MISJUDGING: IMPLICATIONS FOR DISPUTE RESOLUTION

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In the lead symposium article, Chris Guthrie describes recent research demonstrating empirically that judges, just like other people, are affected by cognitive, informational, and attitudinal blinders. He argues that these blinders promote inaccurate trial outcomes and, as a result, disputants might find trials less desirable for resolving disputes. In her response, Shestowsky argues that these findings might not affect disputants in the way that Guthrie supposes because disputants are not primarily guided by outcome accuracy considerations when evaluating dispute resolution procedures. Rather, when choosing procedures, they prefer ones that they expect to deliver outcomes that will advance their self-interests. When evaluating procedures after they have experienced them, they are similarly not focused on outcome accuracy; in fact, they focus more on process (i.e., how they were treated). Shestowsky proposes some alternative implications of judicial blinders for the dispute resolution context.

In his paper entitled *Misjudging,* Chris Guthrie summarizes an impressive body of research illuminating the cognitive shortcomings of judges.[1] A central research endeavor in the field of legal psychology, spanning several decades and a significant array of research methodologies, has already catalogued many ways in which *jurors* deviate from purely rational decision-making.[2] The studies by Guthrie and his colleagues, along with those of others, have done a commendable job of demonstrating empirically that *judges* also have decision-making shortcomings or "blinders" – that judges, too, are human.[3] This long overdue research should be praised not only for advancing our understanding of the psychology of judging, but also for orienting those who follow the literature in legal psychology to the idea that legal actors other than jurors deserve

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[1] Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007).

[2] LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM 411-34 (5th ed. 2002) (summarizing relevant research).

[3] Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 50 (2002) (describing research on cognitive bias and concluding that "Judges, it seems, are human."). Earlier scholarship tended to assume greater rationality on the part of judges. *See, e.g.*, Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 103 (1981) (in the context of comparing judge and jury decisions, noting the tendency to treat the judge's opinion as the "correct" one).

research attention.[4] After all, with the growth of alternative dispute resolution ("ADR"), many types of third parties other than jurors (for example, mediators and arbitrators) are called upon to facilitate dispute resolution and do so much more frequently than jurors. Over time, researchers are likely to examine and compare all kinds of legal actors – lawyers, disputants, and third party neutrals of all types – and find that all of them possess decision-making shortcomings, perhaps ones that vary more in degree than in kind.

After synthesizing the research on judicial decision-making specifically, Guthrie invites us to consider the implications of "misjudging" for how disputants evaluate their dispute resolution options (such as trial, mediation, and arbitration). His paper reminds us that the selection of a dispute resolution procedure is (or at least should be) regarded as a "complicated decision, involving the consideration of many factors."[5] When deciding on the appropriate forum for resolving a particular legal conflict, disputants and their lawyers often consider factors such as time, money, and disputants' nonmonetary interests. But Guthrie builds a very persuasive case for why they should also assay the more subtle psychological attributes of the types of third parties who would oversee the resolution of the dispute. In so doing, he makes a very thought-provoking contribution to the dispute resolution literature by highlighting the psychological complexity of procedural choice.

In response to Guthrie's invitation to consider the relevance of misjudging for dispute resolution, I elaborate on his thesis by taking a psychological perspective and considering the implications of misjudging for civil disputants. I review the literature on the psychology of disputing, explaining that disputants assess dispute resolution procedures on at least two distinct points in time in the disputing trajectory – at the beginning, when they are considering which procedure to use, and at the end, once an outcome has been reached. I analyze how the research on judicial blinders might come to bear on these two points in the trajectory. I ultimately argue that the practical relevance of this research depends less on how blinders affect outcome accuracy, and more on how disputants might use findings on judicial blinders strategically. I also argue that reliance on blinders in the dispute resolution context might be a reflection of the kinds of cases that disputants generally turn over to third parties, rather than evidence of significant decision-making "inaccuracies" on the part of these third parties.

A. *How Do Disputants Evaluate Procedures?*

After reviewing the relevant research on informational, cognitive, and attitudinal blinders,[6] Guthrie observes that because the prospect of misjudging is

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[4] *See, e.g.*, Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 131-32 (2004) (arguing that research on arbitral decision-making is scant and that "more research is needed on how cognitive illusions affect arbitral decision-making"); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001) (noting that "even the most learned judges have acknowledged that they do not understand how judges make decisions" because of the dearth of research on this topic).

[5] Guthrie, *supra* note 1, at 458.

[6] Guthrie defines *informational blinders* as ones that increase the tendency to rely on information that one is exposed to, but not legally permitted to rely on, to make decisions. The

real, disputants and lawyers contemplating their dispute resolution options should not credit the trial option with the expectation that judges will make accurate decisions. He defines "accurate" decisions as ones that are adjudicated on their merits, where the governing law is correctly applied to the relevant facts of the case.[7] Specifically, he argues that:

> This observation has important implications for disputants and their lawyers because it calls into question the still-dominant assumption that the courthouse is the proper locus of dispute resolution. Indeed, the prospect of misjudging suggests that disputants might prefer other dispute resolution fora for three related reasons . . . . First, because court outcomes are uncertain, disputants might opt for consensual dispute resolution processes as a way of removing the risk that they will be subject to binding, and potentially erroneous, decisions. Second, recognizing that accuracy is often elusive in court, disputants might decide to place a primacy on other values in disputing, like self-determination, creativity, improved relationships, speedier and cheaper resolutions, and so forth. Consensual processes, like negotiation and mediation (and perhaps even some non-consensual processes, like arbitration), are more likely than litigation to enable disputants to give expression to these values. Third, if accuracy remains the disputants' primary goal, some processes other than litigation, including some forms of arbitration, might offer disputants more hope than litigation itself.[8]

In essence, Guthrie argues that research demonstrating the existence of judicial blinders suggests that the traditional trial process does not deliver accurate outcomes as reliably as disputants might expect, and that such findings might affect disputants when they choose among procedures. As Guthrie points out, given that accuracy is often elusive in court, disputants might opt to place a premium on other values related to disputing.[9] This argument raises the issue of whether, and to what extent, disputants pursue "accurate" outcomes as a dispute resolution goal. To understand disputants' motives, it helps to review the research on what values laypeople use to assess dispute resolution procedures.[10]

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use of inadmissible evidence to make decisions is an example. The term *cognitive blinders* refers to "heuristics" or mental shortcuts of which anchoring, hindsight bias, and self-serving bias are examples. He defines *attitudinal blinders* in terms of opinions or attitudes that predispose judges to rule in ways that are consistent with those opinions or attitudes; for example, their political affiliation might lead them to vote in line with the position that party espouses on certain issues. Judges' use of these blinders suggests that they deviate from the rational actor model of decision-making. Guthrie, *supra* note 1, at 265-89.

[7] Guthrie, *supra* note 1, at 420 ("adjudication on the merits – by which I mean the accurate application of governing law to the facts of the case").

[8] Guthrie, *supra* note 1, at 448.

[9] Guthrie, *supra* note 1, at 451-54.

[10] People tend to "use fairness standards to evaluate both the outcomes of procedures and the process that yielded those outcomes, and they evaluate these two dimensions separately." Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 179 n.63 (2003). Fairness can be evaluated using a variety of criteria. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 44-45 (1975) (arguing that evaluations of procedures center on factors relating to control over process and outcome); 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 27 (1980) (suggesting that evaluations of procedures center on six justice criteria – ethicality, opportunities for representation, bias, honesty, decision accuracy, and correctability of decisions); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citi-*

Although laypeople typically have little direct experience with formal dispute resolution, when faced with the task of evaluating procedures, they tend to have clear, strongly held views about their options and predictable standards for evaluating them.[11] The literature that investigates how laypeople assess dispute resolution procedures falls under the umbrella of "procedural justice" research.[12] Researchers following this tradition have focused on studying disputants' preferences and the factors underlying these preferences at two specific points in the dispute resolution trajectory.[13] Some have investigated people's assessments at the beginning of the dispute, when they are deciding which procedure they would like to use. Others have researched how they evaluate procedures after experiencing them, once an outcome has been reached or the conflict has otherwise ended.

Findings from this long line of research suggest that outcome accuracy is not of primary importance to people at either point in the dispute resolution trajectory.[14] When people initially consider their options, they tend to be

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zens to Assess the Fairness of Legal Procedures, 22 LAW & SOC'Y REV. 103, 106 (1988) (noting that Thibaut and Walker's process control and decision control criteria were compatible with Leventhal's idea of "representation," and on that basis, combining representation with Leventhal's criteria to distill eight criteria for assessing judgments of procedural fairness: representation, consistency, lack of bias, honesty, effort to be fair, quality of decisions, correctability, and ethicality).

[11] Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987).

[12] These studies have generally taken one of two forms. One common research format is the experiment, wherein participants generally read a short description of facts underlying a legal dispute and consider the scenario from a randomly assigned perspective (e.g., the viewpoint of the plaintiff or the defendant). They are subsequently given descriptions of procedures and asked to evaluate each as a possible means for resolving the underlying conflict. A second popular form of research is the field study. In this kind of research, people who are involved in an actual legal dispute are asked about their experiences. Field researchers generally follow one of two approaches – either they contact disputants prospectively to ask which procedure they plan to use to resolve their dispute, or they contact them retroactively to ask which procedure they used for an already-resolved dispute and how they would evaluate their experiences. Unlike laboratory studies, field studies generally do not randomly assign participants to procedures, which limits their usefulness for drawing conclusions about causation. But field studies offer some benefits, including the emotional element inherent in many real disputes which is difficult to reproduce in laboratory settings.

[13] Most procedural justice studies have examined people's pre-experience (ex ante) preferences rather than their post-experience (ex post) evaluations of procedures. In an interesting direct comparison of these two situations, Tom Tyler and his colleagues found that laypeople tend to use different criteria to assess options ex ante versus ex post. Tom R. Tyler et al., *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 GROUP PROCESSES & INTERGROUP REL. 99, 113-15 (1999) (reporting four studies demonstrating that people arrive at ex ante preferences for decision-making procedures by choosing procedures that help them maximize self-interest in terms of material outcomes but base their ex post evaluations on the quality of the treatment received during the course of the procedure).

[14] *See* Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 340-51 (1988) (finding that laypeople regarded the accuracy of a jury as less necessary than a jury's procedural fairness); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (arguing that accuracy is not the overriding goal of procedural fairness, and advocating for the importance of party participation); Tyler et al., *supra* note 13, at 113-15 (finding that procedures are attractive ex ante when

instrumentally focused. That is, they prefer procedures that are likely to advance their self-interests in terms of generating a favorable outcome, which typically involves maximizing material gains.[15] At least ex ante, people favor procedures that they believe will produce outcomes that would benefit them, whether or not such outcomes are "correct" according to some more objective, external standard.[16] Similarly, after the dispute has ended, they do not focus their evaluations on outcome accuracy. Counterintitutively, people's ex post reactions to their dispute resolution experiences are not even driven by whether or not they "won" their case.[17] Rather, after the dispute has ended, disputants typically evaluate the procedure they used in non-instrumental terms, by considering how fairly they were treated rather than on the outcome they obtained.[18] Underlying this evaluative focus is the basic human need to feel

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they are perceived as offering outcomes that advance self-interests). *But see* Paul G. Chevigny, *Fairness and Participation*, 64 N.Y.U. L. REV. 1211, 1223 (1989) (reviewing E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988)) (reviewing Lind and Tyler's work on procedural justice, and concluding that "participants share a faith that fairness will lead to 'accurate' results in the generality of cases, even if results do not favor the party in the particular case"). *See also* Steven S. Goldberg & Peter J. Kuriloff, *Doing Away with Due Process: Seeking Alternative Dispute Resolution in Special Education*, 42 W. EDUC. L. REP. 491 (1988) (arguing that future research should explore the relationship between procedures and objective justice (accuracy) in complex cases and on determining the effects of ADR on subjective justice). Note that I am not arguing that disputants never value accurate outcomes. I am merely synthesizing aggregated data that suggest that participants tend to primarily value other factors. The issue of whether they *ought* to be relatively more concerned with accuracy is another question, and one that is beyond the scope of this paper. Instead, I focus on the implications of misjudging in light of what we know (descriptively) about how laypeople evaluate procedures.

[15] Tyler et al., *supra* note 13, at 100.

[16] Earlier studies suggested that people tend to prefer procedures that offer disputants high process control but allocate decision control to a third party. *See, e.g.*, Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXP. SOC. PSYCHOL. 13 (1978) (concluding that to maximize procedural preferences of both third parties and disputants, decision control should rest with third parties and disputants should control the process via the presentation of evidence); Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319 (1976) (showing that preferences seemed to increase as a function of both decreasing third-party control over the presentation of evidence and increasing third-party control over the final decisions). More recent research suggests that people prefer to control both the process and outcome. *See e.g.*, Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004).

[17] Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders & V. Lee Hamilton eds., 2001). In the trial context, people's perceptions of their outcomes also do not appear to be driven primarily by attributions of the presence or absence of bias in the judge's decision. E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interests*, 39 J. PERS. SOC. PSYCHOL. 643, 652 (1980). Note that I am not arguing that this tendency on the part of disputants is normatively "good"; I am merely reporting this descriptively.

[18] *See, e.g.*, Tyler et al., *supra* note 13 at 113-15 (reporting four studies demonstrating that, ex post, how people were treated during a procedure was more important to them than outcomes); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (finding that judges believed that disputants would not pay attention to procedures so long as the outcomes in their cases were positive, but that disputants, in reality, were very concerned with issues of process and

respected and included in the broader community. Thus, disputants generally base their evaluations on whether they were given the opportunity to voice their "story" or perspective on the conflict, how respectfully the third party treated them, and similar process-related factors.[19] Disputants not only state a preference for procedures that they perceive as having treated them fairly, they back up that sentiment behaviorally by being more inclined to comply with the outcome of such procedures.[20] Insofar as early justice research focused on outcome fairness (distributive justice) on the assumption that outcome was the primary determinant of assessments, the finding that fair process contributed independently and significantly to overall judgments of procedures was surprising and significant.[21]

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attended less to outcomes). Granted, people tend to be *most* satisfied with dispute resolution procedures when they believe the process was fair *and* produced an outcome favorable to them. But they are also satisfied with procedures that yield unfavorable outcomes so long as they regard the process as fair. Tyler & Lind, *supra* note 17, at 65 ("[T]o some extent outcome favorability influences judgments about fairness. People are more likely to view a procedure as fair when they win. However, the influence of outcomes on the acceptance of decisions is relatively small compared with the direct and indirect effects of procedures.").

[19] Tyler et al., *supra* note 13, at 100-01 (summarizing research showing that people "place great weight on such things as whether they are treated politely and with respect, whether the conflict resolution process allows them some fundamental dignity, and whether their views or needs are considered"); 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 (1987) (describing research demonstrating the importance that people place on the value-expressive aspects of procedures, whereby they have the "chance to state their case irrespective of whether their statement influences the decisions of the authorities").

[20] E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *in* EVERYDAY PRACTICES AND TROUBLE CASES 192 (Austin Sarat ed., 1998) (describing research on court-annexed arbitration that found that "[a]cceptance of the arbitration awards as resolution of the case was much more strongly linked to the fairness judgments than to the outcome"); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224-25 (1993) (showing that acceptance of non-binding dispute outcomes, such as those generated by court-connected ADR programs, depends to a significant extent on whether the procedure is perceived as fair); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981) (finding higher compliance with procedures that disputants viewed as offering fair process); Mark S. Umbriet et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279 (2004) (describing studies of victim-offender mediation programs suggesting that offenders are more likely to comply with the outcome, and are less likely to reoffend, compared to those who experienced procedures that granted them less control over the process). *But see* Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127 (1985) (arguing that another variable might also explain some of the variance in McEwen and Maiman's results – the degree to which the parties partially admitted fault).

[21] TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 70 (2001). As Robert A. Baruch Bush has similarly argued:

> There is thus a substantial body of research that answers our question about what parties value in dispute resolution processes. The most remarkable thing is what the answer is *not*. Despite what we might have thought, parties do not place the most value on the fact that a process provides expediency, efficiency or finality of resolution. Not even the likelihood of a favorable substantive outcome is considered most important. Rather, an equally, if not even more highly, valued feature is 'procedural justice or fairness,' which in practice means the greatest possible opportu-

Researchers have proposed several theories to explain how people come to regard procedures as "fair." One theory posits that people define fairness partly in terms of how much control they retain over the development and selection of information (e.g., facts and evidence) that will be used to resolve the dispute – variably known as "process control" or the "voice" hypothesis.[22] The "instrumental" (or "social exchange") explanation for this effect suggested that control over process is an indirect means to obtaining favorable outcomes.[23] Later work, however, demonstrated that the opportunity for voice heightens disputants' judgments of fair treatment even when they know that their voice will not and cannot influence the final outcome.[24] Thus, instead of perceiving procedures strictly in instrumental terms, they often define fair process in terms of how respectfully the involved third party or authority figure treated them, because such treatment communicates status and inclusion in groups. This explanation has underscored support for a second theory known as the "group-value" model.[25] A newer theory, the "fairness heuristic" hypothesis, suggests that when people lack an accessible framework for evaluating the fairness of a given dispute outcome, they use process characteristics as mental short-cuts for assessing the outcome and deciding whether to comply with it.[26] Thus, this theory recognizes that laypeople generally have little ability to assess the fairness (or accuracy, for that matter) of dispute outcomes. In fact, some evidence suggests that even experienced repeat-players do not use outcome information

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nity for *participation* in determining outcome (as opposed to assurance of a favorable outcome), and for self-expression and *communication*.

Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 20-21 (1996). Another counter-intuitive finding is that economic concerns seem to play at most a minor role in shaping disputants' attitudes about procedures they have experienced. Issues of delay and the cost of litigation have been found to have little impact on satisfaction with case outcomes. EDGAR LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEW OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (1989).

[22] Tyler & Lind, *supra* note 17, at 74-75 (describing the procedural features that enhance perceptions of procedural justice and the theories that explain such effects).

[23] John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 546 (1978). For further elaboration on this model, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 826-30 (2001).

[24] Lind, *supra* note 20, at 179. This research challenged the theory proposed by Thibaut and Walker that laypeople regard the opportunity for voice as fair because it permits them to present the third party with information that will influence the outcome eventually reached by that third party. Welsh, *supra* note 23, at 827 n.195.

[25] *See* Tyler, *supra* note 19, at 333 (presenting a series of studies demonstrating that when people are asked *prior* to experiencing a procedure which one they prefer, they choose procedures that they believe will maximize their self-interest in terms of material outcomes). The "group-value" model was later expanded into the "relational" model of authority. TYLER & BLADER, *supra* note 21, at 91.

[26] This theory's primary tenets are consistent with laboratory research suggesting that when people are given information for evaluating the fairness of outcomes prior to experiencing a procedure, they use that information, rather than process information, to assess the fairness of the eventual outcomes. Kees van den Bos et al., *Procedural and Distributive Justice: What Is Fair Depends More on What Comes First Than on What Comes Next*, 72 J. PERSONALITY & SOC. PSYCHOL. 95, 99-100, 102 (1997) (describing a study in which participants experienced procedures and then evaluated them).

as effectively as one might expect.[27] People appear to be more comfortable assessing and interpreting the treatment they receive rather than the outcomes they obtain.[28] Not surprisingly, therefore, disputants generally place greater weight ex post on process variables than on outcomes.

In sum, when people face a choice between procedures, rather than preferring ones that are likely to produce "accurate" outcomes, they typically prefer ones they believe will advance their self-interests in terms of gains. When evaluating procedures after they have experienced them, they are similarly not focused on outcome accuracy. In fact, they focus on something altogether separate from outcomes, namely, process (i.e., how they were treated). Thus, insofar as disputants do not seem overly concerned with outcome accuracy, either ex ante or ex post, research on judicial blinders is likely to affect disputants mainly for reasons unrelated to how blinders affect the accuracy of judges' decisions.

B. Implications of Judicial Blinders for Disputants

How the findings on blinders will affect disputants' evaluations of procedures depends in part on whether disputants (or the lawyers who advise them) are already aware that judicial decision-making is systematically flawed in the ways these findings suggest. If people already believe that judges routinely "misjudge" and already factor this belief into their decision-making with respect to their procedural choices, the findings Guthrie describes are likely to produce less observable change on the dispute resolution front.[29] This notion of public perception highlights a potential difference between the attitudinal blinders Guthrie describes on the one hand and the informational and cognitive blinders on the other. Research on public perceptions suggests that many citizens believe that judges' decisions are affected by political and other considerations reflecting their personal preferences and self-interest.[30] Thus, many

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[27] Lind et al., *supra* note 20.

[28] Tyler & Lind, *supra* note 17, at 65 (describing the procedural features that enhance perceptions of procedural justice and the theories that explain such effects).

[29] Guthrie argues "that attitudinal theorists generally assume that judges are, in fact, 'rational actors' seeking to maximize their policy preferences or attitudes . . . . Whether my assumption is right, or the attitudinalist assumption is right, is irrelevant here. In either case, judicial attitudes can lead to misjudging." Guthrie, *supra* note 1, at 289. I agree. My point is that if disputants already believe that attitudinal blinders affect judicial decision-making, their procedural choices may already reflect this belief.

[30] AMERICAN BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, PUBLIC FINANCING OF JUDICIAL CAMPAIGNS, 20 (2002), *available at* http://www.soros.org/initiatives/justice/articles_publications/publictions/judcampaigns_20020201/commissionreport.pdf ("The perception that judges are influenced by the contributors to their reelection campaigns is widespread."); NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 3 (1999), *available at* http://ppc.unl.edu/publications/documents/how_public_views_the_state_courts.pdf ("A full 78 percent believe that elected judges are influenced by having to raise campaign funds. Nearly 40 percent strongly agree that judges are influenced by political considerations, while only 20 percent disagree."); NAT'L CTR. FOR STATE COURTS, THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 17 (2006) ("Other reasons cited by those critical of judges' performance include bias/unfairness (8%), politics/cronyism (8%), and corruption or money influence (6%).").

people already perceive judges as having biases when it comes to allowing politics to affect their decisions. It is therefore possible that many lawyers already consider judges' political attitudes when developing arguments for trial, and try to mitigate or enhance the application of those beliefs (as needed) in the case at-hand.

It is less obvious whether disputants, or even lawyers, appreciate the degree to which the more subtle informational and cognitive blinders affect judges' decision-making. I suspect that they do not and that these relatively new findings could significantly alter how disputants evaluate their options. Moving forward, disputants who are concerned with advancing their self-interests ex ante might strategically use insights on blinders to select a procedure for their dispute. That is, they might select trial when the susceptibility of a judge to a specific blinder might help them achieve their desired outcome or attempt to avoid trial when such a blinder would disfavor them.[31] For example, if a lawyer knows that judges have difficulty disregarding inadmissible testimony, and she believes opposing counsel plans to offer prejudicial evidence that would be reviewed but then deemed inadmissible at trial (because the full rules of evidence would apply), she might attempt to use mediation instead (thereby reducing the probability that the informational blinder will affect the outcome).[32] In many ways, this kind of strategizing would be similar to what trial lawyers do already when they, for example, believe that they have a sympathetic witness, expect jurors to be more likely than judges to respond to emotional appeals, choose a jury trial for that reason, and then appeal to the jurors' emotions to win their case. Thus, even if disputants and lawyers do not use research on blinders to make predictions about outcome accuracy, they might use it for other purposes. Specifically, now that the effects of blinders have been documented, disputants might choose trial when it is advantageous for them to do so (given judges' potential reliance on blinders), and lawyers might actively consider judges' blinders in developing case strategy.

The primary disadvantage of judges' reliance on blinders, in Guthrie's view, is that it calls into question the greater "accuracy" of decisions that many may expect from judges. But there is another way to appreciate the findings he describes. When it comes to assessing the accuracy of decision-making for the resolution of legal disputes, a specific challenge arises. The reality is that both the law and facts are often open to a significant amount of subjective interpretation.[33] As decades of social and cognitive psychological research have demon-

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[31] Guthrie makes a similar point by arguing that "[o]nce disputants and their lawyers acknowledge the risk that litigation might not produce fully accurate liability and damage determinations, they might reasonably conclude that they should pursue other values in the disputing process (*unless, of course, they believe that judicial error is likely to favor them in the litigation*)." Guthrie, *supra* note 1, at 451 (emphasis added).

[32] Thus, although the evidence in question might actually be reviewed by the parties and the mediator, the negative effects of this kind of blinder in mediation seem less problematic. Because the outcome of a mediation depends on the consensus of the parties, the party disfavored by the prejudicial evidence has the opportunity to negotiate an outcome that is less tainted by it than she would obtain at trial.

[33] Many psychological studies illustrate this point. *See* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 60-73 (1991) (reviewing many seminal studies illustrating how people subjectively construe experiences,

strated, the perceptual and cognitive processes that help us perceive and interpret information are essentially *subjective* filters.[34] Indeed, objectivity in construing information is quite elusive.

True objectivity is particularly unlikely in cases that end up in front of a third party, such as a judge or an arbitrator, because they tend to be the "close" cases. Disputes that parties believe are *relatively* clearer on the facts and the law (and how the law and facts fit together) – and therefore are amenable to an "objectively" accurate resolution – are the ones that tend to settle, often without the help of a third party.[35] Not surprisingly, cases that are handled by third parties are especially challenging to decide. And yet these conflicts are in need of resolution. To resolve such cases, when the facts and law fail to provide an obvious answer, the third party will often manage that ambiguity by relying, often without conscious awareness, on something else.[36] For that reason, close

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situations, and information). One famous example is Hastorf and Cantril's case study of perceptions of a football game between two traditional rivals, Dartmouth and Princeton, and the extent to which school affiliation biased what a student perceived. Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954). They found that the students from the two schools literally saw different occurrences on the playing field. When students later viewed recordings of the game, students from the two schools could not even agree as to when there were infractions of the rules. The researchers explained their results as follows: "[T]he 'game' actually was many different games and that each version of the events that transpired was just as 'real' to a particular person as other versions were to other people." *Id.* at 132. This insight illustrates the broader point that "facts" are subjectively construed. So, too, is the law. This view is argued persuasively by legal realists who posit that:

> The importance . . . of recognizing that judicial decisions are little more than the judge's idea of what is right, based on his or her life experiences, is fundamental in recognizing that the administration of the law 'will vary with the personality of the judge who happens to pass upon any given case.' Accordingly, the law is subject to variance in relation to the personal traits and disposition of the presiding judge.

Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 8 (1999).

[34] Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 Nw. U. L. REV. 1081, 1089 (2003).

[35] Most cases that go to trial are on the margin. Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 277 n.64 (2004) ("Because parties can select cases for trial (the so-called case-selection effect), mainly cases that fall close to whatever standard of proof applies will proceed to trial."); Ehud Guttel, *Overcorrection*, 93 GEO. L.J. 241, 244-45 (2004) ("Cases that are litigated are therefore close ones, with the probabilities close to 50% for each party . . . cases closest to the applicable 'decision standard' are disproportionately selected for trial."). *But see* Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999) (reporting on a study of tax court suggesting that cases did not settle or go to trial randomly and arguing that factors other than proximity to the standard of proof explain this non-randomness).

[36] ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 165 (1983) (arguing, based on empirical research, that non-legal factors help to explain district court outcomes for close cases); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263 (1995) ("In close cases, something must make a difference. It could be random fluctuation, what the judge ate for breakfast, the judge's background, or other less obvious factors."); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1202 (arguing that "[c]ases are often settled because one or both of the parties perceive that the outcome is

cases are ones that are likely to maximize the observable effects of peripheral factors like blinders.[37]

Psychologists have recognized this for a long time, especially with respect to attitudes, or what Guthrie calls *attitudinal blinders*. Jury psychology researchers commonly appreciate how much case judgments vary as a function of the equivocality of evidence – so much so that they often calibrate the evidence in the hypothetical cases they present their research participants to be "close" or "ambiguous" with respect to the two sides of the dispute. In doing so, they leave some variance to be influenced by the variables under study.[38] Psychologists who study how personality differences affect behavior or decision-making also recognize the value of presenting their research participants with ambiguous stimuli so that any personality effects that exist might be observed. From a psychological perspective, ambiguous cases are ones that make subjective decision-making – be it through informational, cognitive, attitudinal blinders, or by force of personality attributes, for that matter – more likely. Importantly, this subjectivity in decision-making is not pernicious in nature but is simply a product of how humans faced with ambiguous situations (which are psychologically uncomfortable) tend to resolve the ambiguity. In these close cases subjective decisions are especially likely, and sometimes, as the research on misjudging suggests, they will lead to "inaccurate" outcomes.

Thus, in a very real sense, when disputants grant a third party the mandate to determine the outcome of their disputes,[39] in exchange for a resolution they presumably could not achieve on their own, they assume the nontrivial risk that their dispute is in fact so "close" or ambiguous (on the facts, law, or both) that an outcome will be the product of some blinder (or personality trait) of that third party. The question this logic raises is whether the assumption of this risk is more reasonable when it occurs at trial or, now that we know that "misjudging is more common . . . than the legal system has fully realized,"[40] in a different procedural home. My bet is on the latter. I suggest this is so because the

dictated by statute or precedent or some other factor that precludes the exercise of discretion by the judge" and that "[t]he opportunity for [systematic, explainable, or non-random] variation to determine outcomes is maximized, not minimized, in . . . close cases").

[37] Importantly, some of the research Guthrie describes demonstrates that blinders can affect decisions in cases where the evidence is not equivocal. For example, in the research he describes on the biasing effects of information about prior convictions, even the control group awarded the plaintiff a significant amount of compensation, suggesting that the evidence described in the case hypothetical significantly favored the plaintiff. Guthrie, *supra* note 1, at 270-72. My point is that although one might observe the effects of blinders in unequivocal cases, their effects are relatively more likely to emerge in "close" cases.

[38] MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 68 (1978); John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 480 n.13 (2002); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 10 (1997).

[39] Although this is particularly true for trials and private arbitration where the third party renders a decision that resolves the underlying dispute, other third parties who are not charged with *deciding* disputes per se nevertheless make decisions that can affect outcomes, albeit indirectly. For example, suggestions made by court-annexed arbitrators (who render opinions that are merely advisory), and evaluative mediators (who suggest possible resolution outcomes for disputants to consider) may have an anchoring effect on the settlement terms that are ultimately reached.

[40] Guthrie, *supra* note 1, at 421.

potentially negative effects of such blinders can be more readily offset in less adjudicative procedures like arbitration and mediation, because they offer more of what disputants value ex post – namely, a sense of fair treatment.

I elaborate on this point by way of example. Although the risk of blinders also exists in arbitration, arbitration offers several benefits relative to trial. For example, unlike in traditional trials, it is possible for each disputant to get *some* of what he or she desires in terms of outcomes, since some arbitrators make compromise awards, which might augment satisfaction ex post.[41] More important than favorable outcomes, however, is fair process. On that front, arbitration is also preferable to trial because it generally grants disputants greater control over the process and, for that reason, can enhance perceived procedural fairness. A similar case could be made about mediation. Although mediators do not have the authority to *determine* the outcome of disputes, many mediators who follow the evaluative model informally propose solutions that disputants subsequently agree to accept.[42] These mediators might also rely on blinders. But, again, relative to trial, mediation offers advantages that are likely to offset the negative effects of blinders – specifically, it offers the psychological benefits of process control, which is associated with perceived fair treatment.

It is clearly legitimate to regard blinders as responsible for inaccurate outcomes in cases where the facts and the law happen to clearly dictate another result. But if we accept the assumption that many disputes administered by third parties are close cases, where accuracy might be elusive to begin with, evidence of reliance on blinders (especially attitudinal ones) in such cases might merely reflect the subjectivity inherent in resolving such disputes.

C. *Conclusion*

Despite iconic images of justice being blind, legal decisions are often made through a subjective lens worn by third parties, such as judges and arbitrators, who oversee the resolution of disputes.[43] This lens can be obstructed in predictable ways by blinders, be they informational, cognitive, or attitudinal. Although researchers have discovered a number of critically important factors relevant to such blinders, much remains to be learned about what influences decision-making in the dispute resolution context.[44]

Ideally, future research will test all types of dispute resolution procedures involving third parties, using the same stimuli, to compare different types of third parties with respect to blinders and how well they respond to different

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[41] G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 633 (1988) (explaining that "[a]rbitration also differs from court litigation in that arbitrators are legally free to render compromise awards rather than 'all or nothing' decisions").

[42] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. Rev. 7, 17 (1996) (describing and contrasting the facilitative and evaluative styles of mediation).

[43] Jamie Arndt et al., *Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision Making*, 11 PSYCHOL. PUB. POL'Y & L. 407, 408 (2006) (citing relevant research).

[44] *Id.*

remedies for reducing the negative effects of such blinders. If such research ultimately reveals that certain types of third parties are predictably more reliant on particular blinders and are less immune to remedies, disputants who choose procedures on the basis of self-interest might use such findings to "game" their selection ex ante. Given that process-related factors play a particularly significant role in how disputants evaluate procedures ex post, such findings would probably not affect ex post evaluations unless disputants suspected that the third party intentionally relied on blinders and they believed the *process* had been polluted by unfairness as a result.[45] But it would be quite unreasonable for disputants to regard the unintentional reliance on blinders as unfair in the "close" cases that they generally bring to third parties. This is so because all of us are subject to using such blinders and, in fact, we are particularly likely to be influenced by them in such cases. Indeed, as disputants should realize, nobody is perfect.

[45] Disputants are more likely to perceive the use of such blinders as indicative of unfair process when they are applied intentionally, which is more likely to be the case with attitudinal blinders (for example, when third parties rely on their political preferences to guide case outcomes) than with informational or cognitive blinders.