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Procedural Justice Research and the Paucity of Trials

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Professor Deborah Hensler tells an important cautionary tale about mandatory mediation in her thoughtful and provocative contribution to this volume. In *Suppose It's Not True: Challenging Mediation Ideology*,¹ Hensler observes that courts are now requiring litigants to mediate civil cases “on the grounds that litigants prefer [mediation] to traditional litigation,”² yet there is “a long line of social psychological research on individuals’ evaluations of different dispute resolution procedures” consistent with the “idea that litigants might prefer adversarial litigation and adjudication” to mediation.³ Hensler acknowledges that “some experimental research has found that subjects prefer mediation,”⁴ but she argues that “the empirical work to date [does not] provide strong support for the notion that civil disputants prefer mediation to adversarial litigation and adjudication.”⁵

Hensler’s contention that litigants *might* prefer adversarial adjudication to other forms of dispute resolution⁶ is based on a defensible interpretation of the existing “procedural justice” research; in my view, however, the existing procedural justice research is of limited applicability to the mandatory mediation debate because it speaks primarily to litigants’ assessments of *trial*, not *litigation*. Consider, for example, the three primary studies upon which Hensler builds her argument.⁷ In the initial Thibaut and Walker study she cites, the researchers found that subjects

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1. Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. Dis. Res. 81 (2002).

2. *Id.*

3. *Id.*

4. *Id.* at 91. See Robert Peirce, Dean Pruitt & Sally Cazja, *Complainant-Respondent Differences in Procedural Choice*, 4 Intl. J. Conflict Mgmt. 199, 200-02 (1993).

5. Hensler, *supra* n. 1, at 91.

6. The early research compared litigant and observer responses to an “adversarial” process like that used in American courts and an “inquisitorial” process like that used in much of Europe. See e.g. Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. Applied Soc. Psychol. 295 (1974). An inquisitorial process is “a more cooperative model of adjudication where evidence is either developed by the decision-maker, or, in its modified form, is presented to the judge by one investigator who is not aligned with either party.” *Id.* at 296-97.

7. Hensler relies primarily on what she describes as the “first generation” of procedural justice research to construct her mandatory mediation argument. Hensler, *supra* n. 1, at 93. She believes the more recent procedural justice research speaks with less clarity on this issue. *Id.* (“The implications of more recent research focusing on *why* perceived procedural fairness matters for choices between dispute resolution procedures is more ambiguous.”) (emphasis in original).

preferred an adversarial trial to an inquisitorial trial.⁸ In a follow-up Thibaut and Walker study, the researchers evaluated subjects' ex ante assessments of negotiation, mediation (actually non-binding arbitration), a "moot", arbitration, and autocratic decision-making.⁹ And in a "real-world" study conducted by Hensler and her colleagues,¹⁰ the researchers compared litigants' ex post assessments of trial, arbitration, and judicial settlement conferences to settlement, finding that subjects rated trial and arbitration more favorably than settlement but settlement more favorably than judicial settlement conferences.¹¹ These and other procedural justice studies suggest that people like *trial* more than the mediation community would have us believe,¹² but they do not provide much insight into the way people perceive the pre-trial litigation processes likely to resolve their disputes.¹³

This, it seems to me, is the key procedural justice question for the mandatory mediation debate. In a system where a tiny fraction of cases is actually tried, what matters most is not how litigants rate mediation relative to *trial* but how they rate mediation relative to the *litigation processes that are actually likely to lead to the resolution of the dispute*. Data from federal and state courts show that litigants are likely to resolve their disputes not through trials on the merits but rather through pre-trial motions or settlement.¹⁴ In fiscal year 2000, for example, the federal district courts "terminated" 259,637 civil cases.¹⁵ Only 3,131 (or 1.2%) of these culminated in a jury verdict and 1,532 (or .6%) in a bench verdict.¹⁶ Of the 98.2 percent of cases that did not culminate in a trial verdict, most were resolved through: (1) dismissals for lack of jurisdiction, voluntary dismissals, settlements, or other dismissals

8. See Walker et al., *supra* n. 6. For Hensler's description of this study, see Hensler, *supra* n. 1, at 85-86.

9. Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. Exper. Soc. Psychol. 13, at 14-15 (1978). For Hensler's description of this study, see Hensler, *supra* n. 1, at 86-88.

10. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Society Rev. 953 (1990). For Hensler's description of this study, see Hensler, *supra* n. 1, at 88-89.

11. Lind et al., *supra* n. 10, at 965.

12. See Hensler, *supra* n. 1, at 89 (observing that litigants in the Lind study "liked trials") (emphasis in original).

13. Some of this research does compare trial to settlement, which is, of course, one common means of resolving disputes prior to trial. See e.g. Lind, *supra* n. 10; John Thibaut et al., *Procedural Justice as Fairness*, 26 Stan. L. Rev. 1271 (1974).

14. See e.g. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 632-33 ("Civil process based on the Federal Rules of Civil Procedure has largely replaced trials with motions.").

15. I obtained these data from the "Judicial Statistical Inquiry Form" maintained by Cornell Law Professors Theodore Eisenberg and Kevin Clermont. Relying on data originally collected by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-University Consortium for Political and Social Research, Eisenberg and Clermont have constructed a searchable database containing roughly five million federal civil cases terminated during the last two decades or so. See <<http://teddy.law.cornell.edu:8090/questata.htm>> (accessed Jan. 21, 2002).

16. *Id.*

(53.3%);¹⁷ (2) transfers to other courts, remands to state court, judgments on award of arbitrators, trials de novo following arbitration judgments, or other judgments (18.5%);¹⁸ (3) pretrial motions (12.8%);¹⁹ or (4) default judgments (8.2%).²⁰ These fiscal year 2000 data are consistent with federal court data from prior years²¹ as well as available state court data.²²

The purpose of this response is not to criticize the procedural justice literature for ignoring the way people experience (or anticipate experiencing) pre-trial litigation processes. Procedural justice researchers have been motivated by different questions – for example, understanding how people respond to legal authority and make fairness judgments²³ – and have generated valuable answers to these questions – for example, people make judgments about the fairness of a process independent of the outcomes they obtain.²⁴

Nonetheless, this response does identify a set of questions ripe for procedural justice research. How do litigants evaluate the processes by which disputes are typically resolved in the civil justice system? In the (as many as) thirty-five percent of cases resolved by motions to dismiss or summary judgment,²⁵ do the litigants respond as favorably to the motion process as to trial? Are their evaluations of the fairness of the process more (or less) influenced by the outcome of the motion? Do plaintiffs and defendants respond differently? Do the litigants react the same way regardless of whether the judge holds hearings on the motions? Do they rate the process more favorably when the judge issues a written opinion? How do litigants compare disposition by motion to evaluative mediation or facilitative mediation? How do they rate mediation relative to settlement? Do they like consensual

17. Coded as “othdismi” by the researchers. *Id.*

18. Coded as “other” by the researchers. *Id.*

19. Coded as “pretrmot” by the researchers. *Id.*

20. Coded as “defaultj” by the researchers. *Id.*

21. According to the Eisenberg/Clermont database, 1.9% of the federal cases resulted in a trial verdict in 1999, 2.2% in 1998, 2.4% in 1997, 2.4% in 1996, and 2.7% in 1995. *Id.* See also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 511-12 (1986) (citing an estimate by an employee of the Administrative Office of the United States Courts that “some 35 percent of all federal cases are disposed of by rulings on motions for dismissal or for summary judgment”).

22. Eisenberg and Clermont also maintain a database containing information on a sample of state trial court cases taken from forty-five of the country’s most heavily populated counties. See <<http://teddy.law.cornell.edu:8090/questtrs.htm>> (accessed January 22, 2002). Of the 29,880 cases in their sample completed in 1992, 650 (2.18%) culminated in a jury trial and 378 (1.27%) in a bench trial. *Id.* Most cases were resolved through settlements, motions, and defaults. *Id.* See also Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161, 163 (1986) (finding in an initial analysis of 1,649 randomly selected state and federal cases that only seven percent were tried).

23. See e.g. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *Handbook of Justice Research in Law* 65 (Joseph Sanders & V. Lee Hamilton eds., Kluwer Academic/Plenum Pub. 2001).

24. For Hensler’s discussion of this finding and supporting citations, see Hensler, *supra* n. 1, at 89-90.

25. See Resnik, *supra* n. 21, at 511-12.

processes such as settlement and mediation better when they are active participants, passive participants, or entirely absent? And so on.²⁶

Likewise, I do not mean to criticize Hensler's contribution to this volume. Although she is a prominent procedural justice researcher herself, she is certainly not responsible for the inattention given to the questions I have identified, and her measured conclusions about what might be inferred from the existing research are certainly appropriate. Indeed, I take Hensler's broader point to be that courts should not mandate mediation simply because they believe as a matter of faith that mediation is a "better" process than others.²⁷ Rather, courts should base their decisions, to the extent possible, on empirical evidence about the relative desirability, fairness, and legitimacy of the available dispute resolution processes. This seems quite sensible.

26. Hensler makes the intriguing and intuitively plausible suggestion that "people want neutral third parties to resolve their disputes *on the basis of the facts*." Hensler, *supra* n. 1, at 94. Assuming so, how do litigants evaluate resolutions based on dispositive motions where the facts are assumed for purposes of argument? Is this akin to the presentation of facts at trial, or is this treatment of "facts" likely to be less satisfying to litigants?

27. Nor, according to Hensler, should courts base their decisions on outcome studies that assess litigant satisfaction with mediation alone. *Id.* at 82 ("Litigant satisfaction surveys conducted after people had experienced an ADR procedure were the primary tools that courts used to assess consequences, and generally they found that litigants surveyed were more 'satisfied' than 'dissatisfied.' But knowing that litigants are 'satisfied' with mediation tells us little about preferences for mediation – litigants might be even *more* satisfied with a different procedure if it were offered to them.").