

In fact, one might speculate that allowing the use of previews should tend to improve public perceptions of a civil justice system—increasing its legitimacy—precisely because settlement outcomes would be seen as being better informed and thus more accurate. Settlement terms would turn less on the external bargaining asymmetries, for instance, and more on the merits. Such accuracy gains could even be seen as a counterweight to the legitimacy losses that some observers would perceive in a decline in trial-going rates.

But that may be too simplistic. There is a tradeoff, one that should trouble even those who generally favor settlement. Consider why previewing the case materials and previewing the factfinder are complements in the first place: Different judges may vary in how they assess the same body of evidence or how they decide the same case. This is why it is valuable to the parties, in bench cases, to have a “judicial preview” (a signal of what the previewed evidence means to *this* factfinder). But there is also a downside: The use of preview policies can amplify the influence of such individual variation among judges—call it “idiosyncrasy”—on settlement outcomes.¹³⁸

Parties settle not in the shadow of the “true facts” about the case, after all, but in the shadow of the expected verdict.¹³⁹ And they know that this verdict will depend both on the factual materials and on how this specific factfinder will interpret them. When judicial previews are possible, the enhanced learning that results may induce settling—but partly because the parties are gaining insight into how *this* judge thinks. And as Judge Edwards’s ambivalence in the epigraph above suggests,¹⁴⁰ a policy of pushing settlement by exploiting perceptions about judicial idiosyncrasy may not be a widely palatable approach.

To put the question bluntly: Should the parties have more information or should they have “purer” (but less) information? Using previews allows parties to make their settlement decisions based on a sharper sense of how the case will come out at trial, but this sharper sense might be taking into account the idiosyncratic views of the judge (or jury). The alternative is for them to settle (or not) based on a fuzzier sense of the outcome, but at least this fuzzier sense will be less influenced by idiosyncrasy.

A closer analysis begins by distinguishing among three groups of

138. I should emphasize that by “idiosyncrasy” I mean individual variation, and not outlier status or unusual views.

139. “True facts” is a memorable phrase borrowed from *Hickman v. Taylor*, 329 U.S. 495, 506 (1947) (“[T]he Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure whenever they may be found.”).

140. See *supra* note 137 and accompanying text. The ambivalence is evident in Judge Edwards’s need to sidestep the troubling aspect of such a settlement promotion strategy by making clear he thinks it is a “false assumption” that judicial identity partially determines (and thus is useful for predicting) case outcomes.