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JUST NEGOTIATION

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ABSTRACT

Legal systems for dispute resolution provide rules that ensure some measure of procedural due process for disputants. This is true in litigation, arbitration, and even mediation. The process of negotiation, in contrast, is largely unregulated. In this article, I argue that negotiation is not just a “Wild West” where anything goes, but instead a dispute resolution mechanism in which social psychology provides certain unwritten norms for fair behavior. A robust empirical literature has established that procedural justice – that is, the fairness of decision-making processes – has a significant effect on individuals’ perceptions of their outcomes in third-party decision-making systems, encouraging acceptance of and adherence to outcomes and fostering a perception that decision-making systems are legitimate. Here, I argue that procedural justice plays a critical and largely unexamined role in legal negotiation, encouraging the acceptance of and adherence to negotiated agreements. As individuals bargain in the shadow of substantive law and legal endowments, so too they bargain in the shadow of legal process.

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INTRODUCTION

The American civil legal system is, at its core, a system for the resolution of disputes. It is designed to bring order to the chaos of unresolved disputes between and among people and entities. Although the ultimate goal of this system is to produce just results for the involved parties, the architects and caretakers of this system have devoted much attention to ensuring that due process – that is, specifically, fairness of *process*, distinct from *outcome* – is received by participants. Our civil legal system is designed to afford not solely substantively fair outcomes, but also a procedurally fair process for all those who choose to avail themselves of its decision-making authority.

But as has been amply documented, the vast majority of disputes with a legal basis for resolution¹ are not formally resolved by the judicial system,² with its elaborate network of procedural and substantive protections. Instead, most disputes are resolved outside of the legal system – or within that system, but without a final decision by a judge or jury. These matters are said to have been resolved through alternative dispute resolution.³ Within the bailiwick of alternative dispute resolution fall arbitration, mediation, and negotiation. If alternative dispute resolution accounts for the resolution of most legal disputes, negotiation in turn accounts for the resolution of most of these same disputes. Arbitration and mediation bring with them complex webs of procedural and substantive safeguards distinct from but akin in spirit to those in the litigation setting.⁴ But when looking to negotiation for systemic safeguards, the observer encounters a dramatically different picture. Procedural and substantive legal rules for disputants engaged in negotiation are few and far between – indeed, negotiation is perceived as the Wild West, the last great frontier of dispute resolution, where hand-

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¹ By this I mean to exclude disputes of which there is no legal basis for the resolution – such as a dispute over a personal or business decision.

² See, e.g., Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

³ The term is, of course, somewhat ironic, since the bulk of disputes are resolved through this so-called alternative process, while only a tiny fraction of cases are resolved through the “mainstream” process of litigation.

⁴ It is widely acknowledged, however, that the procedural safeguards of arbitration and mediation are lower than those of litigation.

to-hand combat is the order of the day. It is, after all, just negotiation – an organic process worked out between disputants in any way they both might choose.

Or is it? This article posits that where the Federal Rules of Civil Procedure and a vast body of case law outline, clarify, and amplify the procedural safeguards of civil litigation, and other rules do the same in the mediation and arbitration contexts, the legal negotiation arena too may have critical rules of procedure, albeit unwritten. One might think of them as the Invisible Rules of Negotiation Procedure. There are no legal sanctions for their violation, but there are important ramifications for adherence or failure to adhere to them. In this way, important norms of process fairness enter into the realm of the negotiated dispute, leading to subjective assessments of just (or unjust) negotiation. These assessments about the fairness of the negotiation process, in turn, play a crucial role in shaping individuals' responses to their negotiated outcomes. As Mnookin and Kornhauser showed that substantive legal rules, endowments, and entitlements played an important role in negotiation, such that individuals were “bargaining in the shadow of the law,”⁵ this article posits that fairness of process is critical in individuals' experiences in legal negotiation, such that individuals are bargaining in the shadow of due process. It is important to participants that they have engaged in just negotiation – not *merely* negotiation, but negotiation characterized by a fair process.

There are few written rules about the fairness of process – or, indeed, rules about anything – in the legal negotiation setting. Instead, I posit, we can look to psychology research to find the broad contours of the “unwritten rules” of negotiation procedure. A body of research, particularly in social psychology, has shown how deeply individuals care about the fairness of the processes that produce decisions of importance to them, and has identified distinct factors that lead individuals reliably to assess processes as fair or unfair. Beginning over three decades ago, Thibaut and Walker's groundbreaking work on the role of “procedural justice”⁶ showed that the fairness of a process, distinct from the fairness

⁵ Robert Mnookin & Louis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁶ JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). I want, at the outset, to distinguish “procedural justice” as it is used in the psychology and the psychology and law context from the way that some legal academics have used the term procedural justice to refer more broadly to the fairness of a dispute resolution system. “Procedural justice” as a psychology term is a term of art that refers to a particular body of social science research about how individuals perceive the fairness of dispute resolution systems. Procedural justice has been used more generally by philosophers, political theorists, and law and economics scholars to describe the fairness of a legal system, but this usage is broader than the specific psychology usage. *See, e.g.*, Larry Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Bruce Hay, *Procedural Justice – Ex Ante vs. Ex Post*,

or the favorability of the outcome, is an important factor in how individuals make assessments about decisions that affect them. Over time, procedural justice research has shown that the fairness of process also has important implications for individuals' satisfaction with outcomes and for individuals' assessments about the legitimacy of decisions and institutions.

Although procedural justice research has typically focused on the importance of fairness of process to participants who receive a decision from a third party on a matter that is meaningful to them, newer empirical research has suggested that procedural justice effects may also be present in bilateral negotiation. This research suggests factors that lead to assessments of fair treatment in negotiation, and indicates that the fairness of the negotiation process may have significant effects on parties' acceptance of and adherence to their negotiated agreements. Moreover, because legal negotiation and settlement of disputes forms such a large proportion of the disposition of legal cases, the way that disputants view negotiation is meaningful to their perspective on the legal system as a whole. Negotiation is not just a vast wilderness vaguely related to our legal system; it is inextricably tied to our dispute resolution apparatus at every stage and every level. Psychology research has shown that assessments of procedural fairness are reliably related to perceptions of legitimacy; if most of our cases are resolved by negotiation, the procedural fairness of those negotiations may have a significant impact on citizens' perceptions of the legitimacy of the legal system, writ large.

Considering procedural justice in the negotiation context raises several critical questions. Two key questions are interrelated. First, can "procedural justice" or fairness of process reasonably be said to exist at all in the context of a dynamic two-party process in which no one can "set" rules and no one can impose a decision on the participants? In a context where both parties have the potential to contribute equally to the negotiation process, and both parties must agree to any negotiated outcome, there is an open question as to the relevance of the concept of procedural justice. What does fairness of process *mean* in negotiation? When is behavior fair, and when not? The second critical inquiry, then, is to ask what factors guide negotiators' subjective assessments that they have been treated fairly. These factors would form the "unwritten rules" discussed above.

44 UCLA L. REV. 1803 (1996-1997); Robert Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488-89 (2003). The legal philosophy, economic, or political theory perspective on what leads to a fair process and on what the effects of such a fair process are is relevant to, but not the focus of, my inquiry here. *See infra* Part IIA.

Another distinct concern raised by considering the role of procedural justice in negotiation is that the participants in legal negotiation are typically lawyers, rather than clients. Yet procedural justice literature has largely explored the effects of fair process on the principals who receive a decision on a matter of importance to them. In the negotiation context, those principals are clients, who are not often present during the actual negotiation process. The lawyer-client principal-agent relationship considerably complicates, beyond the bounds of existing procedural justice literature, an understanding of the role that procedural justice does, might, and should play in bilateral legal negotiation. Two immediate questions stem from the presence of the principal-agent relationship in this context: first, whether lawyers are likely to experience procedural justice in a negotiation process in the same way that a client would; and second, how potential differences in the experience of fairness of process between attorneys and clients may play out with respect to the ethics of representation and zealous advocacy.

In Part I of this article, I provide a brief background on the psychological concept of procedural justice. In Part II, I look to the civil justice system, including civil litigation, arbitration, and mediation, to explore what specific rules of those dispute resolution mechanisms relate to precepts of procedural justice in psychology. I then survey the (few) rules that exist to govern negotiation in civil disputes, showing that only a handful of explicit legal rules govern attorney behavior and discussing the way in which those rules may relate to procedural justice. In Part III, I explore the intersection of procedural justice and negotiation more fully, first addressing theoretical concerns that the absence of a third-party authority in negotiation may make an exploration of procedural justice inapposite, and then discussing the small but growing body of empirical research on the psychology of procedural justice in negotiation. In the absence of explicit rules for attorney behavior, social norms rather than binding statutory provisions play a large role in regulating behavior; using psychological literature on the origins of procedural justice in negotiation, I explore what those norms are likely to look like. In Part IV, I address specific concerns about the intersection between procedural justice and negotiation in light of the attorney-client relationship present in the legal negotiation setting.

I. PROCEDURAL JUSTICE IN PSYCHOLOGY

In 1975, Thibaut and Walker published their seminal book, “Procedural Justice,” in which they set forth the results of multiple studies showing that individuals were more satisfied with dispute resolution mechanisms when they perceived that the process of dispute resolution was fair, irrespective of the fairness of the outcome or the favorability of the outcome.⁷ This was a remarkable finding, but one that may not have surprised the original crafters of our justice system, concerned as they were with designing a system that afforded due process to its participants. What Thibaut and Walker did that was so revolutionary was to test, quantify, and clarify the great civic intuition of our legal system: that fairness of process matters to people, and drives their assessments of processes for the resolution of disputes separate and apart from the impact of how substantively fair, just, or good an outcome may be.⁸ Thibaut and Walker found that individuals preferred adversary over inquisitorial legal systems,⁹ and also preferred to retain a large share of control of the process even when another party had control over the ultimate decision.¹⁰

In the thirty years since Thibaut and Walker began their empirical exploration of the effects of procedural justice,¹¹ the field has grown substantially. Studies have explored the scope of procedural justice effects across different settings, demographic groups, and cultures; the underlying mechanisms that produce the effects; and the impact of these effects on the perceived legitimacy of authority structures. Throughout the 1980s and 1990s, Tyler, Lind, and other psychologists created a terrifically robust body of research findings that supported the importance of procedural justice in people’s assessments of decisions. Indeed, “[f]ew if any socio-legal topics . . . have received as much attention using as many different research methods.”¹² Procedural justice affects judgments about satisfaction with interaction with the legal system in both civil¹³ and criminal settings.¹⁴ The effects in the

⁷ JOHN THIBAUT & LAURENS WALKER, *supra* note 6, at ____.

⁸ *Id.* at 94.

⁹ *Id.* at ____.

¹⁰ *Id.* at ____.

¹¹ As MacCoun has suggested, procedural fairness may well be a better name, and I follow his and others’ lead in using the terms interchangeably. Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005); *see also* Kees Van den Bos & Allen E. Lind, *Uncertainty Management by Means of Fairness Judgments*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 8 (Mark P. Zanna ed., 2002).

¹² MacCoun, *supra* note 11, at 173.

¹³ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

¹⁴ Jonathan Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483 (1988); Robert MacCoun & Tom Tyler, *The Basis of*

civil setting are found in a variety of contexts, including judicial decision-making,¹⁵ arbitration,¹⁶ and mediation,¹⁷ as well as in citizen encounters with the police.¹⁸ Procedural justice effects extend even beyond the scope of the legal system. Procedural justice effects are found in workplaces,¹⁹ organizations,²⁰ families,²¹ and social groups.²² Robust findings suggest that individuals value decision-making processes that they deem fair, are more willing to accept and adhere to decisions made via fair processes, and believe that authorities are more legitimate when they have used fair processes.²³ These findings support the hypothesis that individuals, while caring about how subjectively “well” they do and how fair the outcome they have received is, also care, independently, about the fairness of process.

Procedural justice theorists have not reached agreement on the motivations and mechanisms that drive people to care about procedural justice separate and apart from distributive justice (that is, the fairness of outcomes)²⁴ and outcome favorability. Three theories attempt to account

Citizens' Preferences for Different Forms of Criminal Jury, 12 LAW & HUM. BEHAV. 333 (1988).

¹⁵ TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 13.

¹⁶ Lind et al., 1993.

¹⁷ Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton, & Lynn M. Castrianno, *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313 (1993); J. J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139 (2003).

¹⁸ Tom R. Tyler & Cheryl Wakslak, *Profiling and the Legitimacy of the Police: Procedural Justice, Attributions of Motive, and the Acceptance of Social Authority*, 42 CRIMINOLOGY 13 (2004); J. Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 555 (2003).

¹⁹ R. Folger & M.A. Konovsky, *Effects Of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115 (1989); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings*, 70 BROOK. L. REV. 1287 (2005).

²⁰ S. Alexander & M. Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177 (1987).

²¹ S.L. Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 LAW & POL'Y 101 (1999); Mark Fondacaro, M. Dunkle, & M.K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101 (1998).

²² Heather J. Smith, Tom R. Tyler, Yuen J. Huo, Daniel J. Ortiz, & Allen E. Lind, *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Procedural Justice*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 470 (1998).

²³ TYLER, *supra* note 13.

²⁴ A long line of research in both psychology and, more lately, economics has established that individuals care about the fairness of the outcomes they receive. Research on relative deprivation suggested that individuals assess outcomes by comparing their own circumstances to the circumstances of others. See SAMUEL A.

for procedural justice effects. First, Thibaut and Walker took an instrumentalist view, arguing that individuals preferred fairer processes because they were likely to produce fairer outcomes.²⁵ Subsequently, Tyler and Lind proffered what they called the “group value model,” suggesting that fairer processes were valued in and of themselves, unrelated to their effects on outcome, because they conveyed important messages to individuals about their status in society that in turn affected individuals’ self-esteem.²⁶ More recently, Van den Bos and Lind have suggested that “fairness heuristic theory” explains the effects of procedural justice: fairness judgments are important because they help to reduce uncertainty, and individuals rely on procedural justice cues to make assessments of satisfaction when there are no available cues about distributive justice or outcome favorability.²⁷

Although researchers disagree on why people care about procedural justice, they converge when assessing what factors individuals rely on when making their subjective assessments of whether or not they have been treated fairly.²⁸ A host of studies have focused on what individuals mean when they say that a process is fair or unfair.

STOUFFER ET AL., *THE AMERICAN SOLDIER: ADJUSTMENTS DURING ARMY LIFE*, VOL. 1 (1949); R.K. Merton & A. Kitt, *Contributions to the Theory of Reference Group Behavior*, in *CONTINUITIES IN SOCIAL RESEARCH: STUDIES IN THE SCOPE AND METHOD OF “THE AMERICAN SOLDIER”* (R.K. Merton & P.F. Lazarsfeld eds., 1950). Subsequently, equity theory suggested that individuals may assess outcomes using a metric of how proportional their reward is in relation to the effort they have expended. See Elaine Walster, G. William Walster & Ellen Berscheid, *EQUITY: THEORY AND RESEARCH* (1978); Robert D. Pritchard, Marvin D. Dunnette, & Dale O. Jorgenson, *Effects of Perceptions of Equity and Inequity on Worker Performance and Satisfaction*, 56 *J. APPLIED PSYCHOL.* 75 (1972). Other research indicated that sometimes individuals make decisions about outcome fairness based on how well the outcomes comport with other norms, such as equality or need. See Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis for Distributive Justice?*, 31 *J. SOC. ISSUES* 137 (1975); Melvin Lerner, *The Justice Motive: Some Hypotheses as to Its Origin and Forms*, 45 *J. PERSONALITY* 1 (1977); T. Schwinger, *The Need Principle in Distribute Justice*, in *JUSTICE IN SOCIAL RELATIONS* 211 (H.W. Bierhoff, R.L. Cohen, & J. Greenberg eds., 1986).

²⁵ THIBAUT & WALKER, *supra* note 6, at ____.

²⁶ Tom R. Tyler & Allen A. Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115 (1992); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 830 (1989).

²⁷ Kees Van den Bos, Allen Lind, R. Vermunt, & H. Wilke, *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 *J. PERSONALITY & SOC. PSYCHOL.* 1034 (1997). Van den Bos and his colleagues suggest that procedural and distributive justice are far more cognitively linked than previously thought.

²⁸ It is important to keep in mind that this is a subjective judgment rather than an objective “reality.” See, e.g., Kees Van den Bos, *On the Subjective Quality of Social Justice: The Role of Affect as Information in the Psychology of Justice Judgments*, 85 *J. PERSONALITY & SOC. PSYCHOL.* 482 (2003).

Beginning with Thibaut and Walker, researchers have distinguished between decision control, which is the extent to which individuals can shape the final outcome, and process control, which is the extent to which individuals can shape the way in which information relevant to the decision, such as evidence or arguments, is presented. The procedural justice literature has suggested that assessments about the fairness of a process stem largely from process control factors rather than control over the ultimate decision. Process control, over time, has become understood largely to be coextensive with the degree to which an individual has the opportunity to have a voice in a particular process – to present his or her side of the dispute.²⁹ The procedural justice literature has also highlighted three other crucial components of a process that will be judged fair. First, Tyler and Lind conducted research demonstrating the importance of being treated with courtesy and respect. This dignitary treatment plays a large part in how individuals decide whether they have been treated fairly.³⁰ Additionally, two linked factors – the trustworthiness of the decision-maker and the decision-maker’s neutral, bias-free actions – have been found to relate strongly to individuals’ assessments of process fairness in a third-party decision-making setting.³¹ Although other antecedents are sometimes discussed in the procedural justice research, recent literature has suggested that these factors – opportunity for voice, courteous and respectful treatment, trustworthiness of the decision-maker, and neutrality of the decision-maker – are the four dominant criteria used in making procedural justice assessments.³² In the next section, I explore what specific rules of litigation, arbitration, and mediation relate to these four procedural justice antecedents.

²⁹ See, e.g., Robert Folger, *Distributive and Procedural Justice: Combined Impact of “Voice” and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977). Research has suggested that the opportunity for participation may be important to individuals even when their participation is unlikely to affect the decision. This suggests that on some occasions, even non-meaningful voice may lead individuals to assess a process as more fair. See, e.g., Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Value Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985).

³⁰ Tom R. Tyler & Robert Bies, *Interpersonal Aspects of Procedural Justice*, in APPLIED SOCIAL PSYCHOLOGY IN BUSINESS SETTINGS 77 (J.S. Carroll ed., 1990).

³¹ TYLER, *supra* note 13.

³² Tom Tyler & Steven L. Blader, *Justice and Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 295, 300 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

II. THE BASIS FOR PROCEDURAL JUSTICE IN DISPUTE RESOLUTION

There has been a voluminous body of writing in psychology exploring the effects of procedural justice on acceptance of and compliance with outcomes produced by legal bodies,³³ and the effects of procedural justice on perceptions of legitimacy.³⁴ In law, there has been a similarly voluminous body of writing on the theoretical and practical underpinnings of procedural fairness and procedural due process in the legal system.³⁵ Despite the fundamental overlap in concern over fair process, rarely have the twain met. And both traditions paint procedural justice with a relatively broad brush. For example, in the psychological procedural justice literature, research considers whether the inquisitorial or the adversarial model of resolving legal disputes offers more opportunity for voice; individual procedures or variants of rules within these models are studied less closely, if at all. Similarly, individual procedures and rules are less often the focus of general legal inquiry into procedural fairness or due process.³⁶

In this section, I turn to some of the specifics of our system of dispute resolution, and some of the theorizing in law about why the design of the system – from a procedural, rather than substantive, perspective – matters, to examine how well these ideas track the psychology of procedural justice. Psychological research has shown that individuals care about fairness of process in litigation, arbitration, and mediation; here, I attempt to highlight some of the structural features of those dispute resolution mechanisms that are the likely sources for a decision about those mechanisms' fairness. I do not mean to suggest that the only goals of these features of the legal system are to provide procedural protections, rather than to ensure substantive justice, or that

³³ See, e.g., TYLER, *supra* note 13, at _____. K. Murphy, *The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders*, 28 LAW & HUM. BEHAV. 187 (2004) (linking procedural justice and compliance with tax laws).

³⁴ See, e.g., Tom R. Tyler & Greg Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994); Tom R. Tyler, *The Psychology of Legitimacy*, 1 J. PERSONALITY & SOC. PSYCHOL. 323 (1997).

³⁵ See, e.g., Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2004) (considering the role of procedural due process in the context of contracts about civil procedure). For broader perspectives on procedural justice as a general concern, see Solum, *supra* note 6; Hay, *supra* note 6.

³⁶ For example, “discussions of fairness in civil procedure are, with only a few exceptions, rather thinly developed.” Bone, *supra* note 6, at 488-89; see also LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 228 n.6 (2002). A notable difference is found in criminal procedure, where many scholars have focused on the procedural due process of particular rules and practices.

the system was consistently and self-consciously designed to reflect psychological principles of procedural justice. Rather, I intend to highlight the ways in which the legal system, as constructed, *does in fact*, whether by conscious design or intuitive coincidence, reflect some of the elements that psychologists have identified as meaningful to individuals as they make assessments about the fairness of a particular process.³⁷ This analysis will show that many of the rules that exist in our legal system map on to the psychological bases for our understanding of fair treatment.³⁸ When an individual experiences litigation, arbitration, or mediation, a number of the rules for those processes dovetail with psychological factors for how individuals decide whether a process was fair. In this way, the rules for these processes help to ensure that citizens using these dispute resolution mechanisms experience at least a baseline of procedural justice.

I begin this section by considering how psychological theories about why procedural justice matters to people map onto legal theories about the role of procedure in law. I then consider how the four antecedents of procedural justice – voice, courtesy and respect, trust, and neutral, bias-free decision-making – manifest themselves in litigation, arbitration, and mediation. I conclude with a survey of the landscape of the few rules that exist in legal negotiation and a discussion of how those rules may relate to procedural justice antecedents as well.

A. *Theories of Due Process and Procedural Justice*

Two of the three psychological theories explaining the importance of procedural justice – that is, the instrumental and the group engagement model – have rough reflections in what legal scholars have said about the importance of procedural due process.³⁹ First, Thibaut and Walker’s original instrumentalist perspective on procedural justice is reflected in a range of writing about procedural due process. For example, one treatise explains that “the quantum and quality of the process due in a particular situation depends on the need to serve the due

³⁷ A close examination of all of the ways that the psychology of procedural justice is reflected throughout the vast web of rules governing civil dispute resolution in the litigation, arbitration, and mediation context is beyond the scope of this project. A discussion of how procedural justice plays out in the criminal field is also outside the purview of this paper, but is at least partially addressed by Michael O’Hear, *Procedural Justice in Plea Bargaining*, 42 GA. L. REV. 407 (2008).

³⁸ It is beyond the scope of this project to offer an answer to a fundamental “chicken-and-egg” problem of procedural justice – that is, do the rules of our system reflect basic human psychology for what individuals seek in finding fair process, or do we understand what it means to be fair, at least in part, from the rules themselves? In essence, which came first, the rules or the psychology – did we design the rules to reflect our own psychology, or does our psychology come from the rules?

³⁹ The third theory, fairness heuristic theory, does not.

process function of minimizing the risk of error in decisionmaking.”⁴⁰ Tribe notes the instrumental approach as well – and this approach is designed “less to assure *participation* than to *use* participation to assure *accuracy*.”⁴¹ Similarly, Easterbrook suggests that “substance and process are intimately related,” and that [t]he procedures one uses determine how much substance is achieved, and by whom.”⁴² Furthermore, the case law itself is explicit in reflecting this notion: in *Fuentes v. Shevin*, the Supreme Court describes “the constitutional right to be heard” not as purely a device to “ensure abstract fair play to the individual,” but rather, “more particularly, . . . to minimize substantively unfair or mistaken deprivations of property.”⁴³

But other theorists, scholars, and judges have suggested, in rough parallel to the Tyler relational model of group engagement, that the value of procedural due process lies in its intrinsic, non-instrumental value – in its value in enforcing norms about human dignity and human interaction in society. These theorists share the perspective that the value of process relates to the role of the human being in society, rather than to the kind of outcome achieved. Tribe has described the due process right to be heard as “a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her,” and has concluded that this right, “analytically distinct from the right to secure a difference outcome,” conveys “the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.” Tribe further noted the words of Felix Frankfurter, who wrote that the “validity and moral authority of a conclusion largely depend on the mode by which it was reached.” As Tribe explains, “At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.”⁴⁴

Although lawyers and legal theorists on the one hand and social psychologists on the other may not share the same vocabulary, and, indeed, discourse between them is far too rare, psychology has brought insights to how individuals make sense of and evaluate their dispute resolution processes that are reflected intuitively in the reasons legal scholars have offered for why fair processes matter.

⁴⁰ 16B AM. JUR. 2D § 904 (date).

⁴¹ LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 667 (1999).

⁴² Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112-

13.

⁴³ *Fuentes v. Shevin*, 407 U.S. 67 (1972).

⁴⁴ TRIBE, *supra* note 41, at 666.

B. The Basis for Procedural Justice in Third-Party Dispute Resolution Mechanisms: Litigation, Arbitration, and Mediation

1. Litigation

Litigation is the most heavily regulated of our dispute resolution mechanisms, and its rules strongly reflect precepts of the psychology of procedural justice. The conscious design of the system ensures a voice, mandates courtesy and respect, and requires a trustworthy and bias-free decision maker. If all goes according to plan, a participant in the legal system should experience litigation as a procedurally just process, regardless of its outcome. Indeed, the very rules that provide the subjective sense that a process is fair are in large part the same rules that judges, lawyers, and scholars understand to be the critical safeguards of due process. Because all of the procedural justice antecedents discussed above are present in rules about litigation, I consider them in turn below.

Voice. The adversary system generally speaking, as contrasted with other types of dispute resolution systems such as the inquisitorial model, relies heavily on the parties' voice in the process. In considering the Federal Rules of Civil Procedure, and the procedural rules for many state court systems, it is clear that affording the parties a sense of their own voice in litigation is critical. The plaintiff, the party bringing a claim, has an easy opportunity to have a voice in the process – the plaintiff brings the action, after all, and must state the case in a pleading that describes the grounds for the action both factually and legally. The back and forth of the pleading system – complaint, answer, ability to amend the complaint – and the motion system – motion, response, reply – provide litigants opportunities to express their views and have them considered by the decision-maker. Although the system controls the form and manner of expression, parties are provided ample opportunity to express their views and their version of the facts to the court.

Consider something as simple as the basic rules surrounding the pleading and service of a complaint. What will constitute proper service so that notice is adequate has been heavily litigated,⁴⁵ and the question of proper notice is one that invokes defendants' due process rights under the Fourteenth Amendment. The Supreme Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard,"⁴⁶ and has further explained that the right to be heard "has little

⁴⁵ See, e.g., *Jones v. Flowers*, 547 U.S. 220 (2006); *Dusenbery v. United States*, 534 U.S. 161 (2002); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Greene v. Lindsey*, 456 U.S. 444 (1982).

⁴⁶ *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

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reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”⁴⁷ The right to a voice is critical, and the right to a voice must be protected by appropriate notice requirements.

The content of the complaint itself also speaks to a concern with the opportunity for voice. Typical pleading rules require a statement of the claim showing that the pleader is entitled to relief.⁴⁸ The complaint must give the defendant ample notice and understanding of the nature of the claims brought, which typically means that the plaintiff must provide a statement of the facts that underlie the complaint.⁴⁹ This requirement is important because it allows the defendant the opportunity to respond to the right facts, and to have an appropriate voice in the action. It would be difficult for the defendant to feel that she had a voice in the proceeding if the defendant did not have any idea what the basis for the specific claim against her was, and was forced to respond with a general denial of wrongdoing rather than a specific rebuttal of the plaintiff’s assertions.⁵⁰ Similarly, *ex parte* communication is prohibited because it would allow one party to express its views to the decision-maker without allowing the other party a similar opportunity to voice his or her response.

Courtesy and respect. Courts also make an effort to hew to a norm of civility and politeness. These rules apply to the conduct of both judges and attorneys: courtesy and respect are expressly called for by Canon 3(A)(3) of the Code of Conduct for United States Judges. The Canon provides that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge’s control, including lawyers to the extent consistent with their role in the adversary process.”⁵¹

Although the Canon does not carry the force of law, and “cannot be the standard for judicial discipline,” it puts forth aspirational goals for the judiciary that seem to be taken seriously.⁵² So, for instance, the Seventh Circuit Court of Appeals noted, “It is a hallmark of the American system of justice that anyone who appears as a litigant in an

⁴⁷ Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

⁴⁸ Fed. R. Civ. P. 8(a)(2).

⁴⁹ See Conley v. Gibson, 355 U.S. 41, 47 (1957) (plaintiff must provide a statement of the claim that will give defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).

⁵⁰ Of course, a primary reason that this is required is in order to give the judge the right information to decide the case.

⁵¹ Canon 3(A)(3), Code of Conduct for United States Judges, available at <http://www.uscourts.gov/guide/vol2/ch1.html>.

⁵² *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995).

American courtroom is treated with dignity and respect.”⁵³ In an opinion describing the gross discourtesy and partiality of an immigration judge, the Third Circuit Court of Appeals indicated that the treatment of defendants with courtesy, respect, and dignity is inextricably tied up with perceptions of neutrality and impartiality, and together these factors help to dictate whether or not a party has received due process.⁵⁴ The court explained, “We began with a reminder of the ‘dignity,’ ‘respect,’ ‘courtesy,’ and ‘fairness,’ that a litigant should expect to receive in an American courtroom. These words . . . are not merely advisory or aspirational. Indeed, although [respondent] has no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application.”⁵⁵ The court displays an intuitive grasp of the way that, according to psychological research, discourtesy and disrespect can help lead to a perception of unfair process.

Trust and neutrality. Trust in the decision-making authority in litigation is tied closely with efforts to maintain a neutral and bias-free decision maker. Trust in the system as a whole is the aim of the many rules designed to ensure impartial judges, and the system strives for transparency so that parties have enough data to conclude that the decision-making authorities and process are impartial. For that reason, among others, judges in the federal system have lifetime tenure, so that they are free to decide without the bias that might creep in if they had to answer to powerful interest groups. Elected judges, too, tend to have fixed terms, so that they are not able to be unseated immediately following unpopular decisions. Judges are required to act transparently and to state publicly their financial holdings. Additionally, judges are required to recuse themselves from decision-making when they have an interest in the subject matter of the case.⁵⁶ Recusal is important, as many have noted, so that there is not even an “appearance of impropriety.”⁵⁷ That is, even if there is no technical impropriety, cases coming close to the line should be decided in favor of recusal, because it is crucial that courts appear to be neutral and bias-free decision makers. Even an appearance of biased decision-making might be enough to shake citizen trust in the court system, and so must be avoided.

⁵³ *Iliev v. INS*, 127 F.3d 638, 643 (7th Cir.1997).

⁵⁴ *Cham v. Att’y Gen. of U.S.*, 445 F.3d 683, 690-91 (3rd Cir. 2006).

⁵⁵ *Id.*

⁵⁶ 28 U.S.C. § 455 (date) expressly provides for recusal when a judge’s “impartiality might reasonably be questioned.”

⁵⁷ *See, e.g., United States v. Fazio*, 487 F.3d 646, 653 (8th Cir. 2007) (the “key ingredient” in a recusal case is “avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge’s impartiality”).

2. Arbitration

Arbitration is a private mechanism for resolving disputes; parties make a private, contractual agreement to resolve their disputes in an arbitration forum, the rules for which can be created by the parties themselves. Arbitration has been widely touted as a low-cost alternative to the cumbersome and expensive process of civil litigation,⁵⁸ but its corner-cutting on process has long led to the concern and perception that arbitration might play fast and loose with procedural due process requirements.⁵⁹ The Federal Arbitration Act validated the use of arbitration in a wide variety of settings, and gave many common arbitration practices the stamp of legality.⁶⁰ However, there is a strong tension between parties' right to privately order the terms of their dispute resolution mechanism and fairness concerns. For that reason, concerns about the fairness of arbitration processes have been visited and revisited by courts throughout the period of arbitration's infancy and its ascendancy.

Because arbitration is a private, contractual mechanism, courts have been more lenient in what is required of an arbitration setting than a litigation setting. This leniency extends even to statutory claims – claims that cannot be waived before the dispute. In *Gilmer v. Interstate/Johnson Lane Corporation*,⁶¹ the Supreme Court upheld the

⁵⁸ See, e.g., Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001); Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000); Alan S. Kaplinsky & Mark J. Levin, *Consumer Arbitration: If the FAA "Ain't Broke," Don't Fix It*, 63 BUS. LAW. 907 (May 2008); Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceanera*, 81 TUL. L. REV. 331, 346 (2006). The Supreme Court itself noted the cost efficiencies of arbitration in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

⁵⁹ See, e.g., Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363 (2007); John Kagel, *Arbitration and Due Process: The Way We Were at the Time of Gilmer*, 11 EMP. RTS. & EMP. POL'Y J. 267 (2007); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Margo E. K. Reder, *Arbitrating Securities Industry Employment Discrimination Claims: Restructuring a System to Ensure Fairness*, 2 U. PA. J. LAB. & EMP. L. 19 (1999).

⁶⁰ Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2000).

⁶¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

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enforcement of a predispute agreement to arbitrate claims that arose in the course of employment. Although employees are not allowed to waive their statutory rights, the Court held that arbitration was not a waiver of rights. Instead, arbitration was merely an alternative method of pursuing the underlying substantive rights.⁶² However, in reviewing the agreement itself, the Court rejected what it termed “a host of challenges to the adequacy of arbitration procedures.”⁶³ The Court dismissed concerns that the arbitrators were biased, that discovery was more limited, that arbitrators did not provide public written opinions, and that class actions and broad equitable relief were not permitted.⁶⁴ Although the Court demonstrated some willingness to police the procedural aspects of the arbitral process, it ultimately rested on the notion that the arbitration agreement was a contract, and common law contractual remedies were the appropriate avenue for any relief.⁶⁵

Despite the basic premise that parties may agree to a variety of arbitration procedures, and despite judicial deference to private ordering of the arbitration process, the existence of judicial oversight does in practice ensure that some minimum level of due process is met. For example, in *Hooters of America v. Phillips*,⁶⁶ the Fourth Circuit Court of Appeals considered the case of an employer who required employees to agree to arbitrate employment related disputes if they wished to be eligible for raises, transfers, or promotions. The agreement between the employer and employee expressly provided that the employer would set up the arbitration forum by promulgating the requisite rules and procedures. In its rules, Hooters required the employee to state its claim, but did not require Hooters to do so, thereby allowing Hooters to surprise the employee at arbitration with information that the employee was unable to investigate or counter. Looked at through the lens of procedural justice, this practice would hamper the employee’s opportunity to meaningfully participate and have a voice in the process.

In addition, the rules called into question the neutrality and trustworthiness of the arbitration panel. The rules provided that each party to the arbitration could choose one arbitrator; the two chosen arbitrators in turn would choose the panel’s third member. However, the catch was that, in contrast to the rules of the American Arbitration Association or the National Academy of Arbitrators, all arbitrators were chosen from a slate created (and thus previously vetted) by Hooters and

⁶² See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

⁶³ *Gilmer*, 500 U.S. at 30.

⁶⁴ *Id.* at 30-32.

⁶⁵ *Id.* at 32-33.

⁶⁶ 173 F.3d 933 (4th Cir. 1999).

Hooters only. Other procedures during the arbitration were similarly structured to provide Hooters with an advantage over the employee. For example, Hooters could expand the scope of the arbitration, but the employee could not; Hooters could move for summary dismissal but an employee could not move for summary judgment; Hooters could bring suit to vacate or modify an award on the grounds that the panel exceeded its authority, but the employee had no such right under the rules.⁶⁷

The Fourth Circuit roundly rejected the rules on the basis of unfairness. Specifically, the court said that the rules, “taken as a whole . . . are so onesided that their only possible purpose is to undermine the neutrality of the proceeding,” and noted that the panel selection mechanism “is crafted to ensure a biased decisionmaker.”⁶⁸ Experts testified that the rules “deviated from minimum due process standards,” that the rules “do not satisfy the minimum requirements of a fair arbitration system,” and that the mechanism for panel selection “violates the most fundamental aspect of justice, namely an impartial decision maker.”⁶⁹ Factors that egregiously run counter to those that lead to procedural justice are not tolerated by the legal system.⁷⁰

3. Mediation

Mediation is a dispute resolution process in which the parties negotiate with the aid of a neutral third-party. Mediation may be conducted by an independent mediator outside of the court system, or may be conducted under the aegis of the court in court-annexed mediation. There is no uniform set of rules for mediation. Rather, the rules for any given mediation typically come from a professional body of mediators or a particular trade or other association that promulgates rules for mediation for groups with disputes in that area.

Mediators take a variety of approaches to the job of managing disputants. The dominant forms of mediation are evaluative, in which the mediator considers it a central part of her role to share her opinion on the merit of each side’s case, and facilitative, in which the mediator acts

⁶⁷ *Id.* at 938.

⁶⁸ *Id.* at 939.

⁶⁹ *Id.*

⁷⁰ Perhaps in response to these minimum requirements, the large institutional arbitration players, such as the American Arbitration Association, the National Academy of Arbitrators, and JAMS/ENDISPUTE have promulgated due process requirements for the resolution of disputes. *See, e.g.*, National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems (Statement adopted May 21, 1997); American Arbitration Association, National Rules for the Resolution of Employment Disputes (1996, as amended 1997); JAMS/ENDISPUTE, Six Principles of Neutrality and Fairness for Employment Dispute Resolution Practice (1995).

more as a conduit for the exchange of information between parties.⁷¹ More recently, mediation scholars and practitioners have developed a third form of mediation, transformative mediation, the goal of which is to engender moral growth and to alter ongoing relationships.⁷²

Although these forms of mediation differ widely, they share some central features. In each type of mediation, the voice of the parties is paramount.⁷³ In some mediations, the degree to which parties have a voice is balanced by the role of mediator voice; the two traditional types of mediation, evaluative and facilitative, differ, with evaluative mediators speaking more and providing their own opinions and facilitative mediators speaking less and refusing to offer judgment or opinion on the facts presented. In both settings, however, it is axiomatic that the mediator allows both sides an opportunity to speak and be heard.⁷⁴ And in the transformative mediation context, the importance of voice and opportunity to speak is even greater than in either of the other forms of mediation.

So, too, it is imperative in each form of mediation that a third-party be neutral. The neutral role played by the party differs; the evaluative mediator is a neutral third-party more akin to a judge than the facilitative or transformative mediator. In all mediation settings, trust in the mediator and her confidentiality and neutrality figures prominently. The trustworthiness of the mediator is particularly of importance when mediators conduct individual caucuses, some of which reveal confidential information that one party does not wish another party to

⁷¹ For a fuller and more nuanced discussion of this distinction, see Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES HIGH COST LITIG. 111 (1994).

⁷² ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

⁷³ Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001); Jay P. Folberg & Alison Taylor, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 35 (1984); Andrew Schepard, *Editorial Notes: Special Issue on Mediation and Conferencing in Child Protection Disputes*, 47 FAM. CT. REV. 1 (2009) ("Mediation and conferencing give parents and children a voice in the process of decision making").

⁷⁴ As mediation has grown as a dispute resolution mechanism, lawyers have assumed a greater role in the proceedings, leading some commentators to suggest that mediation may no longer afford the parties as much direct voice in the process and giving rise to concerns that procedural justice may not be experienced by the parties themselves. See Bobbi McAdoo & Nancy A. Welsh, *The Lawyer's Role(s) in Deliberative Democracy: A Commentary by and Responses to Professor Carrie Menkel-Meadow*, 5 NEV. L.J. 399, 410 (2004-2005); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001).

hear. Finally, mediation scholars have stressed the importance of dignity and respect of the parties in the process.⁷⁵

All mediations share in common the fact that the ultimate decision about whether to agree to a particular outcome remains in the hands of the participants; scholars suggest that mediation, of all third-party aided dispute resolution mechanisms, is the one that also provides the greatest degree of process control. Mediation theoretically provides participating individuals with the hallmarks of procedural justice. Indeed, mediation is thought by some to hold the potential to provide the paradigmatic fair process that procedural justice literature describes.⁷⁶ Others, however, suggest that participants may find greater procedural justice in a process with a third-party decision-maker.⁷⁷ While commentators may disagree on the degree to which individual participants may experience procedural justice based on the specific format of a particular mediation, procedural justice is a central, self-conscious concern of mediation proponents and mediation rules.

C. Rules of Legal Negotiation

The process of settlement negotiation is governed by few express legal rules. Consider the process next to its distant relative, litigation, discussed above. In negotiation, there is no set process by which a negotiation must occur: no order of appearance, no assigned seats at the table, no mandated affirmative presentation, response, and reply in front of a party whose job is to listen carefully. There are, simply put, almost no rules for most procedural and substantive aspects of the negotiation. In negotiation, the most pressing requirement is that both parties must agree to the negotiation process and negotiated outcome. If the parties

⁷⁵ Wayne D. Brazil, *Thoughts About Impasse for Mediators in Court Programs*, 15 NO. 2 DISP. RESOL. MAG. 11 (2009) (“When we give and model respect, we encourage parties to embrace the spirit of mediation. It is especially important for mediators in a court program to proceed in a visible spirit of respect. Our respect for others begets their respect for us, for the judicial system, and for the democratic government of which that system is such an important part.”); Phyllis E. Bernard, *Minorities, Mediation and Method: The View from One Court-Connected Mediation Program*, 35 FORDHAM URB. L.J. 1 (2008) (“[T]he most vital function of the mediation process is to help parties recover or retain their dignity.”); Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243 (2008) (“The principle of fairness in mediation demands, inter alia, to treat the parties with dignity and respect.”).

⁷⁶ Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 594-600 (2004); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, *supra* note 73.

⁷⁷ Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 94.

wanted to agree to let a game of musical chairs govern their decision-making, they could do so.

Nonetheless, there are some rules that govern the outer limits of acceptability for legal negotiation. In most jurisdictions, settlements are considered to be contracts and are subject, in addition to any specialized rules for settlement negotiations, to the rules and principles of contract law.⁷⁸ However, the rules governing the negotiation of contracts are fairly lax; for example, there is no duty of good faith negotiation in contract law.⁷⁹ The rules applying to settlement negotiation that do exist can be broken down into two broad and sometimes overlapping categories: bad conduct rules, dealing with misrepresentation or fraud and threats and duress during negotiation;⁸⁰ and rules about the substance of negotiated agreements, including rules about court-approved settlements. These rules are all designed to ensure a minimum level of fairness in the dispute resolution process, but, as a review of these rules indicates, the focus is largely on outcome and the concerns with process are minimal.⁸¹

Rules about bad conduct. There are express rules about appropriate conduct for attorneys during settlement negotiation. Volumes have been written on the scope of the lawyer's leeway to present information, whether accurately or inaccurately, during negotiation.⁸² The relevant body of applicable law comes from ethical standards for attorneys, which are typically based on the ABA's Model Rules of Professional Conduct. Model Rule 4.1 expressly prohibits lawyers from making false statements of material fact or law, and further prohibits lawyers from failing to disclose material facts to another person when the disclosure is necessary to avoid assisting a criminal or

⁷⁸ See, e.g., *Perfume-bay.com Inc. v. EBAY, Inc.*, 506 F.3d 1165 (9th Cir. 2007) (principles of contract formation are the same for settlement and non-settlement setting under California law); *Transcontinental Ins. Co. v. Rainwater Const. Co., LLC*, 509 F.3d 454 (8th Cir. 2006) (Arkansas law treats settlement agreements as contracts); *In re Cendant Corp. Prides Litigation*, 233 F.3d 188 (3rd Cir. 2000) (settlement agreements are governed by basic contract principles in New Jersey); *Dunbar Medical Systems Inc. v. Gammex Inc.*, 216 F.3d 441 (5th Cir. 2000) (Texas law generally considers settlement agreements to be contracts).

⁷⁹ See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

⁸⁰ The classic bad conduct rule about good faith, as noted above, is not applicable in the contract formation setting, nor is it relevant to settlement negotiation.

⁸¹ Settlement negotiation is not self-policing, either; these rules are only enforced when one party chooses to bring a challenge to the settlement in court.

⁸² See, e.g., James J. White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiation*, 1980 AM. B.J. 67 (1998); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S. CAROLINA L. REV. 181 (1981); Alan Strudler, *On the Ethics of Deception in Negotiation*, 5 BUS. ETHICS Q. 805 (1995); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiation*, 76 IOWA L. REV. 1219 (1990).

fraudulent act by a client. However, these seemingly clear mandates against deception have a murky undertow when it comes to negotiation. So, for example, the comment to Rule 4.1(a) explains that context can shed light on when something is a “statement of fact,” and that “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”⁸³ In particular, the comments suggest that “[e]stimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category.”⁸⁴ In this way, the comments to the Rule exempt much of what lawyers talk about in negotiation, making a vast swath of lies⁸⁵ exempt from the scope of the rules.⁸⁶ Similarly, the text of Rule 4.1 contains an express exemption from its disclosure requirements when the relevant disclosure would be prohibited by Rule 1.6. Rule 1.6, in turn, requires client consent for such disclosure in all cases except those where the disclosure might prevent a client from committing a criminal act that “is likely to result in reasonably certain death or substantial bodily harm” or when the disclosure would occur in the context of a dispute between lawyer and client.⁸⁷

These rules, then, offer lawyers a broad canvas for making statements that are not true in the context of a negotiation because they are not understood as statements of “material fact,” and similarly allow attorneys to fail to disclose information in many situations. The rules, of course, do not mandate that attorneys make any misrepresentations or keep mum, but they do not prohibit attorneys from doing so. By its language, the rule has, indeed, suggested to some that misrepresentations and non-disclosures are not only the norm of negotiation, but that they are sanctioned and encouraged.⁸⁸ As James J. White has suggested, “To conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”⁸⁹ While other scholars take a more conservative or moralistic approach,⁹⁰ the notion persists that

⁸³ MODEL RULE OF PROF’L CONDUCT R. 4.1 cmt. (date).

⁸⁴ *Id.*

⁸⁵ It is beyond the scope of this project to offer a definitive statement on what a lie is; for the purposes of this discussion, it is enough to imagine a lie to be an affirmative statement that is untrue.

⁸⁶ Whether or not the license to misrepresent estimates of price and value is appropriate or not has been hotly debated by scholars. *See, e.g.,* White, *supra* note 82, at ____.

⁸⁷ MODEL RULE OF PROF’L CONDUCT R. 1.6 (date).

⁸⁸ *See, e.g.,* Brian C. Hausmann, Note, *The ABA Ethical Guidelines for Settlement Negotiation: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218 (2004).

⁸⁹ White, *supra* note 82, at ____.

⁹⁰ *See, e.g.,* Walter Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1402 (1986); Michael H. Rubin, *The Ethics of Negotiations:*

zealous advocacy in negotiation requires lawyers to, in some circumstances, mislead others.⁹¹

Of course, the scope of Rule 4.1 is not universally understood so crisply: there is a robust literature on the nuances and subtleties of the nature and reach of the rule.⁹² But even this literature suggests that there is something more behind the plain words of the rule: “ethics” may be relevant, but ethical behavior may not be captured by the terms of the rule, and instead must be self-regulated and enforced by attorneys.⁹³ And yet the scope of the literature on the rule itself reveals the absence of one uniform set of “generally accepted conventions” in many sticky negotiation disclosure or misrepresentation situations. The thin nature of the rule, along with a reliance on individual norms and personal understandings of the ethics of misrepresentation, has created an uncertain and uneven landscape that has helped to encourage a vision of legal negotiation as a forum where “anything goes.”⁹⁴

Beyond the prohibition against misrepresentation of material facts, attorneys engaged in settlement negotiation may not use duress or coercion, per basic contract law. A party may challenge a settlement on the basis that he or she was improperly coerced or threatened.⁹⁵ However, courts have been quick to limit the scope of this challenge to a negotiated settlement, starting with a presumption that settlements conducted by counsel are fairly negotiated.⁹⁶

The bad conduct rules of negotiation dovetail well with two of the four factors that, as discussed above, have been shown to lead to individuals’ assessments of fairness of process. Specifically, these rules speak to the trustworthiness and neutrality of the lawyers in negotiation. On the one hand, the protection of material facts is an effort to enable parties to trust the most serious representations that are made in a negotiation. And, if an opponent is deceptive about these

Are There Any?, 56 LA. L. REV. 447, 476 (1995); PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 71 (1998).

⁹¹ DANIEL MARKOVITZ, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008); ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999).

⁹² See, e.g., Patrick Emery Longan, *Ethics in Settlement Negotiations: Foreward*, 52 MERCER L. REV. 807 (2001); Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining By Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 417-18 (1988); Richard K. Burke, “*Truth in Lawyering*”: *An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 22 (1984)

⁹³ See Longan, *supra* note 92, at ____.

⁹⁴ Richard Painter has suggested that law firms could create their own codes of behavior to fill in this gap. Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001).

⁹⁵ See, e.g., *Brees v. Hampton*, 877 F.2d 111 (D.C. Cir. 1989).

⁹⁶ See, e.g., *Riley v. Am. Family Mutual Ins. Co.*, 881 F.2d 368, 374 (7th Cir. 1989); *Tiburzi v. Dep't of Justice*, 269 F.3d 1346 (Fed. Cir. 2001).

representations, negotiation is deemed unfair beyond what the law can permit. In that respect, the rules support the procedural justice literature's conclusion that there must be trustworthiness to ensure a fair process.

However, the rules expressly exempt attorneys from behaving in a trustworthy way in a wide range of situations. Indeed, because of the ambiguity of and leeway given by the rules, the line is thus blurred between material statements required to be truthful and immaterial statements for which falsehood is permitted. At worst, the rules about lying in negotiation offer express incentive for an attorney to lie; at best, the rules offer a caveat emptor warning to the opposing party that information may not be truthful.⁹⁷ In either case, the rules create an atmosphere that expressly destabilizes expectations of trustworthiness.

These rules also affect the perception of neutrality; far from ensuring neutrality, as is important in the other dispute resolution mechanisms available in law,⁹⁸ these rules explicitly clarify that the lawyers in negotiation are in opposition to one another and may even deceive one another in the service of their own client. However, if the opposite of neutrality is bias, the rules do provide some measure of protection from extreme bias in the form of protection against coercion and duress. Although this outer-limit protection can hardly be said to affirmatively promote neutrality in negotiation, it offers some acknowledgment that even in a non-third-party-neutral setting, there is some extreme bias that is not permissible.⁹⁹

Court rules about settlement. In most cases, courts have no authority to approve or disapprove a settlement agreement between parties – and, indeed, may be barred from doing so.¹⁰⁰ However, courts

⁹⁷ Of course, the perception of the party on the receiving end of information may not match reality: a lie might not be of much use to tell if everyone knew you were lying. But even a party who fails to create an impression of trustworthiness may gain reasonable advantage simply by not revealing true information. In any event, the permissibility of the rule with respect to truth certainly makes an attorney's decision about trustworthy behavior an individual and strategic one, rather than one of abiding by the rules of the profession.

⁹⁸ See *supra* Part IIB.

⁹⁹ These rules might also speak to courtesy and respect in the particular sense that being lied to can, in some situations, be construed as disrespectful (although in other situations, the reverse may be true). Note, though, that none of these rules relate to broader issues of courtesy and respect or voice or participation in negotiation. A negotiation in which one party agrees to a settlement but does so without meaningfully participating in the substance of the negotiation will not violate any legal rules; a negotiation characterized by rudeness or gross disrespect by either of the parties, similarly, does not fall under the ambit of any legal rule.

¹⁰⁰ See *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1025 (2nd Cir. 1992) (“Typically, settlement rests solely in the discretion of the parties, and the judicial system plays no role”); *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984) (repudiating the right of the district court judge to make a notation of “So

have limited power to approve or disapprove settlement in certain situations. The most notable of these contexts is class actions, where the court has heightened scrutiny over the terms of the settlement. The Federal Rules of Civil Procedure require that a class action settlement be approved by the court, in part in order to prevent attorneys from agreeing to settlements that provide them with a sizable fee but the plaintiffs little.¹⁰¹ The standard for judicial approval of class action settlements is that the settlement be “fair, reasonable, and adequate,”¹⁰² and not “a product of collusion.”¹⁰³ Although courts have asserted that in evaluating a class action settlement, “the court should examine the negotiations that led to the settlement, and the substantive terms of the settlement,”¹⁰⁴ it is not common for the court to delve carefully into the process of the lawyers’ negotiation process.¹⁰⁵ Other contexts where the court is required to approve a settlement are in derivative actions, certain employee actions,¹⁰⁶ and, in some jurisdictions, cases involving minors¹⁰⁷ or disabled adults.¹⁰⁸ In all of these settings, courts focus on the fairness of the outcome that parties receive, rarely investigating the underlying negotiations that produce settlements. This suggests that their focus is on the fairness of the outcome, not the fairness of the process, unless fraud or collusion tainted that process.

In sum, settlement negotiation is governed by a handful of rules, most of which are imported wholesale from the contract setting. The main import of the rules is that negotiations should not be characterized by fraudulent or coercive behavior; beyond that, the rules are mute as to the way that a negotiation should progress. It is rare, if ever, that a court will disapprove a settlement because of the process of the negotiation beyond fraud and coercion. The few explicit rules governing negotiation that do exist encapsulate and promulgate a fairness norm in both the

Ordered” on a settlement agreement, stating, “In ordinary litigation, that is, lawsuits between private parties, courts recognize that settlement of the dispute is solely in the hands of the parties”).

¹⁰¹ John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better Than “Voice,”* 30 CARDOZO L. REV. 407, 413 (2008).

¹⁰² Fed. R. Civ. P. 23(e)(1)(C).

¹⁰³ *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

¹⁰⁴ *Cinelli v. MCS Claim Services, Inc.*, 236 F.R.D. 118, 121 (2006).

¹⁰⁵ *Id.* (noting summarily that “counsel for both parties stated that a productive negotiation process led to the settlement in this case”).

¹⁰⁶ Cases under the Fair Labor Standards Act, for example, require judicial approval for settlement because an employee’s rights under that Act are not waivable. Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Unenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1340 (2008)

¹⁰⁷ *See, e.g.,* West Virginia. [cite]

¹⁰⁸ *See* Colorado. [cite]

process and the outcome of the negotiation, but only at the outside edges. These explicit rules relate to trustworthiness and neutrality, but have no connection to voice or courtesy and respect. These rules set only a minimum boundary, beyond which lawyers must chart their own “ethical path” in negotiation. Norms for the legal profession may help fill this open space, but there is a lot of room to make different choices even within those norms. Because negotiation is so thinly regulated, and differs dramatically from litigation, arbitration, and mediation in terms of the safeguards afforded, it is easy to imagine it as an arena in which concerns about procedural justice and fairness are not relevant.¹⁰⁹ In the next section, I explore the theoretical and empirical basis for connecting procedural justice and bilateral negotiation.

III. NEGOTIATION AND PROCEDURAL JUSTICE

Legal negotiation has long been characterized as occurring in the shadow of the law.¹¹⁰ This description acknowledges, however, that legal negotiation is not squarely a part of the formal legal system, but – despite its prevalence as a mechanism by which disputes are resolved – exists on the outer edges of that system. In this section, I explore the question of whether procedural justice may even be relevant to negotiation, in light of the fact that there is no third-party authority to provide some procedural framework or offer a decision. I then look to the empirical work that has been done on the contours of legal negotiation, with a specific focus on fairness and negotiation. This section concludes by suggesting how procedural justice norms may provide unwritten rules for legal negotiation.

A. *Is Procedural Justice Relevant to Negotiation?*

As noted in Part I, procedural justice assessments in third-party decision-making processes are guided by perceptions about the opportunity to be heard, trust in a decision-maker, neutral and unbiased

¹⁰⁹ In some ways, however, the legal negotiation setting is, of all dispute resolution processes, most amenable to a psychological analysis. One might characterize legal negotiation, relative to other dispute resolution processes, as “less law, more people,” that is, less susceptible to a legal analysis and most susceptible to an analysis based on principles of human behavior.

¹¹⁰ Robert Mnookin and Louis Kornhauser first coined this term thirty years ago in their groundbreaking article, *supra* note 5. Since then, many other scholars have used the term and the framework to explore specific areas of the law in which legal endowments affect negotiation. *See, e.g.*, Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621 (2003); Maureen A. O’Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 CASE W. RES. L. REV. 605 (2003); Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT’L L.J. 158 (2000).

decision-making processes, and being treated with courtesy and respect.¹¹¹ However, the use of the term procedural justice in a context where there is no authority involved, and few governing rules, may be greeted with some skepticism. How can one talk about “justice” in an organic process involving individuals who are not subject to procedural rules and who can freely engage or leave the negotiation at will?¹¹²

First, it is important to remember that “procedural justice” is a term of art that describes procedural fairness as it has been developed over more than thirty years of social psychology research. It does not carry the full, freighted weight of “justice” in a more philosophical sense; it is a carefully drawn subset of concerns about fairness, distinct from other types of justice such as distributive, restorative, or reparative justice. Procedural justice by its own definition in psychology is the *subjective* experience by an individual of the fairness of a decision-making process. It is unlikely to be controversial that individuals may feel differently with respect to fairness about different behaviors encountered in a negotiation setting. That is, individuals’ subjective experiences of the fairness of a negotiation are likely to vary, depending on the content of the negotiation and, perhaps, individual differences or sensitivity with respect to fairness concerns.

Even despite this important definitional caveat, there may be objections to the relevance of fair process in bilateral negotiation. Consider two distinct economics viewpoints about the fairness of negotiation: all negotiation is fair, because parties in a free market system would not agree to a negotiated outcome unless it was acceptable to them; and, negotiation cannot be characterized as fair or unfair (or, just and unjust) because it is a purely economic transaction. These viewpoints, despite the fact that they seem orthogonal, reflect the same basic view of negotiation. It is a transaction that can be characterized by utility theory: rational actors interact to produce an agreement to which each party will only agree if the utility of the agreement is greater than the utility of the alternative to an agreement.¹¹³ Economic theories of negotiation in the civil justice system share the same premise. Legal actors in the civil system will settle a case if the value of the settlement is greater than the expected value at trial, minus transaction costs.¹¹⁴

¹¹¹ See *supra* at text accompanying notes 28 to 32.

¹¹² Because there has not, to date, been a serious scholarly exploration in law of the role that procedural justice may play in legal negotiation, there is no body of critical literature to which I am directly responding. However, I am grateful to participants in faculty workshops at law schools at Washington University School of Law and the James E. Rogers College of Law, University of Arizona for their arguments and questions with respect to this point.

¹¹³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 69 (6th ed. 2002).

¹¹⁴ George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

Although it is controversial whether or not this is how one might view the decision of whether to settle versus continue on in the legal system in certain cases, many negotiation scholars find economic theories of negotiation appropriate and compelling.¹¹⁵

So is there no place for fairness in negotiation? As negotiation has fallen under the gaze of behavioral law and economics scholars, research has suggested that a purely economic definition of utility is not reasonable, and that individuals place a significant value on fairness in making assessments about whether or not to accept outcomes.¹¹⁶ For example, research in economics literature has suggested that there are some economically rational outcomes that people will not accept on the grounds that they are unfair.¹¹⁷ That is, people reject outcomes that are economically favorable to them because they do not comport with norms of fairness. Much of this research relies on the ultimatum game, where one party splits a sum however he or she likes, and the other party chooses whether to accept the offer, in which case both parties get the money, or reject it, in which case neither party gets anything.¹¹⁸ The consistent findings in this area suggest that many, if not most, individuals will reject an offer that leaves them financially better off but is lopsided in favor of the other party.¹¹⁹ The structure of this research on fairness of outcome helps to encourage the economists' dichotomous vision: if an outcome is not fair, parties will not agree, but if parties *have* agreed, the outcome must be fair.¹²⁰

However, there are two key reasons why this research does *not* show process fairness to be irrelevant. First, economists use a binary structure in the ultimatum game that is not sufficiently nuanced to provide a full explanation of how parties understand fairness of outcome. The economics research is mainly occupied with determining the threshold moment when a distribution crosses from fair to unfair, rather

¹¹⁵ See, e.g., Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000).

¹¹⁶ See *supra* at ____.

¹¹⁷ Werner Guth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982); RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* (1992); Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgment Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 86 (Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky & Robert Wilson eds., 1996).

¹¹⁸ Guth, Schmittberger, & Schwarze, *supra* note 117, at ____.

¹¹⁹ *Id.* at ____.

¹²⁰ Some literature has explicitly suggested that negotiation may not be the right mechanism for a dispute that implicates fairness concerns. Perhaps most famously, Owen Fiss argued that settlement was inappropriate in some situations, namely when issues of societal justice and fairness were concerned. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

than in understanding whether, within the category of fair, outcomes may be seen as more or less fair. But there is room even for fair agreements to be more or less fair, and nothing in the economics literature suggests otherwise. For example, dividing ten dollars into six for the divider and four for the receiver may be seen as fair, but dividing the ten dollars evenly into five for each party may be seen as more fair. Procedural justice may be the same: even if one assumes that individuals will not agree to a negotiated outcome unless there is a fair negotiation process, that fact alone does not render procedural justice considerations moot. Even within the “fair process” category, individuals are likely to experience different degrees of procedural justice based on the behavior of their adversary. If the choice of whether or not to agree to a particular negotiated outcome may depend on a binary assessment between fair and unfair process, so too might the degree of enthusiasm for acceptance of the agreement and long-term adherence to that agreement relate to an assessment about the degree of fair process afforded.

Second, the empirical economics literature simply does not provide a sufficiently complex framework to assess the role of fairness of process. A focus on outcomes and a demonstration that individuals will not agree to some outcomes that are deemed unfair and will agree to others that are deemed fair, conducted according to rules in a game that are largely held constant, cannot (and does not purport to) support the conclusion that fairness of process does not play an important role in fostering acceptance of and adherence to agreements.

Another argument against the role of procedural justice in negotiation suggests that individuals will not seek fair treatment in a process in which there are no rules for proper conduct. These rules, according to this argument, are what provide a benchmark, the departure from which alerts the participant that an unfair process is taking place. It is true that, unlike a civil litigation, arbitration, or mediation, there are few rules in negotiation that must be followed.¹²¹ However, procedural justice in psychology does not refer to the presence or absence of rules that must be followed. Rather, procedural justice refers to the subjective sense by participants that they have engaged in a process of fair decision-making. As noted above, it seems uncontroversial that individuals will experience different behavior in negotiation as different with respect to its implications for fair treatment, and procedural justice literature suggests that what individuals want from their decision-making processes are fairly consistent. Although, as discussed in Part IIB, rules in litigation, arbitration, and mediation dovetail with individuals’ procedural justice concerns, those rules are not a necessary predicate in order for participants to have a subjective experience of fairness.

¹²¹

See supra Part IIC.

Finally, one might argue that there is no third party present in negotiation who can provide the independent judgment that may be a predicate to an assessment of justice. But this argument assumes its own conclusion. There is no requirement in the psychology of procedural justice that a third party be involved. Although some of the factors that individuals use to assess the fairness of the process seem more easily to relate to a process controlled by a third party, such as neutrality or trust, these factors do not presume or mandate the presence of a third party. Still other factors, such as voice and courtesy and respect, seem even less to necessarily relate to the presence of a third party. I consider these factors in more detail below.

Neutrality is a factor that seems critically important when dealing with a third party decision-maker, but seems initially irrelevant when dealing with a two-party setting in which each party is a partisan (zealous) advocate. Indeed, many descriptions of neutrality in the procedural justice literature use the term neutral, bias-free decision-making, suggesting the necessary presence of a third party. However, aspects of neutrality may in fact be present in bilateral negotiation: consider the advice of Fisher and Ury in *Getting to Yes*. They recommend reliance on objective criteria – some external criteria that both parties can agree to – in order to work out agreements.¹²² The idea of objective criteria has been ridiculed by some who say that the term is completely manipulable and that no such thing as truly objective criteria exist.¹²³ Others, though, have suggested that the use of objective criteria makes negotiation more durable, makes the process smoother, and makes a variety of outcomes more palatable to the parties.¹²⁴

Similarly, trust is an element that naturally suggests a third party authority. However, there is no reason that trust in the other party to the negotiation might not be relevant to the perceived fairness of the negotiation process. Trusting the other party to the negotiation – believing that he or she is telling the truth about important elements of the negotiation, believing that he or she will follow through on commitments made during negotiation – seems likely to produce a greater perception that the process is fair, just as trust in a decision maker would produce an impression that the decision-making process is fair.

Voice, on the other hand, is an element that immediately seems equally relevant to a third-party decision-making process and a bilateral process. Although it might be more meaningful to be afforded a voice in

¹²² For example, parties might agree that fair market value is a reasonable benchmark.

¹²³ James J. White, *Essay Review: The Pros and Cons of Getting to Yes*, 34 J. LEGAL EDUC. 115 (1984).

¹²⁴ Roger Fisher, William Ury, and Bruce Patton, *GETTING TO YES* xviii (1981); Roger Fisher, *Comments to James J. White*, 34 J. LEGAL EDUC. 120 (1984).

a process where one might not be able to speak, versus in a setting where voice is assumed, there are ways for a party to have more or less voice in a dyadic interaction. Feeling listened to, heard, and able to have the opportunity to speak are relevant to a dyadic interaction just as in a more formal setting.¹²⁵ Finally, being treated with courtesy and respect (or discourtesy and disrespect) by a third party may not feel terribly different than receiving such treatment from the other party to a negotiation.

Finally, the underlying theories for why procedural justice matters to people also provide support for the extension of procedural justice to the bilateral negotiation setting. Thibaut and Walker's instrumental theory, in which people value a fair process because it will lead to a fair and favorable outcome, is not conceptually limited to a third-party setting. Tyler and Lind's relational theory may apply even more strongly in a dyadic versus a third-party authority setting; lawyers are members of a shared legal community, and individuals in dispute with each other are often in closer contact with one another and care more about what each other think than either party would care about what a third-party neutral might think. It is not unreasonable to imagine that being treated fairly by an adversary says a lot about status in a way that is different from – but equally important to – what one gleans from an authority figure. And finally, Van den Bos's fairness heuristic may be even more relevant in the negotiation setting, where there is often secrecy and a lack of comparables that make assessing the fairness and favorability of a negotiated outcome very difficult.¹²⁶ In sum, it does not seem unreasonable to talk about the procedural "justice" of a negotiation, despite its differences from the conceptions of justice one might encounter in other settings. Below, I turn to the empirical work that has been done to date on the role that fairness of process plays in negotiation. This empirical work supports the theoretical conclusion reached above that procedural justice may play an important role even in a largely unregulated process where a third-party authority is not present – that is, in bilateral negotiation.

B. Empirical Research on Legal Negotiation

Research on negotiation has focused relentlessly on outcomes. Maximizing outcomes has long been understood as the cornerstone of negotiation teaching and practice. The economic approach, suggesting

¹²⁵ In fact, one might argue that one's need for voice could be heightened in a setting with only two participants.

¹²⁶ See Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007) (confidentiality agreements and "vanishing trials" have made it hard for lawyers to set benchmarks for negotiation).

that individuals want to approach negotiation instrumentally, has found support in both popular and scholarly settings.¹²⁷ In recent years, however, as discussed above, negotiation research has suggested that outcome fairness plays an important role in how individuals make decisions about accepting or rejecting outcomes.¹²⁸ This research has changed the landscape of negotiation; it is no longer controversial that fairness, and not just the favorability of the bottom line, matters to people. But the focus in the research has been almost exclusively on fairness of outcome, rather than process.¹²⁹

In an essay on fairness in negotiation, Nancy Welsh hinted that there might be an important role for procedural justice in the negotiation setting, but noted that most of the research was limited to third-party dispute resolution processes.¹³⁰ And in a chapter on procedural justice and negotiation, Tom Tyler and Steven Blader suggested that there might be an important relationship in light of the strong data on the effects of procedural justice in mediation (what they call “negotiation settings presided over by third-party mediators”),¹³¹ but noted the absence of data in the area, and relied instead on making inferences from the data on procedural justice in mediation.¹³² Because mediation is a negotiation that is aided by the presence of a third-party facilitator, and is a process, like pure negotiation, in which the control over the decision rests in the hands of the disputants, scholars have been comfortable making inferences about the effects of procedural justice in negotiation based on

¹²⁷ See, e.g., G. Richard Shell, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* xiii (1999) (author’s goal is to put forth “ideas and approaches that dependably help people achieve superior results at the bargaining table”); Roy J. Lewicki, David M. Saunders, Bruce Barry, & John W. Minton, *ESSENTIALS OF NEGOTIATION* 3 (2004) (goal of the book is for people, “perhaps most important[ly], [to] be able to obtain better negotiation outcomes than before”). Even books that acknowledge the importance of factors beyond outcome sometimes pitch those factors as trade-offs against good outcomes. See, e.g., Roger Fisher et al., *supra* n. 124 at ___ (“[p]rincipled negotiation shows you how to obtain what you are entitled to and still be decent”).

¹²⁸ See *supra*, text accompanying notes __ to ___. Scholars have suggested that other factors, too, may affect negotiation. For example, Putnam challenged “three assumptions” of the traditional model: that outcomes are defined instrumentally, that the individual drives negotiation, and that rationality is privileged. She suggested that non-instrumental goals should be considered, that emotional and relationship issues matter, and that emotion and feelings can be an important source of knowledge. Linda L. Putnam, *Challenging the Assumptions of Traditional Approaches to Negotiation*, 10 *NEGOTIATION J.* 337, 338 (1994).

¹²⁹ Fairness of the negotiation process has been studied extensively in the context of negotiation ethics, however. See Carrie Menkel-Meadow & Michael Wheeler, *WHAT’S FAIR: ETHICS FOR NEGOTIATORS* (2004).

¹³⁰ See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 *MARQ. L. REV.* 753 (2004).

¹³¹ Tyler & Blader, *supra* note 32, at 302.

¹³² *Id.* at 306.

mediation research. However, there are important distinctions between mediation, in which a third-party neutral typically guides and directs the process of decision-making between the parties, and negotiation, in which the parties must develop their own process for reaching a solution. The presence of a third-party neutral makes extrapolation from mediation to the negotiation context empirically uncertain.

There are, however, a small handful of studies that connect procedural justice and bilateral negotiation directly. In light of this small but growing body of research on procedural justice effects in bilateral negotiation, the time has come for a fuller exploration of the potential relationship between procedural justice and legal negotiation, and the implications of that relationship. The research in this area has focused on a few distinct but related issues surrounding negotiation and procedural justice. One line of research examines what kinds of dispute resolution processes people prefer, and why. Another line explores the effects that experiencing a fair process has on individuals' assessments of their agreements and their negotiation opponent. Finally, some research has considered whether the same antecedents for procedural justice in the third-party setting are present when there is no third-party neutral present. I discuss these three lines of research below.

1. Negotiation and Procedural Preferences

Thibaut and Walker originally posited that procedural justice was the primary guiding factor in individuals' choices about what disputing process they would use.¹³³ In a supporting study, Lind, Huo and Tyler found that procedural fairness was "the most powerful predictor" of procedural preference.¹³⁴ That is, people's assessments about the inherent fairness of dispute resolution processes predicted their choice of preferred process. Of course, people also were guided in their choice of process by their assessments of how favorable the process would be to them versus their opponent in the dispute, but fairness appeared to be a greater motivator in making the choice. In the Lind et al. study, individuals of different ethnic backgrounds rated seven different dispute resolution processes on how fair the processes were and on which of the processes they would prefer for resolving their own disputes. Three out of the four ethnic groups studied ranked negotiation as the most preferred method to resolve disputes.¹³⁵ The study's findings suggested

¹³³ Thibaut & Walker, *supra* note 6, at ____.

¹³⁴ Allan Lind, Yuen Huo, & Tom Tyler, *...And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269, 282 (1994).

¹³⁵ The ethnic groups studied were African Americans, Hispanic Americans, Asian Americans, and European Americans. All but the African Americans ranked

that individuals prefer negotiation because of their belief that the process is procedurally fair vis-à-vis other dispute resolution mechanisms.¹³⁶ This and other similar studies¹³⁷ offer support for the basic premise that individuals care about the fairness of process, even in the negotiation context, and that, indeed, individuals prefer negotiation to other procedures when they believe that negotiation will be conducted fairly.

On the other hand, MacCoun hypothesized that procedural justice concerns were at issue when a mandatory arbitration program in New Jersey increased rather than decreased the cases that did not settle. MacCoun suggested that individuals' interest in a fair process drove them away from bilateral negotiation to arbitration when it was cheap and easily available.¹³⁸ MacCoun concluded that bilateral negotiation was viewed as providing less opportunity for procedural fairness than arbitration.¹³⁹ And some sociology work in the area of procedural justice and negotiation suggests that negotiation per se may be perceived as less fair than other mechanisms for distributing goods. So, for example, Molm and her colleagues found that an exchange of resources where parties negotiated terms of agreement was experienced as less fair than an exchange where parties engaged in mutual reciprocity – or a simple back and forth.¹⁴⁰ Molm suggested that, even though negotiation may encapsulate better the tenets of procedural justice than reciprocity, the fact that negotiators tend to have interests that directly conflict with one another (especially in zero-sum settings) increases the likelihood that the parties will make self-serving attributions that will cast their negotiation opponent in a more negative light.¹⁴¹ These studies, taken together, offer an inconclusive answer as to whether negotiation is, or is not, a procedurally fair process;¹⁴² all of the studies, however, suggest that individuals are alert to, and care about, the fairness of process in dispute resolution, even in the negotiation context.

negotiation as the most preferred method, with persuasion as the second most preferred method; for African Americans, these two choices were reversed. *Id.* at ____.

¹³⁶ *Id.* at ____.

¹³⁷ Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUBL. POL'Y & L. 211 (2004); Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 U. CONN. L. REV. 63 (2008).

¹³⁸ MacCoun, *supra* note 11, at ____.

¹³⁹ *Id.*

¹⁴⁰ Linda D. Molm, Nobuyuki Takahashi, & Gretchen Peterson, *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128 (2003).

¹⁴¹ *Id.* at ____.

¹⁴² Perhaps the determination of the fairness level of a negotiation is context specific, or perhaps individual differences account for differences in perceptions of fairness.

2. *Effects of Procedural Justice in Negotiation*

Another set of studies looks at procedural justice in negotiation specifically, exploring what effect the degree of procedural fairness experienced in a negotiation might have on participants' perceptions about that negotiation process and outcome. In one study by Brockner and his colleagues,¹⁴³ individuals participated in a simulated bilateral business negotiation, and were asked to rate the fairness of the process of negotiation as well as their desire to engage in future business dealings with the other party. The level of procedural justice experienced in the negotiation appeared to predict one's desire to engage in future business dealings with the other party to the negotiation – that is, the more fair the negotiation process an individual experienced, the more likely that individual was to say that she would want to negotiate again with the other party.¹⁴⁴

In that study, the authors measured the effects of procedural justice on future dealings, but did not measure or otherwise study the effects of procedural justice on acceptance of, or adherence to, the negotiated agreement at hand.¹⁴⁵ In recent research, Hollander-Blumoff and Tyler explored the question of what effects fair treatment during negotiation might have on perceptions of the negotiated agreement that would relate to acceptance and adherence to the agreement.¹⁴⁶ Hollander-Blumoff and Tyler found that in a simulated legal negotiation, law students in the role of attorneys in a dispute over a contract were more enthusiastic about recommending a negotiated settlement to their client when they experienced greater levels of procedural justice in the negotiation.¹⁴⁷ The authors there measured this enthusiasm in an effort to capture the degree to which the parties accepted, and in turn were

¹⁴³ Joel Brockner, Ya-Ru Chen, Elizabeth A. Mannix, Kwok Leung, & Daniel P. Skarlicki, *Culture and Procedural Fairness: When the Effects of What You Do Depend on How You Do It*, 45 ADMIN. SCI. Q. 138 (2000). The focus of the study was not, per se, negotiation; instead, the authors were interested in the difference between individuals from countries with a cultural norm of independence (e.g., the United States) or interdependence (e.g., China).

¹⁴⁴ *Id.* There was also an effect of outcome favorability on the desire to engage in future business dealings – that is, individuals who got outcomes that they rated as “better” also were more interested in negotiation with the other party in the future.

¹⁴⁵ In the mediation context, Pruitt and colleagues found that procedural justice was the strongest predictor of adherence to a mediated agreement six months after the mediation. Pruitt, *supra* note 17, at ____.

¹⁴⁶ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 472 (2008).

¹⁴⁷ *Id.* at ____.

likely to adhere to, the negotiated agreement.¹⁴⁸ Additionally, the law students reported that the negotiation process was more collaborative, and that they had a more positive experience during the negotiation, when the negotiations were characterized by procedural fairness.¹⁴⁹ Procedural justice was not the only factor that made a difference in levels of acceptance, positive feelings during the negotiation, and the perception of collaborativeness.¹⁵⁰ Measures of outcome favorability – that is, how good the participants thought the agreement was – also had significant effects on acceptance and good feelings, and measures of distributive justice – that is, how fair the negotiated *outcome* was – had significant effects on acceptance, good feelings, and collaborativeness.¹⁵¹

Hollander-Blumoff and Tyler also examined the relationship between procedural justice and monetary outcome in two different studies – one in which integrative potential was low (a largely “zero-sum”) negotiation, and one in which the integrative potential was higher (there was opportunity for “expanding the negotiation pie”). In the low-integrative potential negotiation, there was no relationship between procedural fairness and actual outcome; in the higher integrative potential negotiation, higher levels of procedural justice were significantly related to a more even distribution of the surplus that was created.¹⁵² This research suggests that there is no systematic relationship between fair treatment and outcome in a zero-sum setting: that is, feeling that one has been fairly treated during a negotiation has no connection to doing well or poorly on the substance of the negotiation. Fair treatment, then, does not appear systematically to “bamboozle” people into accepting poor outcomes, nor does fair treatment systematically seem to ensure a favorable outcome. In an integrative setting, fair treatments’ effects on outcome are limited to the distribution of any surplus that is created, and these effects tend toward an equal distribution of that surplus.

¹⁴⁸ *Id.* at _____. Because the study was a simulation in which the students did not need to report back to a real client, there was no way to measure actual client acceptance, nor was there any way to track short or long term adherence to the agreement. However, the acceptance variable included measurement of how strongly the participants would recommend to their client that the agreement should be accepted and how likely they thought it was that the agreement formed the basis of a good long-term outcome.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at _____. There was an effect of distributive justice (or outcome fairness) on feelings only in the individual, not the dyadic, analysis. That is, subject assessments of fairness of outcome mattered for individuals’ judgments of how positive they felt during the negotiation, but relative differences in outcome fairness did not have a significant effect on relative positive feeling, and joint perceptions of outcome fairness did not have a significant relationship to the joint good feeling ratings of the dyad.

¹⁵² *Id.*

Hollander-Blumoff and Tyler's findings suggest that the procedural justice experienced in the negotiation plays a significant role in shaping how individuals assess their negotiated outcomes, and, specifically for individuals in the role of lawyers, how they think about a recommendation to accept or reject a settlement. If, in fact, subjective experiences of fairness during negotiation play a significant role in shaping lawyers' recommendations about acceptance of settlement, this suggests that lawyers who engage in negotiations characterized by higher levels of procedural justice are more likely to recommend settlements to their clients. This finding would indicate that an attorney who treats opposing counsel in a manner that produces a subjective perception of fair process is more likely to reach an accepted settlement, all other things being equal, than one whose behavior gives rise to a perception of unfair treatment.

3. *Procedural Justice Antecedents in Negotiation*

What does it mean to be fair in negotiation? That is, what are the factors that will produce a subjective perception of fair process by the other party to the negotiation? There has been, to date, only limited empirical research on the role that voice, courtesy and respect, trust, and neutrality play in making procedural justice assessments in the negotiation context, but a review of this research at least helps begin to answer this question. In one of the first studies to explore whether a relationship existed between negotiation and procedural justice, Lind, Tyler and Huo sought to test whether the procedural justice relationships found in third-party dispute resolution processes were also at work in dyadic – that is, two-person – disputing procedures; specifically, the researchers were interested in how people would determine whether a dyadic process was fair or not, and whether it would differ from that same determination in a third-party process.¹⁵³ The authors hypothesized that relational considerations of neutrality, trust, and status recognition¹⁵⁴ would play an important role in forming procedural justice judgments in the dyadic dispute resolution setting just as they do in third-party authority settings. In that study, Lind et al. suggested that because dyadic disputing procedures have no assurance of neutrality, parties to such a process would be *more* concerned about neutrality in the dyadic setting. Lind et al. also hypothesized that status recognition might be a more important variable in procedural justice assessments in the two-

¹⁵³ Allen Lind, Tom Tyler & Yuen Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997).

¹⁵⁴ Status recognition in this context is similar to treatment with courtesy and respect.

party context than in the third-party authority context, and that trust might be less important in assessing procedural justice in the dyadic setting than in the third-party setting. Lind et al.'s results supported these hypotheses – parties appeared to care more about neutrality, more about courtesy and respect, and less about trust in a two-party negotiation than in a setting with a decision-maker.¹⁵⁵

Hollander-Blumoff and Tyler found that law students made an assessment about the fairness of the negotiation based on three out of four traditional foundations of procedural justice – voice, trust, and courtesy and respect. That is, individuals engaged in bilateral negotiation in the legal context formed procedural justice judgments that related significantly to the level of trust they had in the other party, the courtesy and respect with which they were treated in the negotiation, and the degree to which they felt they were able to express themselves in the negotiation. However, in contrast to the Lind, Tyler, and Huo research discussed above, the Hollander-Blumoff and Tyler research provided no support for the hypothesis that parties did not care about trust, or for the premise that neutrality was a particularly important component of procedural justice judgments in negotiation. In fact, there was no significant relationship found at all between procedural justice judgments and the degree to which the negotiation process was neutral.

This finding, although not predicted by the researchers, seems logical in light of the fact that legal negotiation takes place in the adversary system, in which each attorney is meant to be a zealous advocate for his or her client. In this context, it would be surprising to find either party to a bilateral negotiation acting neutrally – indeed, it could potentially be a violation of the lawyer's duty to the client, or malpractice. It is thus understandable that parties would have little or no expectation of neutrality and would, in thinking about the fairness of the negotiation process, not consider the degree of neutrality present in the negotiation to be relevant.¹⁵⁶

Research thus suggests that people's determinations about whether a negotiation process is fair or not are governed by the degree to which they feel that they have a voice in the negotiation and the courtesy and respect with which they feel they are treated, with a possible but uncertain role for both trust and the degree of neutrality present in the negotiation process. Taken together with the findings that people want

¹⁵⁵ Lind, Tyler, & Huo, *supra* note 153. Lind et al. also found that the degree to which individuals felt that they had a voice in the dispute resolution process had an effect on procedural justice in the dyadic setting, although this effect was largely mediated by the relational variables they studied.

¹⁵⁶ However, because there is conflicting data on this point, it is impossible at this point to assess the role of neutrality in subjective perceptions of procedural justice in the negotiation context.

to negotiate, in part, because they believe negotiation is a fair process,¹⁵⁷ and that people who experience a procedurally fair negotiation are more likely to be enthusiastic about accepting the negotiated agreement,¹⁵⁸ these findings suggest that ensuring that one's opponent in a negotiation has the opportunity to express herself, treating one's opponent with courtesy and respect, and, possibly, acting trustworthy or neutral, may have significant positive benefits – and that there may be relatively worse results, in terms of acceptance and adherence, when one does not afford one's opponent an opportunity for voice, courteous and respectful treatment, and a basis for trust or evidence of absence of bias.

If opportunity for voice, courteous and respectful treatment, and possibly trust and neutrality play critical roles in guiding participants' assessments of procedural justice, what are the "invisible rules" that will actually lead to positive assessments about these factors? More research is needed on what actual, specific behaviors in negotiation give rise to the perception by a negotiator that she has had the opportunity for voice, has been treated with courtesy and respect, has a trustworthy negotiation counterpart, and has engaged in a bias-free process. Would interrupting someone deprive them of an opportunity for voice? Would active listening provide a heightened sense of voice? Perhaps courtesy and respect norms are different for lawyers in different types of practice, or in different legal communities. And being trustworthy or bias-free may be demonstrated by resorting to the objective criteria recommended by Fisher and his colleagues, or perhaps by use of outside standards such as legal cases and arguments. On the other hand, using objective criteria or legal arguments might be perceived as contentious and partisan rather than neutral. The particular behavior that will give rise to the experience of the antecedents of procedural justice is not yet clear; research at the intersection of negotiation and procedural justice is still in its early stages, but this is a critical area for future exploration.

IV. THE PROCEDURAL JUSTICE GAP BETWEEN ATTORNEY AND CLIENT IN NEGOTIATION

In thinking about procedural justice in legal negotiation, there are at least two major concerns that need to be addressed. First, in most legal dispute resolution processes, as noted in Part II above, there are set rules that dovetail nicely with psychology's findings on how we make assessments about procedural justice, or fairness of treatment. In legal negotiation, in contrast, as discussed above, there are fewer such defined rules. For that reason, the lawyer may not expect, predict, or understand that fairness norms are at work in negotiation; the attorney's assumptions

¹⁵⁷ See *supra* text accompanying note 136.

¹⁵⁸ See *supra* text accompanying note 147.

may differ from the concept that the layperson brings to lay, rather than legal, dispute resolution. In the Hollander-Blumoff and Tyler study, the participants were not practicing attorneys, but students engaged in a simulation of a legal negotiation. Their perceptions may be more like lay perceptions than legal actors' would be. This leaves as an open question how relevant procedural justice is in the context of legal negotiation conducted by sophisticated lawyers.

Secondly, there is a fundamental difference between the legal dispute resolution settings where procedural justice has been found and negotiation. Namely, most research has explored the role of the procedural justice experienced by the disputant; the negotiation research suggests that the experience of procedural justice impacts assessments about the negotiated outcome, but implicitly assumes a unitary character for both experience of fairness and later acceptance. In legal negotiation, however, the legal disputant is typically not a party to the substance of the negotiation. Clients are not always – or even often – present during the process of the negotiation of a settlement, leaving this to be worked out by the attorneys they have hired.¹⁵⁹ So the procedural justice – or the fairness of process – experienced during the negotiation may, in fact, be experienced by the client's agent rather than the client herself. Imagine two hypothetical lawyers engaged in the same negotiation and faced with the same settlement package.¹⁶⁰ One lawyer is engaged in a negotiation process that she perceives as procedurally fair and the other lawyer is engaged in a negotiation process that she perceives as less procedurally fair. As described in Part IIIB2 above, psychological research suggests that the first lawyer will be more enthusiastic about the settlement offer, and more likely to recommend the settlement to her client.

Because clients are likely to be influenced strongly by the recommendation of the lawyer,¹⁶¹ this would seem to lead to the

¹⁵⁹ This same concern has preoccupied mediation scholars, who worry that the voice experienced by a party is attenuated by the growing role of the lawyer in mediation. See Welsh, *supra* note 73.

¹⁶⁰ Throughout this discussion, I will assume that procedural justice levels differ while holding a settlement outcome the same; this is a reasonable inference in light of Hollander-Blumoff and Tyler's finding that procedural justice and outcomes had no relationship in the zero-sum negotiation setting, *supra* note 146. Note, however, that in the integrative bargaining setting, Hollander-Blumoff and Tyler did find a relationship between procedural justice and outcome, such that the surplus created was split more evenly between the parties. *Id.*

¹⁶¹ Lawyers may exercise different degrees of influence on their clients, of course, see Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811 (1987), but there is widespread agreement on the presence of influence, see, e.g., Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 664 (1976); Herbert Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement*

conclusion that the clients are more likely to accept settlements when the negotiation process is characterized by procedural justice. But, to the extent that the fairness of treatment during negotiation makes a difference, those differences will be felt by an attorney rather than a principal. This is a significant departure from the other settings where procedural justice is typically discussed, such as litigation, where a client is present in the courtroom, or mediation, which is a process designed, in part, explicitly to address the personal and emotional needs of the parties and typically requires the participation of the principals.

These two concerns raise a host of questions. First, are lawyers differently situated from clients such that they will not feel the same procedural justice effects? That is, are they trained professionals who are insulated from the effects of fair treatment by virtue of their experience and training? Second, if we do assume that lawyers will feel the effects of fair treatment, what ethical concerns does this raise in terms of lawyers' role as agents? Will lawyers pass on procedural justice effects that are illusory, giving their clients less financial gain¹⁶² but enabling them to be happier about it, even though the clients are not able to reap the benefit of the procedural justice? Should attorneys communicate the procedural justice elements of the negotiation, so that the client can experience them vicariously? Or should the client attend the negotiation, so that whatever the fairness effects, the client is able to experience them directly? These questions are addressed in turn below.

A. *Will Lawyers Experience Procedural Justice Differently than Clients?*

With respect to the question of whether lawyers will experience procedural justice in a different manner than their (largely laypeople) clients, the data are inconclusive. In Hollander-Blumoff and Tyler's study on procedural justice in negotiation, the subjects were first year law students, who were not yet fully socialized as lawyers and had little experience in negotiating civil disputes on behalf of clients.¹⁶³ It is certainly possible that lawyers would experience diminished procedural

Realities, and Issues of Control in the Lawyer-Client Relationship, 23 LAW & SOC. INQUIRY 795 (1998); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, HARV. NEGOT. L. REV. (forthcoming) (“[I]t is not unlikely that a client's attorney will have considerable influence on the client's settlement decisions”). Empirical support for the premise was provided by Russell Korobkin & Christopher Guthrie, *Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

¹⁶² As noted above, however, research has not shown a relationship between outcome and procedural fairness in zero-sum negotiations. Hollander-Blumoff & Tyler, *supra* note 146, at ____.

¹⁶³ *Id.* at ____.

justice effects in negotiation; sometimes, research shows, lawyers do respond quite differently than parties to cues in negotiation. For example, Robbennolt, studying apology in civil disputes, found that parties to a simulated dispute over a bicycle accident who were offered apologies had lower aspiration levels, reservation points, and “fair settlement” targets than parties who were not; in contrast, lawyers who were given the same information about the dispute and asked to provide these same figures on behalf of the injured party had higher aspiration levels, reservation points, and fair settlement targets when an apology was offered.¹⁶⁴ On the other hand, in that setting the apology was directed to the party, not to the attorney, and the apology additionally had evidentiary value with respect to fault-finding, so that the attorney understood the apology to bolster the merits of the substantive case.¹⁶⁵

In the procedural justice setting, attorneys are interacting with other attorneys, members of their own community. Their treatment in negotiation, with respect to the interpersonal processes related to procedural justice, is about the way that they themselves are being treated, rather than about the treatment of the client. The treatment of the client, in contrast, is typically likely to appear to the attorney as a question of distributive justice, because the client is not present at the negotiation, so the “treatment” the client will get will likely be in the context of a discussion over the substance of the client’s claim.

The underlying theoretical model for procedural justice’s importance sheds some light on when procedural justice effects are or are not likely to be felt by lawyers. The Thibaut and Walker theory, suggesting that individuals care about fairness because they believe that fairness of process is likely to lead to fairness of outcome, would suggest that lawyers would care about fairness of process: if lawyers experience a fair process, they may believe that their outcomes are better as a result of that process. The Tyler and Lind group value model would offer even stronger support for the idea that lawyers would be influenced by procedural justice; people care about the treatment they receive because it reflects their status in a group. Lawyers, one might argue, are particularly status conscious,¹⁶⁶ and to the extent that interactions with a peer lawyer might reflect on their status in the legal community, this will be important to them. Finally, fairness heuristic theory, suggested by Van den Bos, is less conclusive. The idea that people use fairness to judge negotiation outcomes in the face of uncertainty about the outcomes themselves might suggest that lawyers should be relatively insulated

¹⁶⁴ Robbennolt, *supra* note 161, at ____.

¹⁶⁵ *Id.* at ____.

¹⁶⁶ See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1355 (1997).

from these effects, because lawyers' experience with similar cases over time, and knowledge of other cases that fellow lawyers have handled, will provide them with an objective benchmark by which to evaluate their numerical outcomes. In that case, fairness of treatment should be of less importance to lawyers' perceptions about their negotiated outcomes. On the other hand, every case is uniquely situated, and there is no way to directly map a case onto other cases to precisely measure the worth of the particular case at hand. For that reason, procedural justice might serve as a useful heuristic to evaluate outcome in the absence of objective markers. A middle ground position might suggest that although lawyers do have some sense of how to value outcomes on an objective scale, the interstices of ambiguity are filled by procedural justice as a heuristic device.

B. The Ethics of Procedural Justice in an Agency Relationship

To the extent that lawyers do feel an effect of fairness of treatment, this calls into question their ethics as agents for an unaffected principal. Imagine, for example, the following hypothetical scenario: an attorney, receiving very fair treatment during a negotiation, is enthusiastic about the agreed-upon outcome. To the degree that the enthusiasm depends on the fairness of the treatment, which only the attorney, and not the client, received, is it ethical for the lawyer to pass along her enthusiasm about the agreement to the client? Should the lawyer allow her own fair treatment, which the client did not share the benefit of, to affect her perception of the case?¹⁶⁷

This tension between the principal and agent is at the heart of legal negotiation theory.¹⁶⁸ The simple framework of bilateral

¹⁶⁷ Of course, all manner of outside factors may shape the lawyer's perception of the case: as William H. Simon explains, "effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments." William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994). In turn, these judgments unconsciously find their way into communication with the client: "[E]ven when they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by a myriad of judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt." William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217 (1991).

¹⁶⁸ Mnookin et al. suggest that this tension is one of three critical tensions in negotiation, along with the tension between creating and claiming value and the tension between empathy and assertiveness. Robert H. Mnookin, Scott R. Peppet, & Andrew S. Tulumello, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000). There is some question about how well agency theory maps on to the attorney-client relationship in all contexts, however. For example, courts and commentators suggest a clear difference in the way that decisions are handled for

negotiation is considerably complicated by the addition of agents performing negotiation on behalf of principals.¹⁶⁹ There is a wide range of ways in which the attitudes and actions of agents and principals may clash, leading to misalignments and problems within the negotiation setting. Mnookin et al. have suggested that there are three areas where principals and agents might differ in meaningful ways: preferences, incentives, and information. Preferences may differ between agent and principal when, for instance, an agent is a repeat player whose preference is to maintain a good relationship with the other party, while the principal is a one-shot player whose preference is to maximize economic gain.¹⁷⁰ The literature on the role of agents in negotiation is rife with discussion of the perverse problems in aligning incentives that can result from agents' fee structures.¹⁷¹ For example, an attorney paid hourly has some incentive to continue to negotiate, or to refuse to negotiate, rather than settle, as a case moves towards trial; an attorney working on a contingency fee basis may be more likely to want to settle a case before expending more hours.¹⁷² Finally, parties may have very different information; for example, an agent might be well aware of whether a proposed settlement is above or below average in a particular type of case or jurisdiction, and the principal may not have this benchmark for settlement evaluation.

On the other hand, agents offer significant added value in some respects, not just because they bring specialized knowledge or

substantive versus procedural matters, with clients retaining final authority in substantive matters and attorneys exercising final authority with respect to procedural decisions. See, e.g., William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for their Attorneys' Procedural Errors*, 1988 Duke L.J. 733, 739-40. In this way, agency theory does not fully account for the increased role that attorneys play in procedural decisions. Whether to accept a settlement, however, seems likely to fall within the ambit of substantive decisions, where the client retains final decision-making authority. This makes a conflict between agent and principal in this setting all the more problematic.

¹⁶⁹ Indeed, "most accounts of lawsuit settlement . . . share the simplifying assumption that litigation is a two-party activity carried out by a plaintiff and a defendant." Korobkin & Guthrie, *supra* note 114, at 81.

¹⁷⁰ Mnookin et al., *supra* note __, at 75.

¹⁷¹ Geoffrey Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 190 (1987) (analyzing effect on settlement incentives of differences in contingency fee versus hourly fee structures); Korobkin & Guthrie, *supra* note 161, at 122-23; Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOT. L. REV. 53 (1996); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

¹⁷² Mnookin et al., *supra* note __, at 83-84.

particularized negotiation skills to the table,¹⁷³ but because they are able to act more rationally and dispassionately than their clients,¹⁷⁴ especially in the case of dispute resolution, where the parties are engaged in some type of disagreement that has often become heated. In particular, those who have considered the psychology of negotiation have suggested that lawyers might be very helpful because they are able to be less emotional than their principals,¹⁷⁵ and lawyers might be subject to less cognitive bias than their principals.¹⁷⁶

In the context of procedural justice, the tension between what an economist might call an attorney's "revealed preference" for fair treatment in negotiation and a client's likely stated preference to maximize outcome is problematic. In some ways, it reflects the worst of both worlds: on the one hand, we rely on lawyers to judge and assess the favorability of a settlement offer and on the other hand we expect that lawyers are free from the "emotional" bias that we know parties bring to a dispute. Yet, in this instance, we have lawyers' subjective perceptions of their own fair treatment leading to their favorable evaluation of a settlement outcome.

One question is how much of the procedural justice experienced in the negotiation will be "passed along" to the client. Although there is no empirical data on the point, it seems plausible that attorneys would communicate some of the facts surrounding the negotiation process to their clients.¹⁷⁷ For example, an attorney might explain a settlement

¹⁷³ Jeffrey Z. Rubin & Frank E.A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOTIATION J. 395, 396 (1988); MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 146 (1992). See also Mnookin, *supra* n. ___, at 71 (suggesting that the benefits of using an agent stem from five sources: knowledge, resources, skills, and strategic advantage[it says five sources, but only four are listed; either one is missing or the number is inaccurate]).

¹⁷⁴ Rubin & Sander, *supra* note 173, at 397.

¹⁷⁵ *Id.*

¹⁷⁶ This latter point has received some attention in the legal academic literature. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2520 (2004); Russell Korobkin & Christopher Guthrie, *supra* note 161, at ___. But see Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 (2007).

¹⁷⁷ The nature of the communication between attorney and client is the subject of significant scholarly investigation. William L.F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer-Client Relations*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 135, 146-47 (Joseph Sanders & V. Lee Hamilton eds., 2001) (reviewing literature on the interaction between lawyer and client). For the purpose of this article, I assume a somewhat straightforward relationship in which information can be shared easily (or, can be withheld easily) – that is to say, at the least, a relationship in which communication may be used strategically and self-consciously, despite the fact that this may not be the case in every lawyer-client relationship. Some scholars have suggested that the relationship between lawyers and clients, itself, may be characterized by procedural justice concerns, adding yet another layer to the complexity of understanding the role of procedural justice in legal negotiation. *Id.* at 139. The

offer in context, noting the behavior of the opposing counsel as part of that offer. So things like, “I barely had a chance to get a word in edgewise,” or “The other lawyer really wanted to hear why our demand was [x],” might lead to the client’s formation of an opinion with respect to voice. The voice, of course, is attenuated, because it is the attorney’s voice rather than the client’s, but because the attorney is the client’s agent, speaking on behalf of the client, it is reasonable that the client has some identification with and interest in the attorney’s ability to have voice during the negotiation process.¹⁷⁸ Similarly, lawyers might pass on impressions relating to trust in the other lawyer and/or other party; lawyers may know each other from other cases and pass along previously formed opinions about integrity and trustworthiness, or may relate incidents from negotiation that heighten or decrease trust in the other side. Likewise, when explaining the criteria that form the basis for the settlement, attorneys may explain more or less some objective basis for the negotiated outcome, leading to higher or lower perceptions of neutrality from the client. Finally, if another lawyer is discourteous or disrespectful, it seems quite likely that the client’s lawyer will mention this as part of the debriefing process after a negotiation session. So it may be that clients experience a transitive procedural justice effect based on the report given by their lawyers.

In contrast, a sophisticated lawyer could deliberately mask the procedural justice of a negotiation in order to serve her own goals. So, for instance, a lawyer could experience very low procedural fairness, but, knowing that a client may more readily accept an agreement that comes out of a fair negotiation process, the lawyer could deliberately *not* pass on details about the process, or could affirmatively mislead the client about the fairness of the process.¹⁷⁹ Conversely, the lawyer could experience very high procedural fairness himself, but, when relaying the settlement offer to the client, could omit description of the process or could describe the process negatively. Lawyers might be motivated to do these things for any number of reasons: they might explicitly, on principle, want the process to be irrelevant to a consideration of

procedural justice of a negotiation may, indeed, be less relevant to a client than the procedural justice afforded by her lawyer.

¹⁷⁸ There is no difference between this and voice in the litigation context; attorneys represent clients in court unless the parties are *pro se*. Studies of the litigation context finding voice an important element of parties’ assessments of procedural justice do not rely solely on the *actual* voice of the parties, understanding that the lawyer’s voice is a proxy for that of the client. See Welsh, *supra* note 73, at 841.

¹⁷⁹ This concern about the potential for procedural justice to “blind” a party to a disadvantageous outcome is not new. A host of scholars have suggested that a focus on procedural justice may lead to a “false consciousness” problem in which individuals are contented with a fair process when that fair process masks a substantively unfair and/or unfavorable outcome. See MacCoun, *supra* note 11, at 189-190 (reviewing the procedural justice / false consciousness literature).

outcome, or they might have other reasons for wanting a client to accept or reject a settlement. This suggests that procedural justice effects in negotiation could give rise to ethical problems due to a clash of incentives between lawyer and client.

Part of the problem with understanding the effects of procedural justice in this context – even if transmitted clearly and having a transitive effect from attorney to client – is that it is hard to know what incentives individuals have with respect to fairness. In particular, procedural justice may not always be the kind of concern that people are likely to articulate prior to a negotiation. A host of psychological research suggests that people are just not that good at knowing what will make them feel happy or satisfied.¹⁸⁰ And, in particular, individuals have temporally differential preferences for fair treatment.¹⁸¹ So, for example, some research has suggested that someone facing an upcoming negotiation may believe that he or she would care most about finding a process that would yield a huge sum of money, and very little about how fairly he or she was treated. But, after the negotiation, the fairness of treatment matters quite a lot to that individual, perhaps even more than the favorability of the outcome.¹⁸² However, the nature of this temporal paradigm is such that it would be impossible for a principal to communicate accurately, *ex ante*, about her preferences *ex post*.

On the other hand, a client might, both *ex ante* and *ex post*, care very little about how his or her *agent* was treated during the negotiation. And this would be a preference that *could* be clearly communicated. But could it be honored by the agent? Assume three clients: Client A cares about the fairness of treatment during negotiation *ex ante* and *ex post*; Client B cares about fairness during negotiation only *ex post*;¹⁸³ Client C cares about fairness during negotiation in neither temporal frame. For the attorney who experiences procedural justice effects, what are the possibilities? In the case of Client A, the attorney can accurately describe the fairness of the treatment that she experienced during the negotiation, as well as the outcome of the negotiation; perhaps this explicit discussion of the fairness of process would act as a “pass-through” and provide some vicarious experience of procedural justice for the principal. For Client B, the attorney could similarly explain the process of negotiation, but Client B might be more puzzled by the relevance of the fairness of treatment, given that Client B was not

¹⁸⁰ See, e.g., DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006).

¹⁸¹ See Shestowsky & Brett, *supra* note 136, at ___; Tom Tyler, Yuen J. Ho, & E. Allan Lind, *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 *GROUP PROCESS & INTERGROUP REL.* 99 (1999).

¹⁸² Tyler, Huo & Lind, *supra* note 181, at ___.

¹⁸³ The case of the client who cares about fairness *ex ante*, but not after the negotiation, seems less likely and has no support in the literature.

present and had not expressed an interest in fairness. And as for Client C, he will be interested in the fairness of the process only to the extent that he can gauge to what degree that fairness has contributed to his attorney's degree of enthusiasm about the outcome, so that he can discount the attorney's advice about acceptance or rejection by that measure.¹⁸⁴

Unfortunately, Clients A, B, and C most likely fit within a larger category: clients who have never explicitly considered the importance, or lack thereof, of the fairness of treatment they (or their attorneys) have been afforded in negotiation. For all of these clients, then, the ethical concern is that the client may receive no separate and unique benefit from the lawyer being treated fairly. A lawyer receiving fair treatment is more enthusiastic about the negotiated outcome, but the lawyer received the benefit of the dignitary aspects of procedural justice. Again, the client could vicariously receive these benefits if the attorney passed along a description of the negotiation process, but there is no research exploring the benefits of reflected, or transitive, procedural justice. If, in fact, an attorney's opinion about the outcome of the case is affected by the way that the attorney was treated personally, this may lead to an ethical problem, because the attorney is charged with serving the interests of the client. In other settings where the interests of the principal and agent clash, the rules of professional conduct require the lawyer to act in accordance with the wishes of the principal, not the agent.

An obvious but unwieldy solution to this ethical problem would be to have clients present during negotiations. In that way, clients could experience the fairness of the negotiation process themselves, rather than vicariously, and whatever procedural effects were present, the client could experience, or not experience, them herself.¹⁸⁵ This would pose some logistical difficulties; it would also be possible that the presence of the client on a regular basis during legal negotiations would eliminate some portion of the benefit that comes to parties from outsourcing the negotiation of their disputes. So, for instance, the animosity between the parties that is tempered by a negotiation between two lawyers would not be dampened if clients attended a negotiation. Emotional concerns that

¹⁸⁴ As noted above in Part IIIB2, there has been no clear relationship demonstrated between outcome and procedural justice, so an effort to "discount" enthusiasm in an amount reasonably corresponding to some degree of procedural fairness experienced may be impossible. Hollander-Blumoff & Tyler, *supra* note 146, at ____.

¹⁸⁵ Indeed, Nancy A. Welsh has suggested that disputants' lack of presence during negotiation may contribute to a poor assessment of the procedural justice of negotiation as a dispute resolution mechanism more generally. Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 186 n.36.

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lawyers might mitigate without clients present might be at the fore in negotiations with clients in the room. And, indeed, some might argue that procedural justice research merely highlights yet another area in which lawyers reasonably add value by ensuring that their clients are not hampered by their fairness needs in negotiation; if attorneys could act purely economically, leaving aside the fairness concerns that principals would bring to the table, attorneys could ensure that parties achieved the best purely economic outcomes possible without concern about procedural fairness “noise” in the negotiation. This would be yet another way that attorneys, acting as agents, would best serve their principals, who are hampered by emotional and non-rational perspectives on their disputes with others. However, this presumes that what individuals really value is, indeed, their bottom line economic outcomes alone. And that is the heart of the question about the value of procedural justice in dispute resolution systems.

To the extent that greater procedural justice does not predict better or worse outcomes in negotiation, it seems worth understanding, as an attorney or litigant, that parties may care about factors beyond economic outcome. Perhaps some litigants, of course, would be willing to expressly trade process for outcome, but there is no reason why the process fairness – outcome relationship need be zero-sum.¹⁸⁶ Perhaps an express acknowledgement of this would lead to better communication between lawyers and clients, both before and after negotiation, and would allow for a greater explicit role for procedural fairness, which may be what disputants really want.

¹⁸⁶ There is no data to suggest, for example, that, as with Jennifer Robbennolt’s findings on apology, parties will accept a worse settlement in exchange for fair process, or that lawyers will demand a better settlement from those who treat them fairly. See Robbennolt, *supra* note 161.

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CONCLUSION

Recent research suggests that, in legal negotiation, negotiators are more enthusiastic about their negotiated outcomes when they have experienced higher levels of procedural justice in the negotiation process. Feeling as though they have had an opportunity to be heard, feeling as though the other party is trustworthy, feeling as though they have been treated with courtesy and respect – all of these factors appear to lead parties to judgments that they have been treated fairly in negotiation. But the relationship between procedural effects experienced by one individual and the perceptions of the negotiated outcome by another individual not privy to the negotiation process is an open research question: the role of the lawyer complicates the procedural justice mechanism in bilateral negotiation significantly. That is not a reason to abandon an exploration of the effects of fair treatment in negotiation; indeed, it is a reason to continue to conduct empirical research into procedural justice effects in a principal-agent setting. Given the robustness of findings suggesting a vital role for procedural justice in people's understanding of the law, the legal system, and that system's legitimacy, it is particularly important to understand how procedural justice works in negotiation when so many of our disputes are settled in the shadow not just of law but of legal process.