, when documenting judicial preferences to settlement, I quoted one trial judge who had equated trial with systemic failure and others who said that no matter how good the trial, a settlement was better. What do settlements offer judges? They provide a safety net. Imagine having to struggle to resolve a dispute and the doubts one might have about whether the resolution was right or just. Contrast a resolution brought about by the parties' agreements. Their consent serves as a substitute for judgment. Judges may promote settlement because they themselves doubt the capacity of finding information sufficient to pin the label "fact" upon it and are painfully aware of the plasticity of "law." In their enthusiasm for ADR, judges reveal themselves to be both fact and rule skeptics, fearing that stories can dissolve into endless variations, none of which suffice to justify the imposition of state power.

Take then the three facets of judicial experiences of trials that I have outlined thus far: docket pressures that are unending, lawyers that appear contentious, dissembling, and overpriced, and the profoundly challenging problems of rendering judgment. On this account, judges encourage private accords because those agreements provide as much -- or as *little* -- as adjudication can offer. And that preference for settlement, for decisionmaking on the merits without judicial determination of exactly what the merits require, is a phenomenon that can be documented at both trial and appellate level. By "not making law" (to borrow Mitu Gulati's phrase<sup>46</sup>), judges not only avoid indeterminacy, they also avoid making mistakes -- unless of course the push towards settlement is, in itself, mistaken.

As I have elsewhere argued, I think that the judicial embrace of settlement is unwise -- especially for judges.<sup>47</sup> Through their practices, rules, teaching, and doctrine, judges have not only made plain the many facets of the role of judge (judge as settler, judge as negotiator, judge as dealmaker) but also have deconstructed the role of judging, rendering it more vulnerable politically and legally. The concepts

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45. Not all would equate a settlement judge with a mediator for some scholars of mediation delineate the role of the mediator as a facilitative rather than evaluative task. Yet many judges perceive themselves to be mediating as they encourage settlements. For one in-depth study of judges working as mediators and relying on their expertise as judges to obtain concessions, see Stacy Lee Burns, *Making Settlement Work: An Examination of the Work of Judicial Mediators* (Ashgate 2000).

46. Mitu Gulati, *On Not Making Law*, 61 L. & Contemp. Probs. 157 (1998).

47. See Resnik, *supra* n. 3, at 1024-31.

of "judge," "court," and "adjudication" are beginning to lose their coherence. Judges, ever reliant on public funding, are pushing away the very constituencies that they ought to be enlisting. Research on courts reveal that positive views of courts are associated with direct experiences -- as jurors or witnesses as well as litigants -- with courts.<sup>48</sup> By sending litigants elsewhere for judging, judges erode their own basis for popular support.

## V. BALANCING PREFERENCES AND THE RELEVANCE OF PREFERENCES

What are we to make of the conflicting claims made on behalf of and against process? Whose preferences are to count and with what result? How does the conflict of preferences illuminate the relevance of participants' preferences as the polity debates the quantum of process due?

For those with a "consumer" orientation, litigant preferences for process could have substantial sway. Yet many litigants are one-shot players, seeking process and resolution of a particular case but not observing the structure as a whole. However much process may lead to satisfactory experiences, such reports can be at best only a factor in making the systemic political decision about what process ought to be accorded. In contrast, judges are repeat players, and perhaps that fact alone makes their judgments more reliable.

But before according weight to judicial preferences on that basis, the form of play available to judges merits analysis. Until the 1930s, judges were repeat players in that they saw, time and again, the litigation process. But they had no authority to make the rules of the game. Legislatures made procedural rules, and judges did not have the infrastructure of administrative links to enable them to develop policy. Only through changes during the twentieth century did judges gain the institutional capacity that has facilitated their self-education and self-administration. Only in the twentieth century did judges gain the power to develop policy and to prescribe national rules for litigation.<sup>49</sup> Through these political and institutional avenues, judges have found outlets for their concerns about the complexity of judgment, their own limitations, the number of cases, and the failures of lawyers.

Of course, judges and their expanding powers are not the only source of change, and judicial preferences for settlement developed in relationship to a host of other changes. During the same decades, legislatures multiplied causes of action; lawyers developed new models of law firms, and when the rules that judges helped to craft raised the hackles of repeat play defendants, those defendants had the resources to change the rules.<sup>50</sup> Procedural rulemaking has become another arena to be captured by institutional interests. The effects of repeat-player defendants have been tracked

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48. Symposium, *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 Alb. L. Rev. 1307 (1999).

49. See Rules Enabling Act, 28 U.S.C. § 2071 et seq. (1994) (first passed in 1934); Resnik, *supra* n. 3, at 949-96 (analyzing the impact of the rules as forming an institutional identity for the federal judiciary).

50. Galanter, *supra* n. 32.

in the limitations imposed on discovery<sup>51</sup> and in the promotion of non-court based decisionmaking, which both privatizes outcomes and, as Jean Sternlight has explained,<sup>52</sup> reduces the access of less-resourced litigants by limiting aggregation of small claims. Meanwhile, many commercial providers have come to understand the market for "justice services," and some former judges now fill a growing demand for work by someone who bears the title "judge."

Judges then are not only expert in process because of repeated participation in it, judges are situated social actors with their own needs, agendas, and goals. Deborah Hensler focused her discussion on judges whom she saw as attributing to litigants a preference for settlement.<sup>53</sup> While judges may do so, judges are also speaking on behalf of themselves, as overworked public servants seeing a never ending volume of business, as first-hand observers of lawyers' excesses and incompetence, as members of a group with its own goals for status and satisfying work lives.<sup>54</sup>

Once both litigants and judges are understood as self-interested participants in processes that affect them, both groups' preferences can be understood as relevant but not decisive in making the essentially political judgment of what kind of process ought to be due when conflicts emerge. Indeed, given the many pressures on judges, they may be specially situated to develop an antipathy towards process -- a problem that some jurisdictions take into account by building in sabbaticals, rotations to different assignments, and financing of educational opportunities.<sup>55</sup> Were this country to focus its attention on the work-based challenges faced by judges, we might similarly reconceive what we ask from judges, particularly those at the trial level.

But rather than attending to the burdens on judges, this polity focuses on the iconic image of judging, according it a central place in contemporary dramas, both fictional and real. Some of the most heated political battles of recent decades have revolved around the question of who can become a judge. In states in which judges are selected or retained through elections, moneys are now funneled in from across the country in efforts to affect outcomes. In the federal system in which life tenured

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51. See Jeffrey Stemple, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* 64 L. & Contemp. Probs. 197 (2001).

52. See Jean Sternlight, *When Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000).

53. Hensler, *supra* n. 2, at 81, 85.

54. A growing literature addresses the agendas of judges. See e.g. Janet Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. Legal Stud. 647 (1994); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. Legal Stud. 627 (1994); Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993); Resnik, *supra* n. 3.

55. See e.g. Australian Law Reform Commission, Issues Paper 21, *Review of the Adversarial System of Litigation* 3.15, <<http://www.austlii.edu.au/au/other/alrc/publications/issues/21/art03.html>> (describing the availability of sabbatical leaves for judges to pursue research interests); Memorandum from the Canadian Institute for Education (2001) (on file with author) (describing a national fund that provides an annual educational stipend for judges).

judges are nominated by the President, Senate confirmation hearings have become venues to test normative commitments to competing forms of social ordering.

Given this attention paid to the issue of who may serve in the position of the judge, the problem of assessing the pressures towards mediated settlements in lieu of adjudication takes on another dimension. In judgment lies power. Adjudication is a process through which the state regulates conduct, and adjudication also generates the legitimacy of such regulatory efforts. To deflect decisions away from judging is to depoliticize litigants' claims of normative right. Thus, for those who see private ordering and state deregulation as preferable to the regulatory role of the state, mediation offers opportunities to restrict the occasions upon which state actors visibly impose normative judgments about particular courses of conduct.<sup>56</sup> And for those who see in adjudication the promise of applying state normative commitments to the individual interaction, transparent, rule-bound decisionmaking processes offer the occasion for the state to speak to specific instances of alleged wrongdoing.<sup>57</sup>

Here, the language of preference returns, but at a level that reflects political commitments to forms of social organization offering more or less discipline for its participants, more or less space for third-party observation, more or less commitment to explanation addressed to the general polity. Both Deborah Hensler and I worry about the state ceding its authority to the private, less regulated, less transparent spheres of mediated resolution.<sup>58</sup> Such preferences are grounded less in experiences of process at the personal level and more in commitments to process at the political level. Adjudication aspires both to express power relationships and to constrain simultaneously the power of the state and of the individuals acting under its aegis.

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56. Efforts are being made to develop and regularize the practice of mediation. See e.g. National Conf. of Comm. on Unif. State Laws, *The Uniform Mediation Act* (approved Aug. 1, 2001) (hereinafter *The Uniform Mediation Act*); Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. Davis L. Rev. 33 (2001).

57. The shifts back and forth between settlement and trial in the *Microsoft* litigation illustrate the pull towards both private agreement and public pronouncement.

58. Deborah Hensler proposes to bring more process into court-based ADR. See Hensler, *supra* n. 2, at 97-100. I agree and would also retract the license given to non-court based arbitration required by form contracts. Although offering more structured opportunities than does mediation, such contractual arbitrations are the creatures of those drafting the contracts rather than forged by the amalgam of interests at play in crafting more general procedural systems. For other efforts to constrain such practices, see Consumer Credit Fair Dispute Resolution Act of 2000, Sen. 2117, 106th Cong. (2000) (introduced by Senators Feingold and Leahy) (making agreements to arbitrate consumer credit contracts unenforceable unless entered into after the controversy arises); Civil Rights Procedures Protection Act of 1999, Sen. 121, 106th Cong. §§ 2-9 (1999) (exempting employee civil rights claims from mandatory arbitrations unless agreed upon after the dispute arises); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P. 3d 669 (Cal. 2000) (enforcing an agreement to arbitrate employee discrimination claims only if the arbitration imposes no costs greater than would be imposed in court and offers parallel remedies). Compare Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. Ill. L. Rev. 695 (analyzing seventy-five franchisor agreements, concluding that examples of classically unfair clauses were relatively rare) with Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931 (1999) (objecting to such provisions).

It is far from perfect but its imperfections are readily ascertainable. Mediation has yet to confront and to discipline the power that it distributes.<sup>59</sup>

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59. Organizations engaged in providing mediation have recently addressed some concerns through creation of a Uniform Mediation Act, providing model provisions about the confidentiality of proceedings and ethics for mediators. See Richard C. Reuben, *Uniform Mediation Act Becomes a Reality*, Dis. Res. Mag. 31 (Summer, 2001); *The Uniform Mediation Act*, *supra* n. 56.

