

## ESSAY

# LAW IN THE SHADOW OF BARGAINING: THE FEEDBACK EFFECT OF CIVIL SETTLEMENTS

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*Lawmakers, courts, and legal scholars often express concern that settlement agreements withhold important information from the public. This Essay identifies, to the contrary, problematic issues involving the availability of information on nonrepresentative settlements. The theoretical and empirical evidence presented in this Essay demonstrates that, despite the widespread use of nondisclosure agreements, information on settlements is distributed both inside and outside legal communities; the information reaches actors through various channels including the oral culture in legal communities, specialized reporters, professional interest organizations, and media coverage. Moreover, information on private settlement agreements circulates more widely if the agreed compensation in a given settlement exceeds the expected value of the claim at trial. For example, professional organizations highlight novel settlements that are strategically important to lawyers, and special interest groups bring attention to extravagant settlements that are most likely to induce legislative action.*

*The selective availability of information on outlier settlements increases the potential impact of settlement agreements. For instance, in tort disputes, individual settlement concessions make it harder for similarly situated defendants to deflect forthcoming claims. Ambitious trial lawyers will use prior settlements as minimum bargaining thresholds. Plaintiffs in future cases become more demanding and more reluctant to accept settlements below what others have agreed to in prior, analogous settlements. Moreover, due to their noncoercive nature, settlements may frame the normative outlook on particular claims or disputes. Consequently, settlement trends may become normative benchmarks to judges and juries that seek to reinforce such valuations in settlement conferences or trials. The settlement dynamics identified in this Essay provide a novel inroad for possible research on the evolution of remedies and damages in various areas of law.*

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### INTRODUCTION

In a system of precedent, verdicts in individual disputes influence how courts decide future cases. Legal scholars and commentators thus focus on judicial precedent as a driving force of legal change.<sup>1</sup>

Settlements receive considerably less attention in the literature. If considered at all, legal scholarship mostly understands settlements to influence judicial precedent by keeping certain disputes out of the courts. For instance, according to the selection effect, the decision to settle or litigate may influence the path of the law.<sup>2</sup> Repeat players

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<sup>1</sup> See, e.g., Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139, 145–50 (1980) (applying mathematical models of biological evolution to judicial precedent); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393, 395–99 (1979) (using probabilistic analysis to demonstrate that parties will invest more resources to obtain efficient precedent); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 588–94 (1992) (rejecting efficiency claims because judges see only biased samples of potential cases); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 67 (1977) (noting that inefficient precedents generate larger stakes and are more likely to invite litigation); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53 (1977) (explaining how inefficient precedents create asymmetric stakes and are subject to greater selection pressure). As a result, repeat players invest heavily in obtaining favorable precedents. See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y. REV. 95, 149–50 (1974) (arguing that the disparity in legal resources plays a critical role in the evolution of the law); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 808 (1994) (examining the influence of legal professionals on the evolution of the law).

<sup>2</sup> According to the selection effect, disputes selected for litigation concentrate toward decisions where parties’ probability estimates of victory at trial are further away from the decision standard. This observation resulted in the so-called “50 percent rule,” which holds that cases selected for litigation tend toward a 50 percent success rate. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17–24 (1984); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 401–02 (1980). For empirical support and research presenting counterevidence, see, for example, Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent*

with high stakes will settle disputes if an unfavorable precedent might result; they litigate only in the hopes of obtaining positive precedents. As a result, defendants with significant financial stakes in legal disputes come out ahead because of their ability to “purchase” a confidential settlement, avoiding unfavorable judicial precedents.<sup>3</sup>

These observations follow from two conventional viewpoints on settlements. First, it is understood that the likely amount that a court would award at trial determines negotiations. Accordingly, if settlements simply mimic the expected outcomes of disputes at trial, settlements are not relevant as a source of law. Second, it is generally assumed that, due to nondisclosure agreements, information on settlements is confined to the parties involved in the settlement. If confidentiality reigns supreme, settlements have no important public role in matters of civil justice.

Although these perspectives on settlements have some merit, they fall far short of accurately describing the settlement landscape. The premise of this Essay is that the simplified perspective on settlements, as described above, has led scholars to overlook the important, hidden influence that civil settlements have on legal change. Although bargaining occurs in the background of a probable trial outcome, various extralegal considerations often influence the outcome of negotiations. Due to circumstantial factors—for instance, a party’s sensitivity to the negative public attention that a lawsuit generates—settlements may occur at terms that may be below, but also quite likely above, the expected value of a claim at trial. Such novel settlements are of great interest to legal professionals. The theoretical and empirical evidence presented in this Essay demonstrates that, despite the widespread use of nondisclosure agreements, information on such innovative settlements is distributed both inside and outside legal communities, and reaching actors through various channels, including the oral culture

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*Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 235 (1996) (confirming that divergent expectation models closely resemble the fifty percent win rate); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 430–31 (1996) (providing empirical evidence on the basis of an examination of win rates in employment discrimination cases filed during recessions); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 229 (1995) (providing “strong evidence for the selection hypothesis in estimated relationships between trial rates and plaintiff win rates at trial across case types and judges”); Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185, 186–95 (1985) (examining a different model of the distribution of litigation estimates of outcomes that leads to contrary conclusions about the litigation process).

<sup>3</sup> See generally Galanter, *supra* note 1, at 101–02 (suggesting that repeat players are more likely to settle cases in which they expect unfavorable outcomes in an effort to avoid negative precedent).

in legal communities, specialized reporters, professional interest organizations, and media coverage.<sup>4</sup>

In view of these observations, I argue in this Essay that novel civil settlements have a feedback effect on the path of the law. First, prior settlements exert “peer pressure” on similarly situated parties, effectively weakening their position in comparable disputes. Innovative settlements serve as benchmarks to ambitious lawyers, making plaintiffs in future disputes more demanding and thus more reluctant to accept settlements below those that parties in prior settlements received.

Second, due to their noncoercive nature, settlements may frame the normative outlook on particular claims or disputes. A novel legal claim for tort compensation might be considered outrageous at first, but will be perceived as less extraordinary if it has been gratified by a prior concession in a settlement agreement. As a settlement precedent reduces the apparent unreasonableness of any claim, it becomes harder for similarly situated parties to contest similar claims in future cases. Judges, for instance, may interpret settlement precedents as expressive statements regarding the appropriateness of compensation. Once a novel legal claim for tort compensation has been gratified by a similar concession in a private settlement agreement, parties will perceive future claims as less extraordinary. Consequently, if a defendant refuses a settlement proposal that is comparable to concessions made by other defendants in similar circumstances, this defendant might receive little sympathy from a judge or jury in subsequent proceedings. Thus, settlement trends may become normative benchmarks for judges and juries seeking to reinforce such valuations in settlement conferences or trials.<sup>5</sup>

Third, as this Essay describes, a selection bias influences the feedback effect of settlements. Part II describes, from both a theoretical and empirical perspective, how information on private settlement agreements circulates more widely if the agreed compensation in a given settlement exceeds the expected value of the claim at trial. For example, media reports focus on spectacular tort awards, professional organizations highlight novel settlements that are strategically important to lawyers, and special interest groups bring attention to extravagant settlements that are most likely to induce legislative action. The selective availability of information about settlements increases the potential costs of settlement agreements. High-value settlement awards circulate more broadly and have a disproportionate effect on the perceptions of judges and juries. This reduces the maximum amount that a defendant will be willing to award in any settlement agreement

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra* Part III.

but leaves the minimum settlement demand of the plaintiff unaffected. The likely feedback effect of a prior settlement on future disputes thus increases the defendant's stake in the dispute, possibly inducing additional litigation.

This Essay makes several contributions to the literature. First, the feedback effect of settlements complicates the choice between settlement and litigation. In the standard analytical model of litigation,<sup>6</sup> settlements afford litigants the opportunity to avoid the potential costs of adverse judicial precedents.<sup>7</sup> If settlements have a feedback effect, as argued below, this reduces the value of settlement as an alternative to trial. Second, the feedback effect of settlement provides avenues for further research into the evolution of remedies in several areas of law. Because information on outlier settlements involving high awards or novel remedies is distributed more widely, prior settlement concessions may create sustained pressure towards higher awards and novel remedies, resulting in a gradual expansion of the legal system. Third, I document how information on innovative settlements is distributed both inside and outside legal communities. Settlement information is spread inside large law firms, through informal ties among lawyers and judges, as gossip in local bar associations, and through strategic disclosures by interest groups. The circulation of information on settlement puts into doubt the supposed distinction between the public sphere of trials and the private, confidential nature of set-

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<sup>6</sup> The leading economic models on settlements include, for example, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 337–43 (7th ed., 2007); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 283–91 (1973) (developing an economic model to measure “[t]he trading behavior of two individuals in the presence of uncertainty” and applying it in the context of a lawsuit); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 190 (1993) (presenting a model that attempts to “extend[ ] the standard litigation model by taking into account informational constraints and efforts to rationally predict trial outcomes”); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 99 (1971) (examining variables that influence criminal settlements); Priest & Klein, *supra* note 2, at 17–24; Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 69–73 (1982) (comparing four methods of apportioning litigation costs and describing how those methods affect parties’ litigation decisions).

<sup>7</sup> This option is especially likely if parties have asymmetric stakes in the dispute. If the defendant is a repeat player and the plaintiff is not, the former will be more likely to offer a premium to the plaintiff in order to bury the dispute in a confidential settlement agreement. For an economic model, see Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661, 674–75 (1999) [hereinafter Daughety & Reinganum, *Hush Money*] (concluding that a party who is motivated to limit the diffusion of information surrounding settlement negotiations loses considerable bargaining power); Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlement Bargaining: Confidentiality and Correlated Culpability*, 33 RAND J. ECON. 587, 588 (2002) [hereinafter Daughety & Reinganum, *Informational Externalities*] (finding that in cases of correlated liability, the first plaintiff can free-ride off of future plaintiffs by extracting a premium in return for secrecy).

tlements.<sup>8</sup> This Essay intends to be a starting point for a renewed discussion of the role of confidential settlements within the civil justice system. It deliberately invites and acknowledges the need for future development and refinement.

This Essay unfolds as follows. Part I briefly reviews the role of nonlegal factors on the creation of novel settlement outcomes. These nonlegal factors include the role of lawyers as imperfect agents, the influence of varying attitudes toward risk, the role of headliner premiums, and collective action problems among defendants. As a result of these nonlegal determinants of bargaining, settlement outcomes may depart significantly from the expected value of trial outcomes, creating novel solutions to legal disputes. Part II illustrates how information on innovative settlements becomes disbursed both inside and outside of legal communities. Part III explores the authority of settlements as a source of informal precedent. I examine how juries, judges, and lawyers make inferences based upon information regarding novel settlements. Part IV analyzes how the feedback effect of settlements affects litigants' choice between settlement and litigation. I revise the traditional models on the choice between settlement and trial in light of the feedback effect of settlements. Part V considers the virtues and vices of mandatory disclosure statutes given the feedback effect of settlements. Part VI concludes.

## I

### SETTLEMENTS OUTSIDE THE SHADOW OF THE LAW

If settlement outcomes simply reflect the expected outcome of disputes at trial, then settlements are not relevant as a source of law. Indeed, a famous maxim states that “bargaining occurs in the shadow of the law” because parties derive settlement offers from the likely amount that a court would award at trial. However, a more sophisticated understanding of settlement dynamics has amended this basic perspective on settlements. It is now widely understood that various nonlegal factors often influence negotiated outcomes,<sup>9</sup> leading to set-

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<sup>8</sup> See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2624 n.27 (1995) (presenting anecdotal evidence that “lawyer buyout” has occurred in several high profile mass tort cases including asbestos); Heather Waldbeser & Heather DeGrave, Note, *A Plaintiff’s Lawyer’s Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 826 (2003) (arguing that “courts should decide whether such a [secret] settlement would threaten the public interest”).

<sup>9</sup> In their landmark Essay, Robert Mnookin and Lewis Kornhauser first acknowledged the effect of nonlegal factors on negotiated outcomes. They suggest that negotiations may fail because of parties’ different abilities to bear litigation costs, diverse attitudes toward risk, asymmetric information, emotions, and strategic behavior. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 973 (1979) (suggesting two alternative models of bargaining: a strategic model based on threat and bluff and a norm-centered model relying on legal and social

tlement outcomes that differ from the expected value of a claim at trial. These factors, which are unrelated to the substantive merits of a legal dispute, may cause “novel” settlements that depart from the expected value of a claim at trial. Due to these extralegal considerations, the terms of private settlement agreements may often be below but also quite likely above legally available awards. As a result, settlement trends may provide interesting departures from the conventional expectation of the available legal remedies. This Section briefly explores the influence of extralegal considerations on settlement bargaining. In the next Section, I describe how information on innovative settlements is shared both inside and outside legal communities. The remainder of this Essay examines the impact of novel settlements on the legal process more generally.

To illustrate the role of nonlegal factors on settlement outcomes, consider, for example, the influence of cognitive limitations on bargaining. Economists have developed robust models on the role of asymmetric information<sup>10</sup> and strategic behavior,<sup>11</sup> describing how parties may fail to accurately predict either the outcome of trial or the response of the opposing party to their negotiation demands. In these instances, litigation occurs because one of the parties either overestimates his or her legal claim (thereby dissolving the bargaining range)<sup>12</sup> or overestimates his or her ability to extract a larger share from the opposing party (thereby causing a bargaining breakdown).<sup>13</sup>

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norms); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 801–04 (1984) (emphasizing the role of economic, legal, social, psychological, and ethical considerations in settlements).

<sup>10</sup> On information costs as an explanation for litigation see, for example, Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29, 42 (1995); Hylton, *supra* note 6, at 190; Kathryn E. Spier, *The Dynamics of Pretrial Negotiation*, 59 REV. ECON. STUD. 93, 97–99 (1992).

<sup>11</sup> See Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 227–34 (1982) (developing a strategic model for analyzing settlement negotiations).

<sup>12</sup> A number of economic models explain the occurrence of litigation in view of diverging expectations regarding the outcome of trial. See sources cited *supra* note 6. See also Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 406–09 (1984) (developing a model for measuring the effect of informational asymmetries in settlement negotiations); Patricia Munch Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 347–51 (1983) (using data on individual medical malpractice claims to empirically test established theory on the settlement process).

<sup>13</sup> For an example of a model of litigation where both parties are overly optimistic regarding the value of the claim at trial, see Amy Farmer & Paul Pecorino, *Pretrial Negotiations with Asymmetric Information on Risk Preferences*, 14 INT'L REV. L. & ECON. 273, 274–76 (1994). See also Cooter, Marks & Mnookin, *supra* note 11, at 227–34; Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 341–78 (1991) (examining earlier strategic bargaining frameworks in light of data on settlement negotiations in both personal injury cases and commercial disputes).

Because of their preoccupation with explaining why and when litigation occurs, economic theorists tend to focus almost exclusively on the case where a party overextends or incorrectly inflates his or her claim in a legal dispute, leading to bargaining breakdown. However, although errors might lead parties to overestimate a claim, they might likewise lead parties to *underestimate* the value of their claim or their bargaining strength. As a result, plaintiffs or defendants may well settle on terms that are less favorable than what would have been possible absent such information of bargaining weakness. Thus, while errors are the dominant explanation for failed negotiations, relative information and bargaining strengths may also lead to a subset of successfully concluded settlements in which plaintiffs (1) extract awards that exceed the expected value of the case at trial, or conversely (2) settle at terms that are below the expected value of the case at trial.

Several other nonlegal determinants of bargaining lead to settlements that depart from the expected value of trial.<sup>14</sup> For instance, idiosyncratic settlements are more probable when a disputant is concerned with maintaining a professional reputation. A party may be able to exploit a defendant's need to avoid the negative attention of court proceedings and induce settlement offers that exceed legally available remedies. Concerns with the "headliner effect" of a dispute may thus lead to settlement outcomes that are above the expected value of the case at trial.<sup>15</sup>

The principal-agent relationship between an attorney and his or her client might also lead to deviations between a settlement outcome and the expected value of trial. While the principal-agent relationship has been analyzed most thoroughly with regard to the decision to settle or litigate,<sup>16</sup> diverging interests between lawyers and clients also impact the content of settlements. Processing a high volume of cases often best serves the interests of plaintiffs' lawyers who work on a con-

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<sup>14</sup> Lack of information on settlements in most litigation data sets is a major obstacle to testing and measuring differences in success rates and compensation amounts between settled and tried disputes. Some studies have reported settlements below trial rates. See JAMES S. KAKALIK, PATRICIA A. EBENER, WILLIAM L.F. FELSTINER, GUS W. HAGGSTROM & MICHAEL G. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xvi-xix (1984) (presenting data on average compensation in asbestos litigation and comparing claims that settled before trial with claims that went to trial). But see David S. Kaplan, Joyce Sadka & Jorge Luis Silva-Mendez, *Litigation and Settlement: New Evidence from Labor Courts in Mexico*, 5 J. EMPIRICAL LEGAL STUD. 309, 309 (2008) (finding that in labor disputes workers recover less than 30 percent of their claims but receive higher percentages of their claims in settlements than in trial judgments).

<sup>15</sup> Note that other extralegal factors such as time and financial constraints might lead disputants to settle at terms below the value of the case at trial.

<sup>16</sup> See Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 111 (1986) (examining the effect of Rule 68 of the Federal Rules of Civil Procedure—which requires unsuccessful plaintiffs to partially compensate defendants for litigation costs—on settlement negotiations).



tingency fee basis.<sup>17</sup> Similarly, defense attorneys have strong incentives to settle disputes at rates below the expected value of the claim at trial. Conversely, trial lawyers often have much to gain from pushing for settlements that exceed the legally available remedies at trial. First, because spectacular settlements attract more attention in legal communities, trial lawyers may try to settle cases above the going trial rate. Second, another principal-agent problem relates to the notion that lawyers, as a group, benefit from litigation and higher recoveries in lawsuits,<sup>18</sup> while defendants are often more narrowly concerned with the individual case.<sup>19</sup> Third, in some areas of law, such as personal injury and products liability, the concept of protecting plaintiffs is linked to public service and the pursuit of civil justice against corporations. In these circumstances, plaintiffs' lawyers have clear incentives to push the frontiers of the law. These goals are served by landmark court victories, but also by obtaining settlement awards and remedies that are beyond currently available legal remedies.

In sum, extralegal factors may help drive the terms of private settlement agreements below or above legally available awards. The next Section documents how information on such novel settlements circulates both within and outside legal communities.

## II

### ACCESS TO INFORMATION ON SETTLEMENTS

Although a subset of the literature assumes that settlement information remains confined to the parties in a dispute,<sup>20</sup> this Essay challenges the notion that settlement agreements remain unknown to anyone but the parties involved.<sup>21</sup> I argue instead that, despite the widespread use of nondisclosure agreements, information on settle-

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<sup>17</sup> “[I]f the lawyer is compensated according to the conventional contingent fee arrangement . . . the lawyer may have an insufficient incentive to bring the case, may spend too little time working on it if it is brought, and may encourage a settlement when the client would be better off going to trial.” A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 165 (2003) (proposing a modified contingent fee system in which a third party compensates the lawyer for a certain fraction of his costs, in return for which the lawyer pays an up-front fee).

<sup>18</sup> See Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 INT'L REV. L. & ECON. 381, 393–95 (1992) (analyzing the level of legal complexity that attorneys prefer when selecting cases). Note that higher levels of potential liability also increase the value of the services offered by defense lawyers.

<sup>19</sup> This applies especially if defendants are not repeat players. See Rubin & Bailey, *supra* note 1, at 810.

<sup>20</sup> See *infra* Part V.

<sup>21</sup> “Because most attorneys will not draft a settlement agreement without some sort of provision for confidentiality, scholars of the litigation system have come to characterize settlements as ‘invisible.’” Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 664–65 (2001) (citing Gross & Syverud, *supra* note 13, at 340).

ments is available to those legal professionals for whom such information is most valuable. Information on innovative settlements is distributed both inside and outside legal communities, reaching actors through various channels including the oral culture in legal communities, specialized reporters, professional interest organizations, and mass media coverage. This Part briefly surveys the principal sources of settlement information. An analysis of the incentives of the parties involved suggests that information on novel settlements featuring high awards and novel remedies is especially widely distributed. I also report empirical findings on information sharing gleaned from a survey of trial lawyers conducted for this Essay. Information on settlements circulates more widely inside legal communities than generally assumed. Lawyers generally admit that “word gets out” on the amount and terms of many categories of settlements. Within local bar associations, lawyers communicate with one another and try to obtain information and advice about settlements that are relevant to current disputes.

#### A. Oral Culture

Although confidentiality clauses limit the type of settlement information that lawyers can informally share, nondisclosure agreements do not guarantee absolute secrecy. First, courts sometimes require the disclosure of information contained in confidential settlements when the information is important to efficient discovery in subsequent lawsuits.<sup>22</sup> Second, statutes in many states restrict the parties’ ability to keep certain types of settlement agreements confidential—for instance, when public safety issues are involved.<sup>23</sup> Third, lawyers may disclose many aspects of concluded settlements without breaching confidentiality clauses. Lawyers may be permitted to refer to settlement awards in terms of the category of the claim and the size of the award without disclosing the identity of the parties or personalized information related to the case.<sup>24</sup> Finally, possible violations of confidentiality agreements will often remain undetected because of the shared interests and the repeated interaction among lawyers.

Within these confines, lawyers and judges can draw upon their experience and personal relations to keep abreast of novel settle-

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<sup>22</sup> See, e.g., *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993) (holding that a court can mandate individuals bound by a nondisclosure agreement as part of a settlement to release information if the disclosure may enhance discovery in subsequent lawsuits without causing substantial injury to the party opposing disclosure).

<sup>23</sup> See *infra* Part V.

<sup>24</sup> Cf. *Waldbeser & DeGrave*, *supra* note 8, at 820 (“[C]onfidential settlement agreements contain little or no substantive information pertaining to the allegations and usually seal only the amount paid to the plaintiff.” (citing Robert N. Weiner, *Protective Orders and Nest-Feathering*, LEGAL TIMES, Sept. 23, 1991, at 29)).

ments. Since lawyers increasingly specialize, they are able to draw upon a larger selection of relevant prior settlements. Similarly, judges can relate to their experiences as mediators in judicial settlement conferences when they preside over settlement discussions. The heightened involvement of judges in the promotion of settlements, the trend of managerial judging, and the role of specialized courts has further amplified the experience of judges and their stock of relevant knowledge on settlement practices.<sup>25</sup>

The rise of large law firms has also increased the accessibility of information on settlements.<sup>26</sup> One of the comparative advantages of a large law practice is the opportunity to share a great deal of sensitive information among the partners and associates in the firm. Information on emerging settlement practices, as gathered by the various partners and associates of the firm, is an important human capital asset of a large law firm.<sup>27</sup> Similarly, individual plaintiff's lawyers establish various networks to build expertise and exchange professional information.<sup>28</sup>

## B. Specialized Reporters

Specialized literature also contributes to the distribution of information on settlements. Various professional publications provide focused settlement information regarding certain types of injuries, fields of practice or jurisdictions. These publications include *Settlements by Categories*, *What's it Worth*, *Verdicts & Settlements in the Wisconsin Circuit*, *North Texas Reports*, etc.<sup>29</sup>

Printed publications on jury verdicts and settlement awards represent a niche in the legal publishing market.<sup>30</sup> In addition, settlement reporters are blossoming on the Internet. Various web sites

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<sup>25</sup> See discussion *infra* Part III.A.

<sup>26</sup> See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM*, 77-161 (1991) (documenting changes in the American legal profession that accompany the rise of large law firms with intensive specialization).

<sup>27</sup> See David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1229-30 (explaining how, in cases of correlated liability, attorneys can apply information and expertise from prior settlements when pursuing cases for other potential clients). While this Essay focuses mostly on the role of plaintiffs' lawyers, the potential for the pooling of settlement information is, of course, also present in concentrated industries where a few large law firms represent the major defendants. This observation is in line with the pre-existing notion that repeat players, who are often defendants in major tort cases such as products liability disputes, control the direction of dispute outcomes over time. See Galanter, *supra* note 1, at 97-114. In this regard, the control over settlement trends is another contributing factor to the presumed control of major repeat player-defendants over the path of the law. See *id.* The examples in this Essay focus mostly on plaintiffs' influence on settlement trends.

<sup>28</sup> See *infra* Part II.C.

<sup>29</sup> For a detailed list of these publications, see Fromm, *supra* note 21, at 708-34.

<sup>30</sup> See *id.* at 684, 688.

contain extensive databases including detailed information on jury verdicts and settlement awards.<sup>31</sup> Modern technology increases opportunities for networking, enhancing the awareness of legal trends and novel developments within legal communities.

The success of these expensive publications suggests that lawyers particularly value information on settlements. Given the interest of trial lawyers in pushing the boundaries of law, information on path-breaking settlements is particularly relevant to these publications and their subscribers.<sup>32</sup> Settlement reporters “rely heavily on attorneys to volunteer information about cases they have recently settled, many of which will not have been approved by the court or reduced to an unsealed judgment incorporating the settlement terms.”<sup>33</sup>

### C. Professional Interest Organizations

Professional organizations are a major source of information on settlements. For instance, the American Association for Justice (AAJ, formerly the Association of Trial Lawyers of America) collects information and encourages trial lawyers to share their professional experiences in publications<sup>34</sup> and at conferences.<sup>35</sup> The AAJ provides a research and information service, maintains a repository of data relating to cases tried by its members,<sup>36</sup> organizes field-specific seminars and conferences,<sup>37</sup> and coordinates litigation groups that specialize in individual products or product areas.<sup>38</sup> Membership publications, such as the *Products Liability Reporter*, collect available briefs and settlement verdicts from surveys.<sup>39</sup>

### D. Media Coverage of Settlements

Media coverage is another source of information on settlements. Reports on business and tort settlements have become a regular fea-

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<sup>31</sup> See *id.* at 685–86.

<sup>32</sup> Cf. *id.* at 693 (“[P]ublishers are also less interested in publishing low-end settlements.”).

<sup>33</sup> *Id.* at 688–89.

<sup>34</sup> See American Association for Justice, *Professional Resources: Publications*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/502.htm> (last visited Apr. 3, 2010).

<sup>35</sup> See American Association for Justice, *Professional Resources: Conventions*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/867.htm> (last visited Apr. 3, 2010).

<sup>36</sup> See American Association for Justice, *Professional Resources: The AAJ Exchange*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/677.htm> (last visited Apr. 3, 2010).

<sup>37</sup> See American Association for Justice, *Professional Resources: Continuing Legal Education*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/484.htm> (last visited Apr. 3, 2010).

<sup>38</sup> See American Association for Justice, *Professional Resources: Litigation Groups*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/1150.htm> (last visited Apr. 3, 2010).

<sup>39</sup> See American Association for Justice, *Publications: Products Liability Law Reporter*, <http://www.justice.org/cps/rde/xchg/justice/hs.xml/506.htm> (last visited Apr. 3, 2010).

ture in popular news reporting.<sup>40</sup> The increased attention to settlements in the general press is part of the expansion of law and legal news into mainstream culture.

Unfortunately, media coverage of the legal system is highly selective and tends to focus on outlier cases where high, spectacular awards govern. The extent of media distortion of legal news appears clearly in a content analysis of 249 major news magazines by Bailis and MacCoun.<sup>41</sup> Compared to objective data on tort cases, magazines considerably overrepresent controversial forms of litigation, such as product liability and medical malpractice, the plaintiff victory rate at trial, and median and mean jury awards.<sup>42</sup> A series of studies have found similar distortions in media representations of the outcomes of litigation in other aspects of tort litigation,<sup>43</sup> demonstrating a strong bias with regard to the types of cases and the size of awards and settlements that receive attention in the media.<sup>44</sup>

Bias in the media's coverage of settlements is, in part, a product of strategic disclosures of settlement information. A press leak on a spectacular settlement can be a useful instrument to influence the public perception of certain causes.<sup>45</sup> On the one hand, the release of information on a settlement concession may hurt some producers of defective products if it induces other claims by similarly situated victims.<sup>46</sup> On the other hand, news attention to outlier settlements or

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<sup>40</sup> See Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64, 64–67 (1996) (examining the level of objectivity exhibited by popular media coverage of tort litigation from 1980 to 1990).

<sup>41</sup> See *id.*

<sup>42</sup> See Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 541 (2006).

<sup>43</sup> See, e.g., Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 771–74 (1995) (comparing data on cases and media coverage of pain and suffering); Neil R. Feigenson & Daniel S. Bailis, *Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy*, 7 PSYCHOL. PUB. POL'Y & L. 444, 477–78 (2001) (comparing litigation data to media reports on airbag safety); Steven Garber & Anthony G. Bower, *Newspaper Coverage of Automotive Product Liability Verdicts*, 33 LAW & SOC'Y REV. 93, 119–21 (1999) (comparing data on automotive product liability cases to media reports of these cases); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 263–64 (2004) (comparing litigation data to media reports on Title VII discrimination).

<sup>44</sup> See Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 232–34 (1998); see also Fromm, *supra* note 21, at 681 (“Despite the depth of information about a particular settlement that the mass media might offer, its coverage is usually limited to high-profile cases, which tend to lie at the monetary and/or dignitary extremes. The cases covered by the media, therefore, tend not to represent most cases that eventually settle, providing a distorted foundation for case evaluation.”) (footnote omitted).

<sup>45</sup> I am grateful to Judge Guido Calabresi for suggesting the strategic aspect of settlement disclosures and press leaks.

<sup>46</sup> Interestingly, press memos on settlement announcements usually include a disclosure that the defendant does not admit guilt or liability, suggesting that the decision to compensate stems from goodwill or other considerations that are unrelated to the legal

spectacular jury verdicts might bolster the public perception of a “litigation explosion” in an overly litigious society.<sup>47</sup> Settlement disclosures may thus increase public sympathy for tort reform. Proponents of such reform can use stunning jury verdicts and settlements to frame or anchor awards in press releases and advertising.<sup>48</sup> Arguably, examples of “greedy plaintiffs and irrational juries” offend popular standards of equity, justice, and morality, contributing to the perception that reform is needed.<sup>49</sup>

### E. Empirical Evidence

This section reports the findings of a survey conducted for this Essay to assess the accessibility to and distribution of information on settlements among lawyers.<sup>50</sup> One-thousand-three-hundred lawyers were invited via e-mail and telephone to complete an online survey or phone interview.<sup>51</sup> Lawyers were randomly selected (without regard to field of practice) from the Florida and New York listings of the Martindale Yellow Pages and the Verizon Superpages. Approximately 57 percent of respondents were defendant’s lawyers, while 20 percent identified themselves as plaintiff’s lawyers. Twenty-five percent of lawyers in the survey were products-liability lawyers.<sup>52</sup>

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claim or the issue of liability. See, e.g., Gregg Blesch, *Fla. Practice, Former Director Agree to \$12 million Settlement*, MODERNHEALTHCARE.COM, Mar. 23, 2010, <http://www.modernhealthcare.com/apps/pbcs.dll/article?AID=/20100323/NEWS/303239967#> (“Scarborough and the practice dispute the allegations in the agreement, which stipulates that they don’t admit liability by settling.”); John O’Connor, *Sanford Pays Fine for Ethics Breach, Admits No Wrongdoing*, MIAMI HERALD, Mar. 27, 2010, <http://www.miamiherald.com/2010/03/19/1537242/sanford-pays-fine-for-ethics-breach.html>; Sontaya Rose, *Big Fresno Fair Settles E-Coli Poisoning Lawsuit*, ABC NEWS, Mar. 26, 2010, <http://abclocal.go.com/kfsn/story?section=news/local&id=7353475>.

<sup>47</sup> See 1 COMM. TO STUDY MED. PROF’L LIAB. & THE DELIVERY OF OBSTETRICAL CARE, INST. OF MEDICINE, *MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE* 3 (1989) (discussing the relationship between explosive growth in medical malpractice litigation and press attention based on large jury awards and settlements); Deborah L. Rhode, Essay, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 463–64 (2004) (asserting that selective reporting of exceptional recoveries and frivolous suits leads to misperceptions of the likelihood of large recoveries).

<sup>48</sup> For example, there has been an emergence of websites that post lawsuit settlements daily and provide updates on the amount of the settlement awards. See, e.g., Lawyers and Settlements, <http://www.lawyersandsettlements.com> (last visited Apr. 3, 2010).

<sup>49</sup> MacCoun, *supra* note 42, at 558. However, such campaigns may backfire “because they present[ ] descriptive normative information that conflict[s] with the stated injunctive messages.” *Id.* at 559. Indeed, if jurors take such press releases as reality and infer community standards from such coverage, media distortion might sustain the expansion of tort awards and remedies. See discussion *infra* Part III.

<sup>50</sup> The survey is on file with the Cornell Law Review.

<sup>51</sup> The survey included twelve statements. Respondents indicated on a 7-point Likert scale the extent to which they agreed or disagreed with each statement.

<sup>52</sup> Other fields represented were corporate law (3.1%), contract law (3.1%), professional liability (10.3%), class action litigation (2.1%) and various others (58%). The high amount of products-liability lawyers in the sample is partially due to the higher representa-

The data gathered from 114 responses<sup>53</sup> supports the notion that information on settlements widely circulates in legal communities. First, lawyers acknowledge that it is important to be knowledgeable about settlements and are convinced that most lawyers possess relevant settlement information. Ninety-six percent of litigators agree that “[a] lawyer must keep an eye on developments in settlement awards in their field of practice.”<sup>54</sup> Seventy-seven percent of the respondents agree or “fully” agree with the statement that “[l]awyers are generally aware of the trends in settlement awards in their field of practice.” Strikingly, from the data it appears that respondents considered such information available despite nondisclosure agreements. A majority of respondents agree that lawyers have “knowledge of prior settlements in their field of practice” even when confidentiality agreements apply (see Table 1, below). Lawyers indicate that they possess knowledge about prior settlements in their field of practice especially when “the award exceeds the expected value of a case at trial” (56%).<sup>55</sup> Only a relatively small group of respondents disagreed that settlement information is not available when confidentiality agreements apply.<sup>56</sup>

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tion of products-liability lawyers in the Martindale Yellow Pages and the Verizon Superpages. Roughly measured, products-liability lawyers account for almost 40 percent of areas of practice.

<sup>53</sup> A 10 percent response rate is within the general expectation for a survey of this nature. On response rates, see generally Frederick Wiseman, *Methodological Bias in Public Opinion Surveys*, 36 PUB. OPINION Q. 105, 106–07 (1972) (studying whether differences in the method used to collect data impacts response rates).

<sup>54</sup> Of total respondents that agreed: 47 percent agreed strongly, 40 percent agreed and 9 percent agreed slightly. Only one respondent disagreed (strongly).

<sup>55</sup> I conducted a paired samples *t*-test for the statements “Despite confidentiality agreements, lawyers have knowledge of prior settlements in their field of practice (‘when the award exceeds the expected value of a case at trial’ and ‘when the award is below the expected value of a case at trial’).” This analysis reveals a significant effect,  $t(104) = 4.23$ ,  $p < .001$ , indicating that respondents agree more strongly with this statement when the award exceeds the expected value of a case at trial ( $M = 1.04$ ) in comparison to when the award is below the expected value of a case at trial ( $M = .47$ ). Note that these results reflect subjective values. Therefore, the data is subject to possible biases, such as overconfidence, that lead people to think they know more than they actually do. For a collection of studies on information bias, see generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

<sup>56</sup> Four percent of respondents indicated that they strongly disagreed with the statement that “despite confidentiality agreements, lawyers are generally aware of the trends in settlement awards in their field of practice.”

TABLE 1. SETTLEMENT INFORMATION AND CONFIDENTIALITY

*"Despite confidentiality agreements, lawyers have knowledge of prior settlements in their field of practice."*

	<i>strongly disagree</i>	<i>disagree</i>	<i>disagree slightly</i>	<i>do not agree nor disagree</i>	<i>agree slightly</i>	<i>agree</i>	<i>strongly agree</i>
<i>a. Award &gt; EV Trail</i>	2% (2)	9% (10)	5% (5)	18% (19)	16% (17)	36% (38)	14% (15)
<i>b. Award &lt; EV Trail</i>	2% (2)	15% (16)	12% (13)	22% (23)	16% (17)	25% (26)	8% (8)

Second, lawyers confirm that they obtain information on settlements from conversations with other lawyers. Seventy percent of lawyers talk among themselves about settlements in their field of practice. Ninety-one percent of respondents state that they discuss "unusual settlements (concerning the award or remedy)." Ninety-four percent of lawyers state that partners inside law firms discuss "settlements they were involved in." Moreover, it appears that lawyers talk among themselves about prior settlements in their field of practice, especially when "the award exceeds the expected value of a case at trial" (out of 89% positive responses, 49% strongly agree), as well as (but again to a lesser extent)<sup>57</sup> when the award is "below the expected value of a case at trial" (out of 71% positive responses, 26% strongly agree).

TABLE 2. CONTENT OF SETTLEMENTS &amp; INFORMATION EXCHANGE

*"Lawyers discuss settlements in their field of practice."*

	<i>strongly disagree</i>	<i>disagree</i>	<i>disagree slightly</i>	<i>do not agree nor disagree</i>	<i>agree slightly</i>	<i>agree</i>	<i>strongly agree</i>
<i>a. Award &gt; EV Trail</i>	2% (2)	3% (3)	1% (1)	5% (5)	6% (7)	34% (37)	49% (53)
<i>b. Award &lt; EV Trail</i>	2% (2)	8% (8)	10% (11)	8% (9)	11% (12)	34% (36)	26% (28)

Judges also exchange informal information regarding legal disputes. In a survey summarized by Marc Galanter, half of the judges answered that they "occasionally" learn about jury verdicts in trial courts other than their own through publications or informal conversations.<sup>58</sup> The study found that one-third of judges are aware of the

<sup>57</sup> A paired samples *t*-test for the statement "Lawyers talk among themselves about settlements in their field of practice" indicates a significant effect,  $t(105) = 5.06$ ,  $p < .001$ , revealing that respondents agree more with this statement when the award exceeds the expected value of a case at trial ( $M = 2.08$ ) compared to when the award is below the expected value of a case at trial ( $M = 1.27$ ).

<sup>58</sup> See Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 234 & n.152 (1990) (citing unpublished data collected by former University of Wisconsin Law School student Christopher J. Brown).



terms of settlements in their own court in more than 60 percent of settlements.<sup>59</sup> One-third of the participating judges acknowledged that they find out about the terms of settlements in roughly 30 to 60 percent of the cases, whereas one-third estimated that they are aware about less than 30 percent of settlements in their court.<sup>60</sup> The empirical study conducted for this Essay illustrates that lawyers expect that judges share information regarding settlements. Sixty percent of the participating lawyers indicate that they believe that “judges talk among themselves about settlements,” while only 10 percent of respondents disagree.<sup>61</sup> Seventy-two percent of participating lawyers believe that “[j]udges are aware of trends in settlements in their district.”

\* \* \*

To conclude, the theoretical and empirical evidence that I present in this Part suggests that the supposed strict division between the private realm of settlement agreements and the public forum of trial outcomes is naive. First, although information on settlement agreements is not generally available to the public, as opposed to published verdicts, legal professionals—to whom such information is most relevant—are aware of emerging settlement trends. The availability of information on settlements enables the feedback effect discussed below in Parts III and IV.

Second, the distribution of information on settlements among trial lawyers is biased towards outlier concessions. As suggested by the survey results, lawyers are more likely to discuss remarkable, high-value settlements that generate higher fees for trial lawyers and open future opportunities in negotiations. Similarly, the services of specialized settlement reporters and professional organizations are more valuable if they offer new exchange opportunities resulting from information on high awards or novel remedies in settlements. Finally, popular media reports tend to focus on spectacularly generous rewards or novel remedies. Third, as I will describe in more detail in Part III, the selective availability of settlement information plays an important role in the subtle influence that novel settlements have on the path of the law.

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<sup>59</sup> See *id.* at 234 n.152. The remaining responses were divided equally between “less than 30 percent” and “between 30 to 60 percent.” *Id.*

<sup>60</sup> See *id.*

<sup>61</sup> The spread is as follows: while 30 percent of lawyers report that they do not agree or disagree, 60 percent stated that they agree (16% agree slightly, 30% agree, 14% strongly agree).

## III

## THE FEEDBACK EFFECT OF SETTLEMENTS

Although settlements lack a formally binding power, novel settlements may influence the path of the law in several ways.

First of all, prior settlements influence future settlements. Prior settlement concessions increase the demand for future awards. Plaintiffs in future cases become more demanding and more reluctant to accept settlements below what has previously been conceded in analogous settlements. Ambitious trial lawyers will use prior settlements as minimum bargaining thresholds. These demand-side dynamics are most prominent in class action and major state-initiated litigation. Here, major settlement concessions in one state often invigorate similar claims in other states. Recent examples include the nationwide litigation campaigns against the tobacco industry<sup>62</sup> and the antitrust suits against the Microsoft Corporation.<sup>63</sup> In both instances, the concentrated efforts of the trial lawyers involved in prior settlements<sup>64</sup> culminated in a nationwide demand for restitution.

Prior settlement concessions will make future negotiations harder for the defendant or for similarly situated parties in future disputes. But novel settlements and settlement trends may also affect adjudication. The following two subsections describe the subtle influence of civil settlements on trial outcomes.

#### A. The Framing Effect of Settlements

Although adjudication and settlements were once considered entirely distinct categories, today they have become increasingly interrelated due to the expanding role of judges in the settlement process.<sup>65</sup> Procedural reforms have considerably amplified the judge's role in

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<sup>62</sup> See Milo Geyelin, *States Agree to \$206 Billion Tobacco Deal*, WALL ST. J., Nov. 23, 1998, at B13 (discussing various states' settlement efforts with the tobacco industry). These efforts culminated in a groundbreaking agreement between the government and the tobacco industry; however, individual litigation against the tobacco companies continues. See *id.* For the settlement agreement in question, see Master Settlement Agreement, *available at* <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/> (follow the "Master Settlement Agreement" hyperlink; then follow the "Download" hyperlink).

<sup>63</sup> On November 6, 2001, the United States and Microsoft agreed to a revised proposed Final Judgment to resolve the United States' civil antitrust case against Microsoft. See Information on the *United States v. Microsoft* Settlement, *Antitrust Case Filings*, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, <http://www.usdoj.gov/atr/cases/ms-settle.htm> (last visited Apr. 3, 2010).

<sup>64</sup> For instance, trial attorneys, working with several states on their lawsuits against the tobacco companies, coordinated the nationwide tobacco litigation. See *A Review of the Global Tobacco Settlement: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. 1 (1997) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

<sup>65</sup> See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1348 (1994).

brokering settlements.<sup>66</sup> Judges reach beyond adjudication and are also involved in pretrial settlement conferences, dispute processing, mediation, and evaluations of settlements.<sup>67</sup>

The increased involvement of judges in settlement oversight today expands the potential shadow of prior settlements over future disputes. The judge's role as a settlement intermediary in settlement conferences lies partly in framing the dispute within the wider context of judicial precedents and all past and present disputes in his or her court. For judges, then, prior settlements are a benchmark or reference point from which to consider the merits of future, similar cases. This might affect disputes in several ways.

First, members of the judiciary obtain valuable information during settlement conferences. In product liability cases, for instance, a prior settlement agreement might provide important information on standards of care, production standards, bargaining thresholds, and other data important to the resolution of a tort claim. The bargaining position of other defendants in similar disputes may become weakened as such information surfaces. In the course of judicial intervention, judges may obtain information on industry customs, cost structures, incentives and strategies. Perhaps for this reason, empirical studies indicate that lawyers have a favorable disposition toward judicial intervention in settlement negotiations.<sup>68</sup> In pretrial negotiations, judges can offset some of the information advantages that large law firms have over individual lawyers. For an inexperienced lawyer, a judge offers access to information on industry conditions and behavior that would otherwise be difficult to obtain.<sup>69</sup> Judges provide negotiators with access to settlement standards and reduce the opportunities to exploit information asymmetries among litigants.<sup>70</sup>

Second, settlement conferences also provide lawyers with opportunities to inform the opposing party and the judge of emerging

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<sup>66</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982) (stating that judges have been "persuading litigants to settle rather than try cases whenever possible").

<sup>67</sup> Some have criticized judicial intervention in settlements as it, arguably, may result in "coerced" settlements. See Menkel-Meadow, *supra* note 9, at 775; see also Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 657-58 (1971) (labeling judicial discretion "pervasive" in the context of the modern litigation process).

<sup>68</sup> Several studies establish that lawyers generally approve of judicial intervention. See WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 1-2* (1985) (finding that 85 percent of polled attorneys believe that judicial intervention improves settlement prospects); Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 177 (1988) (finding that 67 percent of attorneys favored judicial intervention in settlement even if local rules did not mandate active judicial participation).

<sup>69</sup> See Rude & Wall, *supra* note 68, at 177 (finding that 61 percent of polled judges reported that they inform attorneys about how similar cases have been settled).

<sup>70</sup> See *id.*

settlement trends. Although confidentiality clauses may protect the precise terms of settlement agreements, lawyers can make implicit references to prior settlements by referring to emerging trends and customs while omitting the particular details of such settlement precedents. The interviews and surveys conducted for this Essay, presented in Part II.E above, confirm the usefulness of prior settlement information. When asked whether referring to settlements can be useful,<sup>71</sup> 65 percent of participating lawyers agreed that “[i]t is helpful to refer to settlements in similar cases that are favorable to your case when in front of a judge in settlement conferences.”<sup>72</sup> Ninety percent of those lawyers indicated that “[i]t is helpful to refer to settlements in similar cases that are favorable to your case when in negotiations with opposing counsel without the presence of a judge.”<sup>73</sup>

Third, prior settlements in similar disputes may similarly impact the perception of judges, arbitrators, and court mediators in settlement conferences. Given their noncoercive nature, settlement agreements may be perceived in a normative light. Judges, for instance, may interpret settlement precedents as expressive statements regarding the appropriateness of compensation.<sup>74</sup> Once a novel legal claim for tort compensation has been gratified by a (presumed) concession of the same sort in a private settlement agreement, future claims will be perceived as less extraordinary. If a company refuses to accept an offer that is comparable to concessions that competitors made in prior settlements, judges might be less sympathetic to that firm in subsequent proceedings. When the judge considers these standards in settlement conferences, bench trials, or remittitur,<sup>75</sup> he or she might perceive this as enforcing an industry norm, instead of introducing novel changes to existing law. In this sense, settlement conferences

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<sup>71</sup> The potential usefulness of settlement information is, of course, still higher within settlement conferences than in trial. The higher degree of informality of decision making in the former will allow more explicit references to prior settlements in similar cases. See generally Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 649–52 (1976) (discussing the invocation of precedent during settlement negotiations).

<sup>72</sup> See *infra* Part IV.

<sup>73</sup> The informal nature of settlement discussions frees settlement judges to work more closely with the parties and the evidence than they otherwise could. See BRAZIL, *supra* note 68, at 10.

<sup>74</sup> Generally, the social meaning of settlements also determines the persuasive force of prior settlements. Settlements have become a more common solution to legal conflicts and are subject to regular media attention. As a result, foregoing this means of dispute resolution may be looked upon unfavorably.

<sup>75</sup> On the rise of the active role of judges, see *supra* notes 64–66 and accompanying text.

are an opportunity for judges to reinforce settlement norms and standards.<sup>76</sup>

Overall, prior settlements exert pressure on similarly situated parties, effectively weakening their position in comparable disputes.<sup>77</sup> When a future defendant or plaintiff refuses to settle at terms that similarly situated disputants have previously conceded, the former might be considered opportunistic by judges in settlement conferences by refusing to abide by industry norms or standards. Due to prior concessions in private settlements, it might become harder, for instance, for similarly situated defendants to contest similar claims outright, as the settlement precedent reduces the perceived unreasonableness of the novel claim to a judge. If prior settlement standards influence the opinion of a judge,<sup>78</sup> then these standards may have a subtle effect on both the outcome of settlements in pretrial negotiations and, if the parties fail to reach a settlement, on subsequent trial proceedings. For instance, the experience and information that a judge (or one of his or her colleagues) may gain in prior settlement conferences might influence that judge's damages ruling in trial. Thus, by making it harder for litigants to recede from concessions that similarly situated parties have already made, prior settlements affect both the future supply of settlements and the chances at trial. I turn next to this issue.

## B. The Public Perception of Settlements

In the previous subsection, I suggested that prior settlements may exert subtle pressure on trial outcomes by influencing judges and lawyers. In this Section I argue that settlement information may also find its way into the legal process by influencing the viewpoints of jury members.

Take the example of tort disputes. One of the main functions of juries is to estimate losses when damages cannot easily be derived from market indicators. In order to do their job effectively, juries

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<sup>76</sup> See Jonathan M. Purver, *Evaluation and Settlement of Personal Injury and Wrongful Death Cases*, 53 AM. JUR. TRIALS § 240 at 228 (1995) ("In settlement conferences, experienced and skilled settlement judges will put as much pressure on both sides as they can. The judges will literally pound away with arguments and positions. They will try to get the parties closer so as to make it more difficult, from an economic standpoint, for the parties to take the case to trial.")

<sup>77</sup> See Fromm, *supra* note 21, at 672 ("By referencing past settlements, an attorney can persuade the other side that his offer or demand is reasonable.")

<sup>78</sup> During pretrial settlement conferences, parties try to obtain an estimate of what the judge considers to be a fair settlement. Confidential meetings and private caucusing are the most opportune moments for a judge to explain his viewpoint on the case and to evaluate the viewpoints of both opponents. Sophisticated settlement judges and experienced trial lawyers favor such separate meetings over any other conference format because they promote candor. See Purver, *supra* note 76, at 228.

need to both possess basic information regarding the legal system and to understand how the legal process has handled similar disputes in the past. An important way in which jurors learn about the legal system is through popular media coverage.

As a result of the bias in mainstream news coverage,<sup>79</sup> however, jurors likely base their perceptions of average damage awards on verdicts involving spectacular damage awards or cases involving novel applications of liability.<sup>80</sup> Findings from cognitive psychology show that salient information is highly conducive to anchoring and availability heuristics, causing individuals to attribute disproportionate weight to such memorable evidence.<sup>81</sup> The public's poor understanding of legal institutions amplifies the pervasive effect of popular media coverage of legal issues. When professional commentators decry the alarming state of excessive litigation, they often conflate settlements, awards, and judgments.<sup>82</sup> Blurring these distinctions is problematic, especially in cases when the public draws inferences from publications of jury verdicts or settlement announcements in news reports. Since media coverage of related lawsuits tends to influence juries,<sup>83</sup> it is reasonable to assume that information on settlements will likewise influence attitudes of jurors and their perceptions of right and wrong. As such, information on settlements will influence the viewpoints of juries, regardless of whether the information is representative of settlements as a whole.<sup>84</sup> The potential for bias might be even greater for settlements than for jury verdicts because, as I demonstrated in Part II, access to information on settlements largely depends upon the private supply of settlement information.<sup>85</sup> Apart from cases that received

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<sup>79</sup> See *supra* Part II.D and sources cited.

<sup>80</sup> See Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259 (2005) (providing experimental evidence of judges' inability to disregard inadmissible information).

<sup>81</sup> See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 208 (1973) ("A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind."); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974) ("In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer. . . . [D]ifferent starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring.").

<sup>82</sup> See Galanter, *supra* note 58, at 224 n.111.

<sup>83</sup> See *supra* note 42 and accompanying text.

<sup>84</sup> Attention to major settlement awards might lead juries to infer that such awards are a developing practice that deserves support or, conversely, may instill a perception that the tort system is out of control. See *supra* Part II.D and sources cited.

<sup>85</sup> The role of the media is pervasive here because lawyers do not make references to settlement discussions or prior settlements. Various courts have held that mentioning settlement discussions during opening statements and closing arguments is improper. See KENT SINCLAIR, TRIAL HANDBOOK §§ 3:8, 5:5 (3d ed. 2009). This reduces lawyers' influence

media attention during trial, the media depends on attorneys and interest groups to draw attention to settled cases. The media attention to outlier settlements might have a significant influence on jury viewpoints. Jury studies suggest that, despite instructions to the contrary, information that juries gather outside of trial has lasting impact. One study has demonstrated, for instance, that unfavorable information, such as a party's prior conviction, produces higher rates of conviction even when a judge rules that such information was inadmissible.<sup>86</sup>

#### IV

#### SETTLEMENTS, PRECEDENT, AND LEGAL CHANGE

The feedback effect of settlements, as Part III described, suggests that the outcome of a settlement may reach beyond the individual settlement agreement and affect adjudication. The potential impact of settlements on adjudication complicates the choice between settlement and litigation and, depending on this result, might affect the course of the law. In this Part, I more closely examine the impact of the feedback effect of settlements on litigants' behavior while adapting classic models of the choice between litigation and settlement.

Let us analyze the feedback effect of settlements in the context of two sequential disputes. When deciding between litigation at trial or settlement in Dispute 1, the plaintiff and defendant will consider the costs and benefits of each option. To the defendant, the expected losses from a trial in Dispute 1 consist of the sum of the costs from the expected award in Dispute 1 and any likely payouts that result in Dispute 2 given the judicial precedent that was set in Dispute 1. This

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in focusing attention on outlier settlements but also restricts the opportunity of lawyers to dispel possible media distortions in court.

<sup>86</sup> Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 415 (1995) (“[R]eceiving a legal explanation did not help [mock jurors] disregard inadmissible evidence.”); Roselle L. Wissler, Allen J. Hart & Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 805 (1999) (rebutting the criticism of extreme jury awards by demonstrating how jurors, judges, and lawyers accord similar monetary awards for various types of injuries); Wistrich, Gurthrie & Rachlinski, *supra* note 80, at 1307 (“Exposure to the plaintiff's prior criminal conviction appears to have influenced the judges' decisions, even though most judges ruled to suppress the information.”). Moreover, instructions to disregard certain evidence are often counterproductive, as they highlight that admonished information in the mind of jurors. The process by which people ultimately spend more time thinking about something they are told to suppress is referred to as the “ironic process.” See generally Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCHOL. REV. 34, 34 (1994) (developing a theory “to account for the intentional and counterintentional effects that result from efforts at self-control of mental states”); Daniel M. Wegner, David J. Schneider, Samuel R. Carter III & Terri L. White, *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1987) (analyzing an experiment that tested the participants' preoccupation with a specific thought that they were told to suppress).

Essay claims that novel settlements have a feedback effect.<sup>87</sup> Settlements in Dispute 1 affect the likely award in a trial of disputes in Dispute 2.<sup>88</sup> This is because, as I described in Part III above, prior settlements set new goals for plaintiffs' lawyers, and the perception of emerging settlement trends influences judges' and juries' opinions of what constitutes a "just" award in similar disputes.

Several observations follow from this general effect. First, the feedback of past settlements on future litigation increases the potential costs of any given settlement concession. The feedback effect of the settlement in Dispute 1 will reduce the maximum amount that the defendant will be willing to award in any settlement agreement in Dispute 2. More specifically, it decreases the maximum amount that the defendant will concede in a settlement, while leaving unaffected the minimum settlement demand of the plaintiff. The feedback effect of a settlement in Dispute 1 is especially costly to defendants who might face similar claims in the future. Upon first impression, the feedback effect reduces the bargaining range in settlements, leading to more litigation. However, note that the only way for a defendant to avoid the costs of settlement in Dispute 1 is by going to trial. And at trial, the defendant, of course, faces the potential costs of adverse *judicial* precedent. If we assume that the precedent costs of judicial decisions are higher than the costs of settlement feedback (due to the higher visibility and formal authority of the former), the feedback effect does not necessarily alter the ratio of trials to settlements. However, the potential effect of a settlement in Dispute 1 on trial outcomes in future disputes increases the defendant's stake in the dispute. Because higher stakes increase the impact of relative optimism (and, consequently, the room for disagreement), the feedback effect of settlements might lead to an overall increase in the probability of litigation.

Second, as I outlined in Part II, the distribution of information on settlements is biased towards spectacular, outlier concessions.<sup>89</sup> High-value settlement awards circulate more broadly and may sometimes have a disproportionate effect on the perception of judges and juries.<sup>90</sup> In this sense, a generous settlement concession in Dispute 1

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<sup>87</sup> An adverse settlement precedent on liability issues may also increase the probability of a victory for future plaintiffs in similar disputes.

<sup>88</sup> As argued above, a settlement concession in Dispute 1 also makes settlement negotiations more difficult in Dispute 2.

<sup>89</sup> The informal nature of communication in legal communities and the incentives of the parties involved in releasing settlement information enhances the distribution of this information. See *supra* Part II.A.

<sup>90</sup> See *supra* Part II.D and sources cited. Also, consider that, contrary to publicly released information on judicial decisions, the informal nature of settlement information prevents public correction with objective statistical information.



has a particularly strong impact on the expected losses of similarly situated defendants in analogous disputes.

This analysis presents a number of interesting refinements of the literature on litigants' choice between trial and settlement. Settlement does not offer an easy out to a defendant concerned with an unfavorable trial outcome.<sup>91</sup> The choice is rather between adverse judicial precedent and adverse settlement precedent. In considering the costs and benefits of trial or settlement, a defendant will thus need to weigh the costs from the inherent bias that some settlement precedents produce against the higher visibility and (formal) authority of judicial precedents.

The feedback effect of settlements also provides a possible explanation for the evolution of awards and remedies in various areas of law. To the extent that information in settlements can be applied by analogy to similarly situated defendants in other suits, prior settlements create a pressure toward further concessions. In the absence of effective coordination, defendants cannot take into account the costs that their own settlement imposes on similarly situated companies. Settlement agreements thus introduce a collective action problem among potential defendants. Future defendants would rather see a novel claim fought off, but when individually faced with a claim, they prefer to settle the dispute and avoid the negative attention of a day in court. As the individual logic has it, why would one firm bear the full cost of litigating to obtain a favorable precedent that benefits the entire industry, including the firm's competitors?

Without some level of coordination, similarly situated defendants might leak information in settlement negotiations that will later deteriorate the bargaining position of competitors in comparable disputes. The immediate interest of the negotiator lies in absolving the particular defendant. Hence, the negotiating parties might "not care if the plaintiff obtains an opinion that greatly benefits other plaintiffs"<sup>92</sup> against other defendants. The litigation against the tobacco industry in the 1990s, for instance, illustrates the collective action problem inherent in settlements. A novel settlement involving one tobacco company spurred the initial litigation against the rest of the industry. Although, at the time, the tobacco industry had yet to suffer a loss in court,<sup>93</sup> the Liggett tobacco company agreed to pay the states

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<sup>91</sup> The analysis is different in situations where only the plaintiff is concerned with precedent. In those instances, there is a real exit option because a plaintiff is, of course, in the position to drop the claim and avoid any precedent, be it a judicial precedent or a settlement precedent.

<sup>92</sup> See Rubin & Bailey, *supra* note 1, at 810.

<sup>93</sup> There is one exception in which a trial jury in Florida awarded \$750,000 to a victim of lung cancer. See *Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932, 935 (Fla. 2000).

25 percent of its pretax profits over the next twenty-five years and to label its cigarette packages with a warning that “smoking is addictive.”<sup>94</sup> Liggett disgorged documents showing that the industry knew that its products were addictive, designed them to be that way, withheld that knowledge from consumers, and targeted minors with its ads.<sup>95</sup> Since Liggett was the smallest of the major tobacco companies, some analysts argued that its willingness to settle was mere posturing to attract a merger partner.<sup>96</sup> Not long after the highly publicized admissions of the Liggett settlement, the major tobacco companies initiated their own settlement talks.<sup>97</sup>

Without effective coordination, similarly situated stakeholders will not be able to adopt the optimal group strategy to stave off novel court claims. Consequently, such stakeholders will not be able to avoid acceptance of the legitimacy of these claims by the public in general and legal communities in particular. This leads to the hypothesis that awards will increase more over time in areas of the law where defendants are relatively heterogeneous, such that individual settlements are not easily avoided through coordination or industry norms.<sup>98</sup> In these instances, the feedback effect of settlements infuses a proplaintiff component into the legal process, providing some counterweight to the downward bias that selective litigation by experienced repeat players causes.<sup>99</sup>

In other instances, however, the feedback effect of settlements reinforces the influence of powerful, well-organized litigants. For instance, in disputes that either typically do not attract a strong presence of the plaintiff bar or where relatively heterogeneous plaintiffs face a concentrated industry with closely organized defense counsel, defendants will likely carefully catalogue individual concessions by plaintiffs and use them selectively in future disputes. Insurance com-

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<sup>94</sup> See Milo Geyelin & Suein L. Hwang, *Liggett to Settle 22 States' Tobacco Suits*, WALL ST. J., Mar. 21, 1997, at A3.

<sup>95</sup> See *id.* No tobacco company had, at the time, ever been held liable in court when Mississippi concluded the first settlement agreement. See *id.*

<sup>96</sup> See *id.*

<sup>97</sup> See Alix M. Freedman & Suein L. Hwang, *Philip Morris, RJR and Tobacco Plaintiffs Discuss a Settlement*, WALL ST. J., Apr. 16, 1997, at A1.

<sup>98</sup> This is in accordance with the collective action perspective on the evolution of law, which postulates that areas of law expand more rapidly if plaintiffs are supported by the presence of long-term stakeholders in the expansion of remedies and awards. See Rubin & Bailey, *supra* note 1, at 808–13. Trial lawyers are repeat players with a stake in the increase of products liability lawsuits and the expansion of several areas of tort law. See, e.g., Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. 311, 313–14 (1988); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2219 (1989); White, *supra* note 18, at 385–89; Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1554–62 (2003).

<sup>99</sup> See Galanter, *supra* note 1, at 97–114; George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215, 219 (1985).

panies, for instance, are ideally positioned to obtain information on settlement trends and, subsequently, emphasize downward trends in future dispute negotiations, settlement conferences, or in front of judges and juries.

These effects are compounded in the context of settlements because, as described earlier in this Part, the settlement feedback effect increases the stakes in settlements, leading to additional trials. Overall then, the feedback effect of novel settlements may contribute to increasing or decreasing awards and legal remedies over time.

## V

### SECRET SETTLEMENTS AND MANDATORY DISCLOSURE

One strand of literature condemns the secrecy of settlements.<sup>100</sup> This strand argues that private settlements are suspect because they withhold public information, including information regarding public safety and health issues. Thus, confidential settlements seemingly preclude the creation of judicial precedents.<sup>101</sup> Since settlements lack the “public value” component of litigation, some scholars oppose settlements as an alternative to resolving disputes through judicial adjudication<sup>102</sup> because it deprives judges of the opportunity to expound legal values.<sup>103</sup> Moreover, confidential settlements work to the detriment of the public by delaying awareness of underlying liability issues. Because the tortfeasor’s costs of settling are usually lower than the costs imposed on other victims who remain unaware of the cause of harm, tortfeasors have an incentive to bury those facts that are most likely to induce liability in confidential agreements.<sup>104</sup> As a result, secrecy potentially reduces the deterrent effect of the tort system.

How does the preceding analysis bear on the ongoing debate regarding the wisdom of secrecy versus mandatory disclosure of private settlements? My theory has ambiguous implications for this issue. On the one hand, I suggest that secrecy in the case of settlements is rela-

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<sup>100</sup> See, e.g., Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL’Y 102, 114–19 (1986) (admonishing secret nature of settlements); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 256 (1999) (illustrating cases where the public benefit of obtaining confidential information might outweigh the benefits of secrecy to the parties involved in the settlement).

<sup>101</sup> See Coleman & Silver, *supra* note 100, at 114–19.

<sup>102</sup> See, e.g., Luban, *supra* note 8, at 2624 n.27 (expressing ethical concerns with regard to confidential settlements that involve valuable public information).

<sup>103</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlements deny courts the ability to expound society’s values).

<sup>104</sup> In economic terms, confidential settlements allow prior victims to free-ride off of the costs of other potential future plaintiffs if there is a potential of correlated liability. See Daughety & Reinganum, *Hush Money*, *supra* note 7, at 674–75; Daughety & Reinganum, *Informational Externalities*, *supra* note 7, at 588.

tive. As Part I demonstrates, information about settlements is available through a wide array of formal and informal sources. In this sense, the data from the survey supports the claim that public safety issues are usually available in the industry as soon as such settlements come to light.<sup>105</sup> On the other hand, because information on settlements influences legal outcomes, it may be desirable to make information on settlements more widely available. Much of the discussion above has focused on the circulation of information on settlements, the role of the media, and the use of settlement information by savvy lawyers and managerial judges in settlement conferences. A common theme is the potential bias that results from the nonrepresentative nature of the information on settlements that is available. Settlements are selectively picked up by the press, disclosed by interest groups, or used by in-the-know lawyers and influential judges.<sup>106</sup> This creates a danger of bias because the information on settlements is either only selectively available for the public or accessible only to a select community.

Potential distortions by nonrepresentative information will likely lessen if information on settlements is more extensively available to the public. If more representative reports on settlement trends substitute for sensational media coverage as a source of settlement precedent, this will remove some of the biased effects on legal change that I highlighted in the previous Part. On the other hand, it might be naïve to assume that wider access to settlements will shift the focus of media reports to more representative information about settlements—especially if a strong demand for salient news content drives media attention to outlier settlements.<sup>107</sup> Nevertheless, a ban on secret settlements or a policy of mandatory disclosure would provide analysts of settlement trends with superior access to information in order to rebut some of the inaccurate portrayals of the settlement landscape that popular media creates. Improved settlement data might also reduce uncertainty and lead to additional settlements.

At first glance, a rule of mandatory disclosure would seem to amplify the potential feedback of settlements that this Essay suggests. When all settlements are public goods, information on settlement agreements will surface in broader, more transparent channels of information distribution. This will arguably reduce the role of close-knit, professional networks and confidential legal communities as information pools in favor of publicly available databases of the sort that

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<sup>105</sup> See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 486 (1991) (describing how mandatory disclosure statutes have a chilling effect on settlements).

<sup>106</sup> See discussion *supra* Part II.

<sup>107</sup> See MacCoun, *supra* note 42, at 551–59 (providing a stimulus-based explanation whereby journalists as well as audiences give disproportionate weight to extremes).

are increasingly surfacing on the Internet. The broader circulation of settlements would also embed outlier settlements in a larger body of settlements, including those settlements where plaintiffs received less than the predicted trial outcome.

On the other hand, mandatory disclosure standards may chill parties' incentives to settle because they remove the opportunity to stave off negative public attention by settling.<sup>108</sup> Although there is only weak empirical support for the chilling effect of settlement sunshine provisions,<sup>109</sup> mandatory disclosures could increase the backlog of courts by increasing the number of trials.<sup>110</sup> It is important to note that a ban on secret settlements does not affect the freedom of parties to settle disputes without revealing information before the court process begins. In fact, a ban on secret settlements may lead publicity-conscious defendants to settle earlier in the prefiling stages where no ban applies.<sup>111</sup> A substitution effect may thus occur whereby an increase of prefiling settlements is accompanied by a decrease of postfiling settlements. A rule of mandatory disclosure has two effects: (1) it decreases the number of post-trial settlements while ensuring systematic information on these settlements; and (2) it increases the number of private settlements prior to filing. If the second effect is strong, a ban on secrecy is counterproductive because it reduces the overall amount of information about settlements.<sup>112</sup> Important questions remain about the information benefits attained by shifting the focus from postfiling to prefiling settlements. A recommendation on banning sealed settlements would require further empirical research into

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<sup>108</sup> See Miller, *supra* note 105, at 486; see also Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, 55 S.C. L. REV. 785, 786 (2004) (“[T]he potential clearly exists that elimination of confidential settlements would promote unnecessary litigation without making any more useful information available to the public.”).

<sup>109</sup> See generally Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 726 (2004) (finding that statistics compiled since the implementation of Local Rule 5.03(c) easily refute the purported “Deterrent to Settlements” argument); James E. Rooks Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 867–68 (2004) (citing a string of comments describing this chilling effect when a district court judge solicited opinions about secret settlements from members of the legal profession). United States district court judges in South Carolina “actually tried two fewer cases in the twelve months following the promulgation of Local Rule 5.03(c), than they did in the immediately preceding twelve-month period.” Anderson, *supra*, at 726 (emphasis added). *But cf.* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1467–69 (2006) (emphasizing the erratic decrease of the ratio of dispositions to filings in Florida, but concluding that there are far too many confounding variables for the data to support the chilled-settlements argument).

<sup>110</sup> Overall then, the public interest in promoting settlements might outweigh the potential cost of secrecy in settlements.

<sup>111</sup> See generally Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 880–910 (2007) (modeling the substitution effect that results from mandatory disclosure rules).

<sup>112</sup> See Drahozal & Hines, *supra* note 109, at 1483.

the relative chilling and substitution effects of mandatory disclosure,<sup>113</sup> as well as the type of information that remains hidden or that is only selectively available after a ban on secrecy.

Still, in light of the feedback effect of settlements, a few major differences appear between a world of secret settlement and one where disclosure is mandatory. First, if the substitution effect to pre-filing settlements is strong, a ban on "court-approved" confidential settlements will further reduce the availability of representative empirical data on all settlements. In this sense, a ban on secret settlements will likely augment the bias that the selective availability of settlement information creates, as described in Part IV (e.g., emphasis on outliers, strategic disclosures). Second, given the expected substitution from post to pre-trial settlements, a ban on secret settlements effectively reduces the role of the judge as mediator in the negotiation process.<sup>114</sup> This reduces the potential influence of judges as information pools in settlement discussions and enforcers of customs and norms derived from settlement practices, as discussed in Part II above.

#### CONCLUSION

Commentators generally assume that private settlements present civil justice issues because of the presumed low visibility of such settlements. To the contrary, this Essay identifies problematic issues involving the high visibility of certain nonrepresentative settlements. Information on private settlement agreements circulates more widely if the terms of the agreement are beyond the shadow of the law: media reports focus on outlier cases; lawyers' networks and professional interest organizations circulate information on spectacular settlements; and special interest groups bring attention to extravagant settlements that are most likely to induce legislative counteraction.

Although information on settlements is more extensively distributed than generally assumed, the quality and scope of such information is often dubious. Public records and settlement reporters contain relevant information on public settlements, but are mostly limited to certain topics or jurisdictions where publicity is customary or mandated. Informal access to confidential settlements is subject to the control and (ab)use of those involved in negotiations. This introduces a potential bias in the information that is available from the larger pool of settlements.

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<sup>113</sup> There is much to be gained from comparing data on the amount of dispositions and filings in states before and after the enactment of mandatory disclosure statutes.

<sup>114</sup> This outcome should satisfy critics of managerial judging but frustrate those who advocate the involvement of a judge as an impartial mediator who can balance the unequal bargaining power among litigants.

As a result of prior settlement concessions, it becomes harder for similarly situated defendants to contest similar claims because the precedent reduces the perceived unreasonableness of the novel claim. As it becomes more difficult to withstand prior settlements, the selective availability of individual concessions creates a ratchet effect, leading settlements and judicial decisions further in the direction set by prior concessions. These settlement dynamics provide a novel inroad for possible research on the evolution of remedies and damages in various areas of law.

To illustrate the feedback of settlements, the examples in this Essay have focused mostly on plaintiff's lawyers' potential selective use of information on outlier settlements in order to obtain increasing awards and to create novel remedies in tort disputes. It is important to note, however, that the overall direction of the settlement feedback on awards is ambiguous. This Essay does not suggest that the feedback effect of settlement works to the exclusive benefit of claimants and trial lawyers. To the contrary, in concentrated industries where tort settlements are handled by a few select lawyers or defense firms, for instance, it is to be expected that selective use will be made of information on settlements that are below the going rate at trial, which might eventually enable defendants to drive down legally available awards over time. The strength and direction of the settlement's feedback effect will likely vary between areas of disputes, depending on the involvement, coordination, and power dynamics between, on the one hand, the plaintiff bar, and, on the other hand, long-run stakeholders on the defense side.

Public regulation of the supply of information of settlements—such as mandatory disclosure, sunshine legislation, court oversight, and mandatory mediation procedures—could reduce the distorting effect of selective settlement information. However, if restrictions on confidentiality lead publicity-conscious defendants to settle in the pre-filing stages, court oversight will be affected, further reducing the availability of transparent, publicly available information on settlements.

