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# PERCEPTIONS OF FAIRNESS IN NEGOTIATION

NANCY A. WELSH\*

## I. INTRODUCTION

Often, when people negotiate, their goal is to win. At the very least, people work to achieve outcomes (or allocations of value) that they can call fair, and particularly “fair enough to *me!*” We all know people (including ourselves) who have offered more than was necessary in negotiation sessions or rejected offers even though they made economic sense. These behaviors, which have been replicated by researchers in experiments involving “ultimatum games,”<sup>1</sup> seem irrational but can be explained by examining fairness perceptions. Negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others, and deciding whether to reach an agreement or end negotiations. Because fairness perceptions are so significant in understanding

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1. In these games, Player 1 is given a fixed sum of money and instructed to divide the money in any way he chooses with Player 2. If Player 2 accepts the offer, both players will receive their designated allocations. If Player 2 rejects the offer, neither player will receive anything. Economic models indicate that Player 1 should offer only slightly more than zero to Player 2, and Player 2 should accept this amount as an improvement on his *status quo*. Instead, Player 1 generally offers 30-50% of the sum to Player 2. Twenty percent of those playing Player 2, meanwhile, reject profitable offers to take zero instead. See Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 90-91 (Kenneth Arrow et al. eds., 1995). Some commentators argue that negotiators are motivated less by a desire to be fair than by self-interest or a strong aversion to being disadvantaged themselves. Madan M. Pilluta & J. Keith Murnighan, *Fairness in Bargaining*, 16 SOC. JUST. RESEARCH 241 (2003) (arguing, based on a review of empirical research, that negotiators' behaviors that produce fair results are motivated less by a commitment to fairness than by self-interest and considerations of social utility); see E. Fehr & S. Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002); Andrew Oswald & Daniel Zizzo, *Are People Willing to Pay to Reduce Others' Incomes?*, ANNALES D'ECONOMIE ET DE STATISTIQUE, July/December 2001, at 39. Apparently, the aversion to being disadvantaged (or “envy principle”) affects other animal species as well. See Sarah F. Brosnan & Frans B.M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003) (reporting that high percentages of capuchin monkeys rejected the opportunity to trade rocks for cucumber slices when they saw other monkeys receiving grapes—which were perceived as more desirable—either in exchange for their rocks or without being required to exchange anything).

people's negotiating behaviors, this essay will examine briefly the criteria that people use to judge fairness—both distributive and procedural—and the variables that influence people's perceptions of fairness.

## II. DISTRIBUTIVE FAIRNESS PERCEPTIONS

The concept of distributive fairness focuses on the criteria that lead people to feel that they have received their fair share of available benefits—i.e., that the outcome of a negotiation or other decision making process is fair.<sup>2</sup> People often disagree, however, regarding the criteria that should be applied in order to determine whether an outcome is fair. As is obvious from reading judicial opinions in appellate cases, even impartial and educated people can review the identical record and reach widely disparate yet equally principled conclusions regarding what constitutes a fair outcome. The definition of distributive fairness is, therefore, inevitably subjective. This realization leads to the following questions: What criteria do people—including negotiators—use to guide their judgments regarding distributive fairness? What variables influence people's selection among different criteria, and why do people find it difficult to reach agreement even when they share a commitment to achieving an equitable outcome?

### A. Competing Criteria for Judging Distributive Fairness

The various criteria for judging outcomes' fairness can be distilled into four basic, competing principles or rules—equality, need, generosity, and equity.<sup>3</sup> The *equality principle* provides that everyone in a group should share its benefits equally. According to the *need principle*, “those who need more of a benefit should get more than those who need it less.”<sup>4</sup> The *generosity principle* decrees that one person's outcome should not exceed the outcomes achieved by others.<sup>5</sup> Finally, the *equity principle* ties the distribution of benefits to people's relative contribution. Those who have contributed more should receive more than those who have contributed less. The closer that the actual outcome of a negotiation is to the outcome a negotiator anticipated

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2. See Morton Deutsch, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 41 (Morton Deutsch & Peter Coleman eds., 2000).

3. See *id.* at 42 (describing the equality, need, and equity principles); Karen A. Hegtvold & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 95-96 (Joseph Sanders & V. Lee Hamilton eds., 2001) (describing the equality, need, and equity principles); Kwok Leung & Michael W. Morris, *Justice Through the Lens of Culture and Ethnicity*, in HANDBOOK OF JUSTICE RESEARCH IN LAW, *supra*, at 352.

4. Deutsch, *supra* note 2, at 42.

5. See Leung & Morris, *supra* note 3, at 352.

based on the application of one of these principles, the greater the likelihood that the negotiator will perceive the outcome as fair.<sup>6</sup>

Imagine the application of the four principles described *supra* to a negotiation between two individuals who are establishing a joint venture and negotiating the distribution of income. The first negotiator, who has little capital, is contributing the idea and the time and energy to implement the idea. The other negotiator is supplying the needed funds for the development and marketing of the idea. If these individuals are guided by the equality principle, they will distribute the income from the joint venture equally. If they use the need principle, the poorer negotiator who is contributing “sweat equity” will receive a greater share of the income. Under the generosity principle, neither negotiator would want his income to exceed the income of the other. Last, and perhaps most difficult, is the application of the equity principle. Both contributions are needed. Whose is more valuable? The negotiators’ assessments regarding the relative value of their contributions are likely to be affected by many factors that this essay will examine in more detail in Part II.C.

### *B. Variables Affecting Negotiators’ Selection Among Competing Fair Allocation Principles*

Research has shown that several variables influence negotiators’ selections<sup>7</sup> among the various fair allocation principles that could apply to a particular negotiation. These variables include self-interest, social relationships, and the interaction between cultural norms and situational needs.

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6. See E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIALS, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 59 (1989) (noting that litigants perceived procedures to be more fair and were more satisfied with their outcomes and with the courts when their outcomes exceeded their subjective expectations); Bazerman & Neale, *supra* note 1, at 90 (“[O]ptimal decision making requires consideration of the expectations and standards of the other parties with whom one is transacting business.”); Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 888–89 (1998) (describing the impact of parties’ expectations upon their satisfaction with the mediation process); Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC. REV. 323, 346–47 (1995) (reporting that disputants’ satisfaction with outcomes was influenced primarily by outcome measures and to a lesser but significant degree, by process evaluations; noting that these results are “consistent with theories that maintain that outcome satisfaction is influenced more by one’s assessment of the outcome compared with expectations or with others’ outcomes than by the absolute outcome received”).

7. This suggests some consciousness of choice. In fact, negotiators may be blissfully unaware that they are making a choice among various potential criteria.

### 1. The Influence of Self-Interest and Relationships Between Negotiators

If no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle—need, generosity, equality, or equity—produces the better result for her.<sup>8</sup> When a negotiator has a negative relationship with the other person, she will aim to gain more than the other negotiator, even if this requires undertaking a risky strategy.<sup>9</sup> She certainly will not worry about achieving an outcome that is fair for that other, despised negotiator. Thus, “[n]egative affect within the context of potential relationships can remove fairness barriers.”<sup>10</sup>

On the other hand, the existence of a positive relationship with another negotiator makes the attainment of a fair outcome relevant. Further, positive social relationships influence negotiators’ selection of the particular fair allocation principle that will anchor their negotiations. If a negotiator is dividing a resource with someone else and expects future, positive interactions with that person, the negotiator tends to use the equality principle to define distributive fairness.<sup>11</sup> Those people with some of the strongest attachments—e.g., romantically involved negotiators—have lower aspirations and reach less Pareto-efficient outcomes than negotiators who are friends. The romantically involved negotiators place primary value upon the continuation of their relationship. In contrast, negotiators who are friends or colleagues often benefit from the combination of a long-term relationship and high individual aspirations.<sup>12</sup> Relationships obviously matter in negotiators’ definitions of fair outcomes.

### 2. The Influence of Situational Needs and Cultural Norms

As commerce has become increasingly global, cross-cultural negotiation has also become more commonplace. Some cultures are known for placing greater emphasis upon maintaining social relationships than attaining individual objectives. Many believe, therefore, that the cultural dimension of collectivism-individualism should have great salience in the negotiation context. Simply, “individualism refers to a tendency to put a stronger emphasis on one’s personal interest and goals, whereas collectivism refers to a

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8. See Bazerman & Neale, *supra* note 1, at 97.

9. See *id.* at 98-100.

10. *Id.* at 99.

11. See *id.* at 97; RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY, 211-12 (2002).

12. See Bazerman & Neale, *supra* note 1, at 104-06.

stronger emphasis on the interests and goals of one's in-group members."<sup>13</sup> Collectivist negotiators ought to be more likely than individualists to choose harmony-enhancing principles for the distribution of benefits (e.g., equality, need, or generosity principles).

Research indicates, however, that negotiators' choices among the various allocation principles are not so predictable. First, and consistent with the importance of relationships noted above, it is only when collectivists are negotiating with other in-group members that they are more likely to use a harmony-enhancing principle. If they are not closely related to the other negotiators, collectivists behave like individualists and tie fair allocation to contribution, thus leading to their use of the equitable principle. Second, collectivists' choice among allocation principles depends upon the extent to which they anticipate receiving some portion of the benefits being allocated. If a collectivist will not be a recipient (e.g., a supervisor allocating rewards to employees), the collectivist is less likely to be concerned about fostering harmony and more likely to use the equitable principle that will enhance value creation (e.g., productivity). Last, negotiators in collectivist cultures will be influenced by situational needs. As previously noted, the supervisor managing a work group in a collectivist culture is likely to make allocations that will enhance productivity rather than harmony. Collectivist negotiators who are acutely aware of resource scarcity may choose to allocate resources based on the need principle, in recognition of the greater interest in ensuring basic survival rather than harmony.<sup>14</sup> Though culture is certainly relevant to negotiators' definitions of distributive fairness, its impact depends very much on the context within which a negotiation occurs.<sup>15</sup>

### *C. Variables Affecting Negotiators' Application of the Equitable Principle*

Even if negotiators share a preference for use of the same principle, particularly the equitable principle, they are likely to find it difficult to agree upon precise terms.<sup>16</sup> Self-interest, negative relationships between

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13. Leung & Morris, *supra* note 3, at 348.

14. *See id.* at 355.

15. *See generally* Jayne Seminare Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiators*, 87 MARQ. L. REV. 711 (2004).

16. The frequency and depth of this difficulty may help to explain the criticism that Roger Fisher and Bill Ury received regarding their assertion that negotiators could and should reach agreement upon the "objective criteria" to enable a principled, negotiated outcome. *See* James J. White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115, 116 (1984) ("Chapter 5, entitled 'Insist on Objective Criteria,' is a particularly naive misperception or rejection of the guts of distributive negotiation."); Roger Fisher, *Comment*, 34 J. LEGAL EDUC. 120, 122 (1984) ("Two judges . . . will typically advance law, precedent, and evidence not simply as rationalizations for positions adopted for other reasons, but honestly, as providing a fair basis for decision.").

negotiators, and the dynamics of the negotiation interaction itself can help to explain why some negotiators find it easier to agree upon the definition of an equitable solution than others.

### 1. The Influence of Self-Interest

Even when negotiators express a desire to be fair and to allocate resources in a manner that is equitable, their definitions of “equitable outcomes” are almost inevitably affected by self-interest or an “egocentric bias.”<sup>17</sup> People value their own contributions much more highly than they value the identical contributions of others. In one research project, for example, when people were asked to determine what amount should be paid for accomplishing a particular task, they expected to be paid substantially more for their own work than they were willing to pay to someone else.<sup>18</sup>

Another interesting study simulated the impact of the egocentric bias in the litigation context.<sup>19</sup> The subjects in the research project learned all the facts involved in a personal injury accident in which a motorcyclist was hit by a car and injured. They then determined what they thought would be a fair settlement to compensate the motorcyclist for his injuries. After this, the researchers assigned the subjects to play the role of either the motorcyclist or the driver of the car and to negotiate a settlement. Settlements were reached in nearly every case. The researchers then worked with another set of subjects but, this time, began by assigning them to the roles of the motorcyclist and the driver. While playing their roles, the subjects learned the facts, calculated a “fair” settlement, and tried to negotiate a settlement. These subjects had a very difficult time reaching a settlement. Their perceptions of fairness were affected by the roles they were playing. The motorcyclists’ pre-negotiation judgments of a fair settlement generally involved a large damage award, while the drivers were much more likely to assess a small damage award. Not coincidentally, these assessments worked to their own favor. The further apart the prenegotiation judgments regarding fair outcomes, the more likely the negotiations were to end in impasse.<sup>20</sup>

Equitable distribution, it seems, is in the eyes of the self-interested beholder.

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17. See Linda Babcock et al., *Biased Judgment of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); see also Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in HANDBOOK OF CONFLICT RESOLUTION, *supra* note 2, at 219 (summarizing research regarding egocentric judgment).

18. See Thompson & Nadler, *supra* note 17, at 224-25.

19. See *id.* at 225.

20. *Id.*

## 2. The Influence of Negative Relationships

The perceived equitable fairness of an outcome is also influenced by who offers it. A solution that appears fair—even attractive—often loses its luster once the other negotiator puts it on the table. Several cognitive and psychological processes may explain this effect, which has been labeled “reactive devaluation.”

These range from the perfectly rational tendency for negotiators to view an adversary’s willingness to offer rather than withhold a given concession as informative of that concession’s *value*, to the motivational bias that frequently makes people devalue whatever is at hand or readily available relative to whatever is unavailable or withheld.<sup>21</sup>

When negotiators are adversaries or have a negative relationship, however, they are likely to view each other’s offers with even greater suspicion. Indeed, research has demonstrated that while people will react positively to a solution when it is proposed by someone they view as an ally or neutral, they will reject precisely the same solution as insufficient when it is suggested by their adversary.<sup>22</sup> In negotiation, the messenger is very much a part of the message.

## 3. The Influence of the Negotiation Interaction

A significant body of research has also found that people’s perceptions of outcome fairness are influenced by how they felt they were treated during a dispute resolution or decision making process.<sup>23</sup> If they perceived themselves as treated in a procedurally fair manner, they are more likely to judge the outcome of that process as fair. Most of this research focuses on the manner in which a third-party decision-maker treats the disputants, but more recent research indicates that in consensual processes such as mediation and negotiation, the disputants are also influenced by their interactions with each other.<sup>24</sup> This research suggests that negotiators’ perceptions of sufficiently

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21. Robert M. Mnookin & Lee Ross, *Introduction to BARRIERS TO CONFLICT RESOLUTION*, *supra* note 1, at 15.

22. *See id.* at 15; Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 1, at 29, 41-42.

23. *See infra* note 34 and accompanying text.

24. *See* Tina Nabatchi & Lisa Bingham, *Expanding Our Models of Justice in Dispute Resolution: A Field Test of the Contribution of Interactional Justice* (June 9-12, 2002) (paper presented at conference of the International Association for Conflict Management) (finding that disputants’ satisfaction with mediation in the REDRESS program was best explained by their



equitable arrangements will be influenced by how they were treated during the negotiation process. If a negotiator perceives that the other negotiator gave her sufficient opportunity to speak, tried to be open-minded in considering what she had to say, and treated her with respect, she is more likely to view the outcome of the negotiation as fair. These interactional elements—which signal procedural fairness—will be examined in greater detail in Part III.

#### 4. The Influence of Contextual Distributive Justice Norms

Thus far, this essay has focused on social and psychological variables that influence negotiators' perceptions regarding equitable distributions. There are also rational variables that can mitigate the influence of social and psychological factors. For example, within the legal context, experienced lawyers' susceptibility to the egocentric bias is likely to be tempered by their knowledge of the applicable law and legal standards. These lawyers' negotiations are and should be conducted within the "shadow of the law."<sup>25</sup> Experienced lawyers also possess the knowledge to apply a rational, expected financial value analysis to determine whether a proposed settlement is sufficiently consistent with the trial and settlement outcomes in similar cases.<sup>26</sup> Clients can turn to these sophisticated agents<sup>27</sup> to gain outcomes that are more likely to be consistent with the equitable norms that apply within the legal context and, at the very least, are no worse than those received by other similarly-situated litigants.<sup>28</sup> At the same time, lawyers are not immune from

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perceptions of their interactions with each other—and particularly receiving "consideration and dignified, respectful treatment" from each other).

25. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959–66, 968 (1979) (discussing how the "shadow of the law" affects the negotiation of disputes).

26. Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 122 (1997). But see generally Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999) (discussing the considerations that influence attorneys' settlement decisions); Jeffrey M. Singer & Christopher Honeyman, *Cracking the Hard-Boiled Student: Some Ways to Turn Research Findings into Effective Training Exercises*, in CONFLICT RESOLUTION PRACTITIONER: A MONOGRAPH BRIDGING THEORY AND PRACTICE 190 (Shinji Morokuma ed., 2001).

27. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 93-96 (2000) (describing the benefits of using attorneys as agents); Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, in NEGOTIATION THEORY AND PRACTICE 81, 81-87 (J. William Breslin & Jeffrey Rubin eds., 1991) (describing the potential advantages and disadvantages of using agents in negotiation).

28. Thus, attorneys can help their clients avoid perceiving themselves as the victims of comparative imbalance. According to the theory of relative deprivation, people care very much about whether their results are at least comparable to those received by similarly-situated others.

the effects of social and psychological influences. Indeed, lawyers' increasing reliance upon mediators for second opinions suggests a certain awareness of the difficulties created by the egocentric, availability, and other biases.<sup>29</sup>

### III. PROCEDURAL FAIRNESS PERCEPTIONS

#### A. Definition and Effects of Procedural Fairness

Procedural fairness is concerned with people's perceptions of the fairness of the procedures or processes used to arrive at outcomes.<sup>30</sup> Researchers have found that people's perceptions of procedural justice have profound effects.<sup>31</sup> First, people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair.<sup>32</sup> In effect, a person's perception of procedural fairness anchors general

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The sense of being deprived occurs if there is a perceived discrepancy between what a person obtains, of what she wants, and what she believes she is entitled to obtain. The deprivation is relative because one's sense of deprivation is largely determined by past and current comparisons with others as well as by future expectations.

Deutsch, *supra* note 2, at 44.

29. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 807-09 (2001) (examining lawyers' preference for mediators who engage in evaluative interventions).

30. See Deutsch, *supra* note 2, at 41.

31. See Welsh, *supra* note 29, at 817-20 (describing the effects of procedural justice).

32. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66-70, 205 (1988). Lind and Tyler describe laboratory and field studies that show that greater perceptions of procedural justice generally produce greater perceptions of distributive justice, regardless of whether the outcome is positive or negative. *Id.* Occasional studies show that this effect may be reduced when the outcome is positive, but also that this effect continues to be strong when the outcome is negative. *Id.*; see also Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 37 (1984) [hereinafter McEwen & Maiman, *Mediation in Small Claims Court*] (reporting a study that found that fairness perceptions depend in part upon whether the dispute resolution forum operates under a consent or command model and that "[d]efendants were about twice as likely to perceive the settlement as fair after consensual settlements"—reached in face-to-face mediation sessions generally without lawyers—"as after adjudication"); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 258 (1981) (reporting that the perceived fairness of adjudicated outcomes "closely paralleled the degree of one's victory or loss," while perceived fairness of outcomes reached in face-to-face mediation sessions was much more weakly correlated with the favorability of the outcome); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 859 (1994) (reporting that studies in legal and managerial settings found that the "primary relational issue influencing judgments of distributive justice was trustworthiness"); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 834 (1989) (observing that people are most influenced by the relational concern of neutrality "when the issue of concern is outcome fairness").

fairness impressions or serves as a fairness heuristic.<sup>33</sup> Second, people who believe that they were treated fairly in a dispute resolution or decision-making procedure are more likely to comply with the outcome of the procedure.<sup>34</sup> This effect will occur even if the outcomes are not favorable<sup>35</sup> or produce unhappiness.<sup>36</sup> Last, people's perceptions of the procedural fairness provided by a decision maker affect the respect and loyalty accorded to that decision maker and the institution that sponsored the decision-making process.<sup>37</sup> This effect is particularly strong for the courts.<sup>38</sup> Perhaps surprisingly, perceptions of distributive justice generally have a much more modest impact<sup>39</sup> than

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33. See E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 177, 185 [hereinafter Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*]. Lind writes:

[P]eople 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.

*Id.* This psychological shortcut "replaces a full exploration of the implications and possible motives of each directive from an authority." Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q., 224, 225 (1993).

34. See Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 192 (describing research regarding court-annexed arbitration that found that "[a]cceptance of the arbitration awards as resolution of the case was much more strongly linked to the fairness judgments than to the outcome"). Moreover, one study of the resolution of cases in small claims court found greater compliance with results reached in consensual processes than in adjudicative processes, suggesting that "the personal and immediate commitments generated by consensual processes bind people more strongly to compliance than the relatively distant, impersonal obligations imposed by authorities." McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 32, at 44-45. Compliance with mediated results (reached in face-to-face meetings without lawyers) was higher than compliance with negotiated results. See *id.* at 21; see also Tyler, *supra* note 32, at 857 (discussing field studies that found that "procedural justice is the primary justice judgment influencing affect and the willingness to accept third-party decisions, although distributive influences also occur").

35. See Tyler, *supra* note 32, at 857.

36. See Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 324, 327 (1993) (reporting research showing that respondents who perceived that the mediation process was fair were more likely to comply with the agreement, even though they were not necessarily happier with the agreement).

37. See LIND & TYLER, *supra* note 32, at 209 (summarizing studies that have "found that procedural justice judgments affect the evaluation of authorities and institutions"); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 94-108 (1990) (finding that procedural fairness judgments influence perceptions of the legitimacy of legal authority and that this effect is particularly strong for the courts); Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 188 (summarizing studies showing that perceptions of authorities' legitimacy and compliance "with authoritative directives correlate highly with procedural fairness judgments").

38. TYLER, *supra* note 37, at 94-108.

39. LIND & TYLER, *supra* note 32, at 242. There may be a need to distinguish unsophisticated

perceptions of procedural justice.

### B. Criteria for Judging Procedural Fairness

In contrast to the earlier discussion of competing criteria for judging distributive fairness, researchers have discovered a striking consistency in the criteria that people use to judge whether a dispute resolution or decision-making process was fair. People in a variety of settings (e.g., workplace, contacts with police, litigation)<sup>40</sup> and from different countries and cultures<sup>41</sup> agree on four process characteristics as significant in signaling procedural fairness.<sup>42</sup> First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice).<sup>43</sup> Second, people care about the consideration that they receive from the decision maker.<sup>44</sup> In other words, in a process that feels fair, people

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individual disputants from sophisticated institutional litigants. See, e.g., JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 76, 83 (1983) (Unlike unsophisticated individual litigants, institutional litigants who made extensive use of the arbitration program appeared to care little about "qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers."). In a field study, however, researchers found that procedural justice judgments strongly influenced litigants' decisions whether or not to accept nonbinding arbitration awards, regardless of whether litigants were individuals, small business owners, or corporate officers; only corporate employees failed to demonstrate a link between their procedural justice judgments and their decisions to accept awards. Lind et al., *supra* note 33, at 247.

40. LIND & TYLER, *supra* note 32, at 211-12.

41. 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 and Hamburg 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); E. Allan Lind et al., *Reactions to Procedural Models for Adjudicative Conflict Resolution: A Cross-National Study*, 22 J. CONFLICT RESOL. 318, 335 (1978) (reporting that in a laboratory study involving students in the United States, England, France, and West Germany, researchers found that the subjects consistently preferred the adversary model over the investigator and inquisitorial models, suggesting that "even among subjects whose own legal systems are based on inquisitorial models," procedures that provide high control over voice are preferred and perceived as more fair); see also E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767, 777 (1997) (discussing two laboratory studies involving four cultures, which indicate that procedural fairness is defined consistently across cultures and primarily in terms of relational variables); Leung & Morris, *supra* note 3, at 358-59 (noting that "available evidence suggests that the same general principles determine people's perception [of procedural and interactional justice] across culture").

42. See Welsh, *supra* note 29, at 820-26 (describing process characteristics that enhance perceptions of procedural justice).

43. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 180.

44. *Id.* at 183; See Donald E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085, 1095

receive assurance that the decision maker has listened to them and understood and cared about what they had to say. Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner.<sup>45</sup> Finally, people value a process that accords them dignity and respect.<sup>46</sup>

Most of the research that has been done regarding procedural justice has focused on people's interactions with third-party authorities in dispute resolution or decision making processes (e.g., judges, arbitrators, managers, mediators). Recently, however, researchers have begun to examine the effect of mediation participants' interactions with each other upon their procedural fairness perceptions. In mediation, like negotiation, there will not be an outcome unless the mediation participants themselves agree upon one. They, rather than the third party authority, are the ultimate decision makers. These recent studies have discovered that mediation participants' procedural fairness perceptions are based very much upon the dynamics of their interaction with each other.<sup>47</sup> This research suggests that procedural fairness considerations also are likely to apply to negotiation. Indeed, Tom Tyler has suggested that

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(1989) ("suggest[ing] that it is not only important for disputants to express their opinions, but [that] they must [also] feel that the third party is giving due consideration to the views expressed by the disputants"); Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167, 1173 (1993). The study measured third party fairness by asking grievants whether the third party understood the grievance, whether the third party was fair, whether the third party was impartial, whether the grievants were willing to take a future grievance to the same third party, and whether the third party seriously considered their feelings and opinions. *Id.* at 1171.

45. See ADLER ET AL., *supra* note 39, at 65 (reporting that litigants simply want "an opportunity to have their case heard and decided by an impartial third party"); Tyler, *supra* note 32, at 853 (reporting that "neutrality" is one of three relational concerns that exert independent influence on procedural justice judgments). Although "[n]eutrality involves honesty and lack of bias," people focus "on whether the third party creates a 'level playing field' by evenhanded treatment . . . [and] uses facts, not opinions," as bases for decision making. *Id.* at 854. Consequently, litigants value trust in the motives of the third-party authority as the primary relational influence on procedural justice; "issues of standing and neutrality [are] of lesser importance." *Id.*; see also Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333, 337 (1987) (reporting that in field experiment a significant "voice effect" occurred regardless of whether citizens viewed decision makers as impartial or nonbiased; however, judgments of process control were affected by citizens' perceptions that decision makers considered their views and tried to be fair).

46. See E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIALS, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 22-23 (1989); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 958 (1990); Tyler, *supra* note 32, at 831. Importantly, however, studies suggest that in high power distance cultures—in which hierarchy is more likely to be accepted and those at the top are understood as entitled to more privilege and deference—people are less likely than those in low power distance societies to perceive injustice when a high-status in-group person engages in behavior that is not respectful and even insulting. See Leung & Morris, *supra* note 3, at 361.

47. See Nabatchi & Bingham, *supra* note 24.

the importance of dignified treatment parallels a finding in the negotiation literature that “issues of ‘face saving’ often overwhelm bargainers, leading them to make choices not in their economic self-interest.”<sup>48</sup>

*C. Theories Explaining the Impact of Procedural Fairness Upon Perceptions of Distributive Fairness*

The impact of procedural fairness perceptions upon distributive fairness is so intriguing that this connection merits a bit more exploration. Two theories help to explain this effect of procedural fairness. The first theory, which takes an instrumentalist approach, urges that people value the opportunity for voice because it permits them to influence the final outcome of dispute resolution or decision-making processes.<sup>49</sup> Because they have been invited to express their views, people can be more confident that the final decision will be fully informed and substantively fair. This theory is quite rational, but it was revealed as an incomplete explanation when researchers discovered that the opportunity for voice led to perceptions of procedural justice even when people knew that their views would not and could not influence the final outcome.<sup>50</sup> Scholars today theorize that perceptions of procedural fairness actually represent a heuristic, or mental shortcut, for assessments of distributive fairness.<sup>51</sup>

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48. Tom R. Tyler, *The Psychology of Disputants' Concerns in Mediation*, 3 NEGOTIATION J. 367, 371 (1987).

49. See Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 179.

50. See, e.g., E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (finding that people's fairness judgments are enhanced by the opportunity to voice their opinions even when this opportunity does not occur until after a decision has been made; having a “voice with the possibility of influence . . . leads to even greater perceived fairness”); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (based on one field study and two laboratory studies, researchers concluded that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision); see also Lind & Tyler, *supra* note 32, at 215. Some studies reveal that variations in decision control either have no influence on satisfaction or judgment of procedural justice or have a smaller influence than the effects of control over voice. *Id.* Growing evidence suggests that control over the process or having a voice “enhances judgments of procedural fairness because it is instrumental in assuring fair outcomes.” *Id.* It is important to point out, however, that disputants' perceptions of procedural justice are affected by whether or not they perceive that the decision maker has considered what they said. See *supra* note 44 and accompanying text. In addition, studies have found that under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “frustration effect.” See Tom R. Tyler et al., *supra*, at 74.

51. See Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 177, 185.

Researchers also have found empirical support for a second theory, called the group value theory, which provides that procedures themselves communicate whether people are viewed as valuable members of the relevant group.<sup>52</sup> The opportunity for voice, consideration, and dignified, even-handed treatment send powerful messages to people regarding their social status, which then “validates their self-identity, self-esteem, and self-respect.”<sup>53</sup> Recognition as a member of the favored “in-group” suggests other benefits as well. If people can infer that the decision maker is “trustworthy and benevolently disposed”<sup>54</sup> toward them, “they can trust that in the long run the authority with whom they are dealing will work to serve their interests.”<sup>55</sup>

In the absence of a pre-existing and positive relationship, a negotiator is likely to be somewhat cautious to ascribe benevolent intentions to the other, presumably self-interested negotiator. In addition, people are quite alert for signs that an apparently just process is, in actuality, a sham.<sup>56</sup> Nonetheless, the procedural justice literature suggests that negotiators’ interactions with each other within the negotiation itself can influence their perceptions of both procedural and distributive fairness.

#### IV. CONCLUSION

Lawyers and clients rely upon their assessments of fairness to make all sorts of decisions during negotiation: What offer shall we make? How should we respond to the other side’s demand? Should we settle or make a counter-offer? Is the other side being so ridiculous that it is time to call an impasse?

Each one of these questions requires consideration of fairness, and it should now be quite clear that fairness is largely a matter of perception. Perhaps what is most interesting about the research that has been done regarding fairness perceptions is the extent to which it undermines the iconic image of two rational negotiators locked in a battle of logic, economics, and will. Rather, the research reveals that negotiators’ aspirations and moves will be significantly influenced by the culture and context within which they are

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52. *Id.* at 182.

53. Tyler, *supra* note 32, at 852.

54. Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 182.

55. Tyler, *supra* note 32, at 854.

56. According to the procedural justice literature, citizens are aware of their vulnerability to intentional and unintentional manipulation and, if they perceive any evidence of unfair treatment or perceive “false representations of fair treatment,” they respond with “extremely negative reactions.” Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *supra* note 33, at 187; see Tyler et al., *supra* note 50, at 74 (explaining that under certain conditions, voice without decision control heightens feelings of procedural injustice and dissatisfaction with leaders, a result described as the “frustration effect”).

negotiating, their own self-interest, and most intriguing of all, their sense of connection to each other. Ironically, as negotiations become increasingly global and virtual, it is the development of those old-fashioned relationships that may matter most.<sup>57</sup>

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57. Thompson & Nadler, *supra* note 17, at 228-29 (describing the effectiveness of relationship-building—or “schmoozing”—in email negotiation).