

# TABOO PROCEDURAL TRADEOFFS: EXAMINING HOW THE PUBLIC EXPERIENCES TRADEOFFS BETWEEN PROCEDURAL JUSTICE AND COST

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## INTRODUCTION

Fairness is a foundational concept in American jurisprudence.<sup>1</sup> Yet when evaluating our system of civil procedure, debate surrounds how to reconcile the competing ends of our civil justice system.<sup>2</sup> While scholars agree that our civil justice system must vindicate rights,<sup>3</sup> deter wrongful conduct,<sup>4</sup> respect human

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<sup>1</sup> See ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 2–3 (1979); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) (“By and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions.”); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 178 (1955); John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 164 (1958), reprinted in *JUSTICE AND SOCIAL POLICY* 80 (Frederick A. Olafson ed., 1961) [hereinafter Rawls, *Justice as Fairness*]; John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 9–10 (Sidney Hook ed., 1964) [hereinafter Rawls, *Legal Obligation*].

<sup>2</sup> William James vividly discussed the problem of reconciling different ends and purposes in one of his finest works, *Pragmatism*. See WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 99 (2010) (“Our different purposes also are at war with each other. Where one can't crush the other out, they compromise; and the result is again different from what anyone distinctly proposed beforehand. . . . Whoever claims ABSOLUTE teleological unity, saying that there is one purpose that every detail of the universe subserves, dogmatizes at his own risk.”).

<sup>3</sup> See e.g., Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 113–18 (2011); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1217–25 (1992); see also RONALD DWORKIN, *Principle, Policy, Procedure*, in *A MATTER OF PRINCIPLE* 72, 73 (1985); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1202 (1974).

<sup>4</sup> See e.g., JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1879); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1025 (2010).

dignity,<sup>5</sup> and enhance social welfare and efficiency,<sup>6</sup> scholars disagree on how best to reconcile these ends.<sup>7</sup> Doubtless, the tension between these plural ends poses difficulty when courts, civil rule designers, and legislators balance and weigh the costs and benefits of different civil procedural rules and constitutional safeguards under the Due Process Clause. Notably, courts face this vexing difficulty when conducting the cost-benefit analysis envisioned by *Mathews v. Eldridge* under the Due Process Clause,<sup>8</sup> and upon amendment of the Federal Rules of Civil Procedure, federal courts will face this difficulty under newly amended Rule 1.<sup>9</sup>

In *Mathews v. Eldridge*, the Supreme Court enacted, under the Due Process Clause, a cost-benefit analysis that courts conduct when a claimant challenges as insufficient the procedural safeguards in place when a state actor revokes life, liberty, property, or vital public benefits,<sup>10</sup> including social security benefits, unemployment compensation, aid to dependent children, veteran benefits,

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<sup>5</sup> See e.g., Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–50 (1976); Michelman, *supra* note 3, at 1177; see also COVER & FISS, *supra* note 1, at 2.

<sup>6</sup> See e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 114 n.72 (2002); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (5th ed. 1998); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399 (1973).

<sup>7</sup> Compare *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (“The function of legal process, as that concept is embodied in the Constitution . . . is to minimize the risk of erroneous decisions.”), with *Greenholtz*, 442 U.S. at 34 (Marshall, J., dissenting) (“Finally, apart from avoiding the risk of actual error, this Court has stressed the importance of adopting procedures that preserve the appearance of fairness . . .”), and *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). See generally COVER & FISS, *supra* note 1, at 2; GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 215 (1993) (“The fundamental problem for American civil justice is to accommodate these ideals—equality, access, autonomy, and openness in civil justice—to the reality that their fulfillment entails economic, political, and moral costs.”); Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675 (1997); William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 947–55 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE (1988)); Michelman, *supra* note 3, at 1213; Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 993–97 (2012); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 844–59 (1984).

<sup>8</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>9</sup> See FED. R. CIV. P. 1. The Committee on the Rules of Practice and Procedure proposed an amendment to Rule 1, which was approved by the Judicial Conference on September 14, 2014. The amendment was approved by the U.S. Supreme Court on April 1, 2015. Absent congressional action, the new rule will take effect on December 1, 2015. See Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice & Procedure (June 14, 2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>; Letter of Transmittal from Chief Justice John G. Roberts on Fed. Rules of Civil Procedure to Honorable Joseph R. Biden, Jr. (April 29, 2015), available at <http://www.uscourts.gov/rules-policies/pending-rules-amendments>.

<sup>10</sup> See Mashaw, *supra* note 5, at 39–57.

and state and local welfare.<sup>11</sup> In so doing, the *Mathews* Court called upon courts to weigh the cost of providing additional procedural safeguards against the benefit gained, with benefit narrowly defined as the degree to which additional procedures enhance the accuracy of the determination at stake.<sup>12</sup> Since its inception, this form of cost-benefit analysis has been challenged for failing to encompass the full plurality, diversity, and range of human values implicated when procedural justice is withheld, including the degree to which procedural injustice diminishes human dignity.<sup>13</sup> In this regard, the *Mathews* Court's narrow conception of cost and benefit is now in marked tension with the form of cost-benefit analysis that even federal agencies conduct, which broadly considers values difficult or impossible to quantify, including equity, human dignity, and fairness.<sup>14</sup> The chasm between the cramped analysis conducted by courts under the Due Process Clause, and the more capacious analysis conducted by federal agencies is both deeply troubling and ironic—for the Due Process Clause, properly understood,<sup>15</sup> is inherently about procedural justice, fairness, and furnishing individuals human dignity.<sup>16</sup> This chasm raises the question of whether the *Mathews v. Eldridge* conception of cost-benefit analysis under the

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<sup>11</sup> See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964):

Because it is so hard to confine relevance and discretion, procedure offers a valuable means for restraining arbitrary action. This was recognized in the strong procedural emphasis of the Bill of Rights, and it is being recognized in the increasingly procedural emphasis of administrative law. The law of government largess has developed with little regard for procedure. Reversal of this trend is long overdue.

The grant, denial, revocation, and administration of all types of government largess should be subject to scrupulous observance of fair procedures. Action should be open to hearing and contest, and based upon a record subject to judicial review. The denial of any form of privilege or benefit on the basis of undisclosed reasons should no longer be tolerated.

*Id.*

<sup>12</sup> See *Eldridge*, 424 U.S. at 343.

<sup>13</sup> See *infra* Part III.A.

<sup>14</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). See generally Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1380 (2014); Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1735–41 (2014). Indeed, federal agencies have recently been encouraged and empowered to harness the behavioral sciences in considering how the American public experiences programs when formulating policies. See Using Behavioral Sciences to Better Serve the American People, Exec. Order No. 13,700, 80 Fed. Reg. \_\_\_ (signed Sep. 15, 2015) (“To more fully realize the benefits of behavioral insights and deliver better results at a lower cost for the American people, the Federal Government should design its policies and programs to reflect our best understanding of how people engage with, participate in, use, and respond to these policies and programs.”).

<sup>15</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945); Mashaw, *supra* note 5, at 51; Robert S. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 438 (1978).

<sup>16</sup> See COVER & FISS, *supra* note 1, at 2; DWORKIN, *supra* note 1 (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); Fuller, *supra* note 1 (“By and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions.”); Hart, *supra* note 1, at 185; Rawls, *Justice as Fairness*, *supra* note 1; Rawls, *Legal Obligation*, *supra* note 1; Resnik, *supra* note 7, at 847.

Due Process Clause is consistent with how the public experiences tradeoffs between procedural justice and cost. Does the public, for example, treat procedural justice as an ordinary monetizable consumer preference, or does the public experience procedural justice as a deeply human, sacred, moral, and dignitary value?

Further, these plural ends are forged into Rule 1 of the Federal Rules of Civil Procedure, which serves as the interpretive lens for all other rules of federal civil procedure.<sup>17</sup> Rule 1 provides that the Federal Rules of Civil Procedure “should be construed and administered to secure the *just, speedy, and inexpensive* determination of *every* action and proceeding.”<sup>18</sup> Doubtless, these ends are in tension. Fair procedures entail cost. Fair procedures cause delay.<sup>19</sup> These procedural tradeoffs underlie much of the tension, indeterminacy, and flexibility within our civil justice system, and this tension has engendered considerable—and at times spirited—debate. Until recently, Rule 1 was merely an interpretive guide for courts. The Supreme Court, however, has recently approved newly amended Rule 1, which now affirmatively requires parties to weigh and strike these procedural tradeoffs. Newly amended Rule 1 states that the rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceed.”<sup>20</sup> Soon therefore, claimants, defendants, and courts may face many of the vexing challenges posed by *Mathews v. Eldridge* under newly amended Rule 1. Yet, a crucial threshold question remains: how do members of the public experience these tradeoffs; how would members of the public, for example, experience tradeoffs between procedural fairness and cost?

Consistent with the themes of the inaugural Conference on Psychology and Lawyering,<sup>21</sup> we<sup>22</sup> draw on psychological science and harness psychological experiments to investigate these questions. First, we examine whether the public is willing to pay to upgrade from procedural unfairness to procedural fairness. Relatedly, we examine the public’s maximum willingness to pay to en-

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<sup>17</sup> See FED. R. CIV. P. 1; see also FED. R. EVID. 102 (“[R]ules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

<sup>18</sup> See FED. R. CIV. P. 1 (emphasis added).

<sup>19</sup> See Morrison, *supra* note 7, at 994.

<sup>20</sup> See FED. R. CIV. P. 1 (emphasis added); Memorandum, *supra* note 9.

<sup>21</sup> The inaugural Conference on Psychology and Lawyering: Coalescing the Field was held at the UNLV Boyd School of Law, Las Vegas, Nevada, on February 21–22, 2014.

<sup>22</sup> This project reflects the efforts of a village. First and foremost, I thank the tireless efforts of my IU Law & Social Psychology Lab, and the lab members who helped to complete this project: Michael Yontz, Sarah Kupferberg, Holly Heerdink, Annie Milkey, Taylor Ballinger, and Samantha von Ende. Second, I thank the IU Statistical Consulting Center, and the efforts of Thomas Arthur Jackson, Stephanie Dickinson, and Wesley Beauli. Third, I thank the insights shared by members of the IU Social Psychology Seminar Series. Last, this research would not be possible without insights early on shared by the Mind & Identity in Context Lab at Indiana University.

hance procedural fairness.<sup>23</sup> Next, we examine whether the public is willing to accept payments to downgrade from fair process to unfair process.<sup>24</sup> Stated another way, is the public willing to monetize and exchange the procedural justice afforded to them? Thus, we examine the public's minimum willingness to accept the descent from procedural justice to procedural injustice.<sup>25</sup> Last, we examine whether these willingness-to-pay ("WTP") and willingness-to-accept ("WTA") values vary with the underlying interests at stake.<sup>26</sup> In this way, and joining in the collective efforts of those who seek to coalesce the field of psychology and lawyering, we illustrate how Law & Psychological Science,<sup>27</sup> a form of naturalized legal inquiry<sup>28</sup> and behavioral realism,<sup>29</sup> that examines legal problems by infusing law with insights from the psychological and behavioral sciences, can be harnessed in the realm of civil procedure and dispute system design<sup>30</sup> to cast new light on vexing problems to benefit courts, procedural regulators, and legal professionals.

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<sup>23</sup> See *infra* Part II.

<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part II.

<sup>27</sup> Law & Psychological Science is an interdisciplinary method that melds empirical legal inquiry and psychological science. See Cheryl R. Kaiser & Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 95, 102 (2014); Victor D. Quintanilla, *Judicial Mindsets: The Social Psychology of Implicit Theories and the Law*, 90 NEB. L. REV. 611 (2011). Law & Psychological Science draws inspiration from several neighboring jurisprudential projects, including: Behavioral Realism; see Krieger & Fiske, *supra* note 27, Situationism; see generally Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008) and New Legal Realism; see generally Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555 (2010).

<sup>28</sup> See BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 31 (2007) ("Naturalism is a familiar development in recent philosophy: indeed, it would not be wrong to say that it is *the* distinctive development in philosophy over the last thirty years.").

<sup>29</sup> Behavioral Realism is a far-reaching means of inquiry, which bears an impulse of naturalism, one that explores gaps between a scientific consensus and untested folk wisdom incorporated and subsumed into law. The scientific consensus may arise in a variety of social science disciplines, including evolutionary biology, behavioral genetics, and psychology. "Behavioral realism" emerged from a symposium in July 2006 discussing how advances in social and cognitive sciences offer new jurisprudential perspectives. See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 490 (2010). After the symposium, jurists and social psychologists produced several noteworthy works. See generally EUGENE BORGIDA & SUSAN T. FISKE, BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (2008); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

<sup>30</sup> For examples from the vibrant and growing field of dispute system design, see CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 19 (1996);

Procedural justice measures subjective perceptions about and experiences with the fairness and legitimacy of procedures.<sup>31</sup> This research demonstrates that the public cares deeply about the fairness of the process by which decisions are made, independent from considerations about substantive outcomes.<sup>32</sup> While the harvest of procedural justice research is truly vast, this research has yet to interconnect with a second body of psychological research on taboo tradeoffs. Philip Tetlock, Jonathan Baron, and colleagues have investigated taboo tradeoffs and the problem of constitutive incommensurability.<sup>33</sup> These social psychologists have examined how sacred and protected values affect decisionmaking and result in taboo tradeoffs.<sup>34</sup> Mainly, when members of the public are presented with proposed exchanges between sacred values—such as loved ones, God, justice, human beings—and money, the public experiences sharp cognitive, affective, and behavioral resistance.<sup>35</sup> The public has marked difficulty commodifying these sacred values into market-price terms. While people may be willing to pay to protect these sacred values, the public sharply resists commodifying, monetizing, and selling sacred values. In this article, we

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Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008); Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145 (2004); Jennifer F. Lynch, *Beyond ADR: A Systems Approach to Conflict Management*, 17 NEGOTIATION J. 207 (2001); Francis E. McGovern, *Second-Generation Dispute System Design Issues in Managing Settlements*, 24 OHIO ST. J. ON DISP. RESOL. 53 (2008); Mary Rowe, *Organizational Systems for Dealing with and Learning from Conflict: Introduction*, 14 HARV. NEGOT. L. REV. 233 (2009).

<sup>31</sup> See *infra* Part I.A; see also E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 65 (Melvin J. Lerner ed., 1988); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 65–68 (Joseph Sanders & V. Lee Hamilton eds., 2001).

<sup>32</sup> See *infra* Part I.A; see also LIND, & TYLER, *supra* note 31; Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 138–46 (2011); Tyler & Lind, *supra* note 31.

<sup>33</sup> See *infra* Part II.B; see also Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 853–70 (2000).

<sup>34</sup> See *infra* Part II.B; see also Jonathan Baron & Joshua Greene, *Determinants of Insensitivity to Quantity in Valuation of Public Goods: Contribution, Warm Glow, Budget Constraints, Availability, and Prominence*, 2 J. EXPERIMENTAL PSYCHOL. 107 (1996); Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions That Transgress the Spheres of Justice*, 18 J. INT'L SOC'Y POL. PSYCHOL. 255, 273–85 (1997); A. Peter McGraw et al., *The Limits of Fungibility: Relational Schemata and the Value of Things*, 30 J. CONSUMER RES. 219, 219–21 (2003); A. Peter McGraw & Philip Tetlock, *Taboo Trade-Offs, Relational Framing, and the Acceptability of Exchanges*, 15 J. CONSUMER PSYCHOL. 2, 2–15 (2005); Ilana Ritov & Jonathan Baron, *Protected Values and Omission Bias*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 79, 79–82 (1999); Tetlock et al., *supra* note 33, at 853–56.

<sup>35</sup> See, e.g., Rumen Iliev et al., *Attending to Moral Values*, in MORAL JUDGMENT AND DECISION MAKING 170, 170–78 (Daniel M. Bartels et al. eds., 2009); Jonathan Baron & Mark Spranca, *Protected Values*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 1–4 (1997); Fiske & Tetlock, *supra* note 34, at 256; Tetlock et al., *supra* note 33, at 863–65.

connect these two bodies of research and investigate whether psychological science on taboo tradeoffs casts new light on how the public experiences tradeoffs between procedural justice and cost.

The remainder of the article will proceed as follows: in part I, the article offers a theoretical orientation, presenting social-psychological research on procedural justice, taboo tradeoffs, relational theory, and the sacred-value protection model. In part II, the article reports an experiment conducted with members of the American public, discussing first methods then results. In part III, the article presents a general discussion regarding the implications of this research on procedural regulation, including implications for the cost-benefit analysis envisioned by *Mathews v. Eldridge*<sup>36</sup> under the Due Process Clause and concerns raised under newly amended Rule 1, and turns then to civil procedure pedagogy. Last, the article closes with next steps for this line of research and conclusions.

## I. PROCEDURAL JUSTICE, TABOO TRADEOFFS, AND THE PROBLEM OF CONSTITUTIVE INCOMMENSURABILITY

### A. *Procedural Justice*

Procedural justice research measures the extent to which the public experiences legal procedures and dispute resolution as fair and legitimate. This research investigates both the formal features of procedural rules and the manner in which decisionmakers treat disputants.<sup>37</sup> Over the past several decades, researchers have harvested empirical findings which demonstrate that procedural justice powerfully shapes the degree to which the public deems legal authorities legitimate and affects the public's acceptance and adherence to legal decisions. Procedural justice researchers have demonstrated that experiences with procedural justice influence the public's satisfaction with how disputes are handled.<sup>38</sup> Researchers have, moreover, consistently shown that procedural justice influences the public's impressions of fairness as strongly, if not more so, than substantive outcomes themselves.<sup>39</sup> While distributive justice matters greatly, so too does the fairness by which decisions are made.<sup>40</sup> In brief, fair process and

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<sup>36</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>37</sup> LIND & TYLER, *supra* note 31, at 66–67; Tyler & Lind, *supra* note 31, at 75–86; see, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS*, 1–2 (1975).

<sup>38</sup> Tyler & Lind, *supra* note 31, at 75–86; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 121 (1992).

<sup>39</sup> Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *L. & SOC'Y REV.* 103, 103–04 (1988); see also Lawrence B. Solum, *Procedural Justice*, 78 *S. CAL. L. REV.* 181 (2004).

<sup>40</sup> *Id.*



fair treatment matter independent of and apart from the favorability of outcomes.<sup>41</sup>

Procedural justice is a multifaceted<sup>42</sup> social-psychological construct. That is, several dimensions of the process of arriving at and announcing a decision, as well as how the public is treated, combine to shape the public's experiences of procedural justice. Researchers have empirically revealed that experiences of procedural justice are affected by several criteria, including: whether the public is afforded a voice and heard, whether the public is granted a neutral and trustworthy decisionmaker, and whether the public is treated with dignity and respect.<sup>43</sup> Put another way, the public cares deeply about the degree to which a decisionmaker is ethical and honest and the extent to which that decisionmaker behaves fairly and impartially.<sup>44</sup> These features combine to form a positively interrelated cluster of procedural criteria,<sup>45</sup> which, from the public's perspective, should be simultaneously promoted. The criteria rarely operate inde-

<sup>41</sup> LIND & TYLER, *supra* note 31, at 67; Tyler & Lind, *supra* note 31, at 70, 75. See, e.g., THIBAUT & WALKER, *supra* note 37, at 3.

<sup>42</sup> Tyler, *supra* note 39, at 128.

<sup>43</sup> TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 52 (2002); Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 747–48 (2003); Hollander-Blumoff, *supra* note 32, at 140–41; Tyler & Lind, *supra* note 31, at 75. Tyler, *supra* note 39, at 104–05; Tyler & Lind, *supra* note 38, at 122. These dimensions of procedural justice have a long and hallowed lineage in human experience and can be traced back to the dawn of Western civilization, in the Axial period. For example, Aeschylus, the Greek poet born around year 525 B.C., in *Eumenides*, at 360–88, narrates a discussion between Goddess Athena and the Chorus of Furies, in which the Furies aim to deprive Orestes of voice at his trial before the judges of Delphi. To which, Athena sharply replies:

Athena: Ye would seem just, yet work iniquity.  
 Furies: How? Tell me that! Thou art not poor in wisdom.  
 Athena: Wrong shall not triumph here by force of oaths.  
 Furies: Question him then and give a righteous judgment.

.....  
 Athena: Sir, what hast thou to answer touching this?  
 Tell me thy land, thy lineage and all  
 Thy griefs; and then *speaking in thine own defence*,  
 If that thou look'st for judgment; for that cause  
 Harbourest at my hearth; all rites performed,  
 A grave appelland, like Ixion old.  
*Come, to all this make me your clear reply.*

*Aeschylus*, THE ORESTEIA 85–86, 227–79 (Penguin ed., 1984) (emphasis added). Similarly, Euripides, the Greek poet born around year 480 BC, in *Hippolytus*, narrates a tragic sequence after King Theseus rashly asks Poseidon to curse death on his beloved son Hippolytus without first offering Hippolytus procedural justice to defend himself against false charges, to which Goddess Artemis warns, “But thou alike in [Poseidon’s] eyes and in mine hast shewn thy evil heart, in that thou hast forestalled all proof or voice prophetic, hast made no inquiry, nor taken time for consideration, but with undue haste cursed thy son even to the death.” EURIPIDES, THE PLAYS OF EURIPIDES: VOLUME II 110 (Edward P. Coleridge trans. 1891) (emphasis added).

<sup>44</sup> Tyler, *supra* note 39, at 121, 123.

<sup>45</sup> *Id.* at 131.

pendently and instead holistically combine to constitute experiences of procedural justice.<sup>46</sup>

Researchers have examined the downstream consequences of enhancing or depriving procedural justice in legal and business environments. In legal environments, enhancing procedural justice promotes the public's acceptance of legal decisions.<sup>47</sup> Tom Tyler and colleagues, for example, have shown that the extent to which the public experiences procedural justice shapes the public's adherence to law.<sup>48</sup> In criminal proceedings, elevating procedural justice decreases recidivism.<sup>49</sup>

In business environments, imparting procedural justice promotes pro-social and cooperative workplace behavior.<sup>50</sup> Procedural justice, moreover, affects commitment to organizations and institutions and diminishes workplace strife and conflict.<sup>51</sup> Fair process enhances commitment to organizations and institu-

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<sup>46</sup> *Id.* at 128.

<sup>47</sup> See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (1990); Denise C. Gottfredson et al., *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 J. RES. CRIME & DELINQ. 3, 3 (2007); Jonathan Jackson et al., *Why Do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051, 1062 (2012); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 245 (1993); Jason Sunshine & Tom Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 535 (2003); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 79 (2014).

<sup>48</sup> Tyler, *supra* note 38, at 130.

<sup>49</sup> See Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POL'Y & L. 419, 419 (2011); Jackson et al., *supra* note 47; Andrew V. Papachristos et al., *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 435 (2012); Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 186 (1997); Elizabeth A. Stanko et al., *A Golden Thread, a Presence Amongst Uniforms, and a Good Deal of Data: Studying Public Confidence in the London Metropolitan Police 1*, 4 (Apr. 20, 2011) available at <http://ssrn.com/abstract=1815824>; Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 369–71 (2010).

<sup>50</sup> See TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 10 (2000); TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 108 (2011); Steven L. Blader et al., *Procedural Justice and Retaliation in Organizations: Comparing Cross-Nationally the Importance of Fair Group Processes*, 12 INT'L J. CONFLICT MGMT. 295, 305–06 (2001); David De Cremer & Daan van Knippenberg, *How Do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858, 859 (2002); David De Cremer & Tom R. Tyler, *The Effects of Trust in Authority and Procedural Fairness on Cooperation*, 92 J. APPLIED PSYCHOL. 639, 648 (2007); Tom R. Tyler & David De Cremer, *Process-Based Leadership: Fair Procedures and Reactions to Organizational Change*, 16 LEADERSHIP Q. 529, 531 (2005).

<sup>51</sup> TYLER & BLADER, *supra* note 50; David De Cremer & Tom R. Tyler, *Managing Group Behavior: The Interplay Between Procedural Justice, Sense of Self, and Cooperation*, 37 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 151, 191 (2005); David De Cremer et al., *Manag-*

tions, promotes extra-role citizenship behavior, elevates job performance, increases levels of job satisfaction, and promotes acceptance of supervisor directives and company policies.<sup>52</sup> When procedural justice is withheld, employees often exit the workplace or refuse to cooperate with supervisors, and workplace morale falls.<sup>53</sup> Within procedurally unjust workplaces, employees exhibit workplace stress and may engage in antisocial behavior. Taken together, this research demonstrates that procedural justice powerfully affects the psychology of how individuals think, feel, and behave in particular contexts and the dynamics of how groups, organizations, and societies interact.

Of marked significance, this psychological science reveals that procedural justice is an important means of buttressing democratic norms and promoting the legitimacy of democratic institutions. Experiences of procedural justice shape the extent to which the public accepts law, legal decisions, and rules; and the extent to which the public perceives legal authorities—including judges, mediators, and courts—as legitimate.<sup>54</sup> This wellspring of legitimacy shapes the public's willingness to obey legal rules and judicial decrees.<sup>55</sup> Procedural justice, hence, affords an avenue to both promote voluntary compliance with law and encourage pro-social, civic, and democratic behavior.<sup>56</sup> Insofar as procedural justice is so closely interwoven with human dignity, procedural justice is both an end in itself and a vital means to promote the legitimacy of our civil justice system.

#### B. *Taboo Tradeoffs and the Problem of Constitutive Incommensurability*

The article now turns to the phenomenon of taboo tradeoffs and the related problem of constitutive incommensurability. These psychological phenomena will be contrasted against the theory of unbounded decisionmaking, which the-

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ing *Cooperation via Procedural Fairness: The Mediating Influence of Self-other Merging*, 26 J. ECON. PSYCHOL. 393, 401–02 (2005); David De Cremer & Tom R. Tyler, *supra* note 50, at 640.

<sup>52</sup> See Virginia Murphy-Berman et al., *Fairness and Health Care Decision Making: Testing the Group Value Model of Procedural Justice*, 12 SOC. JUST. RES. 117, 117 (1999); Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652, 661 (2008).

<sup>53</sup> Laurie J. Barclay et al., *Exploring the Role of Emotions in Injustice Perceptions and Retaliation*, 90 J. APPLIED PSYCHOL. 629, 629 (2005); Ana Belén del Río-Lanza et al., *Satisfaction with Service Recovery: Perceived Justice and Emotional Responses*, 62 J. BUS. RES. 775, 776 (2009); David De Cremer, *Unfair Treatment and Revenge Taking: The Roles of Collective Identification and Feelings of Disappointment*, 10 GROUP DYNAMICS: THEORY RES. & PRAC. 220, 220 (2006).

<sup>54</sup> Kristina Murphy et al., *Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?*, 3 REG. & GOVERNANCE 1, 17 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379–80 (2006).

<sup>55</sup> Tyler, *supra* note 54, at 379.

<sup>56</sup> LIND & TYLER, *supra* note 31, at 64; Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 642–45 (2014).

orizes that all competing values can be rendered commensurable and traded off against each other. Chiefly, unbounded accounts of economic decisionmaking theorize that people are indifferent to tradeoffs between competing values, so long as any tradeoff yields the same amount of expected utility.

This classical account of unbounded decisionmaking depicts people as rational actors whose overriding aim is to increase their expected utility by selecting among utility-maximizing options from available choice sets.<sup>57</sup> Under this account, when people make decisions, they explicitly weigh and trade conflicting values against one another. Classically, indifference curves are used to model and depict these tradeoffs. These indifference curves connect combinations of two different values, graphing points of equal utility and desirability for two values along a smooth convex curve. Graphically, indifference curves depict that for any two values, a change in the satisfaction of one value can be compensated for by a change in the second value.<sup>58</sup> Indifference reasoning is taken as a prerequisite for unbounded economic rationality. That is, people are theorized to first reduce and then explicitly weigh all conflicting preferences and values according to a common utility metric.<sup>59</sup>

Over the past several decades, this classical depiction of unbounded decisionmaking has been revealed as incomplete by behavioral economists and researchers of social cognition.<sup>60</sup> Instead, humans are “boundedly rational;”<sup>61</sup> people have both difficulty with and resistance to translating all values into a common utility metric.<sup>62</sup> This difficulty is partially explained by the phenome-

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<sup>57</sup> See generally WILLIAM J. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* 3 (3d ed. 1972); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA: J. ECONOMETRIC SOC'Y* 263, 263–64 (1979).

<sup>58</sup> Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193, 196–97 (1991).

<sup>59</sup> See Jonathan Baron, *Tradeoffs Among Reasons for Action*, 16 *J. THEORY SOC. BEHAV.* 173, 181 (1986); Fiske & Tetlock, *supra* note 34, at 292; McGraw et al., *supra* note 34, at 219; see also Robin S. Gregory, *Incorporating Value Trade-offs into Community-Based Environmental Risk Decisions*, 11 *ENVTL. VALUES* 461, 464–67 (2002).

<sup>60</sup> Alan P. Fiske & Nick Haslam, *Social Cognition Is Thinking About Relationships*, 5 *CURRENT DIRECTIONS PSYCHOL. SCI.* 143, 143 (1996); Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 *AM. PSYCHOLOGIST* 697, 702–03 (2003); Daniel J. Keys & Barry Schwartz, “Leaky” Rationality: How Research on Behavioral Decision Making Challenges Normative Standards of Rationality, 2 *PERSP. PSYCHOL. SCI.* 162, 162 (2007); Taze Shakti Rai & Alan Page Fiske, *Moral Psychology Is Relationship Regulation: Moral Motives for Unity, Hierarchy, Equality, and Proportionality*, 118 *PSYCHOL. REV.* 57, 57 (2011); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

<sup>61</sup> See Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 *Q.J. ECON.* 99, 99 (1955); Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 *AM. J. SOC.* 548, 553 (1981).

<sup>62</sup> See Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 *CORNELL L. REV.* 749, 751–65 (2011); Tetlock et al., *supra* note 33, at 854.

non of *cognitive incommensurability*.<sup>63</sup> Mainly, people find it taxing and cognitively difficult to compare and contrast options across different metrics and dimensions, especially when they have neither personal experience nor cultural standards to guide their judgment.<sup>64</sup>

Moreover, psychological science on moral decisionmaking has cast light on how the public strikes difficult tradeoffs. For example, classical accounts of unbounded rationality often either neglected or obscured the influence of ideologies, religious beliefs, moral values, and ethical positions on decisionmaking. Over the past several decades, however, research on moral judgment and morally motivated decisionmaking has begun to illuminate these processes.<sup>65</sup>

Two lines of research within the field of moral psychology have examined the phenomenon of taboo tradeoffs. First, Tetlock and colleagues have studied how sacred values affect decisionmaking.<sup>66</sup> These researchers define a sacred value as a “value that a moral community implicitly or explicitly treats as possessing infinite or transcendental significance that precludes comparisons, tradeoffs, or indeed any other mingling with bounded or secular values.”<sup>67</sup> In the second line of research, Baron and colleagues have researched the effect of protected values on decisionmaking, which they define as values “that resist trade-offs with other values, particularly with economic values.”<sup>68</sup> These experimental psychologists study forbidden tradeoffs by presenting members of the

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<sup>63</sup> See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 62–63 (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795–76 (1994); see also John W. Patty, *Incommensurability and Issue Voting*, 19 J. THEORETICAL POL. 115, 117 (2007); Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1134–37 (2003); Arden Rowell, *Partial Valuation in Cost-Benefit Analysis*, 64 ADMIN. L. REV. 723, 732 (2012) (arguing that commensurability should not be confused with monetizability).

<sup>64</sup> See Martin Hanselmann & Carmen Tanner, *Taboos and Conflicts in Decision Making: Sacred Values, Decision Difficulty, and Emotions*, 3 JUDGMENT & DECISION MAKING 51, 58 (2008); Mary Frances Luce et al., *Emotional Trade-Off Difficulty and Choice*, 36 J. MARKETING RES. 143, 143–47 (1999); McGraw et al., *supra* note 34, at 220–21; Patty, *supra* note 63.

<sup>65</sup> See generally SHAUN NICHOLS, *SENTIMENTAL RULES: ON THE NATURAL FOUNDATIONS OF MORAL JUDGMENT* 4 (2004); JESSE J. PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* (2007); Fiery Cushman et al., *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082, 1082 (2006); Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517, 517–23 (2002).

<sup>66</sup> See Fiske & Tetlock, *supra* note 34, at 255; McGraw et al., *supra* note 34, at 221; McGraw & Tetlock, *supra* note 34, at 4; Tetlock et al., *supra* note 33, at 855–56.

<sup>67</sup> See Tetlock et al., *supra* note 33, at 853.

<sup>68</sup> See Iliev et al., *supra* note 35, at 171; Jonathan Baron & Joshua Greene, *Determinants of Insensitivity to Quantity in Valuation of Public Goods: Contribution, Warm Glow, Budget Constraints, Availability, and Prominence*, 2 J. EXPERIMENTAL PSYCHOL. APPLIED 107, 107 (1996); Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 74, 74–78 (2004); Baron & Spranca, *supra* note 35, at 1; Ritov & Baron, *supra* note 34, at 79.

public with decisions that involve trading sacred/protected values for money. When presented with these taboo tradeoffs, people experience sharp cognitive, affective, and behavioral responses, including moral outrage.<sup>69</sup>

Research by Tetlock, Baron, and colleagues has demonstrated that taboo tradeoffs, and the public's marked resistance to translating all values into a common utility metric, can be explained by the problem of *constitutive incommensurability*.<sup>70</sup> A range of disciplines—including moral psychology, moral philosophy, and sociology<sup>71</sup>—have grappled with the problem of constitutive incommensurability. Constitutive incommensurability signifies that people compartmentalize the kinds of tradeoffs that are considered legitimate. People, for example, experience tradeoffs between goods and commodities that our society routinely subjects to market pricing as legitimate. In contrast, people experience other ends and values, such as loved ones, humanity, God, and justice, as infinitely valuable and sacred, and hence the latter are not experienced as fungible or commodifiable. Scholars working across disciplines have collected illustrative taxonomies and frameworks for understanding blocked exchanges (quintessential taboo tradeoffs), instances in which it is considered immoral to monetize and sell. These blocked exchanges span to human beings, divine grace, marriage, love, friendship, and sacred freedoms—including our freedoms of speech, assembly, and religion.<sup>72</sup>

Taboo tradeoffs emerge because we exist within a social and cultural environment that instills members with shared beliefs, values, norms, and commit-

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<sup>69</sup> See Iliev et al., *supra* note 35, at 170–71; Craig MacMillan & Colin Wastell, *Taboo Trade-offs, Moral Outrage and the Moral Limits of Markets*, 2 MACQUARIE ECON. RES. PAPERS 4 (2008).

<sup>70</sup> See Jonathan Baron & Sarah Leshner, *How Serious Are Expressions of Protected Values*, 6 J. EXPERIMENTAL PSYCHOL. APPLIED 183, 183 (2000); Gregory, *supra* note 59, at 466–67; Hanselmann & Tanner, *supra* note 64, at 58–59; Keys & Schwartz, *supra* note 60, at 163–65; Patty, *supra* note 63, at 118; *see also* Sunstein, *supra* note 63, at 795–812.

<sup>71</sup> See Alan Page Fiske, *Relativity Within Moose (“Mossi”) Culture: Four Incommensurable Models for Social Relationships*, 18 ETHOS 180, 194 (1990); MacMillan & Wastell, *supra* note 69; Rai & Fiske, *supra* note 60; Nicola Righetti, *The Sacred in Current Social Sciences Research*, 4 ITALIAN SOC. REV. 133, 145 (2014); Tetlock et al., *supra* note 33, at 853–56; *see also* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 325, 325 n.1 (1986).

<sup>72</sup> See Judith Andre, *Blocked Exchanges: A Taxonomy*, 103 ETHICS 29–47 (1992); *see also* Philip E. Tetlock et al., *Proscribed Forms of Social Cognition: Taboo Trade-offs, Blocked Exchanges, Forbidden Base Rates, and Heretical Counterfactuals*, in *RELATIONAL MODELS THEORY: A CONTEMPORARY OVERVIEW* 247, 247–61 (Nick Haslam ed., 2004); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 100–01 (1983).

[T]he initial agreement on the principle of equal liberty is final. An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests. Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty.

It seems possible to consent to an unequal liberty only if there is a threat of coercion.

JOHN RAWLS, *A THEORY OF JUSTICE* 207 (1971)

ments.<sup>73</sup> These shared beliefs, values, norms, and commitments require that members of society deny comparison and commodification of certain concepts.<sup>74</sup> Members of society are socialized to reject tradeoffs between things of finite monetary value with ends and values that our society deems of transcendental and infinite significance.<sup>75</sup> Striking a taboo tradeoff, such as by attaching monetary value when, say, selling one's child, is to disqualify oneself from society.<sup>76</sup> In sum, a taboo tradeoff exists when monetizing subverts an end or value that society deems infinitely meaningful. This forbidden tradeoff is itself experienced as morally corrosive, or taboo.<sup>77</sup>

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<sup>73</sup> See Roland Bénabou & Jean Tirole, *Identity, Morals, and Taboos: Beliefs as Assets*, 126 Q.J. ECON. 805, 807–08 (2011); Tetlock et al., *supra* note 33, at 854–55; Tetlock et al., *supra* note 72. Emile Durkheim reasoned about similar societal phenomena:

There can be no society, which does not feel the need of upholding and reaffirming at regular intervals the collective sentiments and the collective ideas which make its unity and its personality. . . . Now this moral remaking cannot be achieved except by the means of reunions, assemblies, and meetings where the individuals being closely united to one another, reaffirm in common their common sentiments.

EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 427 (Karen E. Fields trans., 1995).

<sup>74</sup> See Bénabou & Tirole, *supra* note 73, at 811; Luce et al., *supra* note 64, at 143–47.

<sup>75</sup> See Baron, *supra* note 59, at 182; Baron & Spranca, *supra* note 35, at 3; Hanselmann & Tanner, *supra* note 64, at 52; Sarah Lichtenstein et al., *What's Bad Is Easy: Taboo Values, Affect, and Cognition*, 2 JUDGMENT & DECISION MAKING 169, 170 (2007); MacMillan & Wastell, *supra* note 69, at 3–4; McGraw & Tetlock, *supra* note 34, at 4; Tetlock et al., *supra* note 33, at 854.

<sup>76</sup> See Philip E. Tetlock, *Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors*, 109 PSYCHOL. REV. 451, 459 (2002); Tetlock et al., *supra* note 33, at 854; see also RAZ, *supra* note 71, at 346 (“For such parents, having children and having money cannot be compared in value. Moreover, they will be indignant at the suggestion that such a comparison is possible. Finally, they will refuse to contemplate even the possibility of such an exchange.”).

<sup>77</sup> See Bénabou & Tirole, *supra* note 73, at 812; Fiske & Tetlock, *supra* note 34, at 285–91; McGraw et al., *supra* note 34, at 221; Rai & Fiske, *supra* note 60, at 66; Tetlock et al., *supra* note 33, at 867. Though psychological research on taboo tradeoffs had been conducted in the last several decades, humans have experienced and written about such conundrums since the days of Greek antiquity. For example, in the Phoenician Maidens, Euripides accentuates the plot by drawing both on taboo tradeoffs and tragic tradeoffs. EURIPIDES, *THE PLAYS OF EURIPIDES: VOLUME I*, at 235, 248 (Edward P. Coleridge trans., 1891). There, Jocasta, mother to her dueling regal sons, Polynices and Eteocles, who battle for the throne of Thebes, puts to Eteocles a taboo tradeoff: “Riches make no settled home, but are as transient as the day. Come, suppose I put before thee two alternatives, whether thou wilt rule or save thy city? Wilt thou say ‘Rule’? . . . thou wilt see this city conquered . . . so will that wealth thou art so bent on getting become a grievous bane to Thebes; but still ambition fills thee.” *Id.* at 235. Eteocles who chooses unwisely perishes, teaching the immorality of his choice. Later in the play, Teiresias, the seer, puts to Creon a tragic tradeoff, “Choose thee one of these alternatives; either save the city or thy son.” *Id.* at 248. Creon’s beloved son is sacrificed, and Thebes survives.

*C. Relational Theory and the Sacred-Value-Protection Model*

Relational theory posits *when*, and *under what circumstances*, people will likely experience taboo tradeoffs;<sup>78</sup> whereas the sacred-value-protection (“SVP”) model theorizes the *psychological consequences* that people experience when confronting taboo tradeoffs.<sup>79</sup>

First, relational theory reveals that people will likely view a tradeoff as impermissible when that tradeoff requires appraisal of a concept governed by one relational model using a different relational model.<sup>80</sup> Relational theory posits that there are four models that generate or lend normative force to our social relationships.<sup>81</sup> Within the social and cultural domains in which each of these four models operate, people can and often do make tradeoffs without cognitive or emotional difficulty.<sup>82</sup> Yet when people are forced to make comparisons that cross these disparate models, they experience cognitive discomfort, anxiety, and in some cases moral outrage.<sup>83</sup> Relational theory predicts that people will experience the most discomfort when attempting to monetize a concept governed by the communal-sharing model using a market-pricing scheme. The latter comparison is experienced as corrosive—felt and thought of as morally taboo.<sup>84</sup>

According to relational theory, humans harness four discrete models to make comparisons.<sup>85</sup> Society at large, and localized cultures, instill members with beliefs about when these models apply, as well as to what, and to whom. In the main, people within a given society and culture share an implicit consensus about when and how to implement the following four models: communal-sharing, authority-ranking, equality-matching, and market pricing.<sup>86</sup> The *communal-sharing* model divides the world into distinct equivalence classes, permitting differentiation or contrast, but without numerical comparison.<sup>87</sup> That is, all members of a community may share communal benefits and resources

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<sup>78</sup> See Alan P. Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 689–93 (1992); Fiske & Tetlock, *supra* note 34, at 258–65; McGraw & Tetlock, *supra* note 34, at 2–4.

<sup>79</sup> See Fiske & Tetlock, *supra* note 34, at 285–91; Tetlock et al., *supra* note 33, at 853–60.

<sup>80</sup> See Fiske, *supra* note 78, at 711–15; Fiske & Tetlock, *supra* note 34, at 255–65.

<sup>81</sup> See Fiske, *supra* note 78, at 689–93; Fiske & Haslam, *supra* note 60, at 144–45; McGraw et al., *supra* note 34, at 220; Tetlock, *supra* note 76, at 458–59.

<sup>82</sup> See Fiske, *supra* note 78, at 689–93; Fiske & Tetlock, *supra* note 34, at 265–66.

<sup>83</sup> See Fiske, *supra* note 78, at 711–15; Fiske & Tetlock, *supra* note 34, at 273–81; McGraw & Tetlock, *supra* note 34, at 2–12.

<sup>84</sup> See Fiske, *supra* note 78, at 711–15; Fiske & Tetlock, *supra* note 34, at 276–77; McGraw & Tetlock, *supra* note 34, at 3–8.

<sup>85</sup> See Fiske, *supra* note 78, at 689–93; Fiske & Haslam, *supra* note 60, at 144–45; Fiske & Tetlock, *supra* note 34, at 258–60; McGraw et al., *supra* note 34, at 220; Tetlock, *supra* note 76, at 458–59.

<sup>86</sup> See Fiske, *supra* note 78, at 689–93; Fiske & Haslam, *supra* note 60, at 146; Fiske & Tetlock, *supra* note 34, at 260–61; McGraw & Tetlock, *supra* note 34, at 2–3.

<sup>87</sup> See Fiske, *supra* note 78, at 702–06; Fiske & Tetlock, *supra* note 34, at 258; McGraw & Tetlock, *supra* note 34, at 3.



without differentiation, including municipal parks, clean air, and national defense. In the context of a communal-sharing relationship, people pool and share resources, which they treat as belonging to a larger whole that transcends individual members.<sup>88</sup> In contrast, the *authority-ranking* model signifies ordinal or hierarchical ranking among persons or social goods.<sup>89</sup> Thus, veterans may be given priority access to governmental jobs, and within the military, scarce benefits and resources may be doled based on rank. Another example includes hierarchy, in many traditional societies, based upon familial relations across generations. The third domain is *equality matching*.<sup>90</sup> This relational structure defines socially meaningful intervals that can be added or subtracted. For example, if one's neighbor offers to help another neighbor, then the expectation in return is that the latter neighbor will reciprocate when assistance is needed, a classic tit-for-tat structure. Other examples include tit-for-tat structures in cooperatives and other social organizations. The final domain is *market pricing*.<sup>91</sup> People make decisions, using market pricing, that combine quantities of goods and entities into a common utility metric. For example, people often use market pricing to compare and contrast different goods and services using the ratio of quality/price or for hourly wages. The quintessential example includes market transactions between buyers and sellers.

Relational theory posits that people will experience angst and constitutive incommensurability when forced to make tradeoffs between entities belonging to two different relational models.<sup>92</sup> When two or more entities fall within the same relational domain, they are constitutively comparable. People, however, experience anxiety, discomfort, and cognitive distress when decisions require explicit weighing of choices among entities governed by different relational models.<sup>93</sup> Further, the theory predicts that the intensity of distress depends on the direction and distance between the two models. Relational theory sets forth a continuum from left to right: from community-sharing, authority-ranking, and

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<sup>88</sup> See Fiske, *supra* note 78, at 693–700.

<sup>89</sup> See Fiske, *supra* note 78, at 700–02; Fiske & Tetlock, *supra* note 34, at 258; McGraw & Tetlock, *supra* note 34, at 3.

<sup>90</sup> See Fiske, *supra* note 78, at 693–700; Fiske & Tetlock, *supra* note 34, at 258; McGraw & Tetlock, *supra* note 34, at 3.

<sup>91</sup> See Fiske, *supra* note 78, at 706–08; Fiske & Tetlock, *supra* note 34, at 258; McGraw & Tetlock, *supra* note 34, at 3.

<sup>92</sup> See Fiske, *supra* note 78, at 711–15; Fiske & Tetlock, *supra* note 34, at 258–60; McGraw & Tetlock, *supra* note 34, at 3–4. Here too, Emile Durkheim eloquently discussed this human experience,

Since the idea of the sacred is always and everywhere separated from the idea of the profane in the thought of men, and since we picture a sort of logical chasm between the two, the mind irresistibly refuses to allow the two corresponding things to be confounded, or even to be merely put in contact with each other; for such a promiscuity, or even too direct a contiguity, would contradict too violently the dissociation of these ideas in the mind. The sacred thing is *par excellence* that which the profane should not touch, and cannot touch with impunity.

DURKHEIM, *supra* note 73, at 38.

<sup>93</sup> See Fiske, *supra* note 78, at 711–15; Fiske & Tetlock, *supra* note 34, at 273–81; McGraw & Tetlock, *supra* note 34, at 3–8.

equality-matching to market pricing. Crossing models from left to right on this continuum, especially when one engages in a comparison of a concept falling within the communal-sharing model using a market-pricing scheme, generates sharp distress. This theory predicts that people will likely experience a tradeoff as taboo when that tradeoff requires market pricing to compare, monetize, and exchange a concept that society regards as intrinsically shared by all within the community.

While relational theory illuminates when, and under what conditions, people will experience taboo tradeoffs, the sacred-value-protection model theorizes psychological consequences including how people will respond to taboo tradeoffs.<sup>94</sup> Psychological science has demonstrated that, when observers believe that decisionmakers have struck a taboo tradeoff, observers respond with moral outrage.<sup>95</sup> The research has also revealed that, after contemplating a taboo tradeoff, decisionmakers often engage in moral cleansing.<sup>96</sup>

Turning first to observers, the SVP model predicts that, when observers believe decisionmakers have entertained a proscribed tradeoff, they will respond with moral outrage.<sup>97</sup> This outrage may take cognitive, affective, and behavioral forms. For example, observers may respond with harsh dispositional attributions toward the decisionmakers, as well as with anger, contempt, and perhaps disgust.<sup>98</sup> Observers may respond with rage and attempt to enforce norms that protect sacred values, perhaps by punishing those who breached normative boundaries. Moreover, research on the SVP model has revealed that the longer observers believe that decisionmakers have contemplated comparing sacred values, the greater their moral outrage.<sup>99</sup>

Turning next to the decisionmakers themselves, the SVP model predicts that even decisionmakers will feel tainted by contemplating a taboo tradeoff.<sup>100</sup> After the fact, decisionmakers may engage in symbolic acts of moral cleansing

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<sup>94</sup> See Fiske & Tetlock, *supra* note 34, at 278–81; McGraw & Tetlock, *supra* note 34, at 3–4; Tetlock et al., *supra* note 33, at 855–56.

<sup>95</sup> This research has revealed several moderators that amplify and attenuate this moral outrage and moral cleansing effect. For example, there are domain moderators—the greater the psychometric distance between the domains, the greater the outrage. The most elevated outrage is reserved for transgressing the community sharing with market pricing models. Moreover, there are, at times, ideological moderators. Particular ideological groups and subcultures may experience tradeoffs as more taboo than others. A capitalist—libertarian, for example, may see fit to reduce many communal phenomenon into market-pricing terms, whereas a social—Democrat would not. As well, there may be contextual moderators. It may be possible to amplify or attenuate outrage depending on the degree to which a tradeoff is directed at and threatens a core socio-political belief.

<sup>96</sup> See Tetlock et al., *supra* note 33, at 855–56.

<sup>97</sup> See Fiske & Tetlock, *supra* note 34, at 285–88; Tetlock, *supra* note 76, at 453–61; Tetlock et al., *supra* note 33, at 855–56.

<sup>98</sup> See generally Fiske & Tetlock, *supra* note 34, at 285–88.

<sup>99</sup> See Fiske & Tetlock, *supra* note 34, at 285–88; Tetlock, *supra* note 76, at 458–59; Tetlock et al., *supra* note 33, at 855–56.

<sup>100</sup> See Tetlock, *supra* note 76, at 458–59; Tetlock et al., *supra* note 33, at 855–56.

to reaffirm their membership in and solidarity with the moral community.<sup>101</sup> Indeed, research has revealed that merely considering or contemplating the forbidden tradeoff may make a decisionmaker feel contaminated—and the longer the contemplation, the greater the contamination.<sup>102</sup>

## II. AN EXPERIMENTAL INVESTIGATION OF TABOO PROCEDURAL TRADEOFFS

### A. *Method*

In this program of research, we experimentally investigate how the public makes tradeoffs between procedural justice versus the cost of legal process. First, are people willing to pay to upgrade from unfair to fair process, when required to pay a small, medium, or large fee? If so, what is the public's maximum willingness to pay to ascend from unfair to fair process? Second, and conversely, are people willing to accept a small, medium, or large payment to downgrade from fair to unfair process? If so, what is the public's minimum willingness to accept to descend from procedural justice to procedural injustice? The latter question raises the conundrums described above, mainly the problem of constitutive incommensurability and taboo tradeoffs. Finally, do these willingness-to-pay and willingness-to-accept values vary with the underlying interests at stake? To investigate these questions, we conducted an experiment with a broadly representative sample of the American public.

#### 1. *Describing the Study*

In this empirical legal study, we presented members of the American public with vignettes that involved legal disputes. Participants were presented with three different kinds of disputes: child custody, employment, and apartment rental disputes.

In the child custody dispute, members of the public were placed in the role of a spouse, married for over ten years, worked full-time, and cared equally with their partner for two children. Over time, when conflicts began to escalate within the marriage, they attempted a trial separation. During that trial separation, they moved out of the home and into a nearby apartment but continued to spend equal time with the children. Their spouse ultimately filed for divorce and sought primary physical custody of the children. While they agreed on the divorce, they wished to challenge their spouse's position on custody.

In the employment dispute, participants were placed in the role of an employee who worked for a company for many years. One day, they began working with a coworker and noticed that the coworker stole several hundred dollars from a cash drawer. They confronted their coworker about it and demanded that their coworker return the funds, but they did not bring his conduct to the attention of their supervisor. About one month later, with little notice or explanation, they were fired. The only reason given was that they behaved inappro-

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<sup>101</sup> See Tetlock, *supra* note 76, at 458–59.

<sup>102</sup> See Tetlock et al., *supra* note 33, at 855–60; Tetlock, *supra* note 76, at 458–59.

priately. They decided to challenge the decision by filing a grievance with the company's human resources department, which has given them a chance to appeal the decision.

Last, in the apartment rental dispute, members of the public were placed in the position of a renter who signed a two-year apartment lease. One of the provisions of the lease restricted them from having overnight guests. At the time of signing, they did not think much of the provision and believed that they would be able to follow it. However, their mother became desperately ill and needed someone to care for her. They volunteered to allow her to come and stay at their apartment until she returned to full health. They had forgotten about the provision of the lease, but a neighbor became aware of their mother's stay and told their landlord. They then received an eviction notice for violating the lease but decided to challenge the eviction by bringing a complaint to the local landlord-tenant official.

To conduct this experiment, a nationally representative sample of the American public was recruited, using Amazon Mechanical Turk.<sup>103</sup> Amazon Mechanical Turk is widely employed in the behavioral and social sciences as a platform to recruit nationally representative samples of online participants.<sup>104</sup> The experiment was a 2 x 4 between-subject design.<sup>105</sup> Each participant was randomly assigned into one condition where they, in turn, reviewed all three vignettes consistent with that condition. Using Qualtrics, the 400 online participants<sup>106</sup> were assigned to one of the eight conditions depicted in Table 1.

The first factor manipulated whether participants began with fair process versus unfair process. To manipulate whether participants began with fair process or not, we drew on concepts theorized in the literature to affect perceptions of procedural justice, mainly whether participants were provided a voice and opportunity to be heard, a neutral and trustworthy decisionmaker, and treated

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<sup>103</sup> The website can be accessed at <http://www.mturk.com/mturk/welcome>.

<sup>104</sup> See generally Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411, 411–19 (2010); see also Krista Casler et al., *Separate but Equal? A Comparison of Participants and Data Gathered via Amazon's MTurk, Social Media, and Face-to-Face Behavioral Testing*, 29 COMPUTERS HUM. BEHAV. 2156, 2156–60 (2013); Rick M. Gardner et al., *Using Amazon's Mechanical Turk Website to Measure Accuracy of Body Size Estimation and Body Dissatisfaction*, 9 BODY IMAGE 532, 532–34 (2012); John J. Horton et al., *The Online Laboratory: Conducting Experiments in a Real Labor Market*, 14 EXPERIMENTAL ECON. 399, 401–06 (2011); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RES. METHODS 1, 1–23 (2011).

<sup>105</sup> For literature discussing between-subject designs, see SHERRI L. JACKSON, RESEARCH METHODS AND STATISTICS A CRITICAL THINKING APPROACH 152–62 (2003); S. Alexander Haslam & Craig McGarty, *Experimental Design and Causality in Social Psychological Research*, in THE SAGE HANDBOOK OF METHODS IN SOCIAL PSYCHOLOGY 237, 245 (Carol Sansone et al. eds., 2004); Eliot R. Smith, *Research Design*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 27 (Harry T. Reis & Charles M. Judd eds., 2000).

<sup>106</sup> Demographic information about the sample is provided in Appendix 1, in the online supplement to this article at <http://scholars.law.unlv.edu/nlj/vol15/iss2/18/>.

TABLE 1: 2 X 4 BETWEEN-SUBJECT DESIGN

		Factor A: WTP vs. WTA	
		<i>WTP: Began with Unfair Process, Required to Pay Fee to Upgrade</i>	<i>WTA: Began with Fair Process, Receives Payment for Downgrade</i>
Factor B: Size of Fee or Payment Suggested	Small	Asked Max WTP to Upgrade to Fair Process & Prompt Suggested Small Fee	Asked Min WTA to Downgrade to Unfair Process & Prompt Suggested Small Payment
	Medium	Asked Max WTP to Upgrade to Fair Process & Prompt Suggested Medium Fee	Asked Min WTA to Downgrade to Unfair Process & Prompt Suggested Medium Payment
	Large	Asked Max WTP to Upgrade to Fair Process & Prompt Suggested Large Fee	Asked Min WTA to Downgrade to Unfair Process & Prompt Suggested Large Payment
	Unspecified	Asked Max WTP to Upgrade to Fair Process	Asked Min WTA to Downgrade to Unfair Process

with dignity and respect.<sup>107</sup> In the first level of this factor, participants began with unfair process and were then asked their willingness to pay to upgrade to a fair process with these features. That is, participants started in a condition that lacked procedural justice and were asked their maximum willingness to pay to upgrade to a condition in which procedural justice was present. In the second level of this factor, participants began with fair process and were asked their minimum willingness to accept to downgrade to unfair process. Here, participants began in a condition in which procedural justice was present, and then they were asked the minimum they would be willing to accept trade down to unfair procedures lacking procedural justice.

In further detail, manipulation of this first factor began participants with a default procedure (Procedure A) that either withheld or afforded participants procedural justice. In the willingness-to-pay (“WTP”) condition for the child custody dispute vignette, for example, Procedure A withheld procedural justice from participants:

The court will allow you to appear before a judge who will not allow you to explain why you should be awarded custody. The judge will be neither polite nor respectful in response to your complaint. The judge will not use objective criteria when deciding how to award custody and will be biased when making a decision. The judge will be untrustworthy.

Participants were informed that Procedure A was the default option provided to them at no cost. Participants were then ultimately asked about any prefer-

<sup>107</sup> For the discussion of procedural justice, see *supra* Part I.A.

ence for, and their maximum willingness to pay for, Procedure B, described as follows:

The court will allow you to appear before a judge who will allow you to explain why you should be awarded custody. The judge will be polite and respectful during the hearing. The judge will use objective criteria in deciding how to award custody and will be unbiased when making a decision. Procedure B will require that you pay a [small/moderate/large/] fee.

In contrast, in the WTA condition for the child custody dispute vignette, participants began with the following default procedure:

The court will allow you to appear before a judge who will allow you to explain why you should be awarded custody. The judge will be polite and respectful during the hearing. The judge will use objective criteria in deciding how to award custody and will be unbiased when making a decision. The judge will be trustworthy. Procedure A is the default option and is provided to you at no cost.

Participants were then asked about any preference for, and their minimum willingness to accept payment for, Procedure B:

The court will allow you to appear before a judge who will not allow you to explain why you should be awarded custody. The judge will be neither polite nor respectful in response to your complaint. The judge will not use objective criteria when deciding how to award custody and will be biased when making a decision. The judge will be untrustworthy. If you select Procedure B, the court will pay you a [small/moderate/large/] fee.

As shown above, the second factor was a subtle manipulation of the suggested size of the fee to be paid or payment to be received. In the WTP condition, the prompt in the last line of Procedure B suggested that participants would be required to pay a small, medium, or large fee for Procedure B, or left unspecified the nature of that fee. Conversely, in the WTA condition, the prompt in the last line describing Procedure B suggested that participants would receive a small, moderate, or large payment, or left unspecified the nature of that payment.

## 2. *Forced-Choice Paradigm*

The first dependent variable of interest was the public's procedural preference. To measure these preferences, we harnessed a forced-choice paradigm. We asked participants to choose one of the two procedural options presented, either Procedure A or Procedure B. In the WTP condition, Procedure A was the default and entailed unfair process, whereas Procedure B entailed fair process. In the WTA condition, Procedure A was the default and entailed fair process, whereas Procedure B entailed unfair process.<sup>108</sup>

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<sup>108</sup> For another excellent study of procedural justice that conducts a forced-choice paradigm between voice and cost, see Avital Mentovich et al., *My Life for a Voice: The Influence of Voice on Health-Care Decisions*, 27 SOC. JUST. RES. 99 (2014).

### 3. *Willingness-to-Pay and Willingness-to-Accept Framework*

The primary dependent variable of interest was the public's willingness-to-pay ("WTP") and willingness-to-accept ("WTA"). This dependent variable—WTP and WTA—is widely used in related fields of social science inquiry. For example, these measures are harnessed within the field of behavioral economics to examine prospect theory and endowment effects.<sup>109</sup> Moreover, these measures have been used within the fields of social and moral psychology to examine the existence of taboo tradeoffs and tensions between sacred and secular values. This literature suggests that when WTP is roughly equivalent to WTA, there is no endowment effect—the allocation of the initial thing, be it a good, property, value, or process, does not affect whether someone is willing to part with it at a higher rate. When WTA value is significantly above WTP, however, an endowment effect has emerged. Classically, the endowment effect has ranged within a band of WTA two to five times greater than WTP.

## B. *Results*

### 1. *Forced-Choice Paradigm*

The forced-choice paradigm investigated the following questions: First, are people willing to upgrade from unfair to fair procedures, even when required to pay a small, moderate, or large fee? That is, when forced to do so, are people willing to purchase fair procedures? Second, are people willing to accept payments to downgrade from fair to unfair procedures, such as when offered a small, moderate, or large payment? The latter question, put bluntly, investigates whether people are willing to sell and exchange the procedural-justice guarantees conferred to them.

Results of the analysis are presented in Table 2 and Figure 1 below:

TABLE 2 - PERCENTAGES OF THE PUBLIC WHO CHOOSE  
FAIR PROCESS ACROSS ALL DISPUTES

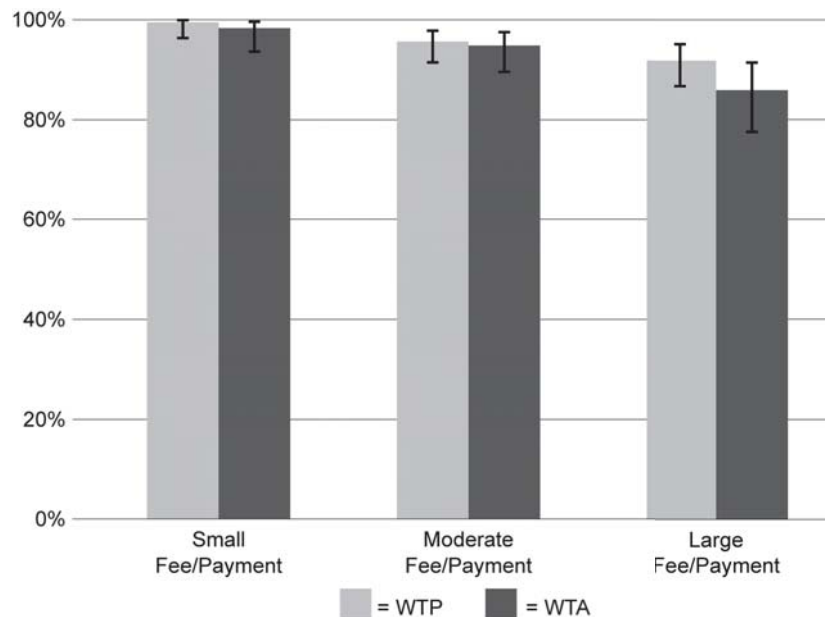
	Small Fee / Payment	Moderate Fee / Payment	Large Fee / Payment
WTP Condition; Default = Unfair Process	99.5% (CI = 96.3–99.9)	95.6% (CI = 91.4–97.8)	91.8% (CI = 86.7–95.1)
WTA Condition; Default = Fair Process	98.3% (CI = 93.6–99.6)	94.8% (CI = 89.5–97.5)	85.9% (CI = 77.5–91.4)

Turning first to the WTP condition, the public began with unfair process and was required to pay a fee to upgrade from unfair to fair process. Here, overwhelmingly, the public was willing to pay to upgrade to fair procedures

<sup>109</sup> See generally John K. Horowitz & Kenneth E. McConnell, *A Review of WTA/WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 426 (2002); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990). For sources cited in the discussion of the endowment effect and prospect theory, see *infra* Part II.C.

across each of the three scenarios. On average, 97.3 percent (CI = 94.5–98.6 percent) of the public was willing to pay for procedural justice across each of the three scenarios (respectively, small fee = 99.47 percent, moderate fee = 95.57 percent, and large fee = 91.8 percent). In the WTP condition, the public began with a default of unfair process but ultimately preferred fair process and was willing to pay small, moderate, and large fees to enhance procedural justice.

FIGURE 1: THE PUBLIC'S ROBUST PREFERENCE FOR PROCEDURAL JUSTICE



In marked contrast, in the WTA condition, the public began with a default of fair process and was approached with the prospect of a payment to downgrade to unfair process. That is, the public was asked, in effect, to sell the procedural justice initially granted to them. Overwhelmingly, the public rejected the exchange across all three scenarios. On average, 94.9 percent (CI = 91.4–97.0 percent) of the public rejected the payment and remained with fair process across each of the three scenarios<sup>110</sup> (respective, small payment = 98.3 percent, medium payment = 94.8 percent, and large payment = 85.9 percent). In the WTA condition, the public began with a default of fair process and was unwilling to part with fair process irrespective of the size of the fee signaled by the prompt; the public was unwilling to exchange procedural justice for money.

<sup>110</sup> Results of the forced-choice paradigm for each scenario are presented in Appendix 2, in the online supplement to this article at <http://scholars.law.unlv.edu/nlj/vol15/iss2/18/>. See *supra* Part II.D.



After participants selected their procedure, we allowed them to explain their decisions in free-entry responses. Across these disputes, most members of the public explained that they would be willing to pay to ensure that they receive procedural justice. For example, in the employment dispute, a participant explained that she chose procedural justice because, *“My job is very important to me. I want someone to evaluate the decision fairly and without bias. Having someone evaluate my case who is trustworthy and willing to hear my side is critical.”* Another stated that she wanted *“the HR department to be fair and honest. I want to be able to explain my side. It is better to pay to receive justice, than to experience injustice for free.”* In the child-custody dispute, one participant stated, *“Even though it’s going to be more expensive, I need to know that the person who is deciding a significant issue in my life will treat me and my case with dignity and serve my family with the time and care that we deserve.”* Another indicated her anger over having to pay for basic justice but stated, *“Even though I am distressed about having to pay a large fee, I feel it is worth it in order to get a just and fair judge who will listen to my case objectively and give me a shot at custody of my children. It’s too important a decision to risk in the hands of a judge who would not be objective.”*

In contrast, many participants expressed anger at the proposal of monetizing and selling fair procedural justice. For example, in the employment scenario, a participant stated, *“I think I deserve the opportunity to explain myself. Money seems to have been the issue in the first place and I will not allow it to continue the problem. Money is not worth my self-image and the value of my character. I know I have done little to nothing wrong and no amount of money will allow me to change that opinion.”* Another stated, *“I would rather be heard than paid to be mistreated.”* In the child custody dispute, a participant stated, *“I want things to be fair, no amount of money would make me want to take the risk I could lose custody of my kids because I took a pay off instead of asking for the fairest hearing.”* Another stated, *“No amount of money would make it okay for me not have a chance to explain why I should have custody of the children.”*

## 2. Willingness-to-Pay and Willingness-to-Accept Measures

Moreover, the WTP-WTA measures investigated the following questions: First, if the public is willing to pay to upgrade from unfair to fair procedures, what is the public’s maximum willingness to pay for fair procedures? Second, if the public is willing to sell fair procedures, and to thereby downgrade from fair to unfair procedures, what is the public’s minimum willingness to accept? Finally, do these WTP-WTA values vary depending on the underlying interests at stake?

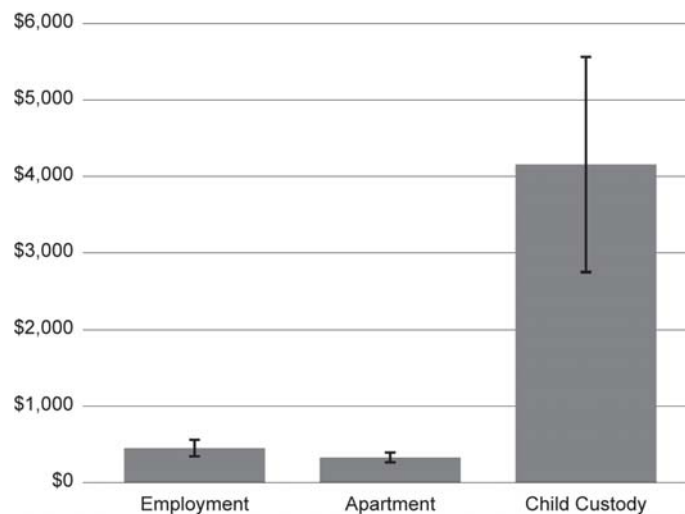
We collapsed across conditions on this factor to create composite means for the maximum willingness-to-pay and minimum willingness-to-accept con-

ditions.<sup>111</sup> The composite means for each of the scenarios are presented below. We first discuss the WTP condition, then the WTA condition, and last the full range of the data.

*a. Maximum Willingness-to-Pay Procedural Justice*

In the WTP condition, participants began with a default of unfair process and were ultimately asked the maximum they would be willing to pay to upgrade to fair process. Figure 2 displays the composite means for WTP for each of the three vignettes. The mean willingness to pay to upgrade to fair process across all vignettes was \$1,646 (CI = \$1,159–\$2,133). Drilling down to each scenario, the average willingness to pay to upgrade to fair procedures in the apartment rental dispute was \$329 (CI = \$266–\$393) and in the employment dispute was \$451 (CI = \$343–\$560), whereas the average WTP in the child custody dispute was \$4,157 (CI = \$2,751–\$5,563).

FIGURE 2: WILLINGNESS-TO-PAY PROCEDURAL JUSTICE (IN DOLLARS)



<sup>111</sup> See Appendix 3 in the online supplement to this article at <http://scholars.law.unlv.edu/nlj/vol15/iss2/18/>. Given that the monetary WTP/WTA values were highly skewed, we first conducted a log transformation of the monetary values to perform statistical analyses, see BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 81, 308 (Allyn & Bacon eds., 2011). We then observed in the WTP conditions, but not the WTA conditions, a small effect relating to the factor that manipulated the subtle prompt suggesting the size of payment, Factor A ( $F(2,176) = 6.1, p = 0.003$ ) and the interaction of Factor A with Scenario ( $F(4,352) = 2.7, p = 0.031$ ). Even so, the effect of the kind of Scenario (*i.e.*, apartment rental, employment, versus child custody dispute) was vastly larger ( $F(2,352) = 229.11, p < 0.001$ ). Therefore, for purposes of the WTP analyses presented below, see *infra* note 99, Factor A and its interaction with Scenario were included as covariates in the linear-mixed-effects model.

We performed a repeated-measure ANOVA to examine whether the different underlying values at stake—child custody, employment rehiring, or apartment rental—affected the public’s willingness-to-pay for fair process.<sup>112</sup> As starkly illustrated, people were willing to pay a great deal more in the child custody dispute than in the apartment rental or employment condition.

Importantly, in the WTP condition, the vast majority of participants (80 percent) were willing to pay for fair process in all three of the scenarios (that is, 80 percent were willing to pay for fair process in three of three scenarios). Even so, a fraction (12.8 percent) of participants rejected the very idea of paying for fair process in at least one of the three scenarios. These participants rejected our instruction to designate the maximum they would pay for fair process. In their free-entry written responses at the end of our survey, these participants expressed that fair process was a human right, one that they should not be required to pay for.

*b. Minimum Willingness-to-Accept Procedural Injustice*

In the WTA condition, participants began with fair process as the default and were asked the minimum that they would be willing to accept to sell fair process and downgrade to unfair process. Figure 3 displays the composite WTA means for each of the three vignettes. While the same pattern emerges as in Figure 2, the scales of the graphs presented for WTP and WTA differ markedly, a matter to which we will return. The mean willingness to accept to descend from procedural justice to procedural injustice across all vignettes was \$487,109 (CI = \$331,023–\$643,196). Examining each scenario individually, the average willingness to accept to downgrade to procedural injustice in the apartment rental was \$98,836 (CI = \$26,041–\$171,633); while the average WTA for the employment dispute was \$160,806 (CI = \$25,173–\$296,441); whereas the average WTA in the child custody dispute was \$1,201,685 (CI = \$778,648–\$1,624,722).

Here again, we performed a repeated-measure ANOVA,<sup>113</sup> to examine whether the different underlying values at stake affected the American public’s

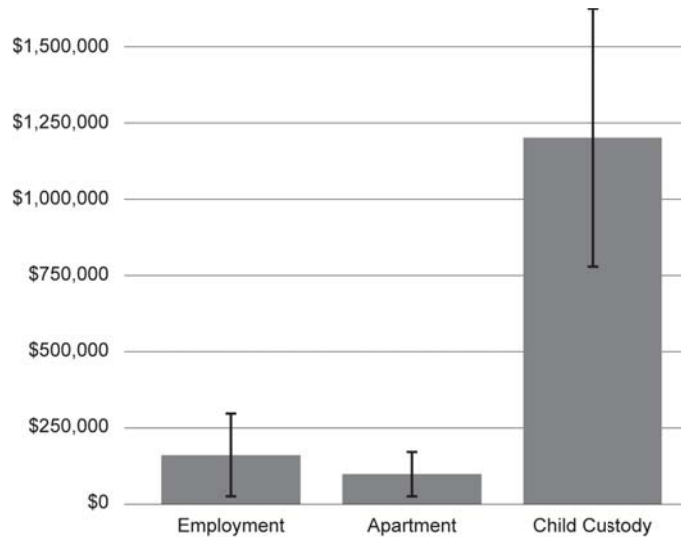
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<sup>112</sup> A linear-mixed-effects model was fit in SPSS with Scenario, Factor A, and their interaction as fixed effects and participant as a random effect. See generally BRADY T. WEST ET AL., LINEAR MIXED MODELS: A PRACTICAL GUIDE USING STATISTICAL SOFTWARE (2006). There were significant differences in WTP between scenarios ( $F(2,352) = 229.1, p < 0.001$ ). Specifically, the amount participants were WTP in the child custody scenario was significantly greater than either the employment ( $t(352) = 17.8, p < 0.001$ ) or apartment scenarios ( $t(352) = 19.2, p < 0.001$ ). There was no significant difference in the amount participants were WTP between the apartment and employment scenarios ( $t(352) = 1.4, p = 0.411$ ). As we discuss *infra*, this supports the theory that WTP-WTA values vary depending on context and the human interests at stake.

<sup>113</sup> A linear-mixed-effects model was fit in SPSS with Scenario as a fixed effect and participant as a random effect. There were significant differences in WTA between Scenarios ( $F(2,234) = 97.8, p < 0.001$ ). Specifically, the amount participants were WTA in the child custody dispute scenario was significantly greater than either the employment ( $t(234) = 9.3,$

minimum willingness to accept. In the child custody dispute, the minimum that people were willing to accept to sell fair process, and to thereby descend from procedural justice to injustice, eclipsed the WTA for the other scenarios.

FIGURE 3: WILLINGNESS-TO-ACCEPT PROCEDURAL INJUSTICE (IN DOLLARS)



Of note, while 60 percent of participants complied with our instruction to list their minimum willingness-to-accept value across all three scenarios, approximately 40 percent of participants rejected this instruction and refused to list a minimum willingness-to-accept value to downgrade to unfair process in at least one of three scenarios—primarily the child custody scenario—or they listed an astronomical sum, eclipsing hundreds of millions of dollars.<sup>114</sup> That is, many participants were unwilling to sell procedural justice and to accept, in essence, *any amount of money* to downgrade to procedural injustice. In free-entry written responses to our study, these participants explained that they felt selling procedural justice was immoral, that the experiment had asked them to engage in a forbidden exchange. In the employment dispute, for example, a participant stated, Procedure A “*is fair and lets you air what you have to and they listen to you. Procedure B is biased and unfair . . . No amount of money can replace an unbiased hearing. No matter what the outcome is.*” In the child custody dispute,

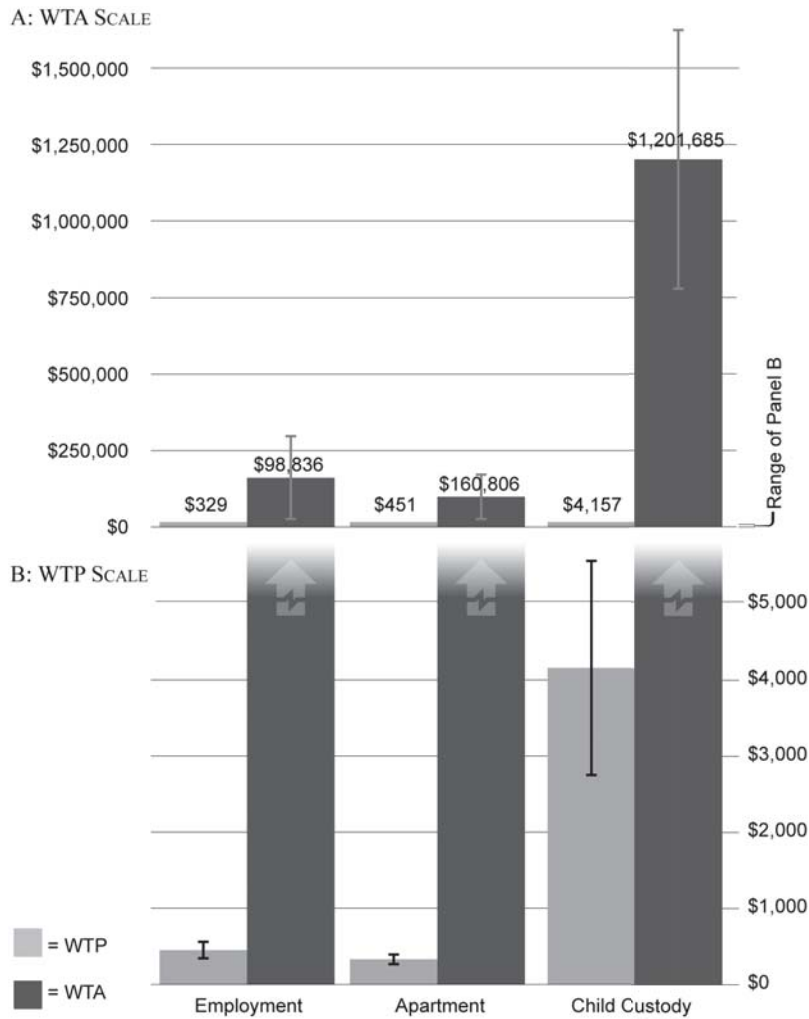
$p < 0.001$ ) or apartment scenarios ( $t(234) = 13.6$ ,  $p < 0.001$ ). Participants’ WTA was greater in the employment scenario than in the apartment scenario ( $t(234) = 4.3$ ,  $p < 0.001$ ).

<sup>114</sup> For example, these participants listed a minimum willingness-to-accept exceeding one billion dollars. Such participants were excluded for purposes of the statistical analyses and treated like those participants who refused to monetize fair process when deriving the WTP/WTA values presented below. Several participants explained in free-entry responses why they selected such astronomical WTA values, “*I chose a huge amount of money because I feel that there is not an amount of money for me to choose Procedure B [procedural injustice] for all of the situations presented in the study.*”

a participant wrote, “Procedure A is clearly the better option. This is the fair and just option and the only reason I can think of a person rather having Procedure B is so they can gain financially and to me it is unthinkable that a person would choose to receive a payment from the court over a fair procedure in determining the custody of their children.” Another stated, “No amount of money would compare to having an unbiased judge in a situation like this. I would choose A no matter how much money I was paid.”

c. Taboo Procedural Tradeoffs in Context

FIGURE 4: TABOO PROCEDURAL TRADEOFFS IN CONTEXT



We depict the mean willingness-to-pay and willingness-to-accept values in the same graph in Figure 4. Figure 4 exhibits both the vast difference between these WTP-WTA values and the extent to which these values vary with the underlying interests at stake. The bottom panel presents the full range of WTP values on an axis that rises to \$6,000, whereas the top panel presents the full range of WTA values on an axis that rises to \$1,750,000. The top panel presents a range displaying the entire data set. As can easily be seen, the mean WTA values for all scenarios eclipse the axis presented in the bottom panel.

With regard to Figure 4, several observations are in order. First, the lay public's minimum willingness to accept to sell procedural justice, and to thereby downgrade to procedural injustice, is *exponentially* higher than the amount they would be willing to pay to upgrade the *status quo* to fair process. Indeed, when compared to the public's willingness-to-pay, the public's willingness-to-accept values are behemoth. That is, the public has great difficulty monetizing procedural justice in market-price terms and selling procedural justice. Consistent with the social-psychological literature on taboo tradeoffs and relational theory, it appears that procedural justice is a sacred/protected value in our society and culture. Members of the public were either unwilling to monetize and sell procedural fairness (again, 40 percent of participants were unwilling to do so in at least one of the three scenarios) and, if they were so willing, the WTA value exponentially escalated far beyond—eclipsed—the WTP value.

Second, the underlying interests at stake mattered a great deal. The child custody context appears to present participants with a double taboo tradeoff. By selling fair process, participants not only lose the opportunity to be heard before a neutral decisionmaker who will treat them with dignity and respect, but they may ultimately lose their children. Thus, participants felt that the conundrum asked them to monetize both procedural justice and the significance of bonds with their children.<sup>115</sup>

Third, interestingly, the standard deviations around the WTP terms were tighter than the standard deviations around the WTA terms. While members of the public appear to have a rough sense of what they would be willing to pay to enhance procedural fairness, people have great difficulty converging on an amount for which they would be willing to sell, and thereby abandon, procedural fairness. This lends support to the hypothesis of constitutive incommensurability. In this regard, several participants noted the difficulty of monetizing procedural justice: "*It was really difficult to put a price on changing options for the custody hearing, I can't really think about putting a price on something invaluable like that.*" Within our society and culture, people do not often explicitly and with self-awareness monetize and sell the basic justice bestowed to them. Therefore, the WTA value is not only much higher than the WTP value,

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<sup>115</sup> Cf. RAZ, *supra* note 71, at 346–48 (“Moreover, they will be indignant at the suggestion that such a comparison is possible. Finally, they will refuse to contemplate even the possibility of such an exchange.”).

but the standard-deviation bands are much wider, revealing that the public had difficulty converging on a monetary range thought normative.

### C. Discussion

We hypothesized that, consistent with social-psychological research on taboo tradeoffs and relational theory, while the public may be willing to purchase ever-greater levels of procedural fairness, people would be either unwilling or sharply reluctant to commodify and sell the fundamental procedural justice afforded to them.

Figure 4 reveals support for this hypothesis that this conundrum results in a taboo tradeoff and the problem of constitutive incommensurability. In Figure 1 and Table 2, the study demonstrated that most members of the public were willing to pay to enhance procedural justice—even when required to pay a small, moderate, or large fee<sup>116</sup>—though, Figure 2 revealed that the extent of the public's maximum WTP turned, in part, on the underlying value at stake. For example, participants were willing to pay greater amounts for procedural justice in the child custody dispute than in the apartment rental or employment dispute.

Second, Figure 1, Table 2, and Figure 4 reveal that, while the public is generally willing to pay for fair process, people are reluctant to sell basic protections to procedural fairness and are sharply resistant to downgrading to procedural injustice. Indeed, approximately 40 percent of participants rejected the conception of selling fairness in at least one of the three scenarios, especially in the child custody dispute. And participants who complied with our instruction to list the minimum they would be willing to accept to downgrade to unfair procedures monetized fairness at mountainously high values. As a result, the chasm between willingness-to-pay and willingness-to-accept widened to 300:1.

This 300:1 pattern is consistent with social-psychological literature on taboo tradeoffs, relational theory, and the sacred-value-protection model. This social-psychological literature theorizes that people will experience a tradeoff as forbidden when that tradeoff inappropriately extends a market-pricing scheme into a domain normatively regulated by a communal-sharing scheme. Members of the public experience procedural justice as a sacred and protected value, one which all members of our society are entitled to share equally. That is, procedural justice is normatively conceived of under a communal-sharing scheme—as a fundamental human value or end guaranteed to all members of society. As a result, asking participants to quantify, monetize, and sell the justice afforded to them pursuant to a market-pricing scheme impermissibly demanded participants to cross relational domains. The public experienced the conundrum as a taboo procedural tradeoff.

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<sup>116</sup> These findings are consistent with another study involving a forced-choice paradigm and procedural justice. See Mentovich, *supra* note 108.

To be sure, prospect theory offers an alternative explanation for the WTP-WTA differential, mainly the endowment effect.<sup>117</sup> Behavioral economists have consistently revealed endowment effects—divergences between maximum willingness-to-pay and minimum willingness-to-accept.<sup>118</sup> Studies on the endowment effect generally manipulate whether participants begin an experiment with an endowment (or not) and later require participants to sell (or purchase) that endowment. For example, seminal studies of the endowment effect manipulated whether participants began an experiment with a coffee mug (or not) and later asked participants their WTA to sell (or WTP to purchase) the coffee mug. These classic studies revealed that, because people are loss avoidant, the minimum WTA values commonly rose above the maximum WTP values. Even so, these seminal studies revealed a WTP-WTA differential of 2:1, whereas later studies revealed a differential of up to 4:1.<sup>119</sup> Given that the present study reveals a 300:1 differential, the endowment effect and loss avoidance cannot fully explain the size and magnitude of this effect.

Moreover, participants responded with moral outrage as predicted by the sacred-value-protection model. When confronted with the taboo procedural tradeoff in the child-custody dispute, a participant wrote, for example, “*I would prefer to have someone in authority actually listen and come to some logical conclusion, rather than an option where I am treated as though I might as well not even be there in the first place. I would feel very angry if I was to put my trust in a legal system that would not allow me to explain why I want custody. I would be angry if the court wasn’t respectful or used some objective criteria for their decision. I would hate to put my fate in the hands of a judge that was untrustworthy. All in all, it would be an incredibly bad decision to prefer choice B [procedural injustice] over option A [procedural justice].*” Another participant wrote, “*I would want the judge to be trustworthy and [to] treat me fairly so that I feel like I have a fair chance at gaining custody of my kids. If the judge was like Judge B [procedurally unfair] who knows what could happen? I*

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<sup>117</sup> See Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225, 225–34 (1991); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991) [hereinafter Kahneman et al., *Anomalies*]; Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342–46 (1990) [hereinafter Kahneman et al., *Experimental Tests*]; Kahneman & Tversky, *supra* note 57, at 286–88; Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989); Russell B. Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1231–42 (2003); Eldar Shafir, *Prospect Theory and Political Analysis: A Psychological Perspective*, 13 POL. PSYCHOL. 311, 311–17 (1992).

<sup>118</sup> See Lyle Brenner et al., *On the Psychology of Loss Aversion: Possession, Valence, and Reversals of the Endowment Effect*, 34 J. CONSUMER RES. 369 (2007); Eric J. Johnson et al., *Aspects of Endowment: A Query Theory of Value Construction*, 33 J. EXPERIMENTAL PSYCHOL. 461, 464–71 (2007); Kahneman et al., *Experimental Tests*, *supra* note 117.

<sup>119</sup> See Horowitz & McConnell, *supra* note 109, at 426–33; Kahneman et al., *Experimental Tests*, *supra* note 117; see also DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 168–69 (2010); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 296 (2013).



could lose my kids all together and I would feel like I had no chance and was cheated.” Another participant wrote, “[W]hat’s the point of a court hearing if you can’t explain your side of the story . . . [A] rude judge would make me feel like I wasn’t getting a fair deal just because of his attitude. Hard to be rude to someone and also truly fair to them.” Similarly, another participant wrote, “The selection is simple. Each litigant has a right to an impartial judge. Also, in the event of the case being decided in favor of my wife, I will feel less inclined to respect the decision if it is made in a harsh, unethical and biased manner. I would expect my spouse to feel the same way if the decision went against her. In addition, there is no benefit in taking Procedure B [procedural injustice] when it will only cause an already awful situation and make it even worse.” Finally, many participants felt that payment to descend from procedural fairness to procedural unfairness amounted to a taboo bribe; one participant wrote, “Procedure A [procedural justice] will allow me to explain my reasoning and have a fair chance. Procedure B [procedural injustice] is untrustworthy and seems to be just trying to buy me out for a small fee.”

### III. GENERAL DISCUSSION AND IMPLICATIONS

This empirical legal study has illuminated how the public experiences tradeoffs between procedural justice and cost. Our findings demonstrate that the American public is willing to pay to enhance procedural fairness. Yet, the public is largely unwilling to sell and exchange away the basic procedural justice bestowed to them, even when approached with small, medium, or large payments to do so. Indeed, approximately 40 percent of participants refused to monetize procedural justice in at least one of the three scenarios, primarily the child custody dispute, refusing to designate any value that they would be willing to accept to descend from procedural justice to procedural injustice.<sup>120</sup> Further, when members of the public designated minimum WTA values, these minimum WTA values far outstripped their maximum WTP values, reflecting a ratio of 300:1. Last, evidently context matters—these WTP-WTA values are not absolute or static, but rather dynamic, varying with the context and underlying interests at stake.

This striking pattern is consistent with Tetlock’s and Baron’s research on taboo tradeoffs and sacred values.<sup>121</sup> As in psychological studies that examine taboo tradeoffs, here, many members of the public experienced procedural justice as a value possessing “transcendental significance that precludes comparisons, trade-offs, or indeed any other mingling with bounded or secular val-

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<sup>120</sup> As previously discussed, *supra* note 101, we designated participants who listed a WTA value over \$100,000,000, like those who refused to monetize fair process.

<sup>121</sup> See Jonathan Baron & Joshua Greene, *Determinants of Insensitivity to Quantity in Valuation of Public Goods: Contribution, Warm Glow, Budget Constraints, Availability, and Prominence*, 2 J. EXPERIMENTAL PSYCHOL. APPLIED 107, 122–24 (1996); Fiske & Tetlock, *supra* note 34, at 258–60; McGraw & Tetlock, *supra* note 34, at 3–4; Ritov & Baron, *supra* note 34, at 79–82; Tetlock et al., *supra* note 33, at 855–56.

ues.”<sup>122</sup> When participants were presented with proposed tradeoffs involving selling procedural justice, we observed strong cognitive, affective, and behavioral reactance. The public sharply resisted selling procedural fairness and translating procedural justice into market-value terms. This pattern is also consistent with the phenomenon of constitutive incommensurability and with predictions of the SVP model. The SVP model theorizes that, when the public believes that decisionmakers have contemplated fixing dollar values to sacred values, the public will direct moral outrage at those who contemplated taboo tradeoffs,<sup>123</sup> for taboo tradeoffs undermine core assumptions central to our conceptions of self and our social relationships.<sup>124</sup>

These findings have important implications and complicate several areas of procedural regulation, including the cost-benefit-analysis test envisioned by *Mathews v. Eldridge* under the Due Process Clause, and new demands imposed on parties under newly amended Rule 1 of the Federal Rules of Civil Procedure.

#### A. *Reconceiving Procedural Regulation Under Mathews v. Eldridge*

Psychological science on taboo tradeoffs reveals the incompleteness and inadequacy of the cost-benefit model of procedural regulation conceived by *Mathews v. Eldridge* under the Due Process Clause.<sup>125</sup> The present study evidences that most members of the public experience procedural justice as sacred, an end that cannot be legitimately balanced away for money. The public experiences certain forms of cost-benefit analysis of procedural safeguards as illegitimate, particularly when this cost-benefit analysis is used to rationalize diminishing, downgrading, and denying the procedural justice furnished to them.<sup>126</sup> This human psychological phenomenon complicates rigid application of *Mathews v. Eldridge*.

In *Mathews v. Eldridge*, the Supreme Court wove into the Due Process Clause a cost-benefit standard that balances the benefit of procedural safeguards against their cost. Specifically, the *Mathews* Court called upon courts, when analyzing the sufficiency of legal safeguards under the Due Process Clause, to: first, consider the private interest affected by official action; second, consider the risk of an erroneous deprivation of that interest through the procedures used; and finally, weigh the government’s interest, including the cost that substitute procedural safeguards would entail.<sup>127</sup>

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<sup>122</sup> See Tetlock et al., *supra* note 33, at 853.

<sup>123</sup> *Id.* at 853–56.

<sup>124</sup> *Id.* at 853–54; Fiske & Tetlock, *supra* note 34, at 255–61; Tetlock, *supra* note 76, 451–61.

<sup>125</sup> See Will M. Bennis et al., *The Costs and Benefits of Calculation and Moral Rules*, 5 *PERSP. PSYCHOL. SCI.* 187 (2010).

<sup>126</sup> See *id.*

<sup>127</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Over the past several decades, *Mathews v. Eldridge*'s cost-benefit calculus has been the object of considerable ire and critique. Some have criticized *Mathews*'s cost-benefit standard as inconsistent with original jurisprudential understandings of the Fifth and Fourteenth Amendment Due Process Clauses—for balancing as an explicit mode of constitutional interpretation did not even evolve until the late 1930s.<sup>128</sup> Some have criticized the standard as unworkable given the incommensurability of values at stake—human life, health, and safety, for example, versus the direct cost of legal procedures.<sup>129</sup> Relatedly, others have contended that the Court's cost-benefit standard requires (and yet cloaks) troubling subjectivity—for judges implicitly weigh, characterize, and calculate costs and benefits highly subjectively, and costs and benefits vary in the eyes of each beholder.<sup>130</sup>

One of the finest critiques, and in my view the most decisive, was leveled long ago by Professor Jerry Mashaw who charged that the *Mathews* Court's single-minded focus on decisional accuracy neglects and conceals other humanistic concerns in the pantheon of human values and experiences.<sup>131</sup> Mashaw eloquently argued that procedural justice, including the right to be heard, matter not only because voice and the opportunity to be heard “contribute to an accurate determination, but also because a lack of personal participation causes alienation and a loss of that dignity and self respect that society properly deems independently valuable.”<sup>132</sup> Since Mashaw, others have criticized the Court's narrow focus on decisional accuracy as excluding other human values.<sup>133</sup> For example, Professor Charles Koch has reasoned that fairness

<sup>128</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948–63 (1987).

<sup>129</sup> See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1138 (1984); Sunstein, *supra* note 63, 839–53. For general a discussion of this problem in law, see Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998); Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53 (1992); Rowell, *supra* note 63.

<sup>130</sup> See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 401–22 (1981); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J. dissenting) (Balancing tests are “not a neutral, utilitarian calculus but an unanalyzed exercise of judicial will.”); see also FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 9 (2004).

[T]here is no reason to think that the right answers will emerge from the strange process of assigning dollar values to human life, human health, and nature itself, and then crunching the numbers. Indeed, in pursuing this approach, formal cost-benefit analysis often hurts more than it helps: it muddies rather than clarifies fundamental clashes about values.

*Id.*

<sup>131</sup> See Mashaw, *supra* note 5, at 39–57.

<sup>132</sup> See *id.* Kant, who famously wrote that humans as rational beings have dignity, “elevated above all price, and admits of no equivalent.” IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 52–53 (1785).

<sup>133</sup> See e.g., Cynthia Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 44 (1992). Some scholars have argued that efficiency (defined as welfare or wealth maximization) should be the primary or sole criterion in evaluating justice. See Louis Kaplow & Steven Shavell, *Fairness*

is a fundamental value—one neglected by the *Mathews* Court—as are ends such as legitimacy, dignity, and equality.<sup>134</sup> Further, one of the chief difficulties with cost-benefit analysis is the very practice of monetizing values that society regards as sacred; monetizing these values interferes with them, leading us to think of these human ends as ordinary tastes and preferences, like those that we consume in the course of our everyday lives.<sup>135</sup> In short, the underinclusive analysis in *Mathews* leaves no room for the plurality of human ends and moral intuitions beyond wealth-maximizing efficiency, including the sense that law may be unjust even if wealth maximizing.<sup>136</sup>

These findings and psychological research on taboo tradeoffs, support Mashaw's sweeping critique of the Court's Due Process cost-benefit calculus. First, the public believes that the aegis of the Constitution guarantees them fundamental fairness and procedural justice. Second, members of the public are largely unwilling to sacrifice procedural justice for money. Thus, the single-minded focus of the *Mathews* formulation on decisional accuracy and cost leaves no room to consider the public's human concern for procedural justice and dignity, and the public's psychological experience of taboo procedural tradeoffs. The public experiences procedural justice as sacred, not commensurable with the direct cost of procedures, not easily monetized, and not easily balanced away for money. Moreover, this empirical legal study revealed a wide willingness-to-pay and willingness-to-accept discrepancy. As such, any balance between procedural justice and cost will turn on whether a decisionmaker characterizes procedural justice as a minimum default guaranteed to the American public, versus a contested baseline that the public must pay for.<sup>137</sup> Lastly, by according no legal or analytical significance to the American public's experience of procedural fairness, the *Mathews* formulation leaves no room for the

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*versus Welfare*, 114 HARV. L. REV. 961 (2000). In contrast, Matthew D. Adler has offered an account of cost-benefit analysis that incorporates intuitions about and experiences of fairness. See MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* (2012).

<sup>134</sup> See Charles H. Koch, Jr., *Community of Interest in the Due Process Calculus*, 37 Hous. L. REV. 635 (2000).

<sup>135</sup> See Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 REGULATION 33, 36–40 (1981); Douglas MacLean, *Cost-Benefit Analysis and Procedural Values*, 16 ANALYSE & KRITIK 166, 171–79 (1994).

<sup>136</sup> Robin West powerfully elaborated the latter argument in her recent text. See ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 82–84 (2013) (discussing the effect on the law of narrow conceptions of justice, which, by focusing on certain evaluative criteria like efficiency and utility, neglect equally important principles such as human flourishing and well-being); see also Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1979); Mark Kelman, *Choice and Utility*, 1979 WISC. L. REV. 769 (1979); Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981); Robin L. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

<sup>137</sup> See Kelman, *supra* note 135; MacLean, *supra* note 122; Kennedy, *supra* note 130.

expressive function of law,<sup>138</sup> no door ajar for courts to express the sacred, symbolic, deeply human significance of procedural justice.<sup>139</sup>

In short, the public's experience of taboo procedural tradeoffs illuminates the incompleteness of *Mathews v. Eldridge*'s narrow cost-benefit formulation of the Due Process Clause—particularly when the state revokes procedural justice to avoid the cost of providing just safeguards. The *Mathews v. Eldridge* standard conceives of the “benefit” of fair process solely as enhancing decisional accuracy. Yet this conception grants no conceptual or analytical weight, when balancing costs and benefits, to the human dignity and fairness concerns interwoven with the public's experience of procedural justice. Troublingly, while Due Process is at its root about furnishing individuals fairness and safeguarding human dignity,<sup>140</sup> these human ends are neither quantified, nor even qualitatively considered within *Mathews v. Eldridge*'s Due Process framework.

The chasm between the *Mathews* Court's single-minded focus on decisional accuracy and a more capacious concern for human values and experiences, including human dignity, is untenable and ironic. At present, courts are prevented from considering human dignity and fairness under *Mathews v. Eldridge*'s conception of the Due Process Clause. In marked contrast, federal agencies are strongly encouraged by executive order<sup>141</sup> to “consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts” when engaging in cost-benefit analysis of regulation.<sup>142</sup> Troublingly, courts have fallen behind federal agencies as the expositors of human dignity and fairness, especially when just safeguards are at stake. Like federal agencies, courts should aspire to consider, either quantitatively or qualitatively, human dignity and fairness under the Due Process Clause when the state revokes procedural justice from the public.

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<sup>138</sup> See Sunstein, *supra* note 63, at 824.

When evaluating a legal rule, we might ask whether the rule expresses an appropriate valuation of an event, person, group, or practice. . . .

...

... When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This is a matter of importance quite apart from consequences, conventionally understood. It is customary and helpful to point to the Court's educative effect. But perhaps its expressive effect, or its expressive character, better captures what is often at stake.

*Id.*

<sup>139</sup> See Owen M. Fiss, *Reason in All its Splendor*, 56 BROOK. L. REV. 789, 792–804 (1990).

<sup>140</sup> See *supra* note 15; see generally COVER & FISS, *supra* note 1; DWORKIN, *supra* note 1; Fuller, *supra* note 1, at 372–75, 388; Hart, *supra* note 1, at 185; Resnik, *supra* note 7; Rawls, *Justice as Fairness*, *supra* note 1; Rawls, *Legal Obligation*, *supra* note 1.

<sup>141</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); see also Exec. Order No. 13,700, 80 Fed. Reg. \_\_\_ (signed Sep. 15, 2015) (“Using Behavioral Science Insights to Better Serve the American People”).

<sup>142</sup> See Sunstein, *supra* note 14; see also Bayefsky, *supra* note 14.

Thus, we concur with Professor Gary Lawson, who has concluded that the *Mathews* formulation must be re-conceptualized, as it once was,<sup>143</sup> as a framework for structuring discussions and deliberations about fairness, rather than a strict, albeit underinclusive, mathematical formula. To begin, *Mathews* should not be rigidly applied as an algorithm of costs and benefits—the seeming mathematical precision conceals and cloaks the indeterminacy and incommensurability of the human values at stake.<sup>144</sup> Further, the *Mathews* framework should be widened to *explicitly* encompass considerations of human dignity, fairness, and the public’s experience of manifest procedural injustice. One charge against the *Mathews* cost-benefit balancing is the concern that courts strike procedural tradeoffs subjectively, and that political ideology affects balancing.<sup>145</sup> In this regard, considerable psychological evidence demonstrates that decisionmakers implicitly adjust the costs and benefits of different alternatives consistent with their own anticipated affective reactions to different predicted consequences.<sup>146</sup>

Psychological science offers a means of navigating beyond both the current calculus’s troubling subjectivity and the *Mathews* Court’s neglect of the public’s experiences of procedural injustice. Not only should courts evaluate whether the public experiences procedural injustice, but courts should harness the best empirical and experimental science available to reveal how the public experiences different civil processes proposed. Courts and procedural regulators should allow parties to proffer psychological evidence on manifest procedural injustice when the minimum level of procedural safeguards is being set under the Due Process Clause for a particular class of disputes. In this way, *fairness* under the Due Process Clause can be re-conceptualized from an intuiti-

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<sup>143</sup> See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17 (1978); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 848–49 (1977); *Dixon v. Love*, 431 U.S. 105, 112–13 (1977); *Ingraham v. Wright*, 430 U.S. 651, 675 (1977). The decision later acquired the air of mathematical precision. See *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979).

<sup>144</sup> See Bennis et al., *supra* note 125; Kennedy, *supra* note 130, at 422–44; Barry Schwartz, *The Limits of Cost-Benefit Calculation: Commentary on Bennis, Medin, & Bartels* (2010), 5 PERSP. PSYCHOL. SCI. 203 (2010); cf. ACKERMAN & HEINZERLING, *supra* note 130.

To say that life, health, and nature are priceless is not to say that we should spend an infinite amount of money to protect them. Rather, it is to say that translating life, health, and nature into dollars is not a fruitful way of deciding how much protection to give them. A different way of thinking and deciding about them is required.

*Id.*

<sup>145</sup> See Christopher J. Schmidt, *Ending the Mathews v. Eldridge Balancing Test: Time for a New Due Process Test*, 38 SW. L. REV. 287, 292 (2008) (stating that legal balancing scale should not “consist of judges’ personal views, unless constitutional law is to return to the ‘locknerizing era’”); see also Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 400 (1993) (“Balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing . . .” (quoting John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975))).

<sup>146</sup> See generally Richard L. Wiener et al., *Emotion and the Law: A Framework for Inquiry*, 30 LAW & HUM. BEHAV. 231 (2006).

tive, rationalistic (yet highly subjective) concept to one closely connected empirically to the experiences of parties, claimants, and recipients of social benefits affected by state action. In this way, *fairness* and *human dignity* under the Due Process Clause may shift from benefits that were once discounted and disregarded to benefits that are *appreciated, validated, and verified*.<sup>147</sup>

Psychological science can reveal whether the class of claimants most affected by procedural deprivations experiences those procedural deprivations as manifestly unjust. In this context, the public's experience of manifest procedural injustice should be deemed of the utmost significance when resolving proposed tradeoffs between fairness and cost. When psychological science demonstrates that the public experiences injustice, a new Procedural Due Process test must grant these experiences of procedural injustice *legal* significance, connecting the empirical evidence, *analytically* to decisionmaking under the Due Process Clause.

In granting *analytical* and *legal* significance to the benefits of procedural justice, fairness, and human dignity, there are at least three paths forward.<sup>148</sup> To begin, when a claimant challenges the constitutionality of particular procedural safeguards, rather than conducting a strict cost-benefit analysis *per se*, courts may conduct a break-even analysis, as Cass Sunstein has elsewhere described.<sup>149</sup> Federal agencies conduct break-even analysis when the benefits of regulatory action are difficult to monetize.<sup>150</sup> While the direct cost of substitute procedural safeguards can be readily appraised and valued, procedural justice and human dignity are exceedingly difficult to monetize. When conducting a break-even analysis, the crucial question would be: What would the benefits of the substitute procedural safeguards have to be in order to justify the costs? Under the break-even analysis, courts should consider the number of similarly-situated individuals affected by state action and capaciously consider the benefits of procedural justice, fairness, and human dignity to these members of the public. Secondly, when the state seeks to descend from procedurally just to procedurally unjust safeguards to save direct costs, the *Mathews v. Eldridge* cost-benefit formulation could perhaps be retained by expanding the conception of the "costs" of procedural injustice. In this scenario, given the deregulatory nature of state action, the "benefit" would be avoiding the cost or expense of

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<sup>147</sup> William James described this pragmatic way of discerning the truth of a concept as follows "The moment pragmatism asks this question, it sees the answer: *True ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those that we cannot.*" JAMES, *supra* note 2, at 138. Fairness, like other concepts, can be put to the empirical test by drawing on procedural justice and social psychological methods.

<sup>148</sup> We offer these paths as plausible avenues to the destination. We leave for another day how one might begin to evaluate and select between them. For a discussion of similar proposals in the administrative agency context, see the following excellent student note. See Bayefsky, *supra* note 14.

<sup>149</sup> See generally Sunstein, *supra* note 14; see also CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE 65–84 (2014).

<sup>150</sup> See *supra* Part II.B.2.c.

just procedures, while the “cost” would be the harms flowing from procedural injustice. If courts absolutely must monetize the costs of injustice, courts should draw on WTA values, rather than WTP values, to fully capture the breadth of psychological and societal harms and costs. Indeed, in this scenario, WTA values are more normatively and morally defensible than WTP values—all humans are endowed with human dignity.<sup>151</sup> The relevant question would be: Do the proposed cost savings exceed the willingness-to-accept values of the population asked to descend from procedural justice to injustice? Last and perhaps best, rather than retaining the *Mathews v. Eldridge* cost-benefit standard, when the state’s procedural safeguards are so deficient that the public experiences manifest procedural injustice, this manifest injustice should be granted legal significance by invoking a lexical,<sup>152</sup> threshold rule that diminishes other considerations.<sup>153</sup> Under this approach, when the population affected experiences manifest injustice, the process applied should be presumed deficient and unconstitutional under the Due Process Clause.

In the decades since the *Mathews* Court elaborated on the cost-benefit approach under the Due Process Clause, experimental psychologists have developed the scientific means to measure and report the public’s experience of procedural injustice,<sup>154</sup> rendering the form of introspection conducted under the

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<sup>151</sup> See KANT, *supra* note 132 (observing that human beings are endowed with dignity, a value that cannot be bought or replaced). Theories of justice and human dignity have been explored from the beginning of human civilization to the present day. See generally PLATO, THE REPUBLIC “Books I-V” (380 BCE); ARISTOTLE, NICHOMACHEAN ETHICS (350 BCE); CICERO, DE LEGIBUS (42 BCE); THOMAS AQUINAS, SUMMA THEOLOGICA (1274), DAVID HUME, A TREATISE OF HUMAN NATURE (1739); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (1788); JOHN RAWLS, A THEORY OF JUSTICE (1971); ROBERT A. NOZICK, ANARCHY, STATE AND UTOPIA (1974); SUSAN M. OKIN, JUSTICE, GENDER AND THE FAMILY (1989); MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1997); AMARTYA K. SEN, THE IDEA OF JUSTICE (2009); MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011).

<sup>152</sup> John Rawls describes a lexical rule as one that requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception.

RAWLS, *supra* note 72, at 43. In this way, one might designate the public’s experience of procedural injustice as a lexical rule, meaning the Court would move on to further inquiry only if the public does not experience manifest procedural injustice.

<sup>153</sup> See JOHN STUART MILL, UTILITARIANISM 88–96 (1864).

Is, then, the difference between the Just and the Expedient a merely imaginary distinction? Have mankind been under a delusion in thinking that justice is a more sacred thing than policy . . . ? By no means. . . . [A]nd no one of those who profess the most sublime contempt for the consequences of actions as an element in their morality, attaches more importance to the distinction than I do. . . . Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class.

*Id.* (emphasis added).

<sup>154</sup> For an outstanding recent example of such an empirical legal study, see Shestowsky, *supra* note 56. For additional examples, see Donna Shestowsky & Jeanne Brett, *Disputants’*



*Mathews* formulation inexcusable. For example, the National Center for State Courts (NCSC) has made available excellent tools that measure the public's experiences of access and fairness, tools already widely in use.<sup>155</sup> Similar instruments may be adapted for considering not only experiences with court procedures, but the public's experience with the safeguards afforded to it under the Due Process Clause. As Judge Burke, one of the leading proponents of procedural justice reform, has aptly said, "For courts to build public trust and enhance the legitimacy of judicial decision making, there must be a willingness to commit to measuring procedural fairness."<sup>156</sup>

As this empirical legal study suggests, the public has marked difficulty trading procedural justice against cost, particularly when procedural tradeoffs dilute procedural fairness. Therefore, when *Mathews v. Eldridge* is harnessed to justify diminishing procedural safeguards, the public will likely perceive that downgrade as a taboo procedural tradeoff. In turn, the public may respond with moral outrage. Unfortunately, courts and procedural regulators that strike taboo procedural tradeoffs may attempt to avoid public outrage by concealing their actions from public scrutiny. Psychological literature demonstrates that, when the public believes that decisionmakers have struck a forbidden tradeoff, the public will likely respond with harsh dispositional attributions and anger. Decisionmakers may, therefore, attempt to conceal or obfuscate forbidden procedural tradeoffs. Decisionmakers may, for example, attempt to increase the opaqueness of cost-benefit analysis to conceal tradeoffs from public view. Ironically, by omitting explicit consideration of procedural fairness, the *Mathews* formula itself conceals taboo procedural tradeoffs from the public. Courts and procedural regulators should instead acknowledge the public's confusion, anger, and angst that naturally, and sensibly, follow when the public learns of decisions that involve trading procedural justice against cost. The public's reac-

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*Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN L. REV. 63, 74 n.46 (2008) (employing a longitudinal design to compare the ex ante and ex post evaluations of disputants involved in legal procedures and concluding that just one past study examined disputants' ex ante evaluations); Lamont E. Stallworth & Linda K. Stroh, *Who Is Seeking to Use ADR? Why Do They Choose to Do So?*, DISP. RESOL. J., Jan.-Mar. 1996, at 30, 33-35 (using data from disputants with pending disputes to explore ex ante attitudes about procedures); see also E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation and Arbitration*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167 (1993).

<sup>155</sup> See *CourTools*, NAT'L CENTER FOR ST. CTS., <http://www.courtools.org> (last visited Apr. 29, 2015). As well, Nancy Welsh, Donna Stienstra, and Bobbi McAdoo have designed an excellent survey tool for settlement sessions, which could in theory be tailored for the Procedural Due Process context. See Nancy Welsh et al., *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION Appendix, chp. 4 (Tania Sourdin & Archie Zariski eds., 2013).

<sup>156</sup> See Kevin S. Burke, *A Vision for Enhancing Public Confidence in the Judiciary*, 95 JUDICATURE 251, 253 (2012).

tions should not be derided as mere self-interest, bias, or resistance. Instead, we must encourage frank, open, and engaged deliberation between decisionmakers and the public, deliberation committed to crafting common solutions to our shared problems. We must encourage courts and procedural regulators to become familiar with the public's experiences of procedural injustice and how the public experiences taboo procedural tradeoffs.

*B. Exploring the Psychological Difficulties Woven Into Newly Amended Rule 1*

The phenomenon of taboo procedural tradeoffs also casts light on underappreciated psychological difficulties woven into newly amended Rule 1. Amended Rule 1 was recently approved by the Judicial Conference and the Supreme Court and has been conveyed to Congress for final review.<sup>157</sup> Whereas Rule 1 was previously directed at judges and served largely as an interpretive tool to resolve ambiguity within the Federal Rule of Civil Procedure, newly amended Rule 1 is now directed at claimants and defendants and requires them to experience and engage in procedural tradeoffs. As amended, Rule 1 will state: the rules “should be construed, administered, and *employed by . . . the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.*”<sup>158</sup>

In amending Rule 1, the drafters sought to promote “cooperation in reducing unnecessary costs in civil litigation”<sup>159</sup>—a laudable aim. Yet conferring procedural justice—a neutral and trustworthy forum where claimants are fully granted a voice and heard, a forum in which claimants are treated with the utmost dignity and respect—and reducing costs to defendants and courts are in tension. While newly amended Rule 1 requires parties to reduce unnecessary costs, claimants and defendants will doubtless disagree on whether costs expended to promote procedural fairness are *necessary*.<sup>160</sup> For example, our findings reveal that claimants will likely experience as taboo the practice of sacrificing procedural justice to save the cost borne on defendants and courts. When these competing dynamics are present, newly amended Rule 1 may compel claimants to experience and strike tradeoffs that violate normative beliefs about the value of justice. Forcing the public to engage in this cost-benefit logic may

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<sup>157</sup> See Memorandum and Letter of Transmittal, *supra* note 9.

<sup>158</sup> *Id.* at B-21 (emphasis added).

<sup>159</sup> The drafters contextualized the rule, stating: “[t]his change should be combined with continuing efforts to educate litigants and courts on the importance of cooperation in reducing unnecessary costs in civil litigation.” *Id.* at B-13. This commentary reveals an implicit connection between the efficiency rationale and cost reduction, a seemingly synonymous nature between the two. Brooke D. Coleman has recently referred to this implicit contiguity between these two concepts as the efficiency norm in civil procedure. See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 5 (2015).

<sup>160</sup> See George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1985); Don A. Moore et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37 (2010).

result in moral outrage, reducing satisfaction with federal adjudication and potentially diminishing our civil justice system's perceived legitimacy.

Further, clients and lawyers hold different perspectives about civil process.<sup>161</sup> Socio-legal scholars have theorized that lawyers and their clients comprise different legal cultures, which fundamentally shape beliefs and values about the legal process.<sup>162</sup> Insofar as courts, lawyers, and members of the public experience the tradeoffs envisioned in Rule 1 differently, these different experiences underscore epistemological tension inherent within newly amended Rule 1. Which logic-in-use should be privileged? Put differently, how one experiences monetizing procedural justice will likely turn on one's distinct legal culture.

To be sure, lawyers are gatekeepers who channel the public through our civil justice, while shaping client perceptions and behaviors.<sup>163</sup> Here, the Committee Note appears to be directed at lawyers: "Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure."<sup>164</sup> While cooperation is doubtless admirable, if by cooperation, attorneys will be tasked with explaining to claimants why they must sacrifice their client's voice to reduce the system-wide cost of litigation, this form of promoting cooperation to reduce cost is wrought with psychological difficulty. Further, courts must tread with caution in applying newly amended Rule 1 to unrepresented litigants because *pro se* litigants are even more likely to experience Rule 1 as requiring taboo procedural tradeoffs.

Newly amended Rule 1 is animated by an implicit normative behavioral theory<sup>165</sup> of how parties *should* navigate the civil justice system (procedural fairness, except when costly), which may fail as a descriptive behavioral theory of how parties *in fact* experience the civil justice system, especially when the competing ends of procedural fairness and efficiency are in tension. Federal courts must proceed with caution when applying newly amended Rule 1. Robust, rigid application of amended Rule 1 will fail the test of behavioral realism<sup>166</sup> and likely dampen the perceived legitimacy of federal adjudication.

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<sup>161</sup> See AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER & MEANING IN THE LEGAL PROCESS* 5 (1995); Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 *LAW & SOC'Y REV.* 737 (1988); see also Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 *LAW & SOC'Y REV.* 585 (1987).

<sup>162</sup> See LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* (2d ed. 1998); Lawrence M. Friedman, *Legal Culture and the Welfare State*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 13, 17 (Gunther Teubner ed., 1988).

<sup>163</sup> See SARAT & FELSTINER, *supra* note 161.

<sup>164</sup> See Memorandum, *supra* note 9, at B-13.

<sup>165</sup> See generally Krieger & Fiske, *supra* note 27.

<sup>166</sup> See *id.*

*C. Reinvigorating Civil Procedure Pedagogy*

Beyond offering insight into both courts and procedural regulators, law and psychological science research holds immense pedagogical value.<sup>167</sup> First and foremost, psychological science on social cognition, judgment and decisionmaking, emotion, attitudes and persuasion, memory, social influence, cognitive-dissonance, prejudice, stereotyping, discrimination, social justice, and procedural justice<sup>168</sup>—and the scientific method harnessed to amass these powerful psychological insights—holds the promise of improving how we teach legal subject matter, including civil procedure. Indeed, as John Dewey sagely wrote in *Experience and Education*,

[I]t is a sound educational principle that students should be introduced to scientific subject-matter and be initiated into its facts and laws through acquaintance with everyday social applications. . . . [I]t is impossible to obtain an understanding of present social forces (without which they cannot be mastered and directed) apart from an education which leads learners into knowledge of the very same facts and principles which in their final organization constitute the sciences.<sup>169</sup>

Dewey later concludes,

I see at bottom but two alternatives between which education must choose if it is not to drift aimlessly. One of them is expressed by the attempt to induce educators to return to the intellectual methods and ideals that arose centuries before scientific method was developed. . . . [I]t is so out of touch with all the conditions of modern life that I believe it is folly to seek salvation in that direction. The other alternative is systematic utilization of scientific method as the pattern and ideal of intelligent exploration and exploitation of the potentialities inherent in experience.<sup>170</sup>

In the main, we can improve legal pedagogy by weaving the mind sciences, including powerful psychological insights, into our curricula and by teaching our law students the scientific and experimental method.

From one perspective, students are exposed early on in law school to both the importance of a fair process when resolving disputes and basic fairness, as both a moral and legal necessity applied to a wide range of legal procedures.<sup>171</sup>

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<sup>167</sup> See Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365, 366 (2015) (“Psychology—the science of how people think, feel, and behave—has a great deal to teach about a range of core competencies related to working with people and making good decisions. . . . Despite the importance of interpersonal aspects of lawyering and the utility of psychology for mastering . . . the profession, law school curricula include relatively little psychology.” (footnote omitted)).

<sup>168</sup> For an outstanding and timely example on how to weave these social-psychological concepts into the legal curriculum, see JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* (2012); Sternlight & Robbennolt, *supra* note 167.

<sup>169</sup> JOHN DEWEY, *THE LATER WORKS 1925–1953*, at 53–54 (Jo Ann Boydston ed., 1988).

<sup>170</sup> *Id.* at 58.

<sup>171</sup> See WEST, *supra* note 136, at 48. Owen Fiss and Judith Resnik have harnessed moral values as a guide to their pedagogy and scholarship. See OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* (2003); *see also*

Too often, however, civil procedure scholars do not teach law students about the competing ends and tradeoffs inherent within the rules of procedure and our civil justice system.<sup>172</sup> When civil procedure scholars do, we may inadvertently normalize the form of underinclusive cost-benefit analysis articulated in *Mathews v. Eldridge*. With the sea change increase in binding consumer arbitration, we must also guard against normalizing the tradeoffs struck when procedural justice is lost upon binding arbitration clauses buried in consumer contracts.

When law students first learn about legal process, many have marked difficulty grasping cost-benefit analysis—particularly when cost-benefit analysis is used to legitimize diminishing procedural safeguards without considering the benefits of procedural justice, and even more so when cost-benefit analysis is used to justify legal process that feels manifestly unjust. This research suggests that this difficulty may be, in part, attributable to different legal cultures of knowledge: *internal* (the legal culture of lawyers and judges) and *external* (the legal culture of the population at large).<sup>173</sup> Before socialization in the legal academy, law students may experience fair process and procedural justice as sacred, of transcendental and infinite significance. Civil procedure pedagogy may socialize law students to reconceive of legal process in more instrumental, consequential, and perhaps even market-price terms. Yet, when law students enter the academy, many likely conceive of procedural justice, and other conceptions of justice, in more humanistic terms.

As teachers of civil procedure, we should recall that, when law students enter the academy, they enter from a different legal culture with a different perspective. The sacred-value-protection model suggests that different cultures will classify different values as sacred. While our internal legal culture may monetize legal procedures into secular terms,<sup>174</sup> *external* legal culture, includ-

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COVER, FISS & RESNIK, *supra* note 7; Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989).

<sup>172</sup> Professor Morrison has eloquently written about this deficiency. See Morrison, *supra* note 7. Robert Cover and Owen Fiss discussed competing aims of the civil justice system and related tradeoffs in their excellent work, which explored themes of meta-procedure. See COVER & FISS, *supra* note 1.

<sup>173</sup> See Friedman, *supra* note 162.

The legal system, in short, is a ship that sails the seas of social force. And the concept of *legal culture* is crucial to an understanding of legal development. By legal culture, we mean the ideas, attitudes, values, and beliefs that people hold about the legal system. . . . One should also distinguish between *internal* legal culture . . . and *external*.

*Id.*

<sup>174</sup> See Marc Galanter, *Notes on the Future of Social Research in Law*, in LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 25, 25–26 (Stewart Macaulay et al. eds., 1995).

Legal scholars and professionals, while accentuating various differences with one another, display a broad agreement about the nature of legal phenomena. I refer [to] adherence, usually tacit to a set of propositions which, taken together, provide a cognitive map or paradigm of legal reality. . . . The rules (authoritative normative learning) represent (reflects, expresses, embodies, refines) general (widely-shared, dominant) social preferences (values, norms, interests).

*Id.*

ing the public and fledgling law students entering the academy, hold more humanistic intuitions about procedural fairness and procedural justice.

As such, we must teach the tension and thorns associated with monetizing fair process. To be sure, the public, and many of the clients that law students will eventually serve, may experience the same difficulty that law students themselves once faced. Drawing on the best research available within the mind sciences, we should teach students about the underlying psychology and the affective processes that occur when disputants experience these tradeoffs, the difficulties that decisionmakers experience when striking taboo procedural tradeoffs, and about procedural justice.<sup>175</sup> Finally, I concur with Professor Jean R. Sternlight and Jennifer K. Robbennolt, who recently concluded that civil procedure courses would be enhanced by teaching about the “the psychology relating to perception, justice, discovery, persuasion, or negotiation in order to help students consider how to evaluate claims and defenses, how best to resolve clients’ disputes, or how to present arguments most effectively.”<sup>176</sup>

#### CONCLUSION

Having discussed the findings of this first phase of the research line, and having thereby begun to illuminate how the public perceives taboo procedural tradeoffs, we now discuss limitations and next steps.

First, we manipulated procedural justice by simultaneously varying voice and opportunity to be heard, a neutral and trustworthy decisionmaker, and being treated with dignity and respect. Nonetheless, the public may experience these distinct components of procedural justice differently. Moreover, although these concepts were simultaneously manipulated to provide an unfair procedural option, altering one of these concepts at a time, or several of these concepts together rather than all at once, may influence the public’s WTP and WTA values. Further studies will explore the possibility that fewer than all of these constructs can together form either fair process or unfair process and affect the WTP and WTA values.

Second, we conducted this program of research with members of the American lay public, which is largely comprised of one-shot litigation players, rather than repeat players.<sup>177</sup> Research, however, suggests that repeat players, such as lenders, liability insurers, and general counsel who handle numerous disputes across many different forums with many different procedures, may experience tradeoffs between procedural justice and cost in economic and bureaucratic-processing terms.<sup>178</sup> Indeed, repeat players may be willing to pay

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<sup>175</sup> See Hollander-Blumoff, *supra* note 32; Sternlight & Robbennolt, *supra* note 167, at 382.

<sup>176</sup> See Sternlight & Robbennolt, *supra* note 167, at 382.

<sup>177</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98–108 (1974).

<sup>178</sup> See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970).

more for procedural justice than one-shot players in strategically selected cases, given the cascading effect of procedures across many of the disputes they initiate or defend.<sup>179</sup> At the same time, repeat players may be willing to accept *far less* than the lay public to sell off procedural justice, as repeat players may more readily conceive of procedures in secular and economic terms. This distinction between one-shot players and repeat players warrants further empirical inquiry.

Third, this particular study used self-report measures and participants' free-written responses. While participants wrote charged emotional statements in their free-responses questions, in the future, we plan to employ more precise psycho-physiological devices to measure the angst and outrage that the public experiences. This is an additional direction of the present research study.

Finally, with regard to method, in this phase of the research, we employed experimentally-manipulated vignettes. While experiments that harness vignettes have high internal validity, these vignette studies may lack in external validity. In the future, we aim to bridge from lab studies to field studies.

In closing, while fairness is a foundational concept, debate surrounds how best to reconcile the competing ends of our civil justice system. In this article, we have drawn on psychological science and experimental methods to examine how members of the public experience tradeoffs between procedural justice and cost. Our empirical legal study revealed, first, that the public is willing to pay to upgrade from procedural unfairness to procedural fairness. The empirical legal study, however, revealed that the lay public largely rejects accepting money to downgrade from procedural justice to procedural injustice—the public is largely unwilling to sell the fundamental justice afforded to them and unwilling to accept money for procedural injustice.<sup>180</sup> While we found that willingness-to-pay and willingness-to-accept values varied with the underlying interest at stake, our study ultimately found that when members of the public designated minimum WTA values, these minimum WTA values eclipsed related maximum WTP values. In this way, we have revealed that the public experiences

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In order to process successfully vast numbers of cases, organizations tend to take on the characteristics of "bureaucracy" in the sociological sense of the term . . . . Such an organizational form produces competence and efficiency in applying general rules to particular cases, but it is not well suited to making complex and individualized decisions.

*Id.* at 237; Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, in 11 *STUDIES IN LAW, POLITICS, AND SOCIETY* 95, 95–117 (1991).

<sup>179</sup> See Welsh et al., *supra* note 155, at 68–69 ("The assessments of judges, lawyers, and other repeat players make of outcome fairness . . . are influenced more by their expectations of the outcomes they should receive than by their perceptions of procedural justice."); see also JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM* 83 (1983) (finding repeat players who made extensive use of the court-connected arbitration program appeared to care little about "qualitative aspects of the hearing process. They judge arbitration primarily on the basis of the outcomes it delivers").

<sup>180</sup> See *supra* Part II.

the psychological phenomenon of taboo procedural tradeoffs. In the main, the public will experience a taboo procedural tradeoff when the procedural justice furnished to the public descends to procedural injustice, and when this descent is rationalized as avoiding monetary costs.

As John Stuart Mill sagely observed in the final words of his magnum opus,

Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class . . . and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feeling which attaches to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands, and by the sterner character of its sanctions.<sup>181</sup>

The public experiences the secular value of money and the sacred end of justice as incommensurable. For our civil justice system to be experienced as legitimate, we must not sacrifice and exchange the procedural justice bestowed on the American public for manifest procedural injustice to save direct costs.

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<sup>181</sup> MILL, *supra* note 153, at 96.