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I. INTRODUCTION

In the eyes of legal scholars, alternative dispute resolution (ADR) mechanisms often show to poor advantage when compared to their judicial counterparts, particularly on procedural fairness grounds. Owen Fiss famously argued against the negotiated settlement of certain important disputes related to fundamental rights,[1] and Deborah Hensler notably criticized the use of mediation on the grounds that it might not appear fair to some disputants because it did not promote a resolution based on public norms.[2] Critics have suggested that a

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1. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073-75 (1984).

2. Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (2002).

judicially-based dispute resolution system that comports with the rule of law may be fundamentally at odds with non-judicial, and therefore less formal, dispute resolution mechanisms such as arbitration, mediation, and negotiation.[3] But other scholars have responded by suggesting that the rule of law is less in tension with ADR than critics imagine, because they both aim to serve the same goal—the pursuit of justice.[4] This difference of opinion is aided and abetted by the fluidity of the definition of the term "rule of law" itself, which scholars have variously defined to include tenets as distinct as non-retroactivity,[5] generality,[6] certainty,[7] protection of individual rights,[8] and lack of discretion by government actors.[9]

We argue here that the tenets of the rule of law, however one may define them, are neither irreconcilably at odds with ADR nor seamlessly reconcilable with it. We suggest that a psychological construct, procedural justice, provides an important perspective on how ADR systems can help maintain societal values that are consistent with the rule of law. Just as the rule of law has historically and philosophically been considered a central component of a legitimate governmental system,[10] so too procedural justice is a central component of how individuals make judgments about the legitimacy of authorities.[11] Because procedural justice, just like rule of law, fosters perceptions of legitimacy, we suggest that the assessments of procedural justice by disputants in ADR systems are a critical element in ensuring that ADR exists in harmony with rule of law values even as ADR, by its very terms, does not produce resolutions that arise directly from the rule of law per se. This is the case because people's everyday understanding of what procedural justice means conforms to many of the key elements that define the rule of law.

If people were simple, purely economic actors whose evaluation of legal procedures was based upon the outcomes they derived from those procedures, then individuals would evaluate their results in ADR processes based on how favorable their outcomes were, and judgments related to the rule of law would be irrelevant. That is, if satisfaction with ADR, which is less rule-based and judicially regulated, was based largely on outcomes, then rule of law would

3. *See, e.g.*, Harry T. Edwards, Commentary, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 675–82 (1986) (cautioning that a virtue of adjudication is its ability to ensure the proper resolution and application of public values, and that public officials, not private individuals, must interpret the values of the rule of law); Fiss, *supra* note 1, at 1075 (arguing that resolving disputes through settlements rather than through adjudication exchanges peace for justice); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23 (1995) (noting that private adjudications fail to produce rules or binding precedents).

4. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569 (2007).

5. Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, *in* RELOCATING THE RULE OF LAW 3-4 (Gianluigi Palombella & Neil Walker eds., 2009) [hereinafter Tamanaha, *Concise Guide*].

6. *Id.*

7. *See* JOHN PHILIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 5-6 (2004).

8. *See, e.g.*, David Dyzenhaus, *Recrafting the Rule of Law*, *in* RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 5, 7 (1999).

9. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 122-26 (2004) [hereinafter TAMANAHA, ON THE RULE OF LAW].

10. Dyzenhaus, *supra* note 8, at 1 ("The rule of law is often claimed to be one of the ingredients of legitimate government.").

11. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-7 (1990).

appear not to matter in that context. However, in reality, studies consistently suggest that people's evaluations of legal procedures, both formal and informal, are strongly shaped by issues of procedural justice, which are the issues that are also central to scholarly writing about the rule of law. People act as naïve legal philosophers and evaluate both their own experience and views about the general operation of the legal system against a template of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis for the rule of law.

In Part II, we provide background on the psychology of procedural justice. Then, because the term rule of law has been used so widely and in so many different ways, we explain its various meanings and go on to draw connections between the elements of procedural justice and the rule of law, highlighting both the similarities and distinctions between the two principles. We then marshal evidence in support of the critical role that procedural justice and rule of law values play in fostering perceptions of legitimacy. Part III explores the links among procedural justice, rule of law, and specific ADR processes, suggesting particular areas of concern where attention should be given to ensure that ADR and rule of law can coexist harmoniously.

II. PROCEDURAL JUSTICE AND THE RULE OF LAW

A. The Psychology of Procedural Justice

Procedural justice in general legal parlance refers to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology captures the *subjective* assessments by individuals[12] of the fairness of a decision making process.[13] Judgments about procedural justice are distinct from those about distributive justice (the fairness of the outcome), as well as from outcome favorability (how good the outcome is for any given party).[14]

A robust body of research in social psychology shows that perceptions of procedural justice have important effects on how people think about, and behave with respect to, the outcomes they receive in legal disputes.[15] Procedural justice drives the satisfaction that people have with their outcomes, and also predicts future adherence to outcomes and agreements.[16] The earliest research on the psychology of procedural justice found that the positive effects of procedural

12. *See* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 117-118 (2000) ("[J]ustice is a socially created concept that . . . has no physical reality. It exists and is useful to the degree that it is shared among a group of people.").

13. Throughout this article, we use the term procedural justice as defined in psychology.

14. *See* TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN A DIVERSE SOCIETY 75-76 (1997) (discussing the distinctions between procedural justice, distributive justice, and outcome favorability).

15. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (noting that "[p]rocedural justice judgments consistently emerge as the central judgment shaping people's reactions to their experiences with legal authorities") [hereinafter Tom R. Tyler, *Effective Rule of Law*].

16. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 63-65 (1988).

justice occurred in formal legal settings with third-party neutral decision makers.[17] Subsequent research demonstrated, quite emphatically, that in trials and proceedings before other legal tribunals, procedural justice makes a significant difference in how people evaluate their outcomes.[18] Even when people lose, they feel better about that loss when they experience procedural fairness; conversely, when they win, they do not feel as good about that outcome absent procedural fairness.[19]

This effect has not been limited to the civil adjudicative context; research has suggested that even defendants in felony cases care deeply about the fairness of the process used to determine the outcome of their cases.[20] Similarly, researchers have found procedural justice effects in the arbitration context, where an arbitrator instead of a judge makes a decision.[21]

More recently, researchers have turned their attention to other, less formal settings like mediation and negotiation, where there is no third-party decision maker and there are far fewer rules. In both of these areas, procedural justice researchers have found that procedural justice drives the assessment about satisfaction with the outcome. For example, Pruitt and his colleagues looked at mediation from the perspectives of both parties and examined how favorable participants felt that outcomes were and how fair they felt the process was.[22] When Pruitt followed up with participants six months later, the biggest driver of whether the parties had adhered to that mediated outcome was the procedural fairness experienced during the mediation, rather than the favorability or fairness of the outcome.[23]

In recent research, we explored procedural justice in negotiation over legal disputes. In a study involving a simulated negotiation by law students over a contract dispute, we found that fairness of process and fairness of treatment by the other party, even without a third party neutral present, drives satisfaction with the outcome and drives how enthusiastic individuals in the role of an attorney are about adhering to the agreement and recommending a negotiated outcome to their clients.[24] These effects of procedural justice were stronger predictors of acceptance and enthusiasm for negotiated outcomes than how favorable and how

17. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 94-95 (1975).

18. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 11, at 115-24.

19. *Id.*

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

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

22. Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton & Lynn M. Castrianno, *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 313 (1993); *see also* Jennie J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139, 140 (2003).

23. Pruitt et al., *supra* note 22, at 321-25.

24. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 478–79 (2008); *see also* Rebecca E. Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 412-20 (2010) [hereinafter Hollander-Blumoff, *Just Negotiation*].

fair the outcomes appeared to the negotiators, suggesting that even in a setting without a third-party neutral and with minimal procedural and substantive rules, individuals care about how fairly they are treated.

Procedural justice research does not suggest, however, that people do not care about either the distributive justice or the favorability of their outcome.[25] What procedural justice research does demonstrate is that the fairness of a process is a separate, independent construct, distinct from how fair or how good an outcome is, and that procedural justice has a separate and independent effect on how people feel about their results, apart from how fair or how good the outcome is.[26] So while fairness and favorability of outcome do matter, research has consistently shown that the fairness of the process is an independent driver of satisfaction with agreements and adherence to them in both judicial and ADR mechanisms. From the perspective of the legal system, it is especially important that people care about procedural justice even when they "lose" their case. That is, those who do not receive what they want or feel that they deserve are nonetheless more likely to defer to those outcomes if they believe that the outcomes were achieved through fair procedures.

Psychologists have studied how people form assessments about whether they have been treated fairly, and there is largely a consensus around the importance of four critical factors.[27] First, individuals care whether or not they have had an opportunity to present their own story, a factor that the literature commonly refers to as voice.[28] In the case of a third-party neutral procedure, parties or their attorneys typically present evidence to a decision maker. Second, people assess whether or not the decision maker was neutral.[29] This involves issues such as impartiality (lack of bias); the ability to gather and assess the information needed to make appropriate decisions; openness about the procedure (transparency); and consistency in the application of rules over people and across time.[30] Third, and related, is the question of whether or not the third-party authority was trustworthy.[31] Trust is the least overt aspect of fairness because it involves inferences on the part of the parties that the authority was sincerely trying to do what was right and was motivated to do what was good for the people involved. Because trust is an inference, it is shaped by how the authorities act. When the authorities provide evidence that they have listened to and considered the views of the parties, and tried to take them into account in thinking about how to respond to

25. Tom R. Tyler, *Effective Rule of Law*, *supra* note 15, at 292.

26. LIND & TYLER, *supra* note 16, at 39.

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

28. *See, e.g.*, Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 109 (1977); E. Allan Lind, Ruth Kanfer & P. Christopher Early, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985).

29. *See, e.g.*, TYLER, *supra* note 11, at 163-64.

30. *Id.*

31. *Id.* at 164. Neutrality and trust are related; it would be hard, of course, to trust a biased person. But the two constructs capture distinct ideas: neutrality refers to the idea that there is some rule-based approach to the resolution, whereas trust relates to the good motive of the decision maker.

the issues, they are viewed as more trustworthy. Finally, individuals consider whether or not they were treated with courtesy and respect.[32] This involves both common respect and courtesy and respect for people's rights. Those rights are both human rights (treatment with dignity) and legal rights (standing to bring a case to the authorities and have it treated seriously).

These four factors clearly guide procedural justice assessments about fair treatment in settings with a third-party decision maker. In other settings where such a decision maker is not present, research has suggested a strong role for both voice, and courtesy and respect, and has presented mixed results with respect to the potential effects of neutrality and trustworthiness.[33]

Theorists have suggested three distinct rationales for the importance of procedural justice. Originally, Thibaut and Walker believed that people cared about fairness of process because it would necessarily lead to good and fair decisions.[34] This instrumental theory suggested that people valued fair process because of its actual effect on bottom-line outcome.[35] Subsequently, Tyler and Lind provided empirical support for the group engagement model, which suggested that the instrumental theory was inadequate in accounting for the role that procedural justice plays.[36] Tyler and Lind argued that people care about fairness of treatment because it provides them with important information about their status within their group.[37] Fair treatment by an authority can reveal that one is a valued, or not valued, member of a group, which in turn has the potential to affect one's self-esteem, one's sense of self-worth, and one's social identity. Most recently, Van den Bos and colleagues have suggested a theory for the reasons behind procedural justice's importance that fits squarely within the cognitive bias literature: "fairness heuristic theory" suggests that fairness judgments help to reduce uncertainty, because individuals rely on procedural justice cues to make assessments of satisfaction in the absence of distributive justice or outcome favorability information.[38]

Procedural justice research suggests not only that people are more satisfied with the results of a fair decision making process, but also that people are more likely to defer to the decisions and judgments of an authority, and comply with those judgments in the long term, when they perceive that the authority has made those decisions according to a fair process.[39] Psychologists have explored the roots of this increased deference and compliance, and have determined that they

32. Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice, in* APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS 77, 78 (John S. Carroll ed., 1990) [hereinafter Tyler & Bies, *Beyond Formal Procedures*].

33. *See* Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 423.

34. THIBAUT & WALKER, *supra* note 17, at 4.

35. *Id.*

36. Tom R. Tyler & Allen A. Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 115, 116-17, 124-37, 144-62 (1992); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group Value Model*, 57 J. PERSONALITY & SOC. PSYCH. 830, 837 (1989).

37. Tyler & Lind, *supra* note 36, at 158.

38. Kees Van den Bos, Allen Lind, R. Vermunt & H. Wilke, *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCH. 1034, 1035-36 (1997). Van den Bos and his colleagues suggest that procedural and distributive justice are far more cognitively linked than previously thought. *Id.*

39. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 11, 115-23.

occur because the procedural justice of the decision making process leads them to conclude that the decision making authority is legitimate.[40] Psychological researchers have repeatedly shown that people follow rules when they believe that the authority that promulgated the rules is legitimate,[41] and in turn have also shown that people think authorities act legitimately when they have experienced procedural justice.[42] In situations where individuals feel that a decision maker is neutral, trustworthy, has given them the opportunity for voice, and has treated them with courtesy and respect, they are more likely to feel that the process was procedurally just, and in turn, that the decision maker has legitimate authority and that they ought to defer to that decision maker.[43]

For example, in one study, Tyler explored the question of whether individuals largely made assessments about legitimacy based on whether they received a favorable outcome or on whether they received procedural justice.[44] In particular, he examined the question of whether relational treatment that had the potential to affect participants' sense of status within their group played a role in assessment of legitimacy.[45] His results suggested that the relational factors dominated the instrumental factors: a regression analysis showed that the relational factors had almost twice the effect as the instrumental factors.[46]

Because a system of command and control, with reliance on complete surveillance, enforcement, and punishment, is not feasible in a society of our size and complexity, a system of voluntary deference to authority is critical to the functioning of society. It is therefore important to recognize that such deference can be affected by the degree of procedural justice—and thus legitimacy—experienced by individuals. When individuals feel that authorities are making decisions in procedurally fair ways, they view the authorities as more legitimate and are more willing to defer to the authorities' decisions.[47] Less command and control is needed, and individuals can rely more on self-regulation in settings where authorities act in procedurally fair ways. The legitimacy of government authorities is central to the ability of government to function; so too, the legitimacy of dispute resolution systems is fundamental in gaining individuals' voluntary deference to the resolution of their disputes and preventing them from engaging in self-help measures that undermine social stability.

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40. *Id.* at 115.

41. *Id.* at 19-57, 115; *see also* Margaret Levi, Audrey Sacks & Tom Tyler, *Conceptualizing Legitimacy, Measuring Legitimating Beliefs*, 53 AM. BEHAV. SCIENTIST 354, 359-60 (2009) (arguing that when governments use fair procedures, citizens are more likely to view those governments as legitimate and worthy of deference).

42. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 11, 115-23.

43. *Id.* at 115-34.

44. *See e.g.*, Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCH. REV. 323, 323-24 (1997).

45. *Id.* at 325.

46. *Id.* at 334 (finding the beta weights of relational factors to be 0.5, while those of instrumental factors were 0.2).

47. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 11, 115-23.

B. The Rule of Law and Procedural Justice

The term "rule of law" has been used so much, and in so many different ways, that it is almost an impossible target to pin down in a single satisfying way.[48] Scholars have defined rule of law in different ways at different times, and the term's definitions are not all mutually compatible.[49] Most scholars agree on at least the "thinnest" description of rule of law that requires government actors and citizens to be bound by and act consistently with law.[50] This formalist view requires that law be set forth in advance, and be general, clear, stable, and applied consistently to everyone.[51] Many theorists who advocate for this definition of the rule of law believe that these requirements foster individual autonomy and dignity, but this definition does not mandate that the law itself carry substantive components enshrining any particular individual rights.[52] That is, the formalist definition does not include any required substantive content. This formalist definition of the rule of law fits well with procedural justice ideas of neutrality, because it requires that decisions be made impartially and through the consistent application of legal rules and the consideration of facts. Additionally, because this definition helps to promote dignity and respect for citizens through procedure, it dovetails with the procedural justice elements of treatment with courtesy and respect.

Some theorists have suggested that there is a substantive component of rule of law as well, that must include respect for individual rights. For example, Dworkin suggested that the rule of law included the capture and enforcement through law of moral rights of individuals.[53] Others have gone farther, arguing that the rule of law includes social welfare principles as well.[54] These substantive components of the rule of law are controversial, perhaps in part because individuals may not share the same perspective on what constitute moral rights.[55] Procedural justice expressly does not include distributive justice, which separates the concerns of procedural justice from the protection of substantive individual rights. Nonetheless, the substantive definition of rule of law shares with procedural justice the core idea that people should have both their rights, as individuals and their rights as citizens with standing in a community, recognized.

Historically, the concept of rule of law developed as protection from tyranny by government, and one important theoretical conception of rule of law is as a

48. *See* Tamanaha, *Concise Guide*, *supra* note 5, at 3 ("Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law, is an exceedingly elusive notion.").

49. *Id.* (noting that political and legal theorists "often hold vague or sharply contrasting understandings of the rule of law.").

50. *Id.* at 3.

51. *Id. See also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 1-3 (New York Univ. Sch. of L. Pub. L. & Legal Theory Research Paper Series, Working Paper No. 10-73, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491.

52. TAMANAHA, ON THE RULE OF LAW, *supra* note 9, at 94 (noting that Raz, Fuller, Unger, and Hayek all share this vision of the rule of law).

53. RONALD DWORKIN, LAW'S EMPIRE 1-3 (1986).

54. TAMANAHA, ON THE RULE OF LAW, *supra* note 9, at 113.

55. *Id.* (noting that "[t]he rule of law cannot be about everything good that people desire from their government"); *see also* Waldron, *supra* note 51, at 2 (explaining that "I am not as hostile as I once was to a substantive conception of [the rule of law] ideal.") (citation omitted).

defense of individuals against government overreaching.[56] The rule of law has also been envisioned as a formal structure to protect individual liberty, as noted above.[57] Finally, still others have taken a functional perspective on the definition of the rule of law, suggesting that the basic "rule of law, not man" axiom stands for the limitation of government officials' complete discretion and flexibility.[58] The law provides a way for individual government authorities, such as judges, to make fair rulings, rather than using their own set of criteria for decision making. Adherence to legal rules, as noted above, fits well with the procedural justice criterion of neutrality and impartial decision making. Additionally, limiting discretion, although not directly considered in the procedural justice literature, may be a factor in promoting trust of authorities.[59] For the purposes of this essay, we need not take sides in the lively debate over the meaning or theoretical underpinnings of rule of law; it is sufficient for our purposes to take a pluralist point of view and acknowledge these different understandings.

On its face, a venerable historical tradition of the rule of law to protect individuals from government tyranny seems quite different than subjective perceptions of fairness by individuals. A closer look suggests, instead, that the rule of law and psychological perceptions of fairness may share an inextricable, symbiotic relationship. Indeed, our psychological inclinations to value fair process, and our assessments about what factors create a fair process, may be the original drivers of rule of law principles. In turn, the design of the system of rule of law to protect individuals from tyranny may then provide us with a helpful template for what fair process looks like as we form our psychological perceptions of procedural justice: the foundational concepts of the rule of law may help people in making individual determinations about what behavior is fair.

There are important differences in the constructs, however: whereas the rule of law requires the use of specific principles that are set forth in some formal system of law, procedural justice, as noted above, is not about the use of any particular set of rules. Instead, it is an assessment of the fairness of a decision making process that relies on individuals' judgments about their voice, the courtesy and respect with which they are treated, and the neutrality and trustworthiness of the decision maker. As measured by psychologists, procedural justice is not about substantive rule application. Indeed, the effects of procedural justice have been felt in settings with few, if any, substantive rules to apply. For instance, in our study of legal negotiation, procedural justice was found to have an effect on acceptance of agreements even though there are almost no rules that govern legal negotiation.[60]

And yet procedural justice and the rule of law share a central focus on providing legitimacy to decision makers. The rule of law fosters legitimacy by equally applying fixed law to all individuals and, in some definitions, respecting

56. Tamanaha, *Concise Guide*, *supra* note 5, at 8.

57. TAMANAHA, ON THE RULE OF LAW, *supra* note 9, at 113.

58. *Id.* at 123.

59. It is clear, though, that people evaluate the motivations that shape the exercise of discretion. If people believe that authorities' actions are guided by benevolent intentions, they are more likely to judge them to be consistent with fair procedures. So, a departure from rules may be viewed as fair or unfair depending upon why people think it has occurred.

60. *See* Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 402, 423; *see also infra* text accompanying notes 105-106.

individuals' rights. Procedural justice promotes legitimacy by giving individuals a neutral and trustworthy decision maker, allowing them a voice, and treating them with courtesy and respect. Some of these values map onto one another quite nicely: for example, how better might a decision maker act neutral but through applying fixed law equally to all parties? Similarly, such adherence to the rule of law by applying law neutrally gives rise to perceptions that the authority is trustworthy. Additionally, the trustworthiness and neutrality of a decision maker may be judged by whether the finding is based on facts and evidence. Because the legal system in the United States is adversarial and relies on parties to present their own evidence, this in turn links voice and an opportunity to be heard with principles of rule of law. So too, providing voice in legal proceedings is one way to manifest respect for individual rights; treating parties with courtesy and respect similarly demonstrates respect for those rights.

Procedural justice researchers have suggested a distinction among the factors that lead to judgments about procedural justice, identifying (1) decision making factors, which include neutrality and voice, and (2) interpersonal factors, which include trust and personal respect.[61] This distinction leads to another way to conceptualize the relationship between procedural justice and the rule of law: classic formalist rule of law features tend to best be analogized with the former group, while the relational factors best speak to the individual rights component of rule of law, even though they do not guarantee any substantive rights per se.

Although the interpersonal elements of procedural justice may appear to be more attenuated from formalist rule of law principles, this relationship can be seen through a different lens: when one takes a broader view, the entire function of having a rule of law is to make sure that people are treated fairly in society. Individuals care about tyranny of the government because they care about how people are treated.

In the history of the psychological study of procedures, early work by Thibaut and Walker focused upon decision making fairness, i.e. voice and neutrality.[62] They found in experimental studies that disputants were concerned about the fairness of decision making and that that concern was distinct from their reactions to the outcome.[63] However, subsequent field studies of both trials and alternative procedures showed that people's procedural concerns extended beyond this more formal definition of procedural justice.[64] They included elements of interpersonal treatment, such as courtesy and respect for rights.[65] In addition, whether disputants said that they trusted the authority that was making decisions played an important role in reactions to the decisions, and trust was shaped by both decision making and interpersonal treatment.[66] As a consequence of these findings, subsequent models of procedural justice have expanded to include both issues of decision making and interpersonal treatment.

Empirical research has suggested that there is a meaningful connection between assessments about the rule of law and procedural justice judgments. In a

61. Tyler & Bies, *Beyond Formal Procedures*, *supra* note 32, at 77-78.
62. THIBAUT & WALKER, *supra* note 34, at ch. 9.
63. *Id.*
64. LIND & TYLER, *supra* note 16, at 107-110.
65. *Id.* at 109.
66. Tyler & Lind, *supra* note 36, at 142.

study of California citizens' interactions with the police or the courts, Tyler and Huo found evidence supporting a two-stage model where elements of rule of law shape judgments about procedural justice and trust, and this in turn then influences willingness to defer to authority.[67] Tyler and Huo developed indices to measure rule of law values; the indices included elements of rule-based decision making (whether the authority allowed them to tell their story, made decisions neutrally, applied rules consistently, and acted transparently), respect for rights (whether decisions were consistent with law, and whether authorities acknowledged and were concerned about individual rights), and respect for persons (treating people with respect, courtesy, and dignity).[68] For individuals dealing with courts, these judgments about rule of law accounted for 73 percent of the variance in assessments about procedural justice, 79 percent of the variance in trust, and 80 percent of the variance in deference to the courts.[69] For individuals dealing with police, judgments about the rule of law accounted for 75 percent of the variance in procedural justice judgments, 83 percent of the variance in trust, and 84 percent of the variance in deference.[70] Each of these analyses was also conducted including judgments about outcome as one of the potential explanatory factors; in each case, outcome was almost completely irrelevant,[71] suggesting that "people react to their experiences largely in terms of the degree to which they judged that the authorities did or did not act in terms of the ideas underlying the rule of law."[72]

In another analysis, this time with data from New York City residents and their opinions about the police, Tyler found that judgments about the rule of law explained 37 percent of the variance in judgments about the procedural justice of police behavior, and 65 percent of the variance in judgments about trust of the police.[73] In turn, procedural justice and trust explained 22 percent of the variance in general deference to and support for the police, and when factors that included the quality of police performance were added in, the extra explanatory power was minimal.[74] That is, procedural justice and trust judgments, rather than performance assessment, were the primary factors driving deference to and support for the police; in turn, rule of law judgments accounted for a significant portion of how individuals made their assessments of procedural justice. The rule of law factors also had a direct impact on deference to the police, accounting for 27 percent of the deference.[75] These findings suggested that general deference to

67. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 669 (2007) (using data collected for TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 28 (2002)).

68. *Id.* at 671-72.

69. *Id.* at 673.

70. *Id.*

71. For example, in an analysis that added judgments about outcomes to the predicate factors in the courts context, the amount of variance did not increase for procedural justice and trust at all, and increased by only one percent for deference. *Id.* Results were similar in the police context. *Id.*

72. *Id.*

73. *Id.*; *see also* Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 260-62 (2004).

74. *Id.*

75. *Id.*

legal authority is shaped in large part by assessments about whether the authorities are adhering to the rule of law.

According to these findings, individuals perceive decisions as legitimate, and therefore appropriate to defer to, when they experience procedural justice as well as when the decision processes embody rule of law values. These constructs are not completely overlapping, but they are also not fully distinct. The research suggests that rule of law judgments play an important role in influencing procedural justice judgments, and also may have an independent effect on deference to authority.

III. PROCEDURAL JUSTICE & THE RULE OF LAW IN ALTERNATIVE DISPUTE RESOLUTION

As noted above, there has been grave concern about ADR processes and whether they appropriately protect individuals' rights and comport with rule of law principles.[76] ADR processes include the very distinct mechanisms of arbitration, mediation, and negotiation. These processes all share in common that they are more informal processes for the resolution of a dispute than a lawsuit before a court; although there are rules that govern each of these dispute resolution mechanisms, they are all indisputably less rule-based than litigation. Indeed, the popular success of ADR has largely been due to its informal, non-rule based processes that are designed for an efficiency that necessarily implies a tradeoff in rules, enforcement, and judicial oversight.[77]

Yet these dispute resolution processes are also very different from one another. Despite the fact that they have been grouped together under the umbrella term of ADR, they are unique and often appear to have more differences than similarities. For example, while arbitration produces a final and binding decision by a third-party neutral, is reviewable by a court,[78] and is typically the product of a contractual agreement to arbitrate, negotiated outcomes do not involve a third party neutral, are not subject to court review, and can be freely chosen or rejected.[79] Mediation, which has more rules than negotiation but fewer than arbitration, is a process that is conducted by a third-party neutral who has no authority to bind the parties and, although it is not subject to any court review, is often the product of a mandate from a judge sending the parties to mediation.

At the same time that critics have attacked ADR for failing to protect individual rights,[80] supporters have suggested that ADR has tremendous potential for fulfilling the procedural justice needs of individual disputants.[81] Procedural justice effects have been found in all three of these ADR settings, and indeed, some have suggested that parties' preferences for certain types of ADR are actually driven by procedural justice assessments about these processes being

76. *See supra* notes 1-3 and accompanying text.

77. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001).

78. The scope of this review is quite narrow, however. *See infra* notes 83-85.

79. *See* Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 406.

80. *See* Edwards, *supra* note 3, at 679.

81. *See* Sternlight, *supra* note 4, at 576.

more fair than litigation.[82] These findings suggest that individuals essentially may "vote with their feet" and, to the extent that procedural justice matters to them, take their disputes to forums where their procedural justice needs will be met. To the extent that this is true, and that parties want to engage in ADR because it appears more procedurally fair to them than traditional judicial decision making, the procedural justice parties experience in these processes may be a key facet of making these processes legitimate. When these processes appear legitimate because of individuals' subjective assessments about fairness, the processes at least comport with the aims, if not necessarily the specific elements, of the rule of law.

However, the "vote with their feet" perspective may ignore important power differentials and constraints in choosing the forum for the resolution of one's dispute. For example, arbitration is often mandated in contracts of adhesion between large, powerful corporations and small individuals who do not fully understand what rights they are giving up. Similarly, courts often require parties to engage in court-annexed mediation; parties with limited resources and pressing financial needs may feel pressure to resolve their dispute in mediation even though they might prefer the case resolved by the judge. Because of the potential for constrained choice, a simple suggestion that individuals will not use a dispute resolution mechanism unless they experience it as procedurally just is not enough.

However, procedural justice still provides a critical perspective. Even if an individual might prefer a different dispute resolution mechanism on procedural justice grounds, any given mechanism can appear more or less fair to an individual. In looking at each type of dispute resolution mechanism, one can consider what factors would ensure that the process was perceived as more, rather than less, procedurally fair. In each ADR process, even in the absence of rule of law elements per se, then, system designers can work to bolster the procedural justice an individual experiences, so that the process can be as fair as possible. ADR will never—by conscious design—be the same as a pronouncement by a judge, with the full heft of the rule of law. But when elements of each ADR process are crafted to ensure maximum procedural justice for participants, they will experience the process as more legitimate and worthy of deference; again, this legitimacy may help to keep the ADR processes in sync with the aims of the rule of law.

In the sections below, we consider each ADR process separately, exploring the role of procedural justice and the rule of law in that setting.

A. Arbitration

Of each of the ADR processes, arbitration looks most similar to traditional litigation. Arbitration is faster and more efficient; in exchange, the parties lose some important procedural protections. Although courts maintain the right to

82. *See generally* Donna Shestowsky & Jeanne Brett, *Disputants' Preferences for Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCH. PUB. POL'Y & L. 211 (2004); *see also* Allan Lind, Yuen Huo & Tom Tyler, . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269, 286-87 (1994).

review an arbitration award under the Federal Arbitration Act (FAA), the standard for review is extremely narrow.[83] Grounds for a court's refusal to confirm an award include, among other things, an award based on corruption, fraud, or misconduct,[84] and grounds for modification or correction of an award include evident material miscalculation, evident material mistake, and imperfections in matter of form not affecting the merits.[85] In a recent case, the Supreme Court found that parties could not widen the scope of judicial review under the FAA even by contract.[86] Indeed, even the validity of the long-used judicial standard that allowed judges to vacate an arbitrator's decision if it was made in "manifest disregard of the law" is currently uncertain.[87]

Additionally, courts have made it clear that parties in arbitration require less procedural protection than parties in court. Arbitration is a private, contractual arrangement about how to resolve a dispute, and courts have been reluctant to interfere with that arrangement. So, for example, in *Gilmer v. Interstate/Johnson Lane Corp.*,[88] the Supreme Court upheld the enforcement of an agreement to arbitrate claims arising from an employment agreement, and demonstrated only minimal concern about the procedural aspects of the arbitral process. However, *Gilmer* did require some minimum level of judicial oversight to protect due process, even as it denied special procedural protections in the arbitration context.[89]

Taken together, the protections for parties in arbitration offer a nod in the direction of rule of law, but fail to promote rule of law values in the same way that judicial proceedings are designed to do. Pro-arbitration commentators suggest that the market process controls, and people will not freely choose to include agreements to arbitrate disputes in their contracts if the arbitration process is manifestly unfair.[90] In contrast, other scholars suggest that the absence of full information on both sides, and the typical power differential between the parties, means that arbitration has the potential to be quite unfair.[91]

Ensuring that participants in arbitration experience high degrees of procedural justice may provide a way to ameliorate this tension between arbitration and rule of law. Because arbitration looks so structurally similar to litigation, the same factors that individuals use to assess procedural justice in judicial proceedings ought to be applicable in arbitration. Thus voice, trustworthiness, neutrality, and courtesy and respect will be the key elements in determining whether or not participants experience procedural justice. While arbitrators ought to easily be able to increase parties' perception of voice, and courteous and respectful

83. Federal Arbitration Act (FAA), 9 U.S.C §§ 10, 11 (2010) (limiting grounds on basis of which courts may refuse to enforce awards).

84. *See* FAA § 10.

85. See FAA § 11.

86. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

87. *See* Stolt-Nielsen S.A. v. Animalfeeds International Corp., 130 S. Ct. 1758, 1768 n. 3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in Hall Street Associates . . . ." (citation omitted)).

88. 500 U.S. 20, 31 (1991).

89. *Id.* at 32.

90. *See, e.g.*, Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 (1998).

91. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632-34 (2005).

treatment, a consideration of trustworthiness and neutrality suggests a more structural reform. Many arbitration panels are chosen from a set list of arbitrators, often a list proffered by one party. Although courts do intervene when the panel of arbitrators appears to be exceptionally biased,[92] a closer look at arbitration through the lens of procedural justice suggests that attacks on the neutrality and trustworthiness of the arbitrator—a hallmark of challenges to arbitration proceedings—ought to be taken more seriously. Shoring up the elements of procedural justice in arbitration will help the process comport with rule of law values.

B. Mediation

Although mediation dates to antiquity,[93] mediation in the United States experienced tremendous growth in prominence in the late 1970s and 1980s, as it became a popular way in which to try to reduce burdens on overloaded courts.[94] The mediation that grew out of this effort was also envisioned by many of its proponents as a way to empower participants and ensure them both process and decision control, core elements of procedural justice.[95] In particular, this type of mediation was based on each party having an extensive opportunity for voice, and the forum was designed to foster courtesy and respect among the parties and the mediator.[96] The mediator was envisioned as a completely neutral and trustworthy third party whose sole role was to facilitate the parties' resolution of conflict.[97] Although mediation was expressly not required to comport with legal rules and principles,[98] its conceptual basis as a party-empowering mechanism provided parties with high levels of procedural justice. In turn, this led to a sense of

92. Hooters of Am. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).

93. Peter J. Carnevale & Dean G. Pruitt, *Negotiation and Mediation*, 43 ANN. REV. PSYCH. 531, 561 (1992); *see also* David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 280 (1987) (describing Greek approaches to achieving "justice" and "reconciliation"); F.S.C. Northrup, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 349 (1958) (describing Chinese philosophy in which mediation was the "first best" way to settle disputes).

94. ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, MEDIATION AND OTHER NON-BINDING ADR PROCESSES 7 (3d ed. 2006); *see also* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1570 (1994).

95. Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 14-16, 18-23 (1984).

96. *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 40-47 (1984) (finding that a higher percentage of parties comply with mediated settlements than with court-ordered judgments).

97. Richard Posner, *Mediation, American Bar Association Section of Dispute Resolution, 11th Annual Frank E.A. Sander Program: The 21st Century Lawyer: Problem Solver or Case Processor? (July 8, 2000)*, *in* MEDIATION AND OTHER NON-BINDING ADR PROCESSES, *supra* note 94, at 49. Posner describes a mediator as "a neutral third party who, unlike arbitrator (a private judge), has no decisional power." *Id.* He further states:

> Since the mediator can meet with the parties separately and his discussions with them are confidential, they are likely to be more candid with him than they would be with each other. . . . He can thus help them converge to a common estimate of the likely outcome of the case if it is litigated to judgment.

Id.

98. *See* Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971) ("[T]here is no pre-existing structure that can guide mediation; it is the meditational process that produces the structure.").

legitimacy that could enable it to appear to comport with the rule of law even as it enabled the crafting of creative and extra-legal solutions to disputes.

This cheerful vision of mediation has been attacked on several grounds. First, critics have suggested that some disputes are not appropriate for mediation because of the power dynamics between the parties.[99] For example, some scholars have argued that domestic disputes in cases where violence has occurred ought not to be the subject of mediation.[100] Secondly, as mediation has grown dramatically in popularity, the mediation mechanism itself has changed. So, for example, Welsh describes a thinning vision of self-determination of mediation,[101] suggesting that mediation used to look more voice-driven and more self-deterministic, but now looks increasingly like another kind of litigation in which, while the mediator cannot give parties a binding decision, the decision can be strongly guiding.[102]

The former criticism suggests that power differentials may mean that mediation is simply an inappropriate forum for some subset of cases in which the potential for party coercion dictates that individual rights cannot be adequately protected without the binding authority of a third-party neutral. In contrast, the latter critique of mediation is perhaps less of a worry for those concerned with the rule of law, because it promotes rule-based decision making rather than interest based decision making. But in this narrow vision, some of the self-determination benefit of mediation is lost, from ADR theorists' perspective.[103] Procedural justice as a framework implies that the shift in focus away from rules has related benefits because parties have increased voice, trust, and courtesy and respect, even if they are losing more of the neutral decision maker.

Both court-annexed "narrow" mediation and more party-empowering mediation have the potential to satisfy parties' needs for procedural justice. However, each type of mediation will have distinct effects on the procedural justice factors. For example, if one expects voice to be a privileged element of mediation, and it is not, the process becomes a softer, less formal version of litigation that may still meet one's criteria for fair process in other ways. However, if parties evaluate each of the antecedent factors of procedural justice based on their prior expectations, parties may be disappointed. Psychological research suggests that individuals make evaluations from some reference point rather than from a neutral starting point,[104] so that these prior expectations may result in lower procedural justice evaluations. This suggests that one key element in ensuring the procedural justice of mediation is setting expectations clearly from the outset about the type of mediation in which parties will participate, which in turn will help mediation appear in sync with rule of law values.

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99. *See, e.g.*, Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (arguing that mediation does not provide enough procedural protections in this context).

100. *Id.* at 1584-85.

101. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 5 (2001).

102. *Id.* at 25-26.

103. *Id.*

104. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 285-87 (1979).

C. Negotiation

Negotiation is the least formal of our dispute resolution mechanisms. Parties are free to negotiate, not negotiate, agree on any resolution or no resolution, craft their agreement to fully reflect the dictates of the law, or disregard the law entirely. Although Mnookin and Kornhauser have suggested that we bargain in the shadow of law and that our negotiated outcomes are likely to reflect the legal endowments that legal rules provide,[105] there is wide variation in negotiated outcomes, even when the legal rules are similar.[106] Often, parties are uncertain about the correct interpretation of legal rules, and many negotiated outcomes do not comport with one party's or both parties' prediction of how a court would rule. Additionally, parties may negotiate in any form they choose. They need not adhere to any structure as they work through the substance of their negotiation.[107] In this way, negotiation appears worlds apart from the formalist and substantive rule of law.

In our research on procedural justice in negotiation, however, we discovered that individuals cared about the fairness of a negotiation process, separate and apart from their economic outcome or their perception of the fairness of the outcome.[108] Even though there are no set rules for negotiation to which parties must adhere, and even though the law may provide little neutral guidance to parties as they work to privately settle their dispute, our research demonstrated that individuals nonetheless are more likely to accept and adhere to a negotiated agreement when they believe that the negotiation was conducted in a fair manner.[109] In a negotiation setting, individuals form judgments about whether or not they were treated fairly by assessing whether or not they were afforded a voice, were treated with courtesy and respect, and trusted the other party.[110]

Thus, while it might initially seem that an informal procedure such as negotiation which lacks a third party would not be defined by participants in procedural justice terms, empirical data suggests that individuals are strongly affected by the fairness of process even in this type of setting. Indeed, studies suggest that people's evaluations of a wide variety of procedures are shaped in these terms. For example, studies suggest that people evaluate the justice of economic markets as much in procedural justice terms as in terms of the favorability of the outcomes they produce.[111]

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

106. *See, e.g.*, Hollander-Blumoff & Tyler, *supra* note 24, at 490 (finding that participants achieved a broad range of outcomes despite the fact that the legal framework and fact pattern were held constant); *see also* Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 383 (explaining there are few rules for lawyer's conduct during the negotiation process).

107. For a discussion about the paucity of rules governing behavior during negotiation, see Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 391.

108. *See* Hollander-Blumoff & Tyler, *supra* note 24, at 476.

109. *Id.* at 477.

110. Neutrality is a more complicated concept in the bilateral negotiation context. For further discussion, see Hollander-Blumoff, *Just Negotiation*, *supra* note 24, at 390-91.

111. Harris Sondak & Tom Tyler, *How Does Procedural Justice Shape the Desirability of Markets?*, 28 J. ECON. PSYCH. 79, 79 (2007).

The fact that people care about procedural justice even in legal negotiation suggests that we may need to be less worried about negotiation existing wholly outside the reach of rule of law principles. Although the negotiation process does not technically come within the ambit of rule of law because it does not apply neutral principles directly to facts and does not adhere to any set procedural form, participants nonetheless appear to evaluate negotiation through a fairness of process lens, suggesting that negotiations that comport with rule of law *values* will be more successful than those that do not.

Because procedural justice fosters perceptions of legitimacy, and because the bulk of our legal disputes are resolved through negotiation, the more procedurally fair our negotiations appear, the more legitimate our legal system appears. To this end, procedural justice again offers a way to bolster the legitimacy of our legal system. When fair processes lead to results that both parties are willing to accept, those results will be perceived as legitimate and will be given deference. Even when negotiated results are not the express product of the rule of law—as negotiated agreements, by definition, are not—they can still coexist harmoniously with the system of the rule of law when they are achieved through procedurally just processes.

Certainly, not all legal negotiation will perfectly reflect principles of procedural justice. However, the greater success of more procedurally just negotiations, through increased acceptance and adherence of outcomes, both provides an instrumental benefit that can encourage participants to act in ways that are procedurally fair and offers some measure of comfort that many negotiated outcomes do give parties an experience that contains some procedural justice.

IV. CONCLUSION

It is a well-worn trope that there is a spectrum of dispute resolution, with arbitration closest to judicial decision making, negotiation farthest from it, and mediation somewhere in between. Despite the tremendous structural differences between these processes, research has suggested that in each process, disputants care about fairness of process, and that people prefer and choose ADR processes and rate them highly, especially when they think they get fair treatment.[112] Studies also show that procedural justice is one factor that drives people in their choice of dispute resolution mechanisms.

Because there is considerable conceptual overlap between rule of law principles and procedural justice, and because they both foster perceptions of legitimacy, perhaps concerns over the lack of rule of law values in ADR are overblown, because people will not chose ADR or accept its outcomes if it does not provide the desired rule of law and procedural justice benefits. That is, to the extent that people's procedural justice needs are met in ADR, one might say that these processes are occurring, in an echo of the words of Mnookin and Kornhauser, in the shadow of the rule of law.[113]

However, the implication of a top-down mechanism is not fully accurate. Rule of law does not necessarily cast its shadow on ADR as a guiding influence;

112. *See infra* text accompanying note 82.

113. Mnookin & Kornhauser, *supra* note 105, at 950.

instead, the rule of law may merely embody the principles that individuals desire in dispute resolution systems. Thus, even though the rule of law is enshrined in formal settings and not in informal settings, individuals still look for its core principles whenever there are disputes to be decided or resources to allocate. Indeed, as noted above, procedural justice has even been found to play a role in how people evaluate markets.[114] This explanation helps to explain the seeming contradiction that people may prefer ADR to litigation. Individuals want the benefits of looser process but still expect or want the rule of law and elements that foster procedural justice too. Understanding that people value fairness in these processes can provide researchers and theorists a measure of comfort that procedural justice helps bridge the gap that may exist between ADR and rule of law—that procedural justice may ameliorate the potential tensions between the two ideals.

But this does ignore a very real problem: some individuals are constrained in their choice of processes, whether by unequal market or bargaining power, socio-cultural constraints, geographic restrictions, or level of access to different systems.[115] It is simply not sufficient to suggest that these individuals would not agree to participate in a particular process if they did not find it fair. But what research does suggest is that they would value procedural justice if they could get it, and that procedural justice would add to the legitimacy of the decision reached in their dispute.[116] For these populations especially, it is critical to focus on several key questions about ADR processes. What are the means by which we can make our ADR processes match people's procedural justice needs? What are the best ways to make each ADR process better from a procedural justice perspective? How can legislators, lawyers, and other actors strengthen perceptions of the fairness of process even in non-rule based decision making systems, in order to further the aims of rule of law and legitimate governance? These are important questions that we have touched on briefly, above, and that creators of dispute resolution systems need to take seriously in order to maintain legitimacy for all participants.

114. *See* Sondak & Tyler, *supra* note 115, at 79.

115. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH U. L.Q. 637, 682-83 (1996).

116. *See* TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 11, at 172.