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The Psychology of Aggregation: Promise and Potential Pitfalls

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THE PSYCHOLOGY OF AGGREGATION: PROMISE AND POTENTIAL PITFALLS

*Tom R. Tyler**

The contributions of Judge Weinstein defy simple categorization. He has literally shaped the entire face of the law during his years on the bench.[1] Recognizing the futility of trying to encompass this enormous corpus of work, I want to focus on one area in which Judge Weinstein is widely recognized for having had an important and innovative role: aggregate litigation. His handling of the *Agent Orange* case[2] is probably his best known case in this area, but he also managed a variety of other similar cases. And, I will draw on the area in which I can make the most useful contribution by focusing on the psychology of aggregation.

I begin with the premise that it is important for the courts to have popular legitimacy. We want the public to trust the courts and see them as a mechanism of recourse when the public has grievances. We want that because the courts can play an important positive role in building trust and confidence in law and government, and provide support for democratic authorities.[3]

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1. *See generally* JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN (2011).

2. *See generally* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 111–252 (1987).

3. *See* Tracey L. Meares & Tom R. Tyler, Essay, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 528 (2014), *available at* http://yalelawjournal.org/forum/justice-sotomayor-and-the-jurisprudence-of-procedural-justice.

Conversely, when people lack conventional routes within which to bring their grievances before authorities, they are more likely to take their actions outside the boundaries of the law.[4]

From the perspective of public trust, there are reasons to be concerned about the courts. A 2012 national survey found that 56% of Americans indicated they trust their local courts.[5] And a 2013 study showed that 68% of African Americans felt that the courts treated them less fairly than whites.[6] This level of trust has been stable for the last thirty years.

This leads to three comments about the relationship of aggregate litigation to legitimacy. First, aggregation is desirable because it allows more people access to bring their grievances into the legal system and as a consequence to feel fairly treated through the provision of voice. Second, it is not enough to allow cases to be brought into the system. From a legitimacy perspective, it is also important how they are handled. Here, the issue is one of the most useful roles for the judge to play in structuring the management of aggregation. Finally, I argue for the benefits and potential risks of using self-aggregation as a mechanism for managing mass injuries in an era in which the avenue of judge-based aggregate litigation within the courts is being diminished.

I. THE LEGITIMACY OF THE COURTS

Justice Breyer has recently argued that the courts are central to creating a context in which communities can "respond to a universal need present in every society . . . for some method for resolving disputes among individuals."[7] Further, Justice Breyer recognizes the importance of Supreme Court legitimacy, suggesting that "public acceptance is not automatic and cannot be taken for granted. The Court itself must help maintain the public's trust in the Court, the public's confi-

4. *Cf.* Katrin Hohl et al., *The Effect of the 2011 London Disorder on Public Opinion of Police and Attitudes Towards Crime, Disorder, and Sentencing*, 7 POLICING: J. POL'Y & PRAC. 12, 19–20 (2013). *See generally* Jonathan Jackson, Aziz Z. Huq, Ben Bradford & Tom R. Tyler, *Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence*, 19 PSYCHOL. PUB. POL'Y & L. 479 (2013); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement,* 20 PSYCHOL. PUB. POL'Y & L. 78 (2014).

5. Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1137 fig. 2 (2014).

6. *Social & Demographic Trends*, PEW RESEARCH CTR. (Aug. 22, 2013). http://www.pewsocialtrends.org/2013/08/22/chapter-1-i-have-a-dream-50-years-later/#treatment-of-blacks-by-the-courts-police-seen-as-less-fair.

7. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 138 (2010).

dence in the Constitution, and the public's commitment to the rule of law."[8] And he notes the need to motivate political participation as a way of maintaining a viable democracy.[9] Justice Breyer's argument suggests the importance of creating avenues within the legal system for people to pursue their grievances—avenues that lead people to feel that they have received a just hearing.

Justice Breyer does not examine the question of how the Court can facilitate the goal of maintaining legitimacy. Fortunately, there is an empirical literature that addresses this question both in terms of the Supreme Court and of the courts in general.[10] That literature provides a framework within which we can understand how the public evaluates legitimacy. The results of that research are very clear: people evaluate the courts through a framework of procedural justice. Their primary concern is whether judges exercise their authority fairly when managing their cases.

What does procedural justice mean to people involved with the courts? Studies of litigants usually identify some concerns linked to how fairly decisions are made. Fairness in decision making involves issues of voice and neutrality.

First, people want voice so that they can participate in decisions about the resolution of problems or the application of rules concerning situations in which they have a dispute with others. When dealing with judicial authorities such as judges, this typically means that people want to have an opportunity to explain their situation or tell their side of the story to that authority before decisions are made and outcomes determined. This opportunity to make arguments and present evidence should occur before the judge makes decisions about what to do. People are interested in having a voice.

Second, whether people feel that the procedures were fair is linked to whether there is evidence that the authorities with whom they have been dealing were neutral. This requires an explanation of the process through which the court handles a case, and how courts use rules to make those decisions. Neutrality involves authorities making decisions based on consistently applied legal principles and the facts of the case, not personal opinions and biases. Transparency or openness about what the rules and procedures are, and how decisions are being made, involves the appearance of neutrality through following such rules.

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8. *Id.* at xiii.

9. *Id.* at xii.

10. For a review of this literature, see Meares & Tyler, *supra* note 3.

My comments on aggregate litigation will be framed in terms of the goal of popular legitimacy for the courts and the government, and will consider that issue through the lens of procedural justice. The key underlying point is that people want to have voice and, having had that voice, they want to see that decisions are being made through the neutral and consistent application of legal principles to the facts of the case, as those facts are revealed by the parties during judicial proceedings.

II. The Psychology of Litigation

The American litigation system gives considerable control over the management of grievances to litigants, at least in comparison to many other systems, such as those found in Germany and France. Litigants decide whether to initiate a case, how to investigate and present their story, and whether to accept settlements or judicial decisions arrived at in mediation or in a trial. As Judge Weinstein notes, the tradition is one of "individual justice and control of their cases by the parties, as well as devotion to the individual client by attorneys that stamps this country's approach to the law."[11]

This does not mean that judges are not involved. They make decisions about whether and in what form cases are presented to the courts. They also shape the nature, costs, and speed of ongoing litigation. Finally, they make many judicial decisions in nonjury trials and approve settlements. Nonetheless, the American legal system is characterized by the comparatively large amount of control over cases that is retained by the parties to a case. The assumption is "that each individual plaintiff is entitled to control his own case and that each defendant is entitled to defend against individual plaintiffs."[12]

Psychological research on litigant satisfaction establishes the importance of voice and neutrality. This research suggests that there are psychological benefits to this legal framework.[13] Giving control to the parties is consistent with the notion that people involved in disputes want to maintain control over their conflicts and are more satisfied when they feel that they have control over decisions that involve them. People resist giving power to third-party authorities such as judges, and only do so reluctantly when efforts at negotiation have

11. Jack B. Weinstein, Individual Justice in Mass Tort Litigation 1 (1995).

12. Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigation*, 2009 Cardozo L. Rev. de novo 1, 14, *available at* www.cardozolawreview.com/de-novo-2009.html. Judge Weinstein characterizes this assumption as having "more force in the era of the horse and buggy." *Id.*

13. Tyler & Jackson, *supra* note 4, at 90.

been unsuccessful or they are compelled to do so by law when the other party seeks to make a legal claim. In other words, "we are autonomous individuals who want to make our own decisions, direct the course of our lives, and when necessary, initiate our own litigation—particularly when it involves something as deeply personal as our health or safety."[14] When people give up their personal power to judicial authorities, they seek to retain control over the presentation of their case, as well as of the ability to interrogate other parties, normally through an attorney, whom they hire and whose actions they feel they can control. The adversary system, as traditionally conceived, is well-designed to produce satisfaction with the litigation process among both winners and losers, and in so doing, maintains the legitimacy of the legal system and of judges.

This basic satisfaction with traditional litigation is supported empirically by the research of Thibaut and Walker, who studied adversarial and inquisitorial procedures for dispute resolution.[15] Their studies demonstrated first, that people prefer to retain control over disputes; and second, that when disputes must be given over to third-party authorities, people try to retain control over the presentation of evidence, even when they must give up control over decisions about the outcome.[16] The Thibaut and Walker research focused on a litigant's satisfaction with trial outcomes and suggested that the adversarial system maximized satisfaction because it maximized litigant control over evidence presentation and, indirectly, over outcomes.[17] This body of research points to the particular importance of giving people voice, i.e., control over the gathering and presentation of evidence. As noted, the combination of opportunities for voice and neutrality define fair procedures for decision making.

Does this general framework for understanding people's evaluations of the courts fit the context of litigants pursuing claims? The issue is why people sue in the first place, and when they stop trying to pursue their grievances. Early discussions of when people pursue lawsuits emphasized the centrality of calculations of gain and loss in deci-

14. Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, B.U. L. REV. 87, 89 (2011).

15. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); *see also* Allan Lind, John Thibaut & Laurens Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

16. THIBAUT & WALKER, *supra* note 15, at 67–116.

17. *Id.*

sions about whether to pursue grievances.[18] The literature on claiming is generally predicated on the economic premise that decisions to pursue claims depend on the expected costs and benefits associated with doing so.[19] Similarly, early discussions of aggregation focused on the impact of mass aggregation on the outcomes that people receive. In both cases, the underlying assumption is that issues of efficiency, delay, costs, and settlement gains are the key factors of concern to the public when pursuing litigation.

Recent studies have suggested that the cost–benefit approach does not capture many of the issues that are important to litigants. Consider first the work of Relis on why plaintiffs sue, and what they seek from litigation.[20] Relis considers empirical evidence on the motivations and objectives of plaintiffs in the context of medical malpractice claims.[21] Her results suggest that plaintiffs seek (1) acknowledgement of harm; (2) retribution for inappropriate or illegal conduct; (3) admission of fault; (4) truth concerning the events that occurred; and (5) apologies.[22] In other words, people sue for principled reasons related to their dignity and desire for respect, their desire to be heard, and their desire for accountability.[23] In contrast, Relis argues that lawyers believe (incorrectly) that people sue to gain monetary damages.[24]

Hadfield considered the same question in a study of individuals who were injured or lost a family member in the September 11, 2001 terrorist attacks.[25] Those studied were involved in choosing whether or not to accept a cash payment from the Victim Compensation Fund or to pursue litigation.[26] As in the prior study, those involved thought that much more was involved in their choice than a monetary decision. In particular, they were interested in obtaining information about what happened, promoting accountability for those involved,

18. *See, e.g.*, William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981).

19. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

20. *See, e.g.*, Tamara Relis, *Consequences of Power*, 12 HARV. NEG. L. REV. 445 (2007); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701 (2007) [hereinafter Relis, *Not About the Money*].

21. Relis, *Not About the Money*, *supra* note 20.

22. *Id.* at 721–28.

23. *See id.*

24. *Id.* at 735–36.

25. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008).

26. *Id.* at 651–53.

and participating in a process of producing change to prevent a repetition of the attack.[27]

Lind, Greenberg, Scott, and Welchans interviewed recently fired or laid-off workers to understand why they did or did not initiate wrongful termination claims.[28] They found that two factors shaped employees estimates of the likelihood of suing: estimates of the likelihood of winning, and how fairly the employee felt that they were treated on the job and during the termination. Of these factors, the most important was the fairness of treatment at termination.[29] The authors note that "feelings of unfair, insensitive treatment at termination had nearly twice the effect of the next most potent factor in determining who would consider suing and who would not."[30] Factors shaping fairness judgments included whether the employee received an honest explanation for the policies that led them to be fired and whether they felt that they were treated with dignity during the termination process.[31]

Lind, Kulik, Ambrose, and DeVera Park studied how evaluations of the fairness of court-ordered arbitration sessions shaped whether disputants rejected those decisions and moved forward to a trial.[32] This study involved interviews with both corporate and individual litigants in federal tort and contract actions.[33] The study found that both the objective outcome and evaluations of the procedural fairness of the court-annexed arbitration hearing shaped decisions about whether to accept the arbitration award.[34] Of the two factors, procedural fairness was the most important.[35]

Barclay considered the issue of when people accept a judicial decision instead of appealing.[36] He did so by drawing from a sample of 1,103 civil litigants who had lost their cases and of whom 622 appealed.[37] Based on interviews with a sample of these litigants, his findings support a process-based model rather than an outcome-

27. *Id.* at 673.

28. E. Allan Lind et al., *The Winding Road from Employee to Complainant: Situational and Psychological Determinants of Wrongful Termination Claims*, 45 ADMIN. SCI. Q. 557 (2000).

29. *Id.* at 580–81.

30. *Id.*

31. *Id.* at 581–82.

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

33. *Id.* at 231, 238.

34. *Id.* at 244.

35. *See id.* at 244–45.

36. SCOTT BARCLAY, AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES (1999).

37. *Id.* at 24.

driven one.[38] The primary motivation he identified was the desire to be treated fairly in resolving claims.[39] Such fair treatment is found to involve having been heard by the courts.[40] Those litigants who felt that they were not heard in their trial, but who felt that they would be heard by an appeals court, were the most likely to appeal.[41]

What are people seeking in appeals? Barclay argues,

> The very act of litigating carries meaning in itself for the litigant, and it appears to work in several ways. First, it validates the original complaint of the litigant by having its value confirmed by the fact that the court takes it seriously. Simultaneously, the fact that the court takes the litigant's ideas seriously in considering a result is taken as evidence that the litigant has effectively exposed the wrongdoing of the other party in a public arena. Thus, it is the very nature of the court's process that is important in meeting the litigants' goals. Further, it is only in the court where such goals can be met.[42]

And in the case of appeals, he suggests that litigants want their "complaint about the existing policy" to be "given credence by the appellate court" by listening to their arguments.[43]

This research on litigation emphasizes the centrality of feeling that one's case has been treated fairly to the willingness to accept judicial decisions and abide by them over time. People are more willing to accept court decisions if they believe court procedures are fair,[44] and they are also more willing to cooperate with the courts—for example, by testifying or serving on a jury—if they believe that the courts function through fair procedures.[45] Of particular importance is the finding that procedural justice promotes decision adherence that lasts over time.[46] The procedural justice that a person experiences during their time in a court also shapes their broader views about the legitimacy of

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38. *Id.* at 155.

39. *Id.* at 84.

40. *Id.*

41. *Id.* at 121–22.

42. BARCLAY, *supra* note 36, at 119.

43. *Id.* at 124.

44. *See, e.g.*, ROBERT J. MACCOUN ET AL., RAND CORP., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM (1988); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Lind et al., *supra* note 32.

45. Tyler & Jackson, *supra* note 4, at 79–80.

46. *See, e.g.*, PENELOPE EILEEN BRYAN, CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM 12–14 (2006); Robert E. Emery et al., *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning One Year After Settlement*, 62 J. CONSULTING & CLINICAL PSYCHOL. 124 (1994); Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553 (2007).

the court system.[47] By giving people a way to engage the legal system, aggregation creates an opportunity within which these objectives can be obtained.

III. Aggregate Litigation and Voice

The problem associated with having a legal system based on this model is that there are situations in which, regardless of what people might want to do concerning a grievance, it is not financially practical for them to pay the costs associated with individual litigation. This can be the case when the people who are injured lack the resources to pay a lawyer, or have a case whose outcome is of sufficient uncertainty that lawyers will not accept contingent fee arrangements. In such a setting, the strength of our system—i.e., the fact that litigants own their own grievances—becomes a limiting condition. This limitation has become very apparent in situations of mass injury, where many people suffer similar injuries emanating from a similar source that they may not be able to seek justice for under traditional models of litigation.

These problems can arise for a variety of reasons. Some common reasons are that litigants lack the resources to support the costs of traditional litigation. And, as individuals, they are not able to offer attorneys the type of potential financial gain that would lead lawyers to be willing to take their cases on a contingency-fee basis. Such situations are widespread, and people often opt to "lump it" when they suffer an injury. However, when an injury is widespread or when there is a sense that the offender behaved unethically, the failure to have a hearing can be damaging to the courts, the law, and the government.

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47. *See, e.g.*, Thibaut & Walker, *supra* note 14; Tyler & Huo, *supra* note 44; Tom R. Tyler, Why People Obey the Law (2006); Jo-Anne M. Wemmers, Victims in the criminal justice system (1996); Rashida Abuwala & Donald J. Farole, Jr., The Effects of the Harlem Housing Court on Tenant Perceptions of Justice (2008), *available at* http://www.courtinnovation.org/sites/default/files/Harlem_Housing_Court_Study.pdf; Ben Bradford, *Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System*, 11 Criminology & Crim. Just. 345 (2011); Donald J. Farole, The New York State Residents Survey: Public Perceptions of New York's Courts (2007), *available at* http://www.courtinnovation.org/sites/default/files/documents/NYS_Residents_Survey.pdf; Stephen Shute et al., A Fair Hearing?: Ethnic Minorities in the Criminal Courts (2013); Avishalom Tor et al., *Fairness and the Willingness To Accept Plea Bargain Offers*, 7 J. Empirical Legal Stud. 97, 113–14 (2010); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 Behav. Sci. & L. 215 (2001); Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 Am. J. Pol. Sci. 629 (1989).

How are people affected by being in this situation? Rottman and Tyler analyzed the results of a survey of residents of California conducted by the Administrative Office of the California Courts.[48] That survey examined whether people had ever considered taking a grievance to court but had not done so; 25% of those interviewed were in this group.[49] The primary reason given for not going to court was a lack of resources.[50] They found that believing that one had been denied the opportunity to go to court was associated with significantly more negative views about the legitimacy of the courts.[51]

Of course, on an everyday basis, many legal claims are never pursued for these and other reasons. However, when many people suffer from a similar cause, two important additional factors become involved. The first is the scope of the discontent and overall sense of injustice that can be created by failing to address injustice. The second is the possibility that by acting together, people with an injury can bring their cases into court even if they could not do so individually.

A key benefit of aggregation is that it allows people who otherwise could not do so to bring their cases into courts where those cases can receive a hearing. This allows people seeking justice to pursue their grievances and provides an opportunity for voice and adjudication of their claims. As Judge Weinstein says: "Every person has a sense of justice. Every person wants to be treated fairly. In this country fair treatment usually includes the right to be heard in court by a judge and usually a jury."[52] Hence, allowing cases into the system in aggregate when individual pursuit of grievances is difficult promotes the judgment that the courts provide fair procedures for the redress of grievances both among the parties and in society more generally. Such fairness judgments in turn encourage positive views about court legitimacy.[53]

The importance of building legitimacy is a theme that is increasingly articulated by legal authorities in an era of widespread distrust in our major social and political institutions. One focus of distrust is political authority, including the executive (51% a great deal or a fair amount), legislative (34% a great deal or a fair amount), and judicial (62% a

48. David B. Rottman & Tom R. Tyler, *Thinking About Judges and Judicial Performance: The Perspective of the Public*, 4 OÑATI SOCIO-LEGAL SERIES 1046, 1051 (2014), *available at* http://ssrn.com/abstract=2541450.

49. *Id.* at 1055.

50. *See id.*

51. *See id.* at 1054, 1064.

52. WEINSTEIN, *supra* note 11, at 1 (1995).

53. Tyler & Sevier, *supra* note 5, at 1127–30.

great deal or a fair amount) branches of government.[54] The judiciary fares reasonably well in contrast to the other branches of government. The proportion of Americans expressing a similar level of trust in the judiciary was 75% in 2003.[55] However, even the courts have lost legitimacy in recent years.

Hence, one important gain that is achieved by aggregation of cases is that it allows people who have a grievance to have an opportunity for their claims to be addressed within a legal forum. This increases their belief that their grievance has been handled fairly, promoting acceptance of the resolution and promoting court legitimacy. Mass torts are especially relevant to the issue of court legitimacy by virtue of the large number of people that are involved. In cases such as the *Agent Orange* case, if the large number of veterans involved can find no way to seek redress for their claims, widespread distrust in the courts and government is created.

The potential pitfall of aggregate litigation is the reverse of that which has already been outlined: the loss of control and, in particular, of voice. In aggregate litigation, the link between lawyers and the concerns of particular clients is diluted. A lawyer represents many clients, and those clients may or may not feel that they have voice. There is no literature on voice and aggregation. However, studies of pro se litigation suggest that people do not feel that they lose voice when they are represented by a lawyer as opposed to representing themselves.[56] Research is necessary to better understand the balance of increased voice through involvement in litigation and potential decreased voice through sharing control.[57]

The first reason to support aggregation is that it may enable more litigants to voice their grievances in forums where they can receive principled decisions from legal authorities. In the case of *Agent Orange*, for example, we can ask what would have happened if the veterans involved had had no forum to express their grievances. This would have encouraged anger and distrust, and undermined both the courts and the government. Hence, opening up the courts in an era in which access to the courts is diminishing is desirable. Aggregation helps to achieve that goal.

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54. *Trust in Government*, GALLUP, http://www.gallup.com/poll/5392/trust-government.aspx (last visited Jan. 19, 2015) (reporting the results of a survey conducted Sept. 5–8, 2013).

55. *Id.*

56. *See, e.g.*, Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473 (2010).

57. *See generally* Stephan Landsman, *Pro Se Litigation*, 8 ANN. REV. L. & SOC. SCI. 231 (2012).

IV. A Relational Perspective on Litigation

Findings about procedural justice in litigation indicate that issues of voice and neutrality in decision making are important, but they also suggest a need to broaden the framework for discussions of procedural fairness.[58] This broadening moves our conception of treatment beyond the handling of one's complaint to the issue of quality of interpersonal treatment, i.e., how a person feels handled as a member of the community.

A focus on voice and neutrality accords with the traditional legal framing of procedural design as being about how legal authorities structure trials and deliberation about cases. A fair judge is one who correctly applies the law to the facts in a particular case, usually with the goal of achieving the correct outcome. However, this framing of procedural justice is inadequate to deal with the broader set of concerns that emerge from studies of litigants.

Research on the popular meaning of procedural justice suggests that the public also considers issues related to the quality of their treatment by judicial authorities.[59] People first value treatment with respect.[60] They want to have their status as human beings and members of the political community acknowledged by judicial and political authorities.[61] Because quality of treatment is a statement about their status, people are sensitive to whether they are treated with dignity and politeness, and to whether their rights as members of the community are respected.[62] This issue of respectful interpersonal treatment consistently emerges as a key factor in reactions to dealings with legal authorities.[63] People believe that they are entitled to be treated with respect, and they react very negatively to dismissive or demeaning interpersonal treatment.[64]

People also focus on cues that communicate information about the intentions and character of the legal authorities with whom they are dealing.[65] This involves inferences of integrity, trustworthiness, and good faith.[66] People react favorably to the judgment that the authorities with whom they are interacting are benevolent, caring, and sin-

58. *See generally* Thibaut & Walker, *supra* note 14.

59. *See* Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 Advances in Experimental Soc. Psychol. 115, 160–65 (1992).

60. *Id.* at 161.

61. *Id.* at 158–60.

62. *Id.* at 160–62.

63. *Id.* at 165–66.

64. *Id.* at 164–65.

65. *See* Tyler & Huo, *supra* note 44.

66. *Id.* at 61–64.

cerely trying to listen to and understand the needs and concerns of the parties so that they can do what is best for the people with whom they are dealing.[67] Authorities communicate this type of concern when they are seen to listen to people's accounts and then explain or justify their actions in ways that show an awareness of and sensitivity to what people have said.[68] In discussions about whether or not to accept a directive from a legal authority, each of these concerns is typically as or more important in decisions than are assessments of the fairness or favorability of the decision itself.[69]

Litigants are more likely to indicate that they received fair decision making than they are to indicate that they experienced fair treatment. Yet, fair treatment is more strongly related to acceptance of decisions and trust in the courts. Hence, attention to issues of respect for a litigant's claims and establishment of a forum in which they have authorities that they trust are areas of the courts that are relatively underdeveloped.

It is here that Judge Weinstein's insights about how to manage aggregate litigation are particularly important. Initial discussions of aggregation focused on the suggestion that aggregation provides a mechanism for quicker and possibly fairer settlements. As an example, using a few trials of cases selected statistically to establish liability and damages, and then a formula to dispense damage awards to a large group of plaintiffs, improves the speed with which people receive damage awards.[70] While such an approach is potentially efficient, focusing on such approaches raises questions about whether damages are the central issue propelling litigation.

Certainly, in some types of cases, damages are a key issue. Workplace compensation programs are an example of a system designed to address injuries in cases in which responsibility is recognized and there are generally not issues of negligence or wrongdoing.[71] However, many of the aggregate litigation cases that have had high levels of visibility in recent years have involved important questions of po-

67. *See id.*

68. *See id.* at 65–67.

69. *Id.*

70. *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 782–86 (9th Cir. 1996); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998).

71. *See* DEBORAH R. HENSLER ET AL., RAND CORP., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES (1991), *available at* http://www.rand.org/content/dam/rand/pubs/reports/2006/R3999.pdf.

tential negligence or wrongdoing,[72] and the research already outlined suggests that in such situations compensation is not the only or even the central issue to the people pursuing grievances.

Judge Weinstein articulates a broader view of the issue of what people want that foreshadows the findings of empirical research on what litigants mean by a fair procedure for managing their grievances and injuries.[73] He suggests that "[s]teps should be taken to ensure that courts provide individual justice, even in a mass context."[74] More broadly he asks:

> How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treats him or her as an individual person? How can each person obtain the respect that his or her own individuality and personal needs should command in an egalitarian democracy such as ours?[75]

Studies support the suggestion that the public cares about the concerns raised by Judge Weinstein. One model that organizes these concerns is the relational model of authority, a model based on the findings of procedural justice.[76] Studies indicate that when people are reacting to their experiences with legal authorities, they are centrally influenced by the quality of their treatment.[77] The key point is that public evaluations of judicial authorities and institutions center most heavily around issues of quality of treatment rather than on evaluations of the quality of the decision making of the courts.[78]

To illustrate this point, we can consider research on how the public deals with disliked groups. A perennial issue in law is determining what obligations society owes to minority groups that want to express unpopular ideas through teaching, public demonstrations, or in other ways. One study presents members of the public with such groups and asks about several types of denials that might occur.[79] The public regards the most acceptable form of denial as the refusal to provide resources to allow the group to promote its agency.[80] An intermediately acceptable denial is to deny the group procedural rights, such as the

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72. *See, e.g.*, Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355 (2003).

73. WEINSTEIN, *supra* note 11.

74. *Id.* at 2–3.

75. *Id.* at 3.

76. Tyler & Lind, *supra* note 59.

77. *See, e.g.*, Tyler & Sevier, *supra* note 5, at 1106.

78. *Id.* at 1129–30.

79. Huo, Yuen J., *Justice and the Regulation of Social Relations: When and Why Do Group Members Deny Claims to Social Goods*, 41 BRIT. J. SOC. PSYCHOL. 535 (2002).

80. *Id.* at 554–58.

right to speak or assemble.[81] However, the least acceptable form of denial would be to treat members of the group disrespectfully.[82] In other words, of all the forms of injustice, disrespect is viewed as the most serious.

Fair procedures are important because they provide reassurance that those in positions of legal authority are attending to these relational issues. As a consequence, when people deal with an authority, or are the members of a group, organization, community, or society, and see evidence that fair procedures are shaping decisions, rules, and policies, they are then more willing to merge their sense of self with the group, intertwining their identities with the values of the group. As people identify more closely with others and the institutions and authorities that unite them, they both view them as more legitimate and engage in a variety of group-supporting behaviors, including following rules, accepting decisions, cooperating with authorities, and generally taking actions that people perceive will help their group.[83]

A relational view of the courts supports a broader conception of what fairness looks like. It supports efforts to humanize judges by allowing them opportunities to communicate respect to members of the public and to highlight their sincere and principled (e.g., "trustworthy") behavior. Such efforts touch on the two core elements of public conceptions of fairness noted, and thus are central to legitimating the court to the American public.

Judge Weinstein understood these concerns of the American public, and hence had a good sense of how to create and maintain legitimacy for the court and its decisions. Studies of public reactions to both local courts and the Supreme Court all demonstrate that when people talk about having experienced a fair or an unfair procedure, they make that determination by considering both the fairness of decision making and the fairness of treatment. These same studies further suggest that fairness of treatment is of particular importance.

Tyler and Sevier used information collected from a national sample of Americans to examine the legitimacy of local courts.[84] They examined the degree to which court legitimacy was based on the quality of the decision making of the courts as defined as the frequency with

81. *Id.*

82. *Id.*

83. *See generally* TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (2000); Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity & Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349 (2003).

84. Tyler & Sevier, *supra* note 5.

which the courts were believed to make accurate decisions and to allocate resources or punish appropriately.[85] While the results indicate that legitimacy is, to some extent, based on the evaluation of the quality of decision making of the courts, the primary factor shaping legitimacy is the perceived quality of the treatment people received from judicial authorities.[86] This includes whether people believe that they are respected when they deal with the courts, and whether they think that judges care about and consider people's needs and concerns when making decisions.[87] The study also shows that people are more willing to cooperate with the courts as institutions when they view them as legitimate.[88] This includes a greater willingness to bring disputes to court instead of engaging in private violence, and more willingness to be a witness in a court proceeding.[89]

Recent efforts to understand public views about the Supreme Court have identified a similar set of issues shaping public views about the Court and an image of public support that includes relational concerns. Gibson interviewed a randomly chosen sample of Americans and found that legitimacy was linked to issues of principle and sincerity.[90] In terms of principle, judges are viewed as acting out of a sincere effort to decide based on principle, rather than in a strategic effort to advance their own self-interest, as members of Congress are viewed.[91]

Kahan argues that the challenge for the Court is to transcend the tendency of people to view the Court through the lens of their prior perceptions of policy-relevant facts (motivated reasoning).[92] Kahan notes that "citizens of diverse values are prone to forming opposing perceptions of the Supreme Court's neutrality."[93] Kahan's insight is interesting because he suggests that the key to gaining acceptance does not lie only in a greater effort by the Court to explain how it makes decisions.[94] He suggests that the Court may be required to "say much more than is required strictly to decide a case."[95] To touch

85. *Id.*
86. *Id.* at 1128–30.
87. *Id.* at 1128.
88. *Id.* at 1114–15.
89. *Id.* at 1123.
90. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 213–14 (2011).
91. *Id.* at 200.
92. Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011).
93. *Id.* at 58.
94. *See id.* at 53–59.
95. *Id.* at 71.

public concerns, courts need to address the broader range of issues outlined in the prior discussion about public views concerning fairness.

Kahan argues that instead of simply elaborating its reasoning to promote confidence in its impartiality, the Court should consider social psychological strategies for countering motivated reasoning.[96] One principle is "aporia," the acknowledgement of the complexity of the issues involved in a case. This acknowledgement, as Kahan outlines, reflects a willingness on the part of the Justices to be inclusive by acknowledging the arguments made by all the sides to an issue.[97] This shows everyone involved that the Court is giving fair and open-minded consideration to opposing arguments.[98]

Kahan's second principle is affirmation.[99] Here, he reflects the idea of respect for people, their rights, and their standing in society.[100] He argues that the Court should explicitly affirm people's possession of valued traits and characteristics by communicating respect for the status and values of the groups with which they identify.[101] This should be done for all the different parties involved in a case.[102] Such recognition of people and the groups that shape their identity promotes not only Court legitimacy, but identification with society and government.

Tyler and Krochik further explored the psychology of support for the Court or Congress in the context of ideological conflicts.[103] They used a vignette procedure in which those who completed a questionnaire were first told that the Court had made a decision consistent with or opposed to their own views on a controversial economic or social issue.[104] Their findings suggest that judgments about the fairness of procedures do shape the willingness to accept Court decisions above and beyond whether those decisions reflected the person's own social or economic values.[105] Overall, three factors mattered. The first was whether or not people assessed that the Court or Congress made decisions fairly (principled decision making).[106] The second was whether people felt that the Court or Congress considered public con-

96. *Id.* at 62–64.
97. *Id.*
98. *Id.* at 63.
99. Kahan, *supra* note 92, at 67.
100. *See id.*
101. *Id.*
102. *Id.* at 67–68.
103. Tom Tyler & Margarita Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict*, 88 CHI.-KENT L. REV. 433, 436–39 (2013).
104. *Id.* at 442.
105. *Id.* at 444–47.
106. *Id.* at app. 452.

cerns when making decisions.[107] And, the third was whether people felt that the Court or Congress respected public values.[108] Of these three issues, the one most central to accepting Court decisions was whether the Court was seen as considering public concerns.[109]

What implications do these findings have for courts? First, they suggest the wisdom and value of the efforts that Judge Weinstein has already undertaken to strengthen the connection between courts and the public. And, research findings support his intuition that this effort needs to be broader than focusing on the neutrality and factuality of judicial decision making, individual or aggregate. Those are important elements of the public's view of the courts, but research findings point to issues of trust in the motives of judges and in their willingness to recognize and acknowledge public concerns. Hence, these are obvious points of contact with the public.

Why does this matter? Because the findings concerning what people want point to issues that ought to be central to efforts to resolve any litigation, and in particular to designing ways to manage aggregate litigation. The risk in such litigation is that the needs and concerns of the individual parties get lost and that, as a consequence, the people involved do not feel fairly treated and do not view the courts as legitimate. A key implication is that mass settlements should not replace individual hearings. Judge Weinstein led the way with *Agent Orange* by holding hearings during which victims could address him and talk about their cases.

Kenneth Feinberg has developed this idea in his subsequent efforts, including administrating the 9/11 Compensation Fund.[110] His approach has been to tailor awards to individuals only after they have the opportunity for a personalized, customized hearing.[111] In fact, he suggests that having such hearings was "the essential reason that the program was so successful."[112] He argues that people felt that "he was empathetic, [he] appreciated the arguments, [he] didn't cut [them] off, [they] had a chance to vent [their] emotion, and [they] think [they] were treated with respect."[113] And, consistent with the perspective being outlined, he notes that people did not come to argue about

107. *Id.*

108. *Id.*

109. Tyler & Krochik, *supra* note 103, at app. 452.

110. Kenneth R. Feinberg, Keynote Address, *How Can ADR Alleviate Long-Standing Social Problems?*, 34 FORDHAM URB. L.J. 785 (2007).

111. *Id.* at 789.

112. *Id.*

113. *Id.*

money.[114] They came to speak about other issues. To summarize, he argues that he is "now a big believer in due process hearings in administrative proceedings."[115]

What is crucial about these comments is that the hearings were not directed at a discussion of the legal rules used to determine the settlements. They were about the relational issues outlined. Hearings provide injured parties with an opportunity to express their feelings, state their arguments, present their evidence, describe their losses, and talk about their grievances before authorities who recognize their standing to address the court and to have themselves, their needs, and their concerns acknowledged and taken seriously. And, the advantage of mass litigation is that it provides a forum for achieving these goals that otherwise would most likely be unavailable because people would be unable to come before the court for financial or pragmatic reasons, leaving large numbers of people feeling that they had not received their day in court and, consequently, lowering the legitimacy of the courts and the government.

Conversely, this perspective on aggregate litigation points to a potential pitfall of aggregation. If aggregation removes the opportunity for people to receive individualized attention to their problems, it will potentially be less satisfactory and will undermine, rather than build, legitimacy. To the degree that aggregate litigation removes people with injuries from forums in which they can receive their day in court and substitutes formulas for dispensing compensation, those with grievances are less likely to feel fairly treated.

V. Aggregate Litigation and Community Solidarity

Judge Weinstein's treatment of aggregation reflects a broader conception of why people pursue grievances than one framed around issues such as winning or losing and the amount and nature of compensation received. It also contains a broader view of the meaning of procedural justice than that found in early psychological research. Hence, it defines a view of what people want that is more inclusive, and more consistent with the psychological research outlined here. However, in another respect, Judge Weinstein's framing of aggregate litigation is very traditional. His focus is on the relationship between individual litigants and a legal authority—in his case, the judge. His concerns are still shaped around the idea of having a judge-controlled system respond to individuals. And, within this

114. *Id.* at 791.
115. *Id.*

framework, the judge controls decisions about forming and certifying a legal class and framing how aggregate litigation will go forward.

More recently, the courts have become less open to aggregate litigation. From the framework of people with injuries, this development limits the possibility of achieving the gains of voice that have already been outlined. As Burch suggests,

> Instead of taking the realities of mass torts into account, courts assume that adversarial legalism and conventional norms . . . continue to ensure procedural justice. They do not. Procedures designed for bipolar "plaintiff versus defendant" litigation cannot handle the demise of adversarial litigation, the volume of claims and litigants, the attenuated attorney-client relationships, and the resulting agency problems presented by mass torts. And yet, because institutional legitimacy and voluntary compliance with judicial decisions hinge on procedural justice, retrofitting the judicial infrastructure is crucial.[116]

So, how can the psychological gains outlined above be achieved in this new, less friendly era?

Recent legal scholarship has pointed to an additional type of aggregate litigation that remains possible.[117] That is private aggregation through contracts among plaintiffs or between a group of plaintiffs and lawyers. Unlike prior forms of aggregation, this form is not determined by judicial authorities. Instead, it is a private agreement among a group of people who feel that they are similarly injured and who identify a common cause of those injuries. The primary proponent of this perspective is Elizabeth Chamblee Burch, who draws on both moral and political philosophy and social psychology to support her arguments.[118] I will focus on this development from the perspective of the psychology of aggregation.

The fundamental point Burch makes is that although the traditional system treats individuals and their cases separately, the common nature of both the injury and the defendant in mass cases invites litigants to identify and act as a group.[119] This promotes trust, reciprocity, and altruism within the group, leads to cooperative behavior, and encourages people to think about the issues involved on a group, rather than an individual, level.[120]

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116. Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 2 (2009).

117. *See, e.g.*, Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2009) [hereinafter Burch, *Litigating Groups*]; Burch, *supra* note 14; Burch, *surpa* note 116.

118. *See* articles cited *supra* note 116.

119. Burch, *supra* note 14, at 90–93.

120. *Id.*

The advantage is that engaging in aggregate litigation promotes the same types of psychological benefits that have already been associated with procedural fairness. Despite these potential advantages, "few, if any, attempts have been made to harness the power of groups for the good of the litigants."[121]

While people can bring their grievances to court, the psychological aspects of their interaction with court authorities can also be addressed by solidarity among groups of litigants. They can provide each other with acknowledgement and emotional support. And, as groups develop, the people within them increasingly act not out of self-interest, but out of concern for the well-being of the group. People identify with the collectivity and work jointly to achieve its aims. In addition to addressing people's concerns for respect and acknowledgement, groups are resilient and proactive in pursuing objectives in the face of external difficulties.

To achieve the psychological gains noted, it is important to minimize the role of lawyers in self-organized groups. How can this be achieved? Many court systems, including California's, provide potential litigants with advice and guidance in the form of websites and help centers. Such guidance could easily include information about how to join together to pursue litigation. Further, rules should encourage opt-in provisions so that people's sense of choice and commitment to the group is maximized. Perceived choice builds solidarity.

VI. The Psychology of Collective Action

Grievances can be conceptualized at the individual level, at the group level, or at the society or system level.[122] Individual justice refers to what a particular person receives in response to some grievance or injury, as in, "my compensation for my workplace injury was less than I deserved," or "the settlement gave me too little money." Group-based justice claims are framed in terms of group membership, for example, "African-Americans are unfairly treated," or "gay people deserve more rights." Finally, societal judgments speak to the overall distribution of resources or opportunities in society. We might say, for example, that it is "unfair" that one percent of our society's population controls such a large share of our total wealth. As has been noted, the legal system traditionally focuses on individual grievances handled individually, and aggregate litigation is a move toward collective case management, based on the idea that, in some way, the

121. Burch, *Litigating Groups*, *supra* note 117, at 2.

122. *See* Tom R. Tyler, *Justice and Effective Cooperation,* 25 Soc. Just. Res. 355 (2012).

people involved are a group by virtue of common experiences. Still, while individuals may form a group, they still receive individualized justice.

A central distinction made in the social psychological literature is between deprivations that people understand to have occurred at the individual level (e.g., "I get less than I should") and the group level (e.g., "my group gets less than it should").[123] This framing issue is important because it shapes whether people respond to injustice as individuals or as a group.[124] In particular, the group-level framing of injustice may lead to people taking group-based or collective action, which has been defined as acts in which people serve as representatives of a group to which they belong when the action is directed at improving the conditions of the group as a whole.[125]

Framing problems as due to group characteristics encourages people to work as a group to respond to those problems. In his seminal work *Why Men Rebel*,[126] Gurr contends that feelings of shared economic deprivation, for example, are at the roots of political action, as people collectively voice their discontent with the discrepancy between their group's expected and actual material conditions.[127]

The key point for the legal system is that when people define themselves as members of a group, they are more likely to respond to collective injustice by taking organized, group-based action. This has the potential for allowing individuals to take on themselves the control of their cases on the basis of group actions, something that has happened in the past, but only because judges defined them as reflecting a class. People can also define themselves as a group. What determines whether people do, in fact, define their grievances in collective terms

123. *See* CAROLINE KELLY & SARA BREINLINGER, THE SOCIAL PSYCHOLOGY OF COLLECTIVE ACTION: IDENTITY, INJUSTICE AND GENDER 13–15 (1996); *see also* W. G. RUNCIMAN, RELATIVE DEPRIVATION AND SOCIAL JUSTICE 9–35 (1966).

124. James M. Olson, *Resentment About Deprivation: Entitlement and Hopefulness as Mediators of the Effects of Qualifications*, *in* 4 RELATIVE DEPRIVATION AND SOCIAL COMPARISON 57, 73–76 (James M. Olson et al. eds., 1986); *see also* Stephen C. Wright et al., *Responding to Membership in a Disadvantaged Group: From Acceptance to Collective Protest,* 58 J. PERSONALITY & SOC. PSYCHOL. 994, 995 (1990).

125. Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparsions, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 293 (1994); *see also* Jacquelien van Stekelenburg & Bert Klandermans, *Individuals in Movements: A Social Psychology of Contention*, *in* HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES 157 (Bert Klandermans & Conny Roggeband eds., 2007) [hereinafter Stekelenburg & Klandermans, *Individuals in Movements*]; Jacquelien van Stekelenburg & Bert Klandermans, *The Social Psychology of Protest*, 61 CURRENT SOC. REV. 886 (2013) [hereinafter Stekelenburg & Klandermans, *Psychology of Protest*]; Wright et al., *supra* note 124.

126. TED ROBERT GURR, WHY MEN REBEL (1970).

127. *Id.* at 12–14.

and pursue collective action? One factor is legitimacy. If people feel that the injuries they have suffered reflect moral wrongdoing by illegitimate institutions or authorities, they are more likely to join together to seek accountability.[128] People are also influenced by their evaluations of their likelihood of success (collective efficacy).[129]

One important finding of studies on collective action echoes the point made by Burch. As people join together to form a group, group interests begin to supplant individual interests and the potential develops for groups to act in ways that are more than simply aggregations of individual claims.[130] For this reason, the likelihood of groups acting collectively to correct injustices is facilitated when the people in the group identify with common group membership.[131] The more people identify with a group, the more likely it is that they will participate in actions on behalf of the group, and the more likely it is that those actions will be based on their group-linked identity needs, rather than individual instrumental reasons.[132] Being a valued member of the group, respected by others, becomes the central reason for behavior.

It is important to recognize that deprivations need not be material. People are also sensitive to procedural deprivations, as when people feel that those in their group do not receive equal respect for their rights. Given the relative importance people are found to place on procedures over outcomes, it has been suggested that grievances stemming from perceived group level procedural injustice might be a more powerful predictor of collective action than those stemming from distributive injustice.[133] For example, it has been found that procedural-justice judgments predict people's support for union certification and

128. Major, *supra* note 125.

129. Stekelenburg & Klandermans, *Individuals in Movements*, *supra* note 125; *see also* Stekelenburg & Klandermans, *Psychology of Protest*, *supra* note 125.

130. *See* TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 101-02 (2011).

131. Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict, in* THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 40–41 (William G. Austin & Stephen Worchel eds., 1979); *see also* TYLER, *supra* note 129, at 11–26.

132. Dominic Abrams, *Processes of Social Identification, in* SOCIAL PSYCHOLOGY OF IDENTITY AND THE SELF CONCEPT 57, 58–59 (Glynis M. Breakwell ed., 1992); *see also* Bert Klandermans et al., *Identity Processes in Collective Action Participation: Farmers' Identity and Farmers' Protest in the Netherlands and Spain*, 23 POL. PSYCHOL. 235, 237–39 (2002); Bernd Simon & Bert Klandermans, *Politicized Collective Identity: A Social Psychological Analysis*, 56 AM. PSYCHOLOGIST 319, 323 (2001).

133. Tom R. Tyler & Heather J. Smith, *Social Justice and Social Movements, in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 595, 610 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

the votes they cast in a union certification election, even after accounting for the influence of their economic concerns.[134]

Framing grievances at a collective level, in other words, leads to joining together to pursue grievances. As people do so, they become intertwined with groups, and individual gains and losses become less central to shaping motivation. This explains why groups seeking social change persist over time in the face of defeats and evidence that their success is unlikely.[135] Outside observers are often struck by the willingness of the members of groups seeking social change to persevere in their actions when success seems unlikely or even impossible. What sustains such action is the internal dynamics of the group and the esteem and status that members derive from others working with them toward a group goal. Internal social dynamics replace monetary issues as the motivation that is sustaining group actions.[136]

What leads to identification with a collective entity? Studies, conducted primarily in work organizations, suggest that when groups operate using fair procedures, they generate identification among their members. This is widely found among hierarchical groups,[137] but is also a conclusion of studies of nonhierarchical groups, such as teams.[138] What is required for the members of a group to feel that group procedures are fair? First, people need to be involved in determining what the group will do. They need to be able to deliberate and make decisions about goals and priorities as a group. They need to be able to collectively determine their objectives and decision rules. Second, when interacting with one another, they need to act fairly by giving group members voice, acting transparently, treating one another with dignity and respect, and being trusted by one another to behave in ways that reflect a desire to do what is best for everyone in the group.[139]

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134. Steven L. Blader, *What Leads Organizational Members To Collectivize? Injustice and Identification as Precursors of Union Certification*, 18 ORG. SCI. 108, 110–16 (2007); *see also* Bert Klandermans et al., *Embeddedness and Identity: How Immigrants Turn Grievances into Action*, 73 AM. SOC. REV. 992, 994–1002 (2008).

135. Stephen Reicher, *The Context of Social Identity: Domination, Resistance, and Change,* 25 POL. PSYCHOL. 921, 931–33 (2006).

136. Simon & Klandermans, *supra* note 132, at 319–31.

137. Tyler & Blader, *supra* note 83.

138. Jason A. Colquitt et al., *Justice in Teams: A Review of Fairness Effects in Collective Contexts*, 24 RES. IN PERSONNEL & HUM. RESOURCES MGMT. 53, 90–94 (2005); *see also* Jason A. Colquitt et al., *Justice in Teams: Antecedents and Consequences of Procedural Justice Climate,* 55 PERSONNEL PSYCHOL. 83, 87 (2002).

139. An important finding of social psychological research is that people who frame their grievances individually are more likely to suffer personal health consequences than are those who frame their grievances collectively. This is because groups can provide victims with emotional support that buffers them from the psychological stress of misfortune. When individuals

What implications does this have for the legal system? It suggests that there is value in groups organizing and functioning in ways that engage their members. If the members delegate decisions to their agents (i.e., their lawyers) and have minimal participation in decisions about actions—individual or aggregate—then the potential benefits of aggregate action are diminished. What is important is the possibility of aggregate action achieving more than can be achieved by people acting as individuals.

This perspective on litigation accords with an emerging view of the goals of the legal system. In the past, a key issue in law was a focus on compliance. The system sought to create legal rules and make legal decisions in ways that encouraged the public to comply with and defer to the authority of legal actors.

In recent years, levels of trust in law have declined, and efforts have been increasingly focused on gaining cooperation. In the case of litigants, the focus has been on willing acceptance because when people do not accept decisions, further litigation is often required, either because they appeal or because they fail to continue to comply over time. There have been similar concerns about the public's willingness to cooperate with the courts by testifying and serving on a jury. These efforts have been focused on cooperation within the framework of the legal system. As cooperation becomes a more important goal of the legal system, legitimacy increasingly matters, because legitimacy strongly influences cooperation.

It has also been increasingly recognized that the law and legal authorities play an important role in promoting or undermining the vitality of communities. They create a framework for social solidarity and political, social, and economic well-being, a view already noted in Justice Breyer's comments.[140] Hence, developing ways to build social capital in the process of managing community social problems is desirable. When groups of people join together to address collective problems in their community, they are building the type of social capital that is central to viability, so collective efforts to define and pursue grievances not only help to manage particular problems, but generally build social cohesion within communities. This may be particularly important in situations in which society gains from addressing larger political or societal issues, such as how to manage compensation for the

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respond individually, they lack this social support. Heather J. Smith & Yuen J. Huo, *Relative Deprivation: How Subjective Experiences of Inequality Influence Social Behavior and Health*, 1 POL'Y INSIGHTS FROM THE BEHAV. & BRAIN SCI. 231, 235–36 (2014).

140. *See* BREYER, *supra* note 7, at 138.

9/11 attacks or how to respond to the widespread damage of the British Petroleum oil spill.

It is equally important, however, to point to a potential pitfall of this group-based approach. Once groups are established, failing to respond to their concerns can create social forces that transcend the legal system and may also undermine the social and political framework within which law exists. In evaluating collective action, it is important to make a distinction between normative (or conventional, nondisruptive activities such as signing petitions, sending letters, and making donations) and non-normative (or unconventional, more disruptive activities such as occupying buildings and setting cars on fire) forms of protest. The antecedents of these forms of action are different. High legitimacy and high collective efficacy predict normative protest, while lack of legitimacy and a belief in the low efficacy of conventional actions are predictors of non-normative protest.[141]

These later findings highlight the dilemma for the legal system. In order to maximize the gains of aggregate litigation in terms of legitimacy and identification with the community, it is important to maximize the role of the parties in the development of litigation strategy and its implementation. This encourages people to develop group solidarity and address broader issues in their community. In cases like *Agent Orange*, in which the legal and the political are mixed, this is potentially valuable. However, it also means that groups develop agendas that they might pursue beyond the confines of the courts. Failure to address these issues can lead to pressure for political change, and can even lead to actions outside of the law.

141. Nicole Tausch et al., *Explaining Radical Group Behavior: Developing Emotion and Efficacy Routes to Normative and Nonnormative Collective Action,* 101 J. PERSONALITY & SOC. PSYCHOL. 129, 130 (2011).