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Just Negotiation

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JUST NEGOTIATION

REBECCA HOLLANDER-BLUMOFF*

ABSTRACT

This Article argues that the procedural justice—that is, fairness of process—plays a critical and largely unexamined role in legal negotiation, encouraging the acceptance of and adherence to negotiated agreements. An economic focus has dominated prior work on legal negotiation and has largely touted the importance of negotiated outcome rather than process. This Article marshals theoretical support for the role that procedural justice may play in bilateral legal negotiation and supports the theoretical case with empirical data from social psychology. A robust empirical literature has established that procedural justice 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. Recently, such empirical work has begun to consider the effects of procedural justice in a setting without a third-party decision maker. These newest empirical findings support an increased role for fairness of process in negotiation. The Article concludes by exploring the complexities of taking procedural justice effects in negotiation seriously in light of the fact that legal negotiation is conducted by agent (the attorney), rather than principal (the client).

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INTRODUCTION

Negotiation is in many ways the poor stepchild of our civil dispute resolution system. Litigation carries with it all the pomp and circumstance of an impressive courthouse, robed judges, and, most importantly, substantive and procedural due process.¹ Arbitration, too, has procedural

1. 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. An exhaustive discussion of the relationship between substantive and procedural due process is beyond the scope of this project; however, as Tribe has noted, procedural due process relates not just to “the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666 (2d ed. 1988).

safeguards that will land the parties back in a courtroom if the process goes too far astray.² Even mediators vouchsafe a fair and unbiased process for participants.³

In contrast, negotiation is the back-room, realpolitik, down-and-dirty way that most cases get resolved. Although it has been well documented that most of the cases with a legal basis for resolution⁴ are resolved through negotiation,⁵ there are few rules for lawyers' conduct during the negotiation process. Procedural and substantive legal rules for disputants engaged in negotiation are few and far between.⁶ It is "just negotiation"—merely a process where disputants work out a resolution in any way they both might choose—and the only way to evaluate how well a negotiation has succeeded is to consider the favorability, or perhaps the fairness, of the outcome that the negotiation has produced.

2. Because arbitration is a private, contractual mechanism, courts have been more lenient in what is required of an arbitration setting than a litigation setting. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (upholding the enforcement of a predispute agreement to arbitrate claims that arose in the course of employment and rejecting challenges to the adequacy of arbitration procedures). However, the Supreme Court demonstrated some willingness to police the procedural aspects of the arbitral process. Therefore, 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. *See, e.g., Hooters of Am. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (rejecting rules for arbitration promulgated by employer as unfair). Perhaps in response to courts' insistence on minimum requirements of fairness in arbitration, 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., AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES* (2005); JAMS/ENDISPUTE, *SIX PRINCIPLES OF NEUTRALITY AND FAIRNESS FOR EMPLOYMENT DISPUTE RESOLUTION PRACTICE* (1995); NATIONAL ACADEMY OF ARBITRATORS, *GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS* (1997).

3. There is no uniform set of rules that govern all mediations. However, mediators are typically members of a professional organization or a particular trade or other association that promulgates rules for mediation, which share some basic features. In all mediations, the parties remain free to accept or reject any agreement produced through the mediation process, ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION* 338 (2002), and the mediator must be a third-party neutral who may not violate the confidentiality of private caucuses with either party, *see id.* at 348. Typically, mediation rules also provide for parties to be allowed a significant opportunity for participation, *id.* at 339, and ask that all parties to the mediation treat one another with courtesy and respect. *See, e.g., Nancy A. Welsh, The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 36 (2001) (citing Florida rules for court-appointed mediators stating that the "mediator shall promote mutual respect among the parties throughout the mediation process") [hereinafter Welsh, *Thinning Vision*]. Additionally, the Uniform Mediation Act sets forth a model for rules governing mediation. UNIF. MEDIATION ACT §§ 1–17 U.L.A. (2003).

4. 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.

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

6. *See infra* Part II.B.

Or is it? 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. Over three decades ago, Thibaut and Walker's groundbreaking work on the role of "procedural justice"⁷ showed that the fairness of a process, distinct from the fairness 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. Thirty years ago, Mnookin and Kornhauser suggested that substantive legal rules and endowments played an important role in negotiation, so that people were "bargaining in the shadow of the law."⁸ But individuals understand the court system to include not just the substantive legal endowments that Mnookin and Kornhauser described, but also the procedural protections that ensure a fair process. In this Article, I suggest that individuals are bargaining in the shadow of this fair process—in the shadow, in essence,

7. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). I want, at the outset, to distinguish "procedural justice" as it is used in psychology and the psychology and law context from the way that some legal academics use the term procedural justice to refer more broadly to the fairness of a dispute resolution system. "Procedural justice" as a psychology term 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., Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); see also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488–89 (2003); Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997). 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 in this Article.

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

of due process—with the fairness of the process playing a critical role in individuals' experiences in legal dispute resolution negotiation.⁹

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. Because legal negotiation and settlement of disputes form 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. Psychology research has shown that assessments of procedural fairness are reliably related to perceptions of legitimacy.¹⁰ Because most 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. I posit here that “just negotiation,” that is, negotiation that is conducted in a fair manner, has an important effect on how disputants perceive negotiated outcomes and thus our legal system more broadly.

Considering procedural justice in the negotiation context raises several critical questions. The first two questions are interrelated. One, 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 at all. What does fairness of process even *mean* in negotiation? When is behavior fair, and when is it not? Secondly, then, we must ask what factors reliably guide negotiators' subjective assessments of whether they have been treated fairly.

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

9. Although the arguments for the importance of procedural justice in legal negotiation may extend beyond the dispute resolution context into transactional negotiation as well, I will exclude discussion of transactional negotiation from this analysis for several reasons. First, transactional negotiation has quite different characteristics than dispute resolution negotiation. Among many differences, in transactional work, parties are typically favorably inclined toward each other, whereas in dispute resolution, parties have already had a breakdown in their relationship with one another. In transactional work, parties are likely to be positive in their desire to forge agreement, whereas in dispute resolution, parties may not be interested in agreement. In transactional work, there is no third-party decision maker looming in the background, ready to offer a solution if negotiation fails; there is also no set of law available to provide a default private ordering. Second, there is not yet sufficient empirical data on transactional negotiation and procedural justice to warrant drawing any conclusions.

10. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162 (1990).

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 unfold with respect to the ethics of representation and zealous advocacy.

In Part I of this Article, I provide background on psychological research on procedural justice. In Part II, I sketch the landscape of prior work on legal negotiation, highlighting the emphasis on outcomes and the absence of a focus on the fairness of process. I also provide a brief background on the handful of explicit rules that do exist for the regulation of the negotiation process, showing that negotiation's reputation for being a lawyer's "Wild West" is supported by the very slender set of rules that governs participants. 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 this section, I demonstrate that the connection between procedural justice and negotiation is both theoretically and empirically sound. In Part IV, I raise and explore specific concerns about the intersection between procedural justice and negotiation in light of the attorney-client relationship present in the legal negotiation setting.

I. THE PSYCHOLOGY OF PROCEDURAL JUSTICE

In 1975, Thibaut and Walker published their seminal book, *Procedural Justice: A Psychological Analysis*, 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.¹¹ 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.¹² 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 dispute resolution processes separate and apart from the impact of how substantively fair, just, or good an outcome may be.¹³ Thibaut and Walker found that individuals preferred adversarial over inquisitorial legal systems¹⁴ and also preferred to retain a large share of control of the process even when another party had control over the ultimate decision.¹⁵

In the thirty years since Thibaut and Walker began their empirical exploration of the effects of procedural justice,¹⁶ the field has grown substantially. Studies have explored the scope of procedural justice effects across different settings, demographic groups, and cultures;¹⁷ the underlying mechanisms that produce the effects;¹⁸ and the impact of these effects on the perceived legitimacy of authority structures.¹⁹ 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

11. THIBAUT & WALKER, *supra* note 7, at 73–74.

12. 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 different 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.” TRIBE, *supra* note 1, at 666.

13. THIBAUT & WALKER, *supra* note 7, at 94.

14. *Id.* at 77.

15. *Id.* at 119–22.

16. 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 J. 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 & E. Allan Lind, *Uncertainty Management by Means of Fairness Judgments*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 8 (Mark P. Zanna ed., 2002).

17. See, e.g., Allan Lind, Yuen Huo & Tom Tyler, . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269, 286 (1994).

18. See, e.g., Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 830–31 (1989); Kees Van den Bos, E. Allen Lind, Riël Vermunt & Henk A. M. 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, 1035–36 (1997).

19. See, e.g., TYLER, *supra* note 10, at 162.

if any socio-legal topics . . . have received as much attention using as many different research methods.”²⁰ Procedural justice affects judgments about satisfaction with interaction with the legal system in both civil²¹ and criminal settings.²² The effects in the civil setting are found in a variety of contexts, including judicial decision making,²³ arbitration,²⁴ and mediation,²⁵ as well as in citizen encounters with the police.²⁶ Procedural justice effects extend even beyond the scope of the legal system. Procedural justice effects are found in workplaces,²⁷ organizations,²⁸ families,²⁹ and social groups.³⁰ 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.³¹ These findings support the hypothesis that individuals, while caring about

20. MacCoun, *supra* note 16, at 173.

21. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 976 (1990).

22. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 483 (1988); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 333 (1988).

23. TYLER, *supra* note 10, at 104–06.

24. E. Allan Lind, Carol T. Kulik, Maureen Ambrose & Maria V. de Vera Park, *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235–36 (1993).

25. Jennie 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, 140 (2003); 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, 327 (1993).

26. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 535–36 (2003); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 262 (2004).

27. Robert Folger & Mary A. Konovsky, *Effects Of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 124–26 (1989); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287, 1305–06 (2005).

28. Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177, 193 (1987).

29. Mark R. Fondacaro, Michael E. Dunkle, & Maithilee K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 114–15 (1998); Shelly Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 LAW & POL'Y 101, 118–19 (1999).

30. Heather J. Smith, Tom R. Tyler, Yuen J. Huo, Daniel J. Ortiz & E. Allan Lind, *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 470, 489 (1998).

31. TYLER, *supra* note 10, at 162.

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)³² and outcome favorability. Three theories attempt to account 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.³³ Subsequently, Lind and Tyler 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.³⁴ 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.³⁵

Although researchers disagree on why people care about procedural justice, they converge when assessing what factors individuals rely on

32. 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. STOFFER ET AL., *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE*, VOL. 1 (1949); Robert K. Merton & Alice S. Kitt, *Contributions to the Theory of Reference Group Behavior*, in CONTINUITIES IN SOCIAL RESEARCH: STUDIES IN THE SCOPE AND METHOD OF “THE AMERICAN SOLDIER” (Robert K. Merton & Paul 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 BERSCHIED, *EQUITY: THEORY AND RESEARCH* 11–12 (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 of Distributive Justice?*, 31 *J. SOC. ISSUES* 137 (1975); Melvin Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 *J. PERSONALITY* 1 (1977); Thomas Schwinger, *The Need Principle of Distributive Justice*, in *JUSTICE IN SOCIAL RELATIONS* 211 (Hans Werner Bierhoff, Ronald L. Cohen & Jerald Greenberg eds., 1986).

33. THIBAUT & WALKER, *supra* note 7, at 121.

34. Tom R. Tyler & E. Allen 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, 830–31 (1989); see also TOM R. TYLER & E. ALLEN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230–40 (1988)

35. Van den Bos et al., *supra* note 18, at 1035–36.

when making their subjective assessments of whether or not they have been treated fairly.³⁶ A host of studies has focused on what individuals mean when they say that a process is fair or unfair. 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 largely understood to be coextensive with the degree to which an individual has the opportunity to have a voice in a particular process in order to present his or her side of the dispute.³⁷

The procedural justice literature has also highlighted three other crucial components of a process that will help to determine whether it is judged to be fair. First, research in psychology demonstrated 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.³⁸ 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.³⁹ 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,

36. 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, 483 (2003).

37. See, e.g., Robert Folger, *Distributive and Procedural Justice: Combined Impact of “Voice” and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 109 (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 nonmeaningful voice may lead individuals to assess a process as more fair. See, e.g., E. Allan Lind, Ruth Kafner & P. Christopher Early, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction With Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985).

38. Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, in *APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS* 77 (John S. Carroll ed., 1990).

39. TYLER, *supra* note 10, at 117–18.

and neutrality of the decision maker—are the four dominant criteria used in making procedural justice assessments.⁴⁰

Decades of research in procedural justice have suggested that fair process is critical to the way that people respond to decisions and decision-making structures. Newer research has looked to explore the effects of procedural justice in settings where there is no third-party authority, such as bilateral negotiation. Before turning to a full exploration of that research in Part III, I briefly sketch the landscape of legal negotiation below. I explore both negotiation scholarship and legal rules for negotiation, showing that the field is largely dominated by a focus on outcomes, and on process only to the extent that it affects outcomes.

II. THE LANDSCAPE OF LEGAL NEGOTIATION

Academic and popular literature on negotiation has long suggested its potential to be an unbridled and combative process. Holmes Norton described negotiation as having “all the adversarial potential of litigation and similar contests but few of the restraints.”⁴¹ Norton explained the source of this behavior in negotiation as the need to increase one’s economic outcome: “the interest of a client, like the self-interest of ordinary negotiators, assures that the basic character of the relationship is always in some respect adversarial.”⁴² Although she noted that adversarial processes are not inexorably bound to produce unfair behavior, she suggested that the adversarial character of the interaction “may increase the pressure to behave” in unfair ways.⁴³ Thus Holmes Norton elegantly summed up the link between a combative negotiation process and outcome in this way: people tend to choose a no-holds-barred negotiation process *because* they believe it is most likely to achieve the best outcome for their own side.

In this section, I briefly explore both (1) existing negotiation research’s common vision of negotiation as an adversarial and combative process, and (2) how negotiation literature largely treats process as a means of achieving particular substantive outcomes rather than as an important element of negotiation in its own right. I examine these concepts in three dominant visions of negotiation: first, the Mnookin and Kornhauser

40. 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).

41. Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L. REV. 493, 530 (1989).

42. *Id.*

43. *Id.* at 531.

“shadow of the law” concept; second, Fisher and Ury’s principled negotiation and Menkel-Meadow’s problem-solving negotiation paradigms; and finally, economic research on bargaining.

I do not purport to present an exhaustive panoramic view of all negotiation scholarship; rather, I provide a series of snapshots of prominent work in negotiation that illustrate some common underlying assumptions about negotiation process and about the importance of outcome versus process. I also present, as a counterpoint, some of the growing voices in negotiation scholarship urging that fairness of process in negotiation be taken seriously. I then examine more closely the handful of rules that do exist for process in negotiation. I demonstrate that the rules do not circumscribe negotiation behavior very significantly, that the rules primarily focus on negotiation outcome rather than process, and that when the rules *do* focus on process, they do so only to the extent that process directly affects outcome.

A. *The Role of Process in Prior Negotiation Scholarship*

1. *Bargaining in the Shadow of the Law*

For thirty years, legal negotiation has been characterized as occurring in the shadow of the law.⁴⁴ In 1979, Mnookin and Kornhauser wrote a seminal article about the way that legal entitlements might affect the negotiation process. They suggested, specifically, that considering endowments that the law gave to particular parties would shed light on how negotiations might be conducted, and parties might use these endowments strategically in negotiation to improve their outcomes.⁴⁵ Mnookin and Kornhauser explored the case of divorce law, and argued in favor of private ordering in that context. They supported the prerogative of parties to negotiate their own outcomes in the case of divorce, while maintaining a limited oversight role for the court, particularly in the context of child custody issues.⁴⁶

44. Robert Mnookin and Louis Kornhauser first coined this term thirty years ago in their groundbreaking article, *supra* note 8. 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.*, 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); Maureen A. O’Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 *CASE W. RES. L. REV.* 605 (2003); Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 *YALE L.J.* 621 (2003).

45. *See* Mnookin & Kornhauser, *supra* note 8, at 968–71.

46. *Id.* at 956–58.

Mnookin and Kornhauser drew a rich picture of the forces at play in the process of bargaining in divorce cases. They suggested that there were two primary sources of conflict in divorce negotiation: money and custodial matters.⁴⁷ They then offered a complex picture of how the legal endowments in these areas might affect the parties' bargaining behavior.⁴⁸ For example, they considered how a change from a maternal-preference custody rule to a sex-neutral rule would affect negotiation, suggesting that such a change would increase fathers' bargaining power and decrease mothers' bargaining power. In turn, this might lower alimony or child support payments.⁴⁹

The Mnookin and Kornhauser paradigm of bargaining in the shadow of the law is powerful and compelling and offers useful insight into the process of negotiation. But in acknowledging the limitations of their framework, Mnookin and Kornhauser revealed their own lack of interest in the role played by process *qua* process, and highlighted the importance of outcome in their discussion. "There now exists," they lamented, "no bargaining theory that can yield accurate predictions of the expected outcomes with different legal rules, even when rational, self-interested parties are only negotiating over money issues."⁵⁰ The authors suggested that the study of process is important to help understand how certain outcomes, and not others, are reached, even if the picture that develops is incomplete.

So Mnookin and Kornhauser shed terrific light on the process of bargaining in cases where legal entitlements exist, and they made a strong case for the effect of legal entitlements on how parties negotiate and on the ultimate negotiated outcomes. But they did not examine process for its own sake or consider the impact of different types of processes of negotiation on the parties. For example, does a negotiation in which the parties rely frequently on the background legal rule affect the parties differently than a negotiation in which the legal rule is not discussed? Might a party be more satisfied with an outcome that closely tracked the legal endowments, or might a party be more satisfied with an outcome if she has no knowledge of the legal endowments? Are parties more enthusiastic about outcomes when their negotiation process has focused extensively on legal entitlements, or do parties adhere more strongly to outcomes negotiated without reference to legal rules? Does the use of legal

47. *Id.* at 963.

48. *Id.* at 968–84.

49. *Id.* at 978.

50. *Id.* at 996.

entitlements during the negotiation process affect the perceived fairness of a negotiation? These are the kinds of questions that Mnookin and Kornhauser, and the many scholars that have followed them in considering the role of legal endowments in the negotiation process, have not considered.

2. *Principled and Problem-Solving Negotiation*

The popular bestseller *Getting to YES*,⁵¹ by Fisher and Ury, portrays the default style of negotiation, “positional bargaining,” as an adversarial process that pits one party against another. The book begins, “Whether a negotiation concerns a contract, a family quarrel, or a peace settlement among nations, people routinely engage in positional bargaining. Each side takes a position, argues for it, and makes concessions to reach a compromise.”⁵² The authors argue that this positional bargaining can be hard or soft:⁵³ the hard, no-holds-barred combative negotiation approach stems from a desire to maximize outcome, while the soft, accommodating style comes from a motivation to avoid disrupting parties’ relationships.⁵⁴ However, the authors quickly dispose of the soft negotiator in the first few pages of their text, while the hard bargainer remains a concern throughout the book.⁵⁵

Against the foil of the competitive negotiator, *Getting to YES* offers its readers a different approach, called “principled negotiation,” which focuses on parties’ interests rather than positions and urges both sides to brainstorm creative solutions and generate multiple options to resolve their disputes.⁵⁶ Throughout the book, the authors advocate disentanglement from interpersonal strife⁵⁷ and the use of objective criteria to establish fair benchmarks.⁵⁸ The authors consciously suggest that this is a new approach to negotiation,⁵⁹ and that the behavior of many negotiators (at least, those

51. ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 1991). *Getting to YES* is widely believed to be the most popular book on negotiation in the United States, used in countless negotiation classes in law schools, business schools, and beyond. Almost 30 years after its publication, it is still a best seller. See *The BusinessWeek Best Seller List: Long-Running Best Sellers*, BUSINESSWEEK, July 23, 2009, http://www.businessweek.com/magazine/content/09_31/b4141063591592_page_2.htm.

52. FISHER & URY, *supra* note 51, at 3.

53. *Id.* at 8–9.

54. *Id.* at 8.

55. See, e.g., *id.* at 92–94; 107–12; 118–28; 130–43.

56. *Id.* at 10–14.

57. *Id.* at 21–39.

58. *Id.* at 81–94.

59. *Id.* at 10.

who have not read the book) is likely to be positional, and, among those negotiators who want to achieve good outcomes, likely to be competitive.⁶⁰

The book offers both a vision of typical negotiation behavior and an explanation for what produces that behavior. Typical negotiation behavior has a hardball, “anything goes” quality; this is because individuals are motivated by their desire to maximize their gain in negotiation and competitive, no-holds-barred behavior is the way to do so. The authors provide an alternative process for negotiating—one that certainly seems more fair and reasonable to many people.⁶¹ Fisher and Ury encourage respectful behavior between parties, the use of objective criteria, an emphasis on both parties having their needs met, and ethical treatment of the other party to the negotiation. However, the end goal remains, largely, to encourage favorable outcomes—indeed, better outcomes than one might receive through positional bargaining.⁶² While *Getting to YES* does suggest that a fairer negotiation process might make the outcome of the negotiation more durable⁶³ or palatable to the parties, there is still a strong focus on an instrumental view of process. Better, fairer processes will yield better, fairer negotiated outcomes that are more mutually advantageous to both parties.

Carrie Menkel-Meadow’s extensive work on problem-solving negotiation offers a similar perspective on “typical” negotiation. In an early and groundbreaking work, she noted the prominence of the adversarial model, which relies on a “win-lose” dichotomy and pits parties against each other in a zero-sum setting.⁶⁴ The parties in this model are in conflict over how to divide a finite pool of resources, and scholars have explored what process individuals use to best accomplish this division in their favor.⁶⁵ In this widely disseminated vision of negotiation, she

60. *See id.* at 107.

61. After almost thirty years, the *Getting to YES* approach continues to dominate teaching of negotiation. *See, e.g.*, Harold Abramson, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 PEPP. DISP. RESOL. L.J. 437, 441–43 (2009); Amy G. Applegate, Brian M. D’Onofrio, & Amy Holtzworth-Munroe, *Training and Transforming Students Through Interdisciplinary Education: The Intersection of Law and Psychology*, 47 FAM. CT. REV. 468, 473 (2009).

62. *See FISHER & URY, supra* note 51, at xii (“Principled negotiation shows you how to obtain what you are entitled to and still be decent.”).

63. *See id.* at 154.

64. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 784 (1984).

65. *Id.* at 787–89.

suggested, the study of process is exclusively geared towards the outcomes it yields.⁶⁶

Menkel-Meadow herself described an alternative model, the problem-solving model, which has much in common with principled negotiation. In the problem-solving model, the emphasis shifts away from win-lose negotiation over a fixed pool of resources toward a needs-based negotiation that will produce beneficial outcomes that satisfy the desires of both parties. Interestingly, despite the fundamental shift in orientation, the focus of problem-solving negotiation remains almost exclusively on outcomes. The needs of the parties, rather than winning, *per se*, now dominate the discussion, but it is by and large the bottom-line needs of the parties, rather than any process-related needs, that are considered. The model of negotiation that emerges is based on a process that will best achieve the results of satisfying each party's primarily economic needs.⁶⁷ Menkel-Meadow suggested that there are needs that may not be compensable; however, she referred mainly to injuries that cannot be redressed through money, such as physical disabilities or damage to reputation.⁶⁸

Menkel-Meadow also highlighted the potential importance of fairness, but her focus on fairness is mostly outcome-based. She briefly suggested the importance of fair process⁶⁹ but did not fully reflect on the issue. She also noted that a negotiator in the alternative model of negotiation could

66. *Id.* at 793.

67. Menkel-Meadow writes:

Parties to a negotiation typically have underlying needs or objectives—what they hope to achieve, accomplish, and/or be compensated for as a result of the dispute or transaction. Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives. By attempting to uncover those underlying needs, the problem-solving model presents opportunities for discovering greater numbers of and better quality solutions. It offers the possibility of meeting a greater variety of needs both directly and by trading off different needs, rather than forcing a zero-sum battle over a single item.

Id. at 795.

68. *Id.* at 796.

69. Menkel-Meadow states:

The justness or rightness of a negotiation can be considered not only from the ends produced, but also from the process—the acts of which it consists. This aspect of negotiation is beginning to be explored with some seriousness. . . . [T]he question of how one feels about the process used to accomplish negotiated solutions is not unrelated to the justness of the solution. A problem-solving orientation toward negotiation may lead not only to better solutions, but to a process which could be more creative and enjoyable than destructive and antagonistic.

Id. at 817 (footnote omitted).

consider how solutions affect relationships between the parties,⁷⁰ as well as ethical concerns, such as “how fair [the parties] desire to be with each other.”⁷¹ However, Menkel-Meadow presented an alternative model of negotiation that, while offering a dramatically different vision of process and outcome than the adversarial model, nonetheless remains largely focused on the parties’ ultimate agreement.

3. *The Economic Approach to Negotiation*

Economic theories of negotiation in the civil justice system share a 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.⁷² If the parties agree on the expected value at trial, all cases will settle.⁷³ However, parties will not always agree, because they do not have perfect information,⁷⁴ the law is uncertain,⁷⁵ or both. If parties had complete information and the law was entirely predictable, so that litigants could calculate perfectly accurate figures for the expected value at trial, then all cases would settle because transaction costs could be saved for both sides by avoiding trial.⁷⁶

In this vision of negotiation, the most important element of a negotiation process involves calculating the expected value—or estimated outcome—of the case.⁷⁷ One does this by multiplying particular expected outcomes by their probabilities.⁷⁸ Transaction costs must also be calculated.⁷⁹ Still another vital piece of negotiation calculation must account for any fee-shifting rules.⁸⁰ In this model, it is a crucial element of strategy to calculate the opposing party’s expected value and transaction costs so that one can understand the parameters of the “zone of overlap”⁸¹

70. *Id.* at 802.

71. *Id.*

72. Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1071 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

73. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 568–89 (6th ed. 2003); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 64 (1982).

74. POSNER, *supra* note 73, at 69–70; Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 404 (1984).

75. POSNER, *supra* note 73, at 589.

76. Shavell, *supra* note 73, at 64.

77. See Priest & Klein, *supra* note 72, at 9.

78. Shavell, *supra* note 73, at 57–58.

79. Cooter & Rubinfeld, *supra* note 72, at 1072.

80. See Shavell, *supra* note 73, at 64–67.

81. HERBERT M. KRITZER, *LET’S MAKE A DEAL* 58 (1991).

or “zone of potential agreement”⁸²—that is, the area that defines the range of outcomes that both parties would be willing to accept. The economic perspective on settlement negotiation has produced, in turn, a robust literature in negotiation on how to define the value of a settlement, how to calculate expected value at trial, and how to divine both one’s own and the other party’s valuation of the settlement in order to calculate the zone of possible agreement.⁸³ From there, scholars expound on how best to act strategically in the negotiation to define the zone of possible agreement to one’s own benefit and to fix the settlement point at the spot most favorable to oneself.⁸⁴

In the past few decades, however, economists have reconsidered the purely monetary approach to understanding bargaining. Behavioral law and economics scholars have suggested, relying on empirical data, that a purely economic definition of utility is not always accurate and that individuals place a significant value on fairness in making assessments about whether or not to accept outcomes. 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—that is, people reject outcomes that are economically favorable to them because they do not comport with norms of fairness.⁸⁵

Much of this research uses a dynamic interaction between two parties called an ultimatum game, in which one party has the opportunity to split a sum of money between himself and another party however he likes. The other party then chooses whether to accept the offer, in which case both parties get the money, or reject it, in which case neither party receives any money.⁸⁶ The consistent findings in this area suggest that many, if not

82. ROY J. LEWICKI, BRUCE BARRY, DAVID M. SAUNDERS & JOHN W. MINTON, *NEGOTIATION* 77–78 (4th ed. 2003).

83. See, e.g., ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT PEPPET, *NEGOTIATION* 107–16 (3d ed. 2006); Jeffrey M. Senger, *Decision Analysis in Negotiation*, 87 MARQ. L. REV. 723, 729–33 (2004).

84. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 132–35 (1986) (discussing the effect of opening offers on the “bargaining set,” or zone of possible agreement).

85. RICHARD H. THALER, *THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 75–6 (1992); Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *BARRIERS TO CONFLICT RESOLUTION* 86, 89 (Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky & Robert B. Wilson eds., 1995); Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

86. Güth et al., *supra* note 85, at 371; see also Martin A. Nowak, Karen M. Page & Karl Sigmund, *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000) (noting that ultimatum game “has inspired dozens of theoretical and experimental investigations”); Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSP. 195 (1988).

most, individuals will reject an offer that leaves them financially better off but is too lopsided in favor of the other party.⁸⁷ The research omits altogether the effect of fairness of process on individuals' perceptions of the outcome. Instead, even in this research, the process is held constant while economists study the effect of varying outcomes. Again, the literature focuses on what it presumes is of most importance to negotiation participants: the bottom line of the outcome they receive.

In one example of the economics-based literature on legal negotiation, Korobkin surveyed the negotiation literature and, dissatisfied with two prominent frameworks (the "cooperative/competitive" model and the "integrative/distributive" model), developed his own, more economically minded "positive theory of legal negotiation."⁸⁸ Korobkin's model rests on the premise that "every action taken by negotiators in preparation for negotiations or at the bargaining table fits into one of [two] categories": the action is related either to definition of the bargaining zone or allocation of the negotiation surplus.⁸⁹ Negotiators' actions are bound up in representing, misrepresenting, or investigating the reservation prices.⁹⁰ Korobkin addressed the role of what he calls "procedural fairness," but his focus was on particular bargaining behavior, such as exchanging concessions or splitting the difference, that will lead to perceptions of *outcome* fairness.⁹¹ Even behavior during negotiation that ostensibly relates to something other than outcome, such as the development of a positive personal relationship, can be explained economically under his theory: these relationships "pay dividends in the surplus allocation process."⁹² The end goal of all process is economic benefit.

4. *Suggestions About an Independent Role for Procedural Fairness*

Fairness of process in negotiation has drawn a significant amount of attention from negotiation scholars, but the focus of this work has almost exclusively been on ethics,⁹³ rather than the relationship between fairness of process and perceptions about the negotiated agreement. Numerous

87. See Güth et al., *supra* note 85, at 384.

88. See, e.g., Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1790–91 (2000).

89. *Id.* at 1791–92.

90. Reservation prices—or reservation points—are the points beyond which a party will not settle. *Id.* at 1791.

91. *Id.* at 1821–25.

92. *Id.* at 1830.

93. See, e.g., WHAT'S FAIR: ETHICS FOR NEGOTIATORS (Carrie Menkel-Meadow & Michael Wheeler eds., 2004) (anthology of essays on ethics and fairness in negotiators).

scholars have addressed the nuances of what behavior accords with ethical rules and standards in negotiation. However, these discussions do not seek to explore the effects of fair processes on participants to negotiation. Rather, these are normative discussions about appropriate attorney behavior under existing ethical and moral codes.⁹⁴

In other dispute resolution contexts, the literature examining the effects of procedural justice is quite robust: scholars have explored the role of fair process in litigation, arbitration, and mediation extensively.⁹⁵ In particular, the role of fairness in mediation has captured the imagination of scholars, some of whom suggest that parties prefer mediation precisely because it affords more procedural justice for its participants.⁹⁶ Others, conversely, have questioned whether mediation provides enough procedural justice.⁹⁷ In negotiation literature, however, there are only a handful of hints about the potential role that fair process, or procedural justice, might play.

In an essay on fairness in negotiation, Welsh suggested that there might be an important role for procedural justice in the negotiation setting, but noted that empirical research was limited to third-party dispute resolution processes and to mediation.⁹⁸ And in a chapter on procedural justice and negotiation, Tyler and 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”),⁹⁹ but noted the absence of data in the area and relied instead on making inferences from the data on procedural justice in

94. *See id.* at xiii.

95. In litigation, such discussions are not characterized as relating to procedural justice; they are typically couched in terms of procedural due process. Similarly, scholars have focused on the importance of fair process in arbitration. It is largely in mediation that the psychological phenomenon of procedural justice, *per se*, has been addressed.

96. *See* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 791–92 (2001) [hereinafter Welsh, *Making Deals*]. However, as mediation has grown as a dispute resolution mechanism, lawyers have assumed a greater role in the proceedings. Some commentators suggest that mediation may no longer afford the parties as much direct voice in the process, giving rise to concerns that procedural justice may not be experienced by the parties themselves. *See* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 410 (2004–2005); Welsh, *Thinning Vision*, *supra* note 3, at 25.

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

98. Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 764 (2004) [hereinafter Welsh, *Perceptions of Fairness*]. *But see* Welsh, *Making Deals*, *supra* note 96, at 831–33 (arguing that procedural justice is not likely to be relevant to negotiation, in contrast to mediation).

99. Tyler & Blader, *supra* note 40, at 302. The link between mediation and negotiation is so close that scholars often use the rules in one setting as a jumping-off point for an analysis in the other context. *See, e.g.*, Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 695 (2001).

mediation.¹⁰⁰ In past years, “[v]irtually no attention has been devoted to process or procedural fairness” in negotiation,¹⁰¹ and when scholars think about fairness in negotiation, their focus gravitates towards the fairness of the outcome, not the process.¹⁰² But recent empirical work on procedural justice in a bilateral negotiation setting makes the time ripe for redressing this gap in the literature.¹⁰³ Before turning to that work, I examine below the rules for legal negotiation to explore what, if any, light they shed on the role of fair process.

B. Rules of Legal Negotiation

The popular vision of negotiation as a competitive, no-holds-barred process finds little to contradict it in the rules governing attorney conduct in negotiation. As with all conduct by professionals, attorney behavior is limited by relevant rules. A lawyer might be tempted to try to win a case in court by asking her client to burn all relevant documents rather than turn them over in discovery. But in breaking important ethical and court rules, that lawyer and client would be subject to severe sanctions, and such behavior would ultimately hurt, rather than help, the case. So, too, lawyers are constrained by the rules for legal negotiation¹⁰⁴—but, as an examination of those rules will show, they are not constrained very much. The rules for negotiation are few and far between, and difficult to enforce.

100. Tyler & Blader, *supra* note 40, at 306. 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 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.

101. Cecilia Albin, *In Theory: The Role of Fairness in Negotiation*, 9 NEGOTIATION J. 223, 224 (1993).

102. See, e.g., John Richardson, *How Negotiators Choose Standards of Fairness: A Look at the Empirical Evidence and Some Steps Toward a Process Model*, 12 HARV. NEGOT. L. REV. 415 (2007).

103. Others have also challenged the negotiation “orthodoxies,” just not from the perspective of procedural justice. For example, Putnam challenged “three assumptions” of the traditional negotiation model: that outcomes are defined instrumentally, that the individual drives negotiation, and that “rationality is the privileged way of knowing.” She suggested that noninstrumental 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, 342 (1994).

104. Korobkin, Moffitt, and Welsh have suggested that three categories of rules govern negotiation: common law, context-specific law, and professional regulations. See Russell Korobkin, Michael Moffitt & Nancy Welsh, *The Law of Bargaining*, 87 MARQ. L. REV. 839, 839 (2004). My analysis relies on rules drawn from all three of these categories.

The process of settlement negotiation is governed by few express legal rules. Consider the process next to its distant relative, litigation, which is governed by highly specific and detailed rules for the presentation of one's case before a judge. In contrast, 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 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.¹⁰⁵ However, the rules governing the negotiation of contracts are fairly lax; for example, there is no duty of good-faith negotiation in contract law.¹⁰⁶ 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 or duress during negotiation;¹⁰⁷ 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.¹⁰⁸

1. 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

105. See, e.g., *Transcon. Ins. Co. v. Rainwater Constr. Co.*, 509 F.3d 454, 456 (8th Cir. 2007) (Arkansas); *Perfumebay.com Inc. v. Ebay Inc.*, 506 F.3d 1165, 1178–79 (9th Cir. 2007) (California); *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.)*, 233 F.3d 188, 193 (3d Cir. 2000) (New Jersey); *Dunbar Med. Sys., Inc. v. Gammex Inc.*, 216 F.3d 441, 452 (5th Cir. 2000) (Texas).

106. See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

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

108. 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.

lawyer's leeway to present information, whether accurately or inaccurately, during negotiation.¹⁰⁹ 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 fraudulent act by a client. However, these seemingly clear mandates against deception have a murky undertow when it comes to negotiation. For example, the comment to Rule 4.1(a) explains that context can shed light on whether 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."¹¹⁰ 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 ordinarily in this category."¹¹¹ In this way, the comments to the Rule exempt much of what lawyers talk about in negotiation, making a vast swath of lies¹¹² exempt from the scope of the rules.¹¹³ 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.¹¹⁴

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

109. See, e.g., Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. 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 Negotiations*, 75 IOWA L. REV. 1219 (1990); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

110. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. (2008).

111. *Id.*

112. It is beyond the scope of this Article 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.

113. Whether or not the license to misrepresent estimates of price and value is appropriate or not has been debated by scholars. See, e.g., White, *supra* note 109, at 933.

114. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2008).

they do not prohibit attorneys from doing so. By its language, Rule 4.1 has, indeed, suggested to some that misrepresentations and nondisclosures are not only the norm of negotiation, but that they are sanctioned and encouraged.¹¹⁵ 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.”¹¹⁶ While other scholars take a more conservative or moralistic approach,¹¹⁷ the notion persists that zealous advocacy in negotiation requires lawyers to, in some circumstances, affirmatively mislead others.¹¹⁸

The scope of Rule 4.1 is not uncontroversial: there is a robust literature on the nuances and subtleties of the nature and reach of the rule.¹¹⁹ 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.¹²⁰ 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.”¹²¹

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

116. White, *supra* note 109, at 928.

117. See, e.g., PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 71 (1998); Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 476 (1995); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1402 (1986).

118. ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 104 (1999); DANIEL MARKOVITS, A MODERN LEGAL ETHICS 3 (2008).

119. See, e.g., Nathan M. Crystal, *The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055 (1999) (arguing that there are obligations to disclose information in negotiation in certain situations, including when the duties of good faith and fair dealing require such disclosure); see also Richard K. Burke, “*Truth in Lawyering*”: *An Essay on Lying and Deceit in the Practice of Law*, 38 ARK. L. REV. 1, 11 (arguing that although the ethical rules technically permit lying as long as the other side expects it, it is wrong for them to do so and that lawyers ought not to lie) (1984); Burns, *supra* note 99, at 695–96 (noting ambiguity and complexity of interpretation of ethical rules for misrepresentation); Patrick Emery Longan, *Ethics in Settlement Negotiations: Foreword*, 52 MERCER L. REV. 807 (2001) (describing application of various ethical rules to a number of hypothetical situations); Gary Tobias Lowenthal, *The Bar’s Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 412–13 (1988) (describing Rule 4.1 as ambiguous).

120. See Longan, *supra* note 119, at 809–10.

121. 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, 732–33 (2001).

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.¹²² However, courts have been quick to limit the scope of this challenge, starting with a presumption that settlements conducted by counsel are fairly negotiated.¹²³

2. 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.¹²⁴ However, courts have limited power to approve or disapprove settlement in certain situations. The most notable of these contexts is class actions, where a 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 a court, in part in order to prevent attorneys from agreeing to settlements that provide them with a sizable fee but leave the plaintiffs with little.¹²⁵ The standard for judicial approval of class action settlements is that the settlement be “fair, reasonable, and adequate”¹²⁶ and not “a product of collusion.”¹²⁷ 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,”¹²⁸ it is not common for the court to delve carefully into the process of the lawyers’ negotiation.¹²⁹ Other contexts where the court is required to approve a settlement are in derivative actions, certain employee actions,¹³⁰ and, in some jurisdictions, cases

122. See, e.g., *Brees v. Hampton*, 877 F.2d 111, 117 (D.C. Cir. 1989).

123. See, e.g., *Tiburzi v. Dep’t of Justice*, 269 F.3d 1346, 1355 (Fed. Cir. 2001); *Riley v. Am. Family Mut. Ins. Co.*, 881 F.2d 368, 374 (7th Cir. 1989).

124. See *Cullen v. Riley (In re Masters Mates & Pilots Pension Plan & IRAP Litig.)*, 957 F.2d 1020, 1025 (2d 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, 1189 (8th Cir. 1984) (repudiating the right of the district court judge to make a notation of “So 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”).

125. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better Than “Voice,”* 30 CARDOZO L. REV. 407, 412–13 (2008).

126. FED. R. CIV. P. 23(e)(2).

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

128. *Cinelli v. MCS Claim Servs., Inc.*, 236 F.R.D. 118, 121 (E.D.N.Y. 2006).

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

130. 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,

involving minors¹³¹ or parties deemed incompetent.¹³² 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 the courts' 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.¹³³ The few explicit rules governing negotiation that exist do promulgate a fairness norm, largely in terms of outcome and occasionally in terms of process, but only at the outside edges. These rules set 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 might not be relevant.¹³⁴ In light of the paucity of rules governing negotiation and the lack of a third-party authority to keep watch over the process, might negotiation be a setting where people do not expect or care about procedural justice? In the section below, I consider the theoretical soundness of extending procedural justice to negotiation and review the empirical work that has been done to date on this question.

Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards, 92 MINN. L. REV. 1317, 1340 (2008).

131. See, e.g., N.J. STAT. ANN. § 4:44-3 (West 2002); W. VA. CODE § 44-10-14(g) (2002).

132. See TEX. R. CIV. P. 44.

133. See Welsh, *Making Deals*, *supra* note 96, at 830–31 (noting that courts “rarely concern themselves” with elements of settlement negotiation related to procedural justice).

134. 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 more susceptible to an analysis based on principles of human behavior.

III. NEGOTIATION AND PROCEDURAL JUSTICE

As discussed above, negotiation is often characterized as occurring in the “shadow of the law.”¹³⁵ 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, and no set of clear rules to govern most of the participants’ behavior. 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, the trustworthiness of a decision maker, the existence of neutral and unbiased decision-making processes, and courteous and respectful treatment.¹³⁶ 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 are free to engage or leave the negotiation at will?¹³⁷

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

135. See Mnookin & Kornhauser, *supra* note 8.

136. See *supra* text accompanying notes 36–40.

137. Because there has not, to date, been an in-depth scholarly exploration 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 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. Additionally, Nancy Welsh has offered a brief argument as to why procedural justice is not an important feature of negotiation, see Welsh, *Making Deals*, *supra* note 96, at 831–33, to which I also respond in this section.

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 not likely 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.

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: first, all negotiation is fair, because parties in a free market system would not agree to a negotiated outcome unless it was acceptable to them;¹³⁸ second, 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.¹³⁹ As noted above, economic theories of negotiation in the civil justice system share the premise that cases will settle when the value of the settlement is greater than the expected value at trial, minus transaction costs.¹⁴⁰ Although it is by no means clear that participants view the decision of whether to settle versus continue to litigate in this way, negotiation scholars often find economic theories of negotiation appropriate and compelling.¹⁴¹

So what is the role for fairness in negotiation? As discussed earlier, research has shown that a purely economic definition of utility is not accurate; individuals do value fairness in making assessments about whether or not to accept outcomes.¹⁴² In the context of an ultimatum game, people will refuse to accept some economically rational outcomes because

138. See, e.g., G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE*, at xii (1999) (“[A]ll deals that close are win-win deals. The two sides would not agree to a proposal unless they thought agreement was better for them than no deal.”).

139. POSNER, *supra* note 73, at 69.

140. Priest & Klein, *supra* note 72, at 4.

141. See, e.g., Korobkin, *supra* note 88.

142. See sources cited *supra* note 85.

they are viewed as unfair.¹⁴³ 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.¹⁴⁴

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 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, in the ultimatum game, 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.

143. *See id.*

144. 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 M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

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. Rules, according to this argument, are what provide a benchmark, the departure from which alerts the participant that an unfair process is taking place. As discussed above, it is true that, unlike in civil litigation, arbitration, or mediation, there are few rules in negotiation that must be followed.¹⁴⁵ 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. Certainly, deviation from set rules can help to guide individuals' perceptions about fair and unfair treatment, but the existence of such rules is not a prerequisite for forming an opinion about the fairness or unfairness of one's treatment. Rules that expressly mandate voice, trust, neutrality, and courtesy and respect are not always present in every setting, and yet procedural justice literature has consistently found that these factors guide perceptions about fairness of process. As noted above, it seems uncontroversial that different behavior during negotiation will give rise to different perceptions of fairness; procedural justice literature suggests that the factors that drive individuals' judgments about their decision-making processes relate to fair treatment and are largely consistent.

Finally, one might argue that there is no third party present in negotiation to 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 to relate more readily 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 related to the presence of a third party. I consider each of 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

145. *See supra* Part II.B.

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.¹⁴⁶ 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 exists.¹⁴⁷ However, Fisher has defended the use of objective criteria, arguing that it makes negotiation more durable, makes the process smoother, and makes a variety of outcomes more appealing to the parties.¹⁴⁸

Similarly, trust is an element that naturally suggests a third-party authority. However, trust in the other party to the negotiation certainly might 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, and 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 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.¹⁴⁹ Similarly, 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. Although a neutral third party and a dyadic partner differ in their status and authority, it is nonetheless meaningful to experience courtesy and respect—or discourtesy and disrespect—from one's peer in the legal community.

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

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

147. James J. White, *The Pros and Cons of "Getting to YES,"* 34 J. LEGAL EDUC. 115, 116–17 (1984) (essay review).

148. FISHER & URY, *supra* note 51, at xviii; see also Roger Fisher, *Comment by Roger Fisher*, 34 J. LEGAL EDUC. 120 (1984).

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

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 thinks than either party would care about what a neutral third party 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.¹⁵⁰ And finally, Van den Bos's fairness heuristic theory 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.¹⁵¹ Even though experienced lawyers may have a good sense of the value of a given case, every case is slightly different and exact comparisons are rarely possible.

In sum, a review of the theoretical basis for procedural justice in negotiation demonstrates that it is not 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 largely on outcomes. Maximizing outcomes has long been understood as the cornerstone of negotiation teaching and practice. The economic approach, suggesting that individuals want to approach negotiation instrumentally, has found support in both popular and scholarly settings.¹⁵² However, as discussed above,

150. Welsh argues that because a third party is not present, the group-value model is irrelevant, which means that there is no expectation of procedural justice. See Welsh, *Making Deals*, *supra* note 96, at 832. However, again, this argument assumes that individuals can only receive status-relevant information from authorities, rather than peers.

151. See Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 116 (2007) (arguing that confidentiality agreements and "vanishing trials" have made it hard for lawyers to set benchmarks for negotiation).

152. See, e.g., LEWICKI ET AL., *supra* note 82, at 3 (stating that goal of the book is for people,

negotiation research has suggested that outcome fairness plays an important role in how individuals make decisions about accepting or rejecting outcomes.¹⁵³ This research has changed the landscape of negotiation; it is no longer controversial among scholars of negotiation that fairness, and not just the favorability of the bottom line, matters to people. But, as noted above, the focus in the research has been almost exclusively on fairness of outcome, rather than process,¹⁵⁴ and most of the procedural justice research has taken place in the context of a third-party decision maker. Even those scholars that have tried to link procedural justice and negotiation have had to rely mainly on research on procedural justice and mediation.¹⁵⁵

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 analysis 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 neutral third party 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

“perhaps most important[ly], [to] be able to obtain better negotiation outcomes than before”); SHELL, *supra* note 138, at xi (explaining that author's goal is to put forth “ideas and approaches that dependably help people achieve superior results at the bargaining table”). Even books that do acknowledge the importance of factors beyond outcome sometimes pitch those factors as trade-offs against good outcomes. *See, e.g.*, FISHER & URY, *supra* note 51, at xviii.

153. *See supra* text accompanying notes 85–87.

154. As discussed above, *see supra* text accompanying notes 104–23, fairness of the negotiation process has been studied extensively in the context of negotiation ethics. In that arena, fairness of process is studied to determine what is ethical, not to determine how it affects participants' assessments of the negotiation and the negotiated outcome. *See* WHAT'S FAIR: ETHICS FOR NEGOTIATORS, at xiii–xiv (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

155. *See* Tyler & Blader, *supra* note 40, at 302; Welsh, *Perceptions of Fairness*, *supra* note 98, at 764.

process they would use.¹⁵⁶ In a supporting study, Lind, Huo, and Tyler found that procedural fairness was “the most powerful predictor” of procedural preference.¹⁵⁷ 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.¹⁵⁸ The study’s findings suggested that individuals prefer negotiation because of their belief that the process is procedurally fair vis-à-vis other dispute resolution mechanisms.¹⁵⁹ This and other similar studies¹⁶⁰ 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.¹⁶¹ MacCoun concluded that bilateral negotiation was viewed as providing less opportunity for procedural fairness than arbitration.¹⁶² 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. For instance, Molm and her colleagues

156. THIBAUT & WALKER, *supra* note 7, at 121.

157. Lind et al., *supra* note 17, at 282.

158. The ethnic groups studied were African Americans, Hispanic Americans, Asian Americans, and European Americans. All but the African Americans ranked negotiation as the most preferred method, with persuasion as the second most preferred method; for African Americans, these two choices were reversed. *Id.* at 280.

159. *Id.* at 283.

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

161. MacCoun, *supra* note 16, at 171–72.

162. *Id.*

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.¹⁶³ 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.¹⁶⁴ These studies, taken together, offer an inconclusive answer as to whether negotiation is, or is not, a procedurally fair process.¹⁶⁵ 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.

2. *Effects of Procedural Justice in Negotiation*

Another set of studies looked 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,¹⁶⁶ individuals participated in a simulated bilateral business negotiation and were then asked to rate the fairness of the process of the 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—that is, the more fair the negotiation process an individual experienced, the more likely that individual was to want to negotiate again with the other party.¹⁶⁷

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

163. Linda D. Molm, Nobuyuki Takahashi, & Gretchen Peterson, *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128, 148 (2003).

164. *Id.* at 149.

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

166. 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). *Id.*

167. *Id.* at 150–53. 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. *Id.* at 153.

agreement at hand.¹⁶⁸ In recent research, Tyler and I explored the question of what effects the perception of fair treatment during negotiation might have on the acceptance of and adherence to the negotiated agreement, as well as on positive feelings about the negotiation and perceptions of collaboration.¹⁶⁹ We found that in a simulated legal negotiation, law students in the role of attorneys in a contract dispute were more enthusiastic about recommending a negotiated settlement to their client when they experienced greater levels of procedural justice in the negotiation.¹⁷⁰ We measured this enthusiasm in an effort to capture the degree to which the parties accepted, and in turn were likely to adhere to, the negotiated agreement.¹⁷¹ 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.¹⁷² 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 experienced during the negotiation.¹⁷³ Measures of outcome favorability—that is, how good the participants thought the agreement was—also had significant effects on acceptance and good feelings; measures of distributive justice—that is, how fair the negotiated *outcome* was—had significant effects on acceptance, good feelings, and collaborativeness.¹⁷⁴

Tyler and I also examined the relationship between procedural justice and monetary outcome in two separate studies—one in which integrative

168. In the mediation context, Pruitt and colleagues found that procedural justice was a stronger predictor of adherence to a mediated agreement six months after the mediation than happiness with the outcome of the mediation. Pruitt et al., *supra* note 25, at 327.

169. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 *LAW & SOC. INQUIRY* 473, 478–79 (2008).

170. *Id.* at 484.

171. *Id.* at 478. 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 clients 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.

172. *Id.* at 484.

173. *Id.*

174. *Id.* 483–85. 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 positively they felt during the negotiation, but relative differences in outcome fairness did not have a significant effect on relative positive feeling. Additionally, joint perceptions of outcome fairness did not have a significant relationship to the joint good-feeling ratings of the dyad.

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.¹⁷⁵ This research suggests that there is no systematic relationship between fair treatment and outcome in a zero-sum setting: the 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.

Our 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

175. *Id.* at 488.

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 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.¹⁷⁶ The authors hypothesized that relational considerations of neutrality, trust, and status recognition¹⁷⁷ 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. They 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. They also hypothesized that status recognition might be a more important variable in procedural justice assessments in the two-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 their 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.¹⁷⁸

In our research, Tyler and I found that law students made an assessment about the fairness of the negotiation based on three out of the four traditional foundations of procedural justice: voice, trust, and courtesy and respect. In other words, 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, our 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

176. E. Allan Lind, Tom R. Tyler & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 768 (1997).

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

178. Lind et al., *supra* note 176. 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. *Id.* at 773.

fact, we did not find a significant relationship between procedural justice judgments and the degree to which the negotiation process was neutral.

This finding, although not predicted, seems plausible 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, in thinking about the fairness of the negotiation process, would not consider the degree of neutrality present in the negotiation to be particularly relevant.¹⁷⁹

Current research thus suggests that determinations about the fairness of a negotiation process are governed, at least, by the degree to which participants feel that they have a voice in the negotiation and the level of courtesy and respect with which they feel they have been treated. Research is still inconclusive, however, on the role of both trust and the degree of neutrality present in the negotiation process. Taken together with the findings that people want to negotiate, in part, because they believe negotiation is a fair process,¹⁸⁰ and that people who experience a procedurally fair negotiation are more likely to be enthusiastic about accepting the negotiated agreement,¹⁸¹ research suggests 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. 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, possibly, a basis for trust or evidence of absence of bias.

If opportunity for voice, courteous and respectful treatment, and perhaps trust and neutrality play critical roles in guiding participants' assessments of procedural justice, the next important question is: what are the behaviors 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

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

180. See *supra* text accompanying note 176.

181. See *supra* text accompanying note 169.

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 using 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.¹⁸² First, in most legal dispute resolution processes, there are set rules. In legal negotiation, in contrast, as noted in Part II above, there are very few 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 may differ from the concept that the layperson brings to lay, rather than legal, dispute resolution. In my study with Tyler, 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 negotiation and the legal dispute resolution settings where procedural justice has previously been found to have a significant effect. 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

182. As noted, another concern is that we need further research on what behavior, exactly, will give rise to perceptions about the relevant antecedents of procedural justice.

always—or even often—present during the process of the negotiation of a settlement, leaving such negotiation to the attorneys they have hired.¹⁸³ 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.¹⁸⁴ 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 III.B.2 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,¹⁸⁵ one might conclude that clients are therefore 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, that difference 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 explicitly to address the personal and emotional needs of the parties and typically requires the participation of the principals.

183. 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, *Thinning Vision*, *supra* note 3.

184. Throughout this discussion, I will assume a scenario in which procedural justice levels differ while the negotiated outcome remains constant; this is a reasonable inference in light of Tyler’s and my finding that procedural justice and outcomes had no relationship in the zero-sum negotiation setting, *supra* note 175. Note, however, that in the integrative bargaining setting, we did find a relationship between procedural justice and outcome, such that the surplus created was split more evenly between the parties.

185. Of course, lawyers may exercise different degrees of influence on their clients, *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, 839–42 (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 M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 796–98 (1998); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 364 (2008) (“[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 & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

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 gain¹⁸⁶ but enabling them to be happier about it, even though the clients are not able to reap the (intangible) 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 Tyler's and my 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 negotiating civil disputes on behalf of clients.¹⁸⁷ It is certainly possible that lawyers would experience diminished procedural 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.¹⁸⁸ 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

186. As noted above, however, research has not shown a relationship between outcome and procedural fairness in zero-sum negotiations. Hollander-Blumoff & Tyler, *supra* note 169, at 490.

187. *Id.* at 479–80.

188. Robbennolt, *supra* note 185, at 379–80.

attorney understood the apology to bolster the merits of the substantive case.¹⁸⁹

In the procedural justice setting, attorneys are interacting with other attorneys, members of their own community. Their experience 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 any event, is likely to appear to the attorney largely as a question of distributive justice: because the client is not present at the negotiation, the “treatment” of the client will likely be imputed from the discussion over the substance of the client’s claim. The client herself cannot have voice in the negotiation if she is not present, and the client’s perspective on trustworthiness and neutrality is likely to be conflated with the attorney’s own perceptions, unless some special circumstances make the status of the client and attorney dramatically different. The client could, conceivably, be treated with discourtesy and disrespect (or courtesy and respect) in a manner distinct from the treatment received by the attorney, but this seems unlikely to be a high-frequency occurrence.

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 as opposed to other negotiation participants. 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 status conscious,¹⁹⁰ and to the extent that interactions with a peer lawyer might reflect on their status in the legal community, such interactions 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 their own uncertainty about the outcomes might suggest that lawyers should be relatively insulated from these effects because lawyers’ experiences with similar cases over time, and knowledge of other cases that fellow lawyers have

189. *See id.* at 380.

190. *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).

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 outcomes 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. Certainly, although I suggest here that lawyers are not likely to be fully immune from procedural justice effects, further exploration of this question through field research is warranted.

B. The Ethics of Procedural Justice in an Agency Relationship

To the extent that lawyers do feel an effect of fairness of treatment, such an effect 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 received, is it ethical for the lawyer to pass along her enthusiasm about the agreement to the client? Should the lawyer allow the fairness of the treatment she received to affect her perception of the case, even when the client did not share in the harm or the benefit of that treatment?¹⁹¹

This tension between the principal and agent is at the heart of legal negotiation theory.¹⁹² The simple framework of bilateral negotiation is

191. Of course, all manner of other outside factors may shape the lawyer's perception of the case as well. 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: "Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad 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) (citation omitted).

192. 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 9–10 (2000). There is some question about how well agency theory maps onto the attorney-client relationship in all contexts,

considerably complicated by the addition of agents performing negotiation on behalf of principals.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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 toward trial; an attorney working on a contingency fee basis may be more likely to want to settle a case before expending more hours.¹⁹⁷ 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, but the principal may not have this benchmark for settlement evaluation. This may lead to distortions in what the principal is willing to accept in a given situation.

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

however. For example, courts and commentators suggest a clear difference in the way that decisions are handled for substantive versus procedural matters, with clients retaining final authority in substantive matters and attorneys exercising final authority with respect to procedural decisions. 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 (1988). 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.

193. 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 185, at 81.

194. MNOOKIN ET AL., *supra* note 192, at 75.

195. *Id.*

196. See, e.g., 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); Korobkin & Guthrie, *supra* note 185, at 122–23; Geoffrey P. 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); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

197. MNOOKIN ET AL., *supra* note 192, at 83–84.

that they can share with the client or particularized negotiation skills,¹⁹⁸ but because they are able to act more rationally and dispassionately than their clients,¹⁹⁹ especially in the case of dispute resolution, where the parties are often engaged in some type of disagreement that has 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,²⁰⁰ and lawyers might be subject to less cognitive bias than their principals.²⁰¹

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 lawyers to be free from the "emotional" bias that we know parties bring to a dispute. Yet, in this instance, we have the potential for lawyers' subjective perceptions of the treatment they have received to lead to changes in their evaluation of a settlement outcome.

One possibility that may mitigate this tension is that some 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.²⁰² For example, an attorney might

198. MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 146 (1992); Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 *NEGOTIATION J.* 395, 396 (1988); see also MNOOKIN ET AL., *supra* note 192, at 71 (suggesting that the benefits of using an agent stem from four sources: knowledge, resources, skills, and strategic advantages).

199. Rubin & Sander, *supra* note 198, at 397.

200. *Id.* Note, though, that it is not clear which direction this emotional "outsourcing" may cut. For example, one person may hire an attorney because she herself is so hostile and unyielding that any negotiation would falter, but another person may hire an attorney because she is afraid that she will be too nice to the other party.

201. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2520 (2004); Korobkin & Guthrie, *supra* note 185, at 87–88. But see Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 *MARQ. L. REV.* 163, 173 (2007) (citation omitted) (summarizing other research that "suggests that attorneys are not systematically free from bias").

202. 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

explain a settlement offer in context, noting the behavior of the opposing counsel as part of that offer. Statements such as, “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. However, since 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.²⁰³ Similarly, lawyers might pass on impressions relating to trust in the other lawyer, the other party, or both; 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 some clients experience a transitive procedural justice effect based on the report given by their lawyers.²⁰⁴

In contrast, a sophisticated lawyer could deliberately mask the procedural justice of a negotiation in order to serve her own goals. 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

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

203. Indeed, 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, *Making Deals*, *supra* note 96, at 841.

204. It is important to note here the obvious fact that attorneys are all different, with different styles of practice and different personalities. Some commenters have suggested to me that most attorneys will of course discuss these features of a negotiation with a client, while other readers have expressed disbelief that *any* lawyer would do so. This suggests that such conversations between lawyers and clients do sometimes—but by no means always—occur.

the fairness of the process.²⁰⁵ Conversely, the lawyer could experience very high procedural fairness himself, but, when relaying the settlement offer to the client, could omit a 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 outcome, or they might have other reasons for wanting a client to accept or reject a settlement. Thus 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 not that good at knowing what will make them feel happy or satisfied.²⁰⁶ And, in particular, individuals have temporally differential preferences for fair treatment.²⁰⁷ 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.²⁰⁸ 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. Indeed, it

205. 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 or unfavorable outcome. MacCoun, *supra* note 16, at 189–91 (reviewing literature on the link between procedural justice and false consciousness).

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

207. See Shestowsky & Brett, *supra* note 160, at 64; Tom R. Tyler, Yuen J. Huo & E. Allan Lind, *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 *GROUP PROCESSES & INTERGROUP REL.* 99, 114–16 (1999). But see Lind et al., *supra* note 176, at 759 (suggesting that people find negotiation an appealing procedure precisely because of its fairness). The somewhat conflicting research on this point suggests that more definitive empirical exploration is needed to understand how much individuals value fairness before they engage in decision making.

208. Tyler et al., *supra* note 207, at 106.

could be that one critical reason why people hire lawyers is so that they do not have to worry about the fairness of their treatment at the hands of others. Clients may retain attorneys to negotiate on their behalf precisely because, like emotional entanglement, procedural fairness is a concern that clients want to eliminate from the dispute resolution process.

If clients expressly want their agents not to care about procedural fairness, just as clients want their agents not to be emotionally caught up in their dispute, could such a desire 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*;²⁰⁹ Client C does not care about fairness during negotiation in either 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 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.²¹⁰

However, it seems most likely that many clients have never explicitly considered the importance, or lack thereof, of the fairness of treatment they (or their attorneys) have been afforded in negotiation. For 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 potentially receive these benefits vicariously if the attorney passed along a description of the negotiation

209. 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.

210. As noted in Part III.B.2, *supra*, there has been no clear relationship demonstrated between outcome and procedural justice in distributive negotiation, 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 169, at 490.

process, but there is not yet research exploring the benefits—or even the existence—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 may clash, the rules of professional conduct require the lawyer to act in accordance with the wishes of the principal, not the agent.²¹¹

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. Whatever the procedural justice effects might be, the client could experience them, or not experience them, herself.²¹² 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. 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 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 nonrational perspectives on their disputes with others. However, this argument presumes that what individuals really value is, indeed, the bottom-line economic outcome alone. And that presumption is at the heart of the question about the value of procedural justice in dispute resolution systems.

211. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2 (2007) (vesting authority to decide whether to settle a case exclusively in the client).

212. Indeed, 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.

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 would be willing to expressly trade process for outcome, but there is no reason why the process fairness–outcome relationship need be zero sum.²¹³ A loss of fair process does not appear to produce a concomitant gain in outcome, and vice versa. Perhaps an express acknowledgement of the scope of the relationship between fair process and negotiation outcome 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 an important part of what disputants really want in dispute resolution.

CONCLUSION

Over a decade ago, Herbert Kritzer wrote that a cynic might suggest that “Equal justice under law” ought to be replaced with the motto, “Let’s make a deal.”²¹⁴ Kritzer asked, “[I]s there an inconsistency between ‘justice’ for an aggrieved party achieved through adjudication and ‘deals’ arrived at by parties in a dispute through negotiation?”²¹⁵ While other literature has suggested that there are outer fairness boundaries on the substance of the deals parties will accept, so that some form of distributive justice is at work in negotiation, I have suggested in this article that individuals in negotiation are also concerned with the procedural justice of the deal-making process. Perhaps, to be accurate, “Let’s make a deal” might actually need to read, “Let’s make (using a fair process) a deal (that is fair to both parties).”

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 and have been treated with courtesy and respect appears to lead parties to judgments that they have been treated fairly in negotiation. Feeling as though the other party is trustworthy and that the process has been neutral may potentially play a similar role in forming fairness of process judgments.

213. 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 185, at 378.

214. KRITZER, *supra* note 81, at 3.

215. *Id.* at 4.

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 of legal process.