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Between Access to Counsel and Access to Justice: A Psychological Perspective

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BETWEEN ACCESS TO COUNSEL AND ACCESS TO JUSTICE: A PSYCHOLOGICAL PERSPECTIVE

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INTRODUCTION

"Access to justice" is a broad term that can be defined in different ways. In this volume alone we find different contributions which present different views of access to justice, and different answers to central normative questions concerning access to justice, such as how much access is appropriate, access to what exactly or access by whom. The movement to increase access to justice has likewise taken different directions, including the development of less formal forms of dispute resolution, simplification of legal processes, and the progress of in-court assistance to unrepresented litigants. Yet, traditionally, and for the most part, increasing access to justice has

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been related to increased access to legal counsel.[1] Having access to representation by an attorney is considered a central means to increase individuals' access to justice, i.e., access to legal institutions or to legal solutions to their problems. The ABA's current proposal to institutionalize a right to counsel in certain civil cases continues this traditional movement. It offers to deal with access problems by making legal services more accessible for greater parts of society and by framing access to counsel as an entitlement in more types of cases.

This paper is written as part of the discussion around the Bar's proposal.[2] This conversation, we believe, presents an important opportunity to use empirical knowledge in order to revisit and explore anew some of the basic assumptions and features of the American legal system—features that are reflected in the proposal itself. In particular, we wish to focus on the equation between access to counsel and access to justice and the realities and difficulties faced by laypeople within the legal process.

The primary purpose of this paper is to explore a psychological perspective on some of the issues concerning access to justice in civil litigation. This is an attempt to present what the existing literature, as well as additional suggested research, can and should teach us about the psychological aspects of the access challenge in civil litigation and about the needs concerning the expansion of the right to counsel to civil cases. Hopefully, the psychological point of view will enrich the discussion around the bar's proposal by focusing on the subjective experiences of represented and unrepresented litigants within the legal system. We will present a discussion that is based on needs rather than rights, on the subjective perceptions of individuals rather than objective, and normative evaluations concerning the value of representation. We are interested in the way individuals perceive the concept of "access", and to what degree they actually feel they have gained, or been denied, access to justice and under which specific circumstances. The values we will discuss are those procedural values that individuals identify with legal procedures that are fair and satisfactory. Public views, we believe, are one factor that needs to be considered when thinking about policy change.

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1. For a detailed discussion of the different stages and waves of the Access to Justice Movement, see Mauro Cappelletti & Bryant Garth, *A World Survey*, *in* 1 ACCESS TO JUST., 21-54 (Mauro Cappelletti ed., 1978).

2. This paper was originally written for a presentation. Tom R. Tyler & Nourit Zimerman, Address at the ABA Symposium: Real People, Real Needs, Real Solutions—Access to Legal Representation in Civil Litigation (Dec. 4-5, 2008). The symposium dealt with the ABA's proposal to establish and institutionalize a right to counsel, at public expense, to low income persons in certain categories of civil adversarial proceedings involving basic human needs, such as issues of shelter, sustenance, safety, health, or child custody.

The bar's proposal is obviously an important step towards increasing many individuals' access to legal representation and to the courts. This is particularly essential in view of the centrality of professionals in the American system—a centrality that disadvantages pro se litigants within the court system. Yet, we will try to go beyond these obvious observations to provide a thicker understanding of the mixed psychological values that are attached to representation, direct participation or access to justice more generally.

Looking into the pro se phenomenon, this paper will explore the lessons that can be learned from the experiences of the many individuals representing themselves in the American legal system today. These lessons apply not only to the needs of this specific group (which is the target of the bar's reform), but may illustrate more generally the centrality of lawyers in the American legal system, and how the advice of counsel, or lack thereof, influences those operating within the court system.

Pragmatically speaking, looking at the bar's proposal, it is the group that is currently denied access to lawyers, but which would have them under the proposed reform that is of the greatest interest here. We can ask how the experiences and evaluations of this group would change if their access to lawyers improved. The change might involve a greater likelihood that they would bring their problems to court and also the possibility that, in court, their experiences and outcomes would be different. For example, these experiences might be more positive because of the support of a professional attorney or, the representation by an attorney might carry some psychological drawbacks since it requires one to give up on the opportunity for direct participation.

Our interest in this paper will go beyond this specific group of self-represented litigants to try to understand better the procedural values that matter to people and how they are related to having or not having professional legal representation. We would distinguish several questions: The first is whether, and in what ways, having a lawyer or not having a lawyer influences the experiences of lay people operating within the legal system, their evaluations of the process and the system, and of the outcomes obtained by them. Reading the procedural justice literature we will ask how representation, or the lack thereof, is related to the procedural aspects identified by individuals as fair and just.

The second question is whether, and to what degree, having or being denied access to counsel influences one's decision to take a problem into court (in cases in which a person might have either a legitimate legal claim or a frivolous claim).

The third question is whether feeling that one is denied access to a lawyer and/or to court due to the inability to have legal representation has an influence upon non-lawyers. What are the consequences when people feel that they are unable to obtain access to counsel? Do people who have access to counsel necessarily use counsel, and how do people feel when they have access to counsel but decide not to use it?

And finally, irrespective of why people do not have counsel, what can we say about the pro se experience and what can we learn from the ways in which non-lawyers and legal actors interact within the legal system.

In the first part of the paper we will present and discuss the legal background and legal challenges presented by the pro se phenomenon, the centrality of lawyers, and the connection between access to counsel and access to justice in the American legal system. The second part is devoted to a review and analysis of the empirical work on the questions we presented above. We then close with some conclusions drawn from the existing data as well as a proposal for additional research.

I. BACKGROUND: UNREPRESENTED LITIGANTS IN A LAWYER-DOMINATED ENVIRONMENT

The American legal system relies heavily on the representation of litigants by lawyers in court procedures. Even more than other western legal systems, the American system is lawyer-dominated.[3] At the heart of its procedures, it posits the lawyer,[4] a professional trained to bring her client's voice and interests before the court. Within this legal scheme, lawyers serve both litigants and the system. They serve the litigants by bringing legal expertise and case management experience to bear on a particular case. They therefore provide a professional service that is believed to significantly increase the chances of winning in a system that treats dispute resolution in an adversarial setting in which the best litigator wins.[5] At the same time,

3. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (First Harvard University Press 2003) (2001).

4. The Federal Rules of Civil Procedure do not assign the litigant a structured role in the process. Generally speaking, it seems that the rules "tacitly posit the lawyer as central," Judith Resnik, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494, 537 (1986), to a degree that they "often make litigants . . . invisible." Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1193 (1992). If we look back to the history of the Rules, it seems that the fundamental role lawyers played in the drafting process can explain, at least to some extent, the lawyer-centered orientation of the rules. *See* Resnik, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494, 503-05 (1986).

5. For the ways in which having legal representation actually influences outcomes, an issue we do not discuss here, see, in this volume: Russell Engler, *Connecting Self-*

the work of lawyers serves the basic structure of the adversary system,[6] allowing judges to preserve a passive role and sparing them the potential complexities of dealing with unprofessional litigants who are not invested in long-term relations with other legal actors that motivate people to adhere to rules of appropriate conduct when dealing with legal authorities.

The American legal system ascribes great importance to the right of individuals to participate in legal procedures, and to have their "day in court."[7] Yet, as lawyers develop a greater role in the system, the legal process becomes more professionalized and complex and, when the procedural design assumes representation, the ability of individuals to actually proceed successfully without an attorney, or to directly participate when they do have an attorney, diminishes.

From here follows the equation between access to counsel and access to justice: being represented by an attorney is considered a central requirement for meaningful access to the American justice system. Moreover, representation by a lawyer in itself has gradually been thought of as an essential aspect of due process rights and the right of participation in legal procedures. As noted by the Supreme Court, "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'"[8] Therefore, while the ideal of participation in legal proceedings can be interpreted and implemented in different ways,[9] this po-

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Representation to Civil Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 44-66 (2010); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 170-71 (2003).

6. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 3 (1986).

7. The conventional understanding of having one's "day in court" seems to be one of personal participation. "Because the English and United States constitutional traditions initially made political commitments to due process within the framework of individual litigation, the relationship between process and individual participation was straightforward. The rights to notice and to be heard belonged to an individual who had the opportunity to participate." Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 358-59 (1996); *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 204 (1992).

8. Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

9. Participation in legal procedures can have different meanings and take different forms. It can be direct participation that includes face-to-face interaction with the decision-maker, or be mediated by a representative. It can be understood more or less broadly. The scope and essence of participation will greatly depend on the different values and goals one attributes to the legal process itself. *See, e.g.*, Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 707-08 (2004). *See generally* Christine B. Harrington, *The Politics of Participation and Nonparticipation in Dispute Processes*, 6 LAW & POL'Y 203 (1984).

sition reflects the way in which the traditional, and dominant, view ended up interpreting it as being truly achieved only through representation by a professional.

In reality though, despite the centrality of representation in the design of legal processes, the cost of legal services today is such that many people cannot afford to hire a lawyer.[10] Responding to that reality, the proposal to institutionalize a right to counsel in civil cases tries to improve the existing structure by creating a level playing field where all litigants enjoy similar professional assistance. Providing an attorney to people could bring more individuals to the courts and improve the prospect of those individuals who already turn to the courts representing themselves.

We find these individuals, in increasing numbers, proceeding pro se in more and more courts and cases across the country. Indeed, pro se litigants are becoming a more common phenomenon in American courts, especially in the area of family law, and in "poor people courts" which deal with cases such as traffic or landlord/tenant disputes, where the pro se litigant has actually become the norm.[11]

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10. Most low-income and moderate-income individuals cannot afford the cost of counsel. An ABA legal needs study reports that nearly 71% of legal situations facing low-income households in America do not find their way into the justice system. *See* JONA GOLDSCHMIDT ET AL., STATE JUSTICE INST., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 10 11, n.26 (1998) (citing ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS – MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994)). In a study conducted in California in 2005, 69% of those interviewed indicated that attorney cost had or might prevent them from going to court. DAVID ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 2005: A SURVEY OF THE PUBLIC AND ATTORNEYS 19-20 *available at* http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf. *See also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1541-46 (2005).

11. Some numbers for example: a California report from 2004 found that 4.3 million court users were self-represented in California. In family law cases, 67% of petitioners were self-represented. In a study of domestic relation cases in Arizona, at least one of the parties was pro se in almost 90% of the cases, and in 52% both parties were pro se. In other types of civil cases the numbers are much lower, but still not negligible. A study from 1995 of forty-five urban trial courts found that an average of 3% of all tort cases involved at least one pro se litigant. In a Chicago study from 1994 pro se cases constituted 28% of all landlord-tenant cases. In 1995, 25% of all new civil suits were brought pro se. And the numbers seem to keep growing. For more data, see GOLDSCHMIDT ET AL., *supra* note 10; JOHN M. GREACEN, CTR. FOR FAMILIES, CHILDREN AND THE COURTS, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW (2003), *available at* www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf; NAT'L CTR. FOR STATE COURTS, PRO SE STATISTICS (2006) *available at* http://www.ncsconline.org/wc/publications/memos/prosestatsmemo/htm. On the growth of pro se litigation in divorce cases, see Lynn Mather, *Changing Patterns of Legal Representation in Divorce: From Lawyers to* Pro Se, 30 J. L. & SOC'Y 137, 142 (2003).

Pro se litigants present a very interesting exception to what is still regarded as the paradigmatic case in court procedures—a dispute resolution process that is dominated by professionals. Indeed, the encounter between lay people and the legal system is challenging for both sides, and pro se litigants are usually perceived as a problem—both to the courts and to themselves. From the litigants' side, there are the obvious difficulties of having to manage within a highly professionalized system whose rules, language and practices they do not know. There is the fear then that pro se litigants' rights and interests are left unprotected.

From the courts' side, pro se litigants are considered a burden; the need to deal directly with litigants (rather than professionals) requires modifications in routine processes and court personnel to deviate from their traditional roles[12] and provide additional assistance. Therefore, pro se litigants are often attacked for clogging the courts and creating judicial inefficiencies.[13] Various reports indicate that there are burdens presented by pro se litigants, such as clerk time required to answer their questions and assist them and judicial time required to explain trial procedures and assist in the presentation of evidence.[14]

The extent of the pro se phenomenon reveals a tension between the way the system is designed (based on the assumption of representation) and the realities with which it is dealing now (a huge percentage of unrepresented litigants).[15] In addition to the attempts to increase access to counsel, then, we suggest that the width of the pro se phenomenon and the challenges it presents, the various reasons that bring people to represent themselves, and the realities faced by them, also require us to rethink the meaning of, and connection between, access to counsel and access to justice.

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12. One central problem in this context is the tension between judicial impartiality, a central feature of the adversarial process, and the need for judges to assist pro se litigants. *See generally* Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2007); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

13. Interestingly, studies have actually found that represented-party cases are the most time consuming and that in some types of cases (such as family cases), the presence of self-represented litigants actually speeds procedures and requires fewer resources. Also, studies have found that pro se cases were being settled at the same rates as those with represented parties, refuting the notion that pro se cases always go to trial and never settle. *See, e.g.*, Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384-85 (2005); *see also* GREACEN, *supra* note 11, at 10-11.

14. *See* GREACEN, *supra* note 11, at 12; John. M. Greacen, *Framing the Issues for the Summit on the Future of Self-Represented Litigation*, *in* THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT 19, 20 (2005).

15. *See supra* note 11.

Obviously, access to justice has different meanings and interpretations.[16] Access could relate to the process through which a certain grievance is turned into a legal claim and brought before the court. It could relate to financial barriers that prevent individuals from bringing a case before the court system. Access to justice is not just a formal concept; it relates also to what happens within the court. Access to justice should be understood to include what happens when lay people interact with the court system, and the degree to which they can have meaningful legal redress. Such meaningful legal redress, i.e. obtaining justice in legal terms, is traditionally the primary focus of discussions of access to justice. In addition, we will argue, the pro se litigant's experience during the process should be included in the discussion, and is important because it shapes both the willingness to accept the outcome and the feeling that "justice was done", as well as the opinions that those involved in the system form about judges, lawyers, the courts, and the legal system.

On the one hand, in a system in which legal knowledge and experience is important, it would be easy to assume that people want, and are more satisfied when they receive, professional legal representation. On the other hand, having a lawyer to speak on one's behalf also means that one does not (in fact normally cannot) speak for oneself. Hence, a represented party loses the opportunity to directly address the decision-maker, ceding that right to the attorney. Under the current design of the system, the represented litigant loses any structured role in the process; the Federal Rules of Civil Procedure do not assign the litigant himself any structured opportunities to speak before the court other than if he chooses to testify. Likewise, the Rules do not require the litigant's own signature on most documents submitted to the court,[17] and do not even require the litigant's

16. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 3-19, 47-68 (2004); Stephen L. Pepper, *Access to What?,* 2 J. INST. STUD. LEG. ETH. 269, 269-70 (1999) (Pepper distinguishes between two meanings of "access to justice": the first refers to "the distribution of lawyer services in regard to litigation, and in the attendant negotiations of disputes prior to litigation," and the second "focus[es] not just on litigation and dispute resolution, but on access to legal advice more generally"); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47 (2003). *See also* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 476 (2002) ("The literature on access to justice generally uses the term 'legal assistance' to mean the provision of counsel, whether subsidized by the government or compensated by contingency fee or other arrangement, to a party who cannot afford representation. Access to justice, however, should also entail other forms of legal assistance, including a court structure that responds fairly and efficiently to claimants who lack the legal equipage needed to present their cases in an effective way.").

17. FED. R. CIV. P. 11.

presence in pretrial conferences, which are meant to enhance the management of the dispute and possibly facilitate its settlement.[18]

The level of involvement of the represented litigant depends then on his lawyer (who can work less or more to inform the client and have him involved in the process), on the judicial attitude and methods of the court, and on the desires and abilities of the litigant himself.[19] In reality then, the difference in the experience of represented and unrepresented litigants could be as big as the difference between complete reliance on one's attorney and having no active involvement in the legal process, on the one hand, and having complete independence in the management of the litigation, with no professional assistance, on the other.

This gap might be mitigated if we think of different lawyering strategies and modifications in the court environment that would allow greater participation on behalf of represented litigants, and more support and assistance to unrepresented litigants. Before discussing such potential changes, however, we want to examine what is currently known about the psychological experiences of those who are and are not represented by lawyers.

II. THE SUBJECTIVE EXPERIENCE OF LITIGANTS: EMPIRICAL FINDINGS TO DATE

Our concern in this section is with one specific subset of the empirical literature on trials; it is with what we know about parties' subjective experiences during trials and, in particular, whether those experiences are linked to their access to, and/or use of, lawyers. The following is a review of what the existing literature, especially in the area of procedural justice, reveals

18. FED. R. CIV. P. 16. Even outside the courtroom, represented clients usually play a very small role in negotiations leading to settlement, as these are usually managed by their lawyers. *See* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 333 (1999).

19. The procedural design, as well as the prevalent lawyer-client relationship, result in many represented litigants having little control and involvement in the litigation process. In a Rand study that dealt with tort litigants, a majority reported having little control over their cases. LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 69 (1989). Most litigants attributed this to the lawyer, the court, or both. Less than 10% regarded their lack of control as resulting from their own choice. Deborah R. Hensler, *The Real World of Tort Litigation*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 155, 164-65 (Austin Sarat ed., 1998). This finding is in accord with other data indicating that litigants feel that they lack control over the legal process. Kritzer, reporting the results of the Civil Litigation Research Project, also concludes that "control rests largely with the lawyer, particularly when the client is an individual," and that "clients simply are not very involved in most cases." HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 60, 62 (1990).

about the experiences, perceptions and expectations of individuals concerning justice, fairness and the legal process—with or without the assistance of an attorney.

In 1975 John Thibaut, a psychologist, and Laurens Walker, a lawyer, published their pioneering book *Procedural Justice*.[20] That monograph reported on their empirical studies of the experience of people involved in dispute resolution proceedings, and made the claim that the perceived procedural justice of legal procedures shaped people's reactions to them. This procedural justice argument—that people care about procedural values no less than they care about outcomes, and that procedural values play a significant role in people's evaluations of, and satisfaction with, procedures in which they have participated—is now widely supported by a large body of empirical studies.[21]

The procedural justice literature has shown that people's concerns about procedural values exist independently of whether they win or lose, that people look for more than winning in their interactions with the legal system, and that they evaluate the fairness of legal processes according to a large variety of criteria.[22] The argument is that:

> What law has summarized under the "due process" rubric, social scientists capture as a bundle of interests, needs, or wants described in a variety of ways—vindication, attention, accountability, information, accuracy, comfort, respect, recognition, dignity, efficacy, empowerment, [and] justice . . . . Research on litigants . . . reveals a group of individuals who seek something in addition to money.[23]

Research indicates that procedural values not only influence individuals' evaluations of the fairness of any specific process, but that greater perceived fairness also enhances "voluntary acceptance of decisions, voluntary compliance with legal rules, and the willingness to proactively help society

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20. *See generally* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

21. For example, a study of tort litigants found that "objective case outcomes, costs of litigation and time to disposition contribute less to plaintiffs' satisfaction with the litigation process than perceived fairness of the process." Resnik et al., *supra* note 7, at 372. For review of additional studies see: E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980).

22. *See, e.g.*, TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, SOCIAL JUSTICE IN DIVERSE SOCIETY 88 (1997) [hereinafter TYLER ET AL., SOCIAL JUSTICE]; Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

23. Resnik et al., *supra* note 7, at 363-64.

and social authorities."[24] In other words, perceived procedural fairness enhances the perceived legitimacy of legal institutions as well as citizens' commitment to the law.[25]

An example of the findings of procedural justice in that respect can be drawn from a study of public willingness to accept judicial decisions in two California communities—Oakland and Los Angeles.[26] This study considered both those who came to these authorities seeking help, and those being regulated by the authorities. The sample included 1,656 people in Los Angeles and Oakland with a recent personal experience with the police or the courts. Fourteen percent (239 people) had contact with a court.[27]

Why did people who dealt with the courts accept court decisions? The study asked participants about their willingness to accept such decisions. In particular, it focused on willing acceptance, rather than mere compliance. It also asked about participants' overall evaluations of the law, the courts, and the legal system.[28]

Reactions to the court could potentially be linked to three judgments people made about their personal experiences in court: whether the procedures used by the court were just; whether the outcome was just; and/or whether the outcome was favorable.[29] Researchers applied a regression analysis to explore the influence of these various factors on the willingness to accept decisions made by the court.[30] As expected by the procedural justice argument, the primary factor shaping the willingness to accept decisions was the perceived fairness of court procedures.[31] Procedural justice was also the primary factor shaping the influence of personal experience upon overall views about the court system.[32] What is striking is that proce-

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24. TYLER ET AL., SOCIAL JUSTICE, *supra* note 22, at 82. It is also argued that procedures that are evaluated as fair by all participants, "facilitate[] the maintenance of positive relations among group members and preserves the fabric of society, even in the face of the conflict of interest . . . ." *Id.* at 99.

25. *See, e.g.*, Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621 (1991).

26. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 28 (2002).

27. The rest had contact with the police. *Id.* at 33.

28. *Id.* at 28.

29. *Id.* at 54.

30. In addition, the study measured and controlled for other potentially important factors, including the person's ideology, age, level of education, income, gender, city of residence, ethnicity (African-American, Hispanic, white); and whether the person appeared in court voluntarily.

31. TYLER & HUO, *supra* note 26, at 54-57.

32. *Id.* at 55.

dural justice overwhelms other factors, explaining three to four times as much of the variance in both decision acceptance and court evaluations.

The findings noted above are especially important because they are true of people irrespective of their social or economic background. The California study was designed to compare the experiences of White, Hispanic, and African-American residents of Los Angeles and Oakland. The members of all three groups reacted in basically the same ways to their experiences. The same is true of those who were economically advantaged and disadvantaged, men and women, and those with varying degrees of education. It was also true of plaintiffs and defendants, and of people who dealt with the police or the courts.[33] In other words, people generally reacted to their experience in terms of procedural justice whatever their background, suggesting that focusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who is using the courts.

The strong link between procedural justice and evaluations of the courts was recently affirmed by another study conducted within the State Courts of California. The Administrative Office of the Courts undertook a study in 2005 in which a random sample of the residents of the state was interviewed about trust and confidence in the California courts. An analysis of that information[34] suggests that "[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts."[35] The California courts are rated as being very fair in terms of treating people with dignity and respect, but not particularly fair in terms of allowing them to participate in decisions that affect them. The report argues that "[p]olicies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts."[36] Interestingly, the report points to experiences with low-stakes courts, such as traffic court, as a particular source of dissatisfaction. It goes on to argue that all experiences with legal authorities, even relatively trivial interactions, are important to members of the public and need to be the focus of court-design efforts.[37]

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33. *Id.* at 141-64.

34. ROTTMAN, *supra* note 10. Analyses of the data from that survey which are presented in this article are from Tom R. Tyler & David Rottman, Public Views about the California Courts (unpublished manuscript, on file with author). Both are based on a study of California state residents that involved interviews with a sample of 2414 people.

35. ROTTMAN, *supra* note 10, at 6.

36. *Id.* at 7.

37. One reason that these findings are particularly important is that they provide an independent confirmation that procedural justice issues matter in real court settings. This study was not conducted or evaluated by the academic researchers who have been responsi-

These procedural justice findings point to the centrality of process issues in the reactions of litigants to their experiences in court. They suggest that issues of "due process," as these are perceived by the public, are the key to creating and sustaining trust and confidence in the courts. Hence, the findings reinforce the value of viewing the issue of access to counsel within this general framework of creating a litigation experience that involves a fair procedure—perceived as such—for resolving disputes. The question remains: what are the elements that make such a process and how are they connected to providing people with an attorney? In other words, the value, goals, and quality of legal representation should be examined in view of the set of criteria people use to evaluate their legal experience, in addition to the outcomes obtained by them.

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ble for many of the early studies of procedural justice. Instead, the need for this study arose within the framework of court concerns in California; the study was designed and conducted within the framework of the administrative offices of the courts, and the report was written by David Rottman, a researcher at the National Center for State Courts. Similar conclusions have also been reached by other judicial leaders. The white paper on procedural fairness authored by Judges Kevin Burke and Steve Leben, is another example. KEVIN BURKE & STEVE LEBEN, AM. JUDGES ASS'N, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION (2007) *available at* http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf. Another white paper reviews research on procedural justice, including recent studies conducted within the court systems of Hennepin County, Minnesota, under Judge Burke's direction, and in Brooklyn, New York. M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), *available at* http://courtinnovation.org/_uploads/documents/Procedural_Fairness.pdf. Again, these court-designed and sponsored evaluations point to the importance of procedural justice in encouraging satisfaction, decision acceptance, and trust and confidence in the courts. *See* M. Somjen Frazer, *Examining Defendant Perceptions of Fairness in the Courtroom*, 91(1) JUDICATURE 36 (2007); Jake Horowitz, *Making Every Encounter Count: Building Trust and Confidence in the Police,* 256 NAT'L INST. JUST. J. 8 (2007) *available at* http://www.ncjrs.gov/pdffiles1/nij/jr000256c.pdf.

A. Procedural Justice Criteria: Voice, Representation, and Participation[38]

Whether people have an attorney has not been generally studied within a procedural justice framework, and the question of legal representation has not been significantly investigated. As we discuss below, however, research does confirm that the ability to be represented before the court, with or without counsel, is central to designing procedures that people view as fair.

Thibaut and Walker identified the opportunity to present one's arguments to the decision-maker (which they term "control") as central to individuals' evaluations of the fairness of trial procedures.[39] Since the publication of their work, a large body of literature has developed on people's subsubjective evaluations of both trials and of more informal legal procedures. That literature suggests that people value the opportunity to present their arguments to legal authorities in either a formal or an informal legal procedure. The original research, however, did not address the distinction between personally presenting arguments, and evidence and indirect representation through an attorney. For example, in their work, Thibaut and Walker do not distinguish between situations where there is some control in the hands of the disputant himself and situations where the control is solely in the hands of the lawyer. Moreover, they do not include the role of the lawyer in their basic model of dispute. They explain this absence by saying that due to their professional expertise lawyers can only increase the litigant's perceived control over the process.[40]

Irrespective of whether it is direct or indirect, there is a great deal of evidence suggesting that people want voice in legal proceedings and react to the extent that they do or do not receive it.[41] Evidence for the value of

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38. The terms that we use here—voice, participation, and representation—are common terms in the procedural justice literature, but they are often used to mean different things. In this article we use *voice* to relate to self expression opportunities in which the litigant is allowed to express his concerns and views with regard to the problem at hand. *Voice* is typically used to refer to a more direct form of participation, such as occurs when a person directly addresses the decision-maker. *Participation* is a somewhat broader term that relates to all of the ways in which one can play a role in the dispute resolution process (including voice). We use *representation* to relate generally to the extent and ways in which the litigant's case is presented before the decision-maker (it could relate either to representation by an attorney or to self representation).

39. For an elaborated discussion of this conclusion, see THIBAUT & WALKER, *supra* note 20, at 117-24.

40. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 547 n.14 (1978).

41. The first to use the term "voice" as an element of procedural justice evaluations was Robert Folger, who defined having a voice in a system as "having some form of participa-

voice comes from studies concerning which aspects of the court experience litigants associate with justice. The aspects found to most strongly influence the experience of litigants are voice, neutrality, respect, and trust.

Voice/Representation. People want to have the opportunity to present their side of the story in their own words, before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making a decision. The value people place on the ability to "tell their story" reappears in various studies. For example, a study of small claims courts found that the opportunity for direct, unmitigated participation—especially the opportunity for the litigant to tell his story before a judge—was an important determinant of the litigant's satisfaction. [42] Again, however, this literature mostly does not distinguish between directly voicing one's concerns and presenting one's evidence and having this occur through one's attorney.

Neutrality. People bring their disputes to the court because they view judges as neutral, principled decision-makers, who make decisions based upon rules and not personal opinions, and who apply legal rules consistently across people and over cases.[43] To emphasize this aspect of the court experience, judges should be transparent and open about how the rules are being applied and how decisions are being made. Explanations emphasizing the application of relevant rules are helpful.

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tion in decision making by expressing one's own opinion." Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 109 (1977). Following Folger, literature in the field began using the term *voice*, sometimes defined as "an opportunity to express [the individual's] position before a decision is made," or as the ability of the disputant to tell his story and present his arguments. Blair H. Sheppard, *Justice is No Simple Matter: Case for Elaborating our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 952, 954 (1985); Tom R. Tyler, Kenneth A. Rasinski & Nancy Spodick, *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985).

42. William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 677 (1985) (noting that "[l]itigants uniformly take advantage of the opportunity to talk . . . and some even offer unsolicited unfavorable comments about this aspect of the procedure").

43. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 137 (1990). An example of the importance of respect can be found in another study which found that, "litigants' assessment of procedural fairness was not based on whether they had an opportunity to participate in the process (e.g. vent), but rather on their perceptions of the carefulness and neutrality of the third party and the dignity of the process." Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 95 (2002).

Respect. Legal authorities, whether police officers, court clerks, or judges, represent the state and communicate important messages to people about their status in society. Respect for people and their rights affirm to people that they are viewed as important and valuable, and are included within the rights and protections that form one aspect of the connection that people have to government and law. People want to feel that when they have concerns and problems both they and their problems will be taken seriously by the legal system.

Respect matters at all stages, and involves police officers and court clerks as well as judges. It includes both treating people well, that is, with courtesy and politeness, and showing respect for people's rights.[44] For example, when people come to court they are often confused about how cases are handled. Providing people with information about what to do, where to go, and when to appear, all demonstrate respect both for those people and for their right to have their problems handled fairly by the courts. Brochures or web sites explaining court procedures, as well as aids such as help desks are found to be valuable.[45]

Trust. Studies of legal and political authorities consistently show that the central attribute that influences public evaluations of legal authorities is an assessment of the character of the decision-maker.[46] The key elements in this evaluation involve issues of sincerity and caring. People infer whether they feel that court personnel, such as judges, are listening to and considering their views; are being honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.

Using the data collected in the study of personal experiences with the courts in Oakland and Los Angeles discussed above, it is possible to examine the potential influence of these four antecedents of procedural justice. An analysis of the four factors considered at the same time suggests that neutrality, trust, and respect directly shape overall evaluations of procedural justice, but that voice does not. An analysis that allows both direct and indirect influences indicates, however, that voice is indirectly important because it shapes evaluations about neutrality, trust, and respect.

People who feel that they have voice, in other words, view the procedures as more neutral, have more trust in the decision-maker, and feel that they have been treated with greater respect. An analysis that considers both

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44. *See* TYLER, *supra* note 43, at 138.

45. *See* GREACEN, *supra* note 11, at 16-19.

46. *See* E. ALLAN LIND ET AL., THE INSTITUTE FOR CIVIL JUSTICE, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 61-67 (1989); ROTTMAN, *supra* note 10, at 24.

direct and indirect influences at the same time indicates that all four factors matter, with voice having the strongest influence, followed respectively by neutrality, trust, and respect. Interestingly, neither outcome favorability nor outcome fairness directly influences overall procedural justice judgments. This data supports the argument that having the opportunity to present one's case leads people to feel that the forum is more neutral, the authorities more trustworthy, and the procedure more respectful of them and their rights. For all of these reasons litigants are more likely to accept decisions and evaluate the legal system more favorably after they have experienced voice.

B. Voice in Direct and Indirect Participation

As we have noted, the opportunity to present one's case can occur either directly, as in an informal legal procedure such as mediation, or as a pro se litigant in court, or indirectly through an attorney. The attorney interviews her clients and organizes the arguments into a legally relevant, and hopefully compelling, presentation of the case.

The key psychological issue raised by pro se litigation is whether people have different reactions to direct and indirect participation in legal procedures. A subsequent important question is how people evaluate and rate different factors that are influenced by direct or indirect participation, such as different levels of voice and control, different levels of knowledge and understanding of the legal process and their rights, or the support provided by having a professional on your side. These are just a few of the many ways in which having or not having an attorney can influence the experience of a litigant.

In order to answer these questions, in face of the limited data, we must understand the value of voice and the different effects it has on people's legal experiences. In the original work of Thibaut and Walker, people's desire for voice was linked to their desire to present their arguments in a compelling way and thereby influence the judge to make a favorable decision.[47] This argument is consistent with the suggestion that people want to have an attorney who can make a more compelling case on their behalf. In its original incarnation, the Thibaut and Walker model is instrumental and suggests that one's desire to speak is directly linked to the view that one's

47. *See* THIBAUT & WALKER, *supra* note 20, at 117-24; Thibault & Walker, *supra* note 40, at 524, 549.

arguments can influence the court's decision.[48] It is easy to imagine that effective legal representation could facilitate such influence.

As research on voice has developed, however, it has moved away from the instrumental view and increasingly emphasized people's desire for personal recognition by authorities.[49] Indeed, later work on the psychology of voice suggests that the experience of voice has interpersonal or "value-expressive" worth that is not linked to any influence over the final decision.[50] These studies show that people still rate a procedure to be more fair if they had voice (versus no voice), even if they know that what they said had little or no influence on the outcome of their proceeding.[51] Even more strikingly, this holds true even when the opportunity for voice comes after the decision was already made.[52] These findings demonstrate that voice has value beyond its ability to shape outcomes.

What factors drive the influence of voice, besides influence over the eventual outcome or decision? We might hypothesize that when an authority listens to a person's arguments, the authority confers interpersonal respect on that person, acknowledging his rights as a citizen and as a person, and validating his status as a person in good standing in society. This argument is supported by the finding that people only value such voice opportunities if they feel that the authority is "considering" their arguments.[53] This suggests that people focus on whether the decision-maker treats their concerns and needs in the situation with respect (by receiving good faith consideration), independently of whether the decision-maker adopts the course of action the people recommend to resolve those concerns.

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48. THIBAUT & WALKER, *supra* note 20, at 118. This instrumental view is also favored by other procedural justice researchers. *See, e.g.*, Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, *in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 32 (K.J. Gergen, M.S. Greenberg & R. H. Willis eds., 1980).

49. E. Allen Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

50. 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, 333 (1987).

51. Tyler et al., *supra* note 41.

52. Lind et al., *supra* note 49, at 957. At the same time, it is important to note that voice with no influence might also heighten feelings of procedural injustice and dissatisfaction. "[W]hen people feel that their opportunity to speak is a 'sham,' rather than an honest opportunity to influence the decision, they may react to that opportunity with anger." Tyler et al., *supra* note 41, at 74.

53. Tyler, *supra* note 22.

To the degree that people see voice as communicating concern and consideration by legal authorities, or as affirming their status and value, direct voice might be as desirable, or even more desirable, than representation by a lawyer. No data exists, however, to clearly support this hypothesis. The data presented here shows clearly that voice matters to people. What is not clear is if it matters whether that voice is direct or indirect. That distinction is central to the issue at hand here, since pro se litigation is direct participation in which people represent their own positions, by making their own arguments and presenting their own evidence, whereas having an attorney constitutes mostly indirect participation. As has been noted, there are plausible reasons for thinking that either direct or indirect participation might be experienced as the fairest procedure.

One source of evidence about direct versus indirect voice is the comparison of trials and informal dispute resolution. While the distinction is not absolute, people are more likely to have opportunities to directly voice their concerns to the decision-maker in alternative dispute resolution ("ADR") procedures such as mediation.[54] Studies of mediation suggest that it is popular among its participants, at least in comparison to traditional adjudication.[55] This popularity is linked to the opportunities for direct participation in discussions about one's case, as well as the opportunity to present arguments about one's situation and needs. Mediation research suggests that people like direct participation, at least in informal legal procedures.[56] For example, a recent experiment examining participants' preferences for alternative dispute resolution mechanisms found that they preferred processes that allowed them to present evidence on their own behalf *without the help of a representative*.[57] The question remains though, whether litigants would *prefer* direct participation in more formal settings, where representation by a lawyer might carry different benefits than it does in mediation and other less formal settings.

In trying to answer this question it is important to note that research about individuals' preferences for different types of dispute resolution me-

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54. Sternlight, *supra* note 18, at 333.

55. The question of the popularity of mediation procedures is complicated. People do not tend to freely choose mediation over litigation. But, once they have participated in a mediation process they would demonstrate high levels of satisfaction with the process. *See* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004) (reviewing studies of participants' assessments of mediation); *see also* Hensler, *supra* note 43 (questioning the use of mandatory mediation and litigants' preference of non-adversarial procedures).

56. *See generally* Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987).

57. Shestowsky, *supra* note 55.

chanisms does not provide clear answers, perhaps because it is difficult to compare different procedures on any one dimension. While mediation and other alternative dispute resolution mechanisms are found to be popular among participants, they are not necessarily always evaluated as providing greater participation opportunities than trials, or as being fairer. This issue was addressed in a study conducted by the RAND Corporation in which trials, court-annexed arbitration, and judicial settlement conferences were compared.[58] Litigants in each procedure were asked to evaluate their opportunities for participation. Interestingly, people rated their opportunities for participation as being highest in trials. As the authors conclude:

> The procedure that is often asserted to offer little opportunity for direct litigant involvement—trial—was in fact that which received the highest participation ratings among both defendants and plaintiffs. One explanation might be that the process of preparing for trial and the experience of testifying at trial led to feelings of having participated in the litigation process.[59]

The previously mentioned 2005 California court study of a random sample of Californians asked people to evaluate the courts on a number of dimensions.[60] Voice (defined as being listened to) was among the lowest-ranked dimension of the courts, with about 35% of those interviewed indicating that the courts do not listen to people.[61] This suggests that there is a widespread perception that people lack voice in the courts. Among those with personal experience in courts, 38% indicated that courts do not listen, as compared to 30% among those without experience.[62] Hence, people are more likely to say that courts do not listen to people if they have actually been to court. Yet, the degree to which people evaluate procedures as providing voice can be based on various factors, including whether or not they were represented, as well as factors such as the attitudes of judges, the de-

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58. LIND ET AL., *supra* note 46.

59. *Id.* at 72. In this study, litigants were usually excluded from participating in the judicial settlement conferences, which meant that they could not even witness the process through which decisions were made. This led more people to experience mistrust and dissatisfaction with this process.

60. ROTTMAN, *supra* note 10, at 9.

61. *Id.*

62. *See* Tyler & Rottman, *supra* note 34. Additional findings include: 20% of the public said that juries were not representative, 21% said that people were not treated with dignity, 28% said that the courts do not make sure that judges follow the rules, and 31% said that the courts do not take peoples' needs into account. Rottman, *supra* note 10, at 9 (percentages estimated from Rottman's bar graph). Also, only 19% of respondents said that local judges were not honest, 29% said that local courts were out of touch with the community, and 34% said that the California courts do not protect everyone's Constitutional rights. Rottman, *supra* note 10, at 32.

sign of court procedures, limitations imposed by evidence law, caseload, etc. There is a need, then, to examine more closely the specific impact of representation on people's evaluations of their court experiences.

C. Does it Matter to People if They Have a Lawyer and in What Ways?

Does it matter if people have a lawyer when they go to court? It is possible that people with an attorney feel more able to effectively represent their case in court. It is also possible, though, that people with an attorney feel denied the opportunity to speak their mind, leading them to feel less fairly treated. This would suggest that pro se litigation might have the benefit of giving people a stronger feeling of voice. Obviously, when we speak here about the potential benefits of pro se litigation, we focus on those psychological benefits—i.e., those factors that better the subjective experiences of litigants. We do not consider the questions of whether, and how much, having a lawyer betters the outcome obtained by litigants, or possible biases in the system against pro se litigants.[63]

Tyler looked at how going to court with or without a lawyer influenced the litigation experience of individuals. He did so among a random sample of 1,575 of Chicago residents.[64] Each person was asked if they had had recent experience with legal authorities. Of the 733 with recent experience, 147 indicated that their most important recent experience was with a court.[65] The study focused upon people's subjective experience during their visit to the courts, not their objective outcomes. It did not, for example, examine whether lawyers obtained better outcomes for their clients. Instead it looked at how people evaluated their experience.

Of the recent court users interviewed by Tyler, 29% had an attorney, and 71% did not. People were more likely to have a lawyer when they viewed the legal issues involved as serious ($r = .35$, $p < .001$) and if they were the plaintiff in the case ($r = .29$, $p < .001$). Age, race, income, education, and gender did not, however, influence whether people had a lawyer.

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63. For example, even in small claims courts, institutions designed with the intent to serve pro se litigants and provide simpler, cheaper, and more accessible legal services, studies have found that pro se litigants do not get as good results as represented litigants, and especially do not get good results when appearing against a represented litigant. *See* Steven Weller, John C. Ruhnka, & John A. Martin, *American Small Claims Courts*, *in* SMALL CLAIMS COURTS: A COMPARATIVE STUDY 11 (Christopher J. Whelan ed., 1990).

64. TYLER, *supra* note 43, at 8. The data reported is described in general terms but is reanalyzed by the authors for this paper.

65. *Id.* at 12.

The study looked at four judgments that people made about their experience. First, people were asked whether they felt they had received a desirable outcome. Second, they were asked whether they felt that the procedures were fair. Third, they were asked whether they felt that they had an opportunity to present their case to the judge. Fourth, they were asked about their feelings (anger, happiness, etc.) with regard to their experience with the courts.

In each case regression analysis was used to examine the influence of whether people had a lawyer on the relevant evaluation, controling for the seriousness of the case and whether the person was the plaintiff. That regression analysis indicated that whether people had a lawyer did not significantly influence the following: whether they felt that their outcome was desirable; whether they believed that the procedures were fair; and whether they had an opportunity to present their case. Finally, whether people had a lawyer did not influence their post-experience feelings. In this study at least, controling upon case characteristics, there is no evidence that, whether people had a lawyer shaped their evaluations of their experience in court.[66]

Similar findings emerge from a study of pro se divorce litigants in Arizona, which found that self-represented litigants had the same level of positive reaction to their court experience as represented ones, while pro se litigants had fewer dissatisfied and very dissatisfied reactions than represented litigants. In other words, in the Arizona study self-representation lowered unfavorable reactions, but did not heighten favorable ones.[67]

Going back to Tyler's study, it is especially striking that there were no differences in the degrees to which people felt that they were able to present their evidence to the judge, since having a lawyer leads to a more indirect form of participation. Hence, people did not indicate feeling deprived of voice via this indirect form of participation.

Another study examining unrepresented litigants was conducted among Australian adults on trial for driving after drinking. In the study, 397 adults who had courtroom trials were examined, of whom 138 had an attorney and 259 did not. Participants were asked to assess their court experiences.[68]

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66. *Id.* at 137-38. If we ignore differences in seriousness, we find that people with lawyers report more negative outcomes, less fair procedures, and more negative feelings, all possibly due to the fact that they have more difficult and serious cases.

67. GREACEN, *supra* note 11, at 4.

68. *See generally* Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 L. & SOC'Y REV. 553 (2007).

The results of the study suggest, first, that litigants did not believe that they received a worse outcome,[69] or were more strongly pressured to accept an outcome,[70] if they did not have a lawyer. Those with a lawyer, however, did feel they better understood their rights,[71] were treated with greater respect,[72] and were not disadvantaged during the trial.[73] On the other hand, those without lawyers felt they had greater opportunity to speak.[74] Interestingly, though, this did not mean that they felt they had control over what happened,[75] since those with lawyers felt more in control. Finally, those with lawyers were more likely to say that their respect for law enforcement increased through their experience,[76] and were found to have higher levels of perceived legitimacy than did those without lawyers.[77]

These findings are similar to others noted in that the gains of having a lawyer are not necessarily linked to the actual outcome; they come through a sense of understanding what is happening and feeling comfortable in the courtroom setting.[78] These feelings, at least in this study, meant that having a lawyer was linked to higher levels of legitimacy and respect for the

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69. The question was, "How severe was your sentence?" The mean for represented litigants was 2.31, and for those not represented it was 2.40 ($t(305) = 0.84$, not significant). The findings discussed in this paragraph come from the reanalysis of the dataset underlying Tyler et al., *supra* note 68.

70. The question was, "Were you pushed into accepting an outcome?" The mean for represented litigants was 2.38, and for those not represented it was 2.45 ($t(306) = 0.47$, not significant).

71. The question was, "Did you understand your rights?" The mean for represented litigants was 3.68, and for those not represented it was 3.32 ($t(306) = 2.82$, $p<.01$).

72. The question was, "Were you treated with respect?" The mean for represented litigants was 3.68, and for those not represented it was 3.47 ($t(306) = 1.68$, $p<.10$).

73. The question was, "Would you say that you were not disadvantaged during the trial?" The mean for represented litigants was 2.95, and for those not represented it was 2.60 ($t(306) = 2.62$, $p<.01$).

74. The question was, "You felt you had an opportunity to express your views?" The mean for represented litigants was 3.38, and for those not represented it was 3.63 ($t(306) = 1.91$, $p<.10$).

75. The question was, "You had enough control over the ways things were run in the conference/court?" The mean for represented litigants was 3.07, and for those not represented it was 2.81 ($t(305) = 1.91$, $p<.10$).

76. The question was, "Would you say your respect for the police has gone up?" The mean for represented litigants was 3.18, and for those not represented it was 2.97 ($t(306) = 2.25$, $p<.05$). Tyler et al., *supra* note 68, at 580.

77. The question was, "Do you view the law as legitimate?" The mean for represented litigants was 4.06, and for those not represented it was 3.86 ($t(305) = 2.35$, $p<.05$). *Id.* at 580.

78. *See* Mather, *supra* note 11, at 151-53; Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 L. & SOC'Y REV. 627 (1992) (discussing the ways in which lawyers actually do or do not benefit their clients in different legal settings).

law. Consistent with other studies, however, people also felt that when they had a lawyer they traded the opportunity to speak for other gains.

To conclude thus far, none of the studies suggest that people represented by lawyers express *lower* levels of control over the outcome or dissatisfaction with limited opportunities for voice, when compared with unrepresented litigants. Hence, the evidence supports the suggestion that indirect participation does not diminish the perception of voice. Given the general value of voice, this is important. The studies outlined suggest that people who go to court with or without lawyers have similar feelings about their voice during their trial experience. Having a lawyer, however, may change other judgments, as the Australian study suggests.

The possible advantages of having a lawyer, and the impact of legal representation on the experience of those participating in legal processes, are reinforced by a study of pretrial arbitration conducted by the RAND Corporation.[79] The RAND study found differences in perceptions of fairness among represented and unrepresented litigants:

> Pro se respondents . . . were more likely than represented litigants to believe they had been treated unfairly, and more likely to be dissatisfied. They were also more likely than represented litigants to believe that the arbitrators' decision was "unjust," to perceive the arbitrators themselves as biased, and to report difficulty in gathering and submitting evidence related to their case. . . . The differences between [represented and unrepresented] litigant samples are not large enough to be statistically significant. Nevertheless, the generally negative shift in the distributions of pro se litigants' attitudes is a disturbing note.[80]

In this study, the fifteen pro se respondents were less successful in achieving their desired outcomes compared to the fifty-one represented litigants. Thirty-nine percent of those represented were evaluated as having won in objective terms, while only 20% of the pro se litigants won their cases.[81] In addition, as noted above, unrepresented litigants generally felt less fairly treated. The report notes a number of problems with unrepresented litigants—such as difficulty in understanding what was expected of them at hearings, difficulties in preparing a case that involved relevant/admissible evidence,[82] and problems resulting from their engaging in legally irrelevant actions while in court, behaviors that upset the arbitra-

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79. JANE W. ADLER, DEBORAH R. HENSLER & CHARLES E. NELSON, RAND CORP., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983).

80. *Id.* at 72.

81. *Id.* at 73.

82. *Id.* at 72-74.

tors.[83] These are all problems that can arise when people lack attorneys—problems that can lead them, as the study reveals, to feel that they have been unfairly treated, and consequently might lead to general dissatisfaction with the legal procedure.[84] While the small size of the study[85] precludes suggesting any systematic differences between represented and unrepresented litigants, the findings do resonate with anecdotal evidence about the experience of pro se litigants, and with the general notion that pro se litigants encounter a great deal of difficulty and experience a lot of frustration.

Indeed, frustration is a recurring theme in descriptions of the experiences of pro se litigants—frustration

> from delay; from distrust of opposing parties and counsel; from lack of familiarity with the law, judicial processes, and even legal terminology; and from lack of confidence in a legal scheme that routinely refuses to afford amends where the pro se feels they are due. In some cases, the apperception of entitlement to redress is derived from fundamental notions of common sense . . . .[86]

Pro se litigants seem, in fact, to experience all of the difficulties one would expect a layperson would have when going through a highly professionalized system. While there are no specific rules of procedure that discriminate against pro se litigants, the nature and design of court procedures are such that nonprofessionals would find them difficult to maneuver. Pro se litigants need to deal with a language they do not always understand, evidentiary constraints and procedural protocols. Such rules are not always in sync with people's common sense and social instincts, which are based on their behavior and interactions outside the legal sphere.[87]

On the other hand, research does evidence possible benefits associated with self-representation. Moreover, while the common perception of pro se litigants is that they are forced to represent themselves due to the cost of legal services, [88] and would prefer being represented by an attorney,[89] there

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83. *Id.* at 74-76.

84. *Id.* at 71, 73.

85. *Id.* at 60.

86. Ira P. Robbins & Susan N. Herman, *Litigating Without Counsel: Faretta or for Worse*, 42 BROOK. L. REV. 629, 644-45 (1975).

87. *Id.* at 655 ("The pro ses' sensibilities are bruised, for example, by those aspects of our legal system that members of the bench and the bar take for granted, such as the normal dalliances of juridical operations, adversarial exaggeration and elocution, and alternative explanations and interpretations of laws and rules.").

88. Most low-income and moderate-income individuals cannot afford the cost of counsel. The ABA legal needs study reports that 70-80% of low-income persons are unable to obtain legal assistance when they need and want it. Of these individuals, most do not take

are litigants who choose self-representation even when they can afford an attorney. [90]

Studies indicate that the most cited reasons for self-representation are: inability to pay for an attorney; belief that the matter is simple enough to be handled without an attorney; and reluctance to pay the high cost of an attorney, despite the ability to pay.[91]

We would like to focus our discussion here on two other explanations for choosing self representation. These two explanations—the view of self-representation as an empowering tool, and the choice of self representation because of the low quality of appointed counsel—we find to be particularly relevant to our discussion of the various psychological values attached to direct or indirect participation.

One very interesting view of pro se litigation is the view that identifies self-representation "as a self-affirming experience that many litigants might select precisely because of the personal empowerment that arises from maintaining control over the elements of their case."[92] In theory, it is not hard to see how pro se litigation has the potential of being an empowering and self-affirming tool. Pro se litigation allows control over the manage-

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their legal issues to court. Nearly 71% of the situations affecting low-income households that could be addressed by the civil justice system, and 61% of these situations affecting moderate-income households, do not get into the court systems. At the same time, it is not clear that the cost of litigation or the lack of access to justice are the reasons for this reality. Per their reasons for not turning to the civil justice system, low-income persons interviewed displayed "a sense that legal assistance will not help, and fear of the cost." The moderate-income persons were less likely to cite cost considerations than those with low income, but they shared the view that "the justice system would not help." GOLDSCHMIDT, *supra* note 10, at 11. For more data on low- and moderate-income households' access to attorneys, see Rebecca L. Sandefur, *Lawyers' Pro Bono Services and American-Style Civil Legal Assistance*, 41 L. & SOC'Y REV. 79 (2007).

89. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1992 (1999).

90. Swank reports on a study in which only 31% of the participants said they were pro se because they could not afford to hire a lawyer, and almost half implied that they had the funds to hire a counsel but chose not to. Swank, *supra* note 13, at 378.

91. *See* GREACEN, *supra* note 11, at 3-4; John M. Greacen, *Framing the Issues for the Summit on the Future of Self-Representation Litigation*, *in* THE FUTURE OF SELF-REPRESENTATION LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT 19, 22 (2005). Swank lists additional factors including, "increased literacy rates; increased sense of consumerism; increased sense of individualism and belief in one's own abilities; an anti-lawyer sentiment; a mistrust of the legal system; a belief that the public defender in criminal cases is overburdened; a belief that the court will do what is right whether the party is represented or not; a belief that litigation has been simplified to the point that attorneys are not needed, and, a trial strategy designed to gain either sympathy or a procedural advantage over represented parties." Swank, *supra* note 13, at 378-79.

92. Scott Barclay, *The Decision to Self-Represent*, 77 SOC. SCI. Q. 912, 913 (1996).

ment of one's case and pro se litigants can choose how to present the case and which aspects to stress. Their participation in the court procedure is active and direct. Again, in theory at least, self representation can serve to solve many of the difficulties and sources of dissatisfaction that characterize the legal experiences of represented litigants (the feeling of passivity and lack of control, the inability to tell one's story, or the difficulty of communicating with lawyers).

In reality, as the data presented here shows, for most pro se litigants, self-representation does not prove to be such a positive experience. Evidence that individuals benefited from pro se representation on a personal level is merely anecdotal. Much of this evidence comes from discussions of the informal dispute resolution literature, which involves procedures such as mediation that may not be relevant to the courts.

Some interesting evidence comes out of interviews with ten women who represented themselves through their divorces, with some out of court assistance from a law clinic.[93] The women who derived the most from their pro se experiences attributed their satisfaction to the fact that they themselves were in control over the legal process and that they found the process to be less complicated than they had imagined before they entered into it. These women said they felt better about themselves and felt more competent in other areas of their lives following their pro se experiences.[94] For example, one woman described the change: "I used to be scared to do new tasks at work; I'd always have to stop and ask my supervisor lots of questions. Now I just plunge right in! She also noticed that she is more assertive, and speaks out more often in her night school classes."[95]

At the same time, and despite what was overall a positive experience, three of the women thought that having a lawyer would have been better. They believed the process would have been quicker and that they would have preserved more rights had they been represented. "One woman acknowledged honestly that 'doing things yourself is just another burden of being poor. Sure, if I had money I'd hire a lawyer.'"[96] When asked whether they would go pro se again in other legal proceedings, four of the women said no, while the other six said they would attempt pro se litigation in future cases.[97] It is important to note, however, with regard to the experience of the women interviewed, that although they represented them-

93. Emily Joselson & Judy Kaye, *Pro Se Divorce: A Strategy for Empowering Women*, 1 LAW & INEQ. 239 (1983).

94. *See id.* at 245, 249.

95. *Id.* at 248.

96. *Id.* at 253.

97. *Id.* at 254.

selves, they also enjoyed legal advice and support through participation in the clinic. As one of them described the process, "I really like doing my divorce alone – with help!"[98] In that sense, their experience is not quite the typical pro se experience, since many pro se litigants have no access to any professional legal advice.[99]

In a study of pro se divorce litigants in Arizona, 70% of those facing self-represented opponents said they would choose to represent themselves in the future. Out of those pro se litigants whose opponents had attorneys, only 36% said they would choose self-representation again in the future.[100]

Another study, focusing on a group of ninety-five civil appellants in Illinois, Minnesota, and Mississippi, 27% of which were pro se, suggests that some of the litigants had chosen to appeal without a lawyer "as part of a legal strategy to force the courts to deal with the issue that the litigants, rather than the legal system, identify as at the heart of their disputes."[101] Yet, litigants in this study were not asked directly about their decision to represent themselves. The author drew this conclusion from the general feeling, revealed in the interviews "that the primary issue in their case was not among the issues discussed by the court,"[102] or promoted by their lawyers. The author infers from this data that a possible strategy for litigants to use to overcome this difficulty is self-representation, which allows litigants "the ability to place directly before the court the issues that they identified as most salient."[103] This observation accords with our prior argument that one benefit of self-representation is the ability to shape the nature of the arguments presented to the legal decision-maker. At the same time, and as the author recognized, it is not clear at all whether self-representation is a successful strategy in that respect.

> It appears that the short-term advantage of redefining the legal focus of their case might have been purchased at the expense of the long-term legal consequences. Although self-representation gives litigants the ability to restrict legal transformation of their issues, the result of such control may be that the litigants are no longer able to fit their claims with the existing legal parameters.[104]

This observation resonates with the findings of Conley and O'Barr in their study of self-represented litigants in small claims courts. They define

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98. *Id.* at 248.
99. Swank, *supra* note 13, at 382.
100. GREACEN, *supra* note 11, at 4.
101. Barclay, *supra* note 92, at 912.
102. *Id.* at 917.
103. *Id.* at 919.
104. *Id.* at 920.

this difficulty in terms of the legal inadequacy of pro se litigants' narratives. They found that while the opportunity to tell their story without evidential constraints increased litigants' satisfaction with the court procedures, it also harmed other interests. Presenting the claims in everyday language and structure, those narratives often lacked the required components of legally adequate claims, which often resulted in losing the case.[105]

Another possible motivation for proceeding pro se, of particular relevance to our discussion, is dissatisfaction with the quality of legal representation. A study of pro se defendants in felony cases suggests that many of them chose to represent themselves because of dissatisfaction with the counsel appointed to them as well as concerns regarding the quality of that representation.[106] From the pro se defendants in the database who had counsel at the beginning of the process, more than half had asked the judge to appoint them a new counsel before they decided to proceed pro se.[107] In addition, the study found that defendants with court-appointed counsel were more likely to choose to represent themselves than federal felony defendants as a whole.[108] The data indicates two possible reasons for dissatisfaction with counsel: the poor quality of court-appointed counsel (which is a result of budgetary deficiencies and huge caseloads) and ideological reasons that made these defendants mistrust the court-appointed attorney (many of the pro se defendants were accused of felonies carrying some ideological character, such as tax evasion).[109]

The data also shows that pro se defendants were more likely to go to trial than represented defendants.[110] This finding is used in this research to support the claim that concerns with attorney quality were the reason these litigants chose pro se litigation. At the same time, the correlation between the choice to go to trial and the choice to proceed pro se might also indicate that these individuals attribute more importance to voice opportunities.

Are defendants' concerns about the quality of representation legitimate? Certainly in some cases they are. It is not hard to find examples and evidence of lawyers, court-appointed and private, who provide their clients with a less than adequate level of legal services. Lawyers' negligence in

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105. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 35-49 (1990).

106. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 429 (2007).

107. *Id.* at 461 ("[Sixteen percent] of them had made the decision to proceed pro se while they were represented by an attorney with whom they had publicly expressed dissatisfaction.").

108. *Id.* at 465.

109. *Id.* at 428-30.

110. *Id.* at 447.

representation, while almost never recognized as such by the court, certainly has the potential to harm their clients.[111] When speaking of court-appointed counsel in criminal cases:

> [T]here also is ample evidence that defendants have a basis for being concerned about counsel – the quality of court-appointed counsel is breathtakingly low in many jurisdictions. While all jurisdictions are constitutionally required to provide a lawyer to indigent defendants, many do not provide good counsel . . . . The deficiencies in the quality of court-appointed counsel result both from a lack of sufficient funding and from problems in the structure used to provide counsel to indigent defendants. Public defender systems often work with extremely limited resources. Attorneys are saddled with crushing caseloads and are unable to represent their clients adequately because of the sheer volume of cases for which they are responsible.[112]

It is important to remember these facts when comparing the experiences of represented and unrepresented litigants, since the quality of the representation is an important factor. The court, for example, says "Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'"[113] But what if pro se litigation is compared to representation by an inexperienced lawyer, or representation by a lawyer whose caseload does not allow him to devote the minimum required time to the case? Is representation always better? Or, can we identify a certain level of legal services which is so poor that it justifies the decision to represent oneself?

D. Does it Matter if People are Denied Access to a Lawyer?

Not having a lawyer is not the same thing as wanting a lawyer and being unable to have one for some reason, particularly as a result of cost. The 2005 California study also asked people about the costs of having a lawyer—in particular, residents were asked if the cost of hiring an attorney kept, or might keep them from going to court. Of those interviewed, 69% indicated that attorney cost had or might prevent them from going to court.[114] This question combines two issues: whether costs might make it more difficult to hire an attorney, and whether the lack of an attorney might make it more difficult to go to court. Likely, there are at least some people

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111. RHODE, *supra* note 16, at 11-14.

112. Hashimoto, *supra* note 106, at 567-70.

113. Martinez v. Court of Appeal, 528 U.S. 152, 161 (2000) (quoting John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot*, 6 SETON HALL CONST. L.J. 483, 487 (1996)) (discussed in Hashimoto, *supra* note 106, at 446-47).

114. ROTTMAN, *supra* note 10, at 19-20.

who feel unable to hire an attorney, but who would be able to go to court without one.

Does the perception that one can not afford an attorney matter, and consequently, does it matter that one is less able to go to court? In the California study, those who indicated that they might not be able to go to court due to attorney costs indicated that the courts performed less well (r = .15); that the courts were less satisfactory institutions (r = .11); that the courts were less procedurally just (r = .14); and that they had less confidence in the court system (r = .09). Hence, in this study, thinking that one lacked access to justice due to prohibitive attorney costs is related to a variety of negative evaluations of the court system.[115]

Another group of potential interest is litigants who could afford or otherwise have access to an attorney, but who nevertheless decide to represent themselves. While studies indicate that there are litigants who choose to represent themselves even though they can afford to hire a lawyer, there is no data that distinguishes the experiences of these litigants from those who represent themselves out of necessity, and at this time we cannot comment upon how these litigants experience going to court.

CONCLUSION

The experience that litigants have when they deal with the legal system is important because it shapes their willingness to accept decisions and their evaluations of the legal system. Extensive psychological literature exists to point to the issues that influence litigants and to the procedural elements that are key to people's reactions. That literature suggests that people care about the fairness of the procedures used to deal with the problems that bring them into court. From this procedural justice framework we argue that structural changes in the legal system, such as the provision of counsel in civil cases, should be evaluated from the perspective of how those changes influence the experience of litigants.

Our analysis of the psychology of pro se litigation began with a recognition that having an opportunity to be represented in the litigation process, often referred to as having voice, is central to people's subjective reactions to that experience. If people feel represented, they indicate that the procedure is more neutral, they feel more respect, and they indicate higher levels of trust in the decision-maker. Further, whether people feel represented in the litigation shapes their satisfaction, their willingness to accept the decisions made, and their evaluations of law and legal authorities more general-

115. *Id.* at 22. The data from this paper has been reanalyzed by the authors of this paper for the analysis reported. Tyler & Rottman, *supra* note 34.

ly. Hence, it is important to consider how the form of legal participation shapes people's feelings about voice—and in particular, in what way it matters if people have or do not have a lawyer.

Our review reveals that there is not a great deal of empirical research addressing questions resulting from access to counsel. Moreover, the existing data presents some contradictory findings. One general impression from this review is that current research fails to capture and measure the quality of individuals' legal experiences. People's evaluations of legal procedures in which they participated are determined, eventually, by the quality of the legal representation they had or the quality of the treatment they received from the judge or other court personnel. It is difficult to compare the experience of a person who had a zealous lawyer with that of a litigant who had an attorney who provided a less than satisfactory level of representation. It is similarly complicated to compare the experience of these two litigants with that of a pro se litigant, in order to draw general conclusions about self representation more generally. Future research should aim to overcome these obstacles in assessing individuals' legal experiences. Meanwhile, any conclusions or recommendations regarding the provision of a lawyer as a means to increased access to justice should take into account the quality of legal representation that could be offered.

There are still, however, several conclusions that can be drawn from what we know at this time.

A. The Denial of Access to the Courts

One clear finding is that the feeling of being denied access to the system, due to lack of financial resources to consult with and retain counsel, clearly leads to negative feelings about the courts and the law. In addition, the inability to obtain legal representation for financial reasons decreases the number of people who go to court and, as a consequence, lowers the general level at which legal grievances are represented in court. Provision of counsel is likely to improve public views of the courts and the law by lessening the number of potential litigants who feel that they are not able to pursue their claims because they lack the financial resources to do so.

B. The Psychology of Representation

One of the primary concerns emerging from an examination of the psychological literature on representation is that people might prefer direct participation. That argument flows from the suggestion that people value direct interaction with the decision-maker for two reasons: first, because it allows them to tell their side of the story and present their own evidence; second, because the attention of authorities provides direct evidence that

the decision-maker is listening to and considering their arguments. This is reassuring. It reinforces the belief that authorities are benevolent and, further, are concerned about the problems of ordinary citizens.

In view of these possible benefits associated with direct interaction with authority figures and voice, the question is whether individuals are less able to experience that sense of control and less likely to feel listened to if the communication occurs through an attorney. Based upon the research reviewed, we saw that overall, having or not having an attorney is not generally associated with changes in litigants' feeling that they have a voice in the litigation process. Fears that representation by an attorney will undermine the satisfaction associated with directly presenting one's side of the case are not supported by currently available evidence. As mentioned before, given the importance of voice this is an important finding. Conversely though, there is no evidence that providing people with an attorney will increase their feeling of having voice. The potential advantages of having legal representation are not manifested in enhancing litigants' satisfaction with their level of participation and voice. There are, however, other advantages related to legal representation.

In reviewing the currently available literature, we found a number of anecdotal suggestions about potential consequences of representation by an attorney. One commonly noted consequence of legal representation is that people usually feel that they understand the procedures used and the decisions made better if they have a trained and experienced lawyer representing them. Litigants with lawyers frequently feel that they better understand the law and legal procedures than do those litigants who represent themselves. As a consequence, the litigation experience is often generally a more satisfying experience when people are represented by a lawyer. It is clear, however, that this is not always the case, and some litigants react positively to the challenges posed by pro se litigation. This might also not be true of cases where the attorney does not provide clients with the appropriate information and guidance. Our conclusions regarding provision of attorney assume adequate level of representation.

Overall, we know that pro se litigants experience a lot of frustration in court but at the same time we have a large body of evidence showing that represented litigants can also feel lack of control or involvement with their own case which leads to frustration as well. There is a need for future research to directly address the different psychological effects of direct and mediated participation. Additional research is also required in order to determine how the different procedural values are ranked and balanced by individuals. For example, how do people compare voice opportunities (direct or mediated), control, or understanding of the legal procedures with the security and reassurance provided by a professional? Or, how do individuals

balance the opportunity to completely control the management of their case, with the difficulties they face as outsiders in a professional system?

C. Potential Changes in the Legal System

In considering the benefits and costs of pro se litigation, some aspects of the legal system need to be mentioned. The first is the quality of legal representation. The impact of the provision of counsel in and of itself is unlikely to have an influence. By retaining counsel, people lose their opportunity to directly represent themselves. Therefore, the quality of their experience will depend upon the quality of their legal representation, relative to what the litigant might have been able, or at least imagines he might have been able, to accomplish himself. To improve the quality of legal representation the organized bar needs to support training in lawyering techniques. It is equally important to provide the resources that allow attorneys the time to be effective advocates for their clients, something that the provision of access to counsel should help to do.

The form of legal procedure is also relevant. Irrespective of whether litigants are provided counsel, it is crucial that their concerns about receiving a fair process are addressed. As we have noted, the current litigation system does not provide opportunities for involvement and voice once litigants are represented by counsel. Conversely, while the court system has taken serious strides to address the pro se phenomenon,[116] many traditional court systems still do too little to aid those litigants who do not have attorneys to master and navigate the complexity of the courthouse. Further, judges vary in the degree to which they are willing to aid pro se litigants trying to make legally relevant arguments in support of their cases. Procedures need to be modified to correct both of these problems.

As an example of creating opportunities for voice, courts have accommodated victim statements at sentencing hearings. While victims have no legal standing to speak before those convicted of crimes against them are sentenced, many jurisdictions provide them with opportunities for voice. In a similar vein, legal authorities should consider ways that represented litigants can be given opportunities for voice. One example, already mentioned, is the use of more informal procedures such as mediation. Or, judges may simply allow represented litigants to have some opportunities to directly address them, to speak to the jury, and or to participate in discussions about the evidence.

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116. *See* Greacen, *supra* note 91, at 22 (reviewing extensively the many programs developed in the court system to assist pro se litigants).

The accommodation of courts to pro se litigation is already ongoing. The courts have created help desks in courthouses, offices whose function is to provide legal guidance and to explain court procedures, and translation services that enable people to more effectively communicate with judges and other court personnel. These accommodations reflect the simple reality that pro se litigation is increasing in frequency and must be dealt with in some way by the courts, in addition to any attempt to increase access to counsel.