
Article

A [Relational] Theory of Procedure

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INTRODUCTION

*“Relational (n): Concerning the way in which two or more people or things are connected.”*¹

It was a dark, rainy night when Mary Churukian began her drive home following her sister’s graduation party.² When the rain momentarily subsided, a mist engulfed the intersection of Chicago Boulevard and Telegraph Road when she approached. Churukian recalled stopping at a blinking red light before attempting to cross the busy intersection.³ The next things she remembered were “the lights in the hospital.”⁴

Churukian had collided in the intersection with a vehicle driven by Clayton LaGest, a serviceman returning home from leave.⁵ Among other issues, the trial court had to decide whether Churukian was contributorily negligent with respect to the injuries she sustained from the collision.⁶ On this point, the plaintiff’s and defense’s trial strategies markedly diverged. The direct examination of Mary Churukian was holistic and focused on the general difficulty that any person would have experienced crossing the intersection under the conditions that night.⁷ The defense attorney asked more specific questions on cross-examination, probing Churukian about the specific time of the accident, the exact speed at which she had been driving, whether she

1. *Relational*, LEXICO, <https://www.lexico.com/en/definition/relational> [<https://perma.cc/N9PT-YK7F>]. The Macmillan Dictionary similarly defines relationality as “relating to the . . . connection between two or more things.” *Relational*, MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/dictionary/american/relational> [<https://perma.cc/Q88G-NV8B>].

2. *Churukian v. LaGest*, 97 N.W.2d 832, 834 (Mich. 1959) (providing background context).

3. *Id.* (recounting the appellant’s response to a question posed at trial: “I came to a stop at Telegraph road. There was a red blinker light there.”).

4. *Id.* (recounting the following exchange: “Q. What is the last you remember that night? A. Putting the car in motion and observing the lights and then the lights in the hospital.”).

5. *Id.* at 834–35.

6. *Id.* at 833 (“After the completion of plaintiff’s proofs the judge directed a verdict for defendant on the grounds of plaintiff’s contributory negligence.”).

7. *Id.* at 834 (recounting the appellant’s answer on direct examination at trial: “I thought I better look to the right again and I looked and saw some lights, it had been raining that day and it was misty outside . . . I thought I had plenty of time to get through [the intersection] . . . [i]f I stopped there might be traffic coming from the left.”).

drank any alcohol at the party, and how much she had slept the night before.⁸

The trial judge found that Churukian was contributorily negligent as a matter of law, and Churukian appealed to the Michigan Supreme Court.⁹ Although the case was a simple vehicular negligence case—and although the court was faced with a relatively straightforward issue of contributory negligence—the case spawned among the justices larger philosophical questions regarding the objectives of legal conflict resolution and the intersection of those objectives with legal procedure. The court quoted large swaths of Churukian’s direct and cross-examination and remarked on the parties’ different trial strategies. In his concurring opinion upholding the trial court’s finding of contributory negligence, Judge Smith noted diametrically opposed approaches to the same problem. On the one hand, the case demanded consideration of “factors such as visibility, the condition of the surface of the road, the speed of the . . . automobile, [and] the width of the intersection,”¹⁰ but, as Judge Smith conceded, “the ultimate question [is] a matter of human judgment, namely, whether the [defendant’s] car constitute[d] an immediate hazard to a safe crossing.”¹¹

In light of their legal positions, it is perhaps unsurprising that the defendant encouraged the tribunal to take a scientific approach to determining the plaintiff’s contributory negligence, and the plaintiff preferred an approach in which the tribunal took her perspective into account and engaged in holistic human understanding. More broadly, however, the manner in which tribunals take factual findings into account is a hotly contested policy debate among scholars of legal institutional design.¹² And depending on an individual’s point of view—whether she prioritizes the accuracy of the underlying fact finding or the holistic, relational judgments that often accompany it—she might identify one approach as superior to the other, such that she is more willing to legitimize tribunals that employ that approach.

8. *Id.* As an example, the court recounted the following question: “Now, could you give me an estimate as to how fast your car was traveling at that time in miles per hour, whether 10 miles an hour or 5 or 15?” *Id.*

9. *Id.*

10. *Id.* at 838.

11. *Id.*

12. See, e.g., Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 J. PERSONALITY & SOC. PSYCHOL. REV. 323 (1997); see also *infra* Parts I.A, II.A.

Legal institutional design involves the development of formal and informal rules, the enforcement characteristics that underlie those rules, and the behavioral norms that foster and structure repeated interactions between the public and a legal institution.¹³ The underlying goal of successful institutional design is the public's willingness to legitimize decisions rendered by legal institutions.¹⁴ This extends beyond legitimizing the substantive legal rules—and the application of those legal rules to individual factual disputes—that are embodied in a tribunal's legal decisions. It extends to the *procedural* rules that govern a tribunal's decisions, which often exert more influence than do substantive outcomes on the public's willingness to legitimize legal institutions.¹⁵

The first comprehensive theory of institutional design, vis-à-vis dispute resolution, appeared in the *California Law Review* in 1978. This groundbreaking article—titled *A Theory of Procedure* and coauthored by psychologist John Thibaut and law professor Laurens Walker—opined that establishing factual truth and providing justice to litigants are the main objectives of dispute resolution.¹⁶ From this guiding principle, they taxonomized all social disputes as falling primarily into one of two categories: cognitive conflicts, which prioritize establishing the truth of the dispute, and conflicts of interest, which prioritize providing a just allocation of resources between disputing parties.¹⁷ They also taxonomized legal procedures as either inquisitorial, which prioritizes establishing truth and vests control of the evidence in a central decision maker, or adversarial, which prioritizes justice

13. See Tom R. Tyler, *Psychology and Institutional Design*, 4 REV. L. & ECON. 801 (2008) (explaining the relationship between psychological research and the concept of institutional legitimacy); see also INKE MATHAUER & GUY CARRIN, WORLD HEALTH ORG., WORLD HEALTH REPORT (2010), BACKGROUND PAPER NO. 36: THE ROLE OF INSTITUTIONAL DESIGN AND ORGANIZATIONAL PRACTICE FOR HEALTH FINANCING PERFORMANCE AND UNIVERSAL COVERAGE, <https://www.who.int/healthsystems/topics/financing/healthreport/36Institutional.pdf> [<https://perma.cc/TCB6-XHKZ>].

14. Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1097 (2014).

15. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 2–3 (1975). For an in-depth discussion, see *infra* Part II.A.

16. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

17. *Id.* at 543–44. See also *infra* Part I.A.2 for an in-depth analysis.

and allocates substantial control over the evidence to the disputing parties.¹⁸ Although Thibaut and Walker do not overtly discuss their theory in terms of institutional legitimacy, they argue that “purely scientific” disputes—which they deem “cognitive conflicts”—should be resolved inquisitorially in the administrative arena, whereas all legal cases—which they deem “conflicts of interest”—should be resolved in trials that follow adversarial dispute resolution procedures.¹⁹

Thibaut and Walker’s influential theory of institutional design has been cited in over 100 law review articles and in several important treatises.²⁰ Yet in the four decades since they published their theory, no one has directly tested whether the public does, in fact, categorize legal cases as cognitive conflicts or conflicts of interest, whether the public believes that inquisitorial procedures prioritize the establishment of truth (and adversarial procedures prioritize justice), or whether the public believes that truth and justice are, in fact, the ultimate goals of legal dispute resolution. Moreover, advances in the field of social psychology—including social identity theory and the group-value model of intergroup dynamics²¹—suggest that dichotomizing legal disputes and legal procedures does not fully capture: (1) the public’s beliefs about the values inherent in those cases and procedures; and (2) the conditions under which the public is willing to legitimize those procedures and the legal institutions that employ them.

18. *Id.* at 555; see also FREDERICK BEUTEL, DEMOCRACY OR THE SCIENTIFIC METHOD IN LAW AND POLICY MAKING (1965) (opining on the suitability of these procedures for scientific discourse).

19. Thibaut & Walker, *supra* note 16, at 554–59.

20. A citation count in the legal search engine WestlawNext™ reveals that Thibaut and Walker’s article has been cited in 122 varied legal academic works, including articles in the *Yale Law Journal* and *Harvard Law Review*, and in treatises such as DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 2.27 (2019–2020 ed. 2019) and DEMONTHENES LORANDOS & TERENCE CAMPBELL, CROSS EXAMINING EXPERTS IN THE BEHAVIORAL SCIENCES §§ 1:10, 11:2 (2019). A citation count in the academic search engine Google Scholar™ reveals an additional fifty-four citations outside the law review literature, including citations in the prestigious *Journal of Personality and Social Psychology* and in several interdisciplinary works. See, e.g., CLYDE H. COOMBS & GEORGE S. AVRUNIN, THE STRUCTURE OF CONFLICT 235 (1988); Tyler, *supra* note 12, at 326.

21. See Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 SOC. SCI. INFO. 65 (1974); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115 (1992). For further discussion of these concepts, see *infra* Part II.B.2.

This Article fills that gap. It proposes an updated, complementary model of procedural and institutional legitimacy that focuses on the social psychological concept of relationality. In doing so, it is the first Article to test empirically the central claims of *A Theory of Procedure* and expand upon the theory in critical ways. For example, it proposes rethinking Thibaut and Walker's dichotomy of disputes and procedures and reimagining them as falling on a relationality *continuum*—such that disputes that center on factual uncertainty are lower in relationality, and disputes that primarily require fact finders to make relational comparisons (such as evaluating alleged negligent behavior against a reasonable person standard) are higher in relationality. In so doing, this Article challenges Thibaut and Walker's assertion that all legal cases, as opposed to disputes regarding scientific principles, are “conflicts of interest” that should be resolved adversarially.

This Article reports several findings from three original experiments. First, it confirms that the public views the objectives of legal dispute resolution as resolving questions of factual truth as well as procedural and distributive justice.²² Second, it demonstrates that the public does not perceive all legal cases as concerned primarily with questions of justice. Rather, the public perceives disputes low in relationality (such as “whodunit” murder cases) as far more concerned with questions of truth than of justice, and vice versa for disputes high in relationality.²³ Moreover, differences in perceived relationality extend to the *phases* of a legal trial as well; the public perceives the liability phase as primarily concerned with truth, and the punishment phase as primarily concerned with the just allocation of resources.²⁴ The second study reports that the public believes that different legal procedures prioritize different psychological values; they perceive adversarial procedures as concerned primarily with procedural justice and inquisitorial procedures as concerned with factual accuracy.²⁵ Finally, the third study suggests that an *alignment* of the dispute's purpose and the priority of the procedure that resolves it—for example, a dispute centering on factual accuracy paired with an inquisitorial procedure—results in

22. See *infra* Part III.A.

23. See *infra* Part III.A.

24. See *infra* Part III.A.

25. See *infra* Part III.B.

greater public willingness to legitimize the legal tribunal and its ultimate decision.²⁶

This Article proceeds in several parts. Part I provides an overview of the arguments in Thibaut and Walker's article, *A Theory of Procedure*. Part II provides the framework for a *relational* model of procedure and its implications for institutional legitimacy. This Part incorporates insights from social identity theory and legal psychologist Tom Tyler's group-value model to understand the circumstances under which the public is most likely to legitimize legal institutions. Part III tests Thibaut and Walker's theory—alongside the relational model of institutional legitimacy—by presenting the results from three original experiments that suggest that institutional legitimacy results from an alignment of the relational goals of the legal proceeding and the relational priorities of the procedure that resolves the dispute. Part IV explores the policy implications of these findings, their limitations, and future directions for legal institutional design.

I. "A THEORY OF PROCEDURE"

Part I of this Article provides an overview of the main arguments for legal institutional design advanced in Thibaut and Walker's article, *A Theory of Procedure*. In describing their theory, this Part discusses the historical backdrop on which the theory rests, as well as the theory's implications and limitations.

A. THIBAUT AND WALKER'S THEORY

The 1960s was a time for upheaval with respect to politics, social mores, and even public scientific discourse. In the latter part of the decade, there was growing discontent that the public discussion regarding matters of scientific inquiry and public policy was becoming increasingly politicized.²⁷ In response, several models for a "science court," which purported to reduce political interference with respect to questions of science relevant to public policy, were introduced.²⁸ These models had several forms, but they were concerned primarily with unmooring questions of

26. See *infra* Part III.C.

27. See Allan Mazur, *The Science Court: Reminiscence and Retrospective*, 4 RISK 161, 161–62 (1993).

28. See, e.g., Arthur Kantrowitz, *Controlling Technology Democratically*, 63 AM. SCI. 505 (1975) [hereinafter Kantrowitz, *Controlling Tech*]; Arthur Kantrowitz, *Proposal for an Institution for Scientific Judgment*, 156 SCI. 763 (1967) [hereinafter Kantrowitz, *Proposal*]; John Noble Wilford, *Science Considers Its Own 'Court'*, N.Y. TIMES, Feb. 29, 1976, at E8.

objective scientific fact from political biases.²⁹ Although the models varied with respect to the methods for achieving this objective, many of the proposals focused on the selection of triers with substantial expertise in the area of relevant scientific inquiry. A significant point of contention, however, was whether the “court” should be held in the political arena with quasi-administrative hearings, or in the courthouse in the form of quasi-adversarial hearings.³⁰ Although the concept of the science court, whatever its form, was met with initial enthusiasm from the legislative and executive branches, it ultimately failed to gain traction.³¹

29. See Kantrowitz, *Proposal*, *supra* note 28, at 763–64; see also Troyen A. Brennan, *Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 U. PITT. L. REV. 1, 62–71 (1989); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 908 (1981).

30. See Kantrowitz, *Controlling Tech*, *supra* note 28, at 507. For a more in-depth discussion of the “science court” debates, see Andrew W. Jurs, *Science Court: Past Proposals, Current Considerations, and a Suggested Structure*, 15 VA. J.L. & TECH. 1 (2010); Justin Sevier, *Redesigning the Science Court*, 73 MD. L. REV. 770 (2014).

31. See Wilford, *supra* note 28. For example, and as I have written in *Redesigning the Science Court*:

Kantrowitz’s proposal enjoyed political momentum in the period before the election of 1976. President Ford supported the proposal and his administration created a task force to evaluate the proposal further. This task force released a favorable interim report, made recommendations to refine the proposal, and announced its intention to convene a public hearing on the science court, in which legal and scientific policymakers could comment on the proposal more fully.

In the fall of 1976, just two months before the presidential election, the task force convened a contentious public hearing in Leesburg, Virginia. Among the various suggestions from the participants was the need for a “test case” to examine the viability of a political science court. That may have been, however, all upon which the participants agreed. Significant criticisms of the political science court emerged ranging from the philosophical—for example, doubt that objective scientific facts could really be separated from sociopolitical questions of morality, and a concern that providing “finality” to scientific disputes is anathema to the scientific method—to the practical—for example, a concern that incorporating cross-examination would increase expenses and interfere with the process of determining the “true” scientific facts. Bluntly, critics of the political science court labeled it “profoundly naive, internally inconsistent, and inherently unworkable.”

Despite the proposal’s broad-based support, as the 1976 presidential election passed and the Ford Administration gave way to President

It was against this cultural and political background that psychologist John Thibaut and law professor Laurens Walker proffered a new theory of conflict resolution. In *A Theory of Procedure*, which they published in the *California Law Review* in 1978, Thibaut and Walker advocated for the development of a political forum to evaluate questions of scientific inquiry separate from the resolution of legal disputes in the courtroom.³² Their theory differed markedly from the previous “science court” proposals of the 1960s and 1970s in an important way: it relied almost entirely on a developing body of empirical social science research applied in the context of the legal system. Perhaps most controversially—and as the title of their article suggests—they argued that the success of any program of institutional design rests not just on the substantive rules and incentives that the program creates, but also on the specifics of the *procedures* that are used to effectuate those rules and incentives.³³ So whereas the political and judicial science court proposals focused primarily on characteristics of the decision maker itself—such as the tribunal’s specialized expertise—Thibaut and Walker’s theory focused instead on the values inherent in the *process* by which a dispute is resolved.³⁴

Thibaut and Walker proffer three arguments in service of their broad theory of effective conflict resolution. They begin by “recogniz[ing] the fundamental dichotomy between the potential dispute resolution objectives of ‘truth’ and ‘justice.’”³⁵ They define the truth objective as the ability of the legal tribunal to unearth correctly the facts that underlie the dispute.³⁶ They define the justice objective as both distributive—the extent to which the

James Carter’s Administration, political winds shifted against the political “science court.” The Carter Administration was much less enthusiastic about the proposal, and the test case for the proposal never materialized. As quickly as it began, the political “science court” experiment had ended.

Sevier, *supra* note 30, at 788–89 (footnotes omitted) (first citing Allan Mazur, *The Science Court: Reminiscence & Retrospective*, 4 RISK 161, 163–65 (1993); then citing Jurs, *supra* note 30, at 12; and then citing Wilford, *supra* note 28).

32. See Thibaut & Walker, *supra* note 16.

33. *Id.* at 565–66.

34. See *id.*

35. *Id.* at 541; see also *id.* at 543 (“The theory begins with the distinction between the two conflict resolution objectives of ‘justice’ and ‘truth.’ We contend that in most instances one or the other of these objectives is dictated by the subject matter of the dispute, or more specifically by the outcome relationship that exists between the individual parties to the conflict.”).

36. *Id.* at 541–42.

outcome of the dispute is fair—and procedural, which refers to the fairness of the process used to resolve the dispute.³⁷ Thibaut and Walker implicitly argue that truth and justice are related but distinct goals, and that they may be implicated to differing degrees in different disputes.³⁸ This claim serves as the lynchpin of their theory.³⁹

1. Taxonomy of Conflicts

On this central premise, Thibaut and Walker argue that all disputes—for example, over scientific principles, civil matters, criminal matters, and administrative actions—can be classified to the degree that they are differentially focused on the objectives of truth or justice.⁴⁰ They argue that most disputes can be dichotomized as either “cognitive conflicts” or “conflicts of interest,” with a small number of disputes classified as “mixed.”⁴¹ They argue that “cognitive conflicts” are disputes that focus on truth, whereas “conflicts of interest” center on justice.⁴²

From Thibaut and Walker’s perspective, the resolution of a cognitive conflict uniformly enhances the interests and outcomes of all affected parties, whereas a contrary resolution would uniformly reduce the outcomes for all parties.⁴³ Thus, in a purely cognitive conflict, all parties seek the correct factual solution to the issue that caused the dispute. Thibaut and Walker describe scientific inquiry as “the prototype of cognitive conflict in a setting of common interest,” because the idealized role of the scientist is to uncover truth in a disinterested manner.⁴⁴

In contrast, Thibaut and Walker argue that all other disputes are “conflicts of interest.” In such disputes, the parties’ in-

37. *Id.* at 544 (discussing “the proper distribution” of resources between parties).

38. *See id.* at 543. This proposition necessarily follows from their argument and has been partially tested empirically. *See* Justin Sevier, *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, 20 PSYCHOL. PUB. POL’Y & L. 212 (2014).

39. This claim is theoretical, insofar as Thibaut and Walker do not argue that the public *perceives* “truth” and “justice” to be the twin aims of conflict resolution. *See* Thibaut & Walker, *supra* note 16, at 543.

40. *Id.* at 543–44.

41. *Id.* at 541–42 (proposing a “two-stage procedure” for resolving mixed disputes).

42. *Id.* at 543–44.

43. *Id.*

44. *Id.* at 543.

terests are diametrically opposed, because any particular solution will maximize the outcome—and therefore the resource allocation—for one disputant at the expense of another.⁴⁵ In these disputes, the parties will not agree that any one solution provided by the decision maker is the “correct” solution; instead, the quality of the tribunal’s decisions will be judged by the distribution of outcomes among the disputants.⁴⁶ Thibaut and Walker argue that civil and criminal litigation comprise the classic “conflict of interest”; patent disputes, disputes over the allocation of trust or estate assets, and disputes over the identity of the perpetrator of a crime all involve decisions in which either money flows from one party to another, or where the state and the defendant “seek incompatible outcomes.”⁴⁷

Thibaut and Walker clarified, however, that cognitive conflicts are not concerned with “truth” to the *exclusion* of “justice” concerns, and vice versa with respect to conflicts of interest.⁴⁸ Rather, the taxonomy turns on the primary objective of these disputes. Cognitive conflicts are primarily focused on establishing factual truth through which justice is attained as a logical consequence, but not as a primary consideration.⁴⁹ Conversely, conflicts of interests involve predicate factual determinations, but these are subordinate to the more important objective, which is the fair allocation of resources among the disputants.⁵⁰ Thibaut and Walker recognize that there may be a degree of overlap between cognitive conflicts and conflicts of interest on this dimension.⁵¹ Yet they characterize these disputes as rare conflicts

45. *Id.* at 544.

46. *Id.*

47. *Id.* at 544 (discussing these disputes and mentioning others, including disputes over land).

48. *Id.* at 544–45.

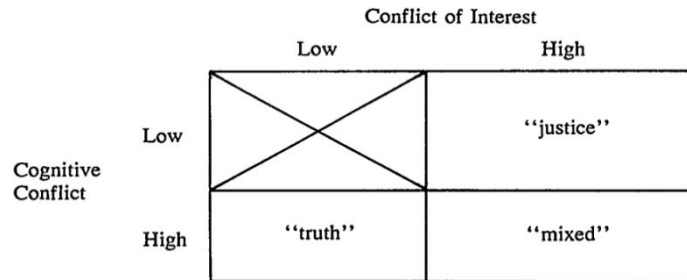
49. *Id.* at 545 (noting that “[i]n science, the facts found have an enduring significance because they guide future conduct”).

50. *Id.* (“The significance of factual determinations in a legal proceeding generally ends with the division of outcomes and there is no future reliance on the cognitive decision.”).

51. *Id.* at 542.

of interest that have spillover effects for society beyond the disputants' distributive outcomes.⁵² Thibaut and Walker's taxonomy of conflicts appears in Figure 1 below.⁵³

Figure 1. Thibaut & Walker's Taxonomy of Conflicts.



2. Taxonomy of Procedures

The final element of Thibaut and Walker's theory involves the procedures by which tribunals resolve cognitive conflicts and conflicts of interest. They view the purpose of procedural rules as defining and maintaining the roles of the disputant vis-à-vis the decision-making tribunal in the course of the proceedings.⁵⁴ Specifically, procedural rules govern the degree of control that participants exert on the proceedings. Thibaut and Walker argue that different decision-making procedures can be taxonomized according to two forms of control that tribunals either afford or deny disputants.⁵⁵ They define *decision control* as the degree to which the disputants can unilaterally dictate the outcome of the dispute.⁵⁶ In contrast, *process control* refers to the ability of either the disputants or the decision maker to control the development and selection of the information from which the tribunal will resolve the dispute.⁵⁷ Process control therefore refers not

52. *Id.* at 566 ("Finally, certain rare but important decision-making problems involve both cognitive conflict and conflict of interest. For resolving these disputes, we propose a two-staged procedure that separates questions of truth from questions of justice and employs an appropriate process for each.")

53. This illustration originally appeared in *A Theory of Procedure*. *Id.* at 560.

54. *Id.* at 545.

55. *Id.* at 546.

56. *Id.*

57. *Id.* (defining the term as "control over the development and selection of information that will constitute the basis for resolving the dispute").

just to the disputants' ability to present evidence to the tribunal, but their control over the investigatory and discovery procedures as well. The interaction between the degree of decision control and process control afforded to disputants determines the overall distribution of control at the proceeding, insofar as reducing the control exercised by the disputants expands the control exerted by the tribunal.⁵⁸

Against this background, Thibaut and Walker argue that, at their core, there are two major dispute resolution procedures: an adversarial (disputing) procedure and an inquisitorial (autocratic) procedure.⁵⁹ These procedures differ markedly in the degree of control that they afford disputants. In the autocratic, inquisitorial model—characteristic of most dispute resolution tribunals in continental Europe—both decision control and process control are ceded by the disputants to the tribunal.⁶⁰ A central decision maker (or panel of decision makers) collects the information necessary to resolve the dispute, while hearing from the disputants at the central decision maker's whim.⁶¹

In the disputing, adversarial model—characteristic of tribunals in the United States, England, and other common law countries—control is split.⁶² The tribunal retains full decision control but cedes a substantial degree of process control to the disputants. Although the tribunal—either one decision maker or a panel of triers—renders the decision, the tribunal does so only after the disputants investigate the facts underlying the conflict and present information to the tribunal for consideration.⁶³

These procedural paradigms, according to Thibaut and Walker, give rise to different priorities vis-à-vis the objectives of truth and justice in conflict resolution. Vesting both decision and process control in the hands of a disinterested central decision maker, as in the inquisitorial procedure, provides the tribunal with a “single ‘selection strategy’ that will generate information

58. *Id.* (noting that it “therefore determines the essential character of the procedures”).

59. *Id.* at 555–56. Thibaut and Walker recognize substantial nuance in the space between “pure” adversarial and “pure” inquisitorial dispute resolution procedures (for example, a “bargaining” procedure that affords disputants total process *and* decision control), although it is not directly relevant here. For a discussion, see *id.* at 555–59.

60. *Id.* at 547.

61. *Id.*

62. *Id.* at 552.

63. *Id.*

appropriate to the inquiry.”⁶⁴ This strategy (1) increases the likelihood that relevant evidence will be discovered and produced, and (2) reduces the transaction and agency costs involved in assimilating and tracking that information.⁶⁵ The inquisitorial procedure therefore prioritizes the establishment of factual truth.⁶⁶

64. *Id.* at 547 (citing J.S. BRUNER ET AL., A STUDY OF THINKING (1956)).

65. *Id.* at 548 (“Such a selection strategy increases the likelihood of obtaining the relevant information, reduces the strain of assimilating and tracking information, and minimizes the risk of failing to reach the correct solution within a limited number of attempts.”).

66. The existing research, much of it relied upon by Thibaut and Walker, suggests that the picture is more complex. I have written about this research in an earlier work, *The Truth Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*, and I reproduce the relevant section here:

Researchers have studied a decision-making procedure’s pursuit of truth, or decisional accuracy, by examining the *objective* truth that it produces and the *perceptions* of truth that it produces among litigants Thibaut and Walker hypothesized that the inquisitorial system produces objective truth by vesting control over the flow of evidence with the decision maker. This suggests that the inquisitorial system produces greater truth than does the adversarial system, in which biased advocates control the presentation of potentially biased evidence to the decision maker. A competing hypothesis states, however, that evidence may be vetted more vigorously in the adversarial system, where motivated advocates cross-examine their adversary’s witnesses and expose weaknesses in their adversary’s case.

Lind, Thibaut, and Walker tested these competing hypotheses. [They] asked participants to gather facts—and to transmit those facts to the court—as either a client-centered, adversarial advocate or as an unbiased, inquisitorial investigator. The study revealed few differences in fact-finding diligence between participants in the inquisitorial and adversarial conditions, but the study revealed substantial differences in the *transmission* of facts. Participants in the adversarial condition transmitted to the court nearly none of the facts they uncovered that disfavored their client, while participants in the inquisitorial condition transmitted to the decision maker nearly the same proportion of positive and negative facts that they uncovered. The study suggests that the adversarial system may shield from the decision maker facts that are unfavorable to the parties, which in turn may lead to inaccurate decisions. Other researchers have replicated these findings.

A smaller body of research, however, suggests that the adversarial system may counteract decisionmaker bias in a manner that the inquisitorial system does not. These researchers hypothesized that inquisitorial decision makers may prematurely characterize a defendant as guilty if the initial facts of the defendant’s case are similar to the facts of other cases in which defendants were found guilty. This, in

The adversarial procedure, however, prioritizes different ends. Thibaut and Walker argue that procedures that allow the parties to perform their own investigation into the facts of the dispute and present those findings to the decision maker provide the parties with a greater opportunity to influence the outcome of the dispute.⁶⁷ Specifically, parties with more information than the decision maker will be able to produce information from their own perspective, “with full particularities and contexts.”⁶⁸ Because the information comes from self-interested disputants, however, it runs the risk of bias.⁶⁹

Nonetheless, the ability to control the flow of information to the decision maker—and to ultimately shape the outcome of the dispute—leads to increased perceptions that the dispute was resolved fairly, which is a central tenet of the justice objective of conflict resolution.⁷⁰

turn, may lead to the biased assimilation of facts in the current defendant’s case. Thibaut et al. tested this hypothesis by varying (a) the information about prior cases that was given to the decision maker and (b) the type of procedure used to evaluate the dispute. The researchers found that judgments of decision makers in the inquisitorial condition were influenced by the outcomes of similar prior cases, whereas the judgments of decision makers in the adversarial condition were not. Thibaut et al. concluded that at least one aspect of the adversarial system reduces bias better than does the inquisitorial system.

Sevier, *supra* note 38, at 212–13 (emphasis in original) (footnotes omitted) (first citing Thibaut & Walker, *supra* note 16; then citing THIBAUT & WALKER, *supra* note 15; then citing ROSENBERG ET AL., *ELEMENTS OF CIVIL PROCEDURE* (1975); then citing E. Allen Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973); then citing Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer’s Role and Machiavellianism*, 39 J. PERSONALITY & SOC. PSYCHOL. 320 (1980); then citing E. Allan Lind & Laurens Walker, *Theory Testing, Theory Development, and Laboratory Research on Legal Issues*, 3 L. & HUM. BEHAV. 5, 5–18 (1979); and then citing John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 386–401 (1972)).

67. Thibaut and Walker, *supra* note 16, at 548–52.

68. *Id.* at 551.

69. *Id.* at 558–59.

70. Social psychologists have defined the justice afforded by decision-making procedures as the perception among people that the decision-making process itself is fair and equitable. See THIBAUT & WALKER, *supra* note 15; see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (Melvin J. Lerner ed., 1988). See generally Craig A. Wendorf et al., *Social Justice and Moral Reasoning: An Empirical Integration of Two Paradigms in Psychological Research*, 15 SOC. JUST. RES. 19 (2002) (elaborating on two para-

B. POLICY RECOMMENDATIONS, LIMITATIONS, AND GAPS

Based on these assertions, Thibaut and Walker make several recommendations for effective conflict resolution and legal reform. Their central claim is that scientific inquiry, a purely

digms of “theoretical and empirical work regarding the concept of justice”). Researchers have found that the decision maker’s neutrality, the degree of respect that the decision maker confers on the parties, the amount of voice and control that the parties have over the legal dispute, and the degree to which parties can trust the decision maker’s motive to be fair influence people’s perceptions of procedural justice. LIND & TYLER, *supra*.

As I have written earlier in *The Truth-Justice Tradeoff: Perceptions of Decisional Accuracy and Procedural Justice in Adversarial and Inquisitorial Legal Systems*:

If perceptions of procedural justice are determined, in part, by the amount of voice and control that the decision maker affords litigants, the adversarial model—which affords litigants more control over the proceedings than does a pure inquisitorial model—should be perceived as more just. To the extent that heightened perceptions of procedural justice lead to greater preferences for a procedure, a body of research supports this hypothesis. In their earlier work, Thibaut and Walker found that, controlling for the outcome of a legal dispute, people generally report higher preferences for adversarial procedures compared with inquisitorial procedures. Other researchers have found similar effects.

A smaller body of research, however, suggests that the adversarial system might not always be perceived as more just than the inquisitorial procedure. [Researchers] Anderson and Otto found cultural differences with respect to litigants’ perceptions of procedural fairness. Although Americans preferred the adversarial system and perceived it to be fairer than the inquisitorial system, Dutch participants preferred the inquisitorial system and perceived it to be fairer than the adversarial system. Furthermore, [researchers] Austin and Tobiasen have found that inquisitorial procedures are perceived as just as fair as adversarial procedures if participants believe that the procedures are implemented reasonably.

Sevier, *supra* note 38, at 213 (footnotes omitted) (first citing THIBAUT & WALKER, *supra* note 15; then citing Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPER. SOC. PSYCHOL. 13 (1978); then citing Stephen LaTour, et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319 (1976); then citing L. Walker et al., *Reactions to Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295, 295–310 (1974); then citing R. A. Anderson & A. L. Otto, *Perceptions of Fairness in the Justice System: A Cross-Cultural Comparison*, 31 SOC. BEHAV. & PERSONALITY 557, 557–63 (2003); then citing William Austin & Joyce M. Tobiasen, *Legal Justice and the Psychology of Conflict Resolution*, in *THE SENSE OF INJUSTICE* 227–74 (Robert Folger ed., 1984); and then citing N.J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 L. HUM. BEHAV. 451, 451–75 (1991)).

“cognitive conflict” concerned ultimately with questions of truth, is unsuitable for the adversarial legal system and should be resolved by an inquisitorial administrative body.⁷¹ All other disputes—including all legal disputes—are conflicts of interest that are concerned predominantly with questions of justice.⁷² These disputes should therefore be resolved through adversarial procedures.⁷³

Thibaut and Walker’s policy recommendations have proven influential, insofar as *A Theory of Procedure* has been cited by myriad scholars and policymakers.⁷⁴ But they are also subject to significant limitations. Most importantly, although Thibaut and Walker’s theory speaks to questions of institutional design, it is not a theory of institutional *legitimacy*. As discussed in more detail, *infra*, psychological legitimacy is based on public *perceptions* of the values embodied in substantive and procedural legal rules.⁷⁵ And although Thibaut and Walker base the principles of their theory on empirical social science, in the four decades since they published their article, no one has tested empirically (1) what the public believes to be the objectives of conflict resolution, (2) whether the public sees different types of cases as implicating different conflict resolution objectives, and (3) whether the public perceives legal procedures as prioritizing these objectives differently.⁷⁶

In fact, there are several reasons to believe that Thibaut and Walker’s taxonomy of cases and procedures does not capture fully the public’s attitudes toward different conflict resolution procedures and the extent to which the public is willing to legitimize them. As this Article discusses below, by framing their theory in terms of the “science court” debate, Thibaut and Walker classify all non-scientific disputes as conflicts of interest subject

71. Thibaut & Walker, *supra* note 16.

72. *Id.* at 557–58.

73. *Id.*

74. *See supra* note 20 and accompanying text.

75. *See, e.g.*, 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, 78 (2014) (“The empirical study of legitimacy has demonstrated that when authorities are viewed as legitimate they are better able to motivate people to comply with the law.”); *see also infra* Part II.A.

76. Although a handful of researchers have indirectly tested certain aspects of Thibaut and Walker’s theory, *see, e.g.*, Sevier, *supra* note 38 and accompanying text, no one has comprehensively tested the theory in the context of its implications for institutional legitimacy.

to adversarial legal resolution.⁷⁷ But there are reasons to believe—based on recent social psychological research on social identity theory and the group-value model—that the public does not perceive *all* legal disputes as conflicts of interest concerned primarily with questions of justice.⁷⁸ Rather, there likely is substantial variation among the public with respect to the perceived objectives of different legal cases. If so, policymakers may need to reevaluate the axiom that all legal disputes should be resolved adversarially.

II. A RELATIONAL THEORY OF PROCEDURE

The following section reframes Thibaut and Walker's theory to more accurately reflect the public's perceptions of the aims of legal conflict resolution and the means by which disputes are resolved, in an effort to articulate a comprehensive theory of institutional legitimacy. It does so by focusing on the psychological concept of relationality. This expanded theory yields a more complete picture of the conditions under which the public legitimizes different conflict resolution procedures.

A. INSTITUTIONAL LEGITIMACY

Institutional legitimacy is an amorphous concept with implications for all aspects of an individual's life, specifically with respect to the manner in which she is governed by those in power.⁷⁹ I have written in detail elsewhere regarding the phenomenon's scholarly origins:

Legitimacy as a political theory has its roots at least as far back as the Enlightenment, when moral philosopher John Locke famously opined that “the government is not legitimate unless it is carried on with the consent of the governed.”

[Building on this axiom,] political theorists describe the concept of [institutional] legitimacy as the status and acceptance that governed people confer onto their governors' institutions and conduct based on the belief that those actions constitute an appropriate use of power.

77. See *infra* Part II.

78. See Tajfel, *supra* note 21; Tyler & Lind, *supra* note 21; see also *infra* Part II.B.

79. See Justin Sevier, *Evidentiary Trapdoors*, 103 IOWA L. REV. 1155, 1195 (2018) (introducing a “behavioral model regarding the effects of trapdoor evidence on the courts' institutional legitimacy”); see also JOHN R. SCHERMERHORN ET AL., ORGANIZATIONAL BEHAVIOR (Lisé Johnson ed., 12th ed. 2011) (discussing “interactional justice” between social actors); CARL SCHMITT, LEGALITY AND LEGITIMACY (Jeffrey Seitzer ed. & trans., 2004) (discussing governmental legitimacy).

According to German sociologist Max Weber, the governed confer legitimacy onto legal actors via an alignment of values between the political actors and the governed—that is, through public trust that the government will act in the interests of the governed—and not through the government’s coercion or force. Therefore, to the extent that a misalignment develops between the values of the governed and the actions of the government, political [and institutional] legitimacy is endangered.⁸⁰

Legitimacy is therefore an important extension of institutional design, insofar as it is based on the public’s attitudes toward a governing body and extends to the public’s willingness to abide by the governing body’s decisions.⁸¹ As, again, I have written elsewhere:

Numerous interdisciplinary scholars have attempted to explain the theories that underlie people’s willingness to legitimize governmental action. Broadly speaking, these theories fall into two camps. The first camp is often referred to as “output,” “instrumental,” or “goal-attainment” legitimacy. This theory posits that legitimacy is derived almost entirely from substantive outcomes for either society at large or, more specifically, for the individuals affected by governmental action. Thus, under this theory legitimacy is a function of social exchange, insofar as exchanges and interactions with governmental actors resulting in a positive distribution of goods to the governed create a greater willingness among the governed to legitimize the governmental action.

In contrast, a second theory of psychological legitimacy is referred to as “substantive” or “relational” legitimacy. In contrast to the instrumental, goal-oriented model, this model posits a relational, equity-based manner in which governmental actors attain popular [and institutional] legitimacy. The theory posits that a government attains legitimacy through its *procedural* responsiveness to the concerns of its citizens by allowing them to meaningfully participate in the governmental process.⁸²

80. Sevier, *supra* note 79, at 1169–70 (footnotes omitted) (first citing JOHN LOCKE: CRITICAL ASSESSMENTS 524 (R. Ashcraft ed., 1991); then citing JOHN RAWLS, A THEORY OF JUSTICE 135 (1971) (discussing a similar theory of legitimacy); then citing JOSEPH RAZ, THE MORALITY OF FREEDOM 80 (1986); then citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 29 (2006); then citing MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 79 (H.H. Gerth & C. Wright Mills, eds., 1991); then citing JOHN RAWLS, POLITICAL LIBERALISM 121 (1993) (suggesting “that political institutions that lack legitimacy exercise their power unjustifiably and will not be obeyed”); and then citing THIBAUT & WALKER, *supra* note 15, at 7). Weber’s idea that the governed confer legitimacy via an alignment of values is also sometimes referred to as “civil legitimacy.” *Id.* at 1170 n.71.

81. See Tyler & Jackson, *supra* note 75.

82. Sevier, *supra* note 79, at 1170 (footnotes omitted) (first citing THIBAUT & WALKER, *supra* note 15, at 7 (theorizing that people view as legitimate governmental actions those that are instrumental to the individual’s attainment of social goods); then citing Florian Weigand, *Investigating the Role of Legitimacy*

That theory has attained empirical support in the form of legal psychologist Tom R. Tyler's group-value model.⁸³ As Professor Tyler and I have explained:

The relational [group-value] model of legitimacy argues that people value the [governmental actor's] use of fair procedures because those procedures carry messages of status and inclusion which reinforce people's identification with legal institutions and authorities and support their feelings of inclusion and status in the community. This then leads to high self-worth and favorable self-esteem. When people can present their concerns to judicial authorities and feel that those authorities consider and take account of their concerns, people's identification with law and legal authorities is strengthened.⁸⁴

In light of the modern social science research on institutional legitimacy, this Article proffers a new theory of procedure that incorporates as its central feature the psychological concept of *relationality*. It argues that psychological relationality as a conceptual framework has important ripple effects for the way the public classifies legal cases and gauges the priorities of the procedures that resolve those cases.

B. RELATIONAL PSYCHOLOGY

The concept of relationality refers to the degree to which people evaluate their own behaviors, and the behaviors of those with whom they interact, in the context of their relationships with others.⁸⁵ Put simply, an individual's appraisals of another's

in the Political Order of Conflict-Torn Spaces (London Sch. of Econ. & Political Sci., Working Paper No. 04, 2015); then citing Tyler, *supra* note 12, at 325; and then citing Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 126–27 (2008). For a succinct summary, see Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 456–57 (2019).

83. Sevier, *supra* note 79, at 1171 (citing Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989) (conducting experiments and finding that the neutrality of the decision-making process, trust in the decision maker, and the information conveyed to an individual regarding her social standing influence perceptions of governmental legitimacy)). Other researchers have replicated these effects. *Id.* at 1171 n.76 (citing Heather J. Smith et al., *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 470 (1998); Fatima H. Sousa & Jorge Vala, *Relational Justice in Organizations: The Group-Value Model and Support for Change*, 15 SOC. JUST. RES. 99 (2002)).

84. Tyler & Sevier, *supra* note 14, at 1097.

85. See, e.g., Tyler & Lind, *supra* note 21 (categorizing relational models as those that “focus on relationship issues, especially perceptions of the relationship between the authority and those subject to his or her decision”); see also Ian Tucker, *Psychology as Space: Embodied Relationality*, 5 SOC. & PERSONALITY PSYCHOL. COMPASS 231, 231–38 (2011) (borrowing from notions of biological

attitudes and behaviors do not occur in a vacuum; people actively—both consciously and outside of conscious awareness—seek to understand the relational context in which behavior occurs.⁸⁶ Although psychologists disagree regarding how successfully people are able to integrate contextual factors into their appraisal of an individual's behavior, there is little disagreement that these relational calculations occur.⁸⁷ Indeed, empirical research suggests that people are especially sensitive to relational equities and inequities in their interactions with others in their social environment, including authority figures.⁸⁸ Social scientists argue that relationality in the context of equity and fairness is a guiding principle for how people view actors in their social environment.⁸⁹ Others further argue that these judgments extend to people's willingness to legitimize the institutions that govern them.⁹⁰ Although several theories have been proffered for understanding how individuals evaluate intergroup relations,⁹¹

“space” and reconceptualizing areas of social psychology as instantiations of the relational “space” between individuals).

86. See, e.g., Tyler & Lind, *supra* note 21.

87. Compare Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in *ADVANCED EXPERIMENTAL SOCIAL PSYCHOLOGY* 173, 184 (Leonard Berkowitz ed., 10th ed. 1977) (discussing the “fundamental attribution error” in which people insufficiently adjust for contextual factors that contribute to behavior), with Bill D. Bell & Gary G. Stanfield, *An Interactionist Appraisal of Impression Formation: The “Central Trait” Hypothesis Revisited*, 9 *KAN. J. SOC.* 55, 63 (1973) (stating the conditions under which people are more likely to take relational considerations into account when evaluating human behavior). For a succinct review of this issue, see Sevier, *supra* note 82, at 458–64.

88. Psychologists Kirschner & Martin have summed up this research this way: “Indeed, a long line of Anglo-American and Continental thinkers have held that our social relations with others have primacy with respect to our psychological existence, being an indispensably necessary source for our thinking about the world and ourselves.” *THE SOCIOCULTURAL TURN IN PSYCHOLOGY: THE CONTEXTUAL EMERGENCE OF MIND AND SELF* 3 (Suzanne R. Kirschner & Jack Martin eds., 2010).

89. See, e.g., Tom Tyler at al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 913, 914–15 (1996) (discussing the “group-value model” of social interaction and explaining the psychological signals sent to group members when they deem interactions as fair).

90. See Tyler & Sevier, *supra* note 14 at 1117–30 (testing two models of legitimacy and finding support for a model of legitimacy based on the social signals produced by a tribunal's procedures).

91. The most well-known of the early theories of intergroup relations was social exchange theory, which posits that people view their societal interactions as a means through which they can maximize the social and economic benefits

the dominant explanation stems from *social identity theory* in social psychology.⁹²

Social identity theory posits that an individual's relevant social group has a direct, measurable impact on an individual's self-concept and her assessments of others in her social environment.⁹³ Social identity theorists hypothesize that social relationships primarily are governed not by what is the most economically beneficial outcome to the parties, but instead by what will lead to the best psychological self-concept for partners to the exchange.⁹⁴ This self-concept is often governed by the individual's group membership.⁹⁵ At the heart of social identity theory is the notion that people are intrinsically motivated, both consciously and unconsciously, to achieve a state of positive self-distinctiveness, or positive self-identity.⁹⁶ They typically judge themselves and others through a series of social comparisons between themselves and a target actor in their environment.⁹⁷ To the extent

while minimizing losses and costs. *See, e.g.*, Karen S. Cook & Richard M. Emerson, *Power, Equity and Commitment in Exchange Networks*, 43 AM. SOC. REV. 721 (1978); *see also* George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958). In studies that test the tenets of social exchange theory, researchers focus on variables such as the individual's degree of self-interest, degree of interdependence, and cognitive appraisals of gains and losses. For a review, *see* Edward J. Lawler & Shane R. Thye, *Bringing Emotion into Social Exchange Theory*, 25 ANN. REV. SOCIOLOGY 217 (1999). One of the principal criticisms of traditional social exchange theory is that it characterizes social interactions and personal dynamics in a manner that is artificially transactional. *See* Edward J. Lawler, *An Affect Theory of Social Exchange*, 107 AM. J. SOCIOLOGY 321 (2001).

92. *See* MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES* (1988); ELAINE WALSTER ET AL., *EQUITY: THEORY AND RESEARCH* (1978).

93. John C. Turner & Penelope J. Oakes, *The Significance of the Social Identity Concept for Social Psychology with Reference to Individualism, Interactionism and Social Influence*, 25 BRIT. J. SOC. PSYCHOL. 237, 240–41 (1986). Self-identity is based on an individual's membership in various social groups; thus a person possesses multiple identities that are adopted and used based on situational factors. *Id.*

94. *See, e.g.*, Tyler & Lind, *supra* note 21.

95. Henri Tajfel & John C. Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33–47 (W.G. Austin & S. Worchel eds., 1979).

96. *See generally* S. ALEXANDER HASLAM, *PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH* 26–56 (1st ed. 2001).

97. Social comparison theory, a highly influential concept in social psychology, was first introduced by Leon Festinger in 1954. The theory centers on the belief that social beings seek to gain information bearing on their self-evaluations. Festinger hypothesized that individuals do so by explicitly or implicitly

that a person's self-perception is linked to her social identity among others in her environment, one hypothesis for explaining how individuals achieve positive self-distinctiveness suggests a direct link between positive self-distinctiveness and positive self-esteem, such that the nature of a person's group status in the relevant social hierarchy, as well as her status within that social group, can positively and negatively affect the polarity of her social identity.⁹⁸

Thus, social identity models predict that interactions that leave people believing that they are not valued within their social group, or that the social group with which they identify is not valued by a decision maker, will affect their perceptions of the fairness and value of that social interaction.⁹⁹ Although this model of intergroup interaction is not orthogonal to the economic outcomes that people receive during their exchange transactions with others, the social identity model focuses primarily on the subjective psychological states of the actors to the exchange.¹⁰⁰ In so doing, this model of intergroup relations moves away from purely "cold" cognitive calculations of expected utility and focuses on "warmer" cognition associated with, among other psychological constructs, dignity and respect.¹⁰¹

Perhaps most importantly, social identity theory explicitly accepts as its premise for societal interaction that group members consistently evaluate interactions with others in their environment through the lens of relationality. This has several implications for the continuing applicability of Thibaut and Walker's *A Theory of Procedure*. As the next sections demonstrate, relationality manifests itself (1) in the concept of intersubjectivity with respect to the classification of legal conflicts, and (2) in the concept of the group-value model with respect to the classification of legal procedures. Under this framework, we can reimagine Thibaut and Walker's taxonomy of cases and procedures as placing different types of disputes and procedures on a continuum based on the extent to which these disputes and

comparing themselves to others in their environment to reduce uncertainty about their own social standing and to receive information relevant to their self-concept. See Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954). Social comparison processes have complex consequences for ethnocentrism, in-group favoritism, stereotyping, and conformity behaviors. *Id.*

98. Tajfel & Turner, *supra* note 95, at 33–47.

99. See, e.g., Tyler & Lind, *supra* note 21.

100. Tajfel & Turner, *supra* note 95, at 33–47.

101. For a review, see HOGG & ABRAMS, *supra* note 92.

procedures foster—or decline to foster—the use of relational comparisons by the public.

1. The Relationality of Conflicts

In the context of the judgments we make about others in our environment, the concept of relationality can be traced to German philosopher Martin Heidegger's "hermeneutic circle."¹⁰² Heidegger argued, in the context of textual interpretation, that neither the whole of an ancient text nor any individual part can be understood without reference to the other.¹⁰³ Thus, pure textual interpretation is impossible without situating the text in its literary, historical, or cultural context.¹⁰⁴

This hermeneutic approach to relationality was expanded upon most famously by sociologist Max Weber¹⁰⁵ and manifests itself in the psychological concept of *intersubjectivity*. Intersubjectivity has been conceptualized in different ways,¹⁰⁶ but it is widely understood as the manner in which we explain and predict others' behavior by imagining what our mental states would be, and how we would behave, if we were in their situation.¹⁰⁷ More specifically, we simulate the target's mental states to understand the cause of the observed behavior, and then use the simulated mental states as input for our decision-making.¹⁰⁸ We then take the resulting conclusion and attribute it to the target.¹⁰⁹

102. See MARTIN HEIDEGGER, BEING AND TIME 352 (John Macquarrie & Edward Robinson trans., Harper & Row 1962).

103. *Id.* But cf. Georgia Warnke, *The Hermeneutic Circle Versus Dialogue*, 65 REV. METAPHYSICS 91 (2011) (critiquing the concept).

104. Warnke, *supra* note 103.

105. See MAX WEBER, GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE (1922).

106. For examples of different approaches, see EVIATAR ZERUBAVEL, SOCIAL MINDSCAPES: AN INVITATION TO COGNITIVE SOCIOLOGY (1997) (discussing intersubjectivity in the context of "thought communities"); Hanne De Jaegher et al., *Can Social Interaction Constitute Social Cognition?*, 14 TRENDS COGNITIVE SCI. 441 (2010) (discussing an "interactive turn in social cognition research"); Shannon Spaulding, *Introduction to Debates on Social Cognition*, 11 PHENOMENOLOGY & COGNITIVE SCI. 431 (2012) (discussing a "theory theory" approach to intersubjectivity).

107. Spaulding, *supra* note 106, at 433. For a neuroscientific view of intersubjectivity, see Vittorio Gallese & Corrado Sinigaglia, *What Is So Special About Embodied Simulation?*, 15 TRENDS COGNITIVE SCI. 512 (2011).

108. Gallese & Sinigaglia, *supra* note 107.

109. *Id.*

Applying these principles to the classification of human conflicts sheds light on the limitations of Thibaut and Walker's approach. Their claim that all questions of science comprise cognitive conflicts and all legal questions comprise conflicts of interest fails to meaningfully distinguish between different types of legal disputes. For example, a classic "whodunit" murder trial attempts to resolve the same primary question as a purely scientific inquiry: the unbiased development of facts. In neither case—either the temperature at which dry ice sublimates or the identity of an assault victim's attacker—does the ultimate determination rest on a subjective, relational judgment by the fact finder; rather, the primary question is the search for objective truth. Thus, although Thibaut and Walker may be correct that even a "whodunit" conflict creates a zero-sum game between the government and the defendant in a manner that normally is not true with respect to adversaries in a scientific dispute,¹¹⁰ the non-relational question at the heart of both disputes is similar.

In contrast, other cases require a greater degree of intersubjectivity, and therefore are more relational. For example, civil and criminal fact finders frequently must determine whether a defendant's admitted actions meet a psychologically subjective standard, such as the actions of a reasonably prudent person under the circumstances surrounding the conflict.¹¹¹ Of course, the underlying fact finding is still important, insofar as the tribunal must have information regarding the actions that the defendant took that bear on the question of reasonableness. But these cases require the tribunal to make the type of relational comparisons that form the basis of social identity theory and intersubjectivity. The fact finder must decide, in reference to the abstract, reasonable person—and in practice, in reference to one's idealized self-image¹¹²—whether the target's behavior conformed to in-group norms, such that the target is relieved of legal responsibility for

110. See Thibaut & Walker, *supra* note 16, at 544 ("Criminal litigation also involves a conflict of interest, because the prosecutor (as surrogate for society) and the defendant seek incompatible outcomes.").

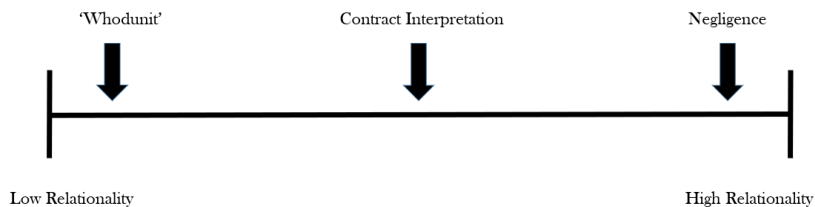
111. Although the inquiry as a formal legal matter is framed as an *objective* one, reasonable people can and frequently do differ on whether civil or criminal defendants meet the standard. This suggests that, at least from a psychological perspective, the determination is more subjective than formal legal doctrines imply.

112. See, e.g., Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 L. & HUM. BEHAV. 263 (1995) (examining the processes by which jurors evaluate the reasonable person standard in tort law).

the consequences of her actions. As in questions of intersubjectivity and social identity theory outside the legal context, these comparisons frequently involve questions of equity and fairness¹¹³—reframed in legal terms: justice.¹¹⁴

Thus, we can reformulate Thibaut and Walker's dichotomy of scientific cognitive conflicts and legal conflicts of interest along a relationality continuum, whereby non-relational quests for objective facts fall along the left side of the continuum and relational conflicts that invite social comparison fall along the right side. A simplified sketch of this continuum appears in Figure 2 below.¹¹⁵

Figure 2. Relationality Continuum of Legal Conflicts.



Interestingly, if relationality is a guiding principle by which the public evaluates the objectives of different legal disputes, another hypothesis emerges. We could extend this theory not just to different types of cases—as Thibaut and Walker did—but also to different phases of a trial. Specifically, the public may perceive the liability phase of a trial as meaningfully different from the punishment phase with respect to the degree of relationality that is present. The liability phase—whether it is a whodunit murder trial or a civil negligence trial—requires the fact finder to reach a binary decision: either guilty or not guilty (or liable or non-liable in the civil context). In contrast, the punishment phase requires the tribunal to make a more subjective judgment: the extent of the restitution that would make the plaintiff or society whole. Scholars have noted that these judgments implicitly involve notions of fairness, as opposed to “accuracy,”¹¹⁶ and these

113. See, e.g., Smith et al., *supra* note 83.

114. See Tyler & Sevier, *supra* note 14, at 1095.

115. For a robust discussion of this relationality continuum, see *infra* notes 125–30 and accompanying text.

116. See, e.g., Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003) (discussing the concept in the context of victim impact statements).

fairness judgments are often reached after hearing from witnesses who explain the harm the defendant inflicted on the victim in the context of the relationship between the witness and the victim.¹¹⁷ This Article therefore predicts that the public perceives the liability phase of a trial as primarily concerned with questions of truth, whereas the public perceives the punishment phase as focusing on justice.

2. The Relationality of Procedures

This Article applies the relationality framework to reimagine Thibaut and Walker's classification of decision-making procedures. In this domain, relationality manifests itself in the concept of the *group-value model*,¹¹⁸ first proposed by legal psychologist Tom R. Tyler, which distinguishes among conflict resolution procedures that have autocratic elements and those that have adversarial elements.

Initially, social science research on the public's perceptions of legal dispute resolution procedures focused solely on the outcomes that the procedures produced.¹¹⁹ Later research, however, suggested that the public's attitudes toward legal tribunals were more complex; they also depended on the process by which those decisions were reached.¹²⁰ This phenomenon, termed "procedural justice," posits that people's perceptions of the justice afforded to them in a social transaction are shaped in part by their subjective evaluations of the fairness of the procedures used to allocate resources.¹²¹

117. *See id.*

118. LIND & TYLER, *supra* note 70.

119. This phenomenon is termed "distributive justice." *See* John T. Jost & Aaron C. Kay, *Social Justice: History, Theory, and Research*, in HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske et al. eds., 5th ed. 2010); *see also* J. Stacy Adams, *Inequality in Social Exchange*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267–99 (Leonard Berkowitz ed., 1965).

120. *See* THIBAUT & WALKER, *supra* note 15; *see also* LIND & TYLER, *supra* note 70.

121. *See* Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985); Tom Tyler & David Markell, *The Public Regulation of Land Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 541 (2010) ("[P]eople's reactions to their experiences with legal authorities are strongly shaped by their subjective evaluations of the justice of the procedures used to resolve their case."). The phenomenon has been demonstrated in a vast array of contexts, including legal adjudication, alternative dispute resolution, interactions with the police, the workplace, and in the family.

The dominant model for explaining the effect of the decision-making process on an institution's perceived legitimacy is rooted in social identity theory. The group-value model asserts that legal procedures provide individuals with important information regarding (1) the status of their social group within the social hierarchy; and (2) their individual standing within the social hierarchy of the group with which they identify.¹²² The group-value model predicts that specific factors will influence people's perceptions of their self-identity and self-distinctiveness as a result of their interaction with a legal procedure: the amount of voice they have in the interaction, the amount of control they have over the procedure used to allocate resources, the level of respect they receive from the decision maker, and the degree of bias the resource allocator displays.¹²³ Perhaps because they are so important to an individual's social identity, social scientists have found that the relational signals inherent in the process by

See, e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 L. & SOC. INEQ. 473 (2008); Shelly Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 L. & POL'Y 101 (1999); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & HUM. BEHAV. 333 (1988); Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287 (2005); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281 (1980). For a review, see Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011).

122. *See, e.g.,* TYLER, *supra* note 80.

123. *See* Tyler, *supra* note 83; Tyler & Lind, *supra* note 21. Notably, people value these constructs when the stakes of the distribution are either high or low, and they value their ability to voice their opinion to the decision maker even when they are explicitly told that doing so will not affect the distribution of resources. *See* E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* (RAND Corp. ed., 1990); Tyler et al., *supra* note 121; *see also* E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. APPLIED SOC. PSYCHOL. 338 (1983).

which a legal decision is reached are often stronger than the outcome itself in determining the degree to which the public confers legitimacy onto a decision making tribunal.¹²⁴

An application of these principles to Thibaut and Walker's taxonomy of decision-making procedures leads to similar conclusions about different legal procedures but through a different psychological pathway. Thibaut and Walker classified procedures according to the degree of decision and process control that the procedures afford litigants.¹²⁵ When evaluating procedures through the lens of relationality, however, we can create a relationality continuum driven by notions of (1) the disputants' perceptions of the degree of voice they have in the proceeding, and (2) the degree of respect they feel the procedure affords them, from the perspective of the group-value model.

Inquisitorial procedures provide a single selection strategy for information processing on the part of the tribunal, but at a significant cost: potentially lowered perceptions of voice and respect from the disputants.¹²⁶ We would therefore expect procedures with inquisitorial elements—such as a single inquisitor or panel of investigators that decide the dispute's outcome—to fall on the left side of the relationality spectrum. In contrast, procedures with greater adversarial elements—for example, that allow the parties to investigate the dispute, call their own witnesses, and cross-examine other parties' evidence with minimal intrusion from the tribunal—are likely to result in greater perceptions of voice and respect from disputants.¹²⁷

We would therefore expect procedures with these elements, including many alternative dispute resolution procedures,¹²⁸ to

124. See, e.g., Hollander-Blumoff, *supra* note 121, at 132 (“[T]his research provided robust empirical evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision.”).

125. Thibaut & Walker, *supra* note 16, at 546.

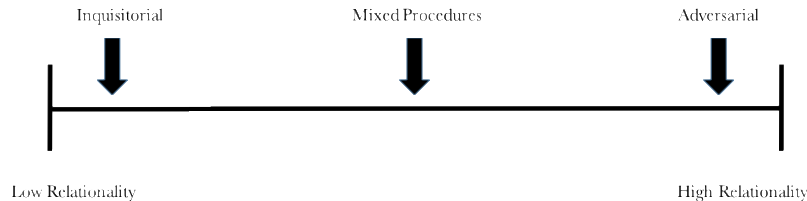
126. See, e.g., TYLER, *supra* note 80.

127. See Sevier, *supra* note 38.

128. Alternative dispute resolution procedures allow litigants to reach agreement and to resolve conflicts in a setting that is less resource intensive than formal litigation. Such procedures include (1) arbitration, in which a central decision maker arbitrates the dispute, but participants are not constrained to the formal rules of evidentiary and civil procedure; and (2) mediation, in which the decision of the mediator does not bind litigants unless they choose to be bound. See generally AM. ARBITRATION ASS'N, ADR & THE LAW: A REPORT OF THE AMERICAN ARBITRATION ASSOCIATION, THE FORDHAM INTERNATIONAL LAW

appear on the right side of the spectrum. A figure that captures this continuum appears as Figure 3 below.

Figure 3. Relationality Continuum of Dispute Resolution Procedures.



This continuum allows us to make predictions regarding how the public will perceive the priorities of different conflict resolution procedures. Research on the group-value model suggests that increasing the degree to which disputants feel that they have been heard by the tribunal in a respectful manner increases their perceptions of the fairness and equity of the proceeding.¹²⁹ This suggests that the public will perceive procedures with adversarial features as prioritizing the justice objective of conflict resolution. In contrast, vesting the gathering and presenting of evidence in the neutral investigatory fact finder should lead to lowered perceptions of the fairness and equity of the proceeding, albeit with an increase in public perceptions that the fact finder will uncover the “true” facts of the dispute.¹³⁰ Thus, procedures with inquisitorial features are likely to be perceived as prioritizing the truth objective of conflict resolution.

C. SYNTHESIS

The psychological research on relationality allows us to draw broader conclusions about the popular legitimacy of legal institutions. Recall that legitimacy is conferred on governing institutions when the values that the institutions embody comport

JOURNAL AND THE FORDHAM URBAN LAW JOURNAL (1997) (discussing alternative dispute resolution procedures in different areas of law).

129. See generally LIND & TYLER, *supra* note 70 (discussing how people’s judgments of procedures and social processes are influenced by the form of social interaction).

130. See Sevier, *supra* note 38, at 216 (suggesting people exposed to an inquisitorial procedure perceived it as producing more truth than justice).

with the values of the citizenry.¹³¹ Applying that principle, the public should be most willing to legitimize legal tribunals when the priorities of the procedures by which they resolve disputes align with the perceived objectives of the underlying conflict. Thus, Thibaut and Walker's theory misses relational nuances that underlie different legal disputes. Rather than assuming that all legal disputes will be legitimized if they are decided adversarially, the relationality research suggests a more complex set of preferences from the public. The public should be substantially more willing to legitimize disputes high in relationality (the characteristic "conflicts of interest" that Thibaut and Walker envision) if they are resolved by *adversarial* means, which prioritize the just allocation of resources. But the public also may be willing to legitimize truth-seeking legal disputes, which are low in relationality, when they are decided under *inquisitorial* means. This Article tests these hypotheses in a series of three original psychology experiments.

III. THREE EXPERIMENTS

This Article reports the results from three original experiments that: (1) empirically test the tenets of Thibaut and Walker's *A Theory of Procedure*; and (2) expand upon those findings to examine litigant preferences for the design of legitimate legal institutions. Specifically, these experiments examine whether litigants actually conceive of different cases—and phases of a case—as associated with different conflict resolution objectives; whether different procedures for resolving those disputes prioritize different objectives; and, most importantly, whether the alignment of the priorities of legal procedures with the perceived objective of the dispute results in a legal tribunal's increased institutional legitimacy.

These propositions are tested in three parts. Study 1 examines how people perceive cases that differ in relationality (that is, "cognitive conflict" cases compared to "conflict of interest" cases), as well as whether they perceive differences in the objectives of the liability and punishment phases of a trial. Study 2 examines the objectives that people believe are served by adversarial and inquisitorial dispute resolution procedures. Study 3 then examines how people's preferences for these procedures differ as a function of different case types and trial phases.

131. See *supra* notes 83–84 and accompanying text (discussing the importance of legitimacy to governing institutions).

A. STUDY 1: CONFLICT OBJECTIVES

The first study in this series explores whether non-lawyers perceive different types of legal cases as concerned with different dispute-resolution objectives. Participants read a vignette in which they were asked to imagine themselves as spectators at a local trial. The study contained two independent variables. First, I manipulated the type of case to which the participants were exposed, such that they read about a non-relational “whodunit” case (that is, a “cognitive conflict”) or a relational “conflict of interest” case. Second, I manipulated the phase of the trial in which the case appeared: either at the liability phase or at the punishment phase. I measured participants’ views of the goals that were effectuated by the legal proceeding that they read—specifically, the degree to which the proceeding was concerned with “truth” or “justice”—and collected demographic information from them.

If participants perceive that different types of legal proceedings are associated with different psychological objectives, as Thibaut and Walker suggest,¹³² and if those differences are a function of relationality, we would expect two results to follow. First, participants should perceive the low-relationality conflict as primarily concerned with establishing factual truth. Conversely, participants should perceive the more relational, “conflict of interest” case as primarily concerned with questions of justice and fairness.

Second, extending Thibaut and Walker’s theory to the *phase* of the proceeding, we would expect that participants perceive the liability phase of a trial (regardless of the type of case) as more concerned with establishing factual truth, whereas the punishment phase as concerned primarily with questions of justice and fairness.

1. Participants

Three hundred American participants were recruited through Amazon Mechanical Turk, an online participation service, and paid \$1.00 for their participation in this study. Participants were 48% female, averaged 37.63 years of age (with a *SD* of 10.76), and ranged from 21 to 73 years old. Fifty-eight percent of the sample had completed at least a college degree, and the median income of the sample was between \$40,000 and \$49,999.

132. Thibaut & Walker, *supra* note 16, at 565–66 (concluding their theory of procedure).

Thirty-seven percent of participants identified as politically liberal, 30% of participants identified as politically moderate, and 23% of participants identified as conservative. A complete description of the sample for this study, as well as the two studies that follow, appears in Table 1.

2. Procedure and Measures

Participants were randomly assigned to (1) one type of case, either high or low in relationality; and (2) one phase of the case, either liability or punishment, in a “factorial design.”¹³³ Participants were told that the researchers were interested in their opinions regarding different types of legal disputes. After providing their informed consent to participate in the study, they read about a hypothetical case.

133. A factorial design is an experiment whose design consists of two or more variables (or “factors”), each with discrete possible values or “levels,” and whose experimental units take on all possible combinations of these levels across all factors. In a “between subjects” design, such as the design of Study 1, each participant is randomly exposed to one level of each variable and is not exposed to the others. See ANDY FIELD, *DISCOVERING STATISTICS USING IBM SPSS STATISTICS* 508–09 (4th ed. 2013) (explaining the meaning and types of factorial design).

Table 1. Demographic Information (Studies 1, 2, and 3).

	Percentages (N)		
	Study 1	Study 2	Study 3
<i>Age</i>			
< 30	24.00 (72)	26.30 (52)	21.00 (71)
30-39	41.00 (123)	45.50 (90)	38.50 (130)
40-49	21.00 (63)	14.60 (29)	20.70 (70)
50-59	07.70 (23)	08.10 (16)	12.70 (43)
60-78	06.30 (19)	05.50 (11)	07.10 (24)
<i>Gender</i>			
Male	48.00 (144)	61.60 (122)	43.90 (148)
Female	51.00 (153)	37.90 (75)	54.90 (185)
<i>Race</i>			
Caucasian	80.30 (240)	78.70 (155)	78.00 (262)
African-American	07.30 (22)	09.60 (19)	08.00 (27)
Hispanic	06.00 (18)	04.60 (09)	06.80 (23)
Asian/Pacific Islander	03.30 (10)	05.60 (11)	05.70 (19)
Other	03.00 (09)	01.50 (03)	01.50 (05)
<i>Education</i>			
High School	13.10 (39)	14.60 (29)	10.10 (34)
Some College	28.30 (84)	26.30 (52)	29.70 (100)
College	49.20 (146)	51.00 (101)	43.60 (147)
Master's	08.40 (25)	06.10 (12)	12.80 (43)
Ph.D. or Professional	01.00 (03)	02.00 (04)	03.90 (13)
<i>Political Affiliation</i>			
Very Conservative	07.30 (22)	10.70 (21)	03.60 (12)
Conservative	15.70 (47)	20.80 (41)	19.90 (67)
Moderate	29.70 (89)	23.90 (47)	29.70 (100)
Liberal	29.70 (89)	28.40 (56)	28.20 (95)
Very Liberal	17.00 (51)	15.70 (31)	18.10 (61)
<i>Income</i>			
Less than \$30,000	24.70 (74)	24.20 (48)	21.10 (71)
\$30,000 - \$49,000	27.10 (81)	29.30 (58)	26.90 (91)
\$50,000 - \$69,000	23.40 (70)	20.70 (41)	21.90 (74)
\$70,000 or greater	24.70 (74)	26.30 (52)	30.20 (102)

The subject of the case was the same across all four experimental conditions. The defendant was accused of striking and severely injuring a small child with his vehicle on a rainy night on a dimly lit road. In each experimental condition, participants were told that, in addition to the police report of the accident, the court would receive evidence of the child's medical expenses and suffering as well as testimony from the child's family members who witnessed the accident and its aftermath.

The focus of the dispute between the parties was the subject of the *case type* manipulation. For half of the participants, who were in the low-relationality condition, the parties did not dispute that negligent driving had caused the injury to the child. They did dispute, however, that the defendant had been the person driving the vehicle. In this experimental condition, the focus of the case was the factual determination of the driver's identity.

For the remaining participants in the high-relationality condition, the focus of the case differed. The defendant did not dispute that he drove the vehicle that injured the child. He did dispute, however, that he had been driving negligently. He argued that, despite the care that he exercised while driving on that rainy night, the accident could not have been avoided. Thus, the jury's factual determinations in this condition would be subordinate to the relational question of whether his actions conformed to societal norms: whether he exercised the care that an ordinary person in the community would have exercised, which would vitiating his liability.

The legal proceeding in which the case unfolded was also manipulated. Half of the participants encountered the case in the context of the liability phase, in which the fact finder determines whether the defendant is subject to punishment for the act of which he is accused. In this experimental condition, participants were told that the evidence collected by the court would be used for this purpose—to determine whether the defendant meets the legal requirements for punishment.

The remaining participants encountered the case in the context of the punishment phase. Here, participants were told that the evidence was collected by the court for a different purpose. Participants who were also in the low-relationality "case type" condition were told here that the evidence was collected to determine the amount of restitution that would be paid to the family on account of the defendant's conduct. Participants who were also in the high-relationality "case type" condition were told that

the evidence was collected to determine the defendant's sentence—the amount of time he should be incarcerated for causing the accident. The distinctions between the experimental conditions are highlighted in Table 2.

After participants completed attention and comprehension checks, they completed the dependent measures of the study.¹³⁴ Five items measured the degree to which the proceeding to which participants were exposed was concerned with truth. These items included the following: (1) “How much do you think the goal of this proceeding is to reach an accurate decision?”; (2) “How much do you think the goal of the proceeding is to uncover the true facts?”; (3) “How much do you think the goal of the proceeding was to reveal the correct information that the court needs to make a decision?”; (4) “How likely do you think it is that the goal of the proceeding is to reach the right factual decision?”; and (5) “How much faith do you have that the goal of this proceeding is to resolve the dispute correctly on its facts?”

134. These questions measure the degree of perceived “truth” and “justice” produced by different legal procedures on seven-point Likert scales. The items were modified to gauge participants' sense of the truth and justice produced by the legal proceedings themselves, to which participants were randomly assigned. These modifications resulted in eleven items, which were randomized.

Table 2. Summary of Experimental Manipulations (Study 1).

Case Type	Trial Phase	
	<i>Liability</i>	<i>Punishment</i>
<i>Low-Relationality</i> (underlying factual questions predominate)	<p>Participants were told that the perpetrator's action was negligent, but that the defendant disputes that he was the perpetrator.</p> <p>The court must collect evidence (in the form of witnesses and documents) to determine whether the defendant in fact struck the victim.</p>	<p>Participants were told that the court is not determining whether the defendant drove the vehicle that struck the victim.</p> <p>The court instead must determine how much the defendant owes in restitution for the injury he inflicted. The court must collect evidence (in the form of witnesses and documents) to determine just how much the victim's family had to spend to recover from the injuries. The court may also determine if the victim is owed money for pain and suffering.</p>
<i>High-Relationality</i> (underlying factual questions subordinate to distributive fairness concerns)	<p>Participants were told that the perpetrator does not dispute that he struck the victim.</p> <p>The court must determine whether the level of caution that the defendant exhibited (as determined by witnesses and documents) was equal to what an "ordinary prudent person" in the community would have exhibited under the circumstances.</p>	<p>Participants were told that the court is not determining whether the defendant drove the vehicle that struck the victim.</p> <p>The court instead must determine how much time in jail the defendant deserves for injuring the victim. The court must collect evidence (in the form of witnesses and documents) and apply it to legal guidelines to decide how much time in jail the defendant will receive.</p>

Six items measured the degree to which the proceeding was concerned primarily with justice. These items included: (1) "How much do you think the goal of the proceeding is about rendering a decision that is fair?"; (2) "How much do you believe that being treated fairly by the courts is the major focus of this proceeding?"; (3) "How much is the fair treatment of people the main focus of this proceeding?"; (4) "How much do you agree that the

purpose of this proceeding is to reach a fair conclusion?"; (5) "How much do you think that treating the parties fairly is the point of this proceeding?"; and (6) "How much would you agree that most people who go through this proceeding would say that the point is to reach a fair decision?"

Participants then answered a series of demographic questions before being debriefed. Participants self-reported their age, gender, race, ethnicity, income, and political orientation. They also answered whether they had previous experience with the courts and, if so, in what capacity.

3. Results

Results are reported in two parts. First, I conducted a confirmatory factor analysis (CFA)¹³⁵ on the measures of truth and justice in this study to examine their convergent and discriminant validity.¹³⁶ Second, I examined participants' perceptions of the truth and justice produced by different types of cases and different trial phases.

135. A confirmatory factor analysis (CFA) is a special form of factor analysis, most commonly used in social science research. It is used to test whether measures of a psychological construct are consistent with a researcher's understanding of the nature of that construct (or "factor"), and the objective of confirmatory factor analysis therefore is to test whether the data fit the researcher's hypothesized measurement model. In a confirmatory factor analysis, the researcher first develops a hypothesis about what factors she believes are underlying the measures used in the study and may impose constraints on the model based on these *a priori* hypotheses. For example, if it is posited that there are two factors accounting for the covariance in the measures, and that these factors are unrelated to one another, the researcher can create a model where the correlation between factor A and factor B is constrained to zero. "Model fit measures" could then be obtained to assess how well the proposed model captured the covariance between all the items or measures in the model. If the constraints the researcher has imposed on the model are inconsistent with the sample data, then the results of statistical tests of model fit will indicate a poor fit, and the model will be rejected. If the constraints are satisfactory and consistent with the sample data, the results of statistical tests of model fit will indicate a good fit. See generally TIMOTHY A. BROWN, CONFIRMATORY FACTOR ANALYSIS FOR APPLIED RESEARCH (2d ed. 2015) (explaining the principles and methods involved in the confirmatory factor analysis technique).

136. Convergent and discriminant validity are subtypes of construct validity. The former measures the degree that constructs that should be related to each other are, in fact, observed to be related to each other; the latter measures whether constructs that should not be related to each other are, in fact, observed to not be related to each other. See generally Donald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56 PSYCHOL. BULL. 81 (1959) (explaining these statistical concepts).

a. *Preliminary Analysis: Confirmatory Factor Analysis*

I conducted the CFA using the Lavaan package from R Statistical Software.¹³⁷ Based on past research,¹³⁸ I hypothesized a two-factor model to be confirmed by the CFA. The theorized model contained the five truth items, which composed one factor (truth), and six justice items, which composed a second factor (justice).¹³⁹ Figure 4 below illustrates the relationship between the two factors, and Table 3 provides the measurements of model fit.

As shown in Table 3, the metrics for measuring the fit of the hypothesized model indicate good fit between the theorized model and the data.¹⁴⁰ Table 3 also provides standardized parameter estimates¹⁴¹ and demonstrates that this two-factor solution provides superior fit compared to a one-factor solution, in which there is no meaningful difference between the truth and

137. Yves Rosseel, *Lavaan: An R Package for Structural Equation Modeling*, 48 J. STAT. SOFTWARE 1 (2012). An analysis of the data revealed no univariate or multivariate outliers.

138. Thibaut & Walker, *supra* note 16, at 543; Tyler & Sevier, *supra* note 14.

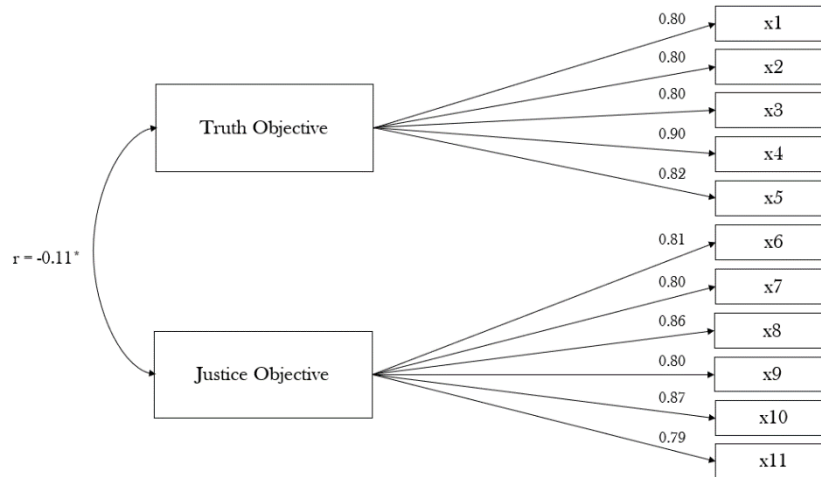
139. Because the data were normally distributed, I chose a maximum likelihood estimation in evaluating model fit. The truth and justice factors were permitted to be correlated based on prior evidence of a weak to moderate relationship between these dimensions.

140. These statistics include the goodness of fit index (GFI), comparative fit index (CFI), Tucker-Lewis Index (TLI), root mean square error of approximation (RMSEA), and the standardized root mean square residual (SRMR). See generally REX B. KLINE, *PRINCIPLES AND PRACTICE OF STRUCTURAL EQUATION MODELING* (3d ed. 2011) (introducing different statistics of evaluating model fit). Generally, test values for GFI, CFI, and TLI should be close to one, whereas values for RMSEA and SRMR should be close to zero. Above 0.95 is considered a good fit for CFI and TLI, with 0.90 considered a good fit for GFI (0.95 in some cases). See Daire Hooper et al., *Structural Equation Modelling: Guidelines for Determining Model Fit*, 6 ELECTRONIC J. BUS. RES. METHODS 53, 53–55 (2008). Below 0.08 is considered an acceptable fit for SRMR, *id.* at 55, while a RMSEA falling between 0.06 and 0.08 indicates a close to good fit. Sengul Cangur & Ilker Ercan, *Comparison of Model Fit Indices Used in Structural Equation Modeling Under Multivariate Normality*, 14 J. MOD. APPLIED STAT. METHODS 152, 157 (2015).

141. A standardized parameter estimate is a descriptive estimation—based on the sample examined in an experimental study—of the true “value” of the phenomena being examined in the population from which the sample is drawn. See generally JAMES V. BECK & KENNETH J. ARNOLD, *PARAMETER ESTIMATION IN ENGINEERING AND SCIENCE* 1 (1977) (defining the term and explaining its significance).

justice items.¹⁴² The items that loaded onto the separate factors were averaged to form two scales: “Truth Objective” and “Justice Objective.”¹⁴³

Figure 4. Confirmatory Factor Analysis.



142. Because of the good fit indices, no post hoc modifications were made to the two-factor solution, and the residual analysis was satisfactory. *See generally* BROWN, *supra* note 135 (explaining principles of confirmatory factor analysis).

143. Five items, $\alpha = 0.91$ (Truth); six items, $\alpha = 0.92$ (Justice). The reliability of a psychometric scale is measured by a Cronbach's alpha statistic ranging from 0.00 (lowest reliability) to 1.00 (highest reliability), with acceptable reliability greater than .80. *See* Lee J. Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16 *PSYCHOMETRIKA* 297, 327–28 (1951) (discussing the range of “ α ”). The two scales were weakly and negatively correlated with each other, $r(298) = -0.11$, $p = 0.048$.

Table 3. Fit Statistics for Two-Factor Solution

	Estimate
Absolute Fit Indices	
Model Chi-Square (df = 43)	122.32***
Goodness of Fit (GFI)	0.93
Standardized Root Mean Square Residual (SRMR)	0.06
Relative Fit Indices	
Tucker-Lewis Index (TLI)	0.96
Non-Centrality-Based Fit Indices	
Comparative Fit Index (CFI)	0.97
Root Mean Square Error of Approximation (RMSEA)	0.08
RMSEA 90% Confidence Interval	[0.06, 0.09]

Model	χ^2	df	GFI	SRMR	TLI	RMSEA	CFI
One-Factor	1351.33	44	0.43	0.32	0.29	0.32	0.43
Two-Factor	122.33	43	0.93	0.06	0.96	0.08	0.97

b. Main Analysis

A mixed-design analysis of variance (ANOVA) was conducted to analyze the data.¹⁴⁴ The analysis included (a) two be-

144. An analysis of variance (ANOVA) provides a statistical test of whether the means of several groups are equal. ANOVA results are represented by an F-statistic, and the sizes of the effects are represented by η^2_p . Means are denoted by the letter "M" and standard deviations are denoted by the letters "SD." See ROBERT LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 168–72 (2d ed. 2016) (explaining empirical research methodologies and statistical techniques).

tween-subjects factors: *case type* (low-relationality vs. high-relationality) and *trial phase* (liability vs. punishment); and (b) one within-subjects factor, which captured participants' judgments of the extent to which the legal case was concerned with *truth* and the extent to which it was concerned with *justice*.¹⁴⁵

To test the hypothesis that people's perceptions of the objective of a legal proceeding would differ as a function of the type of case and the phase in which the case is situated, I conducted a 2 (case type) x 2 (phase) x 2 (objective: truth vs. justice) ANOVA with repeated measures on the last variable.¹⁴⁶ The analysis revealed an effect of the proceeding's objective, such that ratings of the degree to which the case was concerned with truth¹⁴⁷ were lower than ratings of the degree to which the case was concerned with justice¹⁴⁸ on average across all experimental conditions.¹⁴⁹ The analysis also revealed a main effect of the trial phase,¹⁵⁰ such that the composite of participants' truth and justice ratings were lower in the liability phase¹⁵¹ than in the punishment phase.¹⁵²

Differences are denoted as "statistically significant" in this Article if the statistical tests indicate that the likelihood that the difference observed would occur by chance is 5% or less (as indicated by the p-value as $p < 0.05$). A difference is "marginally significant" if the likelihood of seeing such a difference by chance is greater than 5% but less than 10%. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485 n.117 (2003) (citing BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* (2d ed. 1989)).

Bivariate correlations range from -1.00 (a perfect negative relationship) to +1.00 (a perfect positive relationship). A bivariate correlation of 0.00 indicates no relationship. See, e.g., EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 453-54 (11th ed. 2007) (explaining different kinds of relationships between the variables).

145. A mixed design experiment consists of at least one "between subjects" factor, in which different participants are exposed to different versions of an experimental variable, and one "within subjects" factor, in which participants are exposed to multiple versions of an experimental variable. See FIELD, *supra* note 133, at 592 (explaining the definition of mixed designs).

146. A repeated measures factor, which is part of a mixed subjects design, compares multiple responses by the same participant to the experimental stimuli. See *id.* at 544 (providing the definition and examples for repeated-measures designs).

147. $M = 4.80$, $SD = 1.48$.

148. $M = 5.30$, $SD = 1.19$.

149. $F(1, 296) = 24.02$, $p < 0.001$, $\eta^2_p = 0.08$.

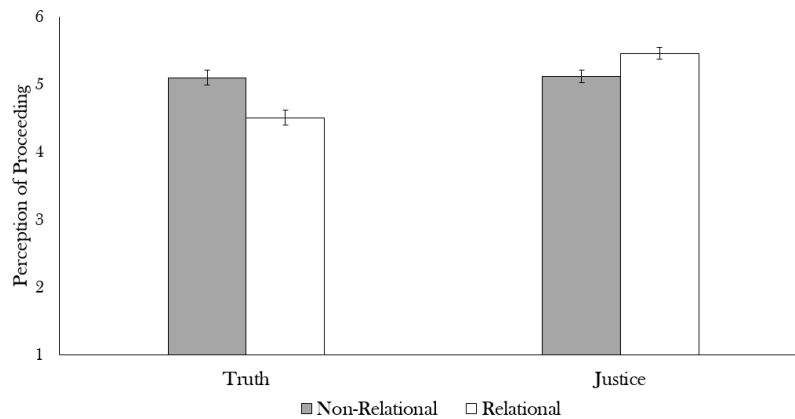
150. $F(1, 296) = 6.27$, $p = 0.013$, $\eta^2_p = 0.02$.

151. $M = 4.91$, $SD = 1.21$.

152. $M = 5.68$, $SD = 1.03$.

Importantly, and as predicted, these main effects were qualified by two significant two-way interactions. First, the analysis revealed an interaction between participants' perceptions of the *objective* of dispute and the *type of case* under dispute.¹⁵³ To explore this interaction, I examined participants' perceptions of truth and justice in low-relationality cases compared to high-relationality cases. Participants rated the objective of low-relationality cases¹⁵⁴ as higher in truth than "conflict of interest" cases.¹⁵⁵ In contrast, they rated the objective of high-relationality cases¹⁵⁶ as more concerned with justice than low-relationality cases.¹⁵⁷ This interaction is illustrated in Figure 5 below.

Figure 5. Perceptions of the Objectives of Different Trial Proceedings.



153. $F(1, 296) = 21.83, p < 0.001, \eta^2_p = 0.07$.

154. $M = 5.10, SD = 1.68$.

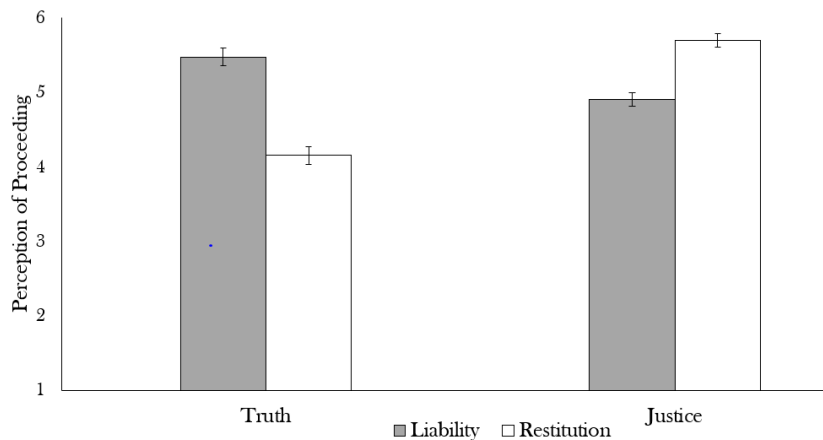
155. $M = 4.51, SD = 1.48, F(1, 298), p = 0.001, \eta^2_p = 0.04$.

156. $M = 5.46, SD = 1.29$.

157. $M = 5.12, SD = 1.01, F(1, 298), p = 0.015, \eta^2_p = 0.02$. This comparison and the comparison with respect to participants' perceptions of the truth and justice objectives of the liability phase were evaluated through a one-way multivariate analysis of variance (MANOVA) to control for false positives (Type I error). Both an ANOVA and a MANOVA are statistical tests, which produce Fisher's F-statistics, that examine whether the means of different groups are statistically different or statistically equal. A MANOVA is a special type of analysis of variance where multiple dependent variables—which are at least moderately correlated with each other—are analyzed in tandem to reduce the likelihood of Type I error. See, e.g., Russell T. Warne, *A Primer on Multivariate Analysis of Variance (MANOVA) for Behavioral Scientists*, 19 PRAC. ASSESSMENT RES. & EVALUATION 1, 2 (2014) (explaining the definition of MANOVA).

Second, the analysis also revealed an interaction between participants' perceptions of the *objective* of the legal case and the *trial phase*.¹⁵⁸ To explore this interaction, I again examined participants' perceptions of truth and justice in the liability phase and in the punishment phase. As predicted, participants rated the objective of the liability phase¹⁵⁹ as more concerned with truth than the punishment phase.¹⁶⁰ In contrast, participants rated the objective of the punishment phase¹⁶¹ as more concerned with justice than the liability phase.¹⁶² This two-way interaction is illustrated in Figure 6.¹⁶³

Figure 6. Perceptions of the Objectives of Different Trial Phases.



4. Discussion

The results from Study 1 support the view that the public perceives that the resolution of relationally-distinct legal disputes involves different psychological objectives. Study 1 yielded several findings consistent with Thibaut and Walker's *A Theory*

158. $F(1, 296) = 113.90, p < 0.001, \eta^2_p = 0.28$.

159. $M = 5.46, SD = 1.32$.

160. $M = 4.14, SD = 1.55, F(1, 298) = 63.10, p < 0.001, \eta^2_p = 0.18$.

161. $M = 5.69, SD = 1.03$.

162. $M = 4.91, SD = 1.21, F(1, 298) = 35.86, p < 0.001, \eta^2_p = 0.11$.

163. Somewhat surprisingly, the analysis also revealed a significant three-way interaction among case type, legal proceeding, and proceeding purpose, $F(1, 296) = 11.09, p < 0.001, \eta^2_p = 0.04$. An exploration of this interaction revealed that the differences between perceptions of low- and high-relationality cases was more muted in the punishment phase than in the liability phase.

of Procedure. First, I found that the public perceives the pursuit of factual truth and the pursuit of relational justice as related but distinct psychological objectives in legal dispute resolution. Moreover, the public does not classify dispute resolution procedures as monolithically about truth or justice; rather, these objectives are associated systematically with different types of legal cases and with different phases of a legal case, depending on the degree of relationality involved in the dispute.

In low-relationality cases, participants perceived that the legal decision maker's primary function is to determine factual truth. But in "conflict of interest" cases high in relationality, where the court must determine whether a defendant's conduct was objectively reasonable in relation to communal norms, participants perceived that the tribunal's function is to reach a decision that is distributively fair and procedurally just.

Similarly, the concept of relationality affected participants' perceptions of the objectives of different phases of a trial. Insofar as the liability phase is comparatively lower than the punishment phase in relationality, the public views the liability phase as concerned more with the creation of factual truth than with notions of justice. The converse is true with respect to the punishment phase, which is higher in relationality. When the court is concerned not with the adjudication of guilt or liability, but instead with the appropriate sentence, restitution, or damages that a litigant must pay, the public views this phase of the trial as more concerned with notions of distributive fairness and procedural justice, and less with establishing factual truth.

Altogether, this study suggests that the public associates different types of legal disputes—and the circumstances under which those cases are adjudicated—with different psychological values and goals. The next study examines whether different methods for resolving legal disputes are perceived as prioritizing these goals differently.

B. STUDY 2: PROCEDURAL PRIORITIES

The second study in this series seeks to explore whether different conflict resolution procedures prioritize different conflict resolution objectives. Study 2 also examines whether the pursuit of factual truth and the pursuit of relational justice are both implicated in participants' willingness to legitimize the decisions of legal tribunals.

In this study, participants read about a different trial at their local courthouse. This time, I manipulated whether the dispute would be resolved pursuant to a relational, adversarial procedure or a non-relational, inquisitorial procedure. I then measured participants' perceptions of the amount of truth and justice that they expected to be produced under the procedure to which they were exposed, in addition to several other items regarding the proceeding, the witnesses and evidence, and the degree to which participants would legitimize the tribunal's ultimate decision.

If participants perceive different procedures for resolving legal disputes as prioritizing different psychological values, we would predict that participants will (1) perceive the adversarial procedure as prioritizing justice more so than the inquisitorial procedure; and (2) perceive the inquisitorial procedure as prioritizing factual truth more so than the adversarial procedure. Moreover, if Thibaut and Walker are correct, we would expect that both truth *and* justice are necessary conditions precedent to legitimizing a legal tribunal's decision. Participants should therefore legitimize legal decisions that are reached under either procedure, but through different psychological pathways. This Section reports the methodology and results of Study 2.

1. Participants, Procedures, and Measures

One hundred ninety-eight American participants were recruited through Amazon Mechanical Turk, an online participation service, and paid \$1.00 for their participation in Study 2. Participants were 38% female, averaged 37.19 years of age (with a *SD* of 10.62), and ranged from 20 to 78 years old. Fifty-nine percent of the sample had completed at least a college degree, and the median income of the sample was between \$40,000 and \$49,999. Forty-four percent of participants identified as politically liberal, 24% of participants identified as politically moderate, and 31% of participants identified as conservative.¹⁶⁴

Participants were told that the researchers were interested in their opinions regarding different types of legal dispute resolution procedures. After providing their informed consent to participate in the study, they read about a hypothetical legal case.¹⁶⁵

164. For a complete description of the sample for this study, see *supra* tbl.1.

165. The case was adapted from Sevier, *supra* note 38, at 214–21 (the pilot study).

The legal case, which was the same for all participants, involved a civil plaintiff suing a drug manufacturer for monetary damages. The plaintiff alleged that, after taking the defendant's antibiotic medicine, she became violently ill with severe stomach pains and related injuries. The evidence against the defendant included testimony from the plaintiff, her family members, and her treating physician regarding her alleged injuries; receipts proving that she had purchased the defendant's medication; and invoices from the hospital emergency room where she was treated. Evidence in the defendant's favor included pre-market, internal reports indicating that the drug was safe and effective. Additionally, the court received expert testimony from a biologist describing animal studies suggesting a link between the defendant's product and illnesses similar to the plaintiff's injuries.

Participants were randomly assigned to one of two legal procedures to resolve the dispute between the plaintiff and the defendant drug company. For half of the participants, the dispute was resolved through adversarial methods. Participants learned that each party was allowed to call its own witnesses, and that the plaintiff called herself, her family members, her doctors, and the expert witness to testify; the defendant primarily called its employees to testify. Each party was permitted to ask questions of the other party's witnesses through cross-examination.

For the remaining participants, the dispute was resolved through inquisitorial methods. In this condition, participants learned that the judge, not the parties, called all of the witnesses and questioned them, including the expert witness. The parties were not allowed to meaningfully cross-examine the witnesses, although they were allowed to ask minor clarification questions. After all participants completed the attention and comprehension checks, they were asked several questions about their impressions of the trial.

The dependent measures in this study consisted of items covering five topics, which were presented to participants in random order. Participants were asked questions related to: (1) the *credibility* of the witnesses,¹⁶⁶ (2) the perceived level of *procedural justice* afforded to the parties (as operationalized by items

166. Three items related to the *perceived credibility* of the trial witnesses: (a) "Under this procedure, how motivated do you believe the witnesses were to give testimony that was no slanted toward one party?"; (b) "Under this procedure, how much do you believe that the witness would testify truthfully?"; and (c) "Under this procedure, how much do you think the witnesses' testimony was unbiased?"

measuring perceived voice, respect, and control),¹⁶⁷ (3) the degree to which the procedure that they were exposed to prioritized the *truth-finding goal* of the courts,¹⁶⁸ (4) the degree to which it prioritized the *overall fairness goal* of the courts,¹⁶⁹ and (5) the degree to which they would *legitimize* a decision maker that used the procedure to which they were exposed.¹⁷⁰ The items were measured on standard seven-point Likert scales.

As in Study 1, participants then answered a series of demographic questions before being debriefed. Specifically, participants self-reported their age, gender, race, ethnicity, income,

167. Three items measured participants' perceptions of the *procedural justice* afforded by the procedure to which they were exposed: (a) "How much control does this procedure give parties over the outcome of the dispute?"; (b) "How respected by the court do you believe parties would feel when the court uses this procedure to resolve the dispute?"; and (c) "How much does this procedure give parties the ability to persuade the decision maker of their point of view?" Rather than measuring participants' general impressions of procedural justice, these items measured individual components of the construct. Both approaches are accepted in the relevant literature.

168. Five items measured the extent to which the legal procedure to which participants were exposed prioritized *truth* in fact finding. These items were: (a) "How likely it is that a decision reached using this procedure will be accurate?"; (b) "How likely is it under this procedure that a court will uncover the true facts?"; (c) "How likely is it that this procedure will reveal the right information that the court needs to make a decision?"; (d) "How much confidence would you have in a court to make a good factual decision using this procedure?"; and (e) "How much faith do you have that a court using this procedure will resolve disputes in a way that gets to the truth?"

169. Four items measured the extent to which the procedure to which participants were exposed prioritized *justice*. These items were: (a) "In general, I can count on courts using this procedure to be just"; (b) "Overall, courts that use this procedure treat parties fairly"; (c) "Most people who have their cases decided under this procedure would believe that it is just"; and (d) "Generally, people receive fair treatment from courts that use this procedure." These items were adapted from Ambrose and Schminke's overall fairness scale for organizational justice. See generally Maureen L. Ambrose & Marshall Schminke, *The Role of Overall Justice Judgments in Organizational Justice Research: A Test of Mediation*, 94 J. APPLIED PSYCHOL. 491 (2009) (examining overall justice and its relationship with specific justice).

170. Finally, five items measured several aspects of the *perceived legitimacy* of the court when it used the procedure to which participants were exposed: (a) "How legitimate would you view verdicts that are reached using this procedure?"; (b) "How willing are you to abide by decisions that are reached using this procedure?"; (c) "How willing are you to cooperate with legal tribunals that make decisions using this procedure?"; (d) "How willing are you to engage with legal tribunals that use this procedure to make decisions?"; and (e) "How willing are you to respect legal decisions that are made using this procedure?"

and political orientation. Participants also answered whether they had previous experience with the courts and, if so, in what capacity.

2. Results

Results are reported in three parts. First, I conducted two preliminary analyses: (1) a reliability analysis for the index variables representing witness credibility, perceived procedural justice, and perceived legitimacy;¹⁷¹ and (2) a CFA for the nine items measuring the extent to which the decision-making procedures prioritized truth and justice. Second, I conducted the main analysis, which examined participants' perceptions of the truth and justice produced by adversarial and inquisitorial procedures for resolving the legal dispute. Finally, I conducted a path analysis¹⁷² to determine the psychological pathways between the decision-making procedure to which participants were exposed and their willingness to legitimize courts that use those procedures.

a. Preliminary Analyses

The first set of analyses examine the construction of three index variables from the items measuring witness credibility, perceived procedural justice, and perceived legitimacy (and the reliability of those indices). Each proposed index variable had satisfactory reliability; the individual items were therefore averaged to form an index measuring witness credibility,¹⁷³ perceived procedural justice,¹⁷⁴ and perceived legitimacy¹⁷⁵ to be used in the serial path analysis.

As in Study 1, to construct the repeated-measures variable for the main analysis, I conducted a CFA on the items measuring

171. A reliability analysis examines how well different items purporting to measure a psychological construct correlate with each other, such that they can be averaged together as a measurement of the psychological construct. See FIELD, *supra* note 133, at 706–16 (explaining the meaning of reliability and how to conduct reliability analysis).

172. A path analysis (also referred to as a “mediation analysis”) consists of a series of regressions that seek to create a psychological pathway that explains the effect of a predictor variable on a dependent variable. See *id.* at 408–09 (explaining the definition of mediation analysis). For a detailed explanation of a path analysis, see *infra* notes 189–97 and accompanying text.

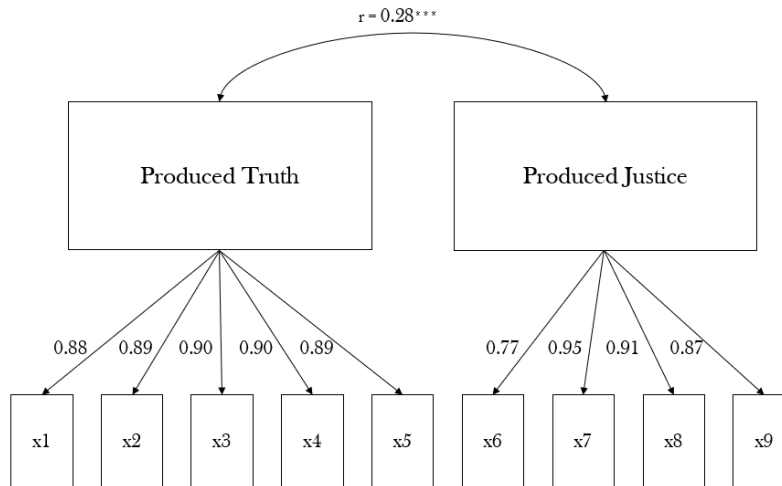
173. Three items, $\alpha = 0.85$.

174. Three items, $\alpha = 0.91$.

175. Five items, $\alpha = 0.95$.

the perceived truth produced by the different procedures¹⁷⁶ and the perceived justice that they provided.¹⁷⁷ I again hypothesized a two-factor model to be confirmed by the CFA. The theorized model contained five truth items, which composed one factor of the model, and four justice items, which composed a second factor.¹⁷⁸ Figure 7 illustrates the relationship between the factors.

Figure 7. Confirmatory Factor Analysis.



Standard fitness measures indicated good fit between the theorized model and the data.¹⁷⁹ The items that loaded onto the separate factors were averaged to form two scales, “Truth Produced”¹⁸⁰ and “Justice Produced.”¹⁸¹

b. Main Analysis

To test the hypothesis that participants would perceive that different dispute resolution procedures differentially prioritize

176. See generally Sevier, *supra* note 38 (providing studies on perceived truth).

177. See generally Ambrose & Schminke, *supra* note 169 (providing studies on overall justice).

178. Because the data were normally distributed, I chose a maximum likelihood estimation in evaluating model fit. As in Study 1, the “truth” and “justice” factors were permitted to be correlated based on prior evidence of a moderate relationship between these dimensions.

179. GFI, TLI, and CFI all > 0.90; RMSEA and SRMR both < 0.08.

180. Five items, $\alpha = 0.95$.

181. Four items, $\alpha = 0.86$. The scales were weakly and positively correlated, $r(196) = 0.28, p < 0.001$.

truth and justice, I conducted a 2 (procedure: adversarial vs. inquisitorial) x 2 (production: truth vs. justice) mixed-design ANOVA with repeated measures on the “production” variable. The analysis revealed a main effect of production,¹⁸² such that ratings of the truth produced by the procedure¹⁸³ were higher than ratings of the justice produced by the procedure across all experimental conditions.¹⁸⁴ The analysis also revealed a main effect of legal procedure,¹⁸⁵ such that the composite of participants’ truth and justice ratings were higher in the adversarial condition¹⁸⁶ than in the inquisitorial condition.¹⁸⁷

Most importantly, and as predicted, the analysis revealed a significant interaction between the *procedure* to which participants were exposed and their *evaluations* of the truth and justice produced by the procedure.¹⁸⁸ Because I hypothesized that participants would perceive the inquisitorial procedure as better at producing truth than the adversarial procedure, and that the adversarial procedure would be better at producing justice than the inquisitorial procedure, I examined the nature of this interaction as a function of participants’ perceptions of truth and their perceptions of justice.

As predicted, an analysis of participants’ perceptions of the tribunal’s decisional accuracy revealed a significant effect of procedure,¹⁸⁹ such that they perceived the inquisitorial procedure¹⁹⁰ as producing greater truth than the adversarial procedure.¹⁹¹ Conversely, and as predicted, an analysis of participants’ perceptions of the court’s production of overall justice also revealed a significant effect of procedure,¹⁹² but with the adversarial procedure¹⁹³ viewed as producing greater justice than the inquisitorial procedure.¹⁹⁴ This significant interaction is illustrated in Figure 8.

182. $F(1, 196) = 23.82, p < 0.001, \eta^2_p = 0.11$.

183. $M = 4.88, SD = 1.42$.

184. $M = 4.36, SD = 1.45$.

185. $F(1, 196) = 7.68, p = 0.006, \eta^2_p = 0.04$.

186. $M = 4.85, SD = 1.17$.

187. $M = 4.40, SD = 1.47$.

188. $F(1, 196) = 87.91, p < 0.001, \eta^2_p = 0.31$.

189. $F(1, 196) = 6.59, p = 0.011, \eta^2_p = 0.03$.

190. $M = 5.13, SD = 1.43$.

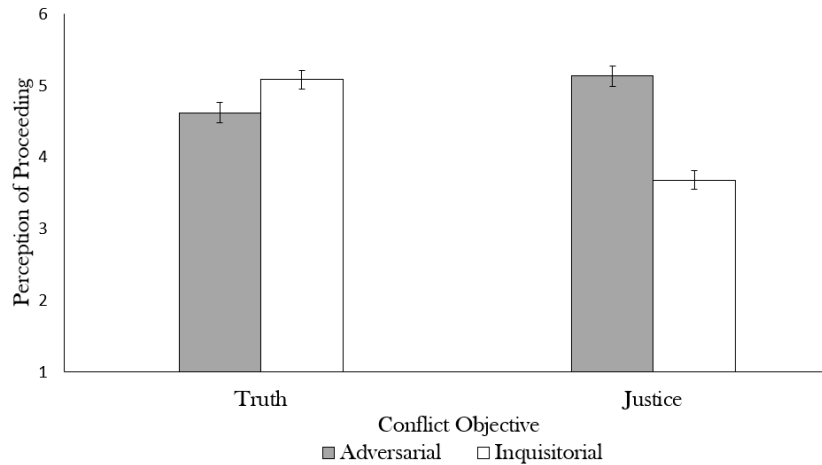
191. $M = 4.62, SD = 1.37$.

192. $F(1, 196) = 60.39, p < 0.001, \eta^2_p = 0.24$.

193. $M = 5.08, SD = 0.97$.

194. $M = 3.67, SD = 1.50$.

Figure 8. Perceived Truth and Justice Produced by Procedure.



c. Serial Path Analysis

To understand the influence of a dispute resolution procedure's production of truth and justice on its perceived legitimacy, I conducted a multimediator analysis.¹⁹⁵

The analysis contained the following variables: (1) legal procedure as an independent variable;¹⁹⁶ (2) the perceived credibility of the witnesses under the procedure, the perceived accuracy produced by the procedure, the perceived procedural justice pro-

195. The multimediator analysis was conducted using Model 6 from Professor Andrew Hayes's "PROCESS" statistical software macroinstruction. See ANDREW F. HAYES, INTRODUCTION TO MEDIATION, MODERATION, AND CONDITIONAL PROCESS ANALYSIS: A REGRESSION-BASED APPROACH 427–28, 446 (2013) (presenting and explaining Andrew Hayes's Model 6). A mediation analysis detects "when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator." Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RES. METHODS 879, 879 (2008). The mediation analysis reported in this Article is performed using a linear regression analysis and reports unstandardized coefficients, "b," and standard errors, "SE." It also reports a "t" statistic, which determines whether the coefficients are statistically significant. A linear regression is a statistical test that estimates the independent effects of several predictor variables on a continuous dependent variable. See LAWLESS ET AL., *supra* note 144, at 257–69 (explaining the concept of linear regression).

196. This variable was coded as "0" for the adversarial procedure and "1" for the inquisitorial procedure.

duced by the procedure, and the perceived overall justice produced by the procedure as mediator variables; and (3) perceptions of the procedure's legitimacy as a dependent variable.

I first examined whether participants perceived adversarial and inquisitorial decision-making procedures to be differentially legitimate. As expected, the analysis revealed no significant difference in perceptions of legitimacy as a function of the procedure to which participants were exposed.¹⁹⁷ In examining the relationship among a legal procedure, the truth it produces, the justice it produces, and its perceived legitimacy, I examined two indirect pathways: a truth pathway and a justice pathway. I examine these pathways separately below, through a series of linear regressions.

Truth Path. To test the hypothesis that a legal procedure's perceived legitimacy is, in part, a function of the amount of truth that the procedure is perceived to produce, I constructed a Truth path with (1) the legal procedure to which participants were exposed as the independent variable, (2) the credibility of the witnesses and the overall accuracy produced as mediator variables, and (3) perceptions of the procedure's legitimacy as the dependent variable.¹⁹⁸

The analysis yielded a significant effect of the procedure on the perceived credibility of the witnesses,¹⁹⁹ reflecting greater perceived credibility of witnesses in the inquisitorial condition than in the adversarial condition. Witness credibility was, in turn, significantly associated with the legal procedure's decisional accuracy, such that where witnesses were perceived as more credible, perceptions of the tribunal's decisional accuracy increased.²⁰⁰ Finally, perceptions of the tribunal's decisional accuracy were positively associated with perceptions of the tribunal's legitimacy.²⁰¹ Importantly, this pathway composed a serial, indirect effect of the legal procedure to which participants were

197. $M_{adversarial} = 4.97$, $SD_{adversarial} = 1.35$; $M_{inquisitorial} = 4.98$, $SD_{inquisitorial} = 1.61$; $F(1, 196) = 0.00$, $p = 0.962$, $\eta^2_p = 0.00$. Because this analysis reveals a nonsignificant total effect of the procedure to which participants were exposed on their subsequent perceptions of the legitimacy of the legal procedure, I fixed this relationship to zero in the multimediator analysis that follows.

198. Witness credibility was included in the analysis because previous research has found that it mediates the relationship between the legal procedure to which participants were exposed and their perceptions of the truth that the procedure produces.

199. $b = 1.63$, $SE = 0.19$, $p < 0.001$.

200. $b = 0.56$, $SE = 0.07$, $p < 0.001$.

201. $b = 0.40$, $SE = 0.07$, $p < 0.001$.

exposed on their perceptions of the tribunal's legitimacy. The ninety-five percent bias-corrected and accelerated bootstrap confidence interval (BCaCI)²⁰² for this indirect effect, based on 5,000 samples, was statistically significant.²⁰³

Justice Path. To test the hypothesis that a legal procedure's perceived legitimacy is, in part, also a function of the amount of perceived justice that the procedure produces, I constructed a Justice path with (1) the legal procedure to which participants were exposed as the independent variable, (2) the degree to which participants experienced the components of procedural justice (including control, voice, and respect) and the overall justice produced as mediator variables, and (3) perceptions of the procedure's legitimacy as the dependent variable.²⁰⁴

The analysis yielded a significant effect of the procedure on perceptions of procedural justice, reflecting greater perceived control, voice, and respect afforded to litigants in the adversarial condition than in the inquisitorial condition.²⁰⁵ Greater perceived control, voice, and respect afforded, in turn, were significantly associated with the legal tribunal's overall justice, such that greater procedural fairness increased perceptions of overall justice.²⁰⁶ Finally, perceptions of the overall justice produced by the legal procedure were positively associated with perceptions of the tribunal's legitimacy.²⁰⁷ Importantly, this pathway also composed an indirect mediation effect of the legal procedure to

202. Bootstrapping is a nonparametric technique for testing indirect effects that does not assume that the variables of interest are normally distributed. The bootstrapping technique takes a large number of samples, with replacement, from the data and computes the indirect effect for each sample. The ninety-five percent Confidence Interval (CI) is derived by sorting the elements of the vector of the indirect effect from low to high. For a sample of 5000, the 250th score in the sorted distribution defines the lower limit of the CI, and the upper limit is defined as the 4751st score. If the CI does not include a value of zero, the indirect effect is statistically significant. See Kristopher J. Preacher & Andrew F. Hayes, *SPSS and SAS Procedures for Estimating Indirect Effects in Simple Mediation Models*, 36 BEHAV. RES. METHODS, INSTRUMENTS, & COMPUTERS 717 (2004).

203. Estimate = 0.37, SE = 0.12, BCaCI [0.11, 0.59].

204. Procedural justice was included in the analysis because previous research suggests that it is correlated with perceptions of overall justice, such that it may act as an antecedent cause. See Ambrose & Schminke, *supra* note 169. It is also differentially associated with different legal procedures. See Sevier, *supra* note 38.

205. $b = -1.90$, $SE = 0.22$, $p < 0.001$.

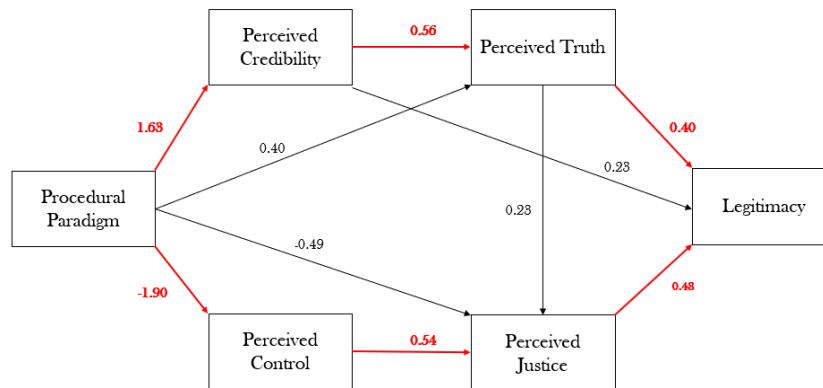
206. $b = 0.54$, $SE = 0.05$, $p < 0.001$.

207. $b = 0.48$, $SE = 0.08$, $p < 0.001$.

which participants were exposed on their perceptions of the tribunal's legitimacy. The bias-corrected bootstrap CI for this indirect effect, again based on 5000 samples, was statistically significant.²⁰⁸ Additionally, a contrast analysis revealed that the Justice pathway was a significantly stronger pathway to the tribunal's legitimacy than was the Truth pathway.²⁰⁹

Additional paths. In addition to the two hypothesized pathways tested above, I tested all other possible indirect pathways composed of different combinations of the six variables involved in the path analyses, to determine other routes by which legal procedures attain popular legitimacy. The analysis revealed, in addition to the Truth and Justice pathways analyzed above, four statistically significant paths from the legal procedure to which participants were exposed to their perceptions of the procedure's legitimacy. A series of contrast analyses revealed that all four additional paths were significantly weaker than the Justice pathway, and none were stronger than the Truth pathway. All significant paths are listed in Table 4, which includes their point estimate, standard error, and bootstrapped confidence interval. The table also provides measures of the comparative strength of all significant pathways. An illustration of the complete path model appears in Figure 9.

Figure 9. Multimediator Analysis.



208. Estimate = -0.49, *SE* = 0.13, BCaCI [-0.78, -0.36].

209. Estimate = -0.57, *SE* = 0.09, BCaCI [-0.77, -0.42].

Table 4. Significant Paths Between Legal Procedure and Perceived Legitimacy²¹⁰

	Estimate	Boot. SE	BCaCI
“Justice” (X → J1 → J2 → Y)	0.48 ^a	0.14	[0.25, 0.79]
“Truth” (X → T1 → T2 → Y)	-0.38 ^b	0.12	[-0.65, -0.17]
X → T1 → Y	-0.37 ^b	0.13	[-0.63, -0.13]
X → J2 → Y	0.23 ^c	0.10	[0.06, 0.44]
X → T2 → Y	0.16 ^c	0.09	[0.01, 0.38]
X → T1 → T2 → J2 → Y	-0.10 ^d	0.04	[-0.18, -0.03]

3. Discussion

Study 2 builds on Study 1 in several ways, while confirming several hypotheses suggested in Thibaut and Walker’s *A Theory of Procedure*.²¹¹ Most importantly, the results strongly suggest that the psychological goals of establishing factual truth and producing relational justice contribute to the public’s willingness to legitimize legal tribunals. Participants in this study legitimized legal disputes decided under adversarial methods and inquisitorial methods equally. But the pathway to legitimacy varied, such that the adversarial system achieved popular legitimacy through heightened perceptions of voice and procedural justice, whereas the inquisitorial system achieved popular legitimacy through perceived increases in the accuracy of the tribunal’s fact finding and the credibility of its witnesses. This study suggests that adversarial and inquisitorial dispute resolution paradigms can both attain legitimacy, but through different pathways. Weaknesses with respect to one of these psychological goals do not necessarily doom a legal procedure to illegitimacy but, especially if the procedure is low in relational justice, it increases the odds.

Critically, the results reveal a tradeoff between adversarial and inquisitorial dispute resolution systems with respect to the psychological objectives that they prioritize. In this study, there

210. “X” denotes Legal Procedure, “T1” denotes Perceived Witness Credibility, “T2” denotes Perceived Accuracy, “J1” denotes Perceived Procedural Justice, “J2” denotes Perceived Overall Justice, and “Y” denotes Perceived Legitimacy. Estimates with different superscripts are significantly different at $p < 0.05$.

211. See *supra* Part I.A.

was a strong and statistically significant difference between the ability of the adversary system—where parties have significant control over the presentation of the evidence to the fact finder—and the inquisitorial system—where the judge largely controls the collection of the evidence—to produce factual truth and to attain relational justice. Specifically, the adversary system was deemed superior to the inquisitorial system with respect to producing fair decisions, whereas the inquisitorial system was superior to the adversarial system in producing accurate decisions.

Altogether, Study 1 suggests that the public associates different types of cases and trial phases with different psychological values and objectives, and Study 2 suggests that the public views different legal procedures as prioritizing these objectives differently. A question arises—untheorized and untested by Thibaut and Walker—whether the public prefers legal procedures whose priorities align with the conflict resolution objectives of the case in which the procedure is used. The final study in this series addresses this question.

C. STUDY 3: INSTITUTIONAL LEGITIMACY

Our final study seeks to extend the findings from Studies 1 and 2 by examining the public's preferences for legal procedures: specifically, whether participants prefer dispute resolution procedures whose priorities align better with the public's perception of the objectives of the legal proceeding. The study therefore manipulated three variables. First, as in Study 1, I manipulated the type of case to which participants were exposed, as well as the phase of the trial presented to participants. Second, participants read about two different dispute resolution procedures—the adversarial method and the inquisitorial method—and evaluated their fitness for resolving the legal dispute. I then measured participants' perceptions of the trial's objectives, their opinions of the priorities of the procedures used to resolve the dispute, and their preferences for the two procedures. The following section reports the methodology and results of Study 3.

1. Participants, Procedures, and Measures

Three hundred thirty-nine American participants were recruited through Amazon Mechanical Turk and paid \$1.00 for their participation in Study 3. Participants were 55% female, averaged 39.19 years of age (with a *SD* of 11.90), and ranged from 20 to 72 years old. Sixty percent of the sample had completed at least a college degree, and the median income of the sample was

between \$50,000 and \$59,999. Forty-six percent of participants identified as politically liberal, 30% of participants identified as politically moderate, and 24% of participants identified as conservative.²¹²

As in Studies 1 and 2, participants were told that the researchers were interested in their opinions regarding different types of legal disputes. After providing their informed consent to participate in the study, they read about the hypothetical legal case that was the focus of Study 1, in which a defendant was accused of striking a small child with his vehicle on a dark, rainy night on a poorly-lit road.

a. Experimental Manipulations

As in Study 1, participants were randomly assigned to two different phases of the case: either the liability phase or the punishment phase. The remaining manipulations occurred within a repeated-measures design. Participants read, in random order, two different versions of the case: (a) the low-relationality version, in which a factual determination was the central focus; or (b) the high-relationality version, in which a relational comparison was the central focus.

Participants were then exposed to two different procedures by which the fact finder could resolve the dispute: (1) through an adversarial procedure (described as Option A), in which the parties presented the evidence to the fact finder (and cross-examined the evidence produced by their adversaries); or (2) through an inquisitorial procedure (described as Option B), in which the judge would decide the evidence to collect and would primarily examine and question the witnesses. The information that the participants received regarding these two procedures appears in Table 5 below.

b. Dependent Measures

After participants completed attention and comprehension checks, they completed the dependent measures of the study. The dependent measures were administered in two phases. Participants encountered the first set of dependent measures upon reading the facts of the case. To replicate the results of Study 1,

212. See *supra* tbl.1 for a complete description of the sample for this study.

participants were asked for their impressions of the purpose of the case along two dimensions: how much the case was primarily concerned with questions of truth and with questions of justice.²¹³

Table 5. Summary of Experimental Manipulations (Study 3).

Case Type	<i>Cognitive Conflict</i>	<i>Conflict of Interest</i>
	<p>Participants were told that the perpetrator's action was negligent, but that the defendant disputes that he was the perpetrator.</p> <p>The court must collect evidence (in the form of witnesses and documents) to determine whether the defendant in fact struck the victim.</p>	<p>Participants were told that the perpetrator does not dispute that he struck the victim.</p> <p>The court must determine whether the level of caution that the defendant exhibited (as determined by witnesses and documents) was equal to what an "ordinary prudent person" in the community would have exhibited under the circumstances.</p>
Legal Procedure	<i>Adversarial</i>	<i>Inquisitorial</i>
	<p>Participants learned that each party would be allowed to call its own witnesses (including expert witnesses) and could question those witnesses.</p> <p>Each party would be permitted to ask questions of the other party's witnesses through cross-examination.</p>	<p>Participants learned that the judge, not the parties, would call all of the witnesses and question them, including any expert witnesses.</p> <p>The parties would not be allowed to cross-examine the witnesses, although they would be allowed to ask minor clarification questions.</p>

213. Participants answered, in random order, the same items that were presented in Study 1. *See supra* Part III.A.2.

Participants encountered the second set of dependent measures after they were presented with the two procedures by which the fact finder could resolve the dispute. Here, participants answered two sets of questions in random order. One set of questions consisted of nine items that measured participants' perceptions of the truth and justice that would be produced by the procedures, as in Study 2. This time, however, the items were modified slightly to force participants to make direct comparisons between the adversarial method and the inquisitorial method. For example, one of the "Truth Produced" items in this study asked, on a seven-point Likert scale (anchored at Option A = -3 and Option B = +3), "Which Option will better lead the court to uncover the true facts?" An example of a modified "Justice Produced" item was "Under which Option will people be treated more fairly overall?" In addition to these nine items, participants were asked to make two dichotomous choices: "Which Option will result in more truth being discovered?" and "Which Option treats parties more fairly?" All modified items used in Study 3 appear in Table 6.

Table 6. Modified Procedural Choice Items.²¹⁴

Items	Text
<i>Truth</i>	
Item 1	Which Option will lead to a decision that is more accurate?
Item 2	Which Option will better lead the court to uncover the facts?
Item 3	Which Option will better reveal the information the court needs to make the right decision?
Item 4	Which Option gives you greater confidence that the court will make a correct factual decision?
Item 5	Which Option gives you more faith that the court will resolve the dispute correctly on the facts?
<i>Justice</i>	
Item 1	Which Option will lead to fairer treatment of the parties to the dispute?
Item 2	Under which Option can you count on people being treated fairly by the courts?
Item 3	Which Option is more likely to lead to the fair treatment of parties?
Item 4	The way things work under which Option would create a fairer proceeding?
Item 5	Which Option leads to better treatment of the parties in this case?
Item 6	Under which Option do you think people would say they've been treated fairly?
<i>Dichotomous</i>	
Item 1	Which Option will result in more "truth" being discovered?
Item 2	Which Option treats people more fairly?

The final set of dependent measures examined participants' preferences for each procedure. Participants responded to three items, on seven-point Likert scales (anchored at Option A = -3

214. Truth and justice items were presented on a seven-point scale anchored at "Option A" and "Option B." The dichotomous questions presented participants with a forced choice between Option A and Option B.

and Option B = +3): “In light of the proceeding you’ve read about, which Option for resolving the dispute do you prefer more?”; “Which Option do you like better, in light of goals of the proceeding?”; and “Which Option would you choose (if you could) for resolving a dispute similar to the one you read about?” Participants also responded to one item with a dichotomous choice: “Which Option do you prefer better for resolving the legal case you read about?” These items were presented to participants in random order.

After completing these dependent measures, participants repeated the process after being exposed to the second version of the case. Participants were told that their answers to the dependent measures for the second version of the case might be the same as their answers to the questions following the first version of the case or that their answers might differ. Finally, as in Studies 1 and 2, participants answered a series of demographic questions before they were debriefed and the study concluded.

2. Results

This section proceeds in two parts. First, it analyzes the items that form the dependent measures in this study. Second, it attempts to replicate the results from Studies 1 and 2, and it examines participants’ preferences for different procedures used to resolve cases that differ in relationality.

a. Preliminary Analyses

The first set of analyses examined the construction of five index variables that will serve as predictors and dependent measures in Study 3. Each index variable had satisfactory reliability; individual items were therefore averaged to form an index measuring truth objective, justice objective, truth production, justice production, and procedural preference.²¹⁵

b. Main Analyses

The analysis of the results of Study 3 is three-fold. First, the analysis attempts to replicate the two-way interactions, found in Study 1, between (1) case type and proceeding objective, and (2) trial phase and proceeding objective. Second, it attempts to conceptually replicate the interaction, found in Study 2, between the

215. Truth objective: 5 items, $\alpha = 0.93$; justice objective: 6 items, $\alpha = 0.93$; truth production: 5 items, $\alpha = 0.96$; justice production: 4 items, $\alpha = 0.93$; and procedural preference: 3 items, $\alpha = 0.93$.

legal procedure to which participants were exposed and their perceptions of the accuracy and justice produced by those procedures. Finally, Study 3 extends these findings by examining whether participants prefer procedures that produce truth and justice in alignment with the type of case under dispute.

Proceeding objectives. To replicate the results from Study 1, and to test the hypothesis that people's perceptions of the objective of a legal proceeding differs as a function of the type of case and the phase in which the case is situated, I conducted a 2 (case type: low-relationality vs. high-relationality) x 2 (trial phase: liability vs. punishment) x 2 (objective: truth vs. justice) ANOVA²¹⁶ with repeated measures on the first and last variable. As expected, the analysis revealed two significant two-way interactions between case type and objective,²¹⁷ and between trial phase and objective.²¹⁸

As in Study 1, these two-way interactions revealed that low-relationality cases and the liability phase of a trial were more associated with establishing truth than were high-relationality cases and the punishment phase of a trial.²¹⁹ Conversely, high-relationality cases and the punishment phase of a trial were more strongly associated with providing justice.²²⁰

Legal Procedures. To conceptually replicate the results from Study 2, and to test the hypothesis that different legal procedures prioritize different conflict resolution objectives, I conducted a one-way, repeated measures ANOVA on participants' perceptions of which Option (A or B) would produce greater truth and greater justice. As expected, the analysis revealed a significant effect of conflict objective.²²¹ Participants more strongly associated Option B, the inquisitorial procedure, with establishing

216. See *supra* note 150.

217. $F(1, 674) = 114.44, p < 0.001, \eta^2_p = 0.15$.

218. $F(1, 674) = 129.86, p < 0.001, \eta^2_p = 0.16$.

219. For case type: M -non-relational = 4.95, $SD = 1.63$; M -relational = 4.36, $SD = 1.66$; $F(1, 338) = 49.42, p < 0.001, \eta^2_p = 0.13$. For trial phase: M -liability = 5.37, $SD = 2.60$; M -restitution = 3.99, $SD = 2.50$; $F(1, 337) = 100.19, p < 0.001, \eta^2_p = 0.23$.

220. For case type, M -non-relational = 4.87, $SD = 1.53$; M -relational = 5.47, $SD = 1.22$; $F(1, 338) = 59.33, p < 0.001, \eta^2_p = 0.15$. For trial phase, M -liability = 4.80, $SD = 2.29$; M -restitution = 5.52, $SD = 2.21$; $F(1, 337) = 34.66, p < 0.001, \eta^2_p = 0.09$.

221. $F(1, 676) = 29.16, p < 0.001, \eta^2_p = 0.04$.

truth compared to the adversarial procedure.²²² Conversely, participants more strongly associated Option A, the adversarial procedure, with providing justice.²²³

Procedural Preferences. Finally, I examined whether participants preferred legal procedures whose perceived production of truth or justice align with the perceived objective of the legal proceeding. To examine this hypothesis, I first examined participants' dichotomous choice between Option A and Option B in low-relationality and high-relationality cases. I supplemented this analysis by examining the strength of participants' preferences for Option A and Option B in those cases.

To test whether participants' preferences for the adversarial procedure (Option A) and the inquisitorial procedure (Option B) depended on the type of case to which participants were exposed, I conducted a repeated-measures test of independence²²⁴ with the legal case (low vs. high relationality) as the predictor variable and participants' choice between Option A and Option B as the dependent variable. As predicted, the analysis revealed a significant effect of case type on participants' choices,²²⁵ such that they preferred Option A (the adversarial procedure) to Option B (the inquisitorial procedure) in high-relationality cases,²²⁶ and vice versa in low-relationality cases.²²⁷ The shift in participants' preferences is illustrated in Figure 10.

222. $M = 0.41$, $SD = 2.40$.

223. $M = -0.28$, $SD = 2.40$. The midpoint of the seven-point Likert scale was set to zero. Positive mean scores indicate a preference for Option B (the inquisitorial model), whereas negative mean scores indicate a preference for Option A (the adversarial model).

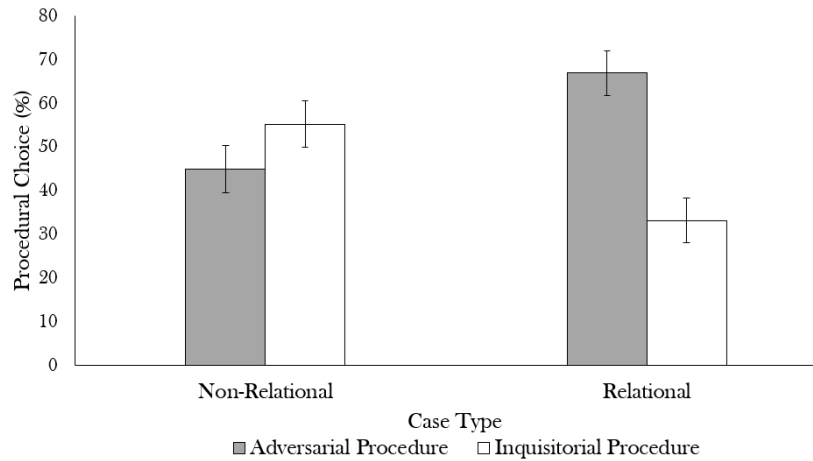
224. A test of independence assesses whether unpaired observations of two categorical variables, expressed in a contingency table, are independent of each other. It is expressed as a chi-squared test statistic with a corresponding p-value. See LAWLESS ET AL., *supra* note 144, at 220.

225. Cochran's Q ($df = 1$, $N = 339$) = 75.00, $p < 0.001$, $\eta^2_p = 0.22$.

226. Option A = 67.00%, Option B = 33.00%.

227. Option A = 44.80%, Option B = 55.20%.

Figure 10. Procedural Preferences as a Function of the Relationality of the Proceeding.



Finally, in light of the finding that participants preferred the adversarial procedure in high-relationality cases and preferred the inquisitorial procedure in low-relationality cases, I examined the strength of participants' preferences for those procedures. I conducted a one-way ANOVA with case type (relational vs. non-relational) as the predictor variable and participants' degree of preference for either Option A or Option B as the dependent variable. As predicted, the ANOVA revealed a statistically significant effect of case type on the degree of participants' preferences for Option A and Option B,²²⁸ such that they leaned toward the inquisitorial procedure in non-relational cases,²²⁹ and they exhibited a strong preference for the adversarial procedure in relational, "conflict of interest" cases.²³⁰

Follow-up tests compared whether participants' preferences for each procedure differed from the midpoint of the scale (set at zero), indicating a neutral view toward the procedures. The results revealed that, although participants favored the inquisitorial procedure (compared to the adversarial procedure) for resolving "cognitive conflict" cases, that preference did not differ statistically from a neutral position.²³¹ Conversely, participants' preference for the adversarial procedure in relational, "conflict

228. $F(1, 338) = 69.27, p < 0.001, \eta^2_p = 0.17$.

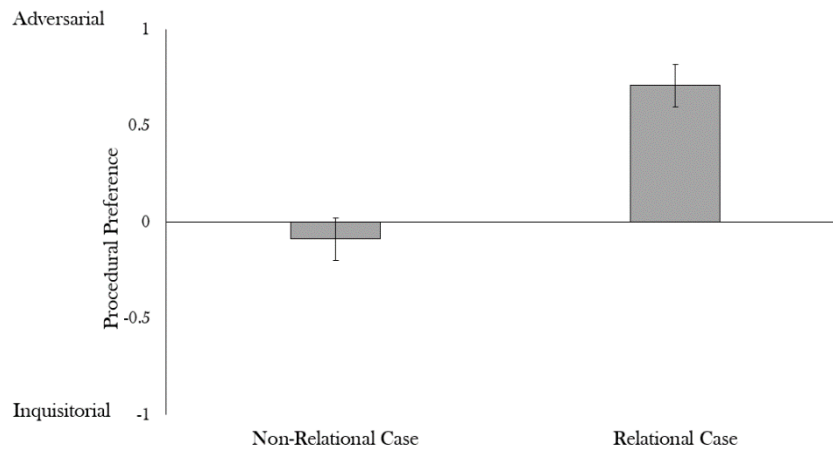
229. $M = -0.09, SD = 2.14$.

230. $M = 0.71, SD = 2.05$.

231. $t(338) = 0.79, p = 0.43$, Cohen's $d = 0.04$ (effect size).

of interest” cases did differ significantly from a neutral position on the Likert scale.²³² The results with respect to the strength of participants’ procedural preferences are illustrated in Figure 11.

Figure 11. Strength of Preference for Dispute Resolution Procedures.



3. Discussion

Study 3 provides critical insights regarding the circumstances under which the public prefers—and is willing to legitimize—different dispute resolution procedures. In this respect, Study 3 replicated the most important findings from Studies 1 and 2: (1) that different types of disputes and trial phases are associated with different psychological objectives; and (2) that the different ways in which those disputes are resolved also are associated with those goals and values, in a manner that affects their popular legitimacy. Importantly, Study 3 extends these findings by demonstrating that an alignment of the proceeding’s perceived objective and the legal procedure’s perceived priorities results in legal decisions with greater popular legitimacy. Conversely, a misalignment between the proceeding’s objective and the legal procedure that resolves the proceeding leads to decreases in the decision maker’s perceived legitimacy.

In this study, I found that participants far preferred the adversarial dispute resolution procedure—which provides litigants with greater voice in the proceedings and increased feelings of

232. $t(338) = -6.36, p < 0.001$, Cohen’s $d = -0.35$ (effect size).

dignity and respect compared to the civil-law inquisitorial procedure—in legal proceedings that are characterized as higher in relationality, and in which accurate fact finding is deemed a subordinate goal to producing relational justice. Moreover, although the strength of participants’ preference for the inquisitorial procedure was weaker, they preferred it to the adversarial procedure when deciding cases high in “cognitive conflict,” in which the importance of accurate factual determinations is paramount. These findings have important implications for Thibaut and Walker’s *A Theory of Procedure*, the decisions of procedural policymakers, and for institutional design, as it relates to formal legal tribunals and alternative dispute resolution procedures. This Article now turns to these implications, the limitations of the findings reported here, and the future direction of this research more generally.

IV. IMPLICATIONS AND CONCLUSIONS

Empirically-based approaches to institutional design provide critical information to legal policymakers.²³³ In designing a dispute resolution paradigm, policymakers are now, more than ever before, able to use real data to understand how litigants and the public at large value the paradigm’s effectiveness, in light of the purported goals associated with the proceeding, and whether they prefer the paradigm to its alternatives.²³⁴ Increased public support for a dispute resolution paradigm is a critical aspect of that paradigm’s ultimate success, longevity, and popular legitimacy.²³⁵ To that end, this Article examines John Thibaut and

233. See, e.g., Stephen Giacchino & Andrew Kakabadse, *Successful Policy Implementation: The Route to Building Self-Confident Government*, 69 INT’L REV. ADMIN. SCI. 139, 139 (2003) (drawing upon an empirical study to determine what factors influenced the successful implementation of public policy in Malta, and in what way the government should organize itself to best deliver the policy); see also Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60, 147 (2013) (explaining that evidence-based policymaking offers much promise for improving federal civil rulemaking, especially to address questions of controlling access to the courts and the amount of litigation brought).

234. See, e.g., Philip J. Cook & Jens Ludwig, *Aiming for Evidence-Based Gun Policy*, 25 J. POL’Y ANALYSIS & MGMT. 691, 727 (2006) (explaining that empirical research can inform public policy on gun control by evaluating the public success of possible interventions and pinpointing the areas in which regulatory enforcement would be most effective).

235. Cf. Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29, 31 (2003) (commenting that public

Laurens Walker's influential article on institutional design, *A Theory of Procedure*. It explicitly tests the empirical tenets of Thibaut and Walker's theory; tests the tenets of a new, relational model of procedure; and explores the implications of the results to several aspects of legal dispute resolution.

This Article tests a relational model of legal institutional legitimacy, which claims that the public is more willing to legitimize a legal tribunal's decisions if the perceived objective of the conflict—either to discover the truth or to provide a just allocation of resources—aligns with the priorities of the procedures that are used to resolve the dispute.²³⁶ The results from the first study suggest that the public perceives legal dispute resolution as concerned with the complementary goals of establishing factual truth and providing a just allocation of resources to litigants. But the first study also suggests that Thibaut and Walker's theory is incomplete, insofar as it claims that all legal disputes primarily involve questions of justice.²³⁷ Instead, there is substantial variation in terms of the public's perceptions of the objectives of different legal conflicts and in their perceptions of the objectives of different phases of a trial.

The second study provides support for Thibaut and Walker's claim that different dispute resolution procedures appear to prioritize different conflict resolution objectives. Because the adversary system provides litigants with substantial control and voice over the proceedings, they associate adversarial systems with prioritizing justice over factual truth. In contrast, the inquisitorial system is perceived to prioritize truth by vesting substantial investigatory authority in a central decision maker. Both procedures can foster institutional legitimacy, but they do so in different ways: the inquisitorial procedure fosters legitimacy through its emphasis on fact gathering, whereas the adversarial procedure fosters legitimacy by prioritizing fair procedures for gathering facts.

The final study examines the implications for institutional legitimacy. It found that the public is most willing to legitimize legal tribunals when there is a relational alignment between the conflict resolution goal to be reached—either attaining the truth

interest organizations can enhance policymakers' responsiveness to public opinion by providing useful information about what the public wants).

236. See *supra* Part I.A.2.

237. Their taxonomy also is incomplete insofar as it addresses the "effectiveness" of legal procedures instead of their popular legitimacy.

or providing justice—and the priority of the procedure that resolves the dispute. Several implications flow from these findings for theories of institutional legitimacy, for actors involved in public and private dispute resolution, and for the design of legal tribunals.

A. POLICY IMPLICATIONS AND OBJECTIONS

Perhaps the most important result from these studies is that, contrary to Thibaut and Walker's assertions, the public does *not* view all legal cases as relational conflicts that should be resolved through adversarial means. Instead, the public is willing to sacrifice some procedural control—and the relational benefits that come with it—in cases where questions of relationality are not the paramount issue to be resolved. Indeed, the results suggest that policymakers should consider the following reforms. First, the penalty phase of legal proceedings generally should be decided via adversarial methods, which prioritize the just allocation of resources, at least compared to the liability phase.²³⁸ Second, views of the appropriate procedure to evaluate disputes in the liability phase are heavily contingent on the degree of relationality involved in the proceeding. Thus, whodunit trials, in which the defendant categorically denies the act of which he is civilly or criminally accused, should be afforded leeway to include inquisitorial methods to resolve the dispute, which prioritize establishing decisional accuracy. In contrast, questions involving relational judgments—such as determining whether a defendant's admitted acts constitute negligence—should normally be resolved pursuant to adversarial methods, which prioritize relational interests.

Third, by reformulating Thibaut and Walker's taxonomy of cases and procedures into a relationality continuum, several types of cases will fall within the margins. For example, certain breach of contract cases might have strong non-relational elements—such as the determination of what a contract term objectively means—that must be viewed in light of relational concerns, such as what the terms meant to the different parties within the context of their business relationship with each other. In these cases, policymakers might experiment with combining

238. The analysis revealed a weaker difference between relational and non-relational cases in the punishment context, although there may exist disputes in which inquisitorial methods are appropriate for the punishment phase. Future research should examine this possibility.

features of adversarial and inquisitorial trials that will effectuate the competing objectives. For example, the court might itself collect the evidence necessary to determine the meaning of a contract (a feature of the inquisitorial paradigm) while allowing the parties to comment on the evidence or meaningfully cross-examine witnesses to assess each party's subjective understanding of the contract terms (a feature of the adversarial paradigm).

Rethinking Thibaut and Walker's dispute classifications along a relationality continuum would allow legal tribunals to attain greater popular legitimacy. For example, in an ordinary negligence case, it may initially appear beneficial to create expensive procedures that are well-calibrated to determine the exact speed a vehicle was traveling, the precise amount of daylight that existed when the accident occurred, or the exact amount of foliage that obscured a driver's view. But the resources invested in that procedure would be ill-spent if the public perceives the tribunal's ultimate decision to be a holistic, relational judgment in which the defendant's actions are compared to in-group norms. There, the factual predicates, although important, are not the primary determinant of the outcome and would be subordinate to the relational judgment, which a different procedure might prioritize better.

Conversely, other scholars have commented on the increased "scientization" of proof in various legal settings,²³⁹ an inevitable consequence of the expanding role of technology in the legal context.²⁴⁰ As relevant technology for resolving disputes improves, the relationality continuum allows those disputes to move fluidly along the spectrum in favor of more inquisitorial procedures. In that sense, procedural reforms would be able to keep pace with the evolving types of proof that appear in these trials (and presumably with the objectives that are valued the most).

Additionally, in cases in which, for example, the truth objective is the predominant concern because of increased "scientiza-

239. See, e.g., MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 145 (1997) ("More than the court's paradigmatic composition, the scientization of proof strains the traditional concept of the trial as a continuous, climatic event.").

240. For a thorough critique of the dangers of the "seconding" of scientific technology into the legal system, see COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [<https://perma.cc/5QT7-PNYD>].

tion,” policymakers could consider concomitant reforms to evidentiary rules and local court customs to facilitate the truth-seeking objective. Specifically, where a central inquisitorial body—either a single judge or a judge and jury²⁴¹—selects the information by which the dispute is decided, it may be advantageous to relax or eliminate the restrictions on character evidence and hearsay, in light of empirical evidence suggesting that these rules may unnecessarily stymie the accurate fact-finding endeavor.²⁴²

These reforms may be easier to adopt initially in the alternative dispute resolution context, which generally does not require the parties to adhere to the formal procedural rules of the courtroom.²⁴³ Nonetheless, a full-scale, immediate redesign of the current procedural regime would not be prudent or possible. Rather, these reforms might develop as a result of incremental changes, such as adding or removing certain relational or non-relational design features over time. The results from the studies reported in this Article, and the empirical findings from which the studies here were derived, provide policymakers with a roadmap to effectuate those changes.

Skeptics might criticize the cost of implementing the policy recommendations that flow from the results of these studies. Doing so would require extensive classifications not just of different types of cases—and their conflict resolution objectives—but also

241. Articles VI and VII of the United States Constitution allow trials by jury for certain alleged wrongs; these protections have also been extended, to varying extents, to citizens in state tribunals. *See, e.g.,* *Colgrove v. Battin*, 413 U.S. 149, 160 (1973) (affirming the right to a six-person jury in federal civil trials); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (extending the jury right to defendants charged with serious crimes).

242. *See, e.g.,* Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 *GEO. L.J.* 879 (2015) (criticizing the hearsay rule); David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 *STAN. L. REV.* 407 (2013) (criticizing the rules regarding evidentiary instructions); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 *DUKE L.J.* 776, 789–93 (1993) (criticizing the character evidence rule). The procedural reforms suggested by the results reported here may also result in the reform of substantive contract, tort, or criminal law principles. Although it is beyond the scope of this Article to address these issues here, the results I report can serve as a springboard for further academic debate regarding the interrelation between procedural and substantive legal reforms.

243. *See, e.g.,* LAURIE S. COLTRI, *ALTERNATIVE DISPUTE RESOLUTION: A CONFLICT DIAGNOSIS APPROACH* (2d ed. 2010) (explaining the basic principles and tenets of mediation and arbitration procedures).

of varying procedures for resolving those disputes. Difficult decisions would need to be made regarding where a dispute falls on the relationality continuum and which procedural features would be the most appropriate for resolving the dispute. Moreover, the act of making substantial changes to entrenched legal norms might be disruptive enough to threaten the popular legitimacy of the new institutional design.

These are legitimate concerns that policymakers should review carefully. Policy change and implementation is never costless; it necessarily involves a complex cost-benefit analysis balancing the benefits of the new institutional design against the drawbacks associated with (1) the disruption created by a new system, and (2) the costs that the new system itself may impose on the public. Procedural reforms consistent with the empirical results reported in this Article—for example, rethinking portions of evidentiary rules in cases in which an inquisitorial tribunal makes a criminal liability determination—might result in constitutional challenges involving, for example, the defendant's right to confront her accuser. Other commentators have provided answers to these types of questions,²⁴⁴ but the potential for such disputes imposes additional costs on litigants.

Nonetheless, large-scale and small-scale policy change happens frequently under the law. Moreover, the recommendations suggested here may have unique advantages that can aid their implementation. First, unlike other areas of the law where empirical research is inchoate or newly developing, the research on institutional legitimacy has accumulated a critical mass of peer-reviewed scholarship that converges on several principles for effective institutional design.²⁴⁵ Moreover, there is a wealth of respected scholars—in the United States and internationally—who produce cutting-edge research in this area. The United States Congress, many of its state counterparts, and various think tanks across the country also are staffed with individuals who are qualified to evaluate this research and to implement its recommendations in ways that minimize disruption.²⁴⁶

244. See, e.g., Fern Nesson & Charles Nesson, *Confrontation: Getting It Right*, HARV. L. REC. (Sept. 9, 2015), <http://hlrecord.org/confrontation-getting-it-right/> [<https://perma.cc/M46Z-W33H>].

245. See generally Tyler & Sevier, *supra* note 14 (reviewing a litany of experimental evidence suggesting that a values-based approach to institutional design is superior to a punishment-based approach).

246. See, e.g., Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 13–16 (2009). This process has resulted in

These resources are critically important with respect to the recommendations that flow from the findings reported here. These studies specifically examined the outer bounds of the relationality continuum—for example, cases that were either very low or high in relationality—and did not focus on disputes that form the interior of the continuum.²⁴⁷ When testing a new theory, it is necessary to examine the outer boundaries first before determining whether further research is warranted. Once those boundaries are established, future research, either in the form of academic scholarship or research in the political realm, will contribute valuable insight into the nuances inherent in the relationality continuum.

Second, there are forums within the legal system that are equipped for experimenting with institutional design features. Several state courts across the country serve as “innovation laboratories” for policy changes affecting the administration of trial proceedings.²⁴⁸ One of the most well-known of these real-world laboratories is the Arizona Jury Project, which specializes in procedural reforms that relate to jury decisionmaking.²⁴⁹ The participating Arizona trial courts have allowed judges and attorneys to experiment with varying “local” rules, such as allowing jurors to take notes during the proceedings, allowing them to ask questions of witnesses and the parties, and allowing them to consult with one another while the case is in progress.²⁵⁰ These laboratories might be the ideal testing grounds for similar procedural innovations suggested by the findings reported in this Article.

dramatic procedural reforms, including the development of specialty tribunals like the Delaware Court of Chancery and the United States Court of Appeals for the Federal Circuit. *Id.*

247. Several countries, such as Italy, employ hybrid inquisitorial procedures to resolve legal conflicts. The specifics of these hybrids vary, but they often incorporate an element of cross-examination that supplements the primary fact-finding authority of the central decision maker. *See, e.g.,* JOACHIM ZEKOLL, *COMPARATIVE CIVIL PROCEDURE: THE OXFORD HANDBOOK OF COMPARATIVE LAW* (2006).

248. *See, e.g.,* Justin Sevier, *The Unintended Consequences of Local Rules*, 21 *CORNELL J.L. & PUB. POL'Y* 291, 293 (2011).

249. *See, e.g.,* Stephen Susman, *Innovative Jury Trials*, *CIV. JURY PROJECT AT NYU SCH. L.* (Aug. 19, 2017), <https://civiljuryproject.law.nyu.edu/innovative-jury-trials/> [https://perma.cc/JV45-KT8F] (discussing the achievements of the Arizona Jury Project and its cousin, the NYU Civil Jury Project, among others).

250. *Id.*; *see also* Sevier, *supra* note 248, at 300.

Finally, and more generally, skeptics might question the use of empirical evidence in debates over legal policy. As I have written recently in more detail:

The judiciary has historically had a complex relationship with social science . . . Empirical studies have shaped legal policy in a variety of areas, including eyewitness identification, false confessions, the size and shape of juries, the manner of proving discrimination, the regulation of corporate behavior, and the implementation of the death penalty. It is, of course, important not to overstate the implications of any one empirical study. But it is also important to situate empirical studies within the literature on which they are based to draw appropriate and measured conclusions about their findings.²⁵¹

CONCLUSION

Mary Churukian and Clayton LaGest likely did not know that their run-of-the-mill vehicular negligence dispute would provoke such lofty, philosophical questions from the justices of the Michigan Supreme Court regarding the purpose of conflict resolution and its intersection with institutional design.²⁵² What they likely did know, however, was the extent to which they were willing to abide by the legal tribunal's decision as a function of the manner in which it evaluated the case.

The findings reported in this Article—and the literature on institutional design in which those findings are situated—suggest that legal policymakers would do well to ensure that the objectives of different legal disputes align with the relational signals that the procedures which resolve those disputes send to litigants. Doing so will likely result in a dispute resolution system that aligns more closely with the public's values and policy preferences, and in turn, greater public legitimacy.

251. Sevier, *supra* note 82, at 507 (citing *ADVANCES IN PSYCHOLOGY AND LAW* (Monica K. Miller & Brian H. Bornstein eds., 3d vol. 2018)). The design of Study 3 in this Article allowed for a conceptual replication of the findings reported in Studies 1 and 2. The results from those studies replicated in Study 3. See *supra* Part III.C.2.

252. *Churukian v. LaGest*, 97 N.W.2d 832 (Mich. 1959); see *supra* notes 1–12 and accompanying text.