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Civil Litigants' Evaluations of Their Legal Experiences

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Abstract

How do litigants evaluate their experiences with the civil justice system? What we know about this important subject has grown out of foundational academic research in procedural justice and studies of litigant involvement in court programs. The volume of projects dedicated to understanding litigant experiences falls short in relation to the magnitude of civil justice system encounters handled by the legal system. Nevertheless, the extant research converges on some surprising insights into the factors that shape litigants' perspectives and the contextual variables that affect their experiences. This article synthesizes the major findings, discusses some of their law and policy implications, and highlights areas that beg for further investigation at the intersection of law and psychology.

1. INTRODUCTION

For two months in the spring and summer of 2022, the defamation trial involving actors Johnny Depp and Amber Heard captivated the American public. Depp filed a defamation suit against Heard, his ex-wife, after she described herself as a domestic abuse survivor in a 2018 *Washington Post* op-ed. Updates about the case were ubiquitous, dominating social media feeds, entertainment programs, and even newscasts. On June 1, the jury handed down a verdict. It was massive and heavily in Depp's favor, awarding Depp a total of $15 million from Heard and awarding Heard $2 million from Depp. However, when Depp (2022) posted his reaction to the verdict on Instagram, he focused not on the money—the objective award that was at the core of the verdict—but on the opportunity to speak "the truth." Similarly, Depp's lawyers stated that the trial was "never about money" but rather about "the chance to speak the truth for the first time" (Kilander 2022). Depp's satisfaction was not wholly explained by his jury verdict "win"; his experience in the courtroom was key. The defamation case and Depp's post-trial reaction illustrate a counterintuitive empirical finding that inspired decades of research: Civil litigants' evaluations of their experiences can hinge on subjective perceptions of fair treatment, including the chance to tell their side of the story, much more than objective results.

Although criminal justice topics tend to dominate the media as well as traditional law and social science journals, the number of civil case filings in the United States each year far surpasses the number of criminal cases (Adm. Off. US Courts 2016a,b; Resnik 2012; Slobogin 2020). Typical civil litigants are involved in disputes concerning contracts, child support, divorce, or torts such as personal injuries (Hannaford-Agor et al. 2015, 2018). Importantly, despite the large number of civil cases, research on how litigants view their engagement in the civil system is surprisingly limited (Shestowsky 2018). In addition, much of the relevant literature is dated, and changes to the legal landscape have outpaced the trajectory of research. Much of the work was conducted before or very shortly after the alternative dispute resolution (ADR) movement expanded to the courts in the 1990s, marking one of the most significant developments in legal practice (Riskin et al. 2019). Alternatives to trial such as mediation, arbitration, and negotiation are now routine in civil litigation (Galanter 2004, Riskin et al. 2019), and since their introduction to the legal system, they have shifted in social acceptability as well as design (Hensler 2002).

Notably, there is no clearly delineated field of civil litigant psychology that illustrates how litigants evaluate their involvement in the civil justice system. Instead, our current understanding of litigants' encounters in the civil justice arena is a product of more than 50 years of studies across multiple lines of research. Laboratory research embedded in the procedural justice paradigm produced key initial findings and a theoretical framework (e.g., Thibaut & Walker 1975, Thibaut et al. 1974) that paved the way for field studies that tested lab results in real-world settings. Many of these field studies evaluated specific court ADR programs and were poised to inform early policy development regarding the expansion of ADR in the courts (e.g., Adler et al. 1983, MacCoun et al. 1988). These different research threads provide a framework for understanding how parties interpret their involvement in the legal system, but many core questions remain unanswered.

The dearth of social scientific research on contemporary civil disputants might partly explain the common observation that lawyers often misunderstand what clients want out of litigation and how they experience it (Relis 2007, Shestowsky 2018, Sivasubramaniam & Heuer 2007). Indeed, legal professionals who interact with civil litigants have little research-based evidence to inform their work. Accordingly, an infusion of empirical work that advances models for understanding and serving the interests of clients engaged in civil cases would significantly enhance legal education curricula as well as the work of judges, court personnel, and dispute resolution professionals.

To set the stage for such research, this article outlines the major findings concerning how civil litigants evaluate their legal experiences and highlights the most promising areas for future work at the intersection of law and psychology. I focus mainly on studies published in the English language and conducted in North America, emphasizing work on individual disputants rather than corporate or organizational parties. I provide an overview of laboratory research in the field of procedural justice, which laid the foundation for studying actual litigants, and synthesize the key field studies that followed. The review is closely connected to three major areas of study, namely, the literatures concerning what motivates people to sue (Hadfield 2008, Miller & Sarat 1980–1981, Relis 2007), how parties decide whether to settle their cases or proceed to trial (Gross & Syverud 1996, Priest & Klein 1984, Rachlinski 1996), and how they evaluate procedural options at the start of litigation (Shestowsky 2014, 2016, 2018; Shestowsky & Brett 2008; Stallworth & Stroh 1996).

2. ROOTS OF THE FIELD

Foundational research relating to litigants' experiences tested the then-conventional assumption that, to put it simply, parties are happy if they win and unhappy if they lose (Hensler 2002, Sivasubramaniam & Heuer 2007, Tyler 1988). Procedural justice research, which began in the 1970s with laboratory studies by social psychologist John Thibaut and lawyer Laurens Walker, demonstrated that litigants evaluate the process used to handle their cases separately from the outcome of their case (Thibaut & Walker 1975, Thibaut et al. 1974). They also found that people evaluate their outcomes as fairer, and are more satisfied with those outcomes, if they perceive the process producing those outcomes as fair (Thibaut et al. 1974). Building on these results, Thibaut & Walker revealed an unexpected pattern in human psychology related to legal experiences: Parties who "lose" often evaluate their experiences as favorably (and sometimes even more favorably) as those who "win," if they believe the relevant processes were fair. This phenomenon—variously called the procedural justice effect or fair process effect—suggests that legal actors can promote the satisfaction of disputants who prevail in some sense, as well as those who do not, by employing procedures that appeal to disputants' subjective notions of procedural fairness. Thibaut & Walker's groundbreaking framework motivated thousands of studies on the antecedents and consequences of procedural justice judgments. Although the civil litigation context was not the main focus of subsequent work, procedural justice has nevertheless dominated the research on how litigants evaluate their engagement with the civil justice system.

The extant literature employed two methodological approaches: laboratory experiments and field studies. Each has its own benefits and drawbacks. In a typical laboratory study, participants are randomly assigned a perspective or role (e.g., plaintiff or defendant) and asked to consider the facts of a hypothetical dispute and then evaluate different procedures or outcomes. Less often, participants are randomly assigned to experience a simulated procedure for a hypothetical dispute and then share their reactions. Although true experiments provide the opportunity to discern causal relations between variables, their focus on responses to hypotheticals leads to questions about how well their findings generalize to real-life disputes (Hayden & Anderson 1979).

Much of the early field research was based on cases filed in small claims and family law courts, where many civil justice system innovations originate. These studies were conducted not only within academia but at think tanks such as the RAND Corporation and legal institutions such as the courts. Field researchers typically ask disputants from actual cases to assess their encounters with the legal system. Field studies rarely use random assignment of participants to procedures and necessarily involve participants reacting to different disputes. Further, in many studies that report using random assignment, parties were randomly offered a particular procedure (usually some alternative to trial) but could reject that opportunity, paving the way for self-selection bias (Emery & Jackson 1989, Emery & Wyer 1987). Thus, although field research avoids some of

the pitfalls of laboratory studies, it is critiqued for other reasons, including not being useful for drawing conclusions about causation due to the lack of true random assignment and for sometimes using data from a single and possibly atypical court (Shestowsky 2008).

Although researchers across these two research modalities have used diverse dependent measures, their focus has been quite uniform: determining what constitutes fairness from the litigant perspective and what drives litigants' satisfaction with procedures. In sum, the literature on litigants' evaluations of their experiences with civil cases is primarily a literature of fairness and satisfaction ratings, reflecting the literature's historical roots in procedural justice theory. Notably, however, some studies have treated satisfaction and fairness as essentially equivalent constructs (Clarke et al. 1991, Howe & Fiala 2008, Kitzmann & Emery 1993, Shestowsky & Brett 2008, Wissler 1995), whereas others have held them as distinct (Shestowsky 2020, van den Bos et al. 1998).

The spotlight on fairness makes good sense given the documented practical advantages of having litigants use procedures that fit with their notions of fairness. Pruitt et al. (1993), for example, found that how fairly respondents perceived their mediation sessions was significantly positively associated with their compliance with the terms of mediation agreements, even four to eight months later. Similarly, MacCoun and his colleagues found that how fairly parties rated their arbitration hearing was associated with how often they accepted their arbitration award in lieu of pursuing a trial de novo (MacCoun et al. 1988). These and similar studies suggest that when litigants experience fair process, subjectively construed, they are more likely to comply with case outcomes (McEwen & Maiman 1981; Pruitt et al. 1990, 1993) and have more favorable views of legal institutions (Rottman et al. 2005). This research raises a foundational question: What factors do parties consider when they evaluate process fairness?

3. USING PROCEDURAL JUSTICE THEORIES TO EXPLAIN FAIR PROCESS

Procedural justice scholars have proposed several theories to explain how disputants and others come to regard procedures as providing fair process (MacCoun 2005, Tyler 2000). A subset of studies supporting the various models shed light on civil litigation specifically or provide insights from analogous decision-making contexts.

The relevant work converges to suggest that litigants consider four aspects of their experience when determining whether they were treated fairly: voice, neutrality, respect, and trust (Tyler 2007). Litigants evaluate voice, meaning their opportunities to present information (e.g., facts and evidence) relevant to the decisions that affect them (Thibaut & Walker 1975, Thibaut et al. 1974). They also contemplate the neutrality of the decision maker or forum, how respectfully they were treated, and how much they trusted the authorities or decision makers involved in the resolution of their dispute (Tyler 2007).

The voice effect (or voice hypothesis) (Folger 1977) is one of the most replicated findings in the justice literature (Colquitt et al. 2001). It serves an important role in Thibaut & Walker's (1978) control (or process control) theory. As one notable review of the literature summarized, "One of the most consistent findings in the research on procedural justice is that dispute resolution procedures that provide high process control (i.e., control over presentation of evidence, and the handling of the 'case' before a third party) to disputants will enhance perceptions of procedural and distributive fairness" (Conlon et al. 1989, p. 1087).

Some research has teased out the reasons why parties value opportunities for voice. The instrumental (or social exchange) explanation suggests that voice is a form of process control that indirectly helps parties obtain favorable outcomes. This notion flows from Thibaut & Kelley's

(1959) social exchange model, which posits that people try to maximize personal gain in their social interactions and behave in ways they believe will advance that goal, including maximizing their control over decisions that affect them. Subsequent research, however, found that the opportunity for voice heightens disputants' perceptions of fairness even when they know that their voice could not have influenced the final outcome (Lind et al. 1990a), suggesting that voice is important for value-expressive reasons rather than instrumental ones.

Although the instrumental and value-expressive rationales for the voice effect appear to be in tension, they can be reconciled by recognizing that there are "two psychologies" of dispute resolution, one prospective and one retrospective (Tyler et al. 1999). When disputants assess their procedural options ex ante, they tend to be instrumentally focused (Tyler et al. 1999), meaning that they prefer procedures they believe will advance their self-interests, typically in terms of maximizing material gains. When litigants are surveyed at the start of litigation, for example, many believe that their case deserves a favorable outcome, with one multi-jurisdictional study finding that 57% of state court litigants believed that they had at least a 90% chance of winning at trial (Shestowsky 2014). These subjective estimates of a trial win are positively associated with their attraction to adjudicative procedures—jury trials, judge trials, and judicial decisions without trial—in which parties control the evidence they present to third parties who then have full control to award them the material outcomes they are owed by law (Shestowsky 2014). Thus, the instrumental perspective is well-suited for explaining why litigants value voice ex ante—they want to control the presentation of information to get the win they believe they deserve. Once disputes end, however, parties use noninstrumental criteria to assess their dealings with the civil justice system, focusing on process attributes related to fair treatment. At this point, they appear to appreciate voice opportunities for more value-expressive reasons (Tyler et al. 1999).

Other procedural justice theories have fleshed out why fair process matters to disputants. One theory—the group-value model of procedural justice (Lind & Tyler 1988)—was grounded in research showing that disputants value procedures that make them feel fairly treated because their treatment in a legal procedure communicates information about their social standing. Yet another procedural justice model, the fairness heuristic theory, suggests that litigants' sense of how fairly they were treated helps them make sense of their contact with the justice system. This model proposes that disputants who lack an accessible framework for evaluating outcome fairness use mental shortcuts to assess the outcome and decide whether to comply with it (van den Bos et al. 1997). Because disputants are often less adept at assessing their case outcomes compared with how they were treated, their interpretation of the latter serves as the mental shortcut for construing their experiences. Field research supports this perspective. For example, federal court litigants' decisions to accept their arbitration awards are associated more strongly with procedural justice evaluations than with the objective size of their awards (Lind et al. 1993).

Together, various procedural justice theories provide insights into why procedural justice matters to litigants, and the factors they consider when determining whether their encounters with the justice system were fair. Although some procedural justice literature reviews have concluded that non-control factors best explain procedural justice determinations (MacCoun & Martin 2015), in the area of civil disputes specifically, control theory retains its importance (Shestowsky 2016, Shestowsky & Brett 2008, Tyler 1989).

4. THE ROLE OF OBJECTIVE METRICS

Field studies have allowed researchers to explore how objective metrics shape civil litigants' evaluations in ways that are all but impossible to do meaningfully in the lab. Much of this work was part of a 1990s trend that compared traditional court procedures with ADR to inform policy debates

on the value of ADR's expansion. Overall, the research suggests that objective factors such as outcomes or wins, and the monetary costs associated with case resolution, are less reliable predictors of litigants' own accounts than legal practitioners might expect. Research on the effects of time investment is more mixed but trends in the same direction. Thus, overall, the work on objective metrics confirms, in broad strokes, the elevated status of subjective assessments in litigants' evaluations.

Early empirical evaluations of parties' postexperience ratings of fairness and satisfaction showed little relationship to either the financial cost of litigation or case resolution time. Large-scale research on tort litigants (Lind et al. 1990b) found that perceived dignity ratings explained more variance in outcome satisfaction evaluations than did personal trial expenditures or case disposition time. Other work by Lind et al. (1989) observed that neither plaintiffs nor defendants rated fairness or satisfaction more highly when the time between the underlying incident and case resolution was shorter. Further, neither fairness nor satisfaction was significantly associated with the financial costs they incurred for litigation. Clarke et al. (1991) found that litigants' process satisfaction was explained by ratings of their opportunities to be heard (i.e., voice), getting at the facts of the case, and getting the dispute in the open but not for resolving the dispute quickly or minimizing litigation costs. However, both outcome and process satisfaction were negatively associated with the amount of time litigants personally spent on their case, which aligns with other findings suggesting that litigants report greater satisfaction when the procedures themselves are shorter (Wissler 1995). Together, this work suggests that litigants distinguish between case duration and how much personal time they spend handling their disputes and that the latter is a more stable driver of satisfaction. Results from more recent work diverge from earlier studies finding no relation between satisfaction and time to disposition: Using data from three state courts and measuring case duration from the time cases opened until they closed at the court, Shestowsky (2020) found that case duration was negatively associated with both procedure satisfaction and procedure fairness evaluations. The novel results of this study, which is more contemporary and analyzes a wider variety of case types and procedures than prior investigations of time effects, highlight the need for additional research on case duration and litigant experiences in the modern landscape.

The effects of objective case outcome measures have also been studied. Especially in adjudicative forums where winners and losers can be clearly delineated, the relevant work suggests that winners appreciate their wins (Clarke et al. 1991, Jones et al. 2019). However, this appreciation does not translate into better evaluations on every postexperience metric. A large-scale field study of tort litigants who experienced trials, court-annexed arbitration hearings, and judicial settlement conferences, for example, found that for both plaintiffs and defendants, the amount won or lost was significantly associated with outcome satisfaction but not procedural fairness or satisfaction with the court (Lind et al. 1989). An oft-cited RAND study in which nearly 300 parties across several courts were surveyed after their court-ordered arbitration hearing found that winning parties were more satisfied with the court's handling of their case but did not rate the process as fairer (Adler et al. 1983). These results illustrate that a key takeaway from procedural justice laboratory research extends to real-world scenarios: To civil litigants, winning is not everything.

Objective metrics also prove to be less reliable predictors of litigants' reactions than their expectations or other reference points. For example, the RAND study of tort litigants (Lind et al. 1989) found that litigant satisfaction had a weaker association with the amount litigants actually won or lost than with their ratings of the outcome relative to their expectations. Further, research comparing small claims mediation and adjudication concluded that litigants' ratings of their outcomes relative to pre-court expectations and relative to the other party's outcome were better predictors of outcome fairness and satisfaction assessments than objective measures of

the outcome as a percentage of the claim (Wissler 1995). These findings combine to show the inadequacy of objective factors for providing an accurate account of the litigant perspective.

5. THE INFLUENCE OF CONTEXT AND EXPECTATIONS

When it comes to understanding how litigants evaluate their experiences, litigants' expectations also matter in other ways, and for other reasons. And so do contextual variables. Even the relative importance of outcome- versus process-related variables—the intervariable relationship at the core of the procedural justice effect—can vary by context. Field research on mediated and litigated child custody disputes (Kitzmann & Emery 1993), for example, suggests that perceived outcome favorability better explains overall satisfaction (measured by a composite of ratings for satisfaction with the outcome and satisfaction with the court) for those in structural positions of advantage, whereas procedural factors play a more significant role for structurally disadvantaged parties and those who report having lost what they wanted (Kitzmann & Emery 1993). In addition, a meta-analysis of 45 studies demonstrated that outcomes and process-related factors interactively combine to affect reactions to justice events: Procedural justice better explains reactions when outcome favorability is low (versus high), and outcome favorability better explains reactions when procedural fairness is low (versus high) (Brockner & Wiesenfeld 1996).

Laboratory findings suggest that information-order effects also affect justice judgments. Specifically, when people receive external information about outcomes as well as the process used to determine those outcomes (van den Bos et al. 1997), whichever information is presented first has a stronger sway on their evaluations. One implication is that people who get a favorable outcome but experience an unfair process will view the identical "win" as less fair when they learn about the process first. Given the ubiquity of lawyer–client discussions regarding procedures that clients did not attend personally, future field studies on this aspect of their communications would be particularly valuable for legal practitioners. Until then, this laboratory research provides a working hypothesis: Lawyers can alter their clients' fairness evaluations simply through the order in which they debrief them on the process versus the result.

Laboratory research also hints at the role that expectations play in explaining assessments. For example, although prior lab and field studies have consistently found that the opportunity for voice is strongly related to satisfaction with dispute resolution procedures, some lab studies suggest that when participants are led to expect a no-voice procedure, they often react more negatively to procedures that later offer voice opportunities than to ones that do not (van den Bos et al. 1996). Similarly, when voice procedures are associated repeatedly with inequitable outcomes, thereby generating negative expectations for these procedures, people tend to react more negatively to those voice procedures than to no-voice procedures (Folger 1977). Overall, this body of research suggests the complex consequences of litigants' forecasts for civil justice and lays the groundwork for field research on these issues.

Unfortunately, most field studies of already-closed cases that explored pre-experience expectations or attitudes used post hoc measures (Lind et al. 1989, Wissler 1995) and therefore were possibly affected by hindsight bias (Fischhoff 1975). One notable exception is work by Shestowsky (2020), who assessed litigants' reactions to the same procedures twice for the same dispute. Litigants rated their attraction to numerous procedures at the start of litigation and then identified and rated the procedure that resolved their case on satisfaction and fairness grounds once their case had closed at the court. She then analyzed the alignment between pre- and post-ratings for the same procedures and found the match to be closer for adjudicative procedures than for settlement procedures, supporting the idea that adjudication better aligns with litigant expectations. This interpretation makes sense given the greater formality of adjudication in comparison to settlement procedures, which tend to be more flexible and unpredictable. The study also found a

positive relation between litigants' postexperience fairness evaluations of the procedure that resolved their case and how they rated their initial attraction to that same procedure at the start of their case only when litigants did not attend their procedure, suggesting that, under this condition, expectations go unchallenged. When litigants attend their procedures, however, they may either confirm or disconfirm expectations. The literature would benefit from longitudinal field research that investigates how specific pre-experience expectations influence litigants' postexperience evaluations and whether this influence varies depending on the alignment between expectations and what transpires. Future research should also explore how attorneys shape their clients' expectations before and during litigation and move toward developing best practices for managing these expectations.

6. WHICH PROCEDURES DO DISPUTANTS EVALUATE MOST FAVORABLY?

Although the relevant literature converges on the idea that parties generally prefer procedures that fit with their conceptions of fairness, conclusions regarding which procedures disputants deem most fair have sparked a lively academic debate. In a 2002 symposium edition of the *Journal of Dispute Resolution*, leading empirical researchers disagreed on what conclusions could be drawn from the relevant literature (Bingham 2002, Hensler 2002). Some focused on empirical evidence that disputants favor adjudicative procedures. Oft-cited multi-jurisdiction field research by RAND, for example, found that litigants reported higher procedural fairness for arbitration and trial than for judicial settlement conferences (Lind et al. 1989) and negotiation (Lind et al. 1990b). Other researchers, however, emphasized findings suggesting that disputants prefer non-adjudicative (i.e., settlement) procedures. Groundbreaking research on the resolution of labor grievances (Brett & Goldberg 1983, Shapiro & Brett 1993), for example, found that parties were more satisfied with mediation than with arbitration. Disputants viewed mediation as providing greater voice, outcome control, and fair treatment by the third party (Shapiro & Brett 1993). When mediation is compared with traditional court processes (usually adjudication), mediation parties generally report more favorable dealings with the civil justice system and more positive perceptions of outcomes (Emery & Jackson 1989; Howe & Fiala 2008; McEwen & Maiman 1981, 1984; Roehl & Cook 1989; Wissler 1995; but see Goerdt 1992, Vidmar 1985). One recent study of small claims litigants found that those who settled in ADR were 21% less likely to return to court for intervention in the subsequent 12 months compared to parties whose cases received a judicial decision (Charkoudian et al. 2017), suggesting greater long-term satisfaction with settlement procedures. Another clever study (Emery & Jackson 1989) computed intra-dyadic correlations of how much each party believed they "got what [they] wanted" and found correlations of −0.47 and +0.33 for litigation and mediation, respectively. These statistics support the idea that mediation is better suited for generating win–win results that satisfy the interests of both parties to a dispute.

Notably, subsequent attempts at reconciling these disparate conclusions regarding disputant preferences suggest that most research pointing to a preference for adjudicative procedures consisted of either field research conducted when court ADR was nascent or laboratory studies that assessed ex ante preferences for disputes that would be resolved in the future (Shestowsky 2016). By contrast, much of the work supporting a preference for settlement options either was conducted more recently or analyzed postexperience evaluations (Shestowsky 2008). This pattern suggests the importance of interpreting preference research in light of the analytical timeframe and context.

It also highlights the value of longitudinal field research that examines litigants' reactions to the same procedures over time. One such study, which surveyed litigants both before and after using procedures (Shestowsky 2020), found that the correspondence between how litigants evaluated

the legal procedure that ultimately resolved their case and how attracted they were to that same procedure before using it depended on whether they used a settlement procedure or an adjudicative one. Specifically, for those who used some form of adjudication, initial attraction ratings were positively associated with ex post procedure satisfaction and fairness. In short, those who wanted their day in court were happier when they got their day in court, and vice versa. By contrast, among those who used a settlement procedure, there was no relationship between ex ante and ex post ratings—indeed, for this group, postexperience evaluations were generally above the midpoint on satisfaction and fairness scales regardless of litigants' initial attraction to the settlement procedure. The fact that some parties who had a dim initial view of settlement look upon it favorably once their case concludes suggests that settlement procedures have virtues that not all litigants appreciate ex ante. This interpretation resonates with the two psychologies (Tyler et al. 1999) perspective, which posits that disputants use different criteria to evaluate procedures ex post as compared to ex ante.

Theoretically, how litigants evaluate procedures might be a function of whether they had a choice in which procedure they used. At times, disputants are unaware of the choices available to them (Shestowsky 2017). In other instances, parties freely choose among options, whereas others are required to use a specific procedure due to the terms of pre-dispute agreement or a rule in the court where their case is filed. Enigmatically, although some disputants avoid voluntary ADR, many report being very satisfied with ADR when it is mandatory (Duryee 1992, Tyler et al. 1999, Wissler 1995). One foundational study (Brett et al. 1996) compared litigants who voluntarily used mediation or arbitration with those who used either procedure because it was required or encouraged by a judge. In this case, choice did not affect litigants' relative evaluations—mediation garnered significantly higher outcome and process satisfaction ratings and had more favorable perceived effects on the relationship between the parties. Studies have also reported no difference between mandatory and voluntary mediation in the effect on the parties' relationship, parties' perceptions of the outcome, compliance with the agreement, or reported time and cost savings but have found mixed results concerning how mandatory and voluntary mediation compare on fairness measures (Wissler 1995, 1997).

Another factor that can affect procedural preference is attendance. Early work finding that litigants viewed judicial settlement conferences as fairer than trials, for example, observed that litigants were often excluded from judicial settlement conferences but not trials (Lind et al. 1989). This interpretation begged the question of how the two procedures would compare when statistically controlling for attendance. More recently, in analyses of state court litigants who personally attended their procedure (Shestowsky 2020), settlement options were rated as fairer than adjudicative ones, whereas no such differences emerged for parties who did not attend their procedures. Moreover, although attendance played a role in evaluations of adjudication (with litigants who attended adjudication viewing it less favorably than those who did not attend), it did not shape the perceptions of those who settled. Together, these findings suggest that how favorably litigants rate different procedure types, and how they stack up against each other, may depend on whether litigants attended the procedures they evaluate.

Litigants who utilize multiple legal procedures represent a unique opportunity for studying procedural preferences. In some instances, these parties use multiple procedures for the same case, such as when they mediate after a failed negotiation or use adjudication following a mediation impasse. Alternatively, they experience different procedures across different disputes. Work on this population, though limited, converges on the conclusion that disputants who use mediation as well as adjudicative procedures tend to prefer mediation. This result has emerged for small claims litigants who went to trial after not settling in mediation (Wissler 2004), disputants who used both mediation and arbitration (Goldberg & Brett 1990), and parties from administrative

agency contexts (Malatesta et al. 2020). In addition, earlier studies (McEwen & Maiman 1981) found a higher payment rate (i.e., outcome, compliance) for small claims defendants who used mediation than for those who used adjudication, both for parties who settled in mediation and for those who returned to court for final disposition after a mediation impasse. The literature is ripe for further research exploring how litigants use past experiences as reference points when they assess their encounters with the civil justice system.

Another small body of research has explored whether litigants have a preference between the two common styles of mediation—namely, facilitative or evaluative. In the former, mediators refrain from presenting their personal views and focus on clarifying issues to help parties develop their own resolution. In the latter, mediators review the strengths and weaknesses of the case and may propose a specific resolution. Research has not yet produced a clear answer on the issue. One study (Alberts et al. 2005) found that the more facilitative mediators were, the greater the parties' process and outcome satisfaction. They also perceived the process and mediator as more just. None of these assessments was significantly associated with how evaluative the mediator was. Other notable work found that parties tend to perceive the mediation process as fairer when mediators evaluate the merits of the case but view the process as less fair and feel more pressure to settle when mediators recommend a particular resolution (Wissler 2002a). Additional work in this area is warranted by the frequency of mediation and the continued debate over the relative merits of the two models.

7. THE IMPORTANCE OF INTERPRETING STUDIES IN THEIR HISTORICAL CONTEXT

Interpreting studies that compare litigants' reactions to different procedures requires considering shifts in the levels of social acceptance of ADR and perceptions of its legitimacy. Differences in conclusions regarding how civil litigants evaluate their experiences with the legal system might be a product of the different timepoints in which the studies were conducted, akin to a cohort effect. Some scholars have argued that differences across procedural preference studies track with how culturally accepted or widely used ADR procedures were at the time (Shestowsky 2004), with earlier studies suggesting less favorable attitudes toward ADR than more recent studies. A 1985 study of a court mediation program, for example, suggested that mediation offered greater benefits to parties when the program had been in place for longer and parties were more familiar with it (Pearson & Theonnes 1985), suggesting that reactions can shift over a period of five years (or less), even for the same court program.

Some relevant findings are quite dated. Most research on representation in mediation, for example, was conducted more than two decades ago. Lawyers have gained experience representing clients in ADR since then and therefore might prepare their clients differently or involve them in different ways. Moreover, the extent to which party attendance and participation are expected in court-connected settlement procedures has changed over time (Shestowsky 2018). Contemporary parties might have greater familiarity or history with ADR than parties surveyed in earlier studies, which could affect their expectations or how they participate.

Importantly, even as dispute resolution procedures evolved over time, the aspects evaluated in early procedural justice research continued to shape studies conducted even decades later (Shestowsky 2004). Indeed, several key variables have been operationalized with such uniformity over time that the resulting literature fails to capture the diversity of options available in modern procedures. For example, process control generally has been operationalized in terms of control over the presentation of evidence and arguments, a focus that traces back to foundational procedural justice research that contrasted settlement procedures with adjudication and presumably used

criteria familiar to adjudication for that reason. In contemporary settlement procedures, however, parties or their lawyers can control process in a plethora of ways, including through decisions about how conversational the exchange of information will be, who attends the procedures, when they will be held, and whether they will take place in person or via technology.

Moreover, early research set a precedent for researchers to define and contrast procedures with respect to who controls the process and outcome—the disputants or third parties like judges or mediators. But contemporary procedures offer flexibility also with respect to who decides which substantive rules or norms will shape case resolution. Parties who negotiate or mediate, for example, can elect which legal principles, if any, will apply or use nonlegal norms such as industry standards, conventions established by their past dealings, or other factors that depend on the ability of each party to advance their own interests. Although research has explored how much litigants want to control different aspects of procedures ex ante (Shestowsky 2008, 2016), researchers should extend this work by conducting postexperience research that examines how different configurations of control over process, outcomes, and rules explain satisfaction and fairness assessments. In addition, the sharp growth in self-represented litigants should motivate researchers to determine whether this population has unique preferences for how control in these areas is divided between the disputants and third parties.

In sum, now that ADR is situated as a mainstay of litigation, researchers should replicate and extend earlier work. For example, diversifying process control variables and exploring control over rules would add much-needed nuance to earlier findings that seem out of touch with today's procedures. Given the extensive developments in dispute resolution over time, meta-analyses of litigant perceptions should use data collection periods as an explanatory variable. Importantly, the extant research should be interpreted cautiously and in light of changes in the legal field or even within a jurisdiction. When relying on empirical work to inform policy decisions or the practice of law, those who encounter research findings that seem to conflict should—all else being equal—give greater weight to more recent findings.

8. INDIVIDUAL DIFFERENCES: RACE, GENDER, AND REPRESENTATION STATUS

Although demographic trends indicate that the pool of civil litigants in the United States is becoming increasingly diverse, few researchers have explored litigants' evaluations of their dealings with the civil justice system from an individual difference perspective. Early cross-cultural work conducted in the United States and Western Europe demonstrated that individualistic, self-interest-based accounts of human behavior were inadequate to explain procedural justice effects (Lind & Earley 1992). It also examined whether preferences for adversarial procedures were a by-product of the cultures or legal systems in which people resided. More recent research examines the possibility that litigants' experiences vary based on their gender or race/ethnicity, but these issues are often presented as secondary research objectives, and accordingly, the analyses may lack the statistical power to detect differences. More work dedicated to these issues is acutely needed as a check on how different subgroups of the US population are served by the justice system. In addition, research that accounts for personality differences is sorely lacking.

The most notable recent study of individual differences (Charkoudian & Wayne 2010) explored the effects of matching mediators and mediation participants by gender and by racial/ethnic identity. The results suggested that when there was a gender mismatch between the mediator and the mediation party who was surveyed, the party rated their satisfaction with the mediation process less favorably. The race/ethnicity of the various participants also had an impact: When only the opposing party matched the mediator on race, the surveyed party gave less favorable ratings for

how well the mediator listened without judging and on the change in feeling in control of the conflict situation as measured both before and after the mediation. The authors concluded that matching parties and mediators based on gender had more noticeable positive effects than matching them based on race/ethnicity; however, the study's small sample size may have obscured any significant findings. Studies in this vein based on larger samples would significantly enhance the literature on individual differences and would be of great value to legal practitioners who work with diverse populations.

One major exception in the otherwise underexplored area of individual differences is research on representation status. This measure has received dedicated research attention, resulting in important findings regarding the role of attorneys in shaping litigants' experiences. This literature indicates that lawyers have an important impact on which procedures litigants use. In one retrospective study, the most common reason litigants offered for using a procedure (20.2%) was that their lawyer encouraged them to use it (Shestowsky 2018). Thus, lawyers need to be adept at counseling clients on legal procedures. Unfortunately, however, representation does not guarantee that litigants will fully understand ADR options (McAdoo & Hinshaw 2002) or even be aware of the court-connected ADR programs for which they are eligible (Shestowsky 2017). Some research indicates that the strongest predictor of whether attorneys advise their clients to try ADR is whether they have acted as counsel in a case that used ADR (Wissler 2002b), suggesting the possibility that litigants may be excluded from these alternatives simply based on their lawyer's lack of experience.

Lawyers also shape litigants' experiences during procedures. Represented parties are more likely than unrepresented parties to report that they expressed themselves in court than in ADR procedures (Charkoudian & LaChance 2016). In mediation, represented parties tend to participate less actively and report less satisfaction with their level of participation than unrepresented parties (Wissler 2010). These findings do not demonstrate that representation hinders litigants' voice opportunities in mediation, however, because representation can be an independent source of voice. For example, one mediation study (Wissler 2010) found that 50% of represented parties who reported that they did not speak for their side "at all" nonetheless felt they had been given a considerable chance to share their views of the dispute. Thus, litigants can, at least in mediation, have voice if they speak for themselves or their lawyer speaks for them. Moreover, having lawyers who actively speak on their behalf can bring about distinct benefits. Self-report studies suggest, for example, that parties feel less pressured to settle the more their lawyers speak during mediation and when their lawyers speak more than they do (Wissler 2010). Future work should attempt to replicate and extend this work on voice and representation by exploring litigants' experiences in other procedures.

Lawyers also shape how their clients feel about the legal process once it ends. Litigants who have lawyer involvement are more satisfied with the procedure used to resolve the case and view it as more just (Shestowsky 2020). Moreover, litigants who feel more positive about their attorneys tend to report stronger experiences of procedural justice (Lind et al. 1990b). When disputants trust their attorneys and regard them as having a good grasp of the case, they are more likely to believe that the procedures used were fair and to be satisfied with their outcomes (Lind et al. 1989). In addition, how much value litigants extract from settlement procedures is likely to hinge on their level of preparation, which is within their lawyers' sphere of influence. Some compelling work specific to mediation (Wissler 2010) found that, compared to parties with less mediation preparation, parties with more preparation reported more chance to share their views and have input into the outcome. They also regarded the mediator as being more impartial and more understanding of their views and treating them with greater respect. They also felt less pressured to settle but were more likely to settle and more apt to regard the settlement as fair. In addition, lawyers who

engaged in more client preparation for mediation had more favorable assessments of mediation than lawyers who did less client preparation. Lawyers' attitudes are important—they likely serve as guideposts for clients as they form their own assessments during postexperience debriefing.

Together, the findings on representation speak to ongoing debates concerning how much utility lawyers provide to their clients (Poppe & Rachlinski 2016, Sandefur 2015). Surprisingly, objective outcomes are not always better among represented litigants compared to unrepresented ones, at least in relatively small–dollar value cases (Poppe & Rachlinski 2016). Indeed, in such cases, the financial costs of representation can outweigh the damages awarded, producing a net-negative monetary outcome for represented parties. However, as the extant literature clearly shows, objective outcomes do not dictate litigants' satisfaction or perceived fairness. The value that parties extract from procedures can depend on the specific procedures used and what happens during the process. These factors often hinge on which procedures their lawyers introduce as options and how well their lawyers prepare them for the procedures and manage their experiences therein.

9. CONCLUSION

How litigants evaluate their civil justice system experiences is a critically important but understudied topic. The foundational knowledge about litigants' perceptions is rooted in procedural justice research and evaluations of specific court programs or policies related to the expansion of ADR in the courts. The major findings in the field converge to show that civil litigants consider far more than financial cost, time, and whether they won when evaluating their encounters with the civil justice system, and that perceptions of fair treatment are particularly important for their assessments. Although these insights are certainly valuable, the literature is in dire need of an update—despite major shifts in the civil justice system in the last two decades, few recent studies have focused on civil litigants. Further, the field lacks a clear overarching framework for understanding the litigant viewpoint. Ideally, researchers will conduct more meta-analyses of the extant research and consolidate the findings into a cohesive structure that can offer guidance to lawyers as they counsel clients and to courts as they develop policies that affect litigant interactions with the legal system.

Given the ubiquity of civil litigation as well as persistent complaints that legal actors often misunderstand the litigant viewpoint on litigation, arguing in favor of more research is an easy case. Because most of the work on how parties experience litigation is based on either responses to close-ended questions that are common in the well-established procedural justice literature or discrete projects intended for other purposes, typically court program evaluations, future studies should diversify their methodologies and incorporate open-ended questions that do not make specific aspects of experience salient. Another vital need is research that teases out how litigants' gender, race/ethnicity, geographic, and personality differences lead to variability in evaluations. Such efforts would provide novel information that could be extremely useful for lawyers, court personnel, and other legal practitioners.

Another critical topic for future research relates to the growing reliance on technology to handle disputes. During the COVID-19 pandemic, just as schools and other institutions made an abrupt move to online sessions, many courts and private ADR providers shifted to virtual procedures. Even before the pandemic, state courts had begun to adopt mandatory or voluntary online dispute resolution programs (Shestowsky & Shack 2022a,b). Some of these programs entail processes that are far removed from the traditional approaches analyzed in the prior research. For example, online programs often require asynchronous text-based communication for negotiation and mediation. These developments raise critical questions about how parties evaluate online proceedings as well as the distributive and procedural justice consequences of these innovations

(Abrams 2022, Pew 2021). Legal researchers will need to move fast to accrue reliable, up-to-date empirical evidence that will allow the field to keep pace with changes in the legal system and inform policy development in this area.

Legal actors should do their part to assist empirical researchers in creating knowledge that informs evidence-based policy efforts and client counseling protocols. For their part, lawyers can facilitate research by encouraging clients to participate in research projects and court program evaluations. Courts can advance the research agenda by overtly welcoming academics who want to collect data for purposes other than straightforward program evaluation. They could also be more open to the use of true random assignment so researchers can eliminate concerns about selection bias (and other third-variable explanations) and gain more clarity on both procedural preferences and the impact of legal representation, party attendance, and participation (in multiple forms) on fairness and satisfaction assessments. Studies that randomly assign disputants to procedures but then allow them to reject the assigned procedure preserve the disputants' choice but hinder the advancement of robust evidence. Random-assignment research might help courts assist their constituents directly. For example, a study examining the effect of attorney representation on party experiences could randomly assign volunteer lawyers or research-funded counsel to some parties who would otherwise be unrepresented and then compare their evaluations to those of parties who were not randomly assigned to have representation (Wissler 2010).

This review should serve as a call to action to social scientists to address important gaps in the literature on litigants' evaluations of their encounters with the civil justice system in ways that will have practical benefits for parties as well as the lawyers, neutrals, and policy makers charged with serving their needs. Research that identifies concrete methods for improving the experiences of litigants does much more than benefit individual parties—it improves how the civil justice system functions and elevates the legitimacy of the system overall.

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