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Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice

Nancy A. Welsh*

I. INTRODUCTION

Professor Deborah Hensler suggests in the lead article of this Symposium issue that the courts' embrace of facilitative, interest-based mediation may have been ill-conceived. She argues that there is *insufficient* evidence to conclude that litigants are more satisfied with mediation than with adjudicative alternatives such as arbitration and trial. She also urges that there is *sufficient* evidence to show that litigants prefer processes that vest decision control in third parties. Both of these assertions are subject to challenge,¹ but this Comment will focus upon the significance of giving decision control to the disputants in consensual processes.

Using available research, this Comment will argue, perhaps surprisingly, that the salience of the disputants' decision control is much more apparent to mediation advocates and to courts than it is to disputants. Disputants involved in consensual

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1. A number of studies suggest that litigants prefer mediation (likely, but not clearly, defined as a hybrid of facilitative and evaluative mediation) over trial or arbitration. See e.g. Wayne Kobbervig, *Mediation of Civil Cases in Hennepin County: An Evaluation* 23-26 (Minn. Judicial Center 1991) (reporting that a greater percentage of the litigants whose cases were mediated perceived the process as "fair" or "very fair" and described the process as "efficient" or "very efficient" than litigants whose cases were arbitrated or adjudicated; also reporting that a greater percentage of litigants whose cases were mediated perceived that they were given an adequate opportunity to express their views); Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. Pers. & Soc. Psychol. 1167, 1175 (1993) (finding that in labor-management disputes, participants perceived greater process and decision control in mediation than in arbitration). However, as Professor Hensler has noted, the majority of the studies comparing mediation and adjudication arise in the areas of domestic relations and small claims. See e.g. Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & Society Rev. 323, 341, 343 (1995) (observing that litigants who unsuccessfully mediated and then adjudicated their cases evaluated their mediation sessions as fairer than the subsequent trial and were twice as likely to say that they would prefer to mediate rather than adjudicate future cases); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Dis. Res. 885, 890 n. 10, 891 n. 19 (1998) (describing research in domestic relations, small claims, and victim-offender mediation programs showing greater satisfaction with mediation than adjudication).

processes often do not perceive themselves as wielding real control over the outcomes achieved in those processes. Thus, the current practice of distinguishing and prioritizing among dispute resolution processes based primarily upon the locus of decision control may be misguided. Further, vesting decision control in the disputants does not guarantee that the disputants will perceive the dispute resolution process or its outcome as fair. To the contrary, the procedural justice literature demonstrates that, regardless of their decision control, disputants consistently value processes that feel fair because they offer a meaningful opportunity for voice and consideration and assure even-handed, dignified treatment. The literature makes it clear that disputants' perceptions of procedural fairness influence their perceptions of outcome fairness. Indeed, disputants' perceptions of procedural fairness may even influence their evaluation of their own control over outcomes. This suggests that courts need to focus quite intently upon the institutionalization of third party processes that are procedurally just, *regardless of whether those processes are classified as consensual or non-consensual.*

Such a uniform commitment to procedural justice might seem natural for the courts. However, the procedural due process jurisprudence indicates that the courts' appreciation of procedural justice is unlikely to translate easily to processes in which the disputants, not the courts, are deemed to exercise control over outcomes. Given the current state of procedural due process jurisprudence, courts may lack both the desire and the ability to demand procedural justice in third party processes that are classified as "consensual." Ironically then, disputants' decision control, which is meaningful to mediation advocates and the courts but a rather hollow promise for disputants, may have the unfortunate effect of hindering the institutionalization of procedural justice in consensual, court-connected processes.

II. DIFFERING PERCEPTIONS OF THE REALITY OF DISPUTANTS' DECISION CONTROL IN CONSENSUAL PROCESSES

For many years, mediation advocates have argued that one of the most salient features of mediation is the extent to which it permits disputants to retain control over the outcome of their dispute (i.e. "decision control").² Indeed, dispute resolution textbooks³ and even court rules⁴ categorize dispute resolution processes according to their "consensual" or "non-consensual" qualities. The locus of decision

2. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1 (2000) (examining self-determination, which is described as the fundamental principle underlying mediation). "Decision control" is defined as "the extent to which disputants are free to accept or reject the result of a third-party intervention." E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. Applied Soc. Psychol. 338, 339 (1983).

3. See e.g. Leonard L. Riskin & James E. Westbrook, *Dispute Resolution and Lawyers*, 1, 1-5 (2d ed., West Group 1998) (categorizing dispute resolution processes as "adjudicative," "consensual," and "mixed").

4. See e.g. Minn. R. Gen. Prac. 114 (1994) (distinguishing among facilitative, evaluative and adjudicative processes).

control apparently is very meaningful to those of us who study and teach in the field of alternative dispute resolution or play the role of neutral third parties.⁵ But research in the area of procedural justice—supplemented here with some provocative suggestions from in-depth interviews with mediation participants—raises questions regarding the salience of decision control for many of the people who bring their disputes to mediation.

Several years ago, Professor Hensler and other researchers conducted a study involving personal injury litigants in three different state courts. The study compared litigants' perceptions of the procedural justice provided by trial, court-connected arbitration, judicial settlement conferences and traditional bilateral negotiations (i.e., negotiations between the litigants' attorneys). One of the striking findings in the study involves the litigants' perception of their decision control in the settlement conferences and bilateral negotiations.⁶ The litigants apparently did not perceive themselves as having any more control in these "consensual" processes than in trial or in arbitration.⁷ Indeed, the defendants perceived themselves as having less control in settlement conferences than at trial.⁸

It seems self-evident that the litigants actually exercised the most direct decision control in the bilateral negotiations between their attorneys and in the judicial settlement conferences. There could be no settlement outcomes unless the clients

5. See Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. Exper. Soc. Psychol. 13, 26 (1978) (observing that "decision control affected third-party preferences [among processes] more than it affected those of litigants Indeed, only third parties believed that high rather than low third-party decision control would result in a fairer procedure").

6. The interview items included the following questions regarding outcome control and process control: "How much control did you feel you had over the outcome of your case? Response options: a great deal, some, a little, not much" and "Overall, thinking about your dealings with the court and with your lawyer, how much control would you say you had over the way your case was handled? Response options: a lot, some, a little, not much." E. Allan Lind et al., *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 82 (RAND 1989).

7. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & Society Rev. 967, 993-94 (1990). See also Lind et al., *supra* n. 6, at 69-70 (observing that litigants' perceptions of control over the outcome and the process "were generally in the low to moderate range" and differentiating between plaintiffs and defendants). It is also interesting to note that attorneys infrequently perceive their clients as exercising more control in the consensual process of mediation than in the traditional litigation process. See e.g. Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 Hamline L. Rev. __ (forthcoming 2002) (manuscript at 33-34) (on file with author) (reporting that few attorneys perceived that mediation has the effect of "providing greater client satisfaction" [26.1 percent] or "providing greater client control" [28.3 percent]); Bobbi McAdoo & Art Hinshaw, *Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri: Supreme Court ADR Committee Report* 67 Mo. L. Rev. __ (forthcoming 2002) (on file with author) (reporting that minority of attorneys perceived that mediation has the effect of "providing greater client satisfaction" [30 percent] or "providing client with a greater sense of control" [31.2 percent]).

8. Lind et al., *supra* n. 6, at 69-70 (Plaintiffs' ratings were "rather moderate" for trial, arbitration and settlement conferences while defendants' ratings of control were "especially low" for arbitration and settlement conferences and "more moderate" for trial.).

agreed to them.⁹ Yet, somehow, this responsibility did not translate into a perception of substantial decision control. How could this be? The researchers suggested that the litigants' perceptions of approximately the same degree of decision control in both the consensual and non-consensual processes could be traced to their general *exclusion* from the consensual processes, contrasted with their general *inclusion* in the non-consensual processes.¹⁰ The researchers particularly speculated that the defendants' perceptions of lack of control could be explained by the fact that they "had been pulled into the legal process against their will, and because many of them were represented by lawyers engaged by their insurance companies [and] few of them could expect to exert much influence on the process or outcome."¹¹

But what about disputants who are present and participate in consensual processes? To what extent do they perceive their own decision control? Although some have studied these questions in the context of small claims court,¹² there is only limited data regarding its application to the court-connected mediation of personal injury, contract and other civil non-family cases. The studies that have been done do not support the conclusion that disputants perceive themselves as wielding decision "control," although in recent research, most disputants agreed that they had lesser or greater degrees of "input in the development of the final outcome."¹³

What is the source of this difference between mediation advocates' emphasis upon disputants' decision control and the disputants' own more limited perceptions of their control over the outcome? Recent post-mediation interviews with disputants -- parents and school district representatives involved in the mediation of special

9. See ABA Model Rule Professional Responsibility 1.2 which provides: "A lawyer shall abide by a client's decision concerning the objectives of representation A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." ABA Model R. Prof. Resp. 1.2 (1983). See also Rule 1.4, which requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Model R. Prof. Resp. 1.4 (1983).

10. Lind et al., *supra* n. 7, at 963.

11. Lind et al., *supra* n. 6, at 71.

12. See e.g. Wissler, *supra* n. 1, at 345 n. 37 (observing that "the features of the [mediation] process that contributed to evaluations of the process as fair and satisfying included . . . , marginally, providing disputants with control over the outcome," but also noting that the analysis suggested "that outcome control is related to procedural judgments through its relationship with other process characteristics").

13. Roselle L. Wissler, *An Evaluation of the Common Pleas Court Civil Pilot Mediation Project* 46-47 (Feb. 2000) (very few litigants perceived that they were significantly pressured by either the mediator or the other party to settle; ninety-one percent of the litigants also perceived that they had "somewhat" to "a great deal" of "input in determining the outcome;" twenty-eight percent of the total litigants indicated that they had "somewhat" input while thirty-four percent indicated that they had "a great deal" of input); Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 Ohio St. J. on Dis. Res. (forthcoming 2002) (observing that in court-connected civil mediation programs in Ohio, sixty-three percent of litigants indicated that they had "considerable input in determining the outcome" and that those litigants who reported speaking more during mediation felt that they had more input in determining the outcome than litigants who spoke less). At the same time, it is important to note that at least one study examining mediation and arbitration in the labor-management context has found that disputants perceive greater control over outcome in mediation than in arbitration. Shapiro & Brett, *supra* n. 1, at 1175.

education disputes¹⁴ -- may offer some clues. In many of these interviews,¹⁵ the parents flatly denied feeling that they had control over the outcome. Their explanations for this perception varied. Most focused on their inability to control the precise terms of any agreement: "I don't think I had control over the outcome though Yeah, I think I played a role, but I think . . . at any time, it could have went [sic] any way."¹⁶ Others revealed great sensitivity to their (or their children's) perceived vulnerability once they left the mediation session: "I was reminded several times of what the school district could do. So to say that I felt that I had control over it . . . no I mean . . . the mediator himself said that. . . if this cannot be worked out, then there could be a more segregated setting chosen by the school Meaning I could not dictate to them what I needed."¹⁷ Finally, several explained their perception of lack of control by highlighting the school district's failure to develop new proposals responding to what the parent had revealed at the mediation: "No I didn't [feel like I had control over the outcome] . . . [b]ecause it's a decision of the school district, those parties. And what mattered was their opinion, not necessarily any documentation or examples which I had to share. I think that was evidenced by the conversation that occurred."¹⁸

School district representatives, in contrast to the parents, were more likely to perceive their control over the outcome. One such representative observed, "I felt that I could have gone another direction at any time. I could have either abandoned the process or chosen to just take total responsibility for what was being requested. I felt that I had a lot of freedom"¹⁹ But even among the school district representatives, particularly those who appeared eager to reach resolution, some did not perceive that they wielded decision control: "No [I did not feel like I had control over the outcome] . . . [b]ecause if I would have had control, utter control, I would have walked away with everything having been resolved."²⁰

These comments from mediation participants hint that disputants may not perceive themselves as clearly having control over the outcome in a negotiation or mediation session because *shared* control does not feel like *real* control. Further, their perception of decision control in the mediation session inevitably is affected by their perception of the extent of their control over the situation outside the mediation session. It has also been shown that disputants' feelings of control may be constrained by their self-image, their learned norms of behavior toward others, or

14. Grace D'Alo and I conducted pre-mediation and post-mediation interviews with participants in fourteen mediation sessions conducted in November-December, 2000 by the Pennsylvania Special Education Mediation Service. Disputes over special education issues involve a complex area of law, potentially significant equitable or monetary relief and continuing relationships. Thus, these cases offer similarities to many of the contract and employment disputes brought to courts for resolution.

15. All of the disputants interviewed after the mediation session, responded to the following question: "Did you feel you had control over the outcome? Why or why not?"

16. Transcript of interview with parent, Case #4, at 1-2 (on file with author).

17. Transcript of interview with parent, Case #12, at 6 (on file with author).

18. Transcript of interview with parent, Case #14, at 2 (on file with author).

19. Transcript of interview with school district representative, Case #3, at 3 (on file with author).

20. Transcript of interview with school district representative, Case #2, at 4-5 (on file with author).

their sense of what "good decent people"²¹ do in responding to conflict. Finally, some of the comments from the special education mediation participants reveal that disputants' perception of their decision control can be influenced by their perception of whether the other side heard and considered what they had to say.

Mediation advocates cannot quickly assume that all (or even most) disputants will feel confident in and protected by the simple knowledge that they control the decision to settle or not to settle in mediation. Thus, mediation advocates may be mistaken in relying so heavily upon the locus of decision control to distinguish mediation from the non-consensual processes of arbitration or adjudication.²² In addition, mediation advocates may need to be wary of equating disputants' decision control with a higher quality dispute resolution process. Instead, if mediation advocates and the courts intend to make mediation feel qualitatively superior and just, they must turn to the research regarding procedural justice. That literature clearly highlights the need to focus on process characteristics, not decision control, as the key to communicating procedural quality to disputants. This Comment will now turn to a brief discussion of those characteristics and their relationship with outcome control.

III. THE PRIMACY OF PROCEDURAL JUSTICE CONSIDERATIONS

Professor Hensler's assertion that the courts should abandon mediation (at least facilitative, interest-based mediation) and instead direct their efforts toward the institutionalization of processes in which a third party exercises decision control overstates the importance of this form of control. Many studies reveal that disputants care as much or more about the procedural justice offered by dispute resolution processes than about decision control.²³ Perceptions of procedural justice influence disputants' perceptions of substantive justice,²⁴ their compliance with the

21. Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 Just. Sys. J. 151, 176 (1984). Merry and Silbey urge that even people's choices of whether or not to take disputes to court are made in the context of "norms about integrity, self-image, self-respect, and duties to others which are neither calculated nor subjects of individual choice" and that "[a]n adequate analysis of conflict behavior must include both normative rules and pragmatic strategies." *Id.* at 160. In the special education research project, one parent noted: "It's my personality to do for the other person and I feel like I based my decisions on . . . how I felt about the person." See Transcript of interviews with parents *supra* nn. 16-18 (on file with author). See also Roderick Gilkey & Leonard Greenhalgh, *The Role of Personality in Successful Negotiating*, 2 Negot. J. 245, 255-56 (1986) (noting that negotiators' locus of control—i.e., external locus or internal locus—affects both the extent of their perceived control over what happens and their behaviors in negotiations).

22. Indeed, this reliance may reflect the "culture of professional elites" in which there is an emphasis upon "free choice, individualism, autonomy, and advantage, and [an] assum[ption of] instrumental rather than normative and religious orientations to social action." Merry & Silbey, *supra* n. 21, at 177.

23. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 Wash. U. L.Q. 787, 825 (2001).

24. See E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 66-70, 205 (Plenum Press 1988).

outcomes reached in dispute resolution processes²⁵ and their perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process.²⁶ The presence of four particular process elements result in heightened perceptions of procedural justice: the opportunity for disputants to express their "voice,"²⁷ assurance that a third party considered what they said,²⁸ and treatment that is both even-handed²⁹ and dignified.³⁰

The study of tort litigants conducted by Professor Hensler and her colleagues in three different state courts found that litigants perceived the non-consensual processes of arbitration and trial as procedurally fairer than the consensual processes of bilateral negotiation and judicial settlement conferences.³¹ On its face, this might suggest that disputants simply prefer processes in which neutral third parties make the decisions. Indeed, as Professor Hensler notes, there are other studies that have found explicitly that disputants prefer non-consensual processes.³² What these studies do *not* say, however, is that disputants prefer non-consensual processes simply because they prefer to transfer decision control to a third party. Instead, the studies consistently indicate that disputants assume that they are more likely to exercise process control—a meaningful opportunity for voice, real consideration, even-handed and dignified treatment—if a third party is doing the listening and making the decisions.³³ Indeed, the tort litigants studied by Professor Hensler and

25. See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & Society Rev. 11 (1984).

26. See Lind & Tyler, *supra* n. 24, at 209; E. Allan Lind, *Procedural Justice, Disputing and Reactions to Legal Authorities*, in *Everyday Practices and Trouble Cases* 188 (Austin Sarat et al. eds., Am. Bar Found. 1998).

27. See Lind & Tyler, *supra* n. 24, at 101-04.

28. *Id.* at 236.

29. See Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. Pers. & Soc. Psychol. 850, 853 (1994).

30. See Lind & Tyler, *supra* n. 24, at 214.

31. See Lind et al., *supra* n. 6, at 44-45.

32. See e.g. Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 Yale L.J. 258, 281 (1976) (finding that subjects in Chapel Hill, North Carolina, and Hamburg, Germany, both preferred procedures allowing "full opportunity for evidence presentation," but diverged with respect to third-party decision control; Chapel Hill subjects preferred that the third party control the outcome while Hamburg subjects did not); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. Exper. Soc. Psychol. 13, 26 (1978) (finding that all litigants and all third parties in the study preferred that the third party exercise high, rather than low, decision control but also noting further that this preference was much stronger for third parties than for litigants). *But see* Tom Tyler et al., *Preferring, Choosing, and Evaluating Dispute Resolution Procedures: The Psychological Antecedents of Feelings and Choices* 28 (Am. Bar Found., Working Paper No. 9304, 1993) (reporting that while people's post-procedure evaluations and preferences are most strongly influenced by issues of "treatment," their actual selection among procedures is based on issues of "control"); Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. Pers. & Soc. Psychol. 898, 903 (1987) (observing that American subjects preferred mediation to the same degree as adversary procedure to resolve a dispute arising out of a car accident).

33. See e.g. LaTour et al., *supra* n. 32, at 274 (speculating that United States participants least prefer bargaining because "if litigants simply present their cases to each other (as in bargaining), they may choose to ignore each other or may prevent each other from making a complete presentation of the evidence). See also Houlden et al., *supra* n. 32, at 26-27 (reporting that while litigants expressed a slight

her colleagues clearly identified process characteristics—their perceptions of “dignity and procedural care”³⁴—as triggering the “perceived fairness advantage”³⁵ of the non-consensual processes. These processes were preferred due to the *process* elements which happened to accompany the role of the third party as decision maker—process elements that were perceived as *not* accompanying the consensual processes that were studied.³⁶

Further, the researchers in this study³⁷ and others have found that litigants’ perceptions of their decision control are related to, and perhaps even influenced by, their assessments of the procedural justice furnished by dispute resolution processes.³⁸ This suggests that disputants use their perceptions of procedural justice to judge the extent to which they have exercised or will exercise control over the outcome.³⁹ Variations in disputants’ decision control, in contrast, do not appear to have any or much influence upon disputants’ procedural justice judgments.⁴⁰

preference for high third-party decision control, apparently in recognition of “the need for third-party intervention in order to assure a resolution of the dispute”, litigants did not believe that high third-party decision control would result in a fairer procedure and were most concerned “about the manner in which information is presented”). Lind has theorized that people use a “fairness heuristic” and “form their original justice judgment on the basis of procedures and social process and then later incorporate outcome information into their overall impressions of the fairness or unfairness of the encounter. In the terms of art used in modern social cognition theory, process information anchors the fairness judgment to such an extent that outcome information can only make relatively minor adjustments.” E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in *Everyday Practices and Trouble Cases* 177, 185 (Austin Sarat et al., eds., Northwestern U. Press & Am. Bar Assn. 1998).

34. Lind et al., *supra* n. 6, at 66.

35. *Id.*

36. It is worth recalling that disputants likely viewed bilateral negotiations and judicial settlement conferences as less dignified and less procedurally careful in part because they were not invited to attend these processes. Thus, the disputants could not observe whether their attorneys were given an opportunity for voice, whether they received consideration, and whether the disputants’ cases were treated in an even-handed and dignified manner. See Lind et al., *supra* n. 6, at 74.

37. Lind et al., *supra* n. 7, at 972 (“Perceptions of control over the case outcome and the litigation process were consistently related to procedural justice judgments We found that both decision and process control were correlated with procedural justice and that both were correlated to about the same degree . . . and that perceptions of control were as highly correlated with procedural justice in the context of stranger-to-stranger disputes . . . as they were in disputes involving those who were previously acquainted.”).

38. Wissler, *An Evaluation*, *supra* n. 13, at viii (reporting that litigants were less likely to feel pressured to accept settlements if their attorneys spent more time talking during mediation to present their cases); Wissler, *supra* n. 1, at 345 n. 37 (reporting that litigants’ perceptions of outcome control were related to procedural judgments through their relationship with other process characteristics); Wissler, *Court-Connected Mediation*, *supra* n. 13, at __ n. 229 (observing those litigants who reported speaking more during mediation felt that they had more input in determining the outcome than litigants who spoke less).

39. See Lind, *supra* n. 26, at 177, 185 (describing the “fairness heuristic”).

40. See Lind & Tyler, *supra* n. 24, at 215; Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 *J. Pers. & Soc. Psychol.* 830, 837 (1989). Indeed, some studies have found no evidence that perceptions of decision control produce or influence perceptions of procedural justice. See e.g. P. Christopher Early & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 *J. Pers. & Soc. Psychol.* 1148, 1154 (1987). But see Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 *J. Pers. & Soc. Psychol.* 850, 859 (1994) (reporting studies’ results finding

These research results further emphasize the extent to which the locus of decision control is less important to litigants' perceptions of procedural justice than process elements—voice, consideration, even-handedness and dignity.⁴¹ These research results also support the need for the institutionalization of procedural justice within *all* of the third party dispute resolution processes occurring within the courts, regardless of whether the processes are categorized as consensual or non-consensual.⁴² This raises the obvious question: Is there anything that obligates the courts to heed this call?

IV. THE TROUBLESOME APPLICATION OF PROCEDURAL DUE PROCESS TO CONSENSUAL PROCESSES

The jurisprudence that has arisen out of the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution is most likely to reveal the courts' appreciation of the importance of procedural justice. Indeed, in *Joint Anti-Fascist Refugee Committee v. McGrath*,⁴³ in which the plaintiffs alleged federal violation of their rights to procedural due process, Supreme Court Justice Felix Frankfurter acknowledged in his concurring opinion that the opportunity for voice has great significance: "No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it. *Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.*"⁴⁴ It is important to note, however, that Justice Frankfurter was examining the due process required before the U.S. Attorney General could make a decision to designate an organization as Communist and forward its name to the Loyalty Review Board of the United States. When disputants are resolving their disputes consensually, in court-connected mediation, do the courts continue to have an obligation "to generate the feeling . . . that justice has been done"?

At a minimum, the procedural due process jurisprudence raises doubts regarding the applicability of procedural due process to court-connected mediation and other processes defined as "consensual." The Due Process Clauses of both the Fifth and

that "both decision and process control mattered" in the legal arena, while control did not matter in the managerial setting).

41. See Houlden et al., *supra* n. 32, at 26.

42. See Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 27 Hous. L. Rev. 635, 636-37 (2000) ("The process whereby decisions are made reflects the community's commitment to fundamental principles as surely as do the substantive outcomes of those decisions. Procedural due process is thus a community imperative, and to approach it as a trade off between the community and the community's individual members misconstrues the task.").

43. 341 U.S. 123 (1951).

44. *Id.* at 171-72 (emphasis added). Other judges have also recognized the importance of procedural justice for court-connected processes. See e.g. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. on Dis. Res. 715, 727-28 (1999) (observing that "the primary concern of any court that sponsors an ADR program must be with the process fairness of the services that are provided in that court's name").

Fourteenth Amendments require “due process of law” before a person may be “deprive[d]” of “life, liberty, or property.”⁴⁵ Traditionally, the courts have understood the Constitutional requirement of procedural due process as protecting individual citizens from the wayward, arbitrary and binding power of the state to work a deprivation.⁴⁶ Ironically, this may mean that the courts will perceive mediation as subject to procedural due process requirements only if the mediator exceeds her authority and behaves in a coercive manner.⁴⁷ At this point, the process will transform from a consensual procedure into a non-consensual one and thus trigger due process requirements, including the opportunity to be heard before a decision is made, the right to an impartial decision-maker, and permission to retain counsel.⁴⁸ In contrast, if disputants attend and reach resolution in a mediation⁴⁹ in which there is no allegation that the court-connected mediator tried to impose her

45. The Due Process Clause of the Fifth Amendment provides that no “person . . . shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

46. Justice Harlan, for example, observed in *Boddie v. Connecticut*: “[T]hose who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State’s monopoly over *techniques for binding conflict resolution* could hardly be said to be acceptable under our scheme of things.” *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (emphasis added).

47. Even Professor Richard Reuben, who has argued that court-connected ADR processes can and should be understood as state action and thus subject to due process standards, acknowledges that the consensual “nature” of mediation and the mediator’s lack of “the coercive authority to decide cases . . . has the effect of limiting instances in which state action will be found in mediation, as well as reducing the constitutional gravity exerted upon the mediator, although not completely eliminating it, when state action is present.” Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1049 (2000). Indeed, most of Professor Reuben’s examples of the application of due process requirements to mediation involve such a change in the mediator’s role. See *id.* at 1092-93. See also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577 (1997).

48. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (in determining whether a recipient of benefits had received the required due process before his benefits were terminated, examined whether and how the termination process provided the recipient with timely and adequate notice of a proposed termination, an effective opportunity to defend by confronting adverse witnesses and presenting his own arguments and evidence, permission to retain counsel, notice of the decision, reasoning and evidence relied upon, and an impartial decision maker).

49. Certainly, class members have argued they have been denied due process of law when they have not been notified of proposed settlements, have not been represented by independent counsel in the settlement negotiations or have not been provided with an opportunity to object to the settlement terms. See e.g. *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (determining that notice provided regarding settlement satisfied due process requirements); *Romstadt v. Apple Computer, Inc.*, 948 F. Supp. 701 (N.D. Ohio 1996) (finding denial of due process as a result of failure to provide class member with notice and an opportunity to be heard when a proposed settlement and related matters were submitted to a Texas court for its consideration). See also *Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (rejecting argument that class counsel and defendants were required to provide notice to absent class members’ counsel about settlement negotiations and to involve them in such negotiations).

will,⁵⁰ how can an alleged deprivation resulting from the mediation session be viewed as anything other than *self-imposed*?⁵¹ And if the deprivation is self-imposed, what is the source of entitlement to the protections of procedural due process? This analysis suggests that for disputants involved in consensual processes such as mediation, there is no entitlement to the protections of procedural due process—or to procedural justice. Although this issue deserves more extensive treatment than is possible here, this discussion highlights the potential difficulty of persuading courts that they are obligated to demand procedural justice from all court-connected mediation.⁵²

The awkwardness of expecting the courts to embrace the primacy of procedural justice and, further, to require the uniform institutionalization of procedural justice is also illuminated by examining the Supreme Court's "implicitly utilitarian"⁵³ approach to procedural due process. In *Matthews v. Eldridge*,⁵⁴ the Supreme Court established a test that balances three factors to determine the procedures that will meet the requirements of procedural due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

50. See e.g. *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1094 (2d Cir. 1986) (quoting *Kline v. Wolf*, 702 F.2d 400, 405 (2d Cir. 1985)) (observing that "a court may not impose upon a plaintiff a settlement that deprives him of relief to which he would be entitled after trial").

51. Professor Reuben notes the inapplicability of due process protections to the negotiation process as follows:

Finally, outside the purview of government power is the process of negotiation between and among private parties. Like a nebula seen throughout the solar system of dispute resolution, negotiation has more of a pervasive presence that is part of and influences all of the other processes. Here there is no constitutional power because there is no government actor exerting coercive authority, only private parties and their agents talking and negotiating among themselves, albeit in the shadow of the law.

Reuben, *Constitutional Gravity* *supra* n. 47, at 1049-50.

52. In *Peragine v. Maimone*, a plaintiff alleged that he had been deprived of his civil rights and due process of law when he settled his claim due to alleged misrepresentations by the defendants. *Peragine v. Maimone*, 504 F. Supp. 136 (D.C.N.Y. 1980). A judge who had been involved in a settlement conference was among the defendants. *Id.* at 38-39. The court determined that the plaintiff's claims were "devoid of merit and wholly insubstantial," observing that defendant-attorneys could not be considered to be state officers and that the defendant-judges were protected by absolute judicial immunity. *Id.* But see *McGrath*, 341 U.S. at 173-74 (Frankfurter, J., concurring) ("Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.").

53. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 46-48 (1976).

54. 424 U.S. 319 (1976).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁵

In this and subsequent cases, the Supreme Court has made it clear that the goal of the *Matthews* test is a narrow one—to insure that a decision-maker renders a reasonably accurate and just decision.⁵⁶ When, for example, the Court has not been persuaded that the substantive result in a case would have been different with the addition or substitution of proposed procedural safeguards, the Court has found no violation of procedural due process.⁵⁷

Thus, the Court intimates that procedural due process matters only to the extent that it can be shown that it would change the substantive outcome.⁵⁸ Clearly missing from the Supreme Court's analysis⁵⁹ is an understanding of the inherent value of procedural justice that is separate from its instrumental effect on the outcomes in particular cases.⁶⁰ It appears that there is no judicial recognition of the research that has demonstrated the effects of procedural due process upon individual litigants'

55. *Id.* at 335.

56. *See id.* at 343-44 ("An additional factor to be considered here is the fairness and reliability of the existing pre-termination procedures, and the probable value, if any, of additional procedural safeguards [P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."). *See also Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 27 (1981) ("accuracy"); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus*, 44 U. Chi. L. Rev. 28, 48 (1976) ("The *Eldridge* Court conceives of the values of procedures too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions.").

57. *See e.g. Matthews*, 424 U.S. 319 (finding that termination decision could be made based on a written "medical assessment of the worker's physical or mental condition" and thus the "potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less . . . than in *Goldberg*"); *Lassiter*, 452 U.S. at 32-33 (In deciding that the Due Process Clause of the Fourteenth Amendment did not entitle an indigent mother to state-provided counsel at a hearing for the termination of her parental rights, the Court observed: "While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter *could not have made a determinative difference.*") (emphasis added). *See also Strickland v. Washington*, 466 U.S. 668, 694 (1984) (The Court established a two-part test for determining when ineffective representation required reversal of conviction. In order to show prejudice to the defense that constitutes ineffective assistance under the Constitution, a client must show "that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different.* A reasonable probability is a probability sufficient to undermine confidence in the outcome.") (emphasis added).

58. *See also* Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 110 (Philip B. Kurland et al. eds., 1983) ("The goal of due process is to hold as low as possible the sum of two costs: the costs created by erroneous decisions, including false positives and false negatives, and the cost of administering the procedures.").

59. It should be noted that lower courts have sometimes voiced concerns about the Supreme Court's approach. *See e.g. People v. Ramirez*, 599 P.2d 622, 626 (1979) ("federal approach. . . undervalues the important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully functioning member of society").

60. *See* Mashaw, *supra* n. 53, at 28-30, 46-59.

dignity, its influence upon perceptions of substantive justice and its significance in sustaining public perceptions of the legitimacy of the courts.

Indeed, using the lens of procedural due process jurisprudence, mediation may be viewed as relieving the courts of the obligation to deliver *either* substantive or procedural justice. When the disputants in civil actions reach their own settlements through mediation, they release the courts from the obligation to reach decisions that meet a standard of substantive justice. And if the courts understand procedural due process as relevant only to the extent that it affects the *substantive justice of court-imposed* outcomes, the disputants' control of their settlements also releases the courts from the obligation to provide dispute resolution processes that meet a standard of procedural justice.

V. CONCLUSION

Where does this leave us? The limited research currently available suggests that vesting decision control in the disputants does not guarantee that they will perceive such control as meaningful or as a significant protection from injustice. Process elements—voice, consideration, even-handed and dignified treatment—do reliably signal procedural justice for disputants, and despite current due process jurisprudence, it is clear from the research that procedural justice is much more than a means to a substantively just end. The research strongly suggests that procedural justice considerations should underlie *all* of the third party processes that are institutionalized within the courts, regardless of whether those processes are consensual or non-consensual. Thus, the institutionalization of procedural justice in mediation, rather than the abandonment of this consensual process in favor of non-consensual processes such as court-connected arbitration, will respond more accurately to the preferences of disputants and do more to insure the legitimacy and social stature of the courts while also facilitating settlements.

The disputant-centered, participatory model of mediation that arose during the contemporary mediation movement may indeed have “offered a means to import procedural justice into the often-invisible yet ubiquitous settlement”⁶¹ of cases that now dominates civil litigation. As T.S. Eliot observed more than seventy-five years ago, however:

Between the idea
And the reality
Between the motion
And the act
Falls the Shadow⁶²

61. Welsh, *supra* n. 2, at 16.

62. T.S. Eliot, *The Hollow Men* in *The Complete Poems and Plays 1909-1950* 56, 58 (Harcourt Brace 1958).

The challenge presented today is to persuade the courts (and even disputants) that procedural justice should be as much a part of consensual processes in which a third party facilitates communication and resolution, as of non-consensual processes which involve the imposition of a decision by the third party. Will the results of research be enough to move the courts to require procedural justice in consensual processes, especially when alleged violations of procedure can themselves provide fertile ground for new litigation? Ultimately, this Comment can do no more than acknowledge the difficulties presented by due process jurisprudence and suggest that success in establishing procedural justice will do much to determine whether the effect of institutionalizing mediation in the courts is marked "with a bang [or] but a whimper."⁶³

63. *Id.* at 59.