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Article

Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study

DONNA SHESTOWSKY & JEANNE BRETT

Disputants who file claims in civil court have more procedural options than ever before. They can settle via negotiation, mediation, arbitration, trial or a host of other alternatives. To the extent that courts and lawyers want to competently advise disputants about how various procedures might satisfy their needs, legal professionals face the challenge of understanding how disputants initially evaluate their options, and how they perceive procedures after they have experienced them. To date, empirical studies of actual civil disputants have examined their perceptions of procedures almost exclusively after their disputes have ended. Moreover, none of the published research has assessed their perceptions both before and after experiencing a dispute resolution procedure for the same dispute. The relevant research as a whole, then, appears to disregard important ways in which disputants' perceptions might be dynamic.

To fill this significant gap in the literature, we present the first pre-experience (ex ante) and post-experience (ex post) longitudinal field study of actual civil disputants. Consistent with previous laboratory research, we found that disputants initially evaluated their options on the basis of the relative control they offered to disputants as opposed to third parties. We also found that initial attraction to third party control predicted ex post satisfaction with adjudicative procedures. However, initial attraction to disputant control did not predict ex post satisfaction with nonadjudicative procedures. This pattern suggests that the more attracted disputants were to third party control initially, the more satisfied they were if they ultimately experienced adjudication (and the more they initially disliked the idea of third party control the more dissatisfied they were with adjudicative procedures), whereas those who ultimately used nonadjudication were no more satisfied if they were initially attracted to disputant control than if they were not initially attracted to it. Recommendations for court policy and future research are discussed.

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Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study

DONNA SHESTOWSKY[*] & JEANNE BRETT[**]

I. INTRODUCTION

The last quarter of the twentieth century produced dramatic changes in how civil disputes are resolved. Courts and private alternative dispute resolution ("ADR") providers began to offer procedures that served as alternatives to the then-default of trial. Now, more than ever, disputants have a variety of options for resolving legal conflict,[1] including trial,

[*] Acting Professor of Law, University of California, Davis, School of Law. J.D., Stanford Law School; Ph.D. (Psychology), Stanford University; M.S. (Psychology), Yale University; B.A., Yale University.

[**] DeWitt W. Buchanan, Jr., Distinguished Professor of Dispute Resolution and Organizations, Kellogg School of Management, Northwestern University; Director of the Dispute Resolution Research Center, Northwestern University. Ph.D. (Industrial/Organizational Psychology), University of Illinois; A.M. (Labor and Industrial Relations), University of Illinois; B.A., Southern Methodist University. The authors would like to thank Nancy McLaughlin and Nathan Sabri for contributing indispensably by conducting the telephone interviews. Thanks also to Nicole Lemming for creating the online reporting system used to record responses to our telephone survey. Gratitude is extended to Kristin Behfar, Lisa Bingham, Floyd Feeney, Ed Imwinkelried, Randall Kiser, Russell Korobkin, Margaret Johns, Bobbi McAdoo, Danny Oppenheimer, Lisa Pruitt, Madhavi Sunder, and Nancy Welsh for their insightful comments on earlier versions of this work. This project also benefited from conversations that the first author had with Donna Stienstra and Sheila Purcell. Appreciation is also extended to research assistants Jennie Carbuccia, Katie Cornforth, Kirin Gill, Liane Katzenstein, Kimberly Lucia, Kelly Menjivar, Martin Siow and Andrew Slade and to research librarians Susan Llano, Erin Murphy, and especially Elisabeth McKechnie, for their research assistance. The first author would also like to thank the participants of the faculty workshop at the University of California, Davis, School of Law (2005), the Journal of Empirical Legal Studies (JELS) Junior Scholars Conference at Cornell Law School (2006), and the annual conference of the International Academy of Law and Mental Health in Padua, Italy (2007) for their helpful suggestions. Special thanks to the Dispute Resolution Research Center at Northwestern University, and the University of California, Davis, for their financial support of this project, and to the Law Division of the Cook County Circuit Court for providing complementary electronic versions of their case filings. Correspondence regarding this Article should be addressed to Dr. Donna Shestowsky, University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, CA 95616.

[1] Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, DISP. RESOL. MAG., Summer 2004, at 3–5 (noting a sixty percent decline in the absolute number of trials since the mid-1980s and arguing that the shift to ADR might explain this phenomenon). The goal of this Article is not to argue whether procedures aimed at settlement are normatively good or bad, but rather to provide a descriptive study of disputants' experiences and perceptions with various procedures. For thoughtful discussions of the former issue, see generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement* (*In Some Cases*), 83 GEO. L.J. 2663 (1995).

arbitration,[2] mediation[3] and negotiation,[4] among other procedures.[5] Yet, despite nearly four decades of empirical research on laypeople's[6] subjective expectations of, and experiences with, dispute resolution procedures, our understanding of the psychology of dispute resolution from the disputants' perspective remains quite rudimentary.

A significant number of field studies have tried to illuminate civil disputants' perceptions of different dispute resolution procedures.[7] An intriguing aspect of this literature is the striking uniformity in the basic methods of such research. That is, with just one exception, studies have examined disputants' preferences only *after* they have experienced a procedure, not before.[8] Thus, how civil disputants evaluate their options at the inception of their dispute remains unclear. Moreover, not one published study has investigated disputants' perceptions at *both* the start of the dispute and after the procedure used to resolve that dispute has ended.[9]

This temporal uniformity is surprising given that dispute resolution is a trajectory in time, and perceptions reasonably might change even for the very same dispute. Although examining perceptions at many points in the dispute resolution trajectory would be interesting from a psychological perspective, perceptions at two particular points are most meaningful from a policy standpoint. First, disputants' perceptions at the dispute's inception are critical because such perceptions presumably guide their procedural choice, for example, whether to mediate or pursue trial. Second, disputants' perceptions *after* the dispute resolution procedure has ended are critical because reactions at that point in time tend to predict whether they will voluntarily comply with the outcome and how much respect they

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[2] Typically more formal than mediation, arbitration involves the submission of a dispute to a third party (or a panel of third parties) who acts as a fact-finder and renders a decision after hearing arguments, including opening and closing statements, and reviewing evidence. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 14 (2005). In private arbitration, decisions are typically binding; in court-connected arbitration, outcomes are non-binding. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 187–88 (2003).

[3] In mediation, a neutral third party assists disputants in reaching a negotiated settlement of their differences. The mediator is not empowered to render a decision or to make findings of fact. RISKIN ET AL., *supra* note 2, at 15.

[4] In this Article, "negotiation" refers to bilateral settlement negotiation, wherein the lawyers or parties (or both) attempt to arrive at a resolution without the assistance of a third party.

[5] For a description of such procedures, such as the summary jury trial and early neutral evaluation, see RISKIN ET AL., *supra* note 2, at 14–18. Some procedures are available in the private ADR market; others are court-connected (required or advised by the court). Some procedures are available in both the private market and in court programs.

[6] In this context, the term "laypeople" refers to individuals who are not in the legal profession.

[7] *See infra* Part III (discussing published research of ex ante perceptions of procedural options).

[8] *See infra* notes 50–54 and accompanying text (describing the temporally comparative studies conducted by psychologist Tom Tyler and his colleagues).

[9] This conclusion is based on searches conducted on Westlaw, Psych Info, and Social Science databases. Final search was conducted in September 2008.

subsequently have for the legal system more broadly.[10]

Because of the homogeneity in how and when disputants' perceptions have been studied, many key questions remain unanswered. First, how do civil disputants evaluate procedural options at the beginning of the dispute resolution process? Second, do their initial preferences for various procedural models in fact predict which procedure they ultimately use? Third, is their ultimate satisfaction with the procedure they use associated with their initial evaluation of that procedure? These questions constituted the primary motivation for our project.

To that end, this Article explains the rationale underlying our research, describes our novel research methods and our sometimes surprising findings, and discusses the potential policy implications of those findings. Part II provides an overview of the empirical literature examining how laypeople evaluate dispute resolution procedure options.[11] It also explains why it is important for lawyers and court administrators to understand how disputants perceive their dispute resolution options.[12] Part III further develops the rationale underlying our research by synthesizing how lay perceptions of dispute resolution procedures have been studied thus far, and explains why such methods appear to be inadequate for fully understanding their perceptions.[13] Part IV presents the methods and results of our study.[14] It was designed not only to investigate disputants' pre-experience perceptions in depths not accomplished by previous research, but also to examine how disputants evaluate procedural options for their dispute both before and after they experienced a procedure to resolve that dispute. Given the novelty of our methods for the purpose of studying disputants' perceptions, the longitudinal aspect was intended to be an initial exploration that would set a precedent for further research of its kind. After reporting our results, we discuss the findings in the context of the psychology of dispute resolution and potential implications for court policy and client counseling.[15]

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[10] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (discussing research suggesting that disputants' perceptions of their experiences with procedures are predictive of their attitudes towards the legal system).

[11] *See infra* Part II (describing empirical research of laypeople's perceptions of dispute resolution options).

[12] *See infra* notes 28–36 and accompanying text (noting the importance of individual choice and democratic governance in procedural justice).

[13] *See infra* Part III (describing studies examining laypeople's perceptions of procedural justice and the need for additional research).

[14] *See infra* Parts IV.A, IV.B, IV.C (reporting the methods used in the longitudinal field study and the study's findings).

[15] *See generally infra* Part IV.C.

II. LAYPEOPLE'S SUBJECTIVE EVALUATIONS: WHAT WE ALREADY KNOW ABOUT THEM AND WHY THEY ARE IMPORTANT

As psychologist Tom Tyler has pointed out, "[s]ince people typically have had little experience with various dispute resolution procedures, it might seem that they would lack clear preferences, since they have no standards against which to judge the fairness of the various procedures they might encounter."[16] Although most laypeople may lack experience with formal dispute resolution, research has demonstrated that they are in fact not reluctant to express preferences among procedures or to "rate" the features of procedures.[17] In fact, laypeople seem to have very clear and strongly held views about various procedural options, however they derive those views.[18] Importantly, these views have clear consequences for their reactions to dispute resolution efforts, their evaluations of third party neutrals, and, more broadly, the legal system as a whole.[19] The literature that examines how laypeople, such as disputants, derive psychological satisfaction from procedures falls under the rubric of "procedural justice" research.

Procedural justice pertains to the fairness of the processes by which decisions are made, and stands in contrast to distributive justice, which concerns the fairness of the outcomes of those procedures, in terms of the distribution of rights or resources.[20] Research has demonstrated, somewhat counter-intuitively, that assessments of dispute resolution processes and outcomes are not entirely dependent upon each other.[21] Instead, people's

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[16] Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643, 643 (1980); *see id.* ("Recent research and theory on the factor affecting perceptions of fairness and justice have followed two discrete paths; 'distributive justice' work . . . and 'procedural justice' work . . . .").

[21] Researchers have found that evaluations of process and outcomes comprise two distinct factors in principal components analysis. Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 88 n.24 (reviewing the relevant research); Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1415–20 (1979) (reporting that "absent the personal participation [in the decisionmaking process] there is no relation between perceptions of" procedural and distributive justice); *see also* E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (reporting research finding that fairness judgments were enhanced when participants had an opportunity to voice their opinions before a decision was announced even when there was no chance of influencing the decision). The procedural justice effect has generally been found to hold across demographic variables such as race and gender, as well as case variables (such as type of legal issue or amounts in controversy). *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 173 (2005) (synthesizing the body of literature and noting that the procedural justice effect has been documented across "contexts involving every major demographic category in the United States").

perceptions of how fair a procedure is tend to depend as much, and sometimes more, on process characteristics than on whether the outcome favored them.[22] According to psychologist John Thibaut and lawyer Laurens Walker, the originators of procedural justice research, people's preferences for procedures develop from their perceptions of which procedures are most fair.[23] Specifically, when laypeople assess the fairness of a procedure, they tend to evaluate the distribution of control that it offers, and then indicate preferences for procedures that allow them (as opposed to third parties) to control the development and selection of information that will be used to resolve the dispute. This interpretation of Thibaut and Walker's preference research has variably been labeled "process control theory" or the "voice hypothesis."[24]

For over four decades, subsequent researchers have followed the procedural justice paradigm in an attempt to understand how laypeople,

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[22] DAVID B. ROTTMAN, NAT'L CTR. FOR STATE CTS., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 25–26 (2005), *available at* http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf (finding in a study of over 2400 adults from California that how fairly they regarded court outcomes was "secondary to procedural fairness concerns"). Laboratory studies that have differentiated between evaluations before and after experiencing a procedure suggest that in post-experience evaluations process matters more to laypeople than outcomes. Tom R. Tyler et al., *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 GROUP PROCESSES & INTERGROUP REL. 99, 113–16 (1999) [hereinafter Tyler et al., *The Two Psychologies*]. As Nancy Welsh has noted:

> [P]erceptions of distributive justice generally have a much more modest impact than perceptions of procedural justice.
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> . . . .
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> [L]aboratory and field studies that show that greater perceptions of procedural justice generally produce greater perceptions of distributive justice, regardless of whether the outcome is positive or negative. Occasional studies show that this effect may be reduced when the outcome is positive, but also that this effect continues to be strong when the outcome is negative.
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> . . . Some studies have found that variations in decision control have no or much smaller effects on procedural justice judgments than variations in process control . . . [and that] process control may be "more important to people's feelings of being fairly treated than . . . decision control."

Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 818 & n.150, 826 n.190 (2001) (internal citation omitted).

[23] *See* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 216–17, 222 (2004) (summarizing Thibaut and Walker's relevant research); John Thibaut & Lauren Walker, et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1283 (1974) ("The best predictor of subjects' preference ratings . . . is their rating of the fairness of the various procedures, with greater preference expressed for those procedures deemed most fair.").

[24] *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 93 (2002) (commenting on how the "'voice' hypothesis derives directly from Thibaut and Walker's original research, which pointed to the importance of control over process and suggested to Thibaut and Walker that individuals have an instrumental interest in process control—that is, individuals care about process because they believe it shapes outcome"); Donna Shestowsky, *Misjudging: Implications for Dispute Resolution*, 7 NEV. L.J. 487, 493 (2007) (describing the "process control" or "voice" hypothesis and its origination in early procedural justice research).

such as typical civil disputants, evaluate dispute resolution options.[25] Although several competing theories have developed to explain such evaluations,[26] the "process control" theory developed by Thibaut and Walker remains dominant.[27]

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[25] Important and reliable findings about laypeople's evaluations have emerged from the corpus as a whole. Many studies support the idea that people not only greatly value control over process, but that they also value opportunities for voice and fair treatment by third parties, and that these factors heavily influence their evaluations of procedures, as well as subsequent voluntary compliance with outcomes. D. E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1087 (1989) (explaining that "one of the most consistent findings in the research on procedural justice is that dispute resolution procedures that provide high process control (i.e., control over presentation of evidence, and the handling of the 'case' before a third party) to disputants will enhance perceptions of procedural and distributive fairness"); Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 322 (2006) (noting the "widespread" research "finding that, holding outcomes (especially undesirable ones) constant, people are significantly more satisfied if they rate as 'fair' the process that resulted in that outcome"); Lind et al., *supra* note 21, at 957 (noting that perceptions of fairness are enhanced by the opportunity to voice opinions); Welsh, *supra* note 22, at 791–92, 817–22 (synthesizing the research, noting the reliability of the "voice" effect, the importance of fair treatment, and observing that "[p]rocedural justice research indicates clearly that disputants want and need [to] . . . control the telling of that story"). *But see* MacCoun, *supra* note 21, at 184 (synthesizing the literature and concluding that research shows that fair process matters, but that whether process or outcomes matter more "may not be answerable in a meaningful, global way").

[26] The "instrumental" or "social exchange" theory suggests that people perceive control over process as an indirect means of obtaining favorable outcomes. *See* Debra Shapiro & Jeanne Brett, *What is the Role of Control in Organizational Justice?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 155, 157–61 (Jerald Greenberg & Jason Colquitt eds., 2005) (discussing perceived fairness of outcome control procedures as opposed to non-outcome control procedures, and why the voice effect affects perceived outcome control); Donald E. Conlon, *Some Tests of the Self-Interest and Group-Value Models of Procedural Justice: Evidence from an Organizational Appeal Procedure*, 36 ACAD. MGMT. J. 1109, 1110 (1993) ("[T]he instrumental model suggests that people desire control over procedures because this control will increase the likelihood of favorable outcomes.") (internal citation omitted); Welsh, *supra* note 22, at 826–27 ("According to the social exchange theory, disputants value the opportunity for voice because this provides them with the opportunity to influence the decision maker and indirectly influence the final outcome."). Later research, however, demonstrated that the opportunity for voice heightens disputants' judgments of fair treatment, even when they know that their voice will not and cannot influence the outcome. Lind et al., *supra* note 21, at 958; Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (concluding on the basis of laboratory research, that "voice increases satisfaction, irrespective of whether it is linked to decision control. In other words, voice without decision control does indeed heighten judgments of procedural justice . . . . In fact, it does so as much as when voice is linked to actual decision control"); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 765 (2004). That is, instead of perceiving procedures strictly in instrumental terms, individuals often define fair process in terms of how respectfully the involved third party or authority figure treated them because such treatment communicates their status and inclusion in groups. This explanation has underscored support for another theory that attempts to explain the procedural justice effect—the "group value" model. E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230–40 (1988). A newer theory designed to explain the procedural justice effect, the "fairness heuristic" hypothesis, suggests that when individuals lack a clear metric for assessing the fairness of a given dispute outcome (frequently the case in legal disputes), they use their evaluation of the process as a mental shortcut for assessing the outcome. Kees van den Bos, *Fairness Heuristic Theory: Assessing the Information to Which People are Reacting has a Pivotal Role in Understanding Organizational Justice*, *in* THEORETICAL AND CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE (S. W. Gilliland et al., eds., 2001).

[27] *See* Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 350–52 (2003)

The procedural justice paradigm developed by Thibaut and Walker highlights the importance of laypeople's subjective analysis of the legal system. This is so for three primary reasons. The first is philosophical. As legal scholars have argued, individual choice and preference are the benchmarks of procedural justice.[28] Justice develops from the "concerns, needs, and values of the people who bring their problems to the legal system."[29] In this sense, the parties "own" their disputes and their basic preferences should guide their resolution.[30] Although "the legal system and society more generally have legitimate interests in the interactions of citizens [and the reduction of conflict,] those interests [should] not preclude concern about the [subjective needs] of disputants."[31] The importance of disputants' subjective preferences has been echoed by the American Bar Association's support for client autonomy in its Rules of Professional Conduct.[32]

The second reason for regarding laypeople's subjective impressions as critically important is that they can be used to advance the goals of democratic governance. As political scientist Austin Sarat has noted, "it would be strange, indeed, to call a legal system democratic if its procedures and operations were greatly at odds with the values, preferences, or desires of the citizens over a long period of time."[33] After all, "[d]emocracy functions as a system in which formal and informal institutions serve the purpose of translating social preferences into public

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(reviewing the dominant procedural justice theories).

[28] Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1808–10 (1997); *see also* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration,* 56 U. MIAMI L. REV. 873, 880 (2002) ("[S]elf-determination includes procedural justice notions of a disputant's perceptions of control and fairness."); Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 490–91 (2003) ("[T]he ex ante argument holds that a procedure is fair if all parties would have agreed to the procedure had they been able to contract for it in advance of ('ex ante') their dispute.").

[29] Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 874–75 (1997); *see also* Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 99 (2002) (arguing that the subjective perceptions of disputants are an important consideration in evaluating ADR programs "[b]ecause how people feel about their governmental institutions is so important in a democracy").

[30] *See, e.g.,* Brazil, *supra* note 29, at 97 ("Because it is the time, money, and sense of fairness of the *parties* that is primarily at stake, it is not obvious why courts should not give the parties the opportunity to decide for themselves how to weigh, in any given case, these sometimes-competing values.") (emphasis in original); Tyler, *supra* note 29, at 874–75 (explaining rationale for regarding disputants as the "own[ers]" of their disputes).

[31] Tyler, *supra* note 29, at 875.

[32] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4 (2007) (providing for the division of authority between lawyer and client). *But see* Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1067–68 (2003) (explaining that the ABA's Model Rules of Professional Conduct present a blurry division between the appropriate roles of lawyers and clients because the rules of professional conduct can be interpreted to condone either an independent or a client-centered stance).

[33] Tyler, *supra* note 29, at 871–72 (quoting Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 430 (1977)).

policies. Dispute resolution mechanisms are among these institutions."[34] Court procedures that do not prioritize the needs of the courts' constituents are likely to foster discontent and mistrust.[35] The same applies to lawyering—the reputation of the legal profession is apt to suffer when clients perceive lawyers as misunderstanding their interests and offering advice that fails to adequately account for their needs.[36] Court policy and lawyer-client counseling protocols that take into account disputants' preferences can promote the democratic functioning of dispute resolution mechanisms and increase citizens' respect for the legal system as a means for effectively and respectfully reducing legal conflict.

The final set of reasons is pragmatic. As empirical research has demonstrated, disputants are more likely to comply voluntarily with dispute resolution outcomes when those outcomes are produced by procedures that they perceive as fair, where "fairness" relates to control over process.[37] That is, when disputants use procedures that grant them some meaningful level of process control, they are likely to perceive those

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[34] Edgardo Buscaglia & Paul B. Stephan, *An Empirical Assessment of the Impact of Formal Versus Informal Dispute Resolution on Poverty: A Governance-Based Approach*, 25 INT'L REV. L. & ECON. 89, 90 (2005).

[35] Magistrate Judge Wayne Brazil has articulated this point well:

> [A] preoccupation with reducing docket congestion . . . can impose pressures on neutrals and on program administrators that can threaten the quality and integrity of ADR processes. . . .
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> It . . . is bad for the courts that sponsor docket-driven ADR programs because such programs invite the parties to think that the court's primary goal is to get rid of them.
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> When the people believe that an institution's goal is to get rid of them they are likely to resent that institution, not respect it. Thus, docket-driven ADR programs can make the people feel alienated from their public institutions and from the democracy those institutions run.
>
> A very different picture emerges when . . . . [i]nstead of looking primarily inward, toward themselves, courts . . . look primarily outward, toward the people. The preoccupation in these courts is not with institutional self-protection but with serving the people.

Wayne D. Brazil, *The Center of the Center for Alternative Dispute Resolution*, 6 PEPP. DISP. RESOL. L.J. 313, 315–16 (2006).

[36] Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 256–57 (2004).

[37] *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent,* 18 LAW & SOC'Y REV. 11, 20-22 (1984) [hereinafter McEwen & Maiman, *Mediation in Small Claims Court*] (concluding that litigants in consensual processes such as mediation are more likely to perceive the outcome as fair and just and, subsequently, be more likely to comply with the outcome than in adjudicated cases); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 264 (1981) (finding that, compared to adjudication, mediation of small claims disputes led to greater satisfaction and greater perception of fairness); Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298 (2004) (concluding that offenders who participate in programs that offer them more process control and the opportunity to shape the outcome are more likely to comply with the outcome and are less likely to re-offend than those who experience more adjudicative procedures); *see also* Floyd Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148, 159 (1987) (describing research suggesting that "decisions perceived as unfair are economically inefficient because of the increased resistance" to them).

procedures as fair, which can in turn make them more likely to comply voluntarily with the outcomes.[38] Consequently, post-dispute conflict between the parties should be less likely to arise and, as a result, less intervention by government institutions should be needed to enforce agreements. Moreover, research has shown that because procedures that offer process control make people feel respected and treated with dignity, laypeople who experience such procedures subsequently demonstrate greater respect for the legal system more generally.[39] As Tyler has aptly stated, when authorities offer procedures that people perceive as fair, they prompt people to "obey the law."[40] Thus, it is critical for legal professionals and institutions to attempt to comprehend, and demonstrate respect for, laypeople's subjective impressions of dispute resolution procedures.

To comprehend the limitations of the current state of knowledge about disputants' evaluations of dispute resolution procedures, it helps to understand the methods used to derive the knowledge that research has thus far produced. It is to this issue of methods that we now turn.

III. LAYPEOPLE'S SUBJECTIVE EVALUATIONS: HOW WE KNOW WHAT WE KNOW

A significant number of studies have assessed ex ante (pre-experience) perceptions of procedural options. Thibaut and Walker's classic studies of this type were laboratory studies,[41] as are most of the subsequent studies on procedural preferences.[42] In the laboratory paradigm, participants (usually college students) typically read a short description of facts underlying a hypothetical legal dispute and consider the scenario from a randomly assigned perspective (e.g., the viewpoint of the plaintiff or the defendant). They subsequently review descriptions of procedures and evaluate each as a possible means for resolving the hypothetical dispute.[43]

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[38] The positive consequences associated with giving disputants control is supported by a long line of procedural justice research. For a discussion and review of the relevant literature, see Shestowsky, *supra* note 23, at 216–18.

[39] *See* Tyler, *supra* note 16, at 368.

[40] TYLER, *supra* note 10, at 4–6.

[41] *See generally* Thibaut & Walker et al., *supra* note 23 (discussing several laboratory experiments).

[42] For a review of this early social psychological research, see generally Jeffrey Z. Rubin, *Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations*, 87 PSYCHOL. BULL. 379 (1980). *See also* Mark R. Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENV. U. L. REV. 303, 327–35 (1995) (summarizing several studies); Mark R. Fondacaro et al., *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 977–80 (2006) (summarizing additional studies).

[43] In a very uncommon alternative form of the laboratory study, participants read the facts of a dispute, are assigned a role, participate in a simulated procedure to which they are randomly assigned, and then are asked to evaluate that procedure. *See, e.g.*, Cynthia F. Cohen & Murray E. Cohen,

Field studies complement this type of research in the form of ex post (post-experience) studies.[44] In the typical field study, individuals involved in an actual legal dispute are asked to evaluate their experiences retroactively.[45] This is "typical" in the sense that, to our knowledge, only one published field study has examined perceptions of actual disputants prospectively, that is, at the start of the dispute resolution process.[46]

Relative Satisfaction with ADR: Some Empirical Evidence, DISP. RESOL. J., Nov. 2002–Jan. 2003, at 36, 39 (describing a study wherein participants read the facts of a hypothetical dispute, were assigned to a role, and then participated in a simulated ADR procedure); Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 265–68 (1976) (describing a study in which undergraduate participants were randomly assigned a disputant role, reviewed evidence in a hypothetical dispute, and then participated in and evaluated simulated ADR procedures wherein law students served as third parties).

[44] By our estimation, the field study of disputants' perceptions that is most commonly discussed in the legal literature is the work conducted by E. Allan Lind and colleagues on behalf of the RAND Corporation. The "RAND study," as it is known, examined tort litigants' perceptions of procedural justice by surveying disputants in three suburban jurisdictions who had used one of three third party procedures: settlement conference, trial, or arbitration. E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES vii–viii (1989). The researchers found that disputants tended to rate non-binding arbitration and trial as more procedurally fair than the (less adjudicative) judicial settlement conference. *Id.* at 44–45. A re-analysis of the data comparing each of the third party procedures to unassisted bilateral negotiation concluded that, compared to negotiation, the average procedural fairness scores were higher for disputants who experienced trial or arbitration, although "[l]itigants' procedural fairness ratings for judicial settlement conferences were somewhat lower than were those for bilateral settlement, but the difference was not statistically significant." 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, 961–66 (1990). These analyses relied exclusively on ex post data.

[45] *See, e.g.*, Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259, 260 (1996) (reporting on post-dispute surveys, mailed to disputants and their lawyers, representing 449 cases administered in five states by providers of dispute resolution services; cases included contract, construction, personal injury, property damage, and environmental disputes); Lind et al., *supra* note 44, at 990 (reporting on telephone interviews of 122 litigants whose cases were tried in Fairfax County, Virginia, 74 litigants whose cases had been arbitrated in Bucks County, Pennsylvania, and 90 litigants who had participated in judicial settlement conferences in Prince Georges County, Maryland); 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, 1170 (1993) (reporting on phone interviews with sixty-nine coal miners who had their grievances mediated and eighty-nine coal miners who had their grievances arbitrated).

[46] Our extensive literature review across the Westlaw and PsychInfo databases found only one study that reported the ex ante perceptions of actual disputants (final search conducted in April 2007). The study was specific to employment cases and investigated perceptions of a narrow list of procedures. Researchers mailed questionnaires to 3000 disputants with employment cases pending at the Illinois Human Rights Commission and offered fact-finding, mediation, or final and binding arbitration as possible alternatives to assess attitudes about these procedures; 109 employers and 102 claimants responded to the survey. Lamont E. Stallworth & Linda K. Stroh, *Who is Seeking to Use ADR and Why Do They Choose To Do So?*, DISP. RESOL. J., Jan.–Mar. 1996, at 30, 33–36 (1996). Some comparative studies suggest that we should not expect results from real-life field studies to differ from results obtained in laboratory experiments. *See* Yochi Cohen-Charash & Paul E. Spector, *Erratum to "The Role of Justice in Organizations: A Meta-Analysis,"* 89 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 89, 89 (2002) (correcting Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis,* 86 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 278, 309 (2001)) (clarifying that a statistical comparison of field and laboratory studies yielded no significant differences); John C. Shaw et al., *To Justify or Excuse?: A Meta-Analytic Review of the Effects of Explanations*, 88 J. APPLIED PSYCHOL. 444, 450 (2003) (reporting the results of a

Unlike laboratory studies, field studies rarely randomly assign participants to procedures, and they necessarily involve participants responding to different disputes.[47] Even the few field studies that have investigated disputants' perceptions longitudinally have reported data from disputants at multiple points in time only *after* they already experienced a procedure.[48]

Thus, the existing research examining disputants' evaluations of dispute resolution procedures has focused on either ex ante (pre-experience) or ex post (post-experience) evaluations, but not both. Several theoretical articles have suggested that differences between ex ante and ex post preferences might exist.[49] We are unaware of any published study comparing ex ante and ex post perceptions of actual civil disputants who experienced different procedures.

To our knowledge, the published research that has come the closest to studying evaluations in this temporally comparative manner was a set of laboratory studies by psychologist Tom Tyler and his colleagues. This

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meta-analysis which found no differences in correlations between explanations and reactions to justice decisions across vignette versus non-vignette studies).

[47] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 601 n.185 (2008).

[48] *See, e.g.*, McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 37, at 18–19 (describing a study wherein disputants who experienced either mediation or trial were interviewed four to eight weeks after resolution, with a sub-sample interviewed six to eighteen months after resolution); Jessica Pearson & Nancy Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 500–03 (1984) (describing a study wherein disputants who used either mediation or trial for custody or visitation disputes were interviewed during the process, three months after resolution, and again six months later); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 133 (1985) (describing a quantitative study of interviews with plaintiffs and defendants prior to a "resolution hearing" and again six to twelve weeks after their case was settled or adjudicated). *See also* Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 607–09 (2004) (describing a study wherein users of a special education mediation program were interviewed regarding their aspirations and evaluations at three points in time—immediately before the mediation session, immediately after, and then approximately eighteen months later—but not reporting pre-mediation data).

[49] *See, e.g.*, Hay, *supra* note 28, at 1804–05 (arguing that "justice to the litigant," or considerations of individual welfare maximization and distributional fairness, favor giving priority to ex ante preferences); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1209–10 (2001) (noting the perils of failing to appreciate the difference between the ex post view and the ex ante view with respect to the perceived attractiveness of various policies); Shestowsky, *supra* note 23, at 213–14 (arguing that "conclusions drawn from the [pre-experience preference] research . . . are not necessarily generalizable to postexperience evaluations"); *see also*, Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 390 (2000) (arguing that, because "the party satisfaction measure and its temporal stability is an important gauge of the quality of [ADR and] there is data, but not definitive data[,] . . . [t]o fully evaluate user views of ADR, there must be sustained examination that does not measure party attitude only in the near aftermath when there may be either disappointment or euphoria"). One empirical study observed in its literature review that laboratory studies tend to study selection preferences, whereas field studies tend to assess post-experience attitudes, but the study did not test for such possible differences in perception empirically. Regina A. Schuller & Patricia A. Hastings, *What Do Disputants Want? Preferences for Third Party Resolution Procedures*, 28 CAN. J. BEHAV. SCI. 130, 130–31 (1996).

research tested the idea that the standards or criteria used in assessing procedures might depend on when the inquiry into disputants' perceptions is made.[50] Specifically, their project was composed of four studies hypothesizing that the decision-making criteria involved in developing ex ante preferences differ from those involved in making evaluations ex post. To assess ex ante perceptions, they asked research participants to indicate their preferences for resolving hypothetical conflicts; to assess ex post evaluations, they asked the same participants to evaluate the procedures they used for an actual prior conflict that they experienced.[51] Tyler and his colleagues found that participants arrived at ex ante preferences by choosing procedures they felt would help them to maximize their self-interest in terms of material outcomes.[52] By contrast, disputants based their ex post assessments on the quality of the treatment they received during the procedure.[53] When evaluating procedures in hindsight, they were more apt to favor those they felt treated them respectfully and fairly.[54] Thus, evaluation standards differed depending on when in the trajectory participants stated their preferences.

A recent theoretical paper by Donna Shestowsky argued that such temporal differences in assessment criteria might lead disputants to prefer different procedures depending on where they are in the trajectory.[55] She argued that temporal differences might help to explain why scholars have reached different conclusions regarding which procedures disputants in the aggregate tend to prefer most.[56] As she pointed out, some studies support the idea that disputants prefer adjudicative procedures to nonadjudicative ones, whereas other studies suggest the opposite.[57] The key to understanding this apparent contradiction requires a close examination of the methods used across the studies. In conducting such a close analysis, one can observe that it is pre-experience research (namely, laboratory studies) that has tended to find a preference for adjudicative procedures,

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[50] Tyler et al., *The Two Psychologies*, *supra* note 22, at 102.

[51] *Id.* at 102–13.

[52] *Id.* at 113–14. As Tyler points out:

> [P]eople typically view themselves as reacting to their experiences based upon the favorability or fairness of their outcomes. This self-perception of motivation reflects their acceptance of the "myth of self-interest," the mistaken belief that they are instrumentally motivated. Acting on this "myth," people make choices among procedures based upon their expected gains and losses through engaging in various courses of action.

Tom R. Tyler, *Trust and Law Abidingness: A Proactive Mode of Social Regulation*, 81 B.U. L. REV. 361, 367–68 (2001).

[53] Tyler et al., *The Two Psychologies*, *supra* note 22, at 114.

[54] *Id.*

[55] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 553 (2008).

[56] *Id.* at 552–53.

[57] *Id.* at 552.

whereas it is mainly post-experience research (primarily field studies) that has generally suggested an overall preference for nonadjudicative procedures. Shestowsky noted that, although this difference appears to provide a solid synthesis of past research, this perceived phenomenon should be tested empirically by examining perceptions of the very same disputes both ex ante and ex post.[58]

Even in light of the thoughtful empirical research by Tyler and his colleagues, exactly when and how ex ante perceptions might differ from ex post perceptions for the same legal dispute remains an open question. Their research neither focused on legal conflict, nor was it directed towards examining how ex ante and ex post perceptions might differ for the very same dispute. Moreover, their ex ante data were based on hypothetical disputes rather than real conflicts. The study presented here fills each of these gaps. For that reason, our methods allowed us to investigate some important unanswered questions. First, how do civil disputants evaluate procedural options at the start of the dispute resolution process? Second, do their initial preferences for different characteristics or features of procedures predict which procedure they ultimately use? Third, is ex post satisfaction with their procedure associated with their ex ante evaluations?

We were motivated by the implications that would avail if we came to find that disputants tend to perceive procedures differently ex ante versus ex post. For example, to the extent that disputants evaluate procedures differently when they initially review them as options compared to after they have experienced them, lawyers would need to consider the counseling implications of this phenomenon. It may be possible to help disputants psychologically prepare for the fact that they might value certain procedures more or less after the dispute has ended. Lawyers or court personnel could help disputants anticipate differences in pre- versus post-experience evaluations and disputants might take such information into account as they make decisions affecting their dispute.

Moreover, a finding of pre- versus post-experience differences in perceptions would have important ramifications for court policy. Many courts currently require disputants to attempt to resolve their disputes through ADR before gaining access to trial.[59] What if disputants do not have favorable initial impressions of the procedures they are being compelled to use? Will that negatively affect their post-experience evaluations? Given the important role that post-dispute evaluations generally play in disputants' respect for the legal system and their willingness to voluntarily comply with dispute resolution outcomes, a

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[58] *Id.* at 554.

[59] *See, e.g.*, Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 373–77 (2001) (stating that many "states [have] jumped on the bandwagon" by mandating mediation for certain civil disputes, and examining such programs in several states).

greater understanding of the complexity of disputants' evaluations would greatly benefit court policy-making.

In light of such potential applications, we conducted a longitudinal study that assessed disputants' ex ante and ex post perceptions across the same disputes. To examine ex ante preferences, we presented disputants involved in a live legal dispute with a list of options for three core characteristics (or "features") of procedures (outcome, process, and substantive rules), which we call "feature options."[60] For example, we gave them a set of options pertaining to the outcome (e.g., who would make the final decision and whether that outcome would be advisory or binding), how the process would evolve (e.g., how informal the process would be and whether disputants could express themselves conversationally or only in response to questions posed by others), and the substantive norms or rules that would be used to resolve the dispute (e.g., whether the law would automatically apply or whether the parties could decide to use other standards). Although variations of this feature-based approach are commonly used in laboratory studies in the procedural justice paradigm, to our knowledge it has never been used to assess the perceptions of real disputants.

This method differs from that used in past procedural preference research, which distinguished procedures mainly on the basis of just two features: the outcome (i.e., whether the disputants or a third party neutral determines it) and the process (i.e., whether the disputants or a third party controls the process that leads to the eventual outcome).[61] There are two significant limitations with this older approach. First, when process control is studied in the laboratory, it is typically described to participants as an opportunity to control the presentation of evidence.[62] But, in modern practice, disputants can control the process in many other ways, including by deciding whether to speak to the opposing party directly (i.e., face-to-face) or indirectly through their lawyers, and by deciding how conversational the exchange of information will be. Despite nearly three decades of research on process control, this variable has been operationalized in this almost singular fashion, failing to fully represent contemporary variants of process control in real dispute resolution settings.

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[60] For examples of studies using a more indirect approach in the context of laboratory research, see Shestowsky, *supra* note 23, at 240, and Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319, 323 (1976).

[61] *See* Donald N. Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*, 46 SMU L. REV. 329, 364 (1992) (noting that the early Thibaut and Walker studies on procedural justice focused on process control and outcome control); LaTour et al., *supra* note 43, at 261 (noting that previous studies focused on two variables: "(i) the degree of third-party control over the decision, and (ii) the degree of disputant control over the process of evidence presentation").

[62] Shestowsky, *supra* note 23, at 222 (explaining how the process control variable has been operationalized in past research).

Second, the earlier approach appears to assume that comparing procedures on the basis of outcome and process control is sufficient to contrast clearly the different procedural alternatives. But contemporary dispute resolution procedures are not so simplistic. Today, procedures also vary in terms of the rules or norms that are used to resolve disputes. Specifically, they vary with respect to who has the power to determine which substantive rules or norms will be used to reach an outcome. For example, both facilitative and evaluative mediation offer parties control over the process and outcome, but they often differ in terms of who chooses the substantive rules used to resolve the conflict. In the former, the parties often establish their own substantive rules (for example, they might decide to use industry norms, or their own standards of fairness); in the latter, the mediator tends to provide an evaluation based on the rules of the law.[63] Thus, differences in who controls the substantive norms or rules—more than who controls the outcome or process—may serve to distinguish between these common procedural options. A recent set of laboratory studies, which examined reactions to opportunities to control rule selection in addition to controlling process and outcome, found that participants valued disputant control over all three.[64] We decided to follow a similar approach in our field study.

IV. LONGITUDINAL FIELD STUDY

Our pre- and post-experience longitudinal study was largely based on two hypotheses. First, consistent with findings from laboratory research in

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[63] RISKIN et al., *supra* note 2, at 368–71, 400–01.

[64] Shestowsky, *supra* note 23, at 240. In a set of laboratory experiments using college students, Shestowsky sought to explain preferences in light of the kind of control the procedures offer those in conflict. *Id.* at 231, 238–40. Past research focused on two types of control: process control (i.e., control over the presentation of evidence and arguments) and decision control (i.e., control over the actual resolution). *Id.* at 222–23. Shestowsky aimed to expand this earlier work by examining whether another type of control—control over determining which substantive rules would govern the conflict resolution—might also affect preferences. She operationalized this type of control in terms of how much disputants could rely on whatever guidelines they personally found relevant for resolving their dispute, including their own ethical norms, current circumstances, industry standards, or the consequences that would follow from various solutions. *Id.* at 229–30. The participants read different hypothetical scenarios outlining conflicts between themselves and another individual. Shestowsky investigated preferences at the feature option level. That is, for each scenario, participants were given three options for each of the following procedural features—process, outcomes and rules. The set of options for each feature represented different levels of disputant control—low, moderate or high. Participants rated how attractive they found each feature option for resolving the hypothetical dispute scenario. Each experiment revealed the same pattern: people (1) preferred control over the decision such that a neutral third party would help disputants reach a mutually satisfactory resolution (high disputant control); (2) favored control over process such that disputants would relay information on their own behalf without the help of a representative (high disputant control); and (3) preferred either the rules typically used in court (moderate disputant control) or substantive rules that disputants would have agreed to in advance (high disputant control). *Id.* at 242–43. Thus, participants preferred to maintain control over process and outcomes (which supports previous procedural justice findings), and they also desired control over the rules.

the procedural justice paradigm, we hypothesized that disputants would evaluate procedural feature options ex ante on the basis of whether a third party would have control over the outcome, process and rules versus whether the disputants could control the outcome, process and rules. Specifically, we expected them to apply a psychological framework of control when evaluating the various options. Second, we also expected disputants to exhibit different preferences ex ante versus ex post.

A. *Methods*

1. *Background*

Location. In April 2004, the Circuit Court of Cook County in Chicago, Illinois, one of the largest unified court systems in the world, established a mediation program for civil law cases.[65] The program was created under the local rules of the Circuit Court.[66] In addition to the new mediation offering, disputants in this court system had numerous other options: pursuing the traditional trial procedure, settling out of court via settlement negotiation, dropping the case (the prerogative of the plaintiff), or opting for a private ADR procedure such as arbitration. Similarly, the court maintained the traditional right to dismiss the case.

Participant Recruitment. Because we relied on public court records to acquire lists of cases that had been filed, our ability to track addresses for the parties was limited by the information obtained by the court. As is common in courts, this court collected the lawyers' addresses but not those

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[65] It is also the largest of the twenty-three circuits in Illinois. Illinois Circuit Court General Information, http://www.state.il.us/court/CircuitCourt/CCInfoDefault.asp (last visited July 8, 2008); State of Illinois, Circuit Court of Cook County, http://www.cookcountycourt.org/about/overview.html (last visited July 8, 2008). It is composed of several divisions, but the mediation program was limited to the Law Division, which hears civil actions at law, whether or not a jury is demanded, with a few exceptions generally limited by municipal district, legal issue, or by the amount in controversy. *See* General Orders of the Circuit Court of Cook County, http://cookcountycourt.org/rules/orders/general_orders.html (last visited July 8, 2008).

[66] The main Rule for our purposes provided as follows:

> 20.02 Actions Eligible for Court-annexed Mediation
>
> (a) Referral by Judge or by Stipulation
>
> The Presiding Judge, individual calendar judge, or motion judge to whom a matter is assigned may order any contested civil matter pending in the Law Division referred to mediation by entering an Order of Referral. An Order of Referral may be entered by the Court sua sponte or upon the motion of any party. Standard case management orders shall include a section addressing when the matter will be considered for mediation. In addition, the parties to any such matter may file a written stipulation to mediate any case or issue between them at any time . . . .
>
> (b) Motion to Dispense with Mediation
>
> Within fourteen (14) days after entry of the Order of Referral, a party may move to set aside or modify the order. Upon good cause shown, the court may exercise its discretion and set aside or modify the order.

Rules of the Circuit Court of Cook County 20.02, *available at* http://cookcountycourt.org/rules/rules/rulespart20.html#rules20.02. Thus, the court established a voluntary opt-out mediation program.

of the parties' (except for cases in which the party opted to represent himself or herself). Thus, our ability to contact the parties directly depended on our ability to obtain contact information through online address databases, using the names of the parties listed on the court documents and their lawyers' addresses as a proxy for the parties' geographical location. The Appendix to this Article describes how we compiled address lists.[67]

Altogether, we mailed our survey to 1888 disputants whose cases were filed in October 2004, November 2004, or January 2005. Ultimately, 200 surveys were returned by the postal service as undeliverable, and 108 completed surveys were returned, reflecting a 6.4% response rate for the written survey. This response rate for mail survey studies of laypeople is not unusual.[68]

We obtained phone numbers for our participants using online databases and phone books. We tracked cases online using the Cook County case update database, and called participants after the website indicated that the case was, from the court's perspective, closed.[69] We checked this database multiple times monthly and attempted to reach disputants within two weeks of the close of their case.[70] Ultimately, 87 out of 108 participants had closed cases by the end date of our data collection period (May 15, 2007); we were able to reach 52 of them by phone for our follow-up telephone survey. Forty-four of these disputants ultimately participated in our second survey. Although the sample size may seem

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[67] *See infra* Appendix.

[68] *See, e.g.*, James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 618 (1998) (noting a 13% response rate for mail study of litigants' perceptions of the costs, time, satisfaction, and fairness of the court proceedings); William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 371 (2004) (noting that 7.1% of disputants returned a completed mail survey about collaborative lawyering); Stallworth & Stroh, *supra* note 46, at 34 (noting that questionnaires were mailed to 3000 parties with cases pending at the Illinois Human Rights Commission; 109 employers and 102 claimants responded). *But see* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 24–25 (1996) (reporting the famous "RAND study" of litigants, which relied on a mail survey, and explaining that "[c]omplete responses to our survey were received from about two-thirds of the ADR providers, about one-half of the lawyers on closed cases, and about one-ninth of the litigants on closed cases (about one-fifth of the litigants on closed cases for whom we had addresses)"); Lamont Stallworth et al., *The NLRB's Unfair Labor Practice Settlement Program: An Empirical Analysis of Participant Satisfaction*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 22, 25 (obtaining a 28% response rate for disputants using a mail survey to obtain perceptions of settlement program).

[69] We searched for any language indicating judgment ("Judgment for Defendant" or "Judgment for Plaintiff") or dismissal. The latter would be demonstrated by "Dismissed by Stipulation," "Dismissed for Failure to Prosecute," or "Voluntarily Dismissed with Leave to Refile."

[70] The time between the court's designation of a case as having closed and the first follow-up communication with the participants varied from approximately five days to nine months. Although we attempted to reach participants within the first two weeks of the closing of their case, some phone numbers were no longer valid (a challenge common to longitudinal studies). In some instances, we were able to locate new valid phone numbers several months later, and we used them to try to contact participants.

small, it is important to note that when statistically significant results are achieved when the number of cases is small it suggests a more dramatic effect in the population than when the sample is large.[71] Thus, small sample sizes are useful in producing a conservative test of a hypothesis.

2. *Survey Instruments*

Data collection began in November 2004 and ended in May 2007. We collected data in two stages.

Time 1. Surveys were mailed to disputants within two weeks of their dispute being filed with the court. An introductory letter and consent form explained that those submitting completed surveys would be entered into a drawing to win one of two $500 cash prizes.

This survey collected basic demographic information about the disputants as well as some details about their case—for example, whether they were the claimant or respondent, whether they and the other party were acting as an individual, company or group, their age group, gender, and previous experience as a litigant. Additionally, from the court record, we noted the type of case (i.e., the legal issues involved), the amount in controversy, and the time of the initial filing.

The remainder of the survey consisted of fourteen unlabelled dispute resolution procedure characteristics, or "feature options." Disputants were asked to consider the specific dispute they were involved with and to rate how attractive each option was for their particular dispute. Each rating was on a scale from one to nine (where one represented "not at all attractive" and nine represented "extremely attractive"). Four items pertained to who would determine the outcome—for example, who would decide on the final outcome and whether that outcome would be advisory or binding.[72] Seven items related to how the process would evolve—for example, how informal the process would be and whether disputants could express themselves conversationally (which is typical in nonadjudicative procedures) or only in response to questions posed by others (as is more

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[71] David Bakan, *The Test of Significance in Psychological Research*, 66 PSYCHOL. BULL. 423, 429 (1966) ("The rejection of the null hypothesis when the number of cases is small speaks for a more dramatic effect in the population; and if the *p* value is the same, the probability of committing a Type I error remains the same. Thus one can be more confident with a small [sample size] than a large [one]."); Matt Wilkerson & Mary R. Olson, *Misconceptions About Sample Size, Statistical Significance, and Treatment Effect*, 131 J. PSYCHOL. 627, 628 (1997) (explaining that a small sample requires a greater treatment effect than a large sample to obtain an equal level of statistical significance).

[72] The outcome options were as follows: (1) a neutral third person will decide how the problem/dispute should be resolved, and the other party/disputant and I will have to accept that decision; (2) a neutral group of people will decide how the problem/dispute should be resolved, and the other party/disputant and I will have to accept that decision; (3) a neutral third person will tell us how he/she thinks the problem/dispute should be resolved, and the other party/disputant and I can either agree to accept that decision or either of us can veto it; (4) a neutral third person will help the other party/disputant and me decide how to resolve the problem/dispute ourselves.

common in adjudicative procedures).[73] The remaining three items concerned the norms or rules that would be used to resolve the dispute—whether those would be determined by a neutral third-party, the parties themselves, or whether the law would automatically apply.[74] Thus, the options differed in terms of whether they pertained to outcomes, processes, or rules. They also differed in terms of whether third parties or the disputants had relatively greater control over the outcome, process, or rules.

Time 2. After the court suggested in its online directory that a participant's case had closed, two research assistants, blind to the goals of our research, contacted that participant by phone. In exchange for completing the phone survey, participants were entered into a drawing for one $500 cash prize. The interviewers followed a script to conduct the survey by phone and used *Viewsflash*, a survey program with an online interface, to record their responses in written form. Disputants were asked to indicate which procedure they ultimately used, what the outcome was, and how satisfied they were with the procedure in terms of the outcome, process, and rules. Five-point scales were used (where one represents "not much at all" and five represented "very much"). They were also invited, through an open-ended question format, to share any other comments they wanted to make about their dispute resolution experience.

B. *Results*

Participants. Our participants were almost evenly split with respect to gender: 50% male; 48% female.[75] They were also almost equally divided in terms of their role in the dispute: 43% participated as a defendant and 56% as a plaintiff. Their median age was in the 46–55 year old category. Our sample included one disputant each from Colorado, Florida, and Indiana, and 105 from Illinois. The disputants typically had no history of

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[73] The process options were as follows: (1) both the other party/disputant and I will present facts and evidence favorable to our own position to a neutral third person; (2) the other party/disputant and I will each have our own representative who will present facts and evidence favorable to our own position to a neutral third person; (3) a neutral third person will appoint another neutral person to gather the facts and evidence from *both* the other party/disputant and me and then present them to him/her; (4) both the other party/disputant and I will be able to speak during the process whenever we like, as informally as we like; (5) the other party/disputant and I will be able to speak during the process but only when a neutral third party determines it would be appropriate or useful; (6) the other party/disputant and I will be able to speak during the process but only to answer questions that a neutral third party or a representative asks us; (7) both the other party/disputant and I will be able to speak to each other, ask each other questions, and speak to the third party during the process.

[74] The rules options were as follows: (1) the other party/disputant and I will first agree on what rules or principles should guide the resolution of our problem/dispute and then these rules or principles will be used as guidelines for reaching a resolution; (2) a neutral third person will decide what rules or principles will guide the resolution of our problem/dispute; (3) the resolution will be based on the same rules or principles that apply in a court of law.

[75] The remaining 2% did not respond to this question.

being a party to a legal dispute prior to this particular conflict—the modal number of times participants previously had been a defendant or plaintiff was 0, but this ranged to a maximum of 25 previous experiences. Although the majority of our sample was composed of individuals who were parties to a dispute (82%), many in our sample were participating in the dispute as representatives of a group or company (a "collective") (17%).[76] Fifty-seven percent of our participants reported that the party opposing them was an individual while the remaining 43% indicated that the other party was a collective.

Disputes. The median amount in controversy in initial case filings was $50,000; this ranged from $30,000 to $999,999,999. With respect to legal issues, cases varied but clustered in the following ways: personal injury (47%), medical or legal malpractice (22%), and contract disputes (12%), with the remaining cases (19%) distributed across a variety of other issues, including intentional torts and property damage claims.

Procedures Used. By the close of our study, 44 participants had cases designated as closed and participated in our follow-up phone interview. Of these, 38 reported the use of a procedure to resolve their dispute. Table 1 catalogues the frequency with which each type of procedure was used.[77] Of the remaining six disputants, three indicated that their case was still pending in some fashion or that they were unsure of the status of their dispute, and two reported uncertainty about which case we were inquiring about.

[76] The remaining 0.9% did not respond to this question.

[77] Initially three participants responded to our question by stating "other." When prompted for further elaboration, it was clear that one participant used arbitration, and we therefore noted the procedure as such. Another participant described his procedure as a class action settlement; thus, we counted this procedure as "settlement/negotiation." The final participant who indicated "other" reported that his case was currently being processed by the probate department; this response remained coded as "other."

Table 1. Procedures Used

Procedure	Frequency	Percent
Settlement/Negotiation	15	39.5
Dismissed/Dropped	11	28.9
Trial	9	23.7
Mediation	1	2.6
Arbitration	1	2.6
Other	1	2.6
Total	38	100

Note: "Other" was described by the participant simply as 'probate case'.

We were interested in determining whether certain types of procedures were used with greater frequency than others. We divided the procedures into three groups: "nonadjudicative" (which combined mediation and negotiation/settlement frequencies), "adjudicative" (which combined trial and arbitration frequencies), and "dropped/dismissed." [78] These three were then coded as 0, 1, and 2, respectively. We compared these frequencies statistically using a chi-square test. This test revealed that the difference in frequencies was not statistically significant.[79] Thus, participants were equally likely to use any of these three procedural types.

1. *Relationship Between Ex Ante Preferences and Procedural Model Used*

To determine whether disputants' preferences predicted the type of procedure used, we first needed to understand how the disputants initially evaluated the attractiveness of the various features in light of their particular dispute. Because each participant rated a substantial number of feature options (fourteen), we conducted a factor analysis on the items.

[78] Because we initially set out to investigate differences between different types of what are traditionally classified as dispute resolution procedures, we did not have the participants differentiate between "dropped" or "dismissed." Certainly, "dropped" cases generally originate from the individual bringing the claim and often do not involve a dispute resolution procedure per se. Dismissed cases might have been dismissed on the basis of documentation to the court or hearings traditionally associated with adjudicative procedures (such as summary judgment motions).

[79] $\chi^2(2) = 1.68$, *ns*.

This multi-variable data reduction technique is extremely useful for summarizing a larger number of variables into a smaller number of factors and is commonly used for that purpose by empirical researchers.

On the basis of a scree test, we concluded that our analysis yielded two stable factors. We performed a Varimax (orthogonal) rotation of the two factors to generate the most interpretable solution. The first factor accounted for 23.88% of the variance, and the second accounted for 19.17% of the variance. The items associated with each factor are listed in Table 2, along with their loadings. In interpreting the factors we excluded from consideration the three items that loaded above .20 on both factors.

We interpreted the first factor as representing a preference for a neutral third party to have control over the procedure—controlling the outcome, the process, and the rules. We labeled this "attraction to third party control." The second factor represented a preference for disputants having involvement in determining the outcome, process, and rules of the procedure. We labeled this "attraction to disputant control." As we predicted, the results of this analysis suggest that when disputants review attributes of dispute resolution procedures at the outset of their dispute, they tended to perceive those attributes along the lines of who gets more control—a third party or the disputants themselves. In terms of contemporary dispute resolution options, the former theoretically aligns with adjudicative procedures, whereas the latter aligns with non-adjudicative ones.[80]

After determining that the reliability of both factors was reached at appropriate levels (.77 and .75 for factors 1 and 2, respectively), we constructed scale scores for each factor by adding the items loading on that factor and dividing by the number of items. As would be expected, because these factors were developed via factor analysis using the varimax rotation, the correlation between the scale scores formed from the two factors was not significant.[81] The two factors were highly orthogonal.[82]

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[80] Some research suggests, however, that, in practice, disputants may not experience direct control in nonadjudicative procedures. *See* discussion *infra* notes 125–27 and accompanying text.

[81] $r(106) = .03$, *ns*.

[82] In this context, "highly orthogonal" means that disputants' scores on one factor were independent of their scores on the other. Thus, some disputants may have a strong preference for both, and some a strong preference for one factor and not the other.

Table 2. Factor Analysis

	Feature Option	Factor 1: "Attraction to Third Party Control"	Factor 2 "Attraction to Disputant Control"
1	Neutral person decides outcome.	.63	.21
2	Neutral group of people decides outcome.	.67	.07
3	Neutral advises us on outcomes.	.02	.31
4	Neutral helps us arrive at our own outcome.	.23	.44
5	We present our own facts and evidence.	.34	.53
6	Representative presents facts and evidence.	.47	.03
7	A neutral third person appoints another neutral to gather the facts and evidence from of us and then presents it.	.57	.08
8	We speak freely with each other and with the neutral.	-.05	.75
9	We speak when neutral feels it is appropriate.	.58	-.08
10	We speak when we are asked questions by the neutral or a representative.	.42	-.04
11	We speak during the process	-.13	.79

	whenever we like, as informally as we like.		
12	We agree on what rules or principles should guide the resolution and then use these rules or principles.	.01	.56
13	A neutral third person decides what rules or principles will guide the resolution.	.66	-.03
14	The resolution will be based on the same rules or principles that apply in a court of law.	.23	-.27

Note: Factor 1 was composed of feature options 2, 6, 7, 9, 10, and 13; factor 2 was composed of feature options 8, 11, and 12. Numbers listed under the two factors are the relevant factor loadings.

To determine whether disputants' initial preferences for the two types of control (disputant vs. third party) predicted their actual procedural choices, we conducted a multinomial logistic regression. We created a "procedure used" dummy variable wherein procedures were coded as "nonadjudicative" (which combined settled/negotiation and mediation), "adjudicative" (which combined trial and arbitration) or "dismissed/dropped" (coded 0, 1, or 2 respectively). This dummy variable served as the dependent variable and the two factors gleaned from our factor analysis (one representing attraction to disputant control, the other reflecting attraction to third party control) were the independent variables. For this type of regression analysis, the presence of a relationship between the dependent variable and the combination of independent variables is based on the statistical significance of the final model chi-square. In our analysis, the model chi-square was not significant.[83] Thus, disputants' initial evaluations of the two procedural types did not predict the procedural type that they ultimately used.

[83] $\chi^2(62) = 72.95, p < .05$.

2. *Factors Affecting Initial Attraction for Procedural Models*

We examined whether evaluations of procedural types varied with disputant-based or case-based characteristics. To that end, we analyzed correlations to determine whether any of the demographic or case variables were associated with evaluations of feature options. We examined issue type, whether the participant was the plaintiff or defendant, the participant's gender, the participant's age, the amount in controversy, whether the disputant was an individual or collective (i.e., a group or an organization), whether the opposing party was an individual or collective, and their own previous experience as a disputant. Only three significant correlations emerged. First, age was negatively correlated with positive evaluations of third party control.[84] Older disputants were less sanguine about third party control than younger disputants. Second, whether the case was or was not a contract dispute (coded yes = 1 and no = 0) was positively correlated with attraction to disputant control.[85] This result suggests that disputants involved in contract disputes were more attracted to options offering control to disputants than disputants involved in non-contract cases. Third, whether or not the disputants were facing a collective (coded yes = 1 and no = 0) was negatively correlated with evaluations of options that offered control to disputants.[86] This result suggests that disputants were less attracted to disputant control when they were disputing with a collective than with an individual. Thus, with these few exceptions, evaluations of the feature options associated with disputant or third party control were unrelated to demographic or case-related variables.

3. *Ex Post Evaluations: How Disputants Evaluated the Procedure They Used*

We asked participants to reflect on the procedure they experienced and rate how "happy" they were with each of the features of the procedure: the outcome, process, and rules. They also provided a global rating of how satisfied they were with the procedure overall. These evaluations were made using five-point scales (where one represented "not much at all" and five represented "very much").

Because legal professionals are generally interested in adversarial notions of "winning" and "losing," we also considered these notions in our analysis of the outcomes. It is important to note that notions of "winning" or "losing" do not have comparable meanings across adjudicative and nonadjudicative procedures. For example, at trial, only one party emerges

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[84] $r(104) = -.22, p < .05$.
[85] $r(104) = .21, p < .05$.
[86] $r(104) = -.21, p < .05$.

as a winner for a given legal issue. By contrast, when negotiation or mediation succeeds in producing a resolution, it is much more likely that each party "won" to some degree. That is, it is more likely that each got at least *some* of what he or she initially wanted. Understanding how much a given party "won" in a negotiation or mediation would require a true understanding of his or her settlement "targets" for each issue, and how he or she prioritized each issue; that is, we would need to know the perceived "ideal" outcome that each participant pursued. Given the complex nature of such determinations, we opted to ask disputants how "happy" they were with the outcome, which is a question that would have relatively the same meaning regardless of what procedure they used. We used responses to this question to conduct a one-way ANOVA, which allowed us to examine whether outcome satisfaction varied as a function of the procedural models that were used. We found no differences across the three models.[87] Thus, disputants' ratings of their outcomes were not dependant on the procedure they experienced.

Ratings of satisfaction with outcomes, process, and rules,[88] and overall satisfaction with procedure, were highly correlated.[89] Thus, we constructed an overall global satisfaction score for each disputant by calculating the mean of his or her satisfaction ratings across these items to use for further analyses.[90] To determine whether global satisfaction varied with the type of procedure used (adjudicative, nonadjudicative, or dropped/dismissed), we used an ANOVA analysis to determine whether global satisfaction (the dependant variable) was predicted by the type of procedure used (the independent variable; nonadjudicative, adjudicative, and dismissed/dropped were coded 0, 1, or 2 respectively). We included "role" in the dispute as a covariate to determine whether role influenced satisfaction, which we expected might be true for those defendants whose cases were dropped/dismissed. We found a marginally significant difference in greater global satisfaction across the procedures.[91] Post-hoc t-tests conducted to investigate the differences in satisfaction across the three procedures revealed that disputants whose cases were dropped or dismissed[92] were significantly less satisfied than disputants who experienced nonadjudicative procedures.[93] There were no differences in global satisfaction between those who experienced adjudicative procedures[94] and those who experienced nonadjudicative procedures, or

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[87] $F(2, 33) = 1.28$, *ns*.
[88] As discussed earlier, rules ratings were obtained only from disputants who did not opt for trial.
[89] rs > .47, ps < .01, all two-tailed.
[90] Coefficient alpha = .89.
[91] $F(2, 33) = 2.86$, $p = .07$.
[92] $M = 1.92$, $SD = 1.31$.
[93] $M = 3.19$, $SD = 1.28$, t diff. (2) = 1.15, $p < .05$.
[94] $M = 2.53$, $SD = 1.51$.

between those who experienced adjudicative procedures and those whose cases were dropped or dismissed.[95]

We found a significant procedure by role interaction for global satisfaction[96] suggesting that the role that disputants had in their dispute affected their satisfaction with the procedures they used. Table 3 provides summary statistics for the relevant data. Post-hoc tests revealed that defendants were significantly (and understandably) much more satisfied when their cases were dropped or dismissed than were plaintiffs.[97] There was also a marginally significant difference in satisfaction between plaintiffs and defendants whose disputes underwent nonadjudicative procedures.[98] Specifically, defendants tended to prefer nonadjudicative procedures more than plaintiffs. The differences for adjudicative procedures were not significant.[99]

Relying on the data summarized in Table 3, we also found that plaintiffs were equally satisfied ex post when they experienced adjudicative or nonadjudicative procedures.[100] But they were understandably less satisfied when their dispute was dropped or dismissed compared to when their case was adjudicated.[101] They were indifferent between nonadjudication and having their case dropped/dismissed.[102] The defendants, by contrast, were more satisfied with nonadjudicative procedures than adjudicative procedures,[103] but were indifferent between experiencing an adjudicative procedure and having their dispute dropped/dismissed.[104] They were also indifferent between nonadjudication and having their case dropped/dismissed.[105]

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[95] All *t*s (2) > .60, *ns*.
[96] $F(2, 31) = 5.83$, $p < .01$.
[97] $t(9) = 2.71$, $p < .05$.
[98] $t(14) = 2.06$, $p = .059$.
[99] $t(8) = -1.80$, *ns*.
[100] $t(2) = -.64$, *ns*.
[101] $t(2) = 2.01$, $p < .05$.
[102] $t(2) = 1.38$, *ns*.
[103] $t(2) = 2.10$, $p < .05$.
[104] $t(2) = 1.25$, *ns*.
[105] $t(2) = 1.26$, *ns*.

Table 3. Ex Post Satisfaction for Disputants in Role of Plaintiff and Defendant by Type of Procedure

Procedure Used			
Role	Adjudicative	Nonadjudicative	Dropped/ Dismissed
Plaintiff	*M* = 3.30 *SD* = 1.43 *N* = 5	*M* = 2.67 *SD* = 1.35 *N* = 9	*M* = 1.29 *SD* = .37 *N* = 7
Defendant	*M* = 1.77 *SD* = 1.27 *N* = 5	*M* = 3.87 *SD* = .85 *N* = 7	*M* = 3.03 *SD* = 1.69 *N* = 4

4. *Relationship Between Ex Ante and Ex Post Evaluations*

To determine whether disputants had different perceptions of procedures ex ante compared to ex post, we compared the correlational relationships between ex ante evaluations of feature options offering disputant versus third party control and ex post general satisfaction within groups of those who experienced nonadjudicative procedures (mediation or negotiation/settlement), those who used adjudicative procedures (trial or arbitration), and those who had their case dropped/dismissed.[106] We then computed the Z score equivalents for these correlations (since correlations are not normally distributed and cannot be directly compared). These Z scores are reported in Table 4.

[106] Kristopher J. Preacher, Calculation for the Test of the Difference Between Two Independent Correlation Coefficients (May 2002), http://www.people.ku.edu/~preacher/corrtest/corrtest.htm (last visited July 8, 2008).

Table 4. Correlations and Z Scores for the Relationship Between Ex Ante Attraction and Ex Post Satisfaction

Procedure Used			
Ex Ante Feature Evaluation Factor	Adjudicative	Nonadjudicative	Dropped/ Dismissed
Attraction to Disputant Control	*r* = -.26 *z* = -.64	*r* = .14 *z* = .52	*r* = .54* *z* = 1.64
Attraction to Third Party Control	*r* = .71** *z* = 2.33	*r* = -.07 *z* = .23	*r* = .05 *z* = .03

*Note: * = significant at the p < .05 level. ** = significant at the p < .01 level.*

The non-significant results in the nonadjudicative column suggest that ex ante attraction did not predict ex post global satisfaction when disputants used a nonadjudicative procedure. Thus, how much disputants liked disputant control ex ante was unrelated to how satisfied they were when they experienced a nonadjudicative procedure.

In contrast, the results for those experiencing an adjudicative procedure were clear. Initial attraction to feature options that offered disputant control was not related to how satisfied they were if they used an adjudicative procedure. However, initial attraction to feature options that offered third party control did predict how satisfied they were if they used an adjudicative procedure. Specifically, the more disputants initially liked options offering third party control the more satisfied they were if they ultimately used an adjudicative procedure; the more disputants initially disliked third party control, the less satisfied they were ex post if they experienced adjudication. The statistics reported in the third column of Table 4 suggest that disputants who liked disputant control and whose dispute was dropped or dismissed were satisfied with this procedure as a means of dispensing their dispute.

We ultimately used our Z score conversions from Table 4 to test the differences in the relationship between ex ante preferences and ex post satisfaction between groups who experienced nonadjudicative procedures (mediation or negotiation/settlement), adjudicative procedures (trial or arbitration), or had their case dismissed or dropped. These results are reported in Table 5.

Table 5. Differences Between Ex Ante and Ex Post Evaluation Relationships by Type of Procedure Used

	Procedures Compared		
Ex ante Feature Evaluation Factor	Nonadjudicative vs. Adjudicative	Nonadjudicative vs. Dropped/Dismissed	Adjudicative vs. Dropped/ Dismissed
Attraction to Disputant Control	Z diff. = 0.87	Z diff. = -0.99	Z diff. = -1.63[m]
Attraction to Third Party Control	Z diff. = 2.04*	Z diff. = .03	Z diff. = -1.57

*Note: * = significant at the p < .05 level; [m] = marginally significant at the p = .07 level. rs were converted to Z scores to obtain Z differences (abbreviated "Z diff."), which represent the difference between the two z scores. To reach significance at the .05 level, a Z difference must be at least 1.96.*

We found a significant difference in relationships between ex ante attraction to third party control and ex post satisfaction for nonadjudicative versus adjudicative procedures. Thus, initial attraction to third party control predicted satisfaction with adjudicative procedures (which theoretically offer such control) better than satisfaction with nonadjudicative procedures (which theoretically do not).

We also found a marginally significant difference in the strength of the relationship between initial attraction for disputant control and satisfaction with adjudicative procedures, compared to initial attraction for disputant control and satisfaction after having a case either dropped or dismissed. The latter correlation was marginally stronger. This result underscores the importance of disputant control for the satisfaction of those whose disputes were dropped or dismissed.

C. *Discussion*

We designed this study to examine the dispute resolution expectations and experiences of contemporary civil disputants. Our findings contribute significantly to theory and provide insights that can be useful for dispute resolution policy. They also establish precedent for future pre- versus post-experience longitudinal research on disputants.

1. *How Disputants Cognitively Processed Procedural Options*

One of the primary goals of our project was to examine how disputants

cognitively process their options at the outset of their dispute. We found that disputants used an underlying standard of control (disputant versus third party control) when evaluating the favorability of various feature options (relating to outcome, process, and rules). Thus, *a priori*, anticipating a dispute resolution procedure, disputants evaluated procedural feature options on the basis of whether they allocated control to themselves as opposed to third parties. This finding is consistent with Thibaut and Walker's procedural justice theory and the impressive amount of laboratory research that has demonstrated that disputants distinguish between procedures on the basis of disputant versus third party control.[107]

However, our study extends prior research in several important ways. First, ours is the first study to assess the ex ante preferences for dispute resolution feature options of civil disputants faced with real legal disputes. Because we discovered that people engaged in real disputes tended to evaluate options using a metric of "control," much like participants in laboratory studies who only simulate being disputants, our results demonstrate the generalizability of prior procedural justice findings. Similarly, whereas past research found that disputants value disputant control *after* experiencing a procedure, we found that disputants also valued it before experiencing a procedure.[108] Second, we found that the reliance on control to evaluate options extended to many different types of process options, including ones that concern the level of formality or conversationality of the discussion, and who has authority to determine when it is appropriate for the disputants to speak. This finding is an important contribution to the literature because prior laboratory research has primarily operationalized "process" in terms of control over the presentation of evidence.[109] Third, unlike prior research, which investigated outcome and process features only, we examined preferences with respect to the substantive rules that would be relied upon to determine the outcome. Here, too, we found that disputants mentally sorted rule options in terms of relative control.

2. *Disputants' Pre-Experience Procedural Preferences*

With few exceptions, ex ante attraction to the sets of feature options reflected by our two factors was unrelated to demographic or case characteristics. The few significant correlations that did emerge were quite intriguing. We found, for example, that older disputants were less attracted to third party control than their younger counterparts. One might expect that older disputants would be more familiar with, and acculturated to,

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[107] See *supra* notes 23–29 and accompanying text for a discussion of Thibaut and Walker's procedural justice theory.

[108] *See supra* Part IV.B.3.

[109] *See* discussion *supra* note 60 and accompanying text.

procedures that maximize such control (namely trial) because alternatives to trial (i.e., ADR procedures) are relatively new. Yet, it seems that with age comes some (arguably jaundiced) perspective on just what can and should be accomplished when control over process, outcomes and rules is delegated to third parties. Younger disputants may have had expectations of revenge and winning, while older and "wiser" disputants may not have believed these to be attainable in procedures controlled by third parties. It is also possible that older disputants were more confident in their ability to shape a suitable agreement via procedures that were less adjudicative, compared to younger disputants who may have had less knowledge of legal procedures and therefore felt more deferential to third party authority figures. At this juncture these interpretations are necessarily speculative. But insofar as the future use of ADR is in the hands of today's younger cohort, such explanations are worth exploring in subsequent research.

Our data also revealed that disputants involved in contract disputes tended to prefer disputant control more than those involved in other kinds of conflicts. One possible explanation for this finding is that relationships typically underlie contract disputes—compared to, for example, the common motor vehicle personal injury dispute between strangers—and disputants' desire to repair (or at least not worsen) the underlying relationship might lead them to find nonadversarial procedures more appealing than disputants involved in other types of cases. Another interpretation is that contract claims are more likely to involve business people who might value the process, outcome, and rules control that nonadjudicative procedures offer because such control fits well with their entrepreneurial self-confidence. They might also value nonadjudicative procedures for being more collaborative and less adversarial options that protect future business opportunities.

Another interesting result that emerged from our correlation analysis was that parties facing a collective (company, organization, or similar body) tended to be less attracted to feature options offering disputant control than those whose opposing party was an individual. This result makes sense given that those disputing with a collective might have felt intimidated by the level of their resources and presumably greater power. Relatedly, they may have feared nonadjudicative procedures, such as negotiation, on the assumption that the absence of a third party neutral with decision control might leave them more vulnerable to pressures to cede to the collective's demands.[110]

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[110] Some legal scholars argue that nonadjudicative procedures, like mediation, can provide a *false* sense of empowerment because powerful parties (e.g., collectives) are likely to be repeat players and have better legal representation; therefore, they can manipulate such informal procedures more effectively than they can the trial procedure. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1402–04

3. *Procedures Used and the Influence of Disputant Preferences on Procedural Choice*

Ultimately, only one disputant in our sample used mediation and only one used arbitration. Thus, our ex post comparison of adjudicative and nonadjudicative procedures was primarily a comparison of negotiation and trial. That only one disputant in our sample used mediation might be due to the newness of the court's mediation program, which began only six months before our earliest-filing participants filed their cases. The newness of the program may have resulted in some skepticism about it. In fact, one of the program's directors reported to us that, years ago, when a different division of the Circuit Court instituted an arbitration program (for certain types of civil cases where the amount in controversy is less than $30,000),[111] it took nearly a decade after its inception to garner noticeable attorney support.[112] This fact highlights the idea that general familiarity with ADR procedures in a jurisdiction, and support of the bar, can influence procedural choice.[113]

On a related note, our most interesting finding with respect to the procedures represented in our sample is that disputants' initial preferences did not predict the procedural model they used. This result suggests that some other factor was driving procedural choice. There are several possible factors. First, disputants' procedural preferences may have been difficult to realize because of issues of time or cost. For example, those who preferred procedures that grant relatively more control to third parties (i.e., adjudicative procedures) may have ultimately opted for less expensive and more rapid procedures to resolve their disputes. Although this interpretation is theoretically plausible, it would be considerably more likely if the overwhelming majority of the disputes in our sample had been resolved by negotiation or mediation. Instead, twenty-four percent of the

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(1985) (arguing that, to protect lower-status disputants, ADR should be reserved for disputes involving people of comparable status and power).

[111] Thus, these cases do not over-lap in eligibility for the Cook County Circuit Court mediation program.

[112] Personal communication with Kim Atz, Director, Arbitration and Mediation, Circuit Court of Cook County, in Chicago, IL (Aug. 3, 2006). For the relevant court rule, see Rules of the Circuit Court of Cook County, Part 18.3 Actions Subject to Mandatory Arbitration, *available at* http://www.cookcountycourt.org/rules/rules/rulespart18.html#rules18.3 (last visited July 8, 2008).

[113] *See* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 15 (1997) (noting that the involvement of the bar was critical in the implementation of each district's case management program); Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343, 343 (2005) (suggesting that local bar practices heavily influence the types of ADR offered and whether ADR is perceived to be an integral part of the legal process); John Bickerman, *Great Potential: The Federal Law Provides a Vehicle, if Local Courts Want to Move on ADR*, DISP. RESOL. MAG., Fall 1999, at 4 (acknowledging that local legal culture strongly influences the types of ADR available, as well as the participation rates in these programs).

disputes in our sample went to trial, which is often a more time-consuming and expensive procedure.[114]

Second, it is possible that those opposing our disputants preferred a different procedure and that the preferences of those *other* disputants determined which procedure was ultimately used. This possibility is plausible if one assumes that trial is the default. Trial was the default at least for those considering mediation in this court, since Cook County's mediation program allowed *either* party to opt out of mediation and go to trial instead. Thus, if a disputant in our sample wanted to mediate but their opposing party wanted a trial instead, the other party's preference would have won out.

Yet another possibility is that lawyers were directing the procedural choices of their clients. That is, the procedures reported in our study may reflect procedural preferences not of the disputants in our sample, but of their lawyers. Although the data we compiled did not allow us to evaluate this possibility directly, it does not seem that the lawyers in our sample worked very hard to settle their clients' cases. Our reasoning for this rather critical interpretation: first, the lawyers were not guiding their clients to the newly available mediation program; and second, they were not settling the disputes via negotiation at the rate that general statistics would have predicted.[115]

This interpretation resonates with the "growing suspicion, and some empirical evidence, that attorneys increasingly are the gatekeepers to ADR . . . ."[116] As a general matter, laypeople look to their lawyers for guidance

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[114] *See, e.g.*, Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 27 (2005) (describing a study randomly assigning divorcing couples to trial or mediation which found that couples assigned to mediation settled their disputes in about half the time); Frank V. Williams III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 664–65 (2007) (pointing out that a Maryland commission studying its courts had found that ADR resolved cases more quickly and with less cost than trial); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 671 (2002) (noting that court-connected mediation for general civil litigation in Ohio courts reduced the time from case filing to disposition by almost five months on average).

[115] NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 31 (Richard Y. Schauffler et al. eds., 2006) ("For the general jurisdiction courts in nine states that reported their civil jury trial caseloads in 2004, the median percentage of civil cases disposed of in that manner was one-half of 1 percent. None of these states reported a jury trial rate above 4 percent. Bench trials were much more common, yet still rarely accounted for more than 4 percent of civil dispositions."); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86 (1983) (reviewing statistics suggesting that "lawsuits are filed in just over 10% of the disputes involving individuals where $1,000 or more is at issue. Approximately 90% of the cases were settled or abandoned without a court filing"); Katie M. McVoy, Note, *"What I Have Feared Most Has Now Come to Pass":* Blakely*,* Booker*, and the Future of Sentencing*, 80 NOTRE DAME L. REV. 1613, 1623 (2005) (ninety-six percent of cases settle before trial); Robert E. Margulies, *How to Win in Mediation*, NEW JERSEY LAWYER, Dec. 2002, at 66 (noting that over ninety-eight percent of all cases settle before full adjudication).

[116] Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON

on how to approach their disputes.[117] They are also influenced by their lawyer's procedural preferences and settlement tendencies.[118] Research has shown, for example, that disputants usually play a limited role in settlement negotiations, and that their decisions regarding whether or not to settle are often influenced significantly by their lawyer's views.[119] In reviewing the relevant empirical research, Roselle Wissler concluded that

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DISP. RESOL. 277, 283 (2007) (internal quotation marks omitted).

[117] *Id.* at 285. *See* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 166 (2001) (stating that lawyers are perceived as professionals "to whom [parties] should defer because of their perceived intelligence and substantive experience in innumerable legal areas"); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 318 (1999) ("[C]lients are largely dependent upon their agents or attorneys for information as to the strengths and weaknesses of each side's case and for an evaluation of the advantages and disadvantages of a proposed settlement.").

[118] Lawyers' perceptions of ADR and settlement often influence disputants' choices. AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 20–21 (1995) (describing research across various fields of legal practice suggesting that clients are routinely relegated to secondary roles in litigation, even when they are involved in the direction of their own disputes lawyers seek to limit it and may even view it as "hostile"); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC'Y REV. 585, 593 (1987) (reporting on open-ended interviews with the disputants and lawyers in twenty-five informally settled divorce cases and commenting that "[m]ost of the lawyers we interviewed say they feel responsible for encouraging informal settlement and will pressure parties to accept settlements that they, as attorneys, find reasonable"); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512–13, 522–27 (1994) (arguing that lawyers might use their reputations for cooperative behavior to foster settlement for clients who would otherwise prefer to litigate); Goldfien & Robbennolt, *supra* note 116, at 305–09 (reporting data suggesting important relationships between a lawyers' conflict style and their mediator preferences and arguing that disputants are influenced by these lawyer preferences); John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC'Y REV. 135, 156–58 (1986) (reporting a study that found that lawyers have great influence on substantive decision-making and dominate procedural decision-making); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997) [hereinafter Korobkin & Guthrie, *Psychology*] ("[E]xperiments provide some illustrative support for the belief that lawyers have the ability—at least under some circumstances—to persuade litigants to approach the settlement-versus-trial decision from the lawyer's preferred analytical perspective."); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 160–64 (1994) [hereinafter Korobkin & Guthrie, *Psychological Barriers*] (describing experiments designed to evaluate lawyers' ability to affect the outcome of settlement discussions). Some argue that it is impossible for a lawyer to present options in a truly neutral manner; how the lawyer frames the choices will affect how the client evaluates them. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988) ("Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves . . . ."). Of course, others argue that some clients think the proper lawyer-client relationship is one in which the client is passive and the lawyer tells the client what option to pursue. *See*, *e.g.*, DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 186, 197 (1977) (describing this alternative approach).

[119] Goldfien & Robbennolt, *supra* note 116, at 285 (commenting on the secondary role that disputants play in the resolution of their disputes); *see also* Welsh, *supra* note 22, at 794, 796–97 (2001) (noting that in the 1970s, "[l]awyers were not welcome" in mediation, but that now, in court-connected civil mediation, "attorneys attend and dominate these mediation sessions while the disputants play no or a much-reduced role"). *See generally* Korobkin & Guthrie, *Psychology*, *supra* note 118; Korobkin & Guthrie, *Psychological Barriers*, *supra* note 118.

lawyers wield significant influence on their clients' decisions regarding dispute resolution.[120] She observed that a "key factor in litigants' willingness to use ADR is the recommendation and encouragement of their attorneys."[121] Certainly, disputants hire lawyers for a reason, and we would expect them to make use of their lawyers' expertise. But to the extent that disputants' own preferences are not guiding procedural choice, and they do not participate in the resolution process directly,[122] the positive consequences of procedural justice, in terms of voluntary compliance with agreements[123] and respect for the legal system,[124] may be less likely to materialize.

4. *Ex Post vs. Ex Ante Judgments*

Our analysis of how ex ante preferences were associated with ex post satisfaction revealed that the more attracted to third party control disputants were initially, the more satisfied they were if they ultimately used an adjudicative procedure. Conversely, the more they disliked the idea of third party control initially, the more dissatisfied they were if they used an adjudicative procedure. In addition, the more disputants initially liked feature options offering disputant control, the happier they were if their cases were ultimately dropped or dismissed (which is typically done

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[120] Roselle L. Wissler, *When Does Familiarity Breed Content?: A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L. J. 199, 205 (2002).

[121] *Id.; see also* Jessica Pearson et al., *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issues*, 6 J. DIVORCE 17, 29 (1982) (finding that a key factor in the decision to mediate is the encouragement of attorneys).

[122] Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (2002) (arguing, on the basis of data from the RAND study, that direct participation in the resolution of disputes is not directly valued by litigants but that "participation matters because litigants' ability to assess the other qualities of the procedures that they care about is critically dependent on their observing the process," where these other qualities appear to be lack of bias, thoroughness of the third party's attention to facts, and dignitary values, which are defined in terms of the degree of care neutrals accord the process); *see also* Leonard Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation,* 15 GEORGE MASON LAW REVIEW 863, 903–26 (2008) (arguing that disputants themselves should be engaged in determining the issues to be addressed in their mediation and suggesting initiatives that courts could undertake to accomplish this end).

[123] Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY MEDIATION 53, 58–59 (Kenneth Kressel & Dean G. Pruitt eds., 1989) (finding that disputants who felt good about their mediation and thought that the agreement was fair were more likely to comply with the agreement's terms); Dean G. Pruitt et al., *Long Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993) (studying the long-term impact of mediation and finding that those who felt that mediation had been fair were more likely to comply with the terms of the agreement and to develop good relationships with the other party).

[124] Pruitt et al., *supra* note 123, at 315 (noting that research indicates that people who believe an authority used fair procedures are more likely to respect that authority). *See generally* TYLER, *supra* note 10 (arguing that empirical evidence suggests that laypeople are more likely to respect authorities who use fair procedures).

at the request of a party), and the more they initially disliked disputant control the less happy they were if their cases were dropped or dismissed. Together, these results suggest that disputants' level of post-experience satisfaction bore some relationship to the nature of their initial preferences for procedural features.

The exception to this pattern of significant relationships between ex ante and ex post evaluations comes from disputants who experienced nonadjudicative procedures. Specifically, disputants who initially were more or less attracted to disputant control were neither more nor less satisfied after having experienced a nonadjudicative procedure to resolve their dispute. This result is particularly interesting given that we interviewed only those disputants whose cases were designated as "closed" and who confirmed the accuracy of this point, from their own perspective, at the start of the telephone interview. Thus, our sample included only nonadjudicative procedures (negotiated settlements and one mediation) that participants indicated were successful in resolving their disputes.

There are several possible explanations for this lack of relationship between ex ante and ex post evaluations for those who used nonadjudicative procedures. First, because the disputants who used these procedures experienced ones that resulted in an agreement, it seems possible that the outcome of the dispute trumped any ex ante preferences for disputant versus third party control. Second, it is possible that disputants whose disputes were settled nonadjucatively did not directly participate in their procedures. After all, the nonadjudicative procedures in our sample were primarily negotiations, which tend to consist of conversations between lawyers *sans* disputants.[125] This too would weigh satisfaction with the outcome more heavily than the fit between the type of control they liked most initially and satisfaction with the procedure that they used.

As a check on the level of participation by our participants who used nonadjudicative procedures, we examined how they responded to a free-response question inviting them to describe the rules that were used as a basis for resolving their dispute.[126] Many participants reported "I have no idea," or "not sure," or "not involved enough to know." We coded responses for language reflecting an inability to respond to the question for

[125] Goldfien & Robbennolt, *supra* note 116, at 284–85 (stating that disputants often have limited involvement in bilateral negotiations); Hensler, *supra* note 2, at 191 (noting limited involvement by parties in court mediation which often resembled judicial settlement conferences); Hensler, *supra* note 122, at 90–91 (noting, on the basis of RAND data, that litigants were often absent at judicial settlement conferences and treated like they were not important participants in the dispute); Lind et al., *supra* note 44, at 963, 982 (finding that because trials offer litigants an opportunity to participate they view trials as more understandable and fairer than bilateral settlements, and noting that litigants are routinely excluded from judicial settlement conferences).

[126] We explained to them that at trial the rules of law automatically apply, but that in other procedures other "rules, norms, or standards" might be expressly relied upon.

such reasons; 39.3% of participants were not able to identify the basis for which their dispute was resolved. Thus, even if disputants using nonadjudicative procedures did "participate" by attending the dispute resolution sessions personally, they were apparently not involved in determining the rules and not involved meaningfully enough in the process to be able to report the normative basis for the outcome that was reached.

This result resonates with conclusions drawn from the well-known RAND study of tort litigants' perceptions of procedures. Its findings have been interpreted to suggest that adjudicative procedures such as trial actually involve the participation of disputants—that is, they give them the opportunity to "experience" procedure—more than at least some nonadjudicative procedures do.[127] Thus, if our disputants were not actively involved in their nonadjudicative procedures then their satisfaction with the nonadjudicative procedure may have been based on outcome, not on process or rules. In contrast, it seems likely that disputants who used adjudication may have observed the process, by, for example, attending the trial, and ascertained that they got the process that they expected from such a procedure (which is likely given that there is not much variability in how trials are structured). This possibility would explain the strong positive correlation between initial attraction for third party control and ex post satisfaction for adjudicative procedures.

Assuming that our findings are replicated, our results could inform court policy in important ways. First, given that disputants' post-experience satisfaction with nonadjudicative procedures was not associated with how much they initially liked the disputant control theoretically associated with such procedures, and the post-experience satisfaction of those who used nonadjudication did not differ from those whose cases were adjudicated, it would seem reasonable for courts to offer mandatory *nonadjudicative* procedures such as settlement conferences and mediation.[128] In theory, such court programs encourage the use of ADR without denying disputants the opportunity for trial because even mandatory court-connected ADR procedures do not result in binding outcomes.[129] Thus, parties who use nonadjudicative procedures and are

[127] Hensler, *supra* note 122, at 90–91; *see also* Lind et al., *supra* note 44, at 982 (arguing that the procedural formality of adjudicative procedures enhances the appearance of fairness to disputants).

[128] Some scholars have argued that mandatory mediation often fails to meet the goal of procedural justice and leaves disputants feeling that their participation is discounted. *See, e.g.*, Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from Institutionalization of Court-Connected Mediation,* 5 NEV. L.J. 399, 418–19 (2004) (summarizing concerns voiced by a number of judges that mandatory mediation fails to achieve the goal of procedural justice, particularly when parties are not included in the process).

[129] Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2085 (1993) ("It is fundamental in determining the appropriate role of court-mandated ADR that parties' constitutional rights to a trial by jury cannot be abrogated. Thus binding forms of ADR (such as traditional arbitration) cannot be mandated, and the forms of ADR that courts have adopted are all nonbinding. A corollary of the

satisfied ex post can benefit by avoiding the waiting time for, and expense of, trial, and parties who are dissatisfied ex post can claim dissatisfaction and proceed to trial, provided they pay any required penalty fee.[130]

Moving forward, courts might consider implementing guidelines for how lawyers should inform their clients about their procedural options,[131]

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principle that the ultimate right to trial cannot be abrogated is that if an ADR process is ordered, it must be accomplished in a manner that will not undermine the ultimate right to a trial."). Although mandatory ADR does not theorectically restrict dipustants' ability to go to trial, reality may be different for less wealthy disputants; mandatory ADR policies can effectively deny them the opportunity for trial because, unless they obtain financial assistance through, for example, contingency arrangements or pro bono programs, they may be unable to afford the additional costs beyond what they have already paid for ADR. Thus, courts should subsidize the neutral's fees for mandatory nonadjudicative procedures for such individuals, or make nonadjudicative ADR optional for them. *See* Michael H. LeRoy & Peter Feuille, *When is Cost An Unlawful Barrier to Alternative Dispute Resolution? The Ever* Green Tree *of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 160 (2002) (stating that disputants pay employment arbitrators $2000 *per diem*, unlike judges to whom litigants do not owe a fee); *see also* Rules of the Circuit Court of Cook County, 20.03. Appointment of the Mediator and Scheduling of Mediation Session, *available at* http://www.cookcountycourt.org/rules/rules/rulespart20.html#rules20.03 (last visited July 8, 2008) (mandating mediator fees at $250 per hour); United States District Court for the Western District of Oklahoma, Panel of Mediators, http://www.okwd.uscourts.gov/files/adr/mediatorlist.pdf (listing the mediators that are court-approved in the United States District Court for the Western District of Oklahoma, along with their hourly fees, many of which are $150, and as high as $325); Superior Court of California, County of Sacramento, ADR Panel List, http://www.saccourt.com/civil/ADR/mediation/docs/CV-E-MED-173%20ADR%20Panel%20List.pdf (last visited July 8, 2008) (listing the court-approved mediators for the Sacramento Superior Court, 37% of which list hourly fees of $300 or higher).

[130] *See, e.g.*, JENNIFER E. SHACK & DANIELLE LOEVY, CENTER FOR ANALYSIS OF ADR SYSTEMS (CAADRS), SUMMARY OF COURT-CONNECTED ADR IN ILLINOIS (2004), *available at http://*caadrs.dreamhosters.com/pfimages/adr_summary.pdf (last visited July 8, 2008) (indicating that litigants may choose to reject the arbitration awards and litigate the matter by paying a $200 rejection fee). *See* Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN'S L. REV. 77, 92 (2007) (noting that "some programs require parties to pay for court-annexed ADR either directly or as a potential sanction for rejoining the queue to trial. It is ironic that parties who opted to litigate rather than to pay for private dispute resolution may be required to pay in any event before being allowed to use the public "free" dispute resolution traditionally offered by courts. For cases that are unresolved by court-annexed ADR and continue to trial, parties incur additional costs."). Although some court-connected programs are free or highly subsidized by the courts (for example, offering the first three or four hours of the neutral's service *gratis*), many charge significant hourly fees for the neutral's time. *See* SHACK & LOEVY, *supra*.

[131] Some states have already implemented such rules. For example, a Massachusetts Comment to its rule on communication states: "There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation. Mass. R. Prof. Conduct 1.4, cmt. 5, *available at* http://www.mass.gov/obcbbo/rpc1.htm. Similarly, the ADR Committee of the State Bar of California has developed educational materials to educate its members and the Sacramento County Bar Association requires its members to review ADR options with each client. *See* The State Bar of California, ADR Committee of the Business Law Section, Programs, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11373&id=19727 (last visited July 8, 2008) (the State Bar of California regularly provides educational programs on ADR); The State Bar of California, ADR Committee of the Business Law Section, The Mission of the ADR Committee, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11373&id=15521 (last visited July 8, 2008) (the State Bar of California's ADR committee's mission statement is to educate and provide information on ADR to both court constituents and attorneys); Sacramento County Bar Association, Standards of Professional Conduct, Section 8, *available at* http://www.saccourt.com/geninfo/local_rules/bar.asp (requiring that lawyers discuss ADR with their clients in every case).

and involve disputants more directly in nonadjudicative procedures. Courts should also consider requiring lawyers to report to their clients with specificity what happened during the settlement process if their clients chose not to participate in the procedure directly. For example, lawyers could be directed to explain the rules or norms used to arrive at the outcome, describe who spoke during the process, and explain how much of the discussion was spent addressing the various issues and outcome proposals. Future research could be aimed at developing standardized "procedure debriefing" guidelines for lawyers to use with their clients to accomplish these goals.

We were not in a position to follow our disputants over time to determine whether ex ante and ex post preferences differentially affect long-term outcome compliance or general attitudes toward the legal system. Future research could, for example, follow up with those who use nonadjudicative procedures to compare those who liked the idea of disputant control ex ante and those who did not (but nevertheless used a nonadjudicative procedure, perhaps due to the court having a mandatory mediation program) to determine whether their initial preference differences differentially affect long-term outcome compliance or respect for the justice system. This type of additional longitudinal research could be very useful for the development of court policy.[132]

5. *Limits to Generalizability*

Our main objective was to conduct a longitudinal analysis of disputants' preferences by examining both pre-experience preferences and post-experience satisfaction. Ultimately, because of the distribution of cases in our sample, our comparison of procedures was primarily a comparison of settlement negotiation and trial. Because the number of both state and federal courts offering arbitration and mediation programs continues to grow, it would be extremely worthwhile to replicate this study in courts with long histories of offering mediation and arbitration for the same types of cases.[133] This type of study would provide the opportunity to extend the research presented here and allow for conclusions specific to arbitration and mediation—procedures that hold special interest to courts because most court ADR programs offer one or the other of these procedures. Naturally, it would also be valuable to replicate our study in a greater number of jurisdictions nationally, both at the state and federal

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[132] *See supra* notes 131–32.

[133] In the court we studied, cases were not eligible for both court-connected mediation and court-connected arbitration. *Compare* Major Case Court-Annexed Civil Mediation, Circuit Court of Cook County, http://www.cookcountycourt.org/divisions/index.html (last visited on Sept. 1, 2008) (stating that mediation is available only for civil suits seeking damages in excess of $30,000), *with* Non-Judicial Offices, Circuit Court of Cook County, http://www.cookcountycourt.org/about/non-judicial.html (last visited on July 8, 2008) (stating that arbitration is available only for civil suits seeking $30,000 or less).

levels. As is true for empirical research in general, it is only through additional research that we can obtain great confidence concerning the reliability and generalizability of our findings. Further study of this nature is essential before courts can justify relying on our results to shape court policy.

It is important to note that although our sample size may appear small, our response rate for the ex ante survey aligns with rates achieved for other legal studies that relied on major mail surveys of laypeople.[134] Our ex post sample size was smaller than our ex ante sample because we were limited by the real-life constraints associated with collecting longitudinal data. Many of the cases we tracked took at least two years to close and some of our disputants moved, changed phone numbers or otherwise became unavailable. These challenges are inherent in longitudinal research.[135] However, despite the challenges posed by longitudinal research in general, its importance in shaping court policy cannot be overstated. Future studies replicating and expanding our research could help courts develop their ADR policies and ideally lead to greater disputant satisfaction with the legal system.

V. CONCLUSION

As Tom Tyler has argued:

> Legal authorities can both do their jobs well and create public satisfaction. The key is to have a clear understanding of what people want from the courts . . . . The first issue involved in knowing what citizens want from the courts is to examine their preferences concerning how disputes should be resolved.[136]

By ensuring that disputants exert their subjective preferences in meaningful ways, courts can assist disputants by promoting procedural justice. Courts themselves can also benefit in terms of greater efficiency through enhanced voluntary compliance with outcomes as well as greater respect for the legal system.

Importantly, in designing their ADR programs, courts should rely on disputant data, rather than on their own intuitions or lawyers' reports about what disputants expect from, and perceive as getting from, court-connected dispute resolution procedures. Lawyers should also rely on such findings to educate their clients about their dispute resolution options and to help them anticipate how they might evaluate procedures after they have

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[134] *See supra* note 65 and accompanying text (citing research with similar response rates).

[135] Tom Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform,* 45 AM. J. COMP. L. 871, 875–76 (1997).

[136] *Id.* at 876.

experienced them. We also hope that researchers will fill the gaps in the existing literature in ways that will be of service both to lawyering and to court policy, which was one of our motivations for this initial pre- versus post-experience longitudinal study.

APPENDIX

We conducted extensive online searches to locate contact information for disputants. We began by searching for disputants' names on Westlaw's "PEOPLE-ALL" database, restricting our search to the state listed in the address of the party's attorney. If the search returned only one record, we used the address associated with the name to mail a survey. If the search produced more than one record, but less than eleven, each individual record was examined for two factors: (1) whether any records overlapped with each other (sometimes individual records were listed multiple times) and (2) the date on which the record was last verified. Additionally, the name was entered into the search engine www.switchboard.com. For searches that returned more than ten records, we conducted the search anew, but limited it to only those names in the relevant county. If one to ten records were returned, the search was treated the same as the broad search that was limited only to the relevant state. However, if more than ten records were returned in this modified search, we used www.switchboard.com and www.whitepages.com to locate records that overlapped with the Westlaw results. Further, if no records were found during the original search that was limited to the records from the relevant state, we then repeated the search without any geographical limitations. The results of this search were treated the same as the results from searches limited to the relevant state only. All records that were retrieved were scored on a reliability scale of 0-5, where 0 denoted low reliability (either no records were returned or too many records were returned (usually more than 15 unique records), and a rating of 5 denoted high reliability (the search returned only one record).

Confined by budgetary considerations, we established our potential participant pool by randomly selecting from among parties whose records received a rating of 3.5 or greater, with the exception that we attempted to evenly divide our invited pool between plaintiffs and defendants.