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## Between the Ceiling and the Floor: Making the Case for Required Disclosure of High-Low Agreements to Juries

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# BETWEEN THE CEILING AND THE FLOOR: MAKING THE CASE FOR REQUIRED DISCLOSURE OF HIGH-LOW AGREEMENTS TO JURIES

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Richard Lorren Jolly\*

*Parties are increasingly using high-low agreements to limit the risks of litigation. High-low agreements are contracts in which defendants agree to pay plaintiffs a minimum recovery in return for plaintiffs' agreement not to execute on a jury award above a maximum amount. Currently no jurisdiction requires high-low agreements to be disclosed to the jury. This Note argues that disclosure should be required. It contends that non-disclosed high-low agreements are a type of procedural contract modifying the jury's core adjudicative function. Drawing on theories of procedural justice, it suggests that by usurping the jury's role these agreements undermine the legitimacy of the judicial system. It contends that requiring disclosure would remedy these negative effects and that any unintended consequences attendant to disclosure could be mitigated by the court or by the parties.*

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## INTRODUCTION

Litigation is a risky business. Caught between soaring court costs and unpredictable jury awards, litigants have sought creative ways to limit liability. One such method is the use of high-low agreements. A high-low agreement is defined as “[a] settlement in which a defendant agrees to pay the plaintiff a minimum recovery in return for the plaintiff’s agreement to accept a maximum amount regardless of the outcome of the trial.”<sup>1</sup> In effect, “the defendant is ‘buying’ the right to be free from the worry of an adverse jackpot jury verdict . . . [while] [t]he plaintiff is selling its lottery ticket in exchange for the certainty that it will recover no less than the low amount.”<sup>2</sup> High-low agreements have been used since at least 1968<sup>3</sup> and have been growing in popularity over the last thirty years.<sup>4</sup> They are employed mostly in tort litigation involving potentially large damages and uncertain liability.<sup>5</sup> The legal community has widely and enthusiastically welcomed high-low agreements for their ability to promote finality, certainty, and efficiency in the resolution of disputes.<sup>6</sup>

1. BLACK’S LAW DICTIONARY (9th ed. 2009).

2. Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 496 (2007).

3. See Robert Coulson, *Negotiating Control Contracts: Trial Counsel Reduce Their Need for Appeals*, 52 JUDICATURE 190, 192–93 (1968) (referring to high-low agreements as “control contracts”).

4. Some have estimated that high-low agreements are discussed in twenty to thirty percent of jury trial cases and implemented in ten percent. See Molly McDonough, *High-Lows’ Ups and Downs*, 91 A.B.A. J. 12, 12 (Aug. 2005) (citing Cook County Circuit Judge Richard J. Elrod).

5. See, e.g., Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 61–62 (1996); see also Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 196 (2001) (arguing that high-low agreements are “a staple not of bet-the industry class action but of run-of-the-mill tort litigation”).

6. See, e.g., *Thompson v. T.J. Whipple Const. Co.*, 985 A.2d 221, 229 (Pa. Super. Ct. 2009) (“Court, counsel, and litigants favor [high-low agreements]. . . .”); Steven R. Gabel, *High/Low Settlement Agreements: Method for Dispute Resolution*, 73 MICH. B. J. 74, 74–75 (1994) (“[High-low] agreement[s] promote[ ] finality, certainty, ease of administration and a degree of comfort for the parties to the agreement[s].”); J.J. Prescott, Kathryn E. Spier & Albert H. Yoon, *Trial and Settlement: A Study of High-Low Agreements*, 57 J.L. & ECON. 699, 701 (2015) (arguing that high-low can serve “litigants’ joint interests by limiting risk exposure at trial—thereby reducing the risk premiums they bear—while still allowing them to benefit from their confidence in their own cases”).

Yet despite this enthusiasm, high-low agreements can have significant adverse consequences. Consider the following: In 2003, William Jameson was eighty-two years old and suffering from prostate cancer.<sup>7</sup> He sought treatment at the Hope Oncology clinic in Richardson, Texas.<sup>8</sup> Due to a series of purported clerical errors, Jameson received two doses of a highly toxic chemotherapy medication, which led to his death.<sup>9</sup> His family brought a medical malpractice suit against the clinic.<sup>10</sup> Shortly after the trial began, the parties executed a high-low agreement that guaranteed the family a payout of \$200,000 and limited the maximum potential award to \$1,000,000.<sup>11</sup> If the jury returned a verdict between these two values, the high-low agreement would not alter the award and the family would receive the amount awarded by the jury. After deliberating for five days, the jury found in favor of the family and awarded them an astounding \$606,000,000.<sup>12</sup> Despite the jury's determination, the clinic paid the family only the \$1,000,000 mandated by the high-low agreement.<sup>13</sup>

By entering into the high-low agreement, the family and the clinic modified the scope of their dispute in order to limit their liability exposure. The twelve Texas jurors who decided the case, however, were not made aware of this modification or of the precise role they were playing in resolving the remaining dispute. The jurors believed that they were performing their civic duty of assessing fault and compensation based on factual determinations, while instead the parties had secretly tasked them with determining what the value of the dispute would be if it were not in fact constrained by the high-low agreement. Thus, the jurors did not adjudicate the actual dispute between the family and the clinic—a dispute that concerned only those potential awards remaining between the high and low parameters. Rather, the jury supplied a hypothetical valuation, which the parties then applied to their contingent agreement. This substantial reformation of the jury's procedural role was not revealed to the jurors because, like all other United States jurisdictions, Texas does not require parties to disclose the existence of

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7. See Featherston v. Gressler, No. 03-08488 (Dall. County District Ct., Tex. March 4, 2005).

8. *Id.*

9. *Id.*

10. *Id.*

11. See Natalie White, *Overdose of Chemotherapy Meds Leads To \$606 Million Verdict: High-Low Agreement Limits Liability To \$1 Million*, FLA. JUST. REFORM INST. (2006), [http://www.fjustice.org/mx/hm.asp?id=od\\_chemo](http://www.fjustice.org/mx/hm.asp?id=od_chemo).

12. *Id.*

13. *Id.*

high-low agreements.<sup>14</sup> This is because non-disclosed high-low agreements have been misunderstood as settlement agreements, which ordinarily may remain private.<sup>15</sup> Consequently, no court or commenter has addressed the procedural implications and negative effects that non-disclosure of high-low agreements have on jurors and on the jury as an institution.

This Note argues that disclosure of high-low agreements to juries should be required. It contends that when left undisclosed, high-low agreements are procedural contracts that secretly transform the jury's adjudicative function and compromise judicial legitimacy. Once they are disclosed, however, high-low agreements simply demarcate the boundaries of the dispute, leaving undisturbed the jury's traditional responsibilities. Part I provides a background on litigants' broad autonomy and constraints in shaping litigation through procedural contracts. It also explores the jury's traditional role in resolving disputes and the benefits flowing from juror participation. Part II argues that non-disclosed high-low agreements should be understood primarily as procedural contracts that alter the jury's role in administering justice and, in so doing, undermine the integrity of the judicial system. It then differentiates non-disclosed high-low agreements from deceptively similar procedures that do not pose the same systemic hazards. Part III recommends that in order to preserve judicial legitimacy courts should require parties to disclose the existence and terms of high-low agreements. It emphasizes that disclosed agreements are distinct from non-disclosed agreements in that they do not alter the procedural function of the jury. It then addresses some of the negative consequences of requiring disclosure and concludes that they can be mitigated by courts and by the parties themselves. Finally, this Note contends that even if these mitigation techniques are ineffective disclosure should be required because it promotes judicial resourcefulness.

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14. See Luis F. Collins, *Admissibility of High/Low Settlements*, FLA. B. J. 35, 38 (1993) (asserting that high-low agreements between two parties are inadmissible); Prescott et al., *supra* note 6, at 701–02 n. 6 (stating that disclosure of high-low agreements “is not a codified requirement in any jurisdiction”). A key exception to this rule is found in the handful of jurisdictions which require disclosure in multi-party litigation when the high-low agreement exists between fewer than all of the participating parties. In this limited circumstance, high-low agreements are likened to Mary Carter agreements. That is, high-low agreements may be used to diminish the liability of one of the defendants proportionately to increases in the liability of the codefendants, thereby undermining the adversarial process. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Thorne*, 110 So. 3d 66, 75 (Fla. Dist. Ct. App. 2013); *Freed v. Salas*, 780 N.W.2d 844, 857 (Mich. App. 2009); *In re Eighth Judicial Dist. Asbestos Litig. v. Amchem Products Inc.*, 8 N.Y.3d 717, 721 (N.Y. 2007).

15. See *infra* note 73; San I. Wesburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 55 (1999) (noting that courts generally defer to parties' settlements except in very specific and limited circumstances).

## I. A BACKGROUND ON PROCEDURAL CONTRACTS AND THE CIVIL JURY

To understand how non-disclosed high-low agreements uniquely undermine judicial legitimacy and why it is critical that they be disclosed to juries, it is necessary to situate our discussion in terms of both the litigants' procedural autonomy and the civil jury's function and purpose. Accordingly, Section I-A outlines courts' increasing willingness to enforce private procedural modifications to traditional public adjudication. It emphasizes that although parties enjoy broad autonomy in shaping procedure, they are nevertheless constrained by overriding institutional interests. Section I-B provides an overview of the complex and multifaceted role of the civil jury. It presents the civil jury not merely as an administrative mechanism for the fair and accurate resolution of public disputes, but also as a celebrated political and social institution.

*A. Litigants Possess Increasing Autonomy in  
Crafting Procedural Contracts*

Litigants enjoy broad autonomy to shape the procedures governing their litigation. The Federal Rules of Civil Procedure allow parties to modify a wide-range of procedural actions and are increasingly viewed as default rules around which parties may contract.<sup>16</sup> And over the last half-century, courts have been gradually willing to implement privately crafted procedures that push well beyond those outlined by the Federal Rules.<sup>17</sup> However, despite these developments, litigants' procedural autonomy remains constrained by overriding institutional interests—interests that non-disclosed high-low agreements compromise.

Courts have not always entertained private agreements modifying civil procedure. English courts going back to at least the sixteenth century declined to enforce arbitration agreements because they impermissibly “oust[ed]” courts of their jurisdiction.<sup>18</sup> This historic hostility to private modifications migrated with common law from

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16. See, e.g., STEPHEN C. YEAZELL, CIVIL PROCEDURE 138 (7th ed. 2008); Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 622 (2007).

17. See Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1140 (2006).

18. See, e.g., *Kill v. Hollister*, 95 Eng. Rep. 532 (1746) (noting that party agreements cannot oust courts of their jurisdiction); see also *Vynior's Case*, 8a, 81b, (1609) (Lord Coke noting in dictum that agreements for arbitration are specifically unenforceable.).

England to the United States.<sup>19</sup> Early American courts justified their inherited antipathy on both party-centric and institutional grounds.<sup>20</sup> For instance, the Supreme Court stressed litigants' due process rights when it refused to enforce an agreement not to seek removal to federal court, stating that access to the public courts was a "substantial right" that an individual could not "barter away" in advance.<sup>21</sup> And in declining to enforce a choice of forum agreement, the Massachusetts Supreme Court emphasized the primacy of the judiciary, stating that where actions may be brought is fixed by law "upon considerations of general convenience and expediency."<sup>22</sup> The Massachusetts court further noted that such private agreements challenge the competency and integrity of the judiciary and have the potential to bring "the administration of justice into disrepute."<sup>23</sup> These kinds of holdings were common, such that through much of American history courts rejected even the most dickered-over procedural contracts.<sup>24</sup>

During the early twentieth century, however, courts' dual concerns over imprudent contracts and securing judicial primacy began to slacken. Commercial actors increasingly desired the convenience of private arbitration and, along with the American Bar Association, lobbied legislatures to overrule the courts' longstanding policies.<sup>25</sup> This successful campaign culminated in the adoption of the United States Arbitration Act in 1925.<sup>26</sup> Although the Act only ensured the validity of arbitration clauses in federal courts, it nevertheless marked the beginning of an era of judicial openness to private procedural modifications.<sup>27</sup> Over the next several decades,

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19. See H. JUDICIARY COMM., REPORT TO ACCOMPANY 646: TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68-96, at 1-2 (1924) ("[T]he jealousy of the English courts for their own jurisdiction . . . survived for so lon [sic] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.").

20. David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 995 (2008).

21. *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874).

22. *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. 174, 184 (1856).

23. *Id.*

24. Admiralty courts are a key exception to this general rule. See Marcus, *supra* note 20, at 978.

25. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 613 (2010); see also, *Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319, 323 (S.D.N.Y. 1921) (noting that a federal act would be necessary if arbitration agreements were to be enforced at the federal level).

26. 43 Stat. 883 (1925) (later renamed the Federal Arbitration Act. 9 U.S.C. §§1-16 (2006)).

27. See, e.g., Marcus, *supra* note 20, at 1042 ("The era of contract procedure arguably dawned with forum selection clauses.").



courts began to emphasize litigants' freedom of contract while enforcing waivers of due process rights.<sup>28</sup> Then in 1972, the Supreme Court declared that the fear of parties ousting courts of their jurisdiction was "hardly more than a vestigial legal fiction."<sup>29</sup> The Court reasoned that rather than being divested of their jurisdiction, courts were simply refraining from exercising their power in order to give effect to the parties' contract-backed expectations.<sup>30</sup> Thus, by the close of the twentieth century, "ancient concepts of freedom of contract"<sup>31</sup> had freed parties to commoditize and exchange procedural goods.

Today, courts routinely entertain litigants' procedural contracts.<sup>32</sup> Litigation increasingly advances according to privately crafted "mini-codes of civil procedure"<sup>33</sup> and parties are free to select rule systems through choice of forum and arbitration clauses.<sup>34</sup> Indeed, the embrace of privately crafted procedure has been so extensive that some scholars argue that an adjudicative framework based on party consent, rather than administrative due process, has become "the preferable modality for conflict resolution."<sup>35</sup> Notwithstanding these developments, there is little case law on procedural rulemaking and no clear legislative or judicial direction on how to cabin litigants' procedural autonomy.<sup>36</sup> Some scholars have even suggested that parties might freely choose procedural arrangements that are entirely inconsistent with the official rules.<sup>37</sup> Others argue that such a high level of procedural control supports just outcomes and procedural efficiency by allowing the parties to

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28. See, e.g., *Nat'l Equip. Rental v. Szukhent*, 375 U.S. 311, 316 (1964) (acknowledging it had become settled law that parties may freely enter into an array of procedural agreements).

29. *Bremen v. Zapata Off-Shore*, 407 U.S. 1, 12 (1972).

30. *Id.* This holding was later extended to unsophisticated consumer contracts. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991).

31. See *Bremen*, 407 U.S. at 11.

32. See, e.g., Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 737 (2011) (noting the courts' "broad embrace of private ordering").

33. See *Horton*, *supra* note 25, at 607 ("Rather than the government, private actors create procedural rules . . . [a]nd rather than marching in lockstep, cases follow their own 'mini-codes of civil procedure.'").

34. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 80 TEX. L. REV. 1329, 1342–43 (2012).

35. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1140 (2006); see also David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convolved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1113 (2002) (noting that "civil procedure has taken a backseat to contract.").

36. E.g., Bone, *supra* note 34, at 1351; Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 513 (2011); Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 627 (2005).

37. See Bone, *supra* note 34, at 1339.



determine and assign risk.<sup>38</sup> Through their exchange, these scholars claim, procedural goods attain value and generate potential for creative and efficient negotiations.<sup>39</sup>

Despite this enthusiasm for an unbound procedural system, there are certainly some limitations on litigants' procedural autonomy. Procedural modifications are contracts and thus are governed by traditional notions of contract law,<sup>40</sup> including public policy concerns with the potential to void them. This can be seen in the treatment of forum selection clauses, where judges must weigh party convenience against "those public-interest factors of systemic integrity and fairness."<sup>41</sup> Likewise in other settings, the Supreme Court has noted that "overriding procedural consideration[s]" alone may invalidate parties' arrangements.<sup>42</sup> This language stretches beyond due process concerns and suggests that parties may not compromise the procedural integrity of the judiciary through private agreements.<sup>43</sup> Though the Supreme Court has not had the opportunity to develop this point further, federal appellate courts have contributed, for example, that parties may not contract for a jury of "12 orangutans,"<sup>44</sup> nor may they ask courts to settle a dispute by "flipping a coin or studying the entrails of a dead fowl."<sup>45</sup> Though neither of these fantastical limitations is particularly illuminating, they suggest that overriding procedural considerations implicate the judiciary's procedural legitimacy.<sup>46</sup> Contracts that potentially compromise this legitimacy should be closely scrutinized.

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38. See Moffitt, *supra* note 2, at 477; see also E. ALLAN LIND & TOM. R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 94 (1988) (noting that "procedures that provide high process control for disputants tend to enhance procedural fairness").

39. Noyes, *supra* note 16, at 647.

40. Cf. Resnik, *supra* note 36, at 599 ("A good deal of contemporary doctrine on Contract Procedure assumes the wholesale application of extant principles of contract law.").

41. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988); see also Michael Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 DUQ. L. REV. 1009, 1015-24 (1995) (overviewing the numerous public policy interests that generally apply in the context of forum selection clauses).

42. United States v. Mezzanatto, 513 U.S. 196, 202 (1995) (upholding an agreement to waive exclusionary provisions of plea-statement rules).

43. For an overview of courts' different approaches to procedural contracts, see Noyes, *supra* note 16, at 593.

44. United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005).

45. LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) ("In general, I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld.").

46. See Noyes, *supra* note 16, at 625 (noting that these cases suggest "the Court might be concerned with keeping up appearances and therefore reject strange processes that make the court look silly or incompetent.").

Non-disclosed high-low agreements compromise perceptions of judicial legitimacy by secretly manipulating the administrative role of the civil jury.

*B. The Civil Jury is an Administrative and Socio-Political Institution*

The Seventh Amendment to the United States Constitution ensures the right to a civil jury.<sup>47</sup> The institution is likewise protected in all fifty states.<sup>48</sup> It is a historically celebrated institution, such that William Blackstone described trial by jury three centuries ago as “the glory of the English law.”<sup>49</sup> And as recently as 2014, the Ninth Circuit described it as among “the most important institutions of self-governance.”<sup>50</sup> The civil jury is well deserving of these protections and praise because of both its administrative functions and socio-political significance. Non-disclosed high-low agreements undermine both of these.

At its most fundamental, the civil jury is an administrative tool for the fair and accurate resolution of public disputes. In accomplishing this task, jurors have the sole responsibility of making factual determinations by assessing the credibility of evidence and the consequence of its weight.<sup>51</sup> Additionally, since the earliest English juries, damage calculations have always been peculiarly the province of the jury.<sup>52</sup> This is because the extent of damages suffered is a question of fact, just like the jury’s determinations of causation or fault.<sup>53</sup> For example, assessing the damages of a standard breach of contract involves not only determining the market value of the goods or services, but also calculating the predicted lost profits, as well as potentially normative determinations of good or bad-faith

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47. U.S. CONST. amend. VII.

48. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999) (“While the Seventh Amendment does not apply to the states, all of the states have their own constitutional or statutory guarantees of a civil jury trial.”).

49. See WILLIAM BLACKSTONE, COMMENTARIES 378 (4th ed. 1876).

50. See *Smithkline Beecham Corp. v. Abbott Lab.*, 740 F.3d 471, 484 (9th Cir. 2014) (holding that jurors may not be excluded based on sexual orientation).

51. See, e.g., EDWARD COKE, COMMENTARY ON LITTLETON 460 (Thomas ed. 1818) (“*Ad questiones facti non respondent iudices; ad questiones legis non respondent juratores*”—Judges do not answer questions of fact; juries do not answer questions of law.”).

52. See, e.g., JOHN DAWSON MAYNE, WOOD’S MAYNE ON DAMAGES § 791, at 739 (3d English & 1st American ed. 1880); see also BLACKSTONE, *supra* note 49, at 324 (“[T]he quantum of damages . . . is a matter that cannot be done without the intervention of the jury.”).

53. See, e.g., *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

breach.<sup>54</sup> Juries make these assessments by drawing inferences from their experiences and from the evidence presented. And, like all other factual determinations, judges are generally prohibited from reexamining a jury's damage award. Damage calculations are thus a natural part of the jury's role as fact-finder.<sup>55</sup>

The civil jury is uniquely qualified to fulfill this adjudicative role. Analysis based on the influential University of Chicago Jury Project<sup>56</sup> suggests that citizens are better able to apply common sense and community norms than are judges.<sup>57</sup> Though they are generally untrained, their everyday experiences render citizen jurors knowledgeable in common law issues such as the profile of negligence and the pricing of damages.<sup>58</sup> These issues often involve complex value judgments and assessments of countless imprecise variables that may not clearly lend themselves to economic appraisal. For instance, calculating damages flowing from the pain and suffering of the loss of reproductive ability requires a swath of factual considerations and a sensitivity that is virtually impossible to encapsulate in a legal standard.<sup>59</sup> Jurors faced with this near hopeless calculus are often only vaguely instructed by courts to use their "collective enlightened conscious" as a measuring stick.<sup>60</sup> The judiciary is thus reliant upon the civil jury's expertise, insights, and institutional authority in order to assure the fair and accurate administration of justice.

Due in part to this central role in the judiciary, the civil jury has been recognized as an important socio-political institution since the earliest days of the Republic.<sup>61</sup> In fact, the initial absence from the Constitution of a guaranteed right to a civil jury trial was heavily

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54. See Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 356–58 (1995) (outlining the different types of determinations juries must make in awarding damages).

55. See *id.* at 357–60.

56. This mid-century project was the most ambitious empirical study of juries that had ever been attempted, and its analysis and conclusions have effected scholarship and policy for more than a generation. See, e.g., Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW & CONTEMP. PROBS. 225, 228 (1989) ("Data from the Chicago Jury Project have withstood the test of time and have formed the foundation for much recent debate about the competence of both criminal and civil juries.").

57. See Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 178 (1958).

58. *Id.* at 160.

59. See Greene, *supra* note 56, at 226.

60. See RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 321 (3d ed. 1993).

61. See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274 (J.P. Mayer ed., George Lawrence trans., 1969) (1835); Federal Farmer XV (Jan. 18, 1788).

debated.<sup>62</sup> Such contestation is unsurprising considering the observations of early sociologist Alexis de Tocqueville, who famously recognized that the American “jury is, above all, a political institution.”<sup>63</sup> This characterization highlights the democratic and participatory role of the jury in administering and, thus, shaping the nation’s laws.<sup>64</sup> Though outright jury nullification—whereby a jury acquits or finds a defendant not liable though they believe the defendant committed the alleged conduct—is a controversial doctrine,<sup>65</sup> in the routine administration of civil justice, the jury’s ability to introduce a degree of flexibility to the rigid application of the law is commonly accepted.<sup>66</sup> In this way, the civil jury restrains government and other powerful parties by tying the judiciary to the mast of the social conscience.

Beyond this important political role, the jury is also a unique socializing institution. Jury duty is among the few affirmative and compulsory obligations of citizenship<sup>67</sup> and one of the only opportunities for laypeople to be involved in the process of administering justice.<sup>68</sup> For these reasons, Tocqueville described the civil jury as “a gratuitous public school” that “instill[s] some of the habits of the judicial mind into every citizen.”<sup>69</sup> He argued that it “teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist.”<sup>70</sup> Many others coming before and after Tocqueville expressed similar sentiments, recognizing that judicial participation invests citizens in the just administration of laws and in the general well-being of society.<sup>71</sup> Indeed, as Plato warned more than a millennium ago: “[I]n private suits . . . all should have a

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62. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966).

63. TOCQUEVILLE, *supra* note 61, at 274.

64. *Id.*

65. For an overview of the jury’s law determining power and the nullification doctrine, see Mortimer R. Kadish & Sanford H. Kadish, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973).

66. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 494–95 (1966) (“The jury in the guise of resolving doubts about the issues of fact, gives reign to its sense of values.”).

67. See 28 U.S.C. § 1866(g) (1994).

68. See KALVEN & ZEISEL, *supra* note 66, at 5 (describing jurors as a “transient, ever-changing, ever-inexperienced group of amateurs.”).

69. TOCQUEVILLE, *supra* note 61, at 274.

70. *Id.* at 295.

71. See, e.g., FRANCIS LIEBERG, *CIVIL LIBERTY AND SELF-GOVERNMENT* 236–37 (2d ed. 1874); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 31–32 (1970) (discussing John Stuart Mill on participation in political processes); Plato, *Laws* IV 768, in 2 *THE DIALOGUES OF PLATO* 528–29 (B. Jowett trans., Random House rev. ed. 1937); Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381, 2382 (1999).

share; for he who has no share in the administration of justice is apt to imagine that he has no share in the State at all.”<sup>72</sup> By secretly constraining citizens’ procedural role, non-disclosed high-low agreements undermine the judiciary and rob citizens of their share.

## II. NON-DISCLOSURE OF HIGH-LOW AGREEMENTS COMPROMISES JUDICIAL LEGITIMACY

This Part contends that non-disclosed high-low agreements are procedural contracts that manipulate the adjudicative role of the jury and thereby compromise judicial legitimacy. Part II-A argues that non-disclosed high-low agreements should be understood not as settlements but as procedural contracts. These secret contracts misrepresent the actual dispute between the parties and transform the jury’s responsibilities. Part II-B asserts that the surreptitious manipulation of the jury’s adjudicative role may cause jurors to lose trust and interest in the just administration of law, which in turn compromises perceptions of judicial legitimacy and undercuts the socio-political benefits of jury service. Finally, Part II-C contends that because non-disclosed high-low agreements are a contractual and secret manipulation, they pose unique harms not raised by non-disclosure of seemingly similar procedures.

### A. *Non-Disclosed High-Low Agreements are Procedural Contracts*

Judges and scholars alike have widely and routinely mischaracterized non-disclosed high-low agreements as no more than private settlements.<sup>73</sup> This misunderstanding overlooks the substantial procedure-altering effects of their non-disclosure. Non-disclosed high-low agreements should instead be understood as procedural contracts modifying the jury’s adjudicative role. When undisclosed, these contracts misrepresent the litigants’ actual dispute and task the jury with resolving a controversy that does not genuinely exist.

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72. Plato, *supra* note 71, at 529.

73. See, e.g. *Barton v. Dep’t of Transp.*, 308 P.3d 597, 608 (Wash. 2013) (describing high-low agreements as “a type of partial settlement agreement”); *In re Eighth Judicial Dist. Asbestos Litig. v. Amchem Products Inc.*, 8 N.Y.3d 717, 721 (2007) (“pre-trial settlements”); *Gulf Industries Inc. v. Nair*, 953 So.2d 590, 594 (Fla. App. Ct. 2007) (“a common form of settlement”); *Monti v. Wenkert*, 947 A.2d 261, 272 (Conn. 2008) (“verdict contingent settlement agreement”); *Prescott et al.*, *supra* note 6, at 702 (a type of “partial settlement”); *Yeazell*, *supra* note 5, at 214 (“a new form of settlement”). *But see* *Moffitt*, *supra* note 2, at 497 (describing high-low agreements as “an option for extrajudicial customization of the litigation experience”).

The portrayal of non-disclosed high-low agreements as merely private settlements is inappropriate. Settlements bring an end to disputes without necessitating a full trial,<sup>74</sup> whereas high-low agreements require full adjudication by jury verdict. Appreciating this point, some have construed non-disclosed high-low agreements as partial or incomplete settlements.<sup>75</sup> This is a more apt description, but it applies only when the agreement is disclosed to the jury. By entering into a high-low agreement, the parties partially settle their dispute by limiting its scope to only those values remaining between the agreed upon high and low parameters. When the agreement is undisclosed, however, the ensuing adjudication is not likewise limited. Non-disclosed high-low agreements do not assure a restrained proceeding because the parties still represent their dispute in its original, unmodified entirety.<sup>76</sup> It is therefore unfitting to refer to non-disclosed high-low agreements as simply a type of settlement.

Moreover, this mischaracterization of non-disclosed high-low agreements is more than a pedantic labeling concern. By misunderstanding these agreements as private settlements, courts and commenters have overlooked the substantial procedure-altering effects resulting from their non-disclosure. This oversight is due to the fact that courts do not generally scrutinize settlement agreements. Parties remain free to end their dispute at any time<sup>77</sup> and courts will defer to the parties' decision except in very specific and limited circumstances.<sup>78</sup> Indeed, "the general rule" of settlements, as Professor Sanford Wesburst quips, "is that there are no rules."<sup>79</sup> Therefore, effectively disguised as private settlements, non-disclosed high-low agreements have slipped by the watchmen almost entirely unchallenged. This is a mistake.

Non-disclosed high-low agreements should instead be understood as procedural contracts that modify the jury's adjudicative role. Though the parties have agreed in advance to limit the scope of their dispute, they nevertheless present their case and request for it to be resolved as if the possibilities of relief are boundless. This fundamentally misrepresents the underlying dispute. The amount

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74. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining settlement as "an agreement ending a dispute or lawsuit").

75. See Gross & Syverud, *supra* note 5, at 62; Prescott et al., *supra* note 6, at 702.

76. Though it is true that the parties to a high-low agreement may voluntarily restrain their overall courtroom presentation relative to the expected recovery, this alone does not assure a factually limited proceeding. Cf. Prescott et al., *supra* note 6, at 728–30 (arguing that high-low agreements may reduce litigation costs by limiting the risks and potential rewards of trial).

77. See FED. R. CIV. P. 41(a).

78. See Wesburst, *supra* note 15, at 55.

79. *Id.*

of damages that a party has suffered is a key question of fact.<sup>80</sup> It is determined by calculating a constellation of imprecise factual variables into a single monetary award. High-low agreements are settlements on the scope of this calculation. The parties essentially agree that they do not dispute some undefined combination of facts that would push the award beyond the high-low parameters. The dispute as modified concerns only those calculations resulting in an award falling between the ceiling and the floor, as all other calculations are no longer in controversy.<sup>81</sup> Thus, when the agreement is not disclosed, the parties task the jury with determining the hypothetical worth of the unmodified dispute, even though that dispute no longer exists.<sup>82</sup> This task is alien to the jury's codified procedural role of providing the fair and accurate resolution of public disputes.

The jury's procedural role thus becomes defined by the non-disclosed high-low agreement. If by coincidence the jury returns a damage award that falls between the preset parameters, then the high-low agreement has no noticeable consequence. The parties simply accept the jury's assessment of the nevertheless still misrepresented dispute. On the other hand, if the jury returns an award that falls outside of the parameters, then the agreement takes effect and the corresponding high or low value is awarded. In both of these circumstances the jury renders a decision that effectuates an end to the dispute. Critically, though, the jury's decision does not alone carry consequence and is considered only in relation to the high-low agreement. That is, the jury's decision acts merely to trigger or fail to trigger the parties' contingent contract. The jury's actions are thus unmoored from their effects, serving only a separate and contractually defined purpose. This is a dramatic procedural shift and one that carries detrimental consequences.

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80. See *supra* text accompanying notes 51–55.

81. To make this point clearer, consider again William Jameson, the eighty-two year-old man who died in the Texas oncology clinic. By entering into the high-low agreement, the parties agreed that while the jury would remain free to consider the universe of relevant facts in awarding damages (for instance: the pain experienced by Jameson's grandchildren, or that Jameson was elderly and already diagnosed with cancer), they would be constrained in their calculation of those facts. Accordingly, the parties did not dispute every conceivable calculation of variables, rather only those that would result in an award within the bounds of the agreement. In this way, the high-low agreement framed, albeit imprecisely, what the parties were litigating. It was the dispute itself.

82. This misrepresentation may even run afoul of Federal Rule of Civil Procedure 11, which requires veracity in pleadings, and Model Rule of Professional Conduct 3.3, which requires candor toward the tribunal. These points will not be discussed here.



*B. Non-disclosed High-Low Agreements Undermine Procedural Legitimacy*

Non-disclosed high-low agreements undermine judicial legitimacy by deceptively transforming the jury's role in adjudicating disputes. Research suggests that jury participation helps instill notions of procedural justice in citizens, which plays a powerful role in securing systemic legitimacy.<sup>83</sup> Removing jurors' decision-making power and misleading them as to their procedural role could, over time, result in a crisis of confidence in the judicial system. Jurors may come to believe that their participation is illusory and accordingly abdicate their difficult responsibilities. This would compromise the worth of all jury verdicts while also reducing the political and social benefits of the jury as an institution.

Procedural justice theory suggests that the legitimacy of a judicial system is determined not by its objective qualities, but by the perception of fairness in its processes.<sup>84</sup> It recognizes that justice is an ephemeral and socially constructed concept, existing only to the extent that it is accepted by society.<sup>85</sup> Many of the system's procedures are therefore designed to secure public recognition of judicial legitimacy.<sup>86</sup> Serving on a jury is a core example of a legitimacy-enhancing procedure. Research has shown that jury service greatly affects citizens' attitudes and confidence in the judicial system.<sup>87</sup> These attitudes are more likely to be positive when citizens feel that they fully exercised their decision-making capacity in a meaningful way; attitudes are more likely to be negative when citizens feel that their time has been wasted.<sup>88</sup> This empirical research establishes what philosophers have long recognized: Directly participating in the administration of laws awakens citizens' confidence in the judicial system.<sup>89</sup>

Non-disclosed high-low agreements challenge this confidence by surreptitiously altering the jury's procedural role. Though citizens are often inexperienced in legal matters, surveys show that they

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83. See, e.g., Shari Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in ROBERT E. LITAN, *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 298 (1993).

84. For an overview of procedural justice literature, see E. ALLAN LIND & TOM R. TYLER, *SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66–80 (1988).

85. See, e.g., Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 *INT'L J. PSYCH.* 117, 117–18 (2000).

86. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 *HARV. L. REV.* 1357, 1368–69 (1985).

87. See, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE* 67–80 (1975); Diamond, *supra* note 83, at 285 (relying on jury surveys to assess the psychological effects and satisfaction rates following jury service).

88. See Diamond, *supra* note 83, at 286–87.

89. See *supra* note 71.

generally take their jury responsibilities seriously.<sup>90</sup> This is true even though jurors have described the decision-making process as “difficult, painful, [and] upsetting.”<sup>91</sup> These descriptions are understandable. Compelled by law and with limited instruction, jurors are told to draw upon the social conscience, deliberate in a face-to-face environment, and then direct the power of the state against a community member.<sup>92</sup> They are often tasked with translating immeasurable and tragic injuries into monetary awards. Jurors put their lives on hold and may spend days enduring this civic duty before earnestly returning their informed decision.<sup>93</sup> But, when parties utilize non-disclosed high-low agreements, the jury’s efforts come to naught. They have been duped. Rather than resolving a genuine dispute, the jurors have been pawns in the parties’ secret arrangement. Even more problematic, by not requiring disclosure the judiciary has been complacent in this charade. So, not only have the jurors been cheated of their time, used for their expertise, and deprived of their democratic accomplishment, they have also been misled by an institution reliant on their perceptions for its continued legitimacy.

Misleading jurors in this way has the potential to undermine the legitimacy of all jury trials. According to the American Bar Association, twenty-nine percent of the adult American population has served on a jury.<sup>94</sup> Furthermore, citizens share with each other their positive and negative experiences of jury service.<sup>95</sup> As the use of non-disclosed high-low agreements increases,<sup>96</sup> citizens are likely to encounter them at some point through their own experiences, hearsay, or media accounts. Without contrary evidence, jurors may reasonably come to believe that parties routinely have secret mechanisms for adjusting the verdicts that juries return.<sup>97</sup> Viewing their

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90. See Kalven & Zeisel, *supra* note 66, at 3–11, 141–62 (1966); Diamond, *supra* note 83, at 284.

91. Nancy S. Marder, *Deliberations and Disclosures, A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 484 (1997).

92. See Clark, *supra* note 71, at 2382 (articulating and celebrating the difficulty of jury duty).

93. The average length of a civil jury trial is nearly four days. See LYNN LANTON & THOMAS H. COHEN., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS CIVIL JUSTICE SURVEY OF STATES COURTS, 2005, 8 (2005), available at [www.bjs.gov/content/pub/pdf/cbjts05.pdf](http://www.bjs.gov/content/pub/pdf/cbjts05.pdf).

94. See HARRIS INTERACTIVE, AM. BAR ASSOC. JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? (July 2004).

95. See Diamond, *supra* note 83, at 283.

96. See McDonough, *supra* note 4, at 12.

97. A not dissimilar phenomenon has been noted with jurors in cases likely involving insurance coverage. Insurance is common and in fact legally required under certain circumstances. And despite evidentiary rules prohibiting admission of evidence proving or disproving coverage, it is documented that jurors tend to assume the parties are insured and

role as superfluous or impotent, jurors may reasonably choose to abdicate their difficult responsibility and defer to these imagined contracts.<sup>98</sup> For example, why waste time and emotional energy in calculating the precise value of a dignitary harm if the parties have already agreed to a potential range of damages? Whether or not such an agreement exists, that jurors may sensibly entertain this supposition suggests that non-disclosed high-low agreements sour the resolution of all public disputes, not just those in which they are actually employed.<sup>99</sup> The traditional means for the fair and accurate administration of justice is thereby brought into disrepute.

Such juror abdication would also have negative social and political consequences beyond the courthouse doors. The civil jury is a celebrated institution in part because it imparts on citizens the means of democratic rule.<sup>100</sup> Through participation, jury service teaches citizens to confront the democratic obligation of deliberating and delivering the communities' shared consciousness on some of society's most challenging issues.<sup>101</sup> This heuristic exercise, however, only acquires its lauded significance when the jurors know that their determination carries a real and actual effect. That is, the jury is not simply a deliberative body, but one that must also take responsibility for its decisions.<sup>102</sup> It is by compelling jurors to shoulder the burden of passing judgment on their peers that the institution imparts its emboldening social and political teachings.<sup>103</sup> If jurors do not view their role as outcome determinative—and especially if their role is in fact only obliquely determinative, as is the case with non-disclosed high-low agreements—their involvement in the proceedings is without broader socio-political benefit. Juror

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consider this assumption in calculating damage awards. See MCCORMICK ON EVIDENCE § 201, 596 (1983); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1866 (2001).

98. This fear has been articulated in the criminal context. The so-called “Caldwell Doctrine” prohibits attorneys from informing jurors that their verdicts may be reviewed as it suggest to them that “responsibility . . . rests elsewhere.” See *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985); see also Clark, *supra* note 71, at 2427–28 (discussing the implications of the Caldwell Doctrine).

99. A similar argument has been made in cases involving non-disclosed summary jury trials. See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 386 (1986) (“If word got around that some jurors are being fooled into thinking they are deciding cases when they are not, it could undermine the jury system.”).

100. See TOCQUEVILLE, *supra* note 61, at 274.

101. See Clark, *supra* note 71, at 2398.

102. See Clark, *supra* note 71, at 2401 (stressing an understanding of the jury as a “responsibility taking institution”).

103. See Clark, *supra* note 71, at 2408–10.

participation becomes purely perfunctory and the judiciary's "gratuitous public school"<sup>104</sup> is reduced to nothing more than daycare.

*C. Non-Disclosed High-Low Agreements Can Be Differentiated from  
Seemingly Similar Procedures*

Admittedly, high-low agreements are not the only procedural modifications that are not disclosed to jurors. Three other common procedures are additur and remittitur, statutory damage caps, and treble damages. Like high-low agreements, each of these procedures adjusts the jury's damage award after it has been returned and does so without the jurors' knowledge. However, the use of these procedures is limited to predetermined circumstances and their non-disclosure is justified by public policy. Accordingly, these award modification procedures do not pose the same dangers as non-disclosed high-low agreements.

Additur and remittitur are notable exceptions to the rule that judges may not reexamine facts already tried by a jury.<sup>105</sup> If the jury returns a damage assessment that is clearly erroneous, the affected party may move for the court to grant a new trial. The judge may grant the motion outright or may grant a conditional new trial if the nonmoving party does not accept an adjusted damage award.<sup>106</sup> Remittitur adjusts the damages downward, while additur adjusts it upward.<sup>107</sup> These modification procedures have roots in English common law<sup>108</sup> and have been used in the United States since 1822.<sup>109</sup> Additur and remittitur are justified by a concern for the litigants' due process rights as well as a desire to preserve judicial resources by avoiding repetitious adjudication.<sup>110</sup> High-low agreements serve a similar function, albeit through private contract. The litigants insure themselves against an excessive jury award and appellate litigation by agreeing to limit the scope of their dispute. The critical difference between these two procedures, however, is that a

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104. TOCQUEVILLE, *supra* note 61, at 290.

105. See U.S. CONST. amend. VII.

106. Judges are more apt to use additur and remittitur if they determine that the only error in the jury verdict is excessive generosity or penuriousness. Irene Deaville Sann, *Remittitur (and Additur) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 164 (1987).

107. Though additur is still employed in some state courts, the practice has been abolished at the federal level. See *Dimick v. Schiedt*, 293 U.S. 474, 486–87 (1935).

108. See BLACKSTONE, *supra* note 49, at 380.

109. *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C.D. Mass 1822).

110. See FED. R. CIV. P. 59; Lee Carlin, *Remittitur and Additur*, 49 W. VA. L. Q. 1, 3–4 (1942) (“The desirability of [remittitur’s] use, to avoid the expense, delay and prolongation of litigation incident to a new trial, would seem to be beyond controversy.”).

non-disclosed high-low agreement determines the effect of the award before the jury returns its verdict. The reasonableness of the award is not assessed, but merely considered in relation to the secret contract. Therefore, unlike additur and remittitur, non-disclosed high-low agreements undermine judicial integrity by preemptively discarding even earnestly-calculated damage awards.

Statutory damage caps are another example of an award modification procedure that is not disclosed to jurors.<sup>111</sup> Statutory damage caps are imposed by the legislature and limit the amount of damages a plaintiff can recover in specific circumstances.<sup>112</sup> If a jury returns an award in excess of this limit, the statute prevents the plaintiff from any additional recovery above the cap. At first glance, statutory damage caps are the modification procedure most similar to high-low agreements. Yet there are three important distinctions. First, while statutory damages caps are not disclosed to the jury during trial, they are nevertheless publicly enacted laws. They are not secret from the jurors in the way that non-disclosed high-low agreements remain shrouded by the parties. Next, many statutory damage caps apply only to punitive damages<sup>113</sup> and so do not implicate the jury's fact-finding responsibility. The Supreme Court has stated that punitive damages, unlike compensatory damages, are not questions of fact.<sup>114</sup> So, while jurors may feel misled by the non-disclosure of civil penalty limits, damage caps do not usurp their role in administering justice in the way that non-disclosed high-low agreements do. Lastly, non-disclosure of statutory damage caps furthers a rational public policy. Keeping caps undisclosed prevents the jury from nullifying the statutory limits by overcompensating on

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111. Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI L. REV. 469, 469 (1999) (noting that "most courts construe [damage] caps as rules of law to be applied by the court without jury involvement").

112. For instance, Congress has passed damage caps on recovery for federal employment discrimination cases. See Rebecca Holland-Blumoff & Mathew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1364 (2005).

113. There are non-disclosed statutory damage caps that apply to compensatory damages. The constitutionality of such legislation is heavily contested and raises many concerns, some of which are not unlike those raised by non-disclosed high-low agreements. For a discussion of these concerns, see Holland-Blumoff & Bodie, *supra* note 112, at 1388–98. See also Murphy, *supra* note 54, at 402 (arguing that all statutory damage caps are unconstitutional).

114. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.* 532 U.S. 424, 437 (2001) ("[T]he level of punitive damages is not really a 'fact' 'tried' by the jury."); see also *Tull v. United States*, 481 U.S. 412, 426 (1987) (holding that assessment of civil penalties is not a "fundamental element of a jury trial").

those damage charges that remain uncapped by the statute.<sup>115</sup> Because high-low agreements apply to general damages, such strategic award calibration is not a concern to justify secrecy. Therefore, statutory damage caps do not pose the same hazards of non-disclosed high-low agreements.

A third, though less common, non-disclosed award modification procedure is treble damages.<sup>116</sup> In this procedure, the court triples the compensatory damages awarded by the jury without their knowledge. Like statutory damage caps, however, treble damages are enacted by legislatures and are therefore not truly kept secret from jurors. Moreover, the modification procedure applies only in narrow circumstances where the civil wrong has had market-manipulating effects, such as in suits for antitrust,<sup>117</sup> racketeering,<sup>118</sup> and willful patent infringement.<sup>119</sup> Treble damage awards are limited to these circumstances because their unabashed purpose is to punish the defendant and further the public policy of promoting market competition.<sup>120</sup> Jurors are not made aware of this procedure for fear that they may calibrate their compensatory damage award in expectation of its multiplied punitive value.<sup>121</sup> Disclosing the treble damages procedure would thus undermine the limited public policy objective behind trebling. Non-disclosed high-low agreements do not further any such policy objective. Instead, they privately alter the jury's adjudicative role to further only the parties' interests.

Therefore, unlike seemingly similar procedures, non-disclosed high-low agreements are unique in that they are private contracts

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115. See Kang, *supra* note 111, at 469; see also Sasaki v. Class 92 F.3d, 232, 237 (4th Cir. 1996) (noting there was reason to believe the jury calibrated its award in relation to the damage cap).

116. Most courts hold that the jury should not be instructed that the award will be trebled. See, e.g., *Heartransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 989 n. 21 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). But see *Bordonaro Bros. Theaters v. Paramount Pictures, Inc.*, 203 F.2d 676, 678–79 (2d Cir. 1953) (holding that the jury may be informed of trebling procedure).

117. See Hart-Scott-Rodino Antitrust Act of 1976, 15 U.S.C. §§ 15b–15h (2013).

118. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1964 (2013).

119. See 35 U.S.C. § 284.

120. See, e.g., *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 88 S.Ct. 1981, 1984 (1968) (“The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.”), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

121. See *Heartransfer*, 553 F.2d at 989 n. 21; *Noble v. McClatchy Newspapers*, 533 F.2d 1081, 1090–91 (9th Cir. 1975), *vacated*, 433 U.S. 904 (1977); see also Note, *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 Mich. L. Rev. 693, 694–98 (1983) (outlining research demonstrating that disclosing trebling tends to decrease jury awards).



implementing an unprecedented shift in the adjudicative role of the jury. Faced with uncertain liability, parties agree to modify their dispute so as to limit its scope. However, they present their case to the jury as if this modification has not occurred. The jury is then secretly tasked with returning the hypothetical value of a dispute that does not genuinely exist. Under no other circumstances do courts engage in such a duplicitous procedure. Though at times courts do withhold information from jurors regarding modifications of their awards, these instances are limited and established in either common law or statutory provisions. They are based on careful considerations of judicial fairness and public policy. Non-disclosed high-low agreements possess no similar credentials. Instead, private parties trade their liability exposure in return for the judiciary's procedural integrity—a weighty bargain, indeed.

### III. DISCLOSURE OF HIGH-LOW AGREEMENTS SHOULD BE REQUIRED

This Part contends that courts should require parties to disclose high-low agreements to juries. Section III-A argues that despite the limited case law concerning procedural contracts, the severe delegitimizing effects of non-disclosed high-low agreements should render such agreements unenforceable. Disclosed high-low agreements, on the other hand, are fundamentally distinct from non-disclosed high-low agreements in that they do not alter the adjudicative role of the jury. Thus, the deleterious effects of non-disclosure dissipate once the jury is made aware of the high-low agreement. Section III-B reviews some of the negative consequences of requiring disclosure, such as anchoring or scaling of damage awards, as well as undue prejudice against the parties. It argues that these harms can be curbed through effective jury instruction and the behavior of the parties themselves. Finally, Section III-C contends that even if these mitigation techniques are ineffective, courts should nevertheless require disclosure. It argues that requiring disclosure is likely to save judicial resources by lessening the attractiveness of high-low agreements and thereby promoting complete settlements.

#### *A. Requiring Disclosure Preserves Judicial Legitimacy*

In order to preserve judicial legitimacy, courts should require parties to disclose the existence and terms of high-low agreements.



Though the case law defining those overriding institutional interests that may alone invalidate private agreements is limited, the delegitimizing effects flowing from non-disclosed high-low agreements should prompt courts to mandate disclosure. Once disclosed, high-low agreements do not pose threats to judicial legitimacy because they do not alter the jury's function. Disclosed high-low agreements are merely the partial settlements that scholars and judges have traditionally characterized them as. The jury is no longer misled and its role in administering justice is left unmodified.

Today's courts generally welcome procedural contracts, though there are exceptions.<sup>122</sup> Over the last half-century, courts have recognized parties' freedom to enter into a wide array of contracts that maximize adjudicative efficiency through mutually beneficial procedural arrangements. Parties may agree to waive service of process, modify the applicable burden of proof, and even choose which legal standards will apply.<sup>123</sup> Yet despite this broad autonomy, procedural contracts are still subject to judicial review. While there is little case law on point, and even less legislative or judicial direction, courts and commenters have acknowledged a public policy exception to the enforcement of contracts that compromise the legitimacy of the judicial system.<sup>124</sup>

Non-disclosed high-low agreements fall within this important exception. Though parties are free to waive their right to a jury trial,<sup>125</sup> the jury remains without question a principal player in the judicial cast. For example, unlike the role of a private arbitrator, whose purpose reflects her clients' wants, the jury has the limited and legally codified function of determining facts in light of applicable law. It is not an infinitely malleable institution. Just as the judge may not be made by private contract to resolve a dispute by flipping a coin,<sup>126</sup> neither may the jury. Non-disclosed high-low agreements assign the jury with a similarly flippant undertaking. Indeed, determining the value of a hypothetical dispute is antithetical to the jury's fact-finding procedural role and therefore should not be tolerated by courts.

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122. See Dodge, *supra* note 32, at 737 (overviewing the courts' "broad embrace of private ordering").

123. See, e.g., Davis & Hershkoff, *supra* note 36, at 517.

124. See, e.g., United States v. Mezzanatto, 513 U.S. 196, 202 (1995); United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring); Noyes, *supra* note 16, at 623; Resnik, *supra* note 36, at 649.

125. See FED. R. CIV. P. 38.

126. See *LaPine Tech. Corp.*, 130 F.3d at 891 (Kozinski, J., concurring).

This proposed restriction is sensible. As discussed, the delegitimizing effects of non-disclosed high-low agreements are substantial. The prestige of the court is leveraged by risk-adverse parties to commit an open lie on the jury. The jury's adjudicative function is thereby surreptitiously reduced to a role in a private contract. Still, though such duplicity is the clear effect, parties enter into high-low agreements with unassuming intentions. Non-disclosed high-low agreements benefit parties by providing them with the legitimacy of a full jury verdict without the unappealing drawback of uncertain liability. Parties thereby receive a near risk-free spin of the judicial wheel—they can have their cake and eat it too.<sup>127</sup> This lopsided arrangement results from the fact that parties to non-disclosed high-low agreements are generally insulated from the system-wide externalities they force onto the public.<sup>128</sup>

Courts can correct this inequity by requiring disclosure. Disclosed high-low agreements are fundamentally distinct from non-disclosed high-low agreements. Whereas non-disclosed high-low agreements are procedural contracts secretly modifying the adjudicative role of the jury, disclosed agreements simply demarcate the contractually settled boundaries of the remaining dispute. There is nothing perverse about high-low agreements once they are disclosed. To be sure, litigants are free and even legally required to confer and negotiate the boundaries of their dispute.<sup>129</sup> Just as litigants may stipulate to the veracity of a given fact, taking its determination out of the hands of the jury, so too might they agree to constrict the overall value of the dispute through a high-low agreement. Disclosed high-low agreements are thus akin to traditional partial settlements, precisely as courts and commenters have long supposed.<sup>130</sup> They are not procedural contracts. Once the high-low agreement is disclosed to them, the jurors simply perform their traditional adjudicative function by determining the value of the dispute as modified.

It is critical, then, that courts require disclosure of both the existence of high-low agreements and the specific high and low

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127. This is the actual title of a practitioners guide article. See Andrea M. Alonso & Kevin G. Faley, *High-Low Agreements: You Can Have Your Cake and Eat It, Too*, 2 BRIEF 69 (1999).

128. See Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1493 (2013) (“When parties agree to modify procedural rules within adjudication they do not internalize the negative externalities that their agreement produces.”).

129. See FED. R. CIV. P. 26(f)(2) (requiring parties to meet and “consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case”).

130. See *supra* note 73.

parameters. The significance of the latter point cannot be understated. The negative effects of non-disclosed high-low agreements stem from the fact the jury is tasked with resolving a dispute that does not exist. It is through this fiction that jurors are cheated of their participatory role and the legitimacy of the judicial system is compromised. Simply disclosing the existence of a high-low agreement without mention of the predetermined bookends does not correct this manipulation. The jury would remain blind to the parties' actual dispute, knowing only that their eyes were veiled. Requiring complete disclosure would allow the jury to retain its responsibilities in determining the veracity of facts and the consequence of their weight in relation to the parties' modified dispute. The jurors' time would then no longer be taken for granted and their expertise no longer abused. And, most importantly, judicial legitimacy would be secured.

*B. The Negative Effects of Requiring Disclosure Can Be Mitigated*

Although it would benefit both juries and the justice system as a whole, requiring disclosure of high-low agreements would also carry negative consequences. Jurors may base their damage awards on the newly disclosed boundaries instead of carefully weighing the evidence. Jurors may also respond with prejudice against one or both of the parties by interpreting the agreement itself as an admission of liability. These undesirable results, however, are not insurmountable and can be mitigated. Courts may offer jury instructions to restrict the evidentiary use and prejudicial effects of the disclosed values. Likewise, the parties may adjust their contract in expectation of the jury's objectionable response or alter their litigation strategy all together.

The jury's knowledge of the high-low parameters will almost certainly affect the amount of damages they award. This is due to anchoring and scaling effects. Anchoring is a psychological phenomenon in which the first number presented to a decision-maker has a demonstrable effect on her ultimate decision.<sup>131</sup> For example, empirical research suggests that when jurors learn of statutory damage caps, they adjust their damage award in relation to the cap.<sup>132</sup>

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131. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974).

132. See Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 367 (1999); Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 251 (1997).

This results in either a devaluation or inflation of the awarded damages, irrespective of the evidence presented.<sup>133</sup> There is no reason to believe jurors' responses to disclosed high-low agreements would be distinct from jurors' responses to statutory damage caps. Indeed, studies have shown that the anchoring effect can occur even when subjects believe that the presented numbers are randomly generated.<sup>134</sup> This suggests that anchoring would almost certainly occur if the jurors knew that the numbers were contractually settled. Jurors may additionally use the disclosed high and low parameters as a scale for calculating damages. Like anchoring, scaling is a psychological effect in which individuals calibrate responses in relation to the presentation of possible choices.<sup>135</sup> Faced with specific values, jurors may believe that awarding the highest amount is warranted only in instances of the most egregious behavior and adjust their award accordingly.<sup>136</sup> Because of these two psychological effects, disclosing high-low parameters reduces the likelihood that a jury would return a maximum or minimum verdict irrespective of the strength of the parties' evidence.

Additionally, disclosure of high-low agreements may result in undue prejudice against one or both of the disputants. The jury may understand the existence of the high-low agreement as an admission of the weakness or strength of a given parties' argument. They may also understand the agreement itself to be an implicit admission of liability. From the layman's point of view, why would someone agree to pay or forfeit any sum of money if there was not at least some truth to the accusations? In fact, these very real concerns animate Rule 408 of the Federal Rules of Evidence. That rule prohibits parties from presenting evidence of compromise offers and negotiations "to prove or disprove the validity or amount of a disputed claim."<sup>137</sup> Importantly, Rule 408 is a narrow rule and does not prohibit disclosure of private agreements for purposes not explicitly prohibited.<sup>138</sup> Therefore, Rule 408 would not apply to disclosure of high-low agreements for the purpose of presenting the jury with an accurate portrayal of the existing dispute. Still, disclosure of high-low agreements implicates the same concerns

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133. *Id.*

134. Tvesky & Kahneman, *supra* note 131, at 1125.

135. See Norbert Schwarz et al., *Response Scale: Effects of Category Range on Reported Behavior and Comparative Judgments*, 49 PUB. OP. Q. 388, 389 (1985).

136. See Holland-Blumoff & Bodie, *supra* note 112, at 1382 (describing this psychological "conversation[ ]" in the context of statutory damage caps).

137. FED. R. EVID. 408(a).

138. See FED. R. EVID. 408(b) (stating that the court may admit evidence of compromises and negotiations for purposes not explicitly prohibited by the rule).

justifying Rule 408's prohibition, and, thus, parties' fears of potential prejudice are not at all unreasonable.

Though these potential detriments are serious, they can be mitigated by courts and by the parties themselves. First, as in all instances in which a jury is likely to consider evidence for both a permissible and impermissible purpose, the court should offer the jury a limiting instruction.<sup>139</sup> Such an instruction would explain that although the high-low agreement limits the potential valuation of the dispute, it has no bearing on the veracity of the complaint and does not reflect a maximum or minimum degree of liability. The court may also inform the jury that high-low agreements are common practice and are designed by parties with the intention to buy peace rather than concede liability. Admittedly, the effectiveness of such limiting instructions may be less than satisfactory, as it has been documented that jurors often misunderstand, forget, or outright ignore courtroom instructions.<sup>140</sup> But, to use juror shortcomings to justify nondisclosure is to succumb to cynicism. The American judicial system presumes that jurors comprehend courtroom instructions and depends on their ability to do so.<sup>141</sup> Moreover, the boundaries of high-low agreements are unlikely to inflame jurors' emotions or prove so complicated that jurors would be incapable of limiting their evidentiary application.<sup>142</sup> Well-crafted jury instructions could therefore help steer the jury away from psychological biases and toward the fair and accurate resolution of the parties' remaining dispute.

The parties themselves may also take proactive steps to limit disclosure's undesirable consequences. A rule requiring disclosure would not curtail parties' autonomy to shape their dispute and limit their liability exposure through the use of high-low agreements. It

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139. FED. R. EVID. 105.

140. See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1306–11 (1979). But see David Alan Sklanksy, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 416 (2013) (arguing that while jurors may not be capable of forgetting evidence once it is disclosed, they are capable of disregarding it or limiting its purpose).

141. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (noting that “[t]he rule that juries are presumed to follow their instructions” is problematic, but rooted in the belief that it represents “a reasonable practical accommodation” of the parties’ interests).

142. Cf. Laura Gaston Dooley, Essay, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 337 (1995) (“[T]he Federal Rules of Evidence rest on an assumption that the judge must protect the jury from certain evidence lest the jurors allow their emotional reaction to overpower their intellectual obligation to decide the case according to the judge’s instructions.”); see also JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 123 (Atheneum 1963) (1949) (noting that rules of exclusion “have been perpetuated primarily because of the admitted incompetence of jurors”).

would simply force the parties to change the way that they approached negotiating the agreement. For instance, if the parties are concerned that psychological effects like anchoring and scaling or prejudice will affect the juries' damage assessment, they can preemptively adjust the ceiling or the floor to correct for distortion. Such a corrective measure would not defeat the purpose of high-low agreements. As Professor J.J. Prescott and his colleagues demonstrate through economic analysis, one of the primary benefits of high-low agreements is that they allow mutually optimistic parties to "reduce[ ] the risk premiums they bear . . . while still allowing them to benefit from their confidence."<sup>143</sup> Requiring disclosure would preserve this jointly beneficial speculation, as it would simply change the assessments that parties must make.

If the parties determine that disclosure would nevertheless prove overly prejudicial, there are a host of alternative procedural arrangements in which high-low agreements may remain undisclosed without resulting in systemic harm. For instance, parties may agree to present the jury with only the question of liability. If the jury returned a verdict in favor of the plaintiff, then the ceiling would be awarded, whereas, if they returned a verdict in favor of the defendant, then the floor would be awarded. In disputes involving sufficiently unpredictable damages, such an agreement would result in an outcome not dissimilar to a standard non-disclosed high-low agreement. Additionally, parties may instead choose to pursue forms of alternative dispute resolution. External procedural systems commonly utilize non-disclosed high-low agreements and would welcome the parties' arbitration fees.<sup>144</sup> And finally, for those parties unwilling to eschew public tribunals, many states are beginning to offer what have been generally termed 'expedited jury trials.' Expedited jury trials are similar to traditional public trials except that the parties litigate their case rapidly, such that an outcome is reached in a single day.<sup>145</sup> Non-disclosed high-low agreements have become fixtures in expedited jury trials,<sup>146</sup> and some states even have statutes explicitly prohibiting disclosing the agreement to the

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143. See Prescott et al., *supra* note 6, at 701, 729–30.

144. See, e.g., Scott S. Morrisson, *Consider Binding Arbitration to Resolve Your Next Dispute*, RES GESTAE, May 1997, at 18, 22.

145. See generally Paula L. Hannaford-Agor, *Short, Summary and Expedited: The Evolution of Civil Jury Trials*, National Center for State Courts (2012), available at <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx>.

146. See Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 LOY. L.A. L. REV. 1585, 1612 (2008) (noting that virtually every case tried by summary jury in Charleston County involves a high-low agreement).



jury.<sup>147</sup> Therefore, while requiring disclosure of high-low agreements might in some ways limit the procedures available to parties, there remain alternative arrangements for parties to realize the benefits of non-disclosed high-low agreements while still assuring judicial legitimacy.

### C. Requiring Disclosure May Preserve Judicial Resources

Even if the suggested mitigation techniques are not able to entirely protect parties from the unwanted consequences of disclosure, courts should still require parties to reveal their high-low agreements. While there exists an overarching judicial policy in promoting settlement agreements, this policy is informed by a desire to avoid the expense of unneeded trials. High-low agreements further no such interest. Instead, they promote litigation by lessening the parties' risks attendant to pursuing adjudication. Disclosure would likely save judicial resources by limiting the advantages of non-disclosed high-low agreements and thereby encouraging parties to completely settle their disputes.

Courts welcome high-low agreements in accordance with the broad public policy of promoting private dispute resolution.<sup>148</sup> This preference for external settlements permeates everything from the rules of procedure and evidence to appellate opinions and judicial scholarship.<sup>149</sup> But this is not because of an altruistic longing for harmony. Rather, settlements are facilitated and encouraged because they avoid the expense of adjudication.<sup>150</sup> Trials are expensive and dockets are full; there is an abundance of lawyers

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147. See, e.g., CAL. CIV. PRO. CODE §§ 630.01(b), 630.03; NY R SUFFOLK SJT RULE 2. Non-disclosure of the agreement under these circumstances is perhaps less concerning than in ordinary trials, as the proceedings are already dramatically altered and limited. Still, expedited jury trials differ dramatically between jurisdictions and may themselves pose unique concerns that have yet to be studied.

148. See, e.g., *Barton v. Dep't of Transp.*, 308 P.3d 597, 605 (Wash. 2013) (stating that high-low agreements further the public policy to "encourage out-of-court settlements"); *In re Eighth Judicial Dist. Asbestos Litig. v. Amchem Products Inc.*, 8 N.Y.3d 717, 723 (2007) (assessing high-low agreements in light of the "State's public policy of encouraging the expeditious settlement of claims"); *Monti v. Wenkert*, 947 A.2d 261, 276 (Conn. 2008) (noting high-low agreements serve the public policy of "encouraging parties to settle their disputes and to avoid protracted litigation").

149. See *Gross & Syverud*, *supra* note 5, at 2.

150. See, e.g., *In re Smith*, 926 F.2d 1027, 1029 ("Settlement is generally favored because it conserves scarce judicial resources."); *Gross & Syverud*, *supra* note 5, at 3-4; Margaret M. Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 36 (1996).



and a dearth of judges.<sup>151</sup> These economic and administrative concerns animate various procedural rules, for instance, the aforementioned evidentiary rule prohibiting admission of compromise offers.<sup>152</sup> The generally articulated fear is that if litigants were made at trial to confront their settlements, they would be less likely to entertain discussions or enter into agreements.<sup>153</sup> The anticipated result would be fewer private settlements and an increase in costly public adjudication.

But, this policy and its economic rationale do not apply to high-low agreements. Though the empirical data is inconclusive on whether or not high-low agreements ultimately preserve parties' resources,<sup>154</sup> there is reason to believe that high-low agreements promote litigation by lowering the cost and risk of going to trial.<sup>155</sup> It is the fear of an uncertain jury verdict that drives parties to settle their disputes.<sup>156</sup> Yet with high-low agreements in place, litigants are no longer concerned with the dangers of a jackpot verdict or a jury snub. They are sure of their overall liability exposure. By lowering the costs and increasing the certainty of trial, high-low agreements invite to the courthouse disputants who might have otherwise decided to privately resolve their disputes. In fact, high-low agreements are most often used in cases involving potentially large damages and uncertain liability,<sup>157</sup> the kinds of cases that would likely settle if not for the safety blanket of the high-low agreement.<sup>158</sup>

Mandating that parties disclose their high-low agreements will likely result in an overall increase in private settlements and a reduction in public trials. Once the agreement is disclosed, litigants are no longer able to receive a near risk-free jury consultation on the value of their unmodified dispute. Furthermore, they face the potential risk that jurors will be unable or unwilling to follow the courts' limiting instruction on the permissible evidentiary uses of

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151. Gross & Syverud, *supra* note 5, at 2–4.

152. FED. R. EVID. 408(a).

153. See FED. R. EVID. 408.

154. See Prescott et al., *supra* note 6, at 729–30 (noting that while in theory high-low agreements may cause parties to reduce their litigation expenditure, empirical data demonstrates no consistent differences in monthly litigation expenses between claims with a high-low agreement in place and all others).

155. See Gross & Syverud, *supra* note 5, at 62 (noting that high-low agreements make “trial less scary, which might encourage more parties to take their chances and try it”); Yeazell, *supra* note 5, at 197 (describing high-low agreements as “insurance against a catastrophic verdict”).

156. See *id.*

157. See John L. Shanahan, *The High-Low Agreement*, FOR THE DEFENSE, July 1991, at 27.

158. For a discussion on the factors that affect the likelihood of settlement, see generally Gross & Syverud, *supra* note 5, at 46–61.

the contract. These detriments would make high-low agreements less appealing to litigants and may curtail their frequent use. It is therefore not unreasonable to predict that a rule requiring disclosure would keep some cases out of already overcrowded dockets and preserve judicial resources.<sup>159</sup>

Disclosure is certainly a double-edged sword. Though informing juries of high-low agreements would secure judicial legitimacy, it would also pose reasonable concerns for the litigants. While the aforementioned mitigation techniques should quash many of these worries, some may persist. This is not necessarily undesirable. Mandating disclosure is likely to prompt out-of-court settlements, thus furthering the public policy of judicial resourcefulness. To be clear, this is not an invitation for jurisdictions to adopt unfair procedural rules solely to promote settlements. Nevertheless, courts should not compromise their integrity by allowing parties to mislead jurors out of an overzealous commitment to party autonomy and private settlements. And this is especially true in the case of non-disclosed high-low agreements, which undermine the economic rationale that motivates courts to promote settlements in the first place.

#### CONCLUSION

Americans enjoy broad autonomy in selecting the procedures governing their disputes. However, this freedom does not stretch so far as to permit choices that compromise judicial legitimacy. Non-disclosed high-low agreements do just that. When undisclosed to jurors, high-low agreements effectuate a dramatic procedural shift. Parties that have settled on the possible outcomes of their dispute present their case to the jury and ask for it to be resolved as if the potential relief is boundless. In this way, jurors are misled and tasked with resolving a purely hypothetical dispute. The answer the jury returns carries no real weight and is appreciated only in relation to the parties' furtive contract. This is a fundamental transformation of the jury's procedural role. It is also a deceptive abuse of jurors' time and expertise. Non-disclosed high-low agreements thus undermine the procedural legitimacy of the judicial system and reduce the social and political benefits of jury service. And, while there is very limited judicial or legislative direction on how to cabin litigants' procedural autonomy, those agreements that

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159. *See id.*, at 62 ("The availability of [high-low agreements] . . . will tend to discourage full settlements and to facilitate trials.").

compromise judicial legitimacy should not be enforced. By mandating disclosure, courts can eschew these delegitimizing effects. Once they are made known to the jury, high-low agreements simply mark the boundaries of the dispute. The jury's role in determining facts and effectuating outcomes is left undisturbed. Although requiring disclosure may adversely affect the parties, these negative consequences can be alleviated by jury instruction or litigation strategy. The parties may also choose to avoid trial altogether. Disclosing high-low agreements would thus maintain the autonomy of the parties to craft creative settlement arrangements while protecting the integrity of the judiciary.

