The Psychology of Procedural Justice in the Federal Courts

REBECCA HOLLANDER-BLUMOFF*

This interdisciplinary Article examines our federal court system from the perspective of the psychology of procedural justice—that is, subjective perceptions about the fairness of process. The Article considers some of the central features of civil litigation from the standpoint of the psychology of procedural justice, highlighting some of the aspects of the system that are likely to increase perceptions of fair process, and exploring, conversely, rules and practices that may decrease those perceptions. The Article focuses on procedural justice in two contexts: basic rules and practices of civil procedure and more complex federal court doctrines that involve the allocation of judicial business between the states and the federal government. In both cases, procedural justice is considered from the perspective of litigants involved in civil disputes; in the latter case, the analysis broadens to encompass the procedural justice experiences of other important actors in civil litigation, including judges, legislators, and state executives. This Article argues that, while legal academics have typically analyzed the fairness of federal procedure and rules through an analysis of procedural due process, the psychology of procedural justice provides an important and potentially wider perspective from which to consider the procedural fairness of our legal system. Because perceptions about fair process are critical to assessments of legitimacy and deference to legal authority, scholars in both law and psychology should devote greater attention—both empirical and theoretical—to the potential procedural justice effects of specific legal rules and doctrine.

* Associate Professor, Washington University Law School. Thanks to Susan Appleton, Matt Bodie, Richard Freer, Emily Hughes, Pauline Kim, Tom Tyler, Laura Rosenbury, Jamelle Sharpe, Larry Solum, Verity Winship, and participants in the University of Illinois Junior Federal Courts Workshop and the faculty colloquia at Saint Louis University School of Law and the University of Illinois College of Law for valuable thoughts, comments, and suggestions. Thanks also to Elizabeth Chen for excellent research assistance.

Table of Contents

Introduction

How satisfied are litigants with our federal courts? Do litigants and the public perceive the federal courts and their decisions as legitimate? Research in social psychology suggests that the fairness of process, or "procedural justice,"[1] provides the key to answering these critical

1. *See generally* John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975). As discussed at greater length, *infra* Part I.B, legal scholars have also explored procedural justice from a nonpsychological perspective. *See, e.g.*, David Resnick, *Due Process and*

questions. This research has indicated that when people feel that they have been treated fairly by decisionmaking authorities, they are more likely to accept and comply with decisions, feel satisfied with outcomes, and believe in the legitimacy of the authority.[2] These perceptions of procedural justice, then, play an important role in ensuring the successful functioning of our legal system. This Article offers an interdisciplinary analysis of federal civil litigation[3] through the lens of the psychology of procedural justice, suggesting ways in which certain rules and doctrines may foster or frustrate perceptions of fair process.

A focus on fair process and legitimacy is certainly no stranger to legal theorists, as a voluminous body of scholarship demonstrates.[4] From the legal side, scholars consider the elements of process fairness historically, philosophically, and doctrinally.[5] These analyses range from broad philosophical examinations of the legal system's theoretical underpinnings with respect to fairness[6] to a more fine-grained analysis of the fairness of individual rules and doctrines.[7] Two (sometimes entwined) approaches dominate legal work on the fairness of procedure. First, scholars have endeavored to formulate comprehensive theories about procedural fairness that sort through and reconcile economic, social, political, and dignitary concerns, among others.[8] Second, commentators have considered fair process from the perspective of procedural due process, using this constitutional benchmark to assess fair process in any given context.[9]

Legal scholars examining process fairness and social psychologists studying procedural justice thus share a concern with processes, separate and distinct from—albeit sometimes related to—substantive outcomes.

Procedural Justice, *in* DUE PROCESS: NOMOS XVIII 206, 206–07 (J. Roland Pennock & John W. Chapman eds., 1977); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004). In this Article, I generally use the term procedural justice to refer specifically to the psychological concept of individual subjective assessment of process fairness, and use the term procedural fairness to refer more broadly to a host of issues surrounding fair process, including issues of system design.

2. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

3. Procedural justice effects have been found in the criminal context, see *infra* note 23, and a similar analysis is certainly feasible for criminal cases. However, this Article expressly limits its focus to civil cases in the federal system.

4. *See infra* Parts I.B.1–I.B.2.

5. *See infra* Part I.B.

6. *See infra* notes 71–86.

7. *See, e.g.*, Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 82 (2009); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575 (2007).

8. *See infra* notes 71–86.

9. *See, e.g.*, William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347 (1988).

Yet despite the fundamental concern over fair process in each discipline, rarely have the twain met.[10] Scholars writing in these two areas—even as they use similar and sometimes even identical language—take fundamentally different tacks as they grapple with the relationship between fair process, fair outcome, and the legitimacy of the system as a whole.[11] Neither the first, more philosophical strain nor the second, more doctrinal strain of legal scholarship on process fairness has systematically considered or focused on empirical data about individual perceptions of procedural fairness.[12] Psychologists, in contrast, are typically concerned purely with subjective experiences with the legal system, without regard to broader historical, philosophical, or doctrinal bases.[13] And while some legal scholars have examined the procedural fairness of particular rules and doctrines, psychologists usually consider participants' broad-brush ex post opinions about the sum total of their treatment in the legal system, rather than examining the specific effects of any individual rules or procedures, despite the fact that global perceptions of fairness are likely to be a product of the cumulative impact of these effects.[14] While legal scholars' work may overlook the fact that the legal system is made up not just of rules and structures, but of real disputes engaged in by real people, psychology in turn may undervalue the importance of specific legal structures and philosophical meaning.

In this Article, I begin to bridge the gap between the legal and psychological perspectives by exploring the psychology of procedural justice as it plays out on the ground of federal court litigation. As part of this exploration, I also argue that legal commentators' focus on theories of procedural fairness and on procedural due process, while of grave importance, is nonetheless limited in its capacity to fully address issues about citizens' actual perceptions of fairness and legitimacy. I demonstrate the distinct scope of a psychological procedural justice analysis in several

---

10. *But see* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162 (1985) (providing a very brief discussion of Thibaut and Walker's work on procedural justice in context of whether procedural protections are valued for instrumental or dignitary reasons); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII, *supra* note 1, at 126, 127 (noting summarily, without exploring empirical data or psychological research, that participatory opportunity may be "psychologically important" to litigants).

11. The distinction between process and outcome is well beyond the scope of this Article; I mean, in restricting myself to a discussion of process fairness, to focus on issues that are not distributive or substantive in nature, acknowledging that this distinction is most certainly imperfect and, in fact, somewhat circular. *See infra* note 75.

12. This failure to include the psychological framework is not accidental. *See, e.g.*, Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 506 (2003) (stating that there is a "fatal defect" in using empirical data about the psychology of procedural justice); Solum, *supra* note 1, at 267 ("[T]he satisfaction interpretation of the participation model fails as a stand-alone theory of procedural justice.").

13. *See* Bone, *supra* note 12, at 505–07.

14. *See id.*

ways. I first explain the fundamental difference in meaning and goals between theoretical accounts of procedural fairness in law and empirical research on procedural justice perceptions; I also explicitly examine the similarities and differences between procedural due process and procedural justice in psychology. Additionally, as I analyze the procedural justice experience of civil litigants in the federal court system in a variety of contexts, I make clear how this analysis departs from the classic procedural due process paradigm that has previously been applied to particular rules and practices. Similarly, I explain how procedural justice effects might be found among parties, such as lawyers, judges, and legislators, who are well beyond the scope of a procedural due process analysis.

In Part I, I explore the contours of procedural justice in psychology, procedural justice in law, and procedural due process, examining the questions of how they differ. Although the frameworks do overlap conceptually, I argue that the psychological perspective is not subordinate to a theoretical account of procedural justice, nor merely duplicative of a procedural due process analysis. Instead, because it provides a much broader and more cross-cutting framework, as well as a way to actually measure the experiences of real individuals, examining the psychology of procedural justice adds to an understanding of our legal system in a way that both complements and deepens classic legal analysis. In this section, I also discuss the parties for whom procedural justice is relevant, including a consideration of the role of lawyers versus clients and individuals versus entities.

In Part II, I look to several basic rules of federal civil litigation through the procedural justice lens, describing the factors that lead to perceptions about procedural justice in psychology and considering how they play out in the context of a host of relatively straightforward civil procedure rules—including those governing notice, pleading, motion practice, and discovery.

Part III examines more complex federal court doctrine through this same lens. I consider diversity jurisdiction and abstention from the viewpoint of individual litigants. I then expand my analysis—and demonstrate the wider applicability of the procedural justice paradigm—by considering procedural justice from a systemic perspective, from the viewpoint of federal and state judges, legislators, and executives. All of these parties have a stake in the division of business between federal and state courts, and these individuals are able to form an opinion about the procedural justice of the judicial decisions about which forum will hear any given case.

Finally, in Part IV, I suggest several implications of my analysis for the legal system and for empirical work in law and psychology. I argue that the details relevant to procedural justice in the basic federal rules, as

well as in allocating the business of the court between state and federal forums, are important to fundamental perceptions of the legitimacy of our federal court system by individual litigants and government actors, and that courts and rule makers ought to pay greater attention to the likely impact of procedure in light of what research has shown about how individuals form judgments about fair process. In addition, I suggest that psychological research could provide greater insight into the experiences of litigants and government actors by focusing more closely on individuals' perceptions of fairness about specific legal rules and doctrines.

I. PROCEDURAL JUSTICE: PSYCHOLOGY VERSUS LAW

A. THE PSYCHOLOGY OF PROCEDURAL JUSTICE

Over thirty years ago, psychologists began to research legal systems in an effort to increase compliance with judicial decisions. In particular, researchers focused on what kinds of processes would seem most fair to disputants and would lead to increased acceptance of and adherence to judicial decisions.[15] This research provided robust empirical evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision. Procedural justice scholars do not suggest that individuals are indifferent to the favorability or the fairness of their outcomes; those things do matter, and often matter a lot.[16] But the additional component of fair treatment by a decisionmaking authority matters as well—and matters independently, apart from the effect that fair treatment has on fair and good outcomes.[17]

John Thibaut and Laurens Walker's original procedural justice research took place in a controlled laboratory setting, in which participants rated dispute-resolution mechanisms that afforded them a higher degree of control over process as more procedurally fair than other mechanisms.[18] Participants' view of a particular process as fair was significantly related to their satisfaction with outcomes that the process produced.[19] From this original research stemmed a multitude of subsequent studies that amplified, clarified, honed, and expanded our understanding of the role of procedural justice,[20] including the scope of

15. *See* THIBAUT & WALKER, *supra* note 1, at 121.

16. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 71 (Joseph Sanders & V. Lee Hamilton eds., 2001).

17. *Id.*

18. *See* THIBAUT & WALKER, *supra* note 1, at 119.

19. *Id.*

20. As Robert MacCoun has said, "Few if any socio-legal topics . . . have received as much attention using as many different research methods." Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 173 (2005).

contexts where procedural justice is relevant, the particular effects procedural justice has on individuals, the antecedent conditions for determining procedural justice, and the underlying mechanisms explaining why procedural justice is important.[21] I briefly review the various facets of this research below.

Procedural justice research has shown that procedural justice effects are present in a wide range of settings. Civil litigants in court care about their treatment by a judge,[22] criminal defendants care about their treatment by judge and jury,[23] disputing parties in arbitration and mediation care about their treatment by an arbitrator[24] or mediator,[25] and even disputing parties in negotiation care about their treatment by the other party.[26] Research outside the legal dispute resolution system has demonstrated that people care about their treatment by other authority figures, such as police officers,[27] work supervisors,[28] and health-care administrators.[29] Beyond both the legal dispute-resolution context *and* the third party context, research has suggested that individuals care about procedural justice in highly relational settings like the family[30] and even in classic economic settings like markets.[31] Effects are found in field

---

21. *See, e.g.*, *id.* at 190–93.

22. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104–06 (2006).

23. Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 485 (1988); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 339–40 (1988). For a more theoretical examination of how procedural justice may play a role in plea bargaining, see Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 416 (2008).

24. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235–36 (1993).

25. Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993).

26. 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).

27. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534 (2003); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281 (1980); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 254 (2004).

28. Robert Folger, *Distributive and Procedural Justice in the Workplace*, 1 SOC. JUST. RESEARCH 143, 143 (1987); Robert Folger & Mary A. Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 128 (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, 1291 (2005).

29. *See generally* Virginia Murphy-Berman et al., *Fairness and Health Care Decision Making: Testing the Group Value Model of Procedural Justice*, 12 SOC. JUST. RESEARCH 117 (1999).

30. Mark R. Fondacaro et al., *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).

31. Harris Sondak & Tom R. Tyler, *How Does Procedural Justice Shape the Desirability of*

studies,[32] simulations and experimental settings,[33] and in situations with both low[34] and very high stakes.[35]

Research has suggested that procedural justice is an important component of individuals' judgments about whether to comply with legal rules and authorities, as well as whether legal systems are legitimate.[36] When people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate.[37]

Psychologists have focused almost exclusively on individuals' subjective perceptions of procedural justice.[38] This subjective focus, far from troubling researchers, is in fact a central component of justice research in psychology. As Tom Tyler has explained,

> The especially striking thing about social justice is that it is a social concept that exists only in the minds of the members of an ongoing interaction, a group, an organization, or a society. Hence, justice is a socially created concept that . . . has no physical reality. It exists and is useful to the degree that it is shared among a group of people.[39]

For psychologists, measuring subjective perceptions of procedural justice is important because this measurement captures individuals' real experiences of fairness or unfairness of the legal system, as opposed to the effects that the system's architects might think or expect to be likely products of the system's structure and rules.[40]

Markets?, 28 J. ECON. PSYCHOL. 79, 80 (2007).

32. Raymond Paternoster, et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 166 (1997) (showing procedural justice effects in a study in which the data was collected based on actual offenders' experiences).

33. *See, e.g.*, THIBAUT & WALKER, *supra* note 1, at 30 (showing procedural justice effects in a study in which first-year law students participated in a simulation in which they acted as attorneys).

34. *See, e.g.*, Hollander-Blumoff & Tyler, *supra* note 26, at 479 (presenting the results of a study involving student performance on an in-class negotiation exercise); TYLER, *supra* note 22, at 19 ("This book . . . examines the general level of noncompliance with everyday laws regulating behavior. Its concern is with the degree to which people generally follow the law in their daily lives.").

35. E. ALLAN LIND, ARBITRATING HIGH STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT 65–66 (1990) (finding that litigants in high-stakes arbitration cases evaluate procedural fairness similarly to litigants in low-stakes ADR studies); Paternoster et al., *supra* note 32 (finding that procedural justice effects can help deter spousal assault recidivism); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984) (finding that defendants sentenced to steep prison terms are more satisfied and more positive in their views of decisionmaking authorities when the defendants perceive the authorities as being honest and unbiased, and when the legal process itself seems fair).

36. *See* TYLER, *supra* note 22, at 162.

37. *Id.*

38. *See, e.g.*, MacCoun & Tyler, *supra* note 23, at 335–56.

39. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 117–18 (2000).

40. *See, e.g.*, MacCoun & Tyler, *supra* note 23, at 335–36.

Researchers have also studied the factors that individuals use to form judgments about whether they have been treated fairly.[41] Although numerous factors have been identified, Tyler has argued that "four elements of procedures are the primary factors that contribute to judgments about their fairness."[42] These elements include: (1) how much voice and opportunity to be heard the party believes she has experienced, (2) neutrality of the forum, (3) the trustworthiness of the decisionmaker, and (4) the degree to which the individual has been treated with dignity and respect.[43] As noted above, the importance of these factors in forming procedural justice assessments does not in any way preclude the importance of other factors, such as concerns about costs, accuracy, winning, or punishment, to name a few.[44] All of these other factors may play a role in how individuals evaluate distributive justice, outcome favorability, or their more general satisfaction with outcome.[45] Psychologists suggest, however, that these other factors are not a critical component of how individuals form judgments about the fairness of a decisionmaking *process*.[46]

Psychologists have suggested that perceptions about control over process are an important determinant of whether people feel that procedural justice has occurred.[47] Individuals typically determine their degree of process control by assessing how much participation they have had in the dispute resolution process—that is, how much voice and opportunity to be heard they have experienced.[48] Participation is perhaps the most robustly researched of the factors that contribute to procedural justice.[49] Its effects have been widely noted, in both laboratory[50] and field studies.[51] Participation yields procedural justice results in civil litigation,[52]

---

41. *See* Tyler, *supra* note 39, at 121.

42. *Id.*

43. *Id.* While courtesy and respect were originally conceptualized as the interpersonal or social component of procedural justice, some psychologists have suggested that courtesy and respect are more properly considered in the context of "interactional justice," which is conceptually distinct from "procedural justice." *See, e.g.*, Robert J. Bies & Joseph S. Moag, *Interactional Justice: Communication Criteria of Fairness*, *in* 1 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 47 (Roy J. Lewicki et al. eds., 1986); Robert J. Bies, *Interactional (In)Justice: The Sacred and the Profane*, *in* ADVANCES IN ORGANIZATIONAL JUSTICE 89 (Jerald Greenberg & Russell Cropanzano eds., 2001). However, there is a lively debate on this issue among researchers, and at present, I incorporate courtesy and respect into my procedural justice analysis in keeping with the work of Tyler and others.

44. *See* Tyler, *supra* note 39, at 119.

45. *See id.*

46. *See id.*

47. *See, e.g.*, *id.* at 119–20.

48. *See id.* at 121.

49. *See id.*

50. *See* THIBAUT & WALKER, *supra* note 1, at 4.

51. *See, e.g.*, JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 65 (1983); ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 43 (1988); Jonathan D. Casper et

mediation,[53] and criminal law.[54] Not surprisingly, individuals value participation highly when they believe that their input will have an effect on the decision at hand,[55] but perhaps more interestingly, individuals also place value on the opportunity for voice even in contexts where they are aware that their participation will not meaningfully affect the decision.[56]

Neutrality and trust are distinct but related factors. Neutrality means that decisionmakers are honest, impartial, and objective, and that they do not allow their own personal values and biases to enter into their decisionmaking calculus; instead, this calculus should be based on rules and facts.[57] Trustworthiness, in contrast, suggests that the decisionmaker's motivation is above board: that the decisionmaker is "benevolent and caring, is concerned about [the parties'] situation and their concerns and needs, considers their arguments, tries to do what is right for them, and tries to be fair."[58] Obviously, these are intertwined judgments: if a decisionmaker were manifestly nonneutral and biased, it would be very difficult for that decisionmaker simultaneously to be trustworthy. However, neutrality relates fundamentally to the set of rules that an authority is using, while trustworthiness encapsulates a separate (albeit quite often related) judgment about that authority's motives. Finally, research has suggested that individuals value being treated with courtesy and respect, because these factors "recognize[] and acknowledge[]" individuals' "dignity as people and as members of society."[59]

Psychologists have proffered three main theories for why individuals care about procedural justice separate and apart from outcome favorability and outcome fairness. First, the original procedural justice researchers, Thibaut and Walker, believed that procedural justice was important to people because what people *really* cared about was in fact outcomes.[60] In this purely instrumental model, they hypothesized that

---

al., *supra* note 23, at 485; E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 954 (1990).

52. THIBAUT & WALKER, *supra* note 1, at 1.

53. *See, e.g.*, Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553, 554 (1993).

54. *See generally* Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1979); Pauline Houlden, *Impact of Procedural Modifications on Evaluations of Plea Bargaining*, 15 LAW & SOC'Y REV. 267 (1980–1981).

55. *See generally* Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167 (1993).

56. *See generally* E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987).

57. Tyler, *supra* note 39, at 122.

58. *Id.*

59. *Id.*

60. THIBAUT & WALKER, *supra* note 1, at 81.

people cared about fair process because of a belief that only a fair process would yield a fair outcome.[61] Thibaut and Walker suggested that fair process was valuable solely because of its effects on outcome.[62] Second, over a decade later, Tom Tyler and E. Allan Lind posited that the desire for, and importance of, fair process was not so inextricably linked to outcomes.[63] They suggested in their "group value model" that people care about fair process because when an authority figure treats an individual in a fair manner, that authority figure conveys positive information to an individual about that individual's status in society.[64] This in turn affects the individual's self-esteem and other psychological factors.[65] Tyler and Lind's research made clear that instrumental effects could not fully account for the importance of procedural justice.[66] Finally, Kees van den Bos and colleagues have suggested more recently that people find it difficult to know how to assess their outcomes, and use fair process as a heuristic, or shortcut, to form judgments about their outcomes.[67] "Fairness heuristic theory" thus suggests that the main value of fair process is to serve as a type of proxy for judgments about outcomes in the face of uncertainty.[68]

The findings from over three decades of research on the psychology of procedural justice research stand in sharp contrast to the continuing insistence of law and economics scholars that individuals are most interested, in any given setting, in maximizing their economic outcomes.[69] This exclusive focus on instrumental gain has repeatedly been refuted empirically, in both the procedural justice and other contexts.[70] Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who

---

61. *Id.*

62. *Id. at* 89–90.

63. Tyler & Lind, *supra* note 16, at 66–67.

64. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 830–31 (1989).

65. *Id.* at 837. *See generally* Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, *in* 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 115 (Mark P. Zanna ed., 1992).

66. Tyler & Lind, *supra* note 65, at 143–44.

67. Kees van den Bos et al., *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, 1034 (1997).

68. *Id.*

69. As Lynn Stout explains, this perspective portrays the rational actor who "worries only about himself, calculatingly and opportunistically pursuing the course of action that brings him the greatest material advantage." LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 4 (2011). She further notes the widespread dissemination of this viewpoint throughout and beyond economics. *Id.*

70. *See, e.g.*, DANIEL GILBERT, STUMBLING ON HAPPINESS 217–18 (2006) (explaining the notion of "declining marginal utility," which theorizes that more money does not always lead to increased happiness).

acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.

B. Procedural Justice in Law

1. Theories of Procedural Justice

Philosophers and legal scholars have grappled with the question of fair process, attempting to offer a unified general conception of the role of fair procedures and what such fair procedures would look like.[71] As with the psychology of procedural justice, theorists have largely fallen into two camps when offering their visions for procedural fairness: some focus on the outcomes that a given process will produce (the instrumental approach), while others focus mainly on process per se, without much regard to outcome (the dignitary approach).[72]

The instrumental theories begin from a premise that the legal system is designed, at heart, to produce substantively accurate outcomes. As Robert Bone has noted, "Outcome-based theories assume that the primary purpose of adjudication is to produce outcomes that enforce the substantive law. . . . This is not to say that procedure cannot produce value in other ways, but it is to say that its primary value lies in the decisions, judgments, and settlements it generates."[73] The instrumental theorists, starting from this premise, suggest that a fair process is meaningful because it is only through fair procedures that parties can achieve a substantively just outcome.[74] As Laurence Tribe has explained, this perspective indicates that the system is designed "less to assure *participation* than to *use* participation to assure *accuracy*."[75] Furthermore, case law has explicitly reflected this notion: in *Fuentes v. Shevin*, the Supreme Court described "the Constitutional right to be heard" not as purely a device to "ensure abstract fair play to the individual," but rather, "more particularly . . . to minimize substantively unfair or mistaken

71. The volume of literature on fair process is too large to cite completely here. For a set of varying perspectives, see, for example, Ronald Dworkin, *Principle, Policy, Procedure*, *in* A Matter of Principle 72, 72–73 (1985); Louis Kaplow & Steven Shavell, Fairness Versus Welfare 38–51 (2002); Mashaw, *supra* note 10, at 162; John Rawls, A Theory of Justice (rev. ed. 1999); Solum, *supra* note 1, at 238.

72. *See* Laurence H. Tribe, American Constitutional Law 666–67 (2d ed. 1988).

73. Robert Bone, *Procedure, Participation, Rights*, 90 B.U. L. Rev. 1011, 1015–16 (2010).

74. Conversely, instrumental theory suggests only that those fair procedures that meaningfully yield a substantively just outcome are important. Other fair procedures are irrelevant—and worse, inefficient. For example, one treatise explains that "the quantum and quality of the process due in a particular situation depends on the need to serve the due process function of minimizing the risk of error in decision-making." 16B Am. Jur. 2d *Constitutional Law* § 957 (2009) (citing Gilbert v. Homar, 520 U.S. 924 (1997)).

75. Tribe, *supra* note 72, at 667; *see also* Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 112–13 (1982) ("Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom.").

deprivations of property."[76] This means that in order to create the "appropriate" level of procedural due process, the legal system must calibrate its investments in procedures with the attendant reduction in error risk.[77]

In contrast, dignitary theories of procedural due process argue that its importance lies in its intrinsic, non-instrumental value—in its value in enforcing norms about human dignity and human interaction in society.[78] Dignitary theorists of procedural due process take the perspective that the value of process relates to the role of the human being in society, rather than to the type of outcome achieved.[79] 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."[80] Tribe further noted the words of Justice Felix Frankfurter, who wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached."[81] As Tribe explained, "At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice."[82] Jerry Mashaw has argued that "the dignitary approach is both necessary to and sufficient for an adequate jurisprudence of due process."[83]

Other explanations for procedural justice are harder to pigeonhole. For example, Lawrence Solum has suggested that participation is the core value for procedural justice and that procedural justice's main value in the adjudicatory process is not reducible to instrumental concerns about cost or accuracy, but rather is purely as a legitimating feature.[84] That is, a process that does not allow for participation is illegitimate, and participation is important not solely for its value in producing better or

76. 407 U.S. 67, 80–81 (1972); *see also* Mathews v. Eldridge, 424 U.S. 319, 344 (1976); Mallette v. Arlington Cnty. Emps.' Supplemental Ret. Sys. II, 91 F.3d 630, 641 (4th Cir. 1996).

77. By characterizing the right to due process as a right to procedures that will, in turn, *produce* the substantively fair outcome to which one also has a (paramount) right, these theorists have inextricably wedded efficiency to the rights discourse. As Bone has explained, "Obviously, parties cannot have a right to perfect accuracy since perfection is impossible. More precisely, if the right guaranteed perfect accuracy, every case would involve a rights violation, which hardly fits common intuitions of procedural fairness." Bone, *supra* note 73, at 1016.

78. *See*, *e.g.*, TRIBE, *supra* note 72, at 667.

79. *See*, *e.g.*, *id.*

80. *Id.* at 666.

81. *Id.* (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

82. *Id.*

83. MASHAW, *supra* note 10, at 169.

84. Solum, *supra* note 1, at 273–75.

more efficient outcomes, but distinctly for its central role in legitimating the process itself.[85] Bruce Hay also explored the idea of procedural justice, suggesting that procedural justice merely captured the subjective experience of any process that an individual would agree to, ex ante, for the resolution of disputes.[86]

While this body of scholarship on procedural justice engages with questions about fairness in serious and important ways, its goal is fundamentally different than that of procedural justice in psychology. The legal and philosophical literature is explicitly normative, while the psychological literature is explicitly descriptive. Psychological research on procedural justice does not argue for or against particular tenets of fair process. Rather, it seeks to measure and quantify how individuals form judgments about fairness in particular situations and what effects these judgments then have. The philosophical and legal theory perspectives, in contrast, rely on philosophical conceptions about the nature of procedural justice rather than on any empirical research, or empirical consensus, about the features that make a particular process appear fair to participants. While it is certainly true that there is a dynamic relationship between these perspectives—that psychology shapes our sense of which rules and systems are acceptable, and that the systems we create in turn influence our psychological experiences—they each offer a distinct outlook on fairness. This project focuses *not* on offering a grand unified theory of procedural justice in law, but instead on the ways in which real individuals are likely to experience procedural justice through the civil litigation process in federal court.

2. *Procedural Due Process*

Much of the legal scholarship on the fairness of the process of litigation has centered around procedural due process. Procedural due process, a bedrock feature of our legal system,[87] defines the appropriate level of procedural safeguards that must be in place to ensure a fair legal process, and scholars have considered at great length these safeguards' contours,[88] pedigree,[89] and theoretical basis.[90] The constitutional right to

85. Solum, *supra* note 1, at 275; *see also* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 13–14 (1974).

86. Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1804 (1997).

87. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 547 (3d ed. 2006) ("The concept of procedural due process has never been controversial."); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1044 (1984) (recognizing that procedural due process is the oldest of our civil rights).

88. *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309–10 (1993) ("Due process doctrine subsists in confusion. . . . [My aim is] less to offer normative prescriptions than to sort out a handful of conceptual misunderstandings in some closely related areas of due process doctrine."); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 189 (1991) ("Scratch the smooth, plausible skin

due process, found in both the Fifth and Fourteenth Amendments, has been interpreted to include a right to procedural, substantive, and structural due process.[91] Procedural due process "delineates the constitutional limits on judicial, executive, and administrative enforcement of legislative or other governmental dictates or decisions."[92] Put simply, procedural due process is about "adequate safeguards."[93] The "core elements of due process" include notice of the issue in the case, the opportunity for a hearing, and an impartial decisionmaker.[94] Scholars have emphasized the fundamental nature of these factors in determining whether procedural due process requirements have been met:

> [T]he core content of procedural due process placed upon government the duty to give notice and an opportunity to be heard to individuals or groups whose interests in life, liberty or property were adversely affected by government action. The assurance of a fair trial or at least a fair hearing mandated that the individual be accorded an open hearing before a "neutral and detached magistrate" who has no "direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case," and who is free from domination by "a mob," with counsel provided for indigents in criminal cases.[95]

Determining the exact procedures required to yield procedural due process for any given party requires a context-specific analysis by the courts,[96] which have considered the question in areas as disparate as

---

of the doctrine and there lies turmoil, contradiction, and instability, a pathological combination of ineffectualness and destructiveness."); Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 4 U.C. DAVIS L. REV. 79, 141–42 (2009); Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1917–18 (2009); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456 (1986); Rubin, *supra*, note 87, at 1044 ("The procedural due process doctrine is now the subject of intense debate, with its central meaning regularly questioned by both courts and commentators.").

89. *See* Rubin, *supra* note 87, at 1044 ("The positive law history of the doctrine dates back to the Magna Carta."). *See generally* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987).

90. *See supra* notes 71–86.

91. *See, e.g.*, TRIBE, *supra* note 72, at 665–77; Rubin, *supra* note 87, at 1044.

92. TRIBE, *supra* note 72, at 664 (emphasis removed). In contrast, substantive due process "asks whether the government has an adequate reason for taking away a person's life, liberty, or property." CHEMERINSKY, *supra* note 87, at 546. In contrast to procedural due process, substantive due process is a concept that has been controversial. *Id*. at 547.

93. CHEMERINSKY, *supra* note 87, at 546.

94. *Id*. at 580.

95. TRIBE, *supra* note 72, at 683–84 (citations omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); Tumey v. Ohio, 273 U.S. 510, 523 (1927); Moore v. Dempsey, 261 U.S. 86, 90–91 (1923)).

96. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996) ("'Due Process' . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." (citation omitted)); Redish & Marshall, *supra* note 88, at 456 ("[T]he content of due process is extremely flexible, and not susceptible to precise definition.").

forfeiture,[97] prisoners' rights,[98] children's rights,[99] and family rights.[100] The specific procedures required have been tailored to the needs of the particular setting. Without a doubt, however, commentators agree that the cornerstone of procedural due process is the right to one's "day in court"[101] before an impartial decisionmaker.[102]

C. The Wide Net of the Psychology of Procedural Justice

Procedural due process and procedural justice in psychology have some clear conceptual overlap. First, the two share a focus on the meaningful nature of participation in legal proceedings. Procedural due process calls such participation notice and an opportunity to be heard,[103] while procedural justice calls it voice, process control, or opportunity to be heard.[104] Second, procedural due process and procedural justice also share a focus on the importance of an impartial decisionmaker who uses a set of substantive rules rather than personal biases to make decisions; the procedural due process "impartial decisionmaker" term can potentially encompass both the neutrality and the trustworthiness elements of procedural justice.[105]

However, where procedural due process elevates concerns about voice, neutrality, and trustworthiness to a constitutional level and thus requires some minimum standard of conduct, procedural justice merely asks individuals to what degree they felt that such concerns were met. Courts fix the legal system's procedural due process requirements, presumably at some threshold level that will ensure fair treatment for participants. In contrast, the subjective experience of procedural justice can be measured on a continuous, sliding scale that includes unfair, very fair, and all the shades of fair in between.

Another distinction between the two concepts is that procedural due process does not expressly enshrine courteous and respectful treatment as a constitutional guarantee. Again, this difference in included criteria

---

97. *See, e.g.*, Dusenbery v. United States, 534 U.S. 161, 167 (2002) (choosing *Mullane* standard over *Mathews* standard for forfeiture cases).

98. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 467 (1983) ("[L]awfully incarcerated persons retain only a narrow range of protected liberty interests. . . . [O]ur decisions have consistently refused to recognize more than the most basic liberty interests in prisoners.").

99. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 584 (1975) (holding that children have due process rights in connection with disciplinary actions taken by schools).

100. *See, e.g.*, Gomes v. Wood, 451 F.3d 1122, 1127 (10th Cir. 2006) (holding that the government may not remove children from their homes without providing due process).

101. *See, e.g.*, Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996).

102. Redish & Marshall, *supra* note 88, at 457 (arguing that the only truly necessary—and perhaps even sufficient—requirement of due process is that an impartial decisionmaker hear the case); *see also* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 Yale L. & Pol'y Rev. 1, 9 (2006).

103. *See supra* note 94 and accompanying text.

104. Solum, *supra* note 1, at 183.

105. *See* Thibaut & Walker, *supra* note 1, at 6; Tyler, *supra* note 39, at 122.

points out clearly that while procedural due process jurisprudence ensures some minimum level of conduct by courts and litigants with respect to fairness of process, it does not encompass all of the behavior that individuals use to form their judgments about when they have been treated fairly.

From a theoretical perspective, the explanations for why procedural justice and procedural due process matter largely dovetail, falling into one of two camps, instrumental or dignitary.[106] First, Thibaut and Walker's original instrumentalist perspective on procedural justice is reflected by what the instrumental theorists of due process have argued. Second, as noted above, other scholars have suggested, in rough parallel to the Tyler relational group value model, that the value of procedural due process lies in its dignitary and legitimizing value to the individual in society.

Although legal theorists and social psychologists may not share the same vocabulary, and discourse between them is far too rare, psychology's insights into how individuals make sense of and evaluate dispute resolution processes comport with the reasons legal scholars have offered for why fair processes matter. From this perspective, the psychology of procedural justice can help inform the debate over why we ought to care about fair process. Research in psychology has suggested that individuals do care about the instrumental value of fairness, but has also suggested that individuals do not *solely* care about the instrumental value of fairness. That is, empirical work has supported the idea that individuals value fair treatment, separately and independently from its instrumental value, for its dignitary importance.[107] In turn, a focus on the dignitary importance of fair process leaves us freer to care more about aspects of procedures that scholars focused on procedural due process might leave on the cutting room floor because they are not bound up with accuracy and substantive rights.

Another important distinction between procedural justice in psychology and procedural due process is that procedural due process, by definition, is about what protections a person is due before she is deprived of life, liberty, or property by the government.[108] Scholars have focused on the particular circumstances in which procedural due process may be required because of such deprivations. Property has been defined expansively for procedural due process purposes,[109] as has liberty.[110]

106. Fairness heuristic theory has no parallel in the due process literature.

107. *See* Tyler & Lind, *supra* note 65, at 135.

108. TRIBE, *supra* note 72, at 666.

109. *See, e.g.*, Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 543–44 (1985) (holding that government employees have a property interest in their employment, and thus they are entitled to procedural due process prior to termination); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with

Nonetheless, as the Supreme Court has explained, "[T]he range of interests protected by procedural due process is not infinite."[111] There are interests that procedural due process protections do not cover, and yet parties with those interests at issue will experience procedural justice—a subjective experience about how fairly they have been treated—when courts resolve their disputes.

Furthermore, because procedural due process protection is *only* triggered by a deprivation of protected rights, procedural due process is typically considered in the context of a party who has something to lose. Therefore, courts and scholars gravitate towards analyzing the procedural due process rights of a defendant in civil litigation or of a plaintiff in a suit against the government. Although procedural due process does provide protection for plaintiffs in suits against private actors,[112] the structure of civil litigation between private parties, by its nature, gives more choice and autonomy to plaintiffs. Plaintiffs typically make the initial decision with respect to a number of structural elements of the lawsuit, including the type of court and the location of the court. This choice, coupled with basic rules that ensure equal treatment of parties during the litigation (that is, both parties may engage in discovery, both parties may not participate in ex parte communication, and so on), means that it is defendants' due process rights that courts more often litigate and scholars more often consider, and it is defendants' due process rights that are considered largely through a constitutional lens.

Procedural justice, in contrast, is a phenomenon that can *always* be discussed with respect to *all* parties to a dispute. Because procedural justice perceptions help promote acceptance of and adherence to outcomes, the procedural justice experienced by a losing party, whether plaintiff or defendant, may be of particular concern. For our legal system to function smoothly, a losing plaintiff should not need to pursue

---

procedural due process."). *But see* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (holding that in order to have a property interest in a benefit, an individual needs to have a "legitimate claim of entitlement to it").

110. The Supreme Court stated in *Meyer v. Nebraska* that the liberty guaranteed by the Constitution includes:

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. 390, 399 (1923); *see also Roth*, 408 U.S. at 572; Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("We are dealing here with . . . one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); CHEMERINSKY, *supra* note 87, at 565.

111. *Roth*, 408 U.S. at 570.

112. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (noting that a constitutionally recognized property interest is subject to due process protection).

extralegal relief, and a losing defendant should be willing to pay a judgment or otherwise comply with a court ruling. But procedural justice effects are not limited to the losing party. Indeed, the procedural justice perceptions of the winning party may be just as important as those of the loser for purposes of satisfaction with the system and perceptions of legitimacy. Thus, procedural justice effects are experienced by, and important for, both plaintiffs and defendants, whether they prevail on the merits of the case or not.

Additionally, perhaps the most interesting difference between procedural justice effects and procedural due process requirements is that procedural justice effects may even be felt by nonparties to any particular dispute: other actors in the legal system with a stake in the decisionmaking process may also experience procedural justice effects that in turn affect perceptions of the legitimacy of the legal system.[113] A procedural justice analysis thus captures a wider range of consequences than procedural due process may include.

Finally, although there are undoubtedly individual differences in experiences of procedural justice, and although the philosophical underpinnings of the legal system are important and valuable, there is a real benefit to exploring the idea of procedural fairness in the legal system from the subjective perspective of individual participants rather than from the perspective of a third-party observer. A psychological perspective suggests how participants may understand that system as they engage with it rather than contemplate it from afar. This analysis may indicate that while rules put in place to provide sufficient procedural due process may appear sound from a structural point of view, subjective perceptions about procedural fair process based on these rules may fall short of our expectations and our desires.[114] Because these subjective perceptions likely influence our compliance with the law and our

---

113. *See, e.g.*, Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1394 (2005) (arguing that jury members, as citizens, may experience procedural justice effects); *see also infra* notes 115–21 and accompanying text.

114. One concern worth raising—although its full consideration is beyond my scope here—is to what extent the very procedures we mandate may, in turn, shape our perceptions of what procedural justice looks like. That is, there may be a classic chicken-and-egg problem between the structure of our legal system and our use of particular factors (and not others) as we form subjective judgments about procedural justice. On one hand, it may be that our innate psychological vision of fairness has led us to form a system with protections that match this vision. On the other hand, our psychological preferences may be shaped by the structures we have created. Interestingly, procedural justice effects that are largely similar to the ones experienced by citizens in the United States have been found in other countries with different legal systems and different cultural orientations. *See* E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 777 (1997) (finding similar antecedents for individuals in United States, Germany, and Hong Kong, suggesting that there are some shared human conceptions about fair treatment even when legal structures differ).

opinions about the law's legitimacy, they must be taken seriously. A greater understanding of how individuals actually form assessments about the fairness of the treatment they receive in the courts can only help efforts to provide fair process to litigants and other relevant actors.

D. Whose Procedural Justice

1. Clients Versus Lawyers

The role of lawyers has been relatively under-studied in empirical procedural justice research.[115] Studies focus largely on the perceptions of individuals rather than of lawyers, whether or not those individuals are represented by counsel.[116] This focus makes sense because parties, not lawyers, are most often responsible for continuing adherence to outcomes. Additionally, empirical researchers have been more concerned with the effects of procedural justice on the general citizenry than on the far smaller group of attorneys involved in dispute resolution because of the size differential between these populations and the potential for large policy implications.

However, a close look at procedural justice in litigation suggests that a lawyer's role as representative, as well as a lawyer's own perceptions of procedural justice, may be important in thinking about litigant assessments of procedural justice. In particular, factors that guide individuals' perceptions of procedural justice may be complicated by the fact that individuals are represented by counsel.[117] More specifically, although assessments about trust and neutrality reasonably may be formed by individual litigants, the degree to which someone feels that she has had a voice in the litigation process and has been treated with courtesy and respect by a judge may be hard to measure precisely in a system where lawyers almost always speak on behalf of clients, and judges most often interact with lawyers rather than directly with clients.

---

115. Some studies have included lawyer-type representation when assessing participant procedural justice. *See, e.g.*, Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. Personality & Soc. Psychol. 1531, 1535 (1978); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. Personality & Soc. Psychol. 643, 645 (1980); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. Applied Soc. Psychol. 295, 299 (1974). Other research has suggested that individuals who feel positive about their attorneys also report higher procedural justice perceptions. *See, e.g.*, Lind et al., *supra* note 51, at 972. But few, if any, studies have looked carefully at the ways in which lawyer and client behavior and lawyer and client perceptions of procedural justice are systematically intertwined.

116. *But see* Hollander-Blumoff & Tyler, *supra* note 26, at 480–82 (presenting the results of a study involving procedural justice assessments of law students in the role of attorneys in a simulated negotiation).

117. *See, e.g.*, Rebecca Hollander-Blumoff, *Just Negotiation*, 88 Wash. U. L. Rev. 381, 386 (2010); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash. U. L.Q. 787, 841 (2001).

Studies of procedural justice in the litigation context often conflate the voice experienced by a litigant with the extent to which a lawyer was able to present the litigant's perspective to the court.[118] Because the lawyer is hired to represent the client in court, this conflation makes sense: to the degree that the lawyer has the opportunity to present the client's case, the client ought to feel that her case has been heard. Of course, representation adds an extra layer that may not be fully under the control of the judge, in that the effectiveness of voice may not depend solely on the opportunity provided by the judge, but also on the skill and actions of the lawyer. The procedural justice perceptions of the client may be affected not only by the performance of the lawyer before the judge or in the dispute context itself. Some commentators have suggested, for instance, that the procedural justice the client experiences in her relationship with her lawyer is important to her perceptions of legitimacy,[119] and occasionally studies have even measured procedural justice by asking about the amount of time clients were able to spend in communication with their lawyers.[120] So, too, procedural justice as subjectively experienced by the attorney might be passed along to the client through the attorney's subjective presentation of information about the case and its disposition to the client.[121] Although there are not yet clear data demonstrating the effects of procedural justice assessments by lawyers on clients or of the relationship between specific lawyer behavior and client perceptions, a discussion of procedural justice in litigation would be incomplete without an acknowledgement that both of these perceptions may be important, may differ from one another, and may also be dynamically interrelated.

2. *Individuals Versus Entities*

In light of long-standing popular stereotypes that federal courts are bastions of corporate interests and the elite,[122] a concern about the psychology of procedural justice in federal court may seem inapposite because federal litigation involves so many corporate parties, for whom the concept of procedural justice appears irrelevant. I offer two responses to this concern. First, procedural justice effects, although attenuated, may still be present in the corporate party context. Second,

---

118. *See* Welsh, *supra* note 117, at 789–90.

119. William L. F. Felstiner & Ben Pettit, *Paternalism, Power, and Respect in Lawyer-Client Relations*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 135, 139 (Joseph Sanders & V. Lee Hamilton eds., 2001).

120. Casper et al., *supra* note 23, at 498.

121. *See* Hollander-Blumoff, *supra* note 117, at 417.

122. *See* Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 BYU L. REV. 923, 925 (noting that the Federal Courts Study Committee believes that federal courts should remain elite because their composition leads to their efficacy and to public confidence in their decisions).

federal court litigation may include more corporate parties than other types of litigation, such as state court, family court, or small claims court, but that does not mean there are not large numbers of individuals involved in federal litigation.

On one hand, it is true that the studies in psychology about procedural justice examine the perspective of individual disputants, not corporate representatives; there have not been empirical studies exploring the procedural justice perceptions of entities engaged in dispute resolution or of the effects and boundary conditions of the procedural justice perceptions of entities' agents. As with the lawyer-client divide, the addition of an entity's agent to the mix complicates the psychological procedural justice analysis by potentially attenuating procedural justice effects. Additionally, an entity represented by an agent simply cannot, as a definitional matter, have any perceptions of procedural justice; it is an entity, with no independent psychological experience. On the other hand, there is no reason to believe that an individual representative of a corporation or other corporate form would not experience some procedural justice effects based on her perceptions of how fairly her organization, and her organization's agents, were treated by certain court procedures. However, because responsibility for adherence to an outcome may be diffuse, or because there are many other potential individuals in the corporation who were not directly involved in litigation but who will also form an opinion about the outcome, the procedural justice effects may be narrower and more constrained.

In addition, because there are so many corporate litigants in federal court, and because the psychology of procedural justice may be most acutely meaningful as it applies to individual litigants, one might discount the potential importance of procedural justice in the federal courts. However, statistics suggest that there are still a vast number of individual litigants in federal court. For example, in 2005, Gillian Hadfield estimated that although ninety percent of non-prisoner and non-student-loan cases involved at least one corporate defendant, seventy percent of plaintiffs in non-prisoner and non-student-loan litigation were individuals.[123] Of course, prisoner and student-loan litigation always involve one individual party, and given that there were a total of 299,512 pending cases in federal court as of March 31, 2010,[124] this suggests that a fairly large number of individuals are involved in pending civil litigation in federal court.

---

123. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1301 (2005).

124. *Federal Judicial Caseload Statistics 2010, Table C-1 U.S. District Courts—Civil Cases Commenced, Terminated, and Pending*, U.S. CTS. (Mar. 31, 2010), http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx.

Thus, although procedural justice effects may be attenuated for corporate parties, they are not impossible to imagine. Perhaps more importantly, there are many individual litigants for whom procedural justice effects are likely to be more profound. In fact, perceptions that the federal courts cater to corporate interests and to the rich elite highlight the importance of a focus on procedural justice. Perceptions of fairness of process may be particularly critical in counteracting negative impressions of resource-based rather than merit-based decisions and of bias towards corporate parties.

II. Procedural Justice in Basic Federal Rules and Procedures

Many of the rules of civil litigation reflect precepts of the psychology of procedural justice. By conscious design, the American legal system attempts to provide a voice for participants, mandates that judges and lawyers act with courtesy and respect, and requires a trustworthy and unbiased decisionmaker. If all goes according to this design, a participant in the legal system should experience litigation as a procedurally just process, regardless of its outcome. Indeed, some of the very rules that could form the basis for an individual's subjective sense that a process is fair are the same rules that judges, lawyers, and scholars understand to be the critical safeguards of due process. But this view is too simplistic. Merely because one *intent* of the system's design is to foster a fair process for participants, the *effect* and the *implementation* of the design do not automatically yield this result.

In this Part, I consider a number of basic rules of civil litigation in light of the four factors that psychological research has suggested lead to procedural justice judgments, as discussed above. I also consider ways in which the rules or their application may complicate, frustrate, or fail to foster perceptions of procedural justice. I have chosen a handful of relatively simple but disparate rules and doctrines highlighting the ubiquity of fairness of process considerations.

One point of clarification is in order here before I proceed: procedural justice in psychology should not lend itself automatically to a zero-sum analysis. That is, increased procedural justice for one party does not naturally mean decreased procedural justice for another. Of course, although many rules that may affect perceptions about procedural justice apply equally to both parties (say, rules against ex parte communication), it is true that some rules may affect one party more than another (such as pleading rules, as I explain more fully below). But providing more voice, more neutrality, more trustworthiness, and more courtesy and respect to any one party does not obviously

decrease those factors for the other party.[125] In certain circumstances, it may be that this zero-sum effect appears to occur, but it is by no means inevitable or obvious.[126] A psychological perspective on procedural justice offers the potential to increase parties' perceptions of procedural justice without *necessarily* concomitantly diminishing perceptions of procedural justice for other parties; indeed, this may be one of the strongest positive aspects of a focus on procedural justice.

A. NOTICE

Consider something as fundamental as the rules surrounding the service of a complaint. Parties have heavily litigated what will constitute proper service so that notice is adequate,[127] and the question of proper notice is one that invokes defendants' due process rights under the Fourteenth Amendment. The Supreme Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard"[128] and has further explained that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[129] The right to a voice is critical, and must be protected by appropriate notice requirements.

If what we really care about is the opportunity to participate, then as long as *actual* notice has occurred, the courts should be satisfied. Yet courts have placed certain limits on what kinds of behavior are permitted in an effort to provide notice: in particular, judges balk at achieving notice through deceptive means. As one court explained, "It is clearly established law that where a 'person has been induced by trickery to come within the jurisdiction of a court for purposes of procuring service of process upon such person, the service will be set aside.'"[130] From a

125. However, dramatically increasing procedural justice for one party while keeping it constant for another may cause the perceptions of the latter party to change. Because people often evaluate their circumstances based on comparisons with others (a phenomenon called "relative deprivation" in the justice literature), a level of procedural justice that initially might have appeared positively might show to ill advantage when contrasted with another party's heightened fair process. *See* 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" 40, 42–48 (Robert K. Merton & Paul F. Lazersfeld eds., 1950); 1 SAMUEL A. STOUFFER ET AL., THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE, 126–27 (1949).

126. For a different perspective on the potential zero-sum nature of procedural rules, see Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 693 (2011) (arguing that the plaintiffs' bar and corporate litigants are antagonists in a zero-sum rulemaking process).

127. *See, e.g.*, Jones v. Flowers, 547 U.S. 220, 223 (2006); Dusenbery v. United States, 534 U.S. 161, 163 (2002); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 792 (1983); Greene v. Lindsey, 456 U.S. 444, 445 (1982).

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

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

130. Voice Sys. Mktg. Co. v. Appropriate Tech. Corp., 153 F.R.D. 117, 119 (E.D. Mich. 1994)

procedural justice standpoint, the served-by-trickery defendant has no complaint about voice or opportunity to be heard, but this behavior does relate both to the trustworthiness of the decisionmaking authority and to the treatment of the party with dignity and respect. By its very nature, deception is untrustworthy, and an authority structure that tolerates, condones, or even encourages parties to trick one another is not likely to induce feelings of trust in its participants. Similarly, trickery makes a mockery of the tricked party, which certainly does not comport with courteous and respectful treatment. Additionally, service by trickery sometimes may serve a substantive purpose—to gain personal jurisdiction over the defendant by virtue of her presence within the forum.[131] When a defendant is not otherwise subject to the court's jurisdiction and is tricked into presence in the forum, which then results in a finding of personal jurisdiction, the defendant may form an opinion that the decisionmaker is acting in nonneutral way, with a bias towards citizens of the home state. Thus, preventing trickery helps to foster a defendant's belief that the decisionmaker is neutral and trustworthy.

On the other hand, federal courts do not allow a defendant who has been evasive of service, or has herself resorted to trickery, to prevail on a claim of improper notice. As one district court recently noted,

> Where the defendant receives actual notice and the plaintiff makes a good faith effort to serve the defendant pursuant to the federal rule, service of process has been effective. Good faith efforts at service are effective particularly where the defendant has engaged in evasion, deception, or trickery to avoid being served.[132]

Service of process is "not a game of hide and seek," and a defendant "cannot claim that the [c]ourt has no authority to act when he has willfully evaded the service of process."[133]

Indeed, Federal Rule of Civil Procedure 4, which allows for service by mail if personal service is waived, largely eliminates the potential for the shenanigans of service that had been common in earlier times. The request for waiver of personal service contained in Rule 4(d)(1), and the resulting drawbacks for failure to waive enumerated in Rule 4(d)(2),[134] suggest that notice in federal court is to be streamlined and is not a fertile

---

(quoting K Mart Corp. v. Gen-Star Indus., 110 F.R.D. 310, 312 (E.D. Mich. 1986)).

131. Presence in a forum is a traditional basis for personal jurisdiction. Burnham v. Superior Ct., 495 U.S. 604, 605 (1990).

132. Conwill v. Greenberg Traurig, L.L.P., No. 09-4365, 2010 WL 2773239, at *3 (E.D. La. July 13, 2010) (citation omitted).

133. Elecs. Boutique Holdings Corp. v. Zuccarini, No. 00-4055, 2001 WL 83388, at *9 (E.D. Pa. Jan. 25, 2001).

134. The rule provides that if a defendant "fails, without good cause, to sign and return a waiver requested by a plaintiff . . . the court must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses." FED. R. CIV. P. 4(d)(2).

field for antics, tricks, or deception. The Advisory Committee Notes on Rule 4 suggest that the rule will be helpful in dealing with "furtive" defendants, and that one goal of the new rule is "to foster cooperation among adversaries and counsel."[135] By making service of process available by mail, Rule 4 makes service of process easier and limits the situations in which a plaintiff would be tempted to resort to trickery or deception, or a defendant would benefit from doing so. In the process, the rule is likely to provide positive perceptions of procedural justice for plaintiffs, who see their opportunities for voice increase and see the potential for discourtesy diminish. The rule similarly decreases opportunities for disrespectful behavior towards the defendant but does not provide defendants with a similar increased opportunity for voice.

B. Complaints and Other Pleadings

Generally speaking, the adversary system, as contrasted with other types of dispute resolution systems such as the inquisitorial model, relies heavily on the parties having voice in the process.[136] In considering the Federal Rules of Civil Procedure, it is clear that affording the parties a sense of their own voice in litigation is critical, and that this voice begins with the pleading process. The plaintiff, as the party bringing a claim, has an easy first opportunity to have a voice in the process—the plaintiff brings the action, after all, and must state the case in a pleading that describes the grounds for the action both factually and legally. The back and forth of the pleading system (complaint, answer, reply, ability to amend the complaint), and the motion system (motion, response, reply) provide all litigants with opportunities to express their views and have them considered by the decisionmaker. Although the system fairly rigidly controls the form and manner of expression, parties are nonetheless provided ample opportunity to express to the court their views and their version of the facts.

The content of the complaint itself also speaks to a concern with the opportunity for voice.[137] Typical pleading rules require that a statement of the claim show that the pleader is entitled to relief.[138] The complaint must give the defendant ample notice and understanding of the nature of the claims brought, which typically means that the plaintiff must provide

---

135. Fed R. Civ. P. 4 advisory committee's notes; *see also* Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 Rev. Litig. 159, 172 (1994).

136. Thibaut & Walker, *supra* note 1, at 121 (finding that parties prefer an adversarial process to an inquisitorial process, largely because of the perception that an adversary system provides greater voice and thus procedural justice).

137. Similarly, ex parte communication is prohibited because it would allow one party to express its views to the decisionmaker without allowing the other party a similar opportunity to voice her response. Model Rules of Prof'l Conduct R. 3.5(b) (2010).

138. Fed. R. Civ. P. 8(a)(2).

a statement of the facts underlying the complaint.[139] This requirement is important because it allows the defendant the opportunity to respond to the right facts and to have an appropriate voice in the action. It would be difficult for the defendant to feel that she had a voice in the proceeding if the defendant did not have any idea what the basis for the specific claim against her was, and was forced to respond with a general denial of wrongdoing rather than a specific rebuttal of the plaintiff's assertions.[140]

The recent decisions by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[141] and *Ashcroft v. Iqbal*[142] have heightened requirements for what must be included in a plaintiff's complaint.[143] Together, the two opinions call for the plaintiff's complaint to provide more information about the basis of her claim and, on a defendant's motion to dismiss, subject the information provided in the complaint to a plausibility or common-sense test.[144] These decisions are likely to have an effect on the procedural justice perceptions of both parties. From the plaintiff's perspective, the restrictions on pleading—even though they require a pleader to say more—may decrease perceptions of procedural justice. Pleaders often are not fully aware of the facts in a dispute, especially the facts most supportive of their allegations. Although requiring plaintiffs to say more about these facts may look, at first blush, like an opportunity to *increase* participation, in fact this requirement dampens participation because it raises the bar to have one's case heard before the court at all. By raising this level, these two decisions will cause some cases not to be heard, thereby completely depriving potential plaintiffs of their voice. From the defense perspective, in contrast, these decisions are likely to

139. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) ("To the contrary, all the rules require is a 'sweet and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

140. Of course, another reason that this is required is in order to give the judge the right information to decide the case.

141. 550 U.S. 544 (2007).

142. 129 S. Ct. 1937 (2009).

143. Legal scholars have largely understood *Twombly* and *Iqbal* as dramatically changing the standard for pleading. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 850 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 17 (2010). But not everyone agrees that the standard has changed so dramatically. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) ("This Article challenges the conventional wisdom that *Iqbal* and *Twombly* run roughshod over a half-century's worth of accumulated wisdom on pleading standards."). Empirical data is not conclusive on how these decisions have affected actual court practice. *See* Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1844–45 (2008).

144. *Iqbal*, 129 S. Ct. at 1954; *Twombly*, 550 U.S. at 570.

increase perceptions of procedural justice based on increased voice: requiring the plaintiff to say more means that the defendant has more information to which to respond, so that her participation in preparing an answer or other responsive pleading is more meaningful.

The new standards in *Twombly* and *Iqbal* raise concerns along the lines of the other procedural justice factors, as well. The old standard, set forth in *Conley v. Gibson*, famously required the deciding court not to dismiss a complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[145] I do not suggest here that the *Conley* standard was pure formalism and that no judicial discretion or bias could creep in, but that standard was less blatantly susceptible to judicial discretion and opportunity for bias. In contrast, the *Iqbal* Court expressly asks the deciding judge to use his or her *own* world view in evaluating the sufficiency of the complaint.[146] As the Court explains, "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[147] This individualization of the standard for decisions is likely to affect participants' judgments about both trust and neutrality. The common sense (and past experience) of an individual judge may suggest, for example, that a productive employee is likely to be promoted, regardless of race or gender, while the common sense and past experience of a plaintiff in a discrimination case may be quite different. This difference in perceptions is likely to lead the plaintiff to infer that the judge is not neutral and perhaps not trustworthy. In contrast, when the judge's common sense and experience are similar to that of the defendant, the defendant's perceptions of neutrality and trustworthiness may increase. When the judge's common sense comports with the plaintiff's, the situation will be reversed. Because the change in standard appears likely to result in more dismissals of complaints, *Iqbal* and *Twombly* seem poised to work a change for the worse in plaintiffs' procedural justice perspectives and for the better in defendants' procedural justice perspectives.

C. Discovery

Discovery, too, is a mechanism that is expressly designed to enable participation and voice. Several scholars have considered discovery from a procedural due process perspective.[148] Just as an opportunity to be

145. 355 U.S. 41, 45–46 (1957).

146. 129 S. Ct. at 1950.

147. *Id.*

148. *See, e.g.*, John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 Minn. L. Rev. 505, 509–10 (2000); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 563 (2001).

heard is worthless without notice, so, too, an opportunity to go to court is worthless without relevant evidence. Discovery provides both parties with the opportunity for meaningful participation by allowing them access to information that will form the basis for their presentation to the court. Imagine a system in which discovery was not permitted: the opportunity for participation would be severely hampered. The focus on whether due process has been provided by discovery rules, paired with an instrumental motive for due process, has framed the debate over discovery rules as largely about efficiency. Accuracy is balanced against cost, and when discovery is too broad, it may be unreasonably inefficient. On the other hand, when discovery is too narrow, there is not only a risk of substantive inaccuracy but also a very real concern that individuals may not experience the litigation process as procedurally just. When discovery is so restricted that it prevents a party from identifying and receiving important material, it in turn prevents a party from adequately presenting her case.

Restrictive discovery rules, taken in tandem with the heightened pleading requirements discussed above,[149] pose a serious threat to individuals' perceptions about their opportunity for voice in litigation, and, in turn, their procedural justice judgments. Because individuals may lack the data to support their case, notice pleading in conjunction with liberal discovery was a system well poised to offer voice to plaintiffs. But when an individual must reach a heightened standard of pleading and has little opportunity to gather potentially hidden information, opportunities for voice may be diminished. This problem is compounded in cases alleging discriminatory behavior because in such a case it is particularly difficult to have all the facts about the other side's behavior. When a potential plaintiff believes she has been discriminated against, the situation is rife for concerns about trust and neutrality, and the very decision not to afford voice, or to severely limit voice, may itself lead to perceptions of bias and untrustworthiness.[150]

Discovery is not without costs, however, and while the voice benefits of liberal discovery are obvious, there are also procedural justice concerns that may cut the other direction. One party may overwhelm the other with discovery requests, or "over comply" in producing responses

149. A number of scholars have considered the connection between restrictive discovery rules and the new pleading requirements. *See, e.g.*, Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 68 (2010).

150. Psychological research has indicated that members of stigmatized social groups may sometimes have increased sensitivity to status-based rejection. *See* Rodolfo Mendoza-Denton et al., *Sensitivity to Status-Based Rejection: Implications for African American Students' College Experience*, 83 J. PERSONALITY & SOC. PSYCHOL. 896, 913 (2002). Heightened sensitivity to status issues may suggest that in discrimination cases status concerns are more salient and that these plaintiffs are poised to perceive disrespect and discourtesy or other dignitary insults.

to discovery requests in order to swamp the other party with documents. Additionally, intrusive questioning during discovery may lead not to the perception of increased voice on the part of the respondent but instead to embarrassment and oppression. When these events happen, perceptions of procedural justice may be negatively affected because these behaviors appear discourteous and disrespectful. Although courts may sometimes step in to manage discovery and prevent these effects, this kind of discovery dispute rarely rises to the level of a procedural due process concern, and discovery is largely self-policing by the parties.

D. Impartial Decisionmaker

An impartial decisionmaker is a key focus of procedural due process analysis in the federal courts.[151] It is not an exaggeration to say that the amount of academic attention given to the topic of judicial impartiality is "staggering."[152] The federal judicial system is designed to afford litigants an impartial decisionmaker. One of the primary means by which the federal system attempts to accomplish this goal is giving federal judges lifetime tenure[153] so that they are free to decide without the bias that might creep in if they had to answer to powerful interest groups or an electorate.[154] Lifetime tenure, however, does not completely insulate federal judges from bias related to the taking and keeping of office: becoming a federal judge involves a networking process among legislators and other benefactors,[155] and the appointments process itself

151. *See, e.g.*, Redish & Marshall, *supra* note 88, at 484.

152. Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. Cal. L. Rev. 723, 724 (1999) ("[T]opics of judicial independence and judicial accountability have been written about extensively, and the number of possibly relevant writings from the past forty years is staggering.").

153. State judges, in contrast, tend to be elected to fixed terms. Even when terms are quite lengthy, preventing judges from being unseated immediately following an unpopular decision, there nonetheless typically comes a time when these judges must campaign for reelection. Such campaigns may be expensive and require outside funding that may suggest a lack of ensuing impartiality towards the contributors. Mark Spottswood, *Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns*, 101 Nw. U. L. Rev. 331, 332 (2007) ("The American Bar Association, which has long opposed judicial elections, has promulgated model regulations of judicial conduct on several occasions; the most recent version is the *Model Code of Judicial Conduct*, first published in 1990. The *Model Code* seeks, among other goals, to control the bias that flows from the financial relationship between judges and their campaign contributors. One provision of the *Model Code*, known throughout this Comment as the Solicitation Canon, bans judges or judicial candidates from personally soliciting donations to their campaigns." (citations omitted)).

154. *See, e.g.*, Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. Cal. L. Rev. 1669, 1680 (1988) (describing benefits of long judicial tenure); Maura Anne Schoshinski, Note, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 Geo. J. Legal Ethics 839, 840 (1994).

155. *See* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 Am. U. L. Rev. 699, 710–11 (1995) (arguing that appointment of federal judges yields benefactors that can threaten impartiality).

has been subject to criticism for its potential to threaten judicial independence.[156]

Once in office, federal judges are subject to rules that expressly attempt to limit their adjudicative capacity to situations in which they themselves do not have a particular interest. The federal system strives for transparency so that parties have enough data to conclude that the decisionmaking authorities and process are impartial. Judges are required to act transparently and to state publicly their financial holdings.[157] Additionally, judges are required to recuse themselves from decisionmaking when they have an interest in the subject matter of the case.[158] Courts note that this helps reduce the probability of bias.[159] Recusal is important because it prevents even an "appearance of impropriety."[160] Even when there is no technical impropriety, courts have suggested that cases coming close to the line should be decided in favor of recusal, because it is crucial that courts appear to be neutral, bias-free decisionmakers.[161] Even an appearance of biased decisionmaking might be enough to shake citizen trust in the court system, and so must be avoided.[162]

In reality, of course, bias is more complicated. What *is* a neutral and unbiased decisionmaker? Robust research in political science has suggested that the ideology of a judge (or of those in control of the judicial appointment process) influences judicial decisionmaking.[163] And

---

156. *See, e.g.*, Orrin G. Hatch, *The Politics of Picking Judges*, 6 J.L. & POL. 35, 39 (1989); Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 KY L.J. 767, 775–77 (1989).

157. These disclosures are mandated by the Ethics in Government Act of 1978 §§ 101–111, 5 U.S.C. app. §§ 101–111 (2006 & Supp. 2009), and are available to the public on the Judicial Watch website. *Judicial Financial Disclosure*, JUD. WATCH, http://www.judicialwatch.org/judicial-financial-disclosure (last visited Oct. 31, 2011).

158. 28 U.S.C. § 455(a) (2006) expressly provides for recusal when a judge's "impartiality might reasonably be questioned."

159. As the Supreme Court has explained:

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison, 349 U.S. 133, 136 (1955).

160. *See, e.g.*, United States v. Fazio, 487 F.3d 646, 653 (8th Cir. 2007) ("[T]he key ingredient in a section 455(a) recusal case is avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge's impartiality.").

161. *Id.*; *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2262 (2009); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988) ("The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."); Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977) ("[A]ppearance of impartiality is virtually as important as the fact of impartiality.").

162. *See* sources cited *supra* note 161.

163. *See, e.g.*, Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 213 (2009); Daniel R. Pinello, *Linking Party to Judicial*

in any given case, judgments about neutrality and absence of bias for a particular judge are, perhaps ironically, themselves subject to bias. This issue was notably considered over three decades ago when parties sought Judge Constance Baker Motley's recusal in a gender discrimination case.[164] Judge Motley, the first African American female judge ever appointed to the federal bench, noted,

> [I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.[165]

More recently, the same argument has been leveled at Judge Vaughn Walker in the consideration of the California ban on same-sex marriage, based on Judge Walker's own sexual orientation.[166] And such concerns are not limited to cases involving discrimination. Justice Antonin Scalia's famous 2004 refusal to recuse himself when one party in a case, Vice President Dick Cheney, had recently been his companion on a duck-hunting trip also sparked criticism.[167] From a procedural justice perspective, rules about neutrality and unbiased decisionmakers may provide some protection, but individual actors and interested parties to the litigation have individual differences with respect to when they believe that a decisionmaker is truly impartial. Impartiality is, in many instances, in the eye of the beholder. In some situations, it may be difficult, if not impossible, to find a decisionmaker whom all parties perceive as neutral and bias-free.

E. RULES ABOUT CONDUCT

Courts also make an express effort, at least on the books, to hew to a norm of civility and politeness. While there is no constitutional guarantee that judges behave nicely in their dealings with litigants,[168]

Ideology in American Courts: A Meta-Analysis, 20 JUST. SYS. J. 219, 243 (1999). *But see* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1370 (1998).

164. Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 2–3 (S.D.N.Y. 1975).

165. *Id.* at 4.

166. *See* Aliyah Shahid, *Judge Vaughn Walker's Sexual Orientation Sparks Ire over Fairness on Prop 8, Same-Sex Marriage Case*, N.Y. DAILY NEWS, Aug. 6, 2010, http://articles.nydailynews.com/2010-08-06/news/27071905_1_gay-marriage-marriage-ban-marriage-case; *see also* MacDraw, Inc. v. The CIT Grp. Equip. Fin., Inc., 994 F. Supp. 447, 447–48 (S.D.N.Y. 1997), *aff'd*, 138 F.3d 33 (2d Cir. 1998) (disciplining counsel for undignified and discourteous conduct when asking for recusal because counsel were involved in a separate case involving bias against the Asian American community and thought Judge Chin had prejudged the instant case).

167. *See, e.g.*, Cheney v. U.S. Dist. Ct., 541 U.S. 913, 913–14 (2004).

168. Alas, whatever the scope of the "good behavior" provision in the Constitution may be, U.S. Const. art. III, § 1, it does not appear to encompass basic civility and good manners. For a lively debate about the actual meaning of the provision, see James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1227–30 (2007); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*,

courtesy and respect are expressly called for by Canon 3(A)(3) of the Code of Conduct for United States Judges, which provides:

> A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.[169]

Although the Code of Conduct does not carry the force of law and "cannot be the standard for judicial discipline," it puts forth aspirational goals for the judiciary that courts seem to take seriously, at least on occasion.[170] For instance, the Seventh Circuit noted, "It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect."[171] And in an opinion describing the gross discourtesy and partiality of an immigration judge, the Third Circuit indicated that the treatment of defendants with courtesy, respect, and dignity is inextricably tied up with perceptions of neutrality and impartiality, and together these factors help to dictate whether or not a party has received due process.[172] The court explained:

> We began with a reminder of the "dignity," "respect," "courtesy," and "fairness," that a litigant should expect to receive in an American courtroom. These words . . . are not merely advisory or aspirational. Indeed, although [respondent] has no constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application.[173]

The court displays an intuitive grasp of the fact that discourtesy and disrespect can lead to a perception of unfair process.[174] In other, less formal but nonetheless entrenched ways, court practices may reinforce a norm of courtesy and respect. For example, the Fourth Circuit has a tradition in which "judges come down from the bench following argument to shake hands with counsel and thank them for their advocacy."[175]

---

116 YALE L.J. 72, 88–89 (2006); Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 141–43 (2006).

169. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(3) (2011).

170. *In re* Charge of Judicial Misconduct, 62 F.3d 320, 322 (9th Cir. 1995) ("While perhaps a judge's rudeness could be so egregious as to constitute misconduct under the [relevant law], the incidents at issue here do not rise to that level.").

171. Iliev v. Immigration & Naturalization Serv., 127 F.3d 638, 643 (7th Cir. 1997).

172. Cham v. Att'y Gen. of the U.S., 445 F.3d 683, 690–91 (3d Cir. 2006).

173. *Id.*

174. There are a number of state court cases authorizing disciplinary action against judges who repeatedly behave in discourteous ways towards litigants. *See, e.g.*, *In re* Wood, 720 So. 2d 506, 506 (Fla. 1998); *In re* Kellam, 503 A.2d 1308, 1311 (Me. 1986); *In re* O'Dea, 622 A.2d 507, 515 (Vt. 1993). *But see In re* Hocking, 546 N.W.2d 234, 245 (Mich. 1996).

175. U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT, ORAL ARGUMENT PROCEDURES (2011).

Courts are also tasked with the oversight of attorney behavior. Attorneys are subject to relevant disciplinary rules in their jurisdiction. Although the current ABA Model Rules of Professional Conduct summarily prohibit lawyers from "engag[ing] in conduct intended to disrupt a tribunal,"[176] prior versions of the Model Rules were far more explicit. The Ethical Canons of the ABA Model Rules of Professional Responsibility formerly called for an attorney to be "respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears,"[177] as well as "courteous to opposing counsel."[178] Similarly, the Disciplinary Rules of the ABA Model Rules of Professional Responsibility forbade a lawyer to "[f]ail to comply with known local customs of courtesy"[179] or "[e]ngage in undignified or discourteous conduct which is degrading to a tribunal."[180] Numerous states govern the conduct of their attorneys through rules that still call for courteous behavior.[181] Although attorneys are not decisionmakers themselves, they are nonetheless in a position of some status in a court proceeding and their behavior may affect the procedural justice perceptions both of the other attorneys involved in the action and of the litigants themselves.

Courts have expressly made the connection between the behavior of attorneys and the legitimacy of the proceedings: the Supreme Court long ago defended a judge's authority to sanction a lawyer's courtroom behavior on the grounds that "it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved."[182] Attorneys have been faced with suspension and the threat of disbarment for disrespectful behavior in court.[183]

---

176. MODEL RULES OF PROF'L CONDUCT R. 3.5(d) (2009).

177. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-36 (1980).

178. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-38 (1980).

179. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(C)(5) (1980).

180. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(C)(6) (1980). Additionally, the previous Model Disciplinary Rules expressly stated that a lawyer does not violate the rules mandating zealous advocacy "by treating with courtesy and consideration all persons involved in the legal process." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1980).

181. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT 3.3(f)(2) (2011) (setting forth disciplinary rules that largely track the earlier version of the ABA Model Rules); MICH. RULES OF PROF'L CONDUCT 6.5 (2011) ("A lawyer shall treat with courtesy and respect all persons involved in the legal process.").

182. *Ex parte* Burr, 22 U.S. 529, 530 (1824). This authority is not limited to the federal judiciary. Similarly, the Illinois Supreme Court, highlighting the importance of the courts having "the confidence and respect of the people," suggested that "[u]njust criticism, insulting language, and offensive conduct toward the judges personally by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted." *Ex rel.* Chicago Bar Ass'n v. Metzen, 125 N.E. 734, 735 (Ill. 1919).

183. *See, e.g.*, *In re* Zeno, 517 F. Supp. 2d 591, 600 (D.P.R. 2007), *aff'd*, 504 F.3d 64 (1st Cir. 2007) (holding that an attorney could be suspended for three months because of "disrespectful" behavior towards a judge); *In re* Evans, 801 F.2d 703, 706–07 (4th Cir. 1986) (holding that an attorney could be

Of course, not all unpleasantly discourteous conduct is sanctionable. For instance, the Supreme Court offered this analysis in one case:

> [T]he tone of a [petitioner's letter] . . . can be read as ill-mannered. All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is "not presently fit to practice law in the federal courts." Nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice.[184]

Although courteous behavior does not always occur, and discourteous behavior does not always bring forth sanctions from the governing court, nonetheless it is clear that the federal courts have an aspirational norm of respectful and courteous behavior for both lawyers and judges. Although procedural due process rarely formally considers questions of courtesy and respect, psychological research suggests that meeting this aspirational norm will help to foster perceptions of procedural justice and, in turn, legitimacy.

III. Procedural Justice in Federal Court Doctrines

From before the time of the Constitutional Convention, Americans have disagreed as to the appropriate relationship between the states and the federal government.[185] The substantive allocation of decisionmaking between the federal and state courts is, of course, extremely important.[186] But the procedural mechanisms for determining that allocation may also have the potential to affect overall satisfaction with the division and the legitimacy of the federal system vis-à-vis the states. In this section, I examine, through the lens of procedural justice in psychology, two doctrines—diversity jurisdiction and federal court abstention—that implicate the appropriate scope of federal court authority as well as the division of judicial business between the federal and state court systems. I first explain to whom I will extend this analysis, and then consider

---

disbarred for making an "unquestionably undignified, discourteous, and degrading" complaint about a judge).

184. *In re* Snyder, 472 U.S. 634, 646–47 (1985) (citations omitted).

185. *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1213 (2004) ("Disagreement over jurisdictional allocation, with us since the framing of the Constitution, remains acute.").

186. For a comprehensive examination of the "multilevel tensions" between the state and federal governments, particularly with respect to federal courts and state courts, see Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 1 (1980).

potential assessments of procedural justice in the context of diversity jurisdiction and abstention doctrine.[187]

A. Whose Procedural Justice, Redux

Both diversity and abstention affect individual litigants, and so I begin with the most visible analysis, examining the procedural justice implications of these doctrines on the involved parties. I then turn to a less obvious procedural justice analysis. Specifically, instead of imagining the perceptions of justice merely among the litigants, I also consider the procedural justice perceptions among the structural actors in the system—the state and federal judges before whom the cases are heard, as well as any number of other interested parties (state and federal legislators, executives, and ordinary citizens) to the division of business between the court systems.

Judges most certainly are not parties asking an authority to make a decision about their own personal dispute; they are relatively autonomous individuals who have working relationships with one another. While this relationship may not be personal, each judge's actions may influence other judges both within their own judicial system and within other systems. Judges make decisions about intersystem disputes over who will hear the substance of a case. The judicial system is a decisionmaker and a societal institution to litigants, but is workplace and societal institution to its judges. There is a robust literature on procedural justice within the organizational context, and this literature suggests that individuals care about fair process within the workplace and other organizational structures.

Research on procedural justice in the workplace has repeatedly demonstrated that individuals care deeply about the fairness of process for decisionmaking in the workplace, separate and apart from how fair or how favorable their outcomes may be.[188] In particular, procedural justice concerns "loom larger" than distributive justice issues when individuals in the workplace are considering their commitment to a system and to trust in its authority.[189] It is widely suggested that federal judges are underpaid relative to the salary they could command in the private

187. These two doctrines by no means represent the limits of areas in which there is a potential conflict between the scope of federal and state power. An extensive literature addresses these conflicts in a host of areas. *See generally* Friedman, *supra* note 185; Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. Rev. 191 (2007); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 Ind. L. Rev. 71 (1998); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 Tex. L. Rev. 1743 (1992).

188. *See supra* note 28 and accompanying text.

189. Folger & Konovsky, *supra* note 28, at 125–26.

sector,[190] meaning that judges are already largely self-selected as individuals who are not motivated solely by instrumental personal gains such as monetary compensation. Thus, issues of system fairness may already be of more critical importance to the judiciary than to other workers.

I suggest here that thinking about judges as individuals embedded in a judicial workplace—which can be writ small (courthouse) or large (legal system as a whole)—is a valuable endeavor that can offer insight about how judges themselves will understand the legal system. Beyond the workplace context, too, judges are also citizens engaged in disputes about the appropriate scope of their own power and influence. To the extent that procedural justice effects have been found in a wide array of contexts, including ones in which there is no third-party decisionmaker and ones in which the free market governs, it is not unreasonable to suggest that judges may be subject to procedural justice effects based on their own experiences within the legal system. To the extent that procedural justice enhances legitimacy and adherence to the law, enhancing procedural justice among members of the judiciary can only yield positive effects.

So, too, legislators who have enacted laws, or executives who are charged with the laws' enforcement, have a stake in whether the laws are fully considered by a judicial body and in which judicial body has that opportunity. A legislator whose handiwork may be considered by either a state or a federal judge for its constitutional validity may have a strong interest in the outcome of that decision. To that extent, such a legislator is, in a way, subject to a decisionmaking process and may evaluate that process for its procedural justice. However, there is not yet empirical research that even begins to explore procedural justice effects on the part of the judiciary, legislators, and executives. For that reason, this analysis is theoretical and speculative, rather than grounded in empirical data. Even so, the analysis relies on the robust framework for the psychology of procedural justice developed over the past three and a half decades.

B. DIVERSITY JURISDICTION

Scholars have quite often considered jurisdiction, generally speaking, from a due process perspective.[191] Personal jurisdiction doctrine, in fact, is

---

190. *See, e.g.*, John W. Dean, *Underpaid and Overworked: The National Disgrace of Undercompensating Federal Judges, While Allowing Their Workload to Balloon*, FINDLAW (Nov. 3, 2009), http://writ.news.findlaw.com/dean/20061103.html.

191. *See, e.g.*, Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1294 (1983); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 471 (2004); Martin Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1132 (1981).

based almost completely on tests that are designed to define due process for out-of-state defendants. Subject matter jurisdiction, in contrast, is not immediately and obviously susceptible to a due process analysis. At first glance, it may not seem that subject matter jurisdiction—that is, the division of judicial business between the state and federal court systems—relates in any way to procedural justice concerns. When the division is straightforward, with state courts considering state law questions and federal courts considering federal law questions, the importance of procedural justice may not be obvious. But when both state and federal courts are available to consider state law questions—as is the case under the aegis of diversity jurisdiction[192]—there may be a tension surrounding the distribution of those questions to the appropriate authority, which raises procedural justice concerns.

Although scholars disagree on the rationale behind diversity jurisdiction, most theorists suggest that it was meant to protect against some type of bias. The most popular theory holds that diversity jurisdiction mitigates bias against out-of-state defendants—an area in which the procedural due process requirement of an impartial decisionmaker and procedural justice's insistence on a neutral and trustworthy decisionmaker converge. Chief Justice John Marshall described diversity jurisdiction in the following way:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.[193]

Judge Henry Friendly, however, rejected the argument that diversity jurisdiction was created because state courts would be biased against out-of-state citizens, instead suggesting that state courts would be biased

192. The Constitution specifically authorizes federal courts to take jurisdiction of suits between citizens of different states. U.S. CONST. art. III, § 2. Additionally, 28 U.S.C. § 1332 (2006) codifies diversity jurisdiction and sets a threshold for the amount in controversy in such cases at $75,000.

193. Bank of the U.S. v. Deveaux, 9 U.S. (1 Cranch) 61, 87 (1809). The actual existence of this bias has long been debated. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493 (1928) ("[S]uch information . . . entirely fails to show the existence of prejudice on the part of the state judges."). However, survey data has suggested that there is a widespread—but not universal—perception of such prejudice by lawyers. *See, e.g.*, Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 LAW AND SOC'Y REV. 749, 759–60 (1980–1981) (finding that lawyers in rural areas perceived bias in local courts); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 380 (1992) (finding that some lawyers perceived local bias).

against interstate commerce and business, and that such bias would be more likely to originate in the legislature.[194]

In either event, the apparent genesis for diversity jurisdiction was some fear of a decisionmaker who was not neutral and could not be trusted. Unfortunately, it is not at all clear that diversity jurisdiction succeeds in its efforts to provide a more impartial decisionmaker for cases involving the citizens of two different states. While some commentators are strong advocates for the benefits of diversity jurisdiction with respect to impartiality and neutrality, others argue that diversity jurisdiction instead perpetrates bias.[195]

How does diversity jurisdiction appear, in procedural justice terms, to litigants themselves? The parties may agree on a suitable forum, but often do not. When a case involving citizens of different states is brought in state court, an out-of-state defendant may remove the case to federal court.[196] In this situation, although the traditional rule is to allow a plaintiff's choice of her home forum to govern,[197] the plaintiff is no longer allowed to be heard in her chosen forum as between state and federal court. Not only may the plaintiff believe that she has traded her chosen decisionmaker for one less neutral and unbiased, but this shift may also decrease the plaintiff's sense of voice. Additionally, procedures for removal may not be particularly suited to fostering a plaintiff's subjective perceptions of voice, because a defendant accomplishes removal simply by filing a notice of removal in the federal court. Once the petition is filed, the state court no longer has jurisdiction over the case.[198] There is no opportunity during this process to object to the removal petition. It is only *after* removal has been effectuated that a party can voice her objections to the change in court system by moving to remand the case to the state court.[199]

Even though the federal system does eventually allow a plaintiff to voice her objections to the federal court taking jurisdiction over the case, and even though the federal court system's own rules will provide the opportunity for the plaintiff's case to be heard,[200] the plaintiff nonetheless

194. Friendly, *supra* note 193, at 495. In the world before *Erie R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938), of course, federal courts sitting in diversity could use federal common law to protect businesses and did not need to apply the law of the state in which the court sat. *See, e.g.*, Swift v. Tyson, 41 U.S. 1, 4 (1842).

195. *See* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 131 (2003).

196. This assumes, of course, that the case meets the amount in controversy requirement. *See* 28 U.S.C. §§ 1332, 1441 (2006).

197. Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947) ("Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice.").

198. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 359 (5th ed. 2007).

199. *See* 28 U.S.C. § 1447 (2006).

200. *See supra* Part II.A.

may experience diminished procedural justice, first because her opportunity to speak in her chosen forum was thwarted,[201] and second because she had little voice in the moment of transition between court systems. Additionally, the plaintiff who initially chose a state court forum may believe that the state court judge is more trustworthy, or more impartial, than a federal court judge, and this diminishment in trust or belief of impartiality may affect her assessments of procedural justice. Of course, the plaintiff may believe *positively* that a state court judge is not impartial, and thus her assessments of procedural justice might increase when the case is removed to a federal court. In any event, though, the switch from a biased to an unbiased judge should not have any *negative* consequences for procedural justice assessments.

Similarly, a defendant sued in federal court under diversity jurisdiction and who would have preferred to be in state court may experience diminished procedural justice because she may believe the federal decisionmaker is biased. Again, if instead she believes that the state court judge *is* biased but that the federal judge is unbiased, there should be no corresponding drop in procedural justice. This defendant, unlike the plaintiff above, is not likely to experience a diminishment in perceptions of voice and opportunity to be heard. Because the defendant did not actually ever have a choice of courts and was not removed from one court to another, this defendant's status quo is the federal court. Whereas the plaintiff described above experiences a potential drop in voice, the defendant here has no such comparison to make.[202]

From the standpoint of the federal judge, voice and an opportunity to be heard are increased when the court exercises diversity jurisdiction: the federal judge adds to her opportunities to pronounce judgment on a variety of issues. From the state court judge's viewpoint, in contrast, this type of jurisdiction removes an opportunity for voice that may be quite important. Diversity cases, by definition, are not about matters of federal substantive law. Therefore, federal judges in diversity cases are called upon to apply and interpret state law.[203] Sometimes these questions of state law may be complicated or may be issues of first impression.

---

201. Because individuals do not evaluate situations from a neutral reference point, but rather from the perspective of losses or gains, even when the federal court might otherwise have been perceived as trustworthy, neutral, or voice-providing, the loss of the plaintiff's original forum may suggest to the plaintiff that lower degrees of these factors will be found in the new forum. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979). Although there is no research on the effect of voice in the procedural justice context and its relationship to status quo bias and endowment effects, it nonetheless seems reasonable that a person whose broader opportunity for expression is curtailed will feel that her voice has been diminished, even if the curtailment results in a level of voice that she might have found perfectly acceptable had it been the first option offered.

202. *Id.*

203. Erie R. Co. v. Tompkins, 304 U.S. 64, 73 (1938).

Scholars have suggested that state courts may be the most appropriate arbiter of state law (just as federal courts may be the most appropriate arbiters of federal law).[204] State court judges likely feel that they are quite qualified to rule on questions of state law, and federal court judges "stealing" these questions away from them may be an affront to their opportunity to be heard.[205]

There are two ways in which federal courts have tried to ameliorate the tension inherent in the federal judiciary interpreting state law. First, although the general rule is that federal courts must take jurisdiction in diversity cases even when state law is unclear,[206] some federal courts have abstained from hearing these cases. Such abstention, based on the rule set forth in *Louisiana Power & Light Co. v. City of Thibodaux*, is appropriate only in special circumstances, such as where there is unclear state law and the doctrine at issue is "intimately involved with [the state's] sovereign prerogative."[207] Abstention inherently is a doctrine about both the comity and the friction between two sovereign systems.[208] Some scholars have criticized the abdication of federal jurisdiction in these cases, arguing that abstention frustrates the very purpose of diversity jurisdiction in providing a "neutral" federal forum.[209] Abstention in this setting has the potential to deprive individual litigants

---

204. As Martin Redish has explained,

> [I]t makes practical sense for a sovereign's courts to have primary responsibility for adjudication of that sovereign's law. . . . [B]oth common sense and practical experience dictate that a court's primary duties will concern the development of the law of its own sovereign. Not surprisingly, a court's level of expertise in and familiarity with a sovereign's body of law will be in direct proportion to the amount of time it devotes to interpretation of that law. Moreover, it is not unreasonable to believe that courts of a sovereign will likely be more sensitive and sympathetic to the interests of that sovereign, if only because of the obvious factor of sovereign allegiance. Thus, there are good reasons for a sovereign to prefer that its own courts have primary responsibility for the protection of that sovereign's interests and for the evolution of its body of law.

Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1774 (1992).

205. Issues related to procedural justice have been discussed in the context of institutional players rather than of individual litigants. *See, e.g.*, Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927 (2003) (arguing for the utility of institutional dignity).

206. Meredith v. Winter Haven, 320 U.S. 228, 237–38 (1943).

207. 360 U.S. 25, 28 (1959) (holding that a case involving unclear state law and eminent domain was appropriate for federal court abstention in a diversity action); *see also* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (holding that the issue of water resources was of vital concern to the New Mexico state government and thus the case was appropriate for abstention).

208. James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1053 (1994).

209. *See, e.g.*, Charles L. Gowen & William H. Izlar, Jr., *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194, 213–14 (1964); Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendation for Legislative Action*, 1990 BYU L. REV 321, 372.

(most acutely, plaintiffs) of their opportunity to be heard, as well as to diminish perceptions of neutrality and trust in decisionmaking for the party who chose the federal forum and believes the state forum is biased or less trustworthy. Additionally, the lengthy delay that abstention may produce is likely to diminish both parties' perceptions of courteous and respectful treatment.

For federal judges, abstention may enhance perceptions of the trustworthiness of the system as a whole: Sending a case to the most qualified decisionmaker seems to increase the likelihood that the decision is sound. Although federal judges choosing to abstain would experience a decrease in their own opportunity to make law, they may feel positive about their voice and opportunity to be heard because they have a voice in the decision not to consider the case. From the state court perspective, such abstention is likely to increase perceptions of procedural justice on all fronts: abstention gives the state judge the opportunity for voice in settling questions of state law, provides the state judge with reason to believe that the federal judge is unbiased and trustworthy, and demonstrates that the federal judge respects the state judge.

Certification is the second procedure that may ameliorate the tension between state and federal courts. When a federal court is presented with an important question about state law, the federal court can ask the state court for its opinion.[210] Beyond the value of getting the legal question substantively correct[211] and the benefit of not creating contrasting precedent between the two systems,[212] certification may provide procedural justice to state court judges. The process not only permits the state court judge to offer her opinion, providing voice,[213] but it also signals respect and deference to the state court system's capabilities to determine its own state law. Additionally, it suggests that federal courts are not seeking to impose their own normative framework onto questions of interpretation of state law, which will augment perceptions of trustworthiness and neutrality.[214] Although this view of deference and respect to state courts is widely held in the literature on

---

210. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 178 (2003).

211. *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1698 (2003) (noting that a state's highest court—the "definitive" authority—typically offers the answer to a certified question).

212. *See* Cochran, *supra* note 210, at 210–11. *But see* Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 690 (1995) (downplaying the importance of consistency between a federal court decision and a later decision by the state's highest court).

213. *See* Nash, *supra* note 211, at 1697 ("[Certification] gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance.").

214. *See id.* ("The prerogative of a state government to establish and define its own state law is enhanced by [certification] . . . .").

certification,[215] others have taken a different view, arguing that the certification process actually demonstrates *disrespect* to the state court by unreasonably and willfully treating state law as foreign, acting as though it is alien, mystifying, and practically occult in its opacity,[216] as well as treating it as less essential to the nation's legal development than federal law.[217]

Certification procedures, when they work smoothly, may also offer state legislators heightened feelings of procedural justice. First, the legislation will be heard and considered by the state judicial body that, presumably, the legislators expected to be the ultimate audience for their work, which may increase perceptions of voice. Second, it seems likely that state legislators will be more trusting of the state court, and also will believe the state to be more neutral in its actions towards state behavior than a federal court might be. Finally, state legislators presumably share some strong identification with the state government, as well, and the respect and courtesy shown to the state from the federal system through certification may be appreciated by the legislators. Similarly, the state executive may appreciate certification procedures as a fair process from voice, neutrality, trust, and courtesy perspectives.

In contrast, however, the certification process adds delay to the process of litigation[218]—indeed, many certified questions are not answered[219]—and this delay may be interpreted as frustrating the voice of the individual litigants. Certification may also frustrate the voice of the federal court, which will most likely—after its initial decision to certify the question—remain silent until such time as the state court responds. Additionally, to the extent that certification puts a question of state law in front of a less impartial decisionmaker—contrary to the very reason for creating diversity jurisdiction to begin with—it will diminish procedural justice perceptions by litigants.[220] On the other hand, the federal judiciary may not feel that its voice is diminished if it believes that it is not qualified to offer an opinion.[221] Finally, the delay by state courts in responding to certified questions, the lack of response entirely

215. *See, e.g.*, Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000).

216. *See* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 154 (2009).

217. *See id.* at 158–59.

218. *See, e.g.*, JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 67 (1995); Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1977); Sandra Schultz Newman, *Certification of State Law Questions: Pennsylvania's Experience in the First Five Years*, 75 PA. BAR ASS'N Q. 47, 57 (2004).

219. *See* M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 325 (1994).

220. Nash, *supra* note 211, at 1698.

221. Most judges—at both the state and federal levels—appear to support the certification process, in particular because it "improves federal-state comity." GOLDSCHMIDT, *supra* note 218, at 66; *see also* Cochran, *supra* note 210, at 166.

in some cases, the ensuing delay in case resolution, the expense incurred by additional proceedings, and the feelings engendered by a challenge to one's forum choice may all increase perceptions of discourtesy, so that both individual litigants and the federal judiciary feel they have been treated disrespectfully and thus with low procedural justice.[222]

C. Abstention

As noted above, abstention is a doctrine whereby federal courts decline to hear a case in which jurisdiction is otherwise proper. There are three basic types of abstention: abstention because of unclear state law (*Pullman*, *Thibodaux*, or *Burford* abstention), abstention to avoid interference with pending state proceedings (*Younger* abstention), and abstention to avoid duplicative litigation in the state court (*Colorado River* abstention).[223] Each of these doctrines has potential procedural justice effects. After a brief caveat, I consider them in turn below.

Abstention doctrines are notoriously difficult to understand for law students, lawyers, judges, and certainly not least, litigants and the public. Thus, while I analyze these doctrines below, I cannot suggest that any given litigant or even her counsel will fully experience all of the potential effects I describe. The degree to which any effect may occur may depend on counsel's explanations; when counsel fails to offer any explanation at all for the twists and turns a case may take, the opacity of the system as a whole seems likely to produce a perception of low procedural justice.[224] Nonetheless, it is clear that abstention does have effects on parties and the public: the recent case involving California's same-sex marriage ban, *Perry v. Schwarzenegger*,[225] in which the Ninth Circuit abstained from a question of state law and certified that question to California's highest court,[226] demonstrates that such practices do create impressions of fairness (or unfairness) in the public eye. Especially in light of this type of case, exploring the possible permutations of abstention's procedural justice effects is a worthwhile exercise. To the extent that a lawyer, a sophisticated client, a client whose lawyer does explain procedure, or even the public understands at least some of the abstention process, these effects may be possible.

---

222. More fine-grained analysis of courtesy and respect seem largely inapposite in the structural context. Assuming that the courts do not go out of their way to use offensive or disparaging language, plain factual exposition ought to suffice in these contexts.

223. Chemerinsky, *supra* note 198, at 783–85, 800–03, 819–21, 872–73. Volumes have been written about the scope, merit, and wisdom of these doctrines; that is not my aim here.

224. *See supra* note 119 and accompanying text.

225. 591 F.3d 1147 (9th Cir. 2011).

226. Order Certifying a Question to the Supreme Court of California at 1–2, *Perry*, 591 F.3d 1147 (2011) (No. 10-16696).

1. Unclear State Law

There are three bases for abstention because of unclear state law: (1) abstention to avoid constitutional rulings (*Pullman* abstention), (2) abstention in diversity cases (*Thibodaux* abstention, discussed in the above Subpart on diversity[227]), and (3) abstention to defer to complex state administrative procedures (*Burford* abstention).

When federal courts abstain on the grounds set forth in *Railroad Commission of Texas v. Pullman Co.*,[228] they are doing so because "a state court's clarification of state law might make a federal court's constitutional ruling unnecessary."[229] The Supreme Court noted three reasons for abstaining in such circumstances. First, abstention in this type of case could avoid "needless friction" between the state and federal systems.[230] Second, abstention will reduce the likelihood of the federal court making mistakes as it interprets state law.[231] Third, the Court suggested that abstention in these cases would be a way to avoid unnecessary constitutional rulings.[232] For abstention based on *Burford v. Sun Oil Co.*,[233] the rationale is slightly different: to "protect[] complex state administrative processes from undue federal interference."[234] In *Pullman* cases, the federal court retains jurisdiction over the case, but in *Burford* cases, the case is dismissed entirely.[235]

For individual litigants, abstention is likely to frustrate perceptions of voice and opportunity to be heard. Notwithstanding the fact that defendants are typically happy with the status quo and have less interest in the case moving forward quickly, abstention forestalls *any* opportunity for either party to have its case heard. This stagnation may be of substantive benefit to the defendant, but it is not useful in fostering procedural justice perceptions. Nonetheless, the voice effects of abstention are likely to be greater on the plaintiff, since the defendant's voice is relevant only in relation to his opportunity to defend himself against the plaintiff's allegations. And if the plaintiff has no opportunity to be heard, then the defendant is likely to be less concerned—even procedurally—with an opportunity to likewise present her defense. From the perspective of impartiality and trust, the forum-selecting party presumably will experience a drop in procedural justice assessments, while a party who was in the forum unwillingly may believe that the state

227. *See supra* notes 205–09 and accompanying text.
228. 312 U.S. 496 (1941).
229. CHEMERINSKY, *supra* note 198, at 785.
230. *Pullman*, 312 U.S. at 500.
231. *Id.* at 499–500.
232. *Id.* at 501.
233. 319 U.S. 315 (1943).
234. New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 362 (1989).
235. CHEMERINSKY, *supra* note 198, at 808.

court or administrative body is more impartial and trustworthy. Finally, it is not clear how litigants would perceive abstention with regard to courtesy and respect. On one hand, the tremendous delay that abstention adds to proceedings, and the dismissive nature of a court's response, may suggest disrespect for the litigants. On the other hand, a refusal to consider the question because another tribunal may have more expertise in handling the matter or because of courtesy to the governmental body that originated the right in question may not appear discourteous or disrespectful to individual litigants.

From the perspective of the state and federal actors involved, abstention in *Pullman* and *Burford* cases seems likely to foster perceptions of procedural justice on the part of the state courts, legislators, and executives. Indeed, the Court's suggestion that one of *Pullman* abstention's goals is to avoid friction between the systems itself indicates that the doctrine has procedural justice implications. While reducing erroneous results and limiting unnecessary decisions are instrumental goals related to the accuracy of the judicial system, reducing friction suggests a more dignitary or relational goal for abstention. If, in cases involving abstention, federal judges are determining whether or not to decide certain types of matters that state governmental authorities (whether judges or administrative agency actors) may prefer to determine for themselves, then state actors will be more satisfied with the outcome when they have experienced procedural justice. Here, federal court abstention gives the state actors greater voice and opportunity to express themselves, sends a signal that federal courts are not biased and can be trusted to leave states to manage their own business, and shows courtesy and respect to the state system of government by allowing it to self-govern and interpret its own statutes. It may be that even occasional abstention by federal courts is sufficient to provide state actors with broader procedural justice benefits. That is, the ultimate division of labor in a larger set of cases is at issue, but being provided procedural justice in some subset of those cases suggests to state actors that the federal judiciary is handling its division of court business, more generally, in a procedurally just manner.

2. Pending State Proceedings

In *Younger v. Harris*,[236] the Supreme Court created an abstention doctrine that prevented federal courts from interfering with pending state court criminal proceedings, in part on comity grounds.[237] The scope of *Younger* abstention was subsequently broadened to include civil

236. 401 U.S. 37 (1971).

237. *Id.* at 44. The decision also relied heavily on equity jurisprudence principles. *Id.* at 43–44.

proceedings.[238] But civil *Younger* abstention is fairly narrow: a federal court may not enjoin or otherwise interfere with a private civil state proceeding, and should abstain from hearing the case only when there is an important state interest involved.[239]

From the perspective of individual litigants, the federal courts' refusal to hear a case involving a state court proceeding may decrease the plaintiff's experience of voice in the federal action, as the plaintiff's effort to give voice to concerns before a federal judge is stifled. On the other hand, for the defendant in the federal action, such abstention is likely to increase feelings of voice, because defendants will feel that they have had the opportunity to be fully heard in their preferred forum and will not be forced to divide potentially scarce resources to present cases in both forums. From a perspective of neutrality and trust, a party seeking a federal forum may do so because of distrust of the state forum, so abstention will decrease that party's assessments about the neutrality of the decisionmaker, who may decide both the actual litigation and where the case will be heard. The party seeking federal court relief may also believe that the federal court's refusal to hear the case is discourteous or disrespectful.

Discussions about the comity rationale for *Younger* abstention explicitly invoke concerns about harmony between federal and state courts. For example, Martin Redish has suggested, in arguing in favor of abstention in these cases, that federal court injunctions may disrupt state proceedings and are likely to engender ill will towards federal judges.[240] In contrast, Erwin Chemerinsky noted that the claim about friction is "based on an assumption about the likely psychological reactions of state court judges," and that in most cases, these judges "probably will not even know that an injunction has been issued."[241] Chemerinsky further argued that even if the state judges did know of the federal injunction, they would likely welcome the decrease in their workload and would be particularly pleased to be relieved of a controversial case. He also suggested that state court judges might take no "insult" from the removal of the case from their purview: this abstention "is no more of an affront to state courts than is the existence of removal jurisdiction."[242]

The procedural justice analysis differs. From the perspective of voice, an injunction diminishes state courts' opportunity to be heard on matters of importance. Additionally, state courts' opportunity to be

238. Moore v. Sims, 442 U.S. 415, 416 (1979).

239. *See, e.g.*, Pennzoil Co. v. Texaco, Inc, 481 U.S. 1, 12 (1987); *see also* Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989).

240. REDISH, *supra* note 186, at 344–45.

241. CHEMERINSKY, *supra* note 198, 830–31; *see also* Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 70 n.65 (1981).

242. CHEMERINSKY, *supra* note 198, at 831.

heard on the very question of whether they may consider the issue is completely nonexistent when a federal court unilaterally enjoins the state court proceeding. Thus, abstention to allow the state case to proceed is likely to enhance the state courts' perception of voice, especially because such abstention is only warranted for those cases that most clearly involve important state interests. Abstention is also likely to enhance state actors' perceptions that the federal judiciary is unbiased and trustworthy; an injunction of a current state proceeding might engender feelings that the federal court is making a grab for power that state actors may not perceive as bias-free. Finally, abstention may signal respect and deference to state courts, whereas an injunction may appear discourteous and disrespectful of state authority.

3. Duplicative Litigation

When parallel proceedings exist in both federal and state forums, principles of res judicata mean that whichever court is the first to rule on the identical issues will have the dispositive word on the outcome. In *Colorado River Water Conservation District v. United States*,[243] the Supreme Court provided that a federal court could abstain only in exceptional circumstances from hearing a case when there was a concurrent state action.[244] In most cases, then, abstention because of concurrent litigation is not permitted.

From a procedural justice viewpoint, individual litigants are able to participate fully in both state and federal jurisdictions. On one hand, litigating in two forums provides multiple opportunities for voice, but on the other hand, presenting one's case in two forums presents a resource-management problem that may undercut the ability to present one's case fully in either court. The effect of allowing the case to proceed in both forums on parties' perceptions of their opportunity to be heard is uncertain. From a neutrality and trust standpoint, the litigants may simply disagree about the most neutral forum; the party who prefers to be in federal court, then, is likely to be more dissatisfied with a decision to abstain on procedural justice grounds. From a courtesy and respect perspective, the party who initiated the first action may feel that the existence of a second action is disrespectful.

From the perspective of the judicial actors involved, federal judges ought to feel increased voice when they do not abstain, while state actors ought to feel increased voice when abstention does occur. When a federal court hears a duplicative case, it does not seem to implicate neutrality and trust concerns by state actors; when a federal court

243. 424 U.S. 800 (1976).

244. *Id.* at 817–18. There is great disagreement about what "exceptional circumstances" means, and a discussion of this question is outside my scope here.

abstains, it may heighten the perception of state actors that the federal court wants to act neutrally. Abstention signals courtesy and respect from the federal to the state court, but a refusal to abstain—when there is no special basis for such abstention beyond duplicativeness—does not seem particularly disrespectful to the state court, either.[245]

IV. Implications of the Psychology of Procedural Justice for Law and Psychology

An examination of the way in which individuals involved in our federal civil justice system may experience procedural justice demonstrates that certain practices and rules are more likely than others to produce subjective assessments of fairness, and sometimes may have differing effects on different parties. Understanding the antecedent factors that produce judgments about fairness is critical to ensuring a system design that meets expectations for fairness, and in turn such system design can yield increased deference to legal authorities and greater perceptions of legitimacy.[246] When litigants and other players in the legal system have an opportunity for voice, feel that a decisionmaker is trustworthy and neutral, and believe that they have been treated with courtesy and respect, they are more likely to believe that the decisionmaking process is fair and that the system is legitimate.

One concern about a psychological procedural justice approach, however, is that individuals may define fairness—including its shared antecedents—differently. While one person might care most about voice, another might care more about courtesy. While one party might find one set of behaviors courteous, another might find those same behaviors brusque. Indeed, the very basis of the psychology of procedural justice—measuring subjective perceptions of fairness—suggests the limitations of a one-size-fits-all template for procedural fairness. Although very few studies have sought to separate the effects of structural factors from the effects of individual differences on procedural justice judgments,[247] implicitly assuming, instead, that most of the variability in judgments comes from external structural features of dispute resolution mechanisms, it is certainly plausible that individual differences represent

245. I do not mean to imply that there are no substantive or distributive implications related to abstention. Presumably, no party would seek abstention unless they believed that it would provide a litigation advantage. However, I restrict my analysis to the procedural justice implications of the doctrine rather than the distributive justice implications.

246. A discussion about the potential to manipulate procedural justice variables in order to create a "false consciousness effect," in which people receive substantively poor outcomes but are satisfied because of fair process, is outside the scope of this Article. For a useful review of literature on this point, see generally MacCoun, *supra* note 20.

247. *But see* Rebecca Hollander-Blumoff, *Objective Antecedents of Procedural Justice Judgments in Bilateral Negotiation* (July 2011) (unpublished manuscript) (on file with Author).

a significant challenge to designing systems that appear fair to all participants.

At the same time, however, because findings have demonstrated that individuals rely on the same set of factors in making judgments,[248] even if the relative weight may differ between settings or individuals, these factors serve as a useful focal point in assessing the successes and failures of our procedural rules and doctrine. Additionally, studies have shown that procedural justice effects are widespread and that both the effects and the antecedents of procedural justice often cut across gender, culture, and racial divisions.[249] Individuals are often alike in their valuation of fair process, and they are often similar in the ways that they make procedural justice assessments: they converge in valuing voice, a neutral and trustworthy decisionmaker, and courteous and respectful treatment. Even so, individuals may differ, as discussed above, over when they believe they have been treated fairly. And in some situations, the same rule may have different effects—not just on different parties to litigation, but on different individuals who have different ways of, and thresholds for, assessing courtesy, or neutrality, or trustworthiness, or voice. But these shared antecedent factors at least provide a useful beginning point in thinking through the likely effects of certain rules.

More research on individual differences in assessments about the antecedent variables of procedural justice will be critical to the success of any future efforts to think in a systematic way about the rules' procedural justice effects. If certain practices lead to consistently high fairness assessments across a range of the population, we can be more positive about adopting those practices. If there is high variability for any particular behavior or reform, then it should not be adopted on the grounds that it will increase procedural fairness. But where rules and doctrine can be shaped to maximize perceptions of fairness—and where, as with courtesy and respect, procedural justice perceptions can be shaped at little additional cost or effort—decisionmakers and rule makers ought to be aware of the psychology of procedural justice as it will likely play out among litigants and system participants.

A focus on subjective perceptions has been rejected by some theorists who believe that the very nature of subjectivity calls for ignoring psychological procedural justice as meaningful in relation to the crafting or analysis of rules.[250] But this perspective is simply too narrow. A psychological procedural justice perspective is a critical complement to a philosophical and doctrinal approach. When theory and doctrine set the threshold rules for fair process, it is important to be able to clarify

248. *See* 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).

249. *See* Lind, *supra* note 114, at 775.

250. *See supra* note 12 and accompanying text.

whether those rules are able to effectuate the stated fairness goals. It should not suffice for theorists and rule makers to create rules and doctrine that they *mean* to be fair. Research on the psychology of procedural justice offers insight into the human psychology of perceiving fair process. When we better understand the mechanisms that drive assessments of fair process, we can better hone our fairness rules to meet those criteria, without losing a focus on normative theoretical commitments to fair process.

Additionally, procedural justice research in psychology offers a complement and a practical rejoinder to the debate among legal theorists about how to weight instrumental and dignitary concerns in procedural fairness. Although no research can purport to answer the question of how properly to balance accuracy, cost, fairness, and efficiency in designing procedures, the research on why people care about fair treatment has several implications in considering this calculus. First, the research shows that individuals are not solely instrumental in their desire for fair process. People do care about fair process for relational and dignitary reasons, in addition to its instrumental value.[251] This suggests that we ought to be careful to value the dignitary effects of process even when they have no likely effect on outcome. This leads to a related point: the procedural justice research also suggests that people value being treated with courtesy and respect, a system feature that is not a part of procedural due process analysis and does not speak in any way to accuracy. However, courteous and respectful treatment is relatively costless to provide, and such treatment may provide important societal benefits that the instrumental model overlooks. Because procedural justice research has demonstrated that people are not solely motivated by instrumental concerns, a system for fair process that addresses their needs ought to incorporate features that provide dignitary benefits, especially when those benefits are likely to have almost no negative impact on efficiency.

CONCLUSION

The legitimacy of our legal system is premised on its constitutional roots, which guarantee due process of law. But in practice, the subjective assessments about the quality of justice received will also influence participants' perceptions about legitimacy—in particular, the quality of procedural justice received. A focus on the subjective perceptions of participants in the legal system—on the psychology of procedural justice—offers a valuable perspective on the way that real people understand the legal system. Looking at specific legal rules and structures through the lens of procedural justice provides a multifaceted

251. *See* Tyler & Lind, *supra* note 65, at 121.

way to explore whether those rules and structures are effective in producing perceptions of fair processes that motivate people to obey and respect the law and legal system. Furthermore, considering rules and doctrine from a procedural justice perspective in psychology helps us understand and take seriously the effects of these rules and doctrines not just from an instrumental but also a dignitary perspective.

In this Article, I have suggested that individual litigants will evaluate the procedural justice of rules, behavior, and doctrine in court. More controversially, I have suggested that other participants in the legal process, such as judges, legislators, and executives, will also evaluate the procedural justice of the legal system writ large—not just considering the way that individual litigants' cases are judged, but also considering the way that judicial business is allocated between the state and federal judiciaries. Of course, empirical research is needed to clarify and refine our understanding of how individuals perceive our legal system with respect to procedural justice.[252] In particular, it would be useful to study litigants' procedural justice reactions to particular rules and behaviors in litigation, as well as to broaden the empirical focus to study reactions of judges and other government actors to different procedural mechanisms for the allocation of judicial business. This project contributes to the foundational conversation about what kinds of relationships we might hope to explore.

252. The call for empirical research to help improve civil procedure is not a new one. *See, e.g.*, Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67, 84–85 (1988).