

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

---

Court Review: The Journal of the American  
Judges Association

American Judges Association

---

2007

## Court Review: Volume 44, Issue 1/2 – Complete Issue

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>



Part of the [Jurisprudence Commons](#)

---

"Court Review: Volume 44, Issue 1/2 – Complete Issue" (2007). *Court Review: The Journal of the American Judges Association*. 229.

<https://digitalcommons.unl.edu/ajacourtreview/229>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# Court Review

Volume 44, Issue 1/2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Special Issue on Procedural Fairness





# Court Review

Volume 44, Issue 1/2

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

## T A B L E O F C O N T E N T S

### EDITORS

Judge Steve Leben  
Kansas Court of Appeals

Professor Alan Tomkins  
University of Nebraska

### ASSISTANTS TO THE EDITOR

Tarik Abdel-Monem  
University of Nebraska

Rachel Sharpe  
Kansas Court of Appeals

### EDITORIAL BOARD

Judge B. Michael Dann  
National Institute of Justice

Julie Kunce Field  
Fort Collins, Colorado

Professor Philip P. Frickey  
University of California at Berkeley

Mark D. Hinderks  
Overland Park, Kansas

Judge Leslie G. Johnson  
American Institute for Justice

Professor Steven Lubet  
Northwestern University

Judge Gregory E. Mize  
Washington, D.C.

Elizabeth Neeley, Ph.D.  
University of Nebraska

C. Robert Showalter, M.D.  
Harrisonburg, Virginia

Professor Charles H. Whitebread  
University of Southern California

### NATIONAL CENTER FOR STATE COURTS STAFF

Charles F. Campbell  
Managing Editor

### AN AJA WHITE PAPER

- 4** Procedural Fairness: A Key Ingredient in Public Satisfaction

*Kevin Burke and Steve Leben*

### ARTICLES/ESSAYS

- 26** Procedural Justice and the Courts

*Tom R. Tyler*

- 32** Procedural Fairness as a Court Reform Agenda

*David B. Rottman*

- 36** Children and Procedural Justice

*Victoria Weisz, Twila Wingrove, and April Faith-Slaker*

- 44** Procedural Fairness in the California Courts

*Douglas Denton*

- 56** The Perceptions of Self-Represented Tenants in a Community-Based Housing Court

*Rashida Abuwala and Donald J. Farole*

- 62** Decision Makers and Decision Recipients:  
Understanding Disparities in the Meaning of Fairness

*Diane Sivasubramaniam and Larry Heuer*

- 72** Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes

*Brian H. Bornstein and Hannah Dietrich*

- 78** Adding Color to the White Paper:  
Time for a Robust Reciprocal Relationship Between Procedural Justice  
and Therapeutic Jurisprudence

*David B. Wexler*

### DEPARTMENTS

- 2** Editor's Note

- 3** President's Column

- 84** The Resource Page

# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

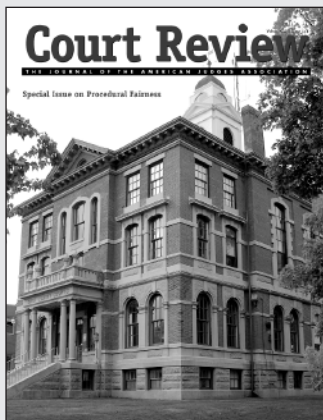
Volume 44, Issue 1/2

2007-2008

## EDITOR'S NOTE

This special issue of *Court Review* focuses on procedural justice. Tom Tyler has called procedural justice the most powerful explanatory concept for why people obey rules that restrict their behavior in ways they would otherwise find unacceptable. David Rottman has written “having a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence” in courts. Procedural justice is worthy of a deep look, and this issue of *Court Review* does precisely that—it presents papers from some of the nation’s leading scholars who have been thinking about procedural justice and related constructs.

The special issue begins with Judges Burke and Leben’s White Paper on procedural justice. Theirs is the first White Paper issued by the American Judges Association (and the Burke/Leben White Paper was recently endorsed by the Conference of State Court Administrators at their 2008 Annual Meeting, July 30, 2008). Originally presented at the meeting of the American Judges Association in September 2007 and available on the AJA website, it is the first article in this special issue. It summarizes both arguments and empirical research making in detail the case for state courts that Tyler and Rottman make, that is, procedural justice matters. It matters a lot, in their opinion. It is the key construct for court improvement.



The rest of the issue examines procedural justice in a variety of contexts. The issue contains an article by Tyler and an essay by Rottman. Tyler and Rottman join Judges Burk and Leben in arguing for the centrality of procedural justice in the justice system. Weisz, Wingrove, and Faith-Slaker join them in extolling procedural justice concepts; they see procedural justice as important for improving the experiences for children in the courts, though they point out research documentation is still sparse. Support for procedural justice continues with Denton, who explains how the California courts have embraced the procedural justice concept to drive major reforms. Abuwala and Farole also applaud procedural justice in their study of its impact in a limited-jurisdiction-court context (landlord-tenant, housing courts) in New York City.

In a summary of a large body of research, Sivasubramaniam and Heuer point out that procedural justice has different meanings for decision recipients (i.e., litigants) than for decision makers (i.e., judges), and among other things they indicate how these differences might cause reform problems in the justice system. Bornstein and Dietrich summarize a complementary literature—distributive justice studies—and counsel that courts pay attention to outcomes as well as procedures. Finally, Wexler points to another complementary area—therapeutic jurisprudence—and argues desirable outcomes are even more likely to occur by heeding the lessons of the therapeutic jurisprudence framework. – Alan Tomkins

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 55. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

*Court Review* is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to one of *Court Review*'s editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, e-mail address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, e-mail address: atomkins@nebraska.edu. Comments and suggestions for the publication, not intended for publication, also are welcome.

Advertising: *Court Review* accepts advertising for products and services of interest to judges. For information, contact Deloris Gager at (757) 259-1864.

Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo shows the Knox County Courthouse in Rockland, Maine. The courthouse, constructed in 1874, is listed on the National Register of Historic Places.

©2008, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, Williamsburg, Virginia 23185-4147. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

Cite as: 44 Ct. Rev. \_\_\_\_ (2007-2008).

# President's Column

Eileen Olds

During this year as your AJA president, my appreciation and respect for the role that we play in our courtrooms has amplified. I have been afforded numerous opportunities to speak with other judges and various community and civic groups to gauge their concerns about our judicial system. Members of the judiciary and the community alike share a common concern for what is viewed as increasingly eroding societal values, as evidenced in courtrooms everywhere. Most conversations eventually evolve to discussions about prevention strategies. How did this happen? What needs to be done? I am convinced that, as judges, we must actively seek to answer these questions and embrace an obligation to offer solutions. Many of our nation's societal challenges are disguised as legal issues on court dockets; far too many severely impact our children.

As a juvenile and domestic relations court judge for more than 13 years, it should be no surprise that this is a subject near and dear to my heart; and one that must be closely examined. It is abundantly clear that there is a proliferation of social problems affecting today's children and their families. Of all the advances the judiciary has made in courtroom technology, docket management, courtroom construction, specialized and problem-solving courts, etc., there is one area that remains constant—overrepresentation of minorities and disadvantaged youth in our criminal justice system. As judges, I believe that we have a responsibility to lend ourselves as participants in the solution. We are the gatekeepers. We are uniquely poised and equipped not only to tackle and to improve the administration of justice, but also to be more mindful of the social ills that cripple our nation today.

I recently sat in an audience with a group of judges as we heard a presentation on the laudable efforts of the Children's Defense Fund ("CDF"). CDF is a nonprofit organization determined to ensure a successful passage from childhood to adulthood. Its goal is to offer preventive support to poor and minority children *before* they encounter family dissonance or educational failure. A core belief maintained by the CDF is that without practical early intervention, incarceration is inevitable for many of America's children.

CDF's *Cradle to Prison Pipeline*® research identified a grave

crisis affecting many minority children. They are abused, abandoned, and impoverished at greater rates than the general population. They are born to teen parents, born underweight, and medically uninsured. They languish in poverty, foster care, and drug houses. Disadvantaged at birth, these neglected children will most likely become America's future prisoners. According to statistics provided by the CDF, African-American boys born in 2001 have a one in three likelihood of becoming incarcerated. Latino boys have a one in six chance of imprisonment.

Underprivileged children are enmeshed in family unreadiness. The majority, rather than being raised by responsible parents or positive role models, are negatively influenced by television images, peers, and gang members. As a result, it becomes increasingly difficult to break free from their hampered environment. Economic disparities, the lack of quality living standards, health care, and education create a divide. Success for these bruised youths is obstructed and replaced with learning impediments. The numbers of those impacted are staggering, and unless this national crisis is remedied, America's *Cradle to Prison Pipeline*® will continue. (You can read the full CDF report online at <http://www.childrensdefense.org/site/PageServer?pagename=c2pp>.)

The judges' acknowledgement is therefore a necessary component to bring awareness and attention to contributing factors that bring juveniles before the court. While we must speak with clarity and authority to those before the court, we also have the responsibility to promote innovative approaches to address the underlying inequities.

Radical actions produce extreme changes. I am confident that the cradle-to-prison pipeline can be derailed and that some of these sociological ills can be healed. I urge your support in actively participating and working together with policy makers, parents, community leaders, and others to identify viable solutions. We are in an undeniable position of relevance to these issues. Through effective partnerships we can unite offering hope, new chances, and a better life for our children. Together we can create opportunities for new beginnings—untainted beginnings that outshine past negative experiences and destructive influences.



# PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION

Kevin Burke & Steve Leben

Americans are highly sensitive to the processes of procedural fairness. It is no surprise, then, that the perception of unfair or unequal treatment “is the single most important source of popular dissatisfaction with the American legal system.”<sup>1</sup> Even first-graders react negatively to a situation where a mother punishes her child for a broken vase without consulting a witness first. This negative reaction signifies powerfully that children are already sensitive to the principles of procedural fairness.<sup>2</sup> If children in early elementary school already react negatively to perceived violations of procedural fairness, it is only that much more imperative to address the needs of the adults who appear in the courts to fight for custody of their children, file bankruptcy, contest a speeding ticket, or respond to allegations of felonious criminal behavior.

Judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views it. While judges should definitely continue to pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public’s expectations of procedural fairness. By doing so, these judges will establish themselves as legitimate authorities; substantial research suggests that increased compliance with court orders and decreased recidivism by criminal offenders will result. Procedural fairness also will lessen the difference in how minority populations perceive and react to the courts.

Many people have little contact with the court system in their daily life, so it is understandable that they feel overwhelmed and lost when they are confronted with an unfamiliar legal system. This lack of knowledge about the court has resulted in a state of ambivalence—accentuated by the lack of depth to most news coverage of the courts and the misinformation of entertainment television. In many ways, procedural fairness bridges the gap that exists between familiarity and unfamiliarity and the differences between each person regardless of their gender, race, age, or economic status. It is a value that the American public expects and demands from judges, and many judges have embodied the concepts of procedural fairness in their everyday lives. While the American

© 2007 by Kevin Burke and Steve Leben. The authors grant you permission to reprint this article for any educational purpose.

#### Footnotes

1. Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 517 (2003).
2. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005).

EXECUTIVE SUMMARY . . . . . 4

THE NEED FOR PROCEDURAL FAIRNESS . . . . . 5

RECIDIVISM, LEGITIMACY, AND COMPLIANCE . . . . . 7

PUBLIC KNOWLEDGE ABOUT THE COURTS . . . . . 8

WHAT SHAPES PUBLIC KNOWLEDGE OF THE COURTS . . . . . 11

THE POWER OF VOICE . . . . . 12

JUDICIAL BODY LANGUAGE . . . . . 13

JUDGES’ PERCEPTIONS OF FAIRNESS . . . . . 14

THE CASE VOLUME OF COURTS . . . . . 16

PROCEDURAL FAIRNESS AND MINORITIES . . . . . 17

RECOMMENDATIONS FOR CHANGE . . . . . 18

BIBLIOGRAPHY . . . . . 22

ABOUT THE AUTHORS . . . . . 24

ABOUT THE AMERICAN JUDGES ASSOCIATION . . . . . 25

ACKNOWLEDGMENTS . . . . . 25

Judges Association recognizes the achievements of these individuals and many courts already intent on promoting procedural fairness, the purpose of this white paper is to identify and advocate for more changes that will improve the daily work of the courts and its judges.

This paper addresses research on courts within the United States and makes recommendations for the judiciary there. In addition to our 2,500 member judges in the United States, however, the American Judges Association also has about 150 members in Canada. Although we make no recommendations regarding the courts in Canada, we believe that the baseline social-science research upon which this paper is based would also be applicable there, given the similarities between the legal systems of these two countries.

**PROCEDURAL FAIRNESS IS THE CRITICAL ELEMENT IN PUBLIC PERCEPTION AND SATISFACTION WITH THE COURT SYSTEM.**

**M**ost people care more about procedural fairness—the kind of treatment they receive in court—than they do about “distributive justice,” *i.e.*, winning or losing the particular case.<sup>3</sup> This discovery has been called “counterintuitive”<sup>4</sup> and even “wrong-headed,”<sup>5</sup> but researcher after researcher has demonstrated that this phe-

3. TOM. R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483 (1988); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513 (2003).

4. M. Somjen Frazer, THE IMPACT OF THE COMMUNITY COURT MODEL

ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER, Center for Court Innovation 3 (2006), available at [http://courttinnovation.org/\\_uploads/documents/Procedural\\_Fairness.pdf](http://courttinnovation.org/_uploads/documents/Procedural_Fairness.pdf).

5. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22 (2006) [hereinafter WHY PEOPLE OBEY].



nomenon exists.<sup>6</sup> Thus, procedural fairness is a critical part of understanding how the public interprets their experience with the court system and translates that experience into a subjective valuation of the court system as whole.

Citizens have high expectations for how they will be treated during their encounters with the judicial system. In particular, they focus on the principles of procedural fairness because “people view fair procedures as a mechanism through which to obtain equitable outcomes—which is the goal in cases of conflict of interest.”<sup>7</sup> People value fair procedures because they are perceived to “produce fair outcomes.”<sup>8</sup>

Psychology professor Tom Tyler, a leading researcher in this area, suggests that there are four basic expectations<sup>9</sup> that encompass procedural fairness:

- **Voice:** the ability to participate in the case by expressing their viewpoint;
- **Neutrality:** consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;
- **Respectful treatment:** individuals are treated with dignity and their rights are obviously protected;
- **Trustworthy authorities:** authorities are benevolent, caring, and sincerely trying to help the litigants—this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants’ needs.<sup>10</sup>

Procedural fairness matters to every litigant who appears before a judge, but “[w]hat is striking about procedural justice judgments is that they also shape the reactions of those who are on the losing side.”<sup>11</sup> People are in fact more willing to accept a negative outcome in their case if they feel that the decision was arrived at through a fair method. Significantly, even a judge who scrupulously respects the rights of litigants may nonetheless be perceived as unfair if he or she does not meet these expectations for procedural fairness.

Of course, this does not mean that people are happy if they lose their case and fail to obtain the outcomes they desire. It does mean, however, that they are more willing to accept and abide by the decisions of judges when those decisions seem to have been made fairly. And their views of judges, the court system, and the law are more favorable following an experience in which their case is handled via a fair procedure.

6. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. APPL. PSYCHOL. 340 (1986); Jerald Greenberg, *Looking Fair Versus Being Fair: Managing Impressions of Organizational Justice*, 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 111 (Barry M. Staw & Larry L. Cummings eds. 1990); Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, in BASIC GROUP PROCESSES 235 (Paul B. Paulus ed. 1983); Larry Heuer et al., *The Generality of Procedural Justice Concerns: A Deservedness Model of Group Value and Self-interest Based Fairness Concerns*, 25 PERS. SOC. PSYCHOL. BULL. 1279 (1999); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. SOC. PSYCHOL. 850 (1994); Tom R. Tyler, *The Relationship*

*of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments about the Procedure?*, 9 SOC. JUSTICE RES. 311 (1996); Kees Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOCIAL PSYCHOL. 1493 (1998); Kees Van den Bos et al., *Sometimes Unfair Procedures Have Nice Aspects: On the Psychology of the Fair Process Effect*, 77 J. PERSONALITY & SOCIAL PSYCHOL. 324 (1999).

7. TYLER ET AL., *supra* note 3, at 75.

8. MacCoun, *supra* note 2, at 12.

9. WHY PEOPLE OBEY, *supra* note 5, at 23.

10. *Id.* at 22-23. See also David B. Rottman, *Adhere to Procedural Fairness Principles Throughout the Justice System*, 6 CRIM. & PUB. POL'Y 835, 835 (2007).

11. WHY PEOPLE OBEY, *supra* note 5, at 23.



## PROCEDURAL FAIRNESS INCREASES COMPLIANCE WITH COURT ORDERS

**P**rocedural fairness reduces recidivism because fair procedures cultivate the impression that authorities are both legitimate and moral.<sup>12</sup> Further, “[o]nce the perception that legal authorities are legitimate has been shaped, compliance with the law is enhanced, even when it conflicts with one’s immediate self-interest.”<sup>13</sup> Legitimacy is created by respectful treatment, and legitimacy affects compliance. This is not to say that judges are unable to sanction defendants, but “sanctions, when imposed in such a manner as to insult the dignity of persons, can also function to increase rather than reduce future offending.”<sup>14</sup> Judges are responsible for upholding the law and that requires punishing defendants when they have broken the law, but judges also have the further responsibility of protecting the rights and human dignity of the defendant whom they have sentenced.

Policies of procedural fairness can have widespread application and impact. For example, there is “at least moderate support”<sup>15</sup> for the assertion that batterers who are treated according to the precepts of procedural fairness are less likely to recidivate “even in the face of adverse outcomes,”<sup>16</sup> such as arrest. However, “those who felt they were treated less fairly, were less satisfied with the court process, and were less likely to view the court as legitimate were more likely to have new criminal cases.”<sup>17</sup> Batterers are even less likely to violate an order for protection if they feel that their cases were handled in a fair manner.<sup>18</sup>

There have been many innovative approaches to implementing procedural fairness policies in order to raise perceptions of legitimacy and in turn compliance rates. The Red Hook Community Justice Center in Brooklyn, New York, was established as an experiment in order to focus on these precise types of issues: “[Community courts] address concerns that courts have become revolving doors in which ‘the process is the punishment’—all too many defendants leave court following a brief but unpleasant experience only to return on similar charges with no effort having been made to address either their underlying problems or the effects of their anti-social behavior on the community.”<sup>19</sup> Red Hook’s goal as a community-court model was to focus both on procedural fairness and on helping litigants address the problems behind their criminal behavior with more drug treatment options, job placement, and educational programs. Red Hook’s ability to provide individualized treatment to their defendants through different sentencing criteria and more one-on-one interaction with the judge has transformed the community. After two years in operation, “the public’s fear of crime dropped and public confidence in local justice system agencies more than doubled, suggesting that the community court has had positive effects on neighborhood perceptions of the legitimacy of the court system.”<sup>20</sup>

12. Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

13. Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 169 (1997); Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC’Y REV. 553 (2007).

14. Paternoster, *supra* note 13, at 169.

15. *Id.* at 192.

16. *Id.* at 163.

17. DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, FAMILY COURT FAIRNESS STUDY (Fourth Jud. District Res. Division, Hennepin Co., MN.) 34-35 (2004), available at [http://www.mncourts.gov/documents/4/Public/Research/Family\\_Court\\_Fairness\\_Report\\_Final.doc](http://www.mncourts.gov/documents/4/Public/Research/Family_Court_Fairness_Report_Final.doc).

18. *Id.* at 34-35.

19. FRAZER, *supra* note 4, at 5.

20. *Id.* at 8.

**ALTHOUGH THE PUBLIC PERCEPTION OF THE COURTS IN RECENT YEARS  
HAS BEEN AMBIVALENT, THERE IS REASON TO BE OPTIMISTIC.**

**T**he judicial branch does not escape the general dissatisfaction Americans have with the legislative and executive branches of government. Perceptions of the court system have been “more stable” than the other governmental branches since the 1970s and 1980s,<sup>21</sup> but public confidence in the judicial branch is still quite low when it is compared with many other institutions.<sup>22</sup>

One of the major factors behind the general ambivalence is widespread misinformation about the judicial branch. The public has a tendency to see the judicial branch as intimately connected with other groups that help constitute the legal process, from the legislators who draft laws to the police who enforce them. The actions of these other institutions tend to “spill over onto defendant evaluations of their experience with courtroom personnel and their general sense of fair treatment.”<sup>23</sup> While it may not be feasible for judges to tackle widespread public education, it is especially important for judges to realize that “people’s experience with any one part of the criminal justice system affects the views of all the others, any contact with the courts, including everything from official notifications to the condition of the courthouse itself, can affect public trust and confidence.”<sup>24</sup> Security guards and even janitors affect the public’s experience in the courthouse, but judges uniquely shape public perceptions because of their position in the courts.

When California citizens were surveyed in 2005 about their perceptions of their state courts, 30% believed that the state courts were doing “excellent” or “very good” whereas 33% thought they were only “fair” or “poor.”<sup>25</sup> The dichotomous split of approval for the court system is not only in California. The State of Minnesota conducted a study with similar results in 2006.<sup>26</sup> In Brooklyn, New York, 57% of people reported a generally “positive” outlook towards the courts before the 2002 opening of the Red Hook Community Justice Center.<sup>27</sup> After two years in operation, the public’s positive perception of the local court system in Red Hook increased to an impressive 78%.<sup>28</sup>

21. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 10 (2005) [hereinafter ROTTMAN 2005], available at [http://www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf).

22. FRAZER, *supra* note 4, at 1.

23. Casper et al., *supra* note 3, at 498.

24. PUBLIC AGENDA & DOBLE RESEARCH, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS, ADMINISTRATIVE OFFICE OF THE COURTS 10

(2006), available at [http://www.courtinfo.ca.gov/reference/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf).

25. ROTTMAN 2005, *supra* note 21, at 8.

26. Minnesota has conducted a similar study: DECISION RESOURCES, LTD., MINNESOTA STATE COURTS: 2006 SURVEY OF MINNESOTA RESIDENTS (2006).

27. FRAZER, *supra* note 4, at 5.

28. *Id.*

**THE PUBLIC EXPANDS THEIR KNOWLEDGE ABOUT THE COURTS BOTH THROUGH DIRECT EXPERIENCE IN THE COURTROOMS AND THROUGH VARIOUS MEDIA SOURCES.**

**P**eople can increase their approval of the courts by interacting directly with the court system as jurors, witnesses, victims, and litigants. A person who has served on a jury is more likely to give the court system a higher overall approval rating than someone who has not.<sup>29</sup> After jury duty ends, approximately 55% of jurors reported being “somewhat more” or “much more” confident in the court system.<sup>30</sup> But direct experience does not always lead to an increase in approval, especially in high-volume courts like family or traffic court.<sup>31</sup> Importantly, litigants in family or traffic court—areas large segments of the population experience personally—are significantly less likely to approve of the court system because of the perception that they are less procedurally fair.<sup>32</sup>

Direct interaction with the courts is a way to gain knowledge about the courts, but most members of the public receive information about the courts indirectly through various media outlets. Approximately 69% of surveyed Californians said that they “often” or “sometimes” receive information about the courts from TV news programs and 59% gain knowledge about the courts from newspapers or magazines.<sup>33</sup> These forms of media are all legitimate avenues for understanding court decisions, but TV news programming rarely delves into the depth necessary to increase the public’s understanding of the legal process and the courts’ responsibilities. Media discussion of the role of the court vis-à-vis the other branches of government is rare.

While TV news programming aims to provide information to its audience, entertainment television, such as *Law and Order* or *Judge Judy*, is strictly for leisurely amusement. Forty-nine percent of people claim that they receive knowledge about courts from television shows whose goal is to entertain rather than enlighten. Many people will not interact directly with the court system, but almost all Americans have some access to television. People who get knowledge about the courts from entertainment television actually report that they feel less familiar with how the courts operate.<sup>34</sup> Moreover, indirect exposure to the courts via the media often has a divisive effect. TV news programs provide legitimate access to the courts but no true depth to the coverage, while entertainment television provides lots of detail that is often inaccurate or misconstrued. The best way for Americans to glean knowledge about the court system is to interact directly with it, and the content of that interaction certainly can affect public opinion.

29. ROTTMAN 2005, *supra* note 21, at 17.

30. *Id.* at 16.

31. *Id.*

32. *Id.* at 17.

33. *Id.* at 11.

34. *Id.*



**LITIGANTS HAVE A POWERFUL NEED TO EXPRESS THEMSELVES  
VOCALLY DURING THE COURT'S PROCEEDINGS.**

People have a powerful urge and need to express their thoughts, experiences, or even their questions. “[B]eing listened to is *symbolically* important, as it reveals that group authorities value the individuals’ standing in their social group.”<sup>35</sup> Litigants make a strong correlation between the ability to speak and a judge’s respectful treatment of them as individuals; it demonstrates civic competence. After all, from a litigant’s point of view, if the judge does not respect litigants enough to hear their side or answer their questions, how can the judge arrive at a fair decision? The belief that one can go to legal authorities with a problem and receive a respectful hearing in which one’s concerns are taken seriously is central to most people’s definition of their rights as citizens in a democracy. Although many people never actually go to court, believing that they could go to court if they needed to—and that, if they did, they would receive consideration—is a key antecedent of trust and confidence in the legal system.<sup>36</sup>

This need for people to speak is not primarily about whether or not they believe that their voice gives them more control of the situation.<sup>37</sup> Amazingly, even people who are told that their voice will have *no* impact on the decision will still perceive the situation as fairer if they get to speak. In Lind, Kanfer, and Earley’s study on voice,<sup>38</sup> participants were asked to rate the perceived fairness of a work interaction where the experimenter doled out a demanding workload. The study used three scenarios with differing levels of voice by the participants. In one voice condition, the experimenter only gave out the schedule and did not allow the participants to provide any feedback. In the “predecision voice” condition, the experimenter handed out a tentative schedule and asked for the participants’ opinions. After listening to them, he decreased the amount of work to more closely resemble their requests. In the “postdecision voice” condition, the experimenter gave out the work schedule and said that it would not be changed, but he asked for their opinions anyway. After listening to the participants, he restated his initial decision.

The researchers discovered that the predecision voice condition was perceived as the most fair. But even the postdecision voice was perceived as significantly fairer by the participants than the condition where no input was solicited at all even though they were explicitly told that what they said would have no impact on the decision.<sup>39</sup> Although these participants in an experiment rated the postdecision voice as fairer than having no voice at all, we as judges cannot consider it fairer in reality to solicit an opinion from someone who has *no* potential to affect the outcome. The researchers called the postdecision voice “patently unfair,”<sup>40</sup> and we agree, of course, that litigants should not be granted an arbitrary voice in the courtroom merely to pacify this need to speak and participate. Judges should know, though, that voice has a positive influence on public per-

35. Larry Heuer, *What’s Just about the Criminal Justice System? A Psychological Perspective*, 13 J. LAW & POLY 209, 211 (2005) (emphasis added).

36. Tyler et al., *supra* note 3.

37. MacCoun, *supra* note 2, at 23.

38. E.Allan Lind, Ruth Kanfer & Christopher P. Early, *Voice, Control and Procedural Justice*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

39. MacCoun, *supra* note 2, at 23-44.

40. *Id.* at 24 (quoting Lind, Kanfer, & Earley, *supra* note 38).

ception of the courts as long as people believe that the judge sincerely considered what they said when making their decision.<sup>41</sup>

These studies demonstrate how much of an emphasis people place on the ability to speak about their experience or opinions. The strong desire to have a voice has a huge implication in how the public views the fairness of the courts, especially given that only 19% of the public surveyed in California would strongly agree that the courts currently allow people to express their views.<sup>42</sup>

## **BODY LANGUAGE INFLUENCES HOW LITIGANTS PERCEIVE THE JUDGE AND THE JUDGE'S DECISION.**

**T**he old adage that actions speak louder than words holds a powerful amount of truth for attorneys, litigants, and judges alike. It's difficult to do controlled, double-blind studies in the courtroom to get specific measurements of the effect there of nonverbal behavior. But general research indicates that nonverbal cues are often more important than verbal ones in ordinary communication.

In interpersonal communication generally, studies indicate that nonverbal behaviors account for 60% to 65% of the meaning conveyed.<sup>43</sup> Significantly, when nonverbal cues conflict with what is actually being said in words, people are more likely to believe what is being conveyed to them nonverbally.<sup>44</sup> And nonverbal communication is the main means for expressing or experiencing emotion.<sup>45</sup>

In 2001, researcher Laurinda Porter conducted in-court observations of trial judges' nonverbal behavior in the Fourth Judicial District of Minnesota (Hennepin County). She followed up these observations with an attitude survey that explored how those judges felt about nonverbal communication.

Porter noted that "almost all the judges observed used nonverbal behaviors . . . that are considered to be ineffective and in need of improvement. About one-third of the judges used these ineffective behaviors frequently."<sup>46</sup> Some of these behaviors on the bench included the more obvious concerns such as a failure to make eye contact, focusing on a cup of coffee, and the use of a sarcastic, neutral, or exasperated tone of voice. She also noted actual displays of negative emotions, such as anger or disgust, sighing audibly, kicking feet up on the table, and "using self-oriented gestures such as rubbing, scratching, picking, licking, or biting parts of the body (to excess)."<sup>47</sup>

41. Tom R. Tyler, *Conditions Leading to Value Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987).

42. ROTTMAN 2005, *supra* note 21, at 26.

43. LAURA K. GUERRERO & KORY FLOYD, NONVERBAL COMMUNICATION IN CLOSE RELATIONSHIPS 2-3 (2005).

44. *Id.*

45. *Id.* at 3.

46. LAURINDA L. PORTER, NONVERBAL COMMUNICATION IN COURTROOMS AT THE HENNEPIN COUNTY GOVERNMENT CENTER: A REPORT ON OBSERVATIONS OF FOURTH JUDICIAL DISTRICT JUDGES IN MARCH AND APRIL 2001 4 (Hennepin Co., MN., June 2001).

47. *Id.*

Despite needing some improvement at effective nonverbal communication, 89% of the surveyed judges in Hennepin County said that they believed their behavior in the courtroom affected the litigants' satisfaction with the outcome of their case.<sup>48</sup> As Porter notes, "If judges do care about showing care and concern and understand that their behavior has something to do with the parties' satisfaction, then it follows logically that judges will want to do something about their nonverbal communication to assure that the message they want to send is in fact the message that is received."<sup>49</sup>

Examples of nonverbal communication include facial expressions, the speed of speech, the pitch and volume of the voice, the use of gap-fillers like "uh" and "umm," gestures, posture and body position, attire, eye contact, and the distance between speaker and listener. Nonverbal communication cues may differ from culture to culture; some might be offended by too much eye contact, while others would find the presentation more engaging.<sup>50</sup>

Porter's study of judges in Hennepin County, combined with general research on the importance of nonverbal communication, suggests that this is an area of great potential for improvement by judges. Even without court-specific data, the available research and common sense both tell us that many litigants are affected by the nonverbal behavior of judges. Porter's in-court observations showed judges how their specific behaviors in court might affect litigants, including by detracting from the messages the judges were trying to convey of concern for the litigants, fairness and impartiality, and competence.

Educators, psychologists, speech and communication researchers, and others have done significant work to make suggestions of ways to improve nonverbal communication skills.<sup>51</sup> Most trial judges could benefit from objective feedback about the nonverbal cues they are giving in the courtroom, along with specific suggestions for improvement.

**UNLIKE THE PUBLIC, JUDGES FOCUS ON THE FAIRNESS OF CASE OUTCOMES INSTEAD OF THE PROCESS.**

**W**hile the public emphasizes fair procedures, judges and attorneys focus on fair outcomes, often at the expense of attention to meeting the criteria of procedural fairness that are so important to the public's perception of the court. Perhaps because of this different focus, in California, "on average, attorneys tend . . . to view procedures in the California courts as fairer than do members of the public: an average of 3.0 for attorneys compared to 2.85 for the public."<sup>52</sup> Attorneys may perceive procedures to be fairer because that is not as much of a critical point of attention for them,<sup>53</sup>

48. *Id.*, app. at 5.

49. *Id.* at 6.

50. See ROGER E. AXTELL, *GESTURES: THE DO'S AND TABOOS OF BODY LANGUAGE AROUND THE WORLD* (1998).

51. See generally JULIA T. WOOD, *COMMUNICATION MOSAICS: AN INTRODUCTION TO THE FIELD OF COMMUNICATION* Chap. 5 (2006).

For a list of techniques for improving nonverbal communication skills tailored to the workplace, see MARY ELLEN GUFFEY, *BUSINESS COMMUNICATION: PROCESS & PRODUCT* 90 (5th ed. 2006).

52. ROTTMAN 2005, *supra* note 21, at 25.

53. Rottman, *supra* note 10, at 840.



or also because they are more familiar with the court's typical procedures and thus do not feel as lost during the process.<sup>54</sup>

An interesting study provides some insight. A number of federal appellate judges reviewed police-citizen encounters raising Fourth Amendment issues. Half the judges read about a search that was conducted fairly, with polite police who identified themselves from the outset and who listened to the citizen's side of the story; the other half read about a search that was conducted without much procedural fairness, with rude and hostile officers who didn't initially identify themselves and who never gave the citizen a chance to explain the situation. While judges recognized differences in the police behavior, those differences made no difference in the way the judges decided the cases under the Fourth Amendment.<sup>55</sup> Judges are trained to focus on the relevant legal issues and to provide fair outcomes. In the public's eye, however, disrespect and blatant bias are certain ways to create dissatisfaction and to be perceived as procedurally unfair. This dissonance between the expectations of judges and the public suggests "that the meaning of fairness among judges is considerably different . . . [and] outcome concerns had a greater influence among judges than the procedural criteria of trust, neutrality, and standing" that constitute the public's conception of procedural fairness.<sup>56</sup>

This difference may be more than just a little problematic since perceptions of procedural fairness have a substantial impact on both satisfaction *and* compliance for the public. However, this is not a difference that affects only judges and litigants; this is perhaps the inherent dissonance that exists between all decision makers and decision recipients. Social psychology professor Larry Heuer found generally in an experiment involving college students, who were tasked randomly either to be the decision maker or the decision recipient, that "decision recipients [were] oriented primarily to procedural information, while decision makers [were] oriented primarily to societal benefits,"<sup>57</sup> which are generally the outcomes. Decision makers, or judges, who are aware of these differences can better cater their remarks to the needs and expectations of litigants and the public so as to ensure better satisfaction and compliance.

The mediation process is one attempt to bridge this expectation divide by meeting the needs of both groups.<sup>58</sup> Judges, who were focusing upon achieving legal solutions, historically have employed a variety of types of procedures to meet those ends, including settlement conferences. But litigants were often excluded from key moments during such conferences. When lawyers emerged from a back room and announced to their clients that they had achieved a good outcome, the lawyers were surprised to find that their clients were often angry instead of pleased. From a traditional point of view, lawyers and judges were confused. They had come upon a legally appropriate outcome and thought that they had done their job. But the parties had no voice and could not see that the procedures were neutral because there was no transparency in the process. They did not see any evidence that their concerns were being taken seriously because they had minimal

54. ROTTMAN 2005, *supra* note 21, at 11, 18.

55. Heuer, *supra* note 35, at 217.

56. *Id.*

57. *Id.* at 218.

58. Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DEN. U. L. REV. 419 (1989).

contact with the judge. As a result, public dissatisfaction could be high, and the parties might not abide by the agreement.

Mediation, or court-annexed arbitration, was initiated to give people a forum that was more consistent with what they were expecting out of their involvement with the court. Mediation leads to greater satisfaction and compliance with the agreements. People are directly involved in a mediation session; they get to have a voice and see evidence that the authority figure is listening to and addressing their concerns.

**CASE VOLUME OF COURTS IS A MANAGEMENT CHALLENGE FOR JUDGES,  
NOT AN EXCUSE FOR DEEMPHASIZING PROCEDURAL FAIRNESS.**

All judges face real-world pressures. For many judges, volume creates pressure to move cases in assembly-line fashion—a method that obviously lacks in opportunities for the people involved in that proceeding to feel that they were listened to and treated with respect.

The vast majority of cases do not go to trial. Judges cannot rely then on the safeguards attendant to trial to provide litigants and others with a feeling of respect, voice, and inclusion. Their impressions of judges and our justice system—for better or worse—largely will be formed by their participation in mass-docket arraignments, probation revocations, calendar calls, and other settings, not trials.

Due process is a legal term, and judges are trained to provide due process. Litigants, jurors, witnesses, and courtroom observers are not trained in due process, but they do form opinions of us based on their observations. Even if minimum standards of procedural due process are met at all times, damage may be done to the court system in mass-docket proceedings that leave large segments of the public feeling that the courts were not fair. This may be reflected in the results of a California survey that found significantly greater dissatisfaction with the courts by respondents who had court experience in traffic or family-law cases, which often are handled in high-volume dockets.<sup>59</sup>

Everyone who comes through the court system has a right to be treated with respect 100% of the time, a right to be listened to during the process, and a right to have key rulings in the proceeding explained in terms that they can understand. Sufficient judicial officers need to be provided so that every docket in the courthouse can be handled in a manner that respects these rights, and in turn enhances public respect for the judicial system and its judges.

59. ROTTMAN 2005, *supra* note 21, at 16.

**PERCEPTIONS OF PROCEDURAL FAIRNESS DIFFER DRAMATICALLY  
AMONG MINORITY AND MAJORITY POPULATIONS.**

A wide division exists among different minority populations in the frequency with which people express approval of the court system. Asian populations generally hold significantly higher approval ratings for the judicial branch than do Hispanics, African-Americans, or even Caucasians.<sup>60</sup> However, when asked about the probability of fair outcomes in court, all of these major ethnic groups "... perceive 'worse results' in outcomes for African-Americans, low-income people, and non-English speakers."<sup>61</sup> It is troubling that a wide consensus believes these groups consistently receive less fair outcomes.

As a group, African-Americans feel that they receive less fair outcomes in their cases. When compared to Hispanics and Caucasians, 70% of African Americans believe that they are treated "somewhat" or "far" worse. African-Americans are also two times more likely to believe that a court's outcome will "seldom" or "never" be fair as they would believe that the outcome will "always" or "usually" be fair.<sup>62</sup> Further, African-American defendants who enter the courtroom "report worse treatment, more negative outcomes, lower perceptions of the quality of the court's decision-making process, and less trust in the motives of court actors. After the case is decided, these negative perceptions translate into less satisfaction with the court overall and less acceptance of the court's decision, all of which in turn lower compliance"<sup>63</sup> It's little wonder that these attitudes negatively impact recidivism. And these perceptions may well be reality-based: though true apple-to-apple case comparisons are difficult to make, African-Americans are 4.8 times more likely to be incarcerated and are generally given much harsher sentences than white defendants.<sup>64</sup>

While people with different ethnic and racial backgrounds differ in the degree to which they have trust and confidence in the legal system, people are concerned about fair procedures irrespective of their ethnicity and economic status and are willing to defer to a court's judgment if procedural fairness exists.<sup>65</sup> Procedural fairness is the primary factor that shapes perceptions of the judicial system.<sup>66</sup> However, since African-Americans perceive less fairness, it is critical to focus on what alleviates or aggravates that difference. Interestingly, "[d]efendants at Red Hook were not only more generally satisfied than those at the traditional court, but there was less variation by race and socioeconomic status."<sup>67</sup> The Red Hook Community Court in Brooklyn seems to have eliminated the distinctions between perceived levels of fairness among economic *and* ethnic divisions. This is of paramount importance because of the demonstrated and pervasive level of distrust of the judicial system among African-Americans; "[i]f community courts neutralize this effect, they make an important contribution to improving the legitimacy of the court in the eyes of a population disproportionately affected by the criminal justice system."<sup>68</sup>

60. ROTTMAN 2005, *supra* note 21, at 8.

61. *Id.* at 30.

62. FRAZER, *supra* note 4, at 4.

63. *Id.*

64. *Id.*

65. Tom R. Tyler, *What Do They Expect? New Findings Confirm the Precepts of Procedural Fairness*, CALIF. CTS. REV., Winter 2006, at 23.

66. Tom R. Tyler, *Governing Amid Diversity: Can Fair Decision-Making*

*Procedures Bridge Competing Public Interests and Values?*, 28 LAW & SOC'Y REV. 701 (1994); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from Law and Legal Authorities?*, 19 BEHAV. SCI. & LAW 215 (2001).

67. FRAZER, *supra* note 4, at IV.

68. *Id.* at 27.



## RECOMMENDATIONS FOR CHANGE

### WHAT CAN AN INDIVIDUAL JUDGE DO?

1. As a matter of practice, explain in understandable language what is about to go on to litigants, witnesses, and jurors. The more they know what to expect, the more likely they will be able to comprehend. Judges need to accept that it is their ultimate responsibility to ensure people understand their processes and orders.
2. Learn how to listen better. Listening is not the absence of talking. There are some excellent books about improving listening. The first step is good self-analysis. Each of us has different strengths and weaknesses. All of the literature concludes that you can become a better listener. The local academic community might be a good repository of advice.
3. While it is understandable to believe that a lawyer will explain judicial orders, not every litigant has a lawyer who will ensure an order is understood. It's your order. You have a responsibility to explain it in understandable terms.
4. Put something on the bench as a mental reminder that patience is a virtue not always easily practiced.
5. At the start of a docket, explain the ground rules for what will happen. For example, explain why certain cases will be heard first or why what litigants or defendants can say is limited in time or scope.
6. Share and discuss this paper with the courtroom staff. They can play a critical role in giving a judge feedback, reminders, and support.
7. Arrange to have yourself videotaped, particularly when you preside in heavy calendars. Ideally, review the tape with a professional or colleagues who will aid your analysis, but even if no one sees it except you (and perhaps a partner or spouse), you can still learn a lot about how you are perceived by the people before you.
8. Enlist the local academic community. Professors who specialize in communication and nonverbal behavior can offer great insight.
9. Thank people for their patience.

### WHAT CAN YOUR COURT DO?

1. Adopt the National Center for State Courts' *CourTools*, a set of ten trial-court-performance measures that offer perspective on court operations. If all ten are more than is feasible, start with number one: Access and Fairness.
2. Examine how your court deals with the three most troubling areas courts have in affording a high degree of procedural fairness: self-represented people, family law, and traffic offenses.
  - a. There is increasing understanding that a good trial judge must change not only the processes that lead

up to the courtroom, but also the way the courtroom itself is conducted. Judicial officers and those who work with them are beginning to think of ways to manage the courtroom so that neutrality is enhanced by making the systems work for all, regardless of whether they have a lawyer. People who appear pro se are more likely to be poor, a minority, and overwhelmed by the legal process.

- b. Some fear that changing court procedures to be friendly to the self-represented undercuts judicial neutrality. The American Judges Association is a member of the Self-Represented Litigant Network, which has resources.
  - c. Courtroom procedures as a whole must be designed to support the type of relaxed neutral communications between judges and self-represented litigants that is optimal for obtaining the facts necessary on which to base high-quality decision making.
3. Use the research cited in this paper to demand adequate numbers of judicial officers to be able to handle high-volume dockets in ways that *both* move the cases toward a timely disposition *and* allow those coming through the court to feel that they have been respected and listened to.
  4. Consider how procedures may affect perceptions of fairness. For example, providing a small-claims litigant a written explanation, even consisting of a few sentences, may be preferable to using a check-the-box form judgment. Or it may be that providing an oral decision from the bench will be seen as fairer than a cursory decision that arrives in the mail.

#### **WHAT CAN COURT ADMINISTRATORS DO?**

1. Share this paper with court employees. Engage them in a discussion of the importance of fairness in our courts. As important as the judge may be in the process, the judge is just one piece of the puzzle when it comes to the public's interaction with the court system. Conduct courtwide training so that all employees understand the important role they play in providing procedural fairness. How litigants are treated by court employees from the moment they enter the courthouse door—or the moment they encounter security personnel at a metal detector—sets the tone.
2. Make it a major project for 2008 to analyze the tone of public interaction that is set in your courthouse. Does it convey respect and care for the people who, often in stress, come there? Could it be improved? Many courthouses have child-care facilities, adequate handicapped-accessible areas (now required by the ADA), and domestic-violence waiting rooms. Are there improvements that should be made at your courthouse? Involve all stakeholders (judges, staff, attorneys, litigants, and the general public) in this process.
3. Treat employees fairly. If court employees do not feel that they are fairly treated in their jobs by court leaders, it is unlikely that they will treat the public any better. The National Center for State Courts' *CourTools* has a specific measurement tool for employee satisfaction. Court administrators need to strive to create a courthouse work environment that doesn't breed cynicism.
4. Work to provide sufficient support staff so that judges are not distracted by activities that may interfere with their perceived attention to the presentation of cases in the courtroom. For example, if a judge is fiddling with tape recorders and making constant notes of tape counter numbers, that judge is not going to be looking at the litigants and attorneys and is not going to be perceived as having paid careful attention to the parties' dispute. There are many roles that judges take on in understaffed courts and courtrooms. Those roles should be carefully monitored for possible interference with the

judge's primary role—hearing and deciding the matter at hand in a way that clearly adheres to the requirements for a high public perception of procedural fairness. Having judges perform duties that might more appropriately be done by a clerk should especially be avoided in high-volume dockets.

5. Provide opportunities for courthouse visitors to evaluate their experience before they leave the courthouse. Doing so communicates respect and gives an opportunity for voice.

## WHAT CAN RESEARCHERS DO?

1. For more than thirty years, the social-science academic community has learned a great deal about fairness in our courts. The knowledge that they have gained, however, has too often remained within the confines of academia. The truth is that most judges don't know about the journals the research appears in and often don't easily understand the jargon. The National Science Foundation and others who fund social-justice research need to reach out to judges to develop strategies to ensure that sound academic social-science research is shared in forms that are likely to produce change within the courts—journals like *Court Review*, the quarterly journal of the American Judges Association, and judicial-education conferences are key venues for the dissemination of this information.
2. While there is a lot of research at the trial-court level on the issue of procedural fairness, there is little research about how the concept applies at the appellate level. This could be an important area for additional thought and research.
3. The American Judges Association encourages the National Highway Traffic Safety Administration to fund research specifically targeted to improving the procedural fairness of courts dealing with traffic cases.
4. Substantial research documents the need to have a voice in the proceedings. Usually, litigants express themselves in court through their attorneys. Researchers could attempt to determine whether it is always sufficient for the litigant to be represented by an attorney in a forum in which the litigant is present, or whether litigant satisfaction would be substantially improved by having some time in which the litigant is heard from directly. This sort of research could be done in a variety of contexts, civil and criminal.
5. Help to evaluate the potential consequences on perceptions of procedural fairness through pilot projects on changes in court procedure. At a minimum, changes in procedure should not reduce the sense of procedural fairness by people who come to court.

## WHAT CAN JUDICIAL EDUCATORS DO?

1. The American Judges Association encourages judicial educators to simply distribute this paper as a start. (We'll happily provide it in electronic form.) Judicial education is driven by advocacy; that is, educators try to get judges to *do* something by *telling them about* something. If judicial educators simply make good, accessible information about procedural fairness known to judges, change will begin to occur even without a call for specific action.
2. Judges should be formally educated on the implications of research regarding procedural issues and action steps they might take. Procedural Fairness might be developed as an intensive course of study presented by the National Judicial College. But, in addition to considering Procedural Fairness as a stand-alone subject, it also should be integrated into virtually all judicial-education subject areas.



3. Judicial education must include—for lack of a better term—“leadership” development. Programs like the Leadership Institute in Judicial Education at the University of Memphis help participating judges to understand themselves better, as well as how others learn and change. Such programs teach the role of emotions in those processes in ways that can be useful in educating others, in judging, and in life. Judges need honest feedback in a safe environment in order to build self-awareness and continue to develop as leaders in their courtrooms.
4. Judicial educators need to train judicial mentors. The habits and values judges adopt within the first 24 months are likely to be the ones they keep throughout their careers. Effective mentoring is a key in shaping this.

## **WHAT CAN COURT LEADERS DO?**

1. The American Judges Association encourages the Conference of Chief Justices to place the issue of procedural fairness in state courts on their agenda during 2008. Each state Chief Justice has enormous influence on the agenda for justice in their state. Collectively the Conference of Chief Justices can set the agenda for our nation’s state courts. It may at first glance seem presumptuous for the American Judges Association to encourage the Conference to place this issue on their agenda in 2008. Many states already are deeply committed to improving the procedural fairness of their courts, and many individual Chief Justices are champions of this issue. But the performance of our courts on matters of procedural fairness has certainly not been perfected, which is why the Conference of Chief Justices should place this issue on their agenda.
2. Similarly, the American Judges Association encourages the Conference of State Court Administrators to place the issue of procedural fairness on their agenda during 2008. We acknowledge the leadership of COSCA in developing excellent white papers to guide future action; we have modeled our white-paper process on COSCA’s excellent efforts. State-court administrators have been the traditional champions of improved case management. The new mantra of court administration should be that effective case management that also affords procedural fairness to litigants is the essence of effective court administration. Unless both goals are achieved, the system of justice will flounder.
3. The American Judges Association encourages courts to examine the National Center for State Courts’ *CourTools*. Our goal is to have at least 100 additional courts adopt and implement the CourTool on access and fairness in 2008.
4. The American Judges Association invites the courts community to plan for a national conference on procedural fairness in 2009. The National Center for State Courts, the National Judicial College, the Center for Court Innovation, the Institute for the Reform of the American Legal System, Justice at Stake, and the American Judicature Society all have tried to improve the fairness of our courts. If these organizations and others were willing to partner with the American Judges Association to plan and seek funding for a national conference on procedural fairness, the issue of fairness in our courts could be advanced exponentially.
5. The American Judges Association encourages bar-association leaders to join with the courts to ensure greater procedural fairness in our courts. Lawyers need to be educated on the social-science research described in this paper so that all of the players within the court system can work together toward a justice system that can be respected by all.
6. The American Judges Association encourages the Urban Court Manager Network, working with the

Justice Management Institute and others, to examine the issue of how to improve the sense of procedural fairness for racial minorities.

7. By embracing procedural fairness, courts can embrace judicial accountability without reference to specific decisions on the merits of individual cases. Judges should be held accountable for running a courtroom in which everyone is treated with respect, has the opportunity to be heard, and receives an adequate explanation of court orders. Judges cannot avoid controversy—we must decide the cases before us. But in the face of potentially unfair criticism for specific decisions, it should be an effective defense by a judge to be able to say that the people who appear in my courtroom feel they have been treated fairly.

## BIBLIOGRAPHY

Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988).

DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, FAMILY COURT FAIRNESS STUDY (Fourth Jud. District Res. Division, Hennepin Co., MN.) 34-35 (2004), available at [http://www.mncourts.gov/documents/4/Public/Research/Family\\_Court\\_Fairness\\_Report\\_Final.doc](http://www.mncourts.gov/documents/4/Public/Research/Family_Court_Fairness_Report_Final.doc).

DECISION RESOURCES, LTD., MINNESOTA STATE COURTS: 2006 SURVEY OF MINNESOTA RESIDENTS (2006).

M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (Center for Court Innovation 2006), available at [http://courttinnovation.org/\\_uploads/documents/Procedural\\_Fairness.pdf](http://courttinnovation.org/_uploads/documents/Procedural_Fairness.pdf).

Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. APPL. PSYCHOL. 340 (1986).

Jerald Greenberg, *Looking Fair Versus Being Fair: Managing Impressions of Organizational Justice*, in 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 111 (Barry M. Staw & Larry L. Cummings eds. 1990).

Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, in BASIC GROUP PROCESSES 235 (Paul B. Paulus ed., 1983).

Larry Heuer, *What's Just about the Criminal Justice System? A Psychological Perspective*, 13 J. LAW & POL'y 209 (2005).

Larry Heuer et al., *The Generality of Procedural Justice Concerns: A Deservedness Model of Group Value and Self-interest Based Fairness Concerns*, 25 PERS. SOC. PSYCHOL. BULL. 1279 (1999).

E. Allan Lind, Ruth Kanfer & Christopher P. Early, *Voice, Control & Procedural Justice*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990).

E. Allan LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005).

Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 169 (1997).

LAURINDA L. PORTER, NONVERBAL COMMUNICATION IN COURTROOMS AT THE HENNEPIN COUNTY GOVERNMENT CENTER: A REPORT ON OBSERVATIONS OF FOURTH JUDICIAL DISTRICT JUDGES IN MARCH AND APRIL 2001 (June 2001).

PUBLIC AGENDA & DOBLE RESEARCH, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS (2006), *available at* [http://www.courtinfo.ca.gov/reference/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf).

DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS (2005), *available at* [http://www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf).

David B. Rottman, *Adhere to Procedural Fairness Principles throughout the Justice System*, 6 CRIM. & PUB. POL'Y 835 (2007).

Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003).

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

Tom R. Tyler, *Conditions Leading to Value Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987).

Tom R. Tyler, *Governing Amid Diversity: Can Fair Decision-Making Procedures Bridge Competing Public Interests and Values?*, 28 LAW & SOC'Y REV. 701 (1994).

Tom R. Tyler, *Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000).

Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. SOC. PSYCHOL. 850 (1994).

Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215 (2001).

Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DEN. U. L. REV. 419 (1989).

Tom R. Tyler, *The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments about the Procedure?*, 9 SOC. JUSTICE RES. 311 (1996).

Tom R. Tyler, *What Do They Expect? New Findings Confirm the Precepts of Procedural Fairness*, CALIF. CTS. REV., Winter 2006, at 22.

TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997).

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

Kees Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 *JOURNAL OF PERSONALITY & SOC. PSYCHOL.* 1493 (1998).

Kees Van den Bos et al., *Sometimes Unfair Procedures Have Nice Aspects: On the Psychology of the Fair Process Effect*, 77 *J. PERSONALITY & SOC. PSYCHOL.* 324 (1999).

## ABOUT THE AUTHORS



**Kevin Burke** has been a district judge in Hennepin County, Minnesota, since 1984. He served as chair of the AJA's White Paper Committee in 2006-2007; he is also a member of the AJA's Board of Governors. He has been elected to four terms as chief judge and three terms as assistant chief judge of the Hennepin County District Court, which has 61 judges and more than 750,000 annual case filings.

Burke received the William H. Rehnquist Award from the National Center for State Courts in 2003; the Rehnquist Award is presented annually to a state judge who meets the highest level of judicial excellence, integrity, fairness, and professional ethics. Among his many other awards, *Governing* magazine named him the Public Official of the Year in 2004; the Minnesota Chapter of the American Board of Trial Advocates named him the trial judge of the year in 2005; and the magazine *Law & Politics* named him one of the 100 most influential lawyers in the history of Minnesota. Burke is a past chair of the Minnesota State Board of Public Defense and was a leader in efforts to improve and expand the state's public defender system.

Burke teaches at the University of Minnesota and University of St. Thomas law schools. He has been a speaker in many states, as well as in Canada, Mexico, China, India, and Ireland regarding improvement in judicial administration and court leadership.



**Steve Leben** is a judge on the Kansas Court of Appeals, which he joined in June 2007 after nearly 14 years as a general-jurisdiction trial judge in Johnson County, Kansas. He served as president of the American Judges Association in 2006-2007 and has served on the AJA's Board of Governors since 1999 and its Executive Committee since 2002.

Leben received the Distinguished Service Award from the National Center for State Courts in 2003, one of two trial judges recognized that year for contributions nationally to the administration of justice. He has served as the editor of *Court Review*, the journal of the American Judges Association, since 1998.

Leben has presented lectures to lawyers in Kansas and at national and international conferences. He has taught a course on statutory interpretation to law students at both the University of Kansas and University of Missouri-Kansas City law schools. He has published 13 law-review articles in the areas of evidence, civil procedure, ethics, and jurisprudence and is the editor of a multivolume practice manual on Kansas family law.



## **ABOUT THE AMERICAN JUDGES ASSOCIATION**

The American Judges Association (AJA) is the largest independent association of judges in the United States, and it also has about 150 members who are Canadian judges. Formed in 1959, it has about 2,500 members from all levels of the judiciary—municipal, state or provincial, and federal; trial, appellate, and administrative. The majority of its membership consists of state trial-court judges.

The American Judges Association seeks to serve as the Voice of the Judiciary® by speaking out on issues of concern to judges and by working to improve the work done by judges and the judiciary. The AJA provides high-quality educational programs for judges at an annual educational conference and publications with information useful to judges. The AJA supports a variety of programs and initiatives that promote fair and impartial courts, including the work of Justice at Stake, a partnership of more than 30 organizations, including AJA, dedicated to maintaining fair and impartial courts.

The American Judges Association is governed primarily by a 45-member Board of Governors and an eight-member Executive Committee. This white paper was approved by American Judges Association acting through its General Assembly at its meeting on September 29, 2007.

## **ACKNOWLEDGMENTS**

The authors and the American Judges Association wish to thank the following people for their advice and help in developing this position paper: Paul Anderson, Seth Andersen, Michael Bender, Greg Berman, Bert Brandenburg, Frank Broccolina, Colin Campbell, Alan Carlson, Mary Celeste, John Conery, Douglas Denton, Jay Dilworth, Gordon Doerfer, Sue Dosal, Gerald Elliott, Donovan Frank, Gene Flango, Geoff Gallas, Timothy Fautsko, Larry Heuer, Elizabeth Hines, Collins Ijoma, Dallas Jamison, William Johnston, Alan Kalmanoff, Rebecca Kourlis, Susan Ledray, Dale Lefever, Barry Mahoney, Tanja Manrique, Lynn Mather, Thomas Mengler, Alanna Moravetz, Gayle Nachtigal, Brian Ostrum, Diane Pawlowicz, Bruce Peterson, Kathleen Flynn Peterson, Marcy Podkopcak, David Rottman, Steve Schele, Roy Schotland, Noreen Sharp, Steve Swanson, James Swenson, Sandra Thompson, Tom R. Tyler, Chelle Uecker, Kent Wagner, Roger Warren, David Wexler, Russell Wheeler, Penny White, and Richard Zorza. Thanks also to Laura Taken, who is Judge Burke's law clerk. Special thanks to Rachel Sharpe, judicial assistant to Judge Leben, who provided substantial research and drafting assistance for the paper.

# Procedural Justice and the Courts

Tom R. Tyler

People come to the courts about a wide variety of problems and disputes. Although this has always been the case, in recent years the court system has become the branch of government in which people deal with an ever broader variety of issues and concerns. And the people who bring their problems to court have themselves become increasingly diverse in terms of their ethnic and social backgrounds. In addition, more and more of these people choose to represent themselves, rather than acting through lawyers. Finally, these changes are occurring in an environment in which people have generally lower levels of trust and confidence in all forms of governmental authority. All of these trends pose a challenge for the courts.

In dealing with these problems and disputes, one core goal of the judicial system is to provide people with a forum in which they can obtain justice as it is defined by the framework of the law. This is the traditional concern of judges, and the goal emphasized in legal education—the correct application of the law to particular legal disputes.

A second goal of the courts is to handle people's problems in ways that lead them to accept and be willing to abide by the decisions made by the courts. The effectiveness of the courts in managing social conflicts depends upon their ability to issue decisions that are authoritative, i.e., that shape the conduct of the parties that come before them. Courts want that deference to continue over time, with people adhering to court judgments long after their case, so that the parties are not continually bringing the issues back into the courts for re-litigation. Finally, the courts want to retain and even enhance public trust and confidence in the courts, judges, and the law. Such public trust is the key to maintaining the legitimacy of the legal system.

## THE IDEA OF PROCEDURAL JUSTICE

The concepts behind procedural justice have developed from research showing that the manner in which disputes are handled by the courts has an important influence upon people's evaluations of their experiences in the court system.<sup>1</sup> The key finding of that research is that how people and their problems are managed when they are dealing with the courts has more influence than the outcome of their case on the issues noted above. Judgments about how cases are handled are generally referred to as assessments of procedural justice to dis-

tinguish them from assessments of the favorability or the fairness of the outcomes that people received. Studies suggest first that procedural justice has an impact on whether people accept and abide by the decisions made by the courts, both immediately and over time. Second, procedural justice influences how people evaluate the judges and other court personnel they deal with, as well as the court system and the law.

Problems with noncompliance with the decisions of judges are long-standing.

One major motivation for the alternative dispute resolution movement, which seeks alternative forums to traditional courtrooms, is the effort to find a way to increase the willingness to accept the decisions made by third-party authorities. In family court, for example, judges have struggled to find ways to make decisions about child custody and child support that would be willingly followed by both fathers and mothers and that would, to the degree possible, create positive post-separation dynamics in which both parents took responsibility for supporting their children financially and emotionally. And, procedural justice is found to be effective in both creating positive dynamics within families and in facilitating long-term adherence to agreements.<sup>2</sup> In other words, the use of fair procedures encourages a positive climate among the parties, which is more likely to promote both a long-term relationship and adherence to the agreements made about how to handle issues, such as child custody, that are related to that relationship.

## MISCONCEPTIONS ABOUT PROCEDURAL JUSTICE

Before discussing the implications of the procedural justice approach, let me comment on a common misconception about this perspective. That is that it suggests that people are happy when they lose. On the contrary, no one likes to lose. However, people recognize that they cannot always win when they have conflicts with others. They accept "losing" more willingly if the court procedures used to handle their case are fair. This is true both for formal procedures such as trials and for informal procedures, including settlement conferences, mediation sessions, and arbitration hearings.

One reason the procedural justice approach results in "losing" being more acceptable to litigants is that it minimizes the degree to which problems are framed in terms of winning and losing, as well as generally shifting the focus of attention away

## Footnotes

1. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000).
2. PENELOPE E. BRYAN, *CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM* (2005); Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131 (1996); Robert

E. Emery, Sheila G. Matthews & Katherine M. Kitzmann, *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning One Year After Settlement*, 62 J. CONSULTING & CLINICAL PSYCHOL. 124 (1994); Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553 (1993).

from outcomes and toward the procedures through which the dispute is being resolved. As a consequence, fair procedures lead to a concern about delivering gains to all parties rather than winning over others.<sup>3</sup> For example, all parties have the opportunity to present their story and to have it considered by the relevant authorities. Further, all parties have their right to seek justice from the courts, recognized and acknowledged by the courts.

Because it provides all parties with desirable experiences with the courts, procedural justice is a key to the development of stable and lasting solutions to conflicts. The beginning point of such solutions is a better and generally less conflictual relationship among the parties to a case. When people have settled their conflict in a less adversarial way, they have better feelings toward one another. For example, as previously noted, in child custody hearings both parents are likely to be involved in their children's lives a year or even several years after the hearing if they view the hearing as fair. And this is true irrespective of the outcome. Fathers, who typically lose such hearings, are more likely to have contact with their children in the future if the hearing is one they evaluate as being fair. In addition, having a fair hearing encourages people to view the authority involved and their decision as more legitimate. Consequently, people feel more obligation to accept and obey the decision. This leads to long-term rule following.

One example of this long-term effect is provided by a study of adult rule following conducted in Australia. Adults who were arrested for driving while drunk had their case disposed through different legal procedures, including traditional courts. After their case was disposed each person was interviewed. As expected, the fairness of the legal procedure was related to the legitimacy of the legal system. Two years later, those involved were reinterviewed and it was found their views about the legitimacy of the law were related to their initial perceptions of the fairness of their cases. Peoples' obedience to the law was then tracked for the two years following this second interview, and it was found that people who experienced their hearing as fairer, and therefore viewed the law as more legitimate two years later, reoffended at around 25% the rate of those who viewed the law as less legitimate during the two years following their second interview. In other words, the reduction in reoffending caused by experiencing a hearing as fairer extended to at least four years after the hearing.<sup>4</sup> It is striking that people's experiences in a courtroom or at a conference with legal authorities, something that lasts at best a few hours, can be strongly affecting their behavior several years later.

### THE INFLUENCE OF PROCEDURAL JUSTICE

As the findings outlined suggest, judges and court personnel should be interested in procedural justice because studies indi-

3. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008).  
 4. Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms*

**TABLE 1. THE INFLUENCE OF PROCEDURAL JUSTICE**

	Willingness to accept the decision	Evaluation of the courts and the law
<b>Experience-based judgements</b>		
Procedural justice	.68***	.36***
Distributive justice	.20**	.15 <sup>^</sup>
Outcome favorability	-.11*	-.11
<b>Background factors</b>		
Ideology	.08	.07
Age	-.06	.02
Education	-.12	.05
Income	.13*	.07
Gender	.02	.00
African-American	-.03	-.17 <sup>^</sup>
Hispanic	-.10	.07
City of residence	-.06	.04
Was contact voluntary?	-.04	.02
<b>Adjusted R<sup>2</sup></b>	58%***	21%***
<sup>^</sup> p < .10; *p < .05; **p < .01; ***p < .001.		

cate that it encourages decision acceptance and leads to positive views about the legal system. A particularly telling example comes from a study of willingness to accept decisions made by police officers and judges in two California communities—Oakland and Los Angeles.<sup>5</sup> This study considered both those who came to these authorities seeking help, and those being regulated by the authorities. It also considered a diverse sample of White, African-American, and Hispanic residents. The sample included 1,656 people in Los Angeles and Oakland with a recent personal experience with the police or the courts. Fourteen percent (239 people) had contact with a court.

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

Reactions to the court could potentially be linked to three judgments: whether the procedures used by the court were just; whether the outcome was just; and/or whether the outcome was favorable or unfavorable. In addition, the study measured and controlled for other potentially important factors, including the person's ideology, their age, their level of

*in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553 (2007).

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

**[F]ocusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who the people using the courts are.**

education, their income, their gender, the city they lived in, their ethnicity (African-American, Hispanic, white); and whether they appeared in court voluntarily.

Regression analysis was used to explore the influence of these various factors on the willingness to accept decisions made by the court. The results of that analysis are shown in Table 1. The numbers shown are standardized

regression coefficients, which indicate the relative influence of different factors. As expected, the primary factor shaping the willingness to accept decisions was the fairness of court procedures (standardized regression coefficient,  $r = .68$ ,  $p < .001$ ). Procedural justice was also the primary factor shaping the influence of personal experience upon overall views about the court system (standardized regression coefficient,  $r = .36$ ,  $p < .001$ ).

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

These findings are typical of studies of the courts. Early experimental research on trials by John Thibaut (a psychologist) and Laurens Walker (a lawyer) demonstrated that, irrespective of the outcome of a trial, the participants were more willing to accept the decisions of the judge if the trial procedure was fair.<sup>6</sup> In particular, they argued that disputants viewed adversary procedures as fair because they allowed people the opportunity to tell their side of the story before decisions were made by the authority managing the trial. Such an

opportunity is often described as having voice in the proceedings. This early experimental research has been subsequently supported by a number of laboratory and field studies of trials and other legal procedures.<sup>7</sup> At this point the influence of procedural justice is widely supported by both experimental and field research.

As I have noted, an especially important finding of studies on procedural justice is that people are more likely to continue to abide by a decision if that decision is made through a fair procedure. The process legitimates the decision and creates commitment to obeying it that is found to persist into the future. In addition, studies find that people's general commitment to obeying the law is heightened when they experience fair procedures in legal settings.

A common misconception about regulatory procedures is that you cannot deliver undesirable outcomes without being unpopular. This suggests that the police and courts are inevitably unpopular. The study of people dealing with legal authorities that I have just described indicates that as long as people view the procedures they experience as fair, they are largely unaffected by their outcomes, even when those outcomes are negative.<sup>8</sup> In addition, studies that interview people both before and after their personal experiences with legal authorities show that trust and confidence in legal authorities increases when people experience procedural justice, even in situations in which they receive a negative outcome.<sup>9</sup> It might seem paradoxical but people are found to feel more trust in authorities after receiving a negative outcome than they did before receiving that outcome, as long as the authority involved behaves in a fair way. So, legal authorities can act in ways that are necessary to be effective in their regulatory role and simultaneously build confidence among the public.

Finally, people often suggest that procedures do not matter when the stakes are high. In fact, studies suggest that people continue to care about the fairness of procedures when the outcomes involved are substantial and important to them. This includes when the monetary stakes are high, as is true in civil cases;<sup>10</sup> when people are very invested in the issues, for example in child custody hearings;<sup>11</sup> when their liberty is at stake, as is true in felony cases;<sup>12</sup> when people are incarcerated;<sup>13</sup> and when important public policy issues are being decided.<sup>14</sup>

These same procedural justice judgments are also a key factor in the evaluations made by the general public of the courts as institutions.<sup>15</sup> National surveys of public trust and confidence in state courts show that public evaluations of state

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

7. LIND & TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, *supra* note 1.

8. For similar findings from research conducted in Chicago, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

9. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* OHIO ST. J. CRIM. L. (forthcoming 2008).

10. Allan E. Lind, Carol T. Kulik, Maureen Ambrose & Maria V. de Vera Park, *Individual and Corporate Dispute Resolution: Using*

*Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993).

11. BRYAN, *CONSTRUCTIVE DIVORCE*, *supra* note 2.

12. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988).

13. RICHARD SPARKS, ANTHONY BOTTOMS & WILL HAY, *PRISONS AND THE PROBLEM OF ORDER* (1996).

14. Tyler, *Social Justice*, *supra* note 1.

15. DAVID B. ROTTMAN, *TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS* (2005).



courts are based heavily upon evaluations of the fairness of court procedures.<sup>16</sup> In particular, people are found to be sensitive to whether the courts protect their rights and to whether they think that judges are honest. While these procedural justice judgments are the most important factor shaping trust and confidence in the courts, those interviewed are also sensitive to whether the courts treated the members of different groups equally, as well as to other structural issues about the courts, such as cost and delay. But, their primary basis for evaluation is procedural justice.

The strong linkage between procedural justice and evaluations of the courts was recently affirmed by a study conducted within the State Courts of California. The Administrative Office of the Courts undertook a study in 2005 in which a random sample of the residents of the state were interviewed about their trust and confidence in the California courts. An analysis of that information<sup>17</sup> suggests that “[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in the California courts.”<sup>18</sup> The California courts are rated as being very fair in terms of treating people with dignity and respect, but as not particularly fair in terms of allowing them to participate in decisions that affect them. The report argues that “[p]olicies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts.”<sup>19</sup>

Interestingly, the report points to experiences with low-stakes courts, such as traffic court, as a particular source of dissatisfaction, and argues that all experiences with legal authorities, even relatively trivial interactions, are important to members of the public and need to be the focus of court design efforts. Finally, the report argues that there need to be mechanisms for the ongoing evaluation of people’s experiences with the courts, mechanisms institutionalized through periodic surveys of members of the public, especially those who have had experiences with the courts.

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

dural justice. Instead, the need for this study arose within the framework of court concerns in California; the study was designed and conducted within the framework of the administrative offices of the courts; and the report was written by David Rottman, a researcher at the National Center for State Courts.

Hence, the confirmation of core procedural justice findings is especially important.

Similar conclusions have also been reached by other judicial leaders. The White Paper on procedural fairness authored by Judges Kevin Burke and Steve Leben,<sup>20</sup> presented at the annual meeting of the American Judges Association in 2007 and which is the focus of this special issue of *Court Review*, is another example. The White Paper reviews research on procedural justice, including recent studies conducted within the court systems of Hennepin County, Minnesota, under Judge Burke’s direction, and in Brooklyn, New York.<sup>21</sup> Again, these court-designed and -sponsored evaluations point to the importance of procedural justice in encouraging satisfaction, decision acceptance, and trust and confidence in the courts.<sup>22</sup>

Finally, the findings outlined do not apply only to litigants or other members of the public who come to court (the “clients” of the court system). They also apply to the people who work within the court system. Studies of employees in general indicate that employees in a wide variety of types of work organizations evaluate their own experiences on the job in terms of the procedural fairness of their treatment by their own authorities. Research suggests that the degree to which employees follow work rules, as well as doing their jobs well, is linked to the fairness of workplace procedures.<sup>23</sup> Similarly, studies of agents of social control, for example police officers, suggest that their behavior on the job is related to how fairly they are treated by their supervisors.<sup>24</sup> Hence, the same principles that can be used to design efforts to deal with the public also apply to efforts to design effective approaches to dealing with the people working within the criminal justice system.

**The procedural justice research findings "also apply to the people who work within the court system."**

16. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions?* 19 BEHAV. SCI. & L. 215 (2001).

17. ROTTMAN, TRUST AND CONFIDENCE, *supra* note 15.

18. *Id.* at 6.

19. *Id.* at 7.

20. *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (this issue) (White Paper originally delivered at the annual conference of the American Judges Association, Sept. 2007, Vancouver, B.C.), available at <http://aja.ncsc.dni.us/htdocs/AJAWHITEPAPER9-26-07.pdf>.

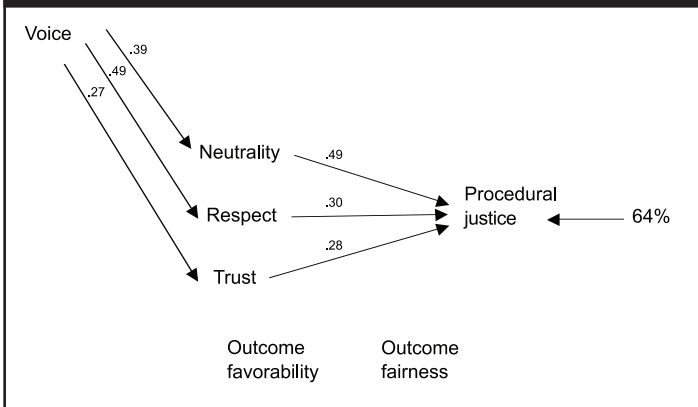
21. M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL IN DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), available at [http://courtinnovation.org/\\_uploads/documents/Procedural\\_Fairness.pdf](http://courtinnovation.org/_uploads/documents/Procedural_Fairness.pdf).

22. See M. Somjen Fraser, *Examining Defendant Perceptions of Fairness in the Courtroom*, 91 JUDICATURE 36 (2007); Jake Horowitz, *Making Every Encounter Count: Building Trust and Confidence in the Police*, NAT’L INST. JUST. J., Jan. 2007, at 8, available at <http://www.ncjrs.gov/pdffiles1/nij/jr000256c.pdf>.

23. 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 & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct?: The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143 (2005).

24. Tom R. Tyler, Patrick E. Callahan & Jeffrey Frost, *Armed, and Dangerous(?): Motivating Rule Adherence Among Agents of Social Control*, 41 L. & SOC’Y REV. 457 (2007).

**FIGURE 1: DIRECT AND INDIRECT INFLUENCES ON PROCEDURAL JUSTICE**



**TABLE 2. TOTAL INFLUENCES ON PROCEDURAL JUSTICE**

	Overall procedural justice
Voice	.55***
Neutrality	.49***
Respect	.28***
Trust	.30***
***p < .001	

**WHAT IS PROCEDURAL JUSTICE?**

Given that procedural justice matters, what are the aspects of the court experience that should be emphasized by legal authorities? There are four key procedural justice principles: voice, neutrality, respect, and trust.

**Voice.** People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem. Having an opportunity to voice their perspective has a positive effect upon people’s experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decision. This desire for voice is found to be one of the reasons that informal legal procedures such as mediation are very popular. People value the chance to communicate with the mediator, indicating what they view the problem as being and making suggestions concerning how it should be handled.

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

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

Respect matters at all stages, and involves police officers and court clerks as well as judges. It includes both treating people well, that is, with courtesy and politeness, and showing respect for people’s rights. For example, when people come to court they are often confused about how cases are handled.

**COURT MANAGEMENT STRATEGIES**

How can we secure the gains associated with procedural justice? We need to design a court management framework that treats people’s entire experience with the legal system from a procedural justice perspective.<sup>25</sup> Studies suggest that people are influenced by their treatment at all stages of their experience, and by all the authorities whom they encounter. This includes their experiences with the police, their out-of-court experiences with their lawyers, their treatment by jail authorities, court clerks and bailiffs, and their experience in the courtroom dealing with judges and lawyers. Consequently, we need to emphasize procedural justice during initial contacts with the police and jail authorities; during experiences with attorneys throughout the case disposition process; in contacts with court clerks and other administrative personnel; in the conduct of settlement and pretrial mediation procedures; during experiences with judges and lawyers during trials and in informal proceedings; and in posttrial experiences involving the implementation and enforcement of orders, as well as in any subsequent incarceration.

It is equally important to remember that everyone involved with the courts treats their experience as a “civics lesson” about the legal system. This includes the parties to any case, but also is true for their families, friends, and other observers; witnesses; jurors; as well as all of those who hear stories about the courts from their friends, family, neighbors, or coworkers. And, of course, everyone is affected by the stories that appear in the mass media.

Does everyone share these procedural justice concerns? Studies suggest that procedural justice judgments dominate the reactions of all of the people who deal with legal authorities across ethnic/racial groups, among the rich and poor, and for both men and women.<sup>26</sup> Most important, they dominate the concerns of the members of the major minority groups in the United States, in particular African-Americans and Hispanics.<sup>27</sup>

25. TOM R. TYLER, *PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS* (2008).

26. Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair*

*Decisionmaking Procedures on the Legitimacy of Government*, 28 L. & SOC’Y REV. 809 (1994).

27. TYLER & HUO, *supra* note 5.

Providing people with information about what to do, where to go, and when to appear, all demonstrate respect both for those people and for their right to have their problems handled fairly by the courts. Brochures or websites explaining court procedures, as well as aids such as help desks, are found to be valuable.

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

**THE INFLUENCE OF PROCEDURAL CONCERNS**

Using the data collected in the study of personal experiences with the courts discussed above, it is possible to examine the influence of the four antecedents of procedural justice that have just been outlined. An analysis of the four factors considered at the same time suggests that neutrality, trust, and respect directly shape overall evaluations of procedural justice, but that voice does not. However, an analysis that allows both direct and indirect influences, shown in Figure 1, indicates that voice is indirectly important because it shapes neutrality, trust, and respect. An analysis that considers both direct and indirect influences at the same time, shown in Table 2, indicates that all four factors matter. Interestingly, neither outcome favorability nor outcome fairness directly influences overall procedural justice judgments. The willingness to accept court decisions, in other words, was about the procedures used to reach those decisions, not the decisions themselves.

**DESIGN IMPLICATIONS**

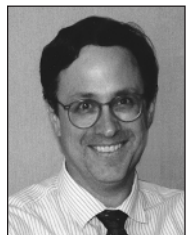
The courts are not a store, so “customer satisfaction” is not their primary goal. Their goal is to fairly resolve conflicts and accurately administer the law. However, the courts need to take people’s concerns seriously, since the courts have the task of conflict resolution, and whether people will accept their

decisions matters. Further, whether people feel that justice has been achieved is central to their trust and confidence in the court system.

A beginning point for dealing with people’s concerns is the recognition that people come to court about issues that are important to them, irrespective of the strength of their legal case. Legal authorities can communicate that their decisions reflect a sincere effort to reasonably apply the law to these problems and therefore ought to be accepted and followed in a variety of ways. Authorities can provide evidence that they are listening to people and considering their arguments by giving people a reasonable chance to state their case, by paying attention when people are making that presentation, and by acknowledging and taking account of people’s needs and concerns when explaining their decisions. This is true even if the authorities cannot accept those arguments and give people what they feel they deserve.

**SUMMARY**

We live in an era of scarce resources and high levels of mistrust. Procedural justice approaches provide a mechanism for managing conflicts that produces authoritative decisions while sustaining, and even building, trust and confidence in the courts and the law.



*Tom R. Tyler, Ph.D., is Chair and University Professor at New York University. He teaches in the psychology department and the law school. His research explores the dynamics of authority in groups, organizations, and societies. In particular, he examines the role of judgments about the justice or injustice of group procedures in shaping legitimacy, compliance, and cooperation. He is the author of several books, including The Social Psychology of Procedural Justice (1988), Trust in Organizations (1996), Social Justice in a Diverse Society (1997), Cooperation in Groups (2000), Trust in the Law (2002), and Why People Obey the Law (2006).*

This article is based upon presentations to the California conference on court management (September 2007) and to the Federal Judicial Center’s annual training meetings for bankruptcy judges (June and August 2008).

**AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES**

**2009 Midyear Meeting**  
 Sanibel Island, Florida  
 May 14-16  
 Sundial Beach Resort  
 \$145 single/double

**2009 Annual Conference**  
 Las Vegas, Nevada  
 September 13-18  
 The Golden Nugget  
 Rate to be determined

**2010 Midyear Meeting**  
 Tucson, Arizona  
 May 19-21  
 Loews Ventana Canyon Resort  
 \$179 single/double

**2010 Annual Conference**  
 Denver, Colorado  
 Westin Tabor Center  
 October 3-8  
 \$205 single/double

# Procedural Fairness as a Court Reform Agenda

David B. Rottman

This essay reflects on the ways in which procedural fairness can provide the direction for a revived court reform agenda. All previous eras of court reform were guided by a theory drawn either from academia or the field of management. Procedural fairness, in my view, is the organizing theory for which 21st-century court reform has been waiting.

Past eras of court reform accomplished a great deal. In 1950, there were 826 trial courts in California. Today, 58 trial courts—one per county—hear all manners of cases.<sup>1</sup> Management theories drawn from the business field provided the blueprint for court reform by (a) simplifying trial court structure through consolidation, (b) centralizing management, (c) replacing local court funding with state funding under a centralized budget, and (d) centralizing rulemaking.

By the 1970s, a more flexible approach to reform emerged, one that sought to optimize court performance by matching a court's organization with the broader socio-political context in which it operates. The inspiration was new developments in the sociology and social psychology of organizations. "Contingency Theory" views organizations as open systems responding to specific environments. This was translated by judges, court administrators, and consultants into a reform program seeking "decentralized coordination" that encouraged innovation. Subsequent theory-driven influences on court reform included "Total Quality Management," expressed as court performance standards adopted for both trial and appellate courts by national court leadership organizations in the 1990s.

## THE LIMITS OF TRADITIONAL COURT REFORM

A 1977 national survey was designed to confirm that court reform had increased public trust in and support for the state courts. The Public Image of the Courts Survey oversampled residents of three states regarded by experts as having undertaken significant court reforms in recent decades, and three that had not. The results were disheartening: People in the reforming states were no more likely to be aware of recent changes in the court system than were people in the non-reforming states; they also were no more supportive of their courts.<sup>2</sup> Consolidating courts, centralizing court management, and implementing state funding did not resonate with the public or even penetrate their awareness.

The State of Utah in the early 1990s carried out a fascinating experiment. The backdrop to the effort was a solid 20 years of court reform in Utah that brought about significant unification of the state's courts and heightened the authority of the chief justice, and established a judicial council through a constitutional amendment. A justice system reporter from a major newspaper took a leave of absence to write a series of in-depth articles on issues relating to the courts. Over a one-year period, television and radio stations aired stories and public-service announcements relating to the courts, including four documentaries. An opinion survey was conducted in 1990 and repeated in 1991. There was no detectable change in the public's opinion of the state court system.<sup>3</sup>

More generally, 33 state-specific surveys and six national surveys on public opinion on the courts since 1977 do not record a significant change in how the public views the state courts. The expected payoff of higher levels of public trust and support for the state courts never really materialized from these reform programs. Courts became more businesslike and efficient, and more adaptable, but reform failed to address the core concerns of litigants, jurors, and others who enter the courthouse.

Procedural fairness, in contrast, offers the judiciary a reform program that strengthens the connection between the judiciary and the public. The promise of that program is that it will organize the work of the courts in a way that generates satisfaction, trust, and compliance with court orders. That goal takes on particular importance as efforts are made to politicize the state judiciary.

## A NEW REFORM AGENDA

Where did court reformers go astray? Procedural fairness research offers a convincing answer. While court reformers focused on "instrumental factors" such as time to disposition and costs associated with structural and procedural changes, the public was, and is, focused on the quality of their interaction with judges and experiences within the court system.<sup>4</sup>

Procedural fairness can also explain why some court reforms proved successful. Problem-solving courts, of which some 3,200 now populate the court landscape,<sup>5</sup> have been shown in rigorous evaluations to reduce recidivism levels in drug and mental-health cases significantly compared to tradi-

## Footnotes

1. LARRY L. SIPES, COMMITTED TO JUSTICE: THE RISE OF JUDICIAL ADMINISTRATION IN CALIFORNIA 119 (2002).
2. STATE COURTS: A BLUEPRINT FOR THE FUTURE: PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON THE JUDICIARY HELD IN WILLIAMSBURG, VIRGINIA 15 (Theodore J. Fetter ed., 1978).
3. UTAH COMMISSION ON JUSTICE IN THE TWENTY-FIRST CENTURY, FINAL REPORT 6-7 (1991).

4. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions?* 19 BEHAV. SCI. & L. 215 (2001).
5. C. WEST HUDDLESTON, III ET AL., 2 PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES I (National Drug Court Institute 2008), available at [http://www.ndci.org/publications/PCPII1\\_web.pdf](http://www.ndci.org/publications/PCPII1_web.pdf).



tional court processing. For example, a 2007 evaluation report on the Portland, Oregon, drug court reduced re-arrests between 17 and 26 percent over a 10-year period.<sup>6</sup> What explains this advantage for the new type of forum? Procedural justice is the answer, or rather: “the DTC [Drug Treatment Court] program, especially the judicial hearing, contributes to an offender’s perception of fairness and due process, thereby increasing his or her willingness to fulfill his or her part of the negotiated DCT agreement.”<sup>7</sup>

There is solid evidence that the general public also perceives the key elements of problem-solving courts as desirable. In a 2000 national survey, 1,500 adults were asked if they agreed or disagreed with four such elements: (1) courts hiring drug treatment counselors and social workers, (2) ordering people to go back to court and talk to the judge about their treatment progress, (3) solving problems by coordinating the work of local agencies, and (4) considering what psychologists and medical doctors know about the causes of emotional problems when adjudicating cases. The response was overwhelmingly positive. Enthusiasm was greatest among members of minority groups who tend to be the most critical of the traditional court system.<sup>8</sup>

If the goal of court reform is to improve the quality of outcomes rather than their speed or cost, procedural fairness can lead the way.

### **SOME PRECEPTS TO GUIDE SPECIFIC REFORMS**

Procedural fairness research and the experience of those courts that have embraced procedural fairness offer lessons as to where and how court reform needs to refocus.

#### ***Recognize that courts have two publics***

Trial-court judges and courts have two publics. One public consists of the 50 percent of all adults who have had one or more direct experiences with the courts as a litigant, defendant, juror, or witness. Members of that public remember the details of their encounter decades later, even if the stakes in their case were low and the time involved short.<sup>9</sup> A negative or positive experience will linger for many years in a person’s

mind. It becomes the person’s point of reference when expressing their views on the judiciary or court system.

Procedural justice offers a template on how to increase the proportion of people entering their courtrooms who will leave satisfied with their day in court. Procedural fairness teaches us that it is not inevitable that 50 percent of litigants who lose their case will leave feeling that they did not receive their day in court and believe the outcome to be unfair.<sup>10</sup>

This public is expanding rapidly. The proportion of the public with court experience has grown as jury service has expanded from 6% to 25% of adults in recent decades in response to a reduction in exemptions from jury service and reform of jury source lists. In recent years, about 1.5 million Americans annually are impaneled as jurors (nearly 1% of the adult population) and another 32 million receive a jury summons.<sup>11</sup>

The other public lacks direct experience on which to base opinions about courts. Instead, their perceptions of the courtroom experience are shaped by popular perceptions that judges are too lenient when sentencing, the antics of fictional representations of judges on television and the movies, and “reality” TV judges. A lack of experience makes a person’s political orientation a significant predictor of their beliefs about the judiciary and court system.<sup>12</sup> Overall, their frame of reference about the courts is national, not local. In contrast, people with direct court experience are little influenced by factors over which the judiciary has no control.

#### ***Focus civic education efforts on court users***

Gatherings of the state court community and its supporters almost invariably prescribe civic education as a way to increase

**Procedural fairness research and the experience of those courts that have embraced procedural fairness offer lessons as to where and how court reform needs to refocus.**

6. Bernice Yeung, *Succor: Succor in the Court*, MILLER-MCCUNE MAG., July 14, 2008, available at <http://beta.miller-mccune.com/article/491>.

7. Denise C. Gottfredson, Brook W. Kearley, Stacy S. Najaka & Carlos M. Rocha, *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 J. RES. IN CRIME & DELINQ. 28 (2007).

8. DAVID ROTTMAN, RANDALL HANSEN & NICOLE MOTT, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE, AND ETHNICITY 44-45 (2003), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PerceptionsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PerceptionsPub.pdf).

9. DAVID ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS JUDICIAL COUNCIL OF CALIFORNIA/ ADMINISTRATIVE OFFICE OF THE COURTS 14 (2005), available at [http://www.courtinfo.ca.gov/reference/documents/4\\_37\\_pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37_pubtrust1.pdf).

10. As Tyler notes,

One reason the procedural justice approach results in “losing”

being more acceptable to litigants is that it minimizes the degree to which problems are framed in terms of winning and losing, as well as generally shifting the focus of attention away from outcomes and toward the procedures through which the dispute is being resolved. As a consequence, fair procedures lead to a concern about delivering gains to all parties rather than winning over others.

Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26-27 (this issue) (citing Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008)).

11. GREGORY E. MIZE, PAUL HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007), available at [http://www.ncsconline.org/D\\_RESEARCH/cjs/pdf/SOSCompendiumFinal.pdf](http://www.ncsconline.org/D_RESEARCH/cjs/pdf/SOSCompendiumFinal.pdf).

12. Susan M. Olson & David A. Huth, *Explaining Public Attitudes Toward Local Courts*, 20 JUST. SYS. J. 41-61 (1998); Tyler, *supra* note 4, at 227.

**[M]embers of minority groups, and especially African-Americans, have less trust and confidence in judges than do whites.**

trust and support for judges and counteract negative messages stemming from groups that wish to politicize the bench.

In the “two-public” scenario, the prospect for success of such ventures is doubtful. Public opinion surveys dating back to 1977 reveal a public that is inattentive to news about the courts. There is even

evidence that the public is less concerned than in the past about sentencing. Attempts to provide more information about how judges make decisions, and the good that they are accomplishing, often fall on deaf ears if communicated through the mass media or court press releases.<sup>13</sup>

It follows that the most promising form of civic education is based on targeting those people with actual court experience. As Tyler observes, “each encounter people have with criminal justice authorities is an instance of civic education.”<sup>14</sup> In particular, efforts at civic education should be concentrated on jurors. We know that jurors tend to leave the courthouse with more positive feelings about judges than when they arrived. It is reasonable to assume that they are an attentive audience, interested in understanding what is going on around them. It seems difficult to imagine another group more receptive to receiving a civics lesson on the role of the courts. As former jurors share their experiences and new knowledge, the impact of the educational effort will radiate through communities.

***Be guided by procedural fairness when drafting orders and opinions***

Orders and opinions have a life beyond the moment they are issued in the courtroom. If crafted according to the elements of procedural fairness, they influence the likelihood that the parties will comply with the decision and the manner in which the broader public reacts to the decision. The National Center for State Courts collaborated with the Missouri judiciary to produce a Web course on “Writing Opinions and Orders in Controversial Cases.” The course materials, prepared by a retired Washington State trial judge, Robert Alsdorf, and a law professor who teaches opinion writing, draw heavily on the elements of procedural fairness to offer guidance on how to rule from the bench or write opinions in ways that will satisfy the parties, build trust in the judiciary, and enhance compliance.<sup>15</sup>

***Remember that you are a boss as well as a judge***

Procedural fairness applies wherever there is a superior-to-subordinate relationship. Judges should bear in mind that the

elements of procedural fairness will govern the results whenever judges interact with and set policies for their courtroom staff and court staff generally. This applies to counter clerks, bailiffs, cleaners, and all other employees who make the courthouse function. Judges should also monitor the degree to which probation officers are adhering to the principles of procedural fairness. The officers, and thus the court, will be more effective at reducing recidivism if they are practicing procedural fairness.<sup>16</sup>

The same advice applies to judges who assume managerial roles within their courts. Presiding judges, for example, typically have the authority to assign judges to calendars of dockets. Some assignments are seen as more desirable than others, and individual judges feel that their strengths are best utilized in specific kinds of dockets. Administrative judges are likely to find that the response that they receive from the bench to case assignments and other decisions affecting their judges will depend, in large part, on the extent to which the decision-making process is perceived as fair. In unified state court systems, decisions sent down to local trial courts from on high also will be received in a manner dependant on whether the decision-makers are perceived to have manifested respect, neutrality, participation, and trustworthiness. There is no escape from the role procedural fairness plays in shaping the responses people, whether judges or not, make to evaluate the fairness of decisions.

A partial exception should be noted. Attorneys, and perhaps judges in particular, attach more importance than the general public to considerations of outcome fairness (distributive fairness) in evaluating decisions or decision makers.<sup>17</sup> So judges are not exactly like ordinary employees when responding to those above them in the organizational hierarchy that makes decisions affecting their quality of life. The exception is only partial because, nonetheless, perceptions of procedural fairness will influence the legitimacy of decisions. It is a difference in degree, not in kind. Following procedural fairness precepts will translate into a court system that tends to generate better outcomes than one that is not so oriented.

***Procedural fairness is the key to increasing minority group trust in the courts***

Opinion surveys consistently find that members of minority groups, and especially African-Americans, have less trust and confidence in judges than do whites.<sup>18</sup>

Minority distrust of the courts is undoubtedly linked to a more general level of distrust and dissatisfaction with the main institutions of American society. Procedural fairness allows us to locate the root source of that dissatisfaction and point to a way in which courts can respond, especially for people who appear in court as litigants, jurors, or witnesses. When researchers test a model of what influences people’s views on

13. UTAH COMMISSION *supra* note 3.

14. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 318 (2006).

15. An overview of the course can be accessed at <http://www.ncsconline.org/opinionwriting/>

16. Faye S. Taxman & Meredith H. Thanner, *Probation from a Therapeutic Perspective: Results from the Field*, 7 CONTEMP. ISSUES IN L. 39-63 (2003).

17. For discussion of outcome fairness within the legal profession, see ROTTMAN (2005), *supra* note 9, at 25; Larry Heuer, *What’s Just about the Criminal Justice System? A Psychological Perspective*, 13 J.L. & Pol’y 209 (2005) (outlining effects on judges).

18. ROTTMAN ET AL., *supra* note 8, at 25.

judges, if procedural fairness is entered into the equation, then factors such as race, ethnicity, and gender become statistically insignificant. People share a common basis for deciding on what is fair. If minority group members report less trust and confidence in the courts than do whites, it is because they believe the procedures courts follow are not fair.

### **Designing new court forums**

Procedural fairness has especially strong implications for the design of forums that supplement traditional court proceedings. Problem-solving courts are one example of how this works. Mediation and arbitration programs offer other models of how adjudication can be designed in ways that enhance satisfaction, trust, and compliance.

### **THE BIG PICTURE: PROCEDURAL FAIRNESS AS THE TOUCHSTONE FOR COURT REFORM**

The lessons just offered are specific examples of how adhering to the principles of procedural fairness can guide court reform. A more ambitious agenda of reform uses the demonstrated power of procedural fairness as one of the key objectives of court reform. Some forms of court organization, some policies, and some rules are more conducive to perceptions of fairness than are others.

An example is the design of programs to assist self-represented litigants. Assistance that is provided swiftly and in a style comprehensible to the non-lawyer will contribute to the quality of justice administered by our courts. But to be truly effective, the program needs to meet the expectations of procedural fairness for the quality of treatment that participants experience. The extent to which the program is used and the satisfaction of those who do use it will depend in large measure on whether people perceive that they are being treated in a procedurally fair manner. That applies whether the help is being offered by a person or an automated system.

There is a model for how a state can treat procedural fairness as the touchstone for court management and court reform. California is pointing the way in demonstrating how a focus on procedural fairness can lead the process of court reform. The full story is provided by Douglas Denton in his article in this issue of *Court Review*.<sup>19</sup> Some aspects of that experience are summarized here for purposes of illustration.

The California Judicial Council sponsored a public opinion survey in 2005, that was discussed extensively within the branch. The report emphasized the critical role of perceptions of procedural fairness in establishing trust and confidence in the courts. In 2006, the survey themes were pursued in a program of focus group research. One series of focus groups included court participants who had recently been involved in the kinds of cases found by the survey to be associated with the lowest levels of perceived procedural fairness. Groups of judges and court administrators were convened to explore procedural justice issues through the lenses of their experiences. In 2007, the California courts embarked on a three-year pro-

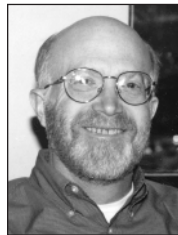
cedural fairness initiative woven into their strategic planning process. “Work to achieve procedural fairness in all types of cases” is a goal of the 2006-2012 Plan. Seventeen committees and other advisory groups were charged with identifying ways in which court rules and procedures could be changed to promote procedural fairness.

### **CONCLUSION**

Every era of court reform has been inspired by theories of organization that were applied to the court context by judges, court administrators, and supporters of the courts.

Previous initiatives made the court systems more efficient organizations offering enhanced customer service. Yet something was missing. Court reform that realizes its promise needs to connect with the core concerns of respect, neutrality, participation, and trustworthiness—principles that encourage people to support and comply with court decisions. Adhering to procedural fairness throughout the court system is a program for reform capable of addressing the problems judges face in the 21st century.

Procedural fairness applies to all organizations, but it has particular relevance to judges and court administrators because it so clearly influences the effectiveness of court decisions. Protection orders are more likely to be followed, civil litigants are more likely to pay damages, and probationers are more likely to desist from crime. Procedural fairness can even guide the judiciary as it fends off efforts to politicize their work. Judges should respond with arguments that demonstrate how courts embody the elements of procedural fairness and how those attacking the courts would harm those same elements.



*David B. Rottman, Ph.D., is a principal court research consultant at the National Center for State Courts, where he has worked since 1987. His research interests include minority-group perceptions of the courts and methodologies for measuring public opinion on the courts, the pros and cons of problem-solving courts, judicial selection, and judicial campaign oversight committees. Dr. Rottman is a former director of the Court Statistics Project and is the lead staff for the joint NCSC/College of William and Mary School of Law “Election Law Program.” A sociologist, Dr. Rottman is the author of books on community justice, social class, and contemporary Ireland.*

19. Douglas Denton, *Procedural Fairness in the California Courts*, 44 Ct. Rev. 44 (this issue).

# Children and Procedural Justice

Victoria Weisz, Twila Wingrove, and April Faith-Slaker

The American Judges Association's White Paper that forms the centerpiece of this issue begins with the recognition that even first graders have an understanding of procedural fairness.<sup>1</sup> Developmental research has indeed established that young children are able to evaluate the fairness of activities and that they have a more positive perception of activities they deem to be more fair.<sup>2</sup> Until recently, however, there has been little concern in the U.S. regarding children's experiences of legal processes and procedures. In fact, children were not generally expected or encouraged to directly participate in most legal processes, even those where they were a main party to the proceedings, such as cases involving abuse/neglect and foster care. In the last several years in the U.S.,<sup>3</sup> there have been arguments made to increase children's participation in legal processes that affect them and to increase children's knowledge of legal processes.<sup>4</sup> These arguments for increased participation are generally couched in the language of procedural justice—children desire and deserve a voice in legal proceedings that affect them. For example, a recent publication for and by foster youth, provided by the nonpartisan Pew Commission on Children in Foster Care, is titled *My Voice, My Life, My Future*.<sup>5</sup> Similarly, efforts at increasing children's knowledge of legal processes are attempts to empower them in their dealings with the legal system by increasing their understanding of the players and the process.

Despite recent trends in expanding children's participation in legal and quasi-legal proceedings, there is little empirical data that can provide guidance to courts. Many questions are unanswered. Do factors that contribute to perceptions of procedural fairness for adults also contribute to perceptions of procedural fairness for children and youth? Are children and youth similar to adults in valuing procedural fairness more than distributive justice in their general satisfaction regarding

decision outcomes? Does knowledge about the legal system impact children's perceptions of fairness? Do children's experiences with the legal system impact their perceptions of and respect for the legal system? Are there judicial practices that might increase children's sense of judicial fairness and perhaps increase the development of general trust and confidence in the judiciary?

In this article, we describe recent national trends in enhancing children's experience of justice in the court and provide an overview of the relevant empirical research regarding children and procedural justice. The article focuses on children's participation in legal proceedings and children's legal knowledge drawing upon the literature in the predominate types of cases that involve or impact children: civil abuse/neglect and foster care, delinquency and status offenses, custody disputes in divorce proceedings, and victim-witnesses in criminal proceedings of child sexual abuse. We conclude with a summary of the current state of knowledge regarding children and procedural justice and with implications for court practice.

## NATIONAL TRENDS

The U.S. has come relatively late to the idea that children should be allowed and encouraged to participate in legal proceedings that affect them. A number of other countries had earlier endorsed this principle influenced in part by Article 12 of the UN Convention on the Rights of the Child<sup>6</sup> that establishes the right of capable children to directly express their views and to be provided the opportunity to be heard in judicial and administrative proceedings either directly or indirectly.

Still, considerable support has grown over the past several years in the U.S. for directly involving children in their abuse/neglect/foster-care court proceedings and giving them voice in the proceedings.<sup>7</sup> The prestigious nonpartisan Pew

## Footnotes

1. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4 (this issue) (White Paper originally delivered at the annual conference of the American Judges Association, Sept. 2007, Vancouver, B.C.), available at <http://aja.ncsc.dni.us/htdocs/AJAWWhitePaper9-26-07.pdf>.
2. See P. S. Fry & Vera K. Corfield, *Children's Judgments of Authority Figures with Respect to Outcome and Procedural Fairness*, 143 J. GENET. PSYCHOL. 241 (1983); Anthony J. Hicks & Jeanette A. Lawrence, *Children's Criteria for Procedural Justice: Developing a Young People's Procedural Justice Scale*, 6 SOC. JUST. RES. 163 (1993).
3. The U.K. has been involving children in legal and quasi-legal processes since the early 1990s. See generally Eileen Munro, *Empowering Looked-After Children*, 6 CHILD & FAM. SOC. WORK 129 (2001).
4. See Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 J. JUV. L. & POL'Y 233 (2008).
5. Home At Last and the Children's Law Center of Los Angeles, *My Voice, My Life, My Future* (2006) (brochure sponsored by The Pew Commission on Children in Foster Care), available at [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=19876](http://www.pewtrusts.org/our_work_report_detail.aspx?id=19876).
6. U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>. The U.N. Convention on the Rights of the Child is the most widely and rapidly ratified human-rights treaty in history with 192 countries ratified by 2005 (exceptions are U.S. and Somalia). See Office of the United Nations High Commissioner For Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), available at <http://www.unhcr.ch/pdf/report.pdf>.
7. See Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD L. PRAC. 149 (2006); Miriam Aroni Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, JUV. & FAM. JUST. TODAY, Fall 2006, at 16; Pitchal, *supra* note 4; *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L. REV. 592 (2006).



Commission on Children in Foster Care made a number of recommendations to Congress to strengthen the Court's effectiveness in child welfare cases, including that, "Courts should be organized to enable children and parents to participate in a meaningful way in their own court proceedings."<sup>8</sup> Advocates have begun providing practical advice for including children in proceedings including specific suggestions to prepare children for their court involvement, to make the courtroom process more comfortable for children, and to assist attorneys and judges in their ability to ask age-appropriate questions.<sup>9</sup>

A recent review of state statutes shows that children have a right to be present at abuse/neglect proceedings in 18 out of 51 states (including the District of Columbia), they are considered a party in 38 out of 51 states, and they are required to be given notice in 14 out of 51 states (with age requirements in most with this requirement).<sup>10</sup> Additionally, recent federal legislation sets forth a requirement that "the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child."<sup>11</sup>

Along with the growing impetus for children's increased participation has been a growth in efforts to increase children's knowledge of the judicial process and their rights in the legal system. Many states have developed guidebooks or other materials to inform about and prepare them for a court experience.<sup>12</sup> A number of jurisdictions provide child-victim-witness-preparation programs. The most formal of these programs include educational interventions to improve children's knowledge of courtroom actors and procedures and typically include pretrial tours and role-playing exercises.<sup>13</sup> These interventions are all intended to increase children's understanding of the legal system so that they can best benefit from or be

most effective in their participation.

## RESEARCH ON CHILDREN'S PARTICIPATION

### General Background

Adults who have the opportunity to participate in decision-making proceedings and express their perspectives perceive the process and outcome as more fair.<sup>14</sup> The reasons for the relationship between participation and fairness judgments are not clear. Some researchers have argued people value participation in the legal process because it provides opportunity to influence the decision.<sup>15</sup> Others argue participation indicates the person's value in the process and this recognition of individual standing is the main contribution to the person's assessment of fairness.<sup>16</sup>

A few studies have applied procedural justice theories to children or youth and demonstrated that children and youth also value fairness in procedures. The earliest studies explored procedural justice as a specific aspect of moral development in children.<sup>17</sup> More recently, Hicks and Lawrence assessed adolescents' judgments of procedural justice in hypothetical scenarios involving a young thief.<sup>18</sup> They found that, like adults, teens consider procedural justice factors in assessments of overall satisfaction with case outcomes and processes.

Procedural justice has also been explored within the family context. Fondacaro and his colleagues asked 240 college students to recall a recent family dispute and rate how their parents handled it along various dimensions.<sup>19</sup> Overall judgments

**A few studies have applied procedural justice theories to children or youth and demonstrated that children and youth also value fairness in procedures.**

8. THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 18 (May 18, 2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

9. See Andrea Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 CHILD L. PRAC. 129 (2007).

10. Theresa Hughes, *State-by-State Summary of a Child's Right to be Present/Participate in Child Protective Proceedings* (2007), [http://www.abanet.org/child/empowerment/involving\\_youth.html](http://www.abanet.org/child/empowerment/involving_youth.html). As of Spring 2007, children have a right to be present in hearings in Alabama, Arkansas, California, Connecticut, Florida, Illinois, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, Ohio, Oregon, Texas, Utah, Virginia, and West Virginia.

11. Adoption and Safe Families Act, 42 U.S.C. 675(5)(C).

12. See, e.g., Phil Ladew, *Fight for Your Rights: A Guidebook for California Foster Youth, Former Foster Youth and Those Who Care About Them* (The National Center for Youth Law 2007), available at [http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fight\\_for\\_rights/Fight\\_for\\_your\\_Rights\\_Handbook\\_2007.pdf](http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/fight_for_rights/Fight_for_your_Rights_Handbook_2007.pdf); Nebraska Court Improvement Project, *Know Your Rights: A Guide for Youth in Nebraska's Foster Care System* (University of Nebraska-Lincoln Center on Children, Families and the Law 2008), available at <http://www.throughtheeyes.org/files/Know%20Your%20Rights.pdf>; Victims Services Section, Virginia Department of Criminal Justice Services, *Going to Court: An Activity Book for Children* (2005), available at <http://www.dcjs.virginia.gov/victims/documents/goingToCourtColoringBook.pdf>.

13. See Julie Lipovsky & Paul Stern, *Preparing Children for Court: An Interdisciplinary View*, 2 CHILD MALTREATMENT 150 (1997).

14. E.g., E. Allan Lind, Ruth Kanfer, & P. Christopher Earley, *Voice Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); E. Allan Lind, Tom R. Tyler, & Yuen J. Huo, *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997).

15. See generally Lind, Kanfer, & Earley, *supra* note 14; Tina L. Robbins et al., *Using the Group-Value Model to Explain the Role of Noninstrumental Justice in Distinguishing the Effects of Distributive and Procedural Justice*, 73 J. OCCUP. & ORG. PSYCHOL. 511 (2000); John Thibaut & Laurens Walker, *A Theory of Procedure* 66 CAL. L. REV. 54 (1978); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115 (Mark P. Zanna, ed., 1992).

16. See, e.g., Tyler & Lind, *supra* note 15; Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justices*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994).

17. See, e.g., Laura J. Gold et al., *Children's Perceptions of Procedural Justice*, 55 CHILD DEV. 1752 (1984).

18. Hicks & Lawrence, *supra* note 2.

19. Mark R. Fondacaro, Michael E. Dunkle, & Maithilee K. Pathak, *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLES. 101 (1998).



**[T]here has been considerable recent attention placed on increasing children's participation in their foster-care court hearings....**

of procedural fairness were positively related with family cohesion and psychological well-being. Disrespectful treatment was the best predictor of deviant behavior.

In Fagan and Tyler's study exploring connections between procedural justice attributions and legal socialization, adolescent judgments of procedural fairness in their interactions with legal actors, including police, school security officers, and store security

staff, were assessed along with a variety of measures of attitudes toward the legal system and with self-reported legal compliance.<sup>20</sup> The researchers found that children's interactions with legal actors shaped their views about the legitimacy of the law and its institutions. Further, more positive perceptions about the legitimacy of the legal system were associated with lower rates of self-reported delinquency behaviors. Thus, Fagan and Tyler's research suggests a link between children's judgments about the procedural fairness of legal activities they experience, their developing conceptions of the legitimacy of our legal system, and their delinquent behaviors.

**PARTICIPATION IN CHILD-PROTECTION/ FOSTER-CARE PROCEEDINGS**

As discussed earlier, there has been considerable recent attention placed on increasing children's participation in their foster-care court hearings by national legal advocacy groups. Foster youth and former foster youth who are active in support and advocacy organizations have strongly voiced their desires for participation.<sup>21</sup> The trend for more participation by children has been met with considerable resistance in some quarters, primarily because of concerns that court participation may be harmful to children by exposing them to painful information or forcing them to talk about sensitive matters in a public or quasi-public setting.

A current study by the authors is designed to investigate these matters in a general population of children in foster care. We are assessing the perceptions of children who participate in their foster-care hearings as compared to children in foster care who do not attend their hearings. We are specifically exploring the children's interests in participating, their stress regarding participation, and their perceptions of the fairness of the legal process and players. Children under eight are not included in this study.

Preliminary findings<sup>22</sup> suggest that children who attended their hearings strongly felt that they were given a chance to tell their side of things, the judge listened to them when they

talked in court, they were treated fairly during the hearings, and their attorney guardian ad litem and their case worker did a good job telling the judge about their situation. Children who did not attend their hearings reported comparatively lower ratings about whether they were given a chance to tell their attorney guardian ad litem about their situation. Children who had never attended a hearing had less positive perceptions, when compared to children who had attended their hearings, about whether the judge knew enough to make a fair decision for them. Of particular interest is the perception of the children who had never attended a hearing who disagreed with the statement that "Someone at the hearing told the judge what I think." Finally, children who attended their hearings had very high agreement (and slightly higher than the non-attenders) with the statement "I trust the judge to do what is best for me." These preliminary findings are strongly suggestive that children who attended their court hearings have more positive feelings about the fairness and benevolence of their legal proceedings than do children who did not attend their hearings. Children who attended their hearings believe they had an opportunity to provide their perspective and the judge listened to them. Children who never attended court believe that no one tells the judge what they think.

Because of concerns that court attendance would be stressful for children, we asked children about some emotional aspects of the experience. Children who attended court reported some agreement with being nervous before going to court but reported they did not feel upset while in court, they felt comfortable answering the judge's questions, and it was not hard to talk to the judge in front of everyone. Children who attended court reported strong feelings they were glad they went to court and thought kids should be able to go to court. Children who had never attended a hearing also reported they thought kids should be able to go to court.

When the children were asked open-ended questions about whether they thought going to court was a good idea, the children who had been to court had much more to say than the children who had never been. Most of the children who had been to court indicated their preference to go to court both to articulate their opinions to the judge as well as to obtain information about their situation. One child, age 15, indicated it was a good idea for kids to go to court because "if I hear things from other people, they might not be the truth." Another child said she wanted to go because she "wanted to know what happened." Some children reported concerns their guardian ad litem or caseworker might not effectively advocate for their best interest. A foster parent reported two young adolescents in her care had recently attended a hearing and had both been quite eloquent in discussing their placement desires and concerns with the judge.

20. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 Soc. JUST. RES. 217 (2005).

21. One must be cautious, however, in assuming that this means that all children in foster care desire participation. Foster-youth spokespersons are not representative of all children in foster care. These youth, as evidenced by their voluntary membership in these advocacy groups, are more likely to want and be comfortable with

voicing their perspectives than the foster youth who do not choose to join such groups. Still, although one cannot assume a general desire for participation by foster youth, one also cannot dismiss it.

22. These preliminary findings include data from 30 children (16 attenders, 14 non-attenders). The study will eventually include 100 children.

Several of the court attenders expressed concerns about how to appropriately integrate children into hearings. One child, age 14, reported difficulty understanding what was happening during the hearing. She said “they should simplify it for kids because a lot of the words were very technical.” That same child also expressed concerns about being upset by having to see other members of her family at court. In fact, she had not attended the hearing in question because she had heard her mother was going to be there, though she had attended previous hearings. Similarly, another child expressed concerns she was not able to tell the judge what she really thought because she did not want to upset her mother, who was also present at the hearing. It is interesting to note that the same children who expressed these concerns also expressed positive attitudes about the value of attending court and their perceptions of fairness of the court procedure. The children who felt concerns about family members actively made decisions to protect themselves from situations they found stressful or painful (not attending a hearing; not being forthcoming in front of the mother). These comments suggest that if children are to benefit from the court participation, including feeling their perspective is important and the process is fair, it may be important to give children the option to choose not to attend their hearing. The comments also suggest attorneys or guardians ad litem have a role to play in “translating” the technical language of the courtroom.

This project builds on a small, but growing body of research about children’s perceptions regarding their participation in legal and quasi-legal proceedings. Surveys of children who are in or who were in the foster-care system have generally found these children want more participation in the decision making about their lives.<sup>23</sup> Foster children have reported they wished they were asked their opinions about decisions that affected them, and a major concern of theirs was their perception that they lacked control over decisions being made about them.<sup>24</sup>

In England and Wales, The Children’s Act of 1989 requires courts and local authorities to obtain “looked after” (i.e., foster) children’s views and to take those views into consideration when making decisions regarding their care. Several studies have explored children’s perceptions of their required participation in review meetings, which are formal reviews that include representatives of various agencies, parents, and foster parents. The studies typically involve self-reports of small numbers of children that are convenience samples. The largest study involved interviews with 47 children between the age of 8 and 12.<sup>25</sup> Most of the children wanted more preparation before the meetings to learn what the meeting would be like, who would be there, and what would be discussed. Most of the children

felt satisfied with the amount of support they received at the meetings. A quarter of the children felt that they spoke “a lot” at the meetings, the rest felt they spoke “some” or “a little.” Most of the children who spoke felt they were listened to “a lot” by the adults. In contrast, few of the children felt they had “a lot” of influence over decisions that were made. Surprisingly, half the children reported they liked the meetings only “a little,” describing them as boring, scary, upsetting, or embarrassing. Some children expressed the views that they didn’t like being put on the spot or having their lives discussed by strangers.

**Another focus of research [has been on] child witnesses testifying about their allegations of sex abuse victimization in criminal court.**

**PARTICIPATION AS VICTIM-WITNESSES**

Another focus of research regarding children’s participation in legal proceedings involves child witnesses testifying about their allegations of sex-abuse victimization in criminal court. The seminal work in this area was a study by Goodman and her associates that followed children through the criminal-court process, including the experience of testifying for those children whose cases went to trial. Sixty children who went on to testify were compared to 75 control children whose cases did not go to trial.<sup>26</sup> The study’s main findings were that the “testifiers” exhibited more behavioral disturbance than the “non-testifiers” seven months following their testimony, especially if they had to take the stand numerous times, did not have maternal support, and did not have their statements corroborated. The adverse effects diminished after the prosecution was complete. A long-term follow up of these children (average elapsed time of over 12 years from trial) by Quas and her colleagues found victim-witnesses who had testified perceived the legal system as fairer than those victim-witnesses who had not had their day in court.<sup>27</sup> The researchers surmised those children who more fully participated were more satisfied with the legal system, but they also could not rule out the possibility that the children who did not end up testifying had their cases resolved through plea bargains and that there may have been less severe sentences for the alleged perpetrators in those cases.

**PARTICIPATION IN CHILD-CUSTODY DECISION MAKING**

Another major trend in increasing children’s participation in legal proceedings involves custody determinations in divorces.

23. E.g., Mary C. Curran & Peter Pecora, *Incorporating the Perspectives of Youth Placed in Family Foster Care*, in THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE 99 (Patrick A. Curtis, eds., 1999); Krinsky, *supra* note 7.  
 24. E.g., TRUDY FESTINGER, NO ONE EVER ASKED US: A POSTSCRIPT TO FOSTER CARE (1983); Judy Cashmore, *Promoting the Participation of Children and Young People in Care*, 26 CHILD ABUSE & NEGLECT 837 (2002).  
 25. Nigel Thomas & Claire O’Kane, *Children’s Participation in Reviews*

*and Planning Meetings When They Are “Looked After” in Middle Childhood*, 4 CHILD & FAM. SOC. WORK 221 (1999).  
 26. Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (1992).  
 27. Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (2005).

**[T]here has been a push... for more participation by children [in divorce custody determinations] and a push-back... about potential harms to children....**

Again, there has been a push by legal advocacy groups for more participation by children and a push-back from some professionals about potential harms to children in being drawn into loyalty conflicts between their parents. Again, there is little empirical research that has addressed the impact on children regarding participation in custody determinations.

A recent study by the authors explored young adults' perceptions of their experiences going through parental divorce when they were children.<sup>28</sup> Approximately half of the study participants reported that they had participated in the custody decision making. In general, all respondents perceived the custody decision making process as fair and their treatment as benevolent and respectful. They generally felt they had some influence over the custody decision, and they were generally satisfied with the decision. Respondents who directly participated in the custody decision, either informally with their parents or more formally in mediation or with a judge, perceived the process as fairer than those who had not participated. However, participation did not influence whether they thought the outcome was fairer or whether they were more satisfied with the decision.

The study revealed an interesting pattern regarding the age of the child during the divorce. For the respondents who were younger when their parents divorced, if they thought they were treated fairly, they were more satisfied with the decision. In contrast, for those who were older, their perceptions of the fairness of the custody decision itself, not the fairness of their treatment, was related to their satisfaction with the decision.

Participants in the study were asked an open-ended question about whether they thought it was beneficial or harmful to have been asked about their custody preferences. There were more responses that expressed a benefit for participation, but there were some mixed responses and a few that suggested more harm than benefit. Examples of positive assessments include: "It was beneficial that my parents talked to me because it showed that they cared about my feelings in the divorce, not solely their own," and "It was beneficial because I was caught in the middle of a dispute and making a preference helped me through the situation better." Mixed comments included, "I think that it was a little of both. It was beneficial in the fact that I was allowed input, but harmful that I had to tell my dad I would rather live with my mom," and "Beneficial,

I feel that it gave me a voice, but it also may have given me too much freedom." One individual expressed a largely negative experience: "Harmful. It put me under a lot of stress, and I always felt guilty. I felt I shouldn't have to choose between parents. That is unfair for a child to do." Despite some reports of negative consequences, there was almost universal opinion by these young adults who had experienced parental divorce as children that children should be involved in custody decisions.

There have been relatively few other studies on children's desires to participate in decision making regarding custody decisions or on the impact of their participation. It should be noted there has been more international policy focus on including children in legal decision making than there has been in the U.S. Also, none of the following studies looked at children's feelings about participating in the legal hearings themselves.

New Zealand researchers Smith and Gollop asked 107 children whose parents had divorced several years earlier about what advice they would give to parents who were separating.<sup>29</sup> The children recommended parents should keep children informed, should listen to them, should respect their views, and take their views into account in decision making. Kaltenborn interviewed 62 children who had custody evaluations at the time of their parent's divorce where the children's custody preferences had been explored.<sup>30</sup> Children who did not have their wishes followed were less likely to comply with the court-ordered custody arrangement (by running away or living with the non-custodial parent) than were the children (the vast majority) whose wishes were followed. Kaltenborn attributed this to children's general ability to know what they needed and desire to create their own paths.

Thus, the few studies on children's participation in custody decision making provide mixed results about children's general desires to be involved and the impact of involvement. However, there appears to be stronger support for giving children the opportunity for involvement.

## RESEARCH ON CHILDREN'S LEGAL KNOWLEDGE

Children's perceptions of the fairness of their experiences with the legal system would seem to require a basic understanding of the roles of the legal actors and of the processes that transpire. The primary research focused on the legal knowledge of children and youth has centered on law violators because having "a rational as well as factual understanding of the proceedings against him"<sup>31</sup> is a key component of a youth's competence to assist in his or her defense.<sup>32</sup> There have been relatively consistent findings that children under the age of 13 or 14 appear to have substantially less basic knowledge about the trial process and players than do older adolescents and adults.<sup>33</sup> Studies have provided mixed results as to whether

28. Twila Wingrove et al., *Young Adults' Perceptions of Their Participation in the Child Custody Decision: An Extension of Procedural Justice Theory* (2007) (unpublished manuscript, on file with the author).

29. Anne B. Smith & Megan M. Gollop, *What Children Think Separating Parents Should Know*, 30 *NEW ZEAL. J. PSYCHOL.* 23 (2001).

30. Karl-Franz Kaltenborn, *Individualization, Family Transitions and*

*Children's Agency*, 8 *CHILDHOOD* 463 (2001).

31. *Dusky v. U.S.*, 362 U.S. 402, 402 (1960).

32. Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 67, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

33. Michele Peterson-Badali et al., *Young Children's Legal Knowledge and Reasoning Ability*, 39 *CAN. J. CRIMINOLOGY* 145 (1997).

prior experience with the legal system is associated with more knowledgeable youth, but there appears to be more support for the conclusion that prior experience does *not* relate to better understanding of the system.<sup>34</sup>

Given the poor knowledge performance of many youth in the juvenile justice system, researchers have explored whether educational interventions can improve youth's knowledge and understanding. Teaching of legal information improved legal understanding, especially for older adolescents (over age 13), ethnic minorities, and youth with higher IQs.<sup>35</sup> However, efforts at increasing youth's understanding and competencies have not proved to be very successful with younger children and children or youth with developmental or other cognitive deficits.<sup>36</sup>

Unlike children facing delinquency charges, children participating in foster-care hearings are not legally required to meet competency standards. Nonetheless, it does seem that greater understanding of the process might allow children to better place their participation in context and draw conclusions about fairness. A recent study by Quas and her colleagues explored the relationship between maltreated children's understanding of their dependency-court involvement and their emotional reactions to that involvement.<sup>37</sup> While not assessing children's perceptions of fairness, the study's focus on the relationship between children's knowledge and their comfort in the proceedings is instructive. As would be expected, the study found that as children got older (the sample included children age 4-15), they were able to demonstrate more general legal knowledge and more knowledge about the dependency-court system. Even many older children, however, lacked a full understanding of the outcome of their hearing, leading the authors to conclude "[b]oth older and younger children need assistance understanding the legal system generally and interpreting what is happening in their own case, particularly the decisions made in court on their behalf."<sup>38</sup> The findings suggested that children with more general legal knowledge were less distressed about their hearings, leading the authors to conclude that greater general legal understanding was useful for children in both helping them feel less distress and also helping them better make sense of their own participation experience.

It should be noted that despite the relationship between children's knowledge and distress, Quas et al.'s study found low levels of distress among most children who participated in their hearings. Children, on average, reported positive general feelings and positive feelings about the court process both before and after their hearings. Their feelings about the judge's decision were also both on average positive, and they improved

from before the hearing (anticipating the decision) to after the hearing (recalling the decision). Thus, this research suggests that most children do not experience negative emotional reactions to court participation and prior knowledge about the court process may make the experience even more positive.

## CONCLUSIONS

Research regarding children and procedural justice in the courts is in its infancy and is consequently far from conclusive. Nonetheless there are some findings that suggest that, like adults, children view their participation in legal proceedings that affect them as an important component of their judgment of procedural fairness. Children and adolescents appear to desire participation in legal proceedings that affect them both because they want to have a voice in decisions and because they want to have accurate information about the proceedings and their outcomes. It is not clear, however, whether children are similar to adults in valuing fairness in procedures more than they value fairness in outcomes. The study examining young adults looking back on to custody decisions that were made when their parents divorced suggests that there may be an important developmental component to these judgments, with younger children placing a greater value on procedural justice and adolescents placing a greater value on distributive justice.<sup>39</sup> Although there has not been sufficient research to know whether particular theoretical models of procedural justice that predict adult judgments also apply to children's experiences, the fundamental value of participation as a component of procedural justice determinations appears to reflect children's experiences as well as adults.

It seems as if children would need to have a basic understanding of the legal system to be able to place their participation in context and make judgments about the fairness of proceedings. They need to know the basic roles of the professionals. They also may need to know the sources of information the judge relies on to make decisions (e.g., written reports as well as courtroom testimony and argument). There is no research that explores the relationship between children's knowledge about the legal system and assessments of procedural justice. The recent study of children in dependency court did find a positive relationship between children's knowledge of the legal system and their comfort with the proceedings.<sup>40</sup> Further

**[C]hildren view their participation in legal proceedings that affect them as an important component of their judgment of procedural fairness.**

34. Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 139, 151 (Thomas Grisso & Robert G. Schwartz eds., 2000).

35. Jodi L. Viljoen et al., *Teaching Adolescents and Adults about Adjudicative Proceedings: A Comparison of Pre- and Post-Teaching Scores on the MacCAT-CA*, 31 *L. & HUM. BEHAV.* 419 (2007).

36. Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 *PSYCHOL. PUB. POL'Y & L* 87 (2007).

37. Jodi A. Quas et al., *Maltreated Children's Understanding of and Emotional Reactions to Dependency Court Involvement*, *BEHAV. SCI. & L.* (forthcoming, manuscript date April 1, 2008), manuscript available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1055&context=thomaslyon>.

38. *Id.* at 21.

39. Wingrove et al., *supra* note 28.

40. Quas et al., *supra* note 37.



**There is a clear need for more social scientific research.... Nonetheless, the little research that exists suggests three conclusions.**

research exploring a link between knowledge and perceptions of fairness would be useful. Many jurisdictions are utilizing educational materials and interventions to children and youth to improve their knowledge of the legal system. Research from the juvenile justice system has indicated that these efforts may not be as successful as hoped, especially

with younger children or youth with developmental or other cognitive deficits.<sup>41</sup> It may be important to clarify the purpose of educational interventions (e.g., to reduce stress, to increase experience of fairness, etc.) and then conduct research to determine if children in the various populations of interest (e.g., foster care) show improvements in knowledge following the interventions, and equally important, if increase in knowledge is associated with the intended purpose (e.g., less stress, increased judgments of fairness).

Research on the legal socialization of children and youth indicates that children's experiences with the legal system impacts their perceptions of and respect for the system, although the part of the legal system thus far explored has focused on law-enforcement experiences, not court experiences.<sup>42</sup> Nonetheless, this research produced important research findings suggesting a link between children's assessments of how fairly and respectfully they were treated by legal actors and their judgments of the legitimacy of legal authority and, finally, to reductions in their illegal behavior. If children's interactions with police and security personnel contribute to their sense of the legitimacy of the legal system, one might expect their interactions with judges and attorneys would do so as well.

Child maltreatment is a risk factor for later delinquency and a return to court as a law violator.<sup>43</sup> Consequently, the court system has an opportunity with maltreated children and youth to provide them with experiences through their participation that seem, from the little research that is available, to increase their perceptions of the responsiveness, fairness and benevolence of the system and that may also increase their sense of the legitimacy of the authority of the system and their trust and confidence in the courts. Alternately, some of the early findings reported previously in this article from our children-in-court study suggest children who do not participate in their hearings might presume that their perspectives are not valued and that the judge may not have adequate information to make a fair decision. Thus, court procedures not allowing or discouraging children's participation may contribute to children having negative perceptions about the legitimacy of the

system and less trust and confidence in it. Further research is needed to both confirm the findings of these small early studies and also to explore whether increases in perceptions of procedural justice for children relate to better compliance with court orders and with reduced risk for later delinquency.

There does not appear to be a basis for concerns about undue stress for children who attend their hearings and or speak in front of others in a courtroom setting. Children who attended hearings reported fairly low base rates of stress or discomfort.<sup>44</sup> The possibility was raised in the comments of some children that coerced participation may not have positive benefits for children; however there is no research that has directly addressed the issue. Also, some of the findings from the studies on custody decision making in divorce suggest some children may be negatively affected by being drawn into the dispute.

Some children indicated they found some of their hearings confusing, and they would like to understand more of what was happening. This would suggest a value in some intervention directed at improving knowledge and understanding of the process. Research from the juvenile justice field suggests educational interventions may not always be effective, so the impact of such efforts should be evaluated. Furthermore, even with increased general knowledge children may still not understand the particulars of their own case.<sup>45</sup> The child's attorney or guardian ad litem should take some responsibility to prepare children ahead of time and provide explanations after hearings. Nonetheless, even in imperfect situations where preparation and debriefing does not occur, children's stress levels appeared quite low, and their belief that children should be able to attend their hearings appeared quite high.

There is a clear need for more social scientific research in this area. Nonetheless, the little research that exists suggests three conclusions. First, children's participation in legal proceedings increases their perception of procedural justice in the court system. Second, most children do not appear to experience significant stress through participation. Third, many children desire to participate so they can have a voice in the proceedings that affect them and so that they can know about what happens in those proceedings. In this general sense, children appear to be similar to adults. Judges have an opportunity to positively affect the development of children's trust and confidence in the legal system by giving them the opportunity, but not coercing them, to participate in the legal proceedings that affect their lives.

41. Viljoen & Grisso, *supra* note 36.

42. Fagan & Tyler, *supra* note 20.

43. Thomas Grisso, *Using What We Know about Child Maltreatment and Delinquency*, 5 CHILDREN'S SERVICES: SOC. POL'Y, RES., & PRAC. 299, 300 (2002).

44. Quas et al., *supra* note 37. The preliminary findings from the children-in-court study reported in this article also found low levels of overall stress.

45. Quas et al., *supra* note 37.





Vicky Weisz is a research professor of psychology at the University of Nebraska-Lincoln Center on Children, Families, and the Law. She received her Ph.D. in clinical psychology from Washington University in St. Louis and her Master of Legal Studies from the University of Nebraska College of Law. Dr. Weisz is Director of the Nebraska Court Improvement Project, a

federally funded program focused on improving the state judicial and legal system for abused and neglected children, and serves as the main staff support for the Nebraska Supreme Court Commission on Children in the Courts. Her research projects include assessments of court and legal processes, evaluations of innovative legal or quasi-legal programs, and children's participation in court. She can be reached at [vweisz1@unl.edu](mailto:vweisz1@unl.edu).



Twila Wingrove is a doctoral student in the Law-Psychology Program at the University of Nebraska-Lincoln. Her primary research interests include youth's participation in the legal system, and legal decision making regarding youth and families. Her dissertation explores the influence of procedural justice on parental compliance with the child protection system.

She earned a J.D. with high distinction from the University of Nebraska College of Law in 2007, and is scheduled to receive her Ph.D. in 2009.



April Faith-Slaker is a doctoral student in the Human Development and Social Policy Program at Northwestern University. She received her law degree from the University of Wisconsin School of Law in 2007. After law school, she participated in research on children in the court process at the University of Nebraska-Lincoln Center on Children,

Families, and the Law. She is also the managing editor of the *Political and Legal Anthropology Review*.

# Procedural Fairness in the California Courts

Douglas Denton

*I just want to be treated the same, like you treat anybody else that has money. . . . You got a tie, I don't. I'm still a man, a human being.*

— 2006 focus group participant

*Ensure that all court users are treated with dignity, respect, and concern for their rights and cultural backgrounds, without bias or appearance of bias, and are given an opportunity to be heard.*

— Operational Plan for California's Judicial Branch, 2008–2011

In 2005, California's judicial branch embarked on a two-part assessment to determine current levels of trust-and-confidence in the state courts and to obtain information concerning expectations and performance of the state courts. The findings were revealing—they highlighted good news for the courts and identified considerable challenges. The trust-and-confidence study not only informed the subsequent strategic and operational planning processes, it also spurred a large-scale initiative focused on one particularly compelling aspect of the public-trust-and-confidence assessment: the significant and important role that perceptions of procedural fairness play in determining court users' trust and confidence in the California courts.

"Procedural Fairness in the California Courts" is a statewide initiative aimed at ensuring fair process for and quality treatment of court users, resulting in higher trust and confidence in California's courts. It focuses on strategies to ensure the public perceives the highest standards of fairness and quality treatment in every interaction with the court.

Procedural fairness, as defined here, incorporates four elements:

**Respect**—People react positively when they feel they are treated with politeness, dignity, and respect and that their rights are respected. In addition, helping people understand how things work and what they must do is strongly associated with respect and court user satisfaction.

**Voice**—People want the opportunity to tell their side of the story, to explain their situation and views to an authority who listens carefully.

**Neutrality**—People are more likely to accept court decisions when those in authority act with fairness and neutrality (i.e., court users have been treated equally, and legal principles and assistance from court personnel were consistent). Court users also respond more positively to court decisions when the importance of facts are emphasized and the reasons for a decision have been clearly explained.

**Trust**—People observe behavior or look for actions to indi-

cate that they can trust the character and sincerity of those in authority and that those in authority are aware of and sincerely concerned with their needs (e.g., they look for conduct that is benevolent and caring).

The California initiative was officially launched in September 2007, incorporating input and feedback from court users, court administrators, and judicial officers. Previous judicial efforts focused on achieving procedural fairness have been directed in other states within an entire court district (most notably, Minnesota's Fourth Judicial District, the largest state trial court in Minnesota, serving Hennepin County), but California's initiative is a statewide, multiyear effort through which the judicial branch will:

- Identify procedural fairness best practices and model programs;
- Study and evaluate efforts that have the potential to achieve procedural fairness for court users;
- Develop procedural fairness guidelines, tools, and resources for judicial officers and judicial branch personnel;
- Recommend educational programs and objectives to help judicial officers and court personnel achieve procedural fairness; and
- Make periodic recommendations to the Judicial Council regarding a variety of strategies and means to help the courts achieve procedural fairness.

The goal is to create a model court program to help achieve procedural fairness that also highlights the innovative and creative projects that currently exist in the California courts. The initiative also provides an opportunity and a forum to highlight areas where procedural fairness has been noted as an area of concern, for example, the handling of juvenile delinquency matters.

During visits to the courts (described below), judicial branch leaders in California remarked that procedural fairness impacts everything that they do in the courthouse. The innovative application of procedural fairness concepts has become an important tool in California to enhance public trust and confidence, improve court user satisfaction, and increase court efficiency and effectiveness. Before delving into current activity in California regarding procedural fairness, reviewing the findings from the two-part public-trust-and-confidence assessment will provide some context.

## **TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: METHODOLOGY, FINDINGS, AND THE IMPACT ON PERCEPTIONS OF PROCEDURAL FAIRNESS**

The trust-and-confidence assessment began with a 2005 statewide survey in which procedural fairness—having a sense that court decisions are made through processes that are fair—

emerged as the strongest predictor by far of public approval and confidence in the California courts.<sup>1</sup> For members of the public, procedural fairness concerns outweighed winning or losing a case. This was a significant finding for the California judicial branch that continues to dramatically affect policy direction and program development for the state's courts.

The 2005 survey reached more than 2,400 members of a diverse public—including a broad range of minority and non-English-speaking residents—and more than 500 practicing attorneys. Survey respondents were questioned on a broad range of perceptions and experiences, including their:

- Knowledge about the courts and the sources of that knowledge;
- Perceived and real-life experiences with barriers to court access;
- Experiences as jurors, litigants, or consumers of court information;
- Expectations for what the courts should be doing; and
- Sense of the accessibility, fairness, and efficiency of the courts.

The survey process found that procedural fairness is a key determinant of public trust and confidence and revealed important common perceptions among court users: a lack of understanding regarding court processes, an unease about going to court, and a lack of certainty about what to do (or even what occurred) while navigating the court process, particularly if someone is self-represented. Thus, the findings had the potential to allow the branch in California to leverage or initiate procedural fairness efforts where attention is needed most (e.g., family and juvenile, traffic, and small-claims cases).

Following the survey, a second in-depth, qualitative study was conducted to ascertain the views of California court users. Focus groups were conducted with a demographic cross-section of people who had direct court experience, either through jury service or as witnesses, plaintiffs, or defendants in a high-volume court venue such as family, juvenile, traffic, or small claims. Focus group discussions centered on the entire court experience—from getting initial information to appearing before a judge to the conclusion of a matter. A trained professional moderator guided discussions to elicit opinions from more than 160 Californians in Fresno, Los Angeles, Oakland, Riverside, Sacramento, San Diego, and San Francisco. A total of 15 focus groups were conducted, 8 with a demographic cross-section of court users and 7 with various minority groups to mirror the survey participants and reflect the diverse nature of the state (3 focus groups directly engaged Latino court users; 2 were conducted with African-American court users; and 2 were held with Chinese-American court users, 1

conducted in Mandarin and 1 in Cantonese).

To complement the court user focus groups, seven separate focus groups were conducted with judicial officers and court administrators who were randomly selected from across the state. In addition to engaging in a similar moderated discussion about the challenges facing the California court system, these focus group participants also viewed and commented on videotaped excerpts from the court user groups.

A key finding from the survey and the focus groups was that a high degree of trust and confidence exists toward the California state courts.<sup>2</sup> Court users, court administrators, and judicial officers all expressed this opinion, especially concerning their high regard for the integrity of the judges they encountered in their court experience. As will be discussed later, perceptions regarding the fairness of court outcomes varied by ethnic group. However, most court users expressed a substantial level of trust and confidence in the courts of California.

Regarding seeking and receiving information about the courts, self-rated familiarity with the California courts was low for the public, unchanged since 1992. Court users in focus groups were concerned about the shortage of information available in multiple languages, the usability and clarity of available information, and why legal advice could not be provided by court staff (findings showed that balancing permissible information without providing legal advice is a challenge for court administrators).

Court users repeatedly stated that courtroom experiences leave an indelible memory. People could recall exact details of court experiences from years ago. Many of those experiences were frustrating or stressful, including the long delays and crowded dockets of high-volume courts, like traffic court, or circumstances that brought people into family court. On the other hand, jury service—often the only courtroom experience someone may ever have—generated the most positive feedback. Many respondents commented the experience of jury service was contrasted (positively) with their expectation before serving; jury service was educational and strengthened their confidence in the justice system.

A powerful finding in the research was that the single greatest barrier to taking a case to court was finding a qualified, affordable attorney. In California this barrier has caused a significant rise in the number of self-represented litigants,

**Court users repeatedly stated that courtroom experiences leave an indelible memory.**

## Footnotes

1. The Judicial Council's 2005–2006 public-trust-and-confidence assessment led to the publication of two reports: DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (2005), available at [http://www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf), and PUBLIC AGENDA & DOBLE RESEARCH ASSOCIATES, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT

USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS (2006), available at [http://www.courtinfo.ca.gov/reference/documents/Calif\\_Courts\\_Book\\_rev6.pdf](http://www.courtinfo.ca.gov/reference/documents/Calif_Courts_Book_rev6.pdf). These and other reports are available on the California Courts Website at [http://www.courtinfo.ca.gov/reference/4\\_37pubtrust.htm](http://www.courtinfo.ca.gov/reference/4_37pubtrust.htm).

2. The 2005 survey found that 67 percent of the public had a positive attitude about the courts, compared to less than 50 percent in 1992.

**The plan affirms the importance of listening to the public, effective information sharing, and outreach and education in improving public understanding of the courts.**

making issues of procedural fairness even more pressing to ensure quality treatment as well as trust and confidence in the court system.

Court users had positive comments about the concept of self-help centers inside the courthouse or mobile units outside the courthouse at key community sites. However, there was only nominal experience by court users of self-help centers and

minimal awareness of family law facilitators, alternative dispute resolution concepts like mediation and arbitration, low-cost legal services, or other potential ways to reduce access barriers.

California's diverse population creates a complex set of challenges for the judicial branch in meeting the needs of court users. Every year more than 100 languages are spoken in California's courts, sometimes interpreted by the young children of non-English-speaking parties. Thus, cultural competency and language emerged as large concerns for the focus group participants, who felt that there are not enough interpreters and also perceived issues with the quality of interpretation. Court users who were fluent in more than one language stated they could tell that translations were not always accurate, and this affected their confidence in the court outcome.

To tease out the key finding from the trust-and-confidence survey regarding the importance of procedural fairness, focus group moderators discussed the four essential elements of procedural fairness (respect, voice, neutrality, and trust) with court users. Mirroring the survey, most respondents said the courts do an outstanding job regarding three of the four elements: respect, trust, and neutrality. However, regarding the fourth element—voice or participation, the sense that court authorities listen carefully to the people involved in a court case—people were less likely to be satisfied that the courts are doing a good job. A common sentiment heard in the focus groups over and over again was a strong desire to “tell my story directly to the judge.” There was a fair amount of frustration expressed over feeling constrained by court procedures, language, and practices. In addition, Latinos and African-Americans expressed more concern than Caucasians and Asians about people receiving fair results in the courtroom. These perceptions included differing views of fair legal outcomes and equal treatment by court personnel throughout the courthouse.

The focus groups confirmed the survey finding that confidence among court users depends more on the perception of fairness in court procedures and quality of treatment than on the actual legal outcome of an individual's case. Those court

users who had positive views of the courts after losing their case seemed to understand why a ruling went against them and felt they were treated fairly. Judicial branch members were likely to discount this finding somewhat and stress that the outcome of a case was an important contributor to the perceptions of fairness (a common sentiment heard from judicial members in focus groups was that half the population will go home unhappy because they lost).

**JUSTICE IN FOCUS CREATES A FRAMEWORK FOR PROCEDURAL FAIRNESS**

The 2005–2006 public-trust-and-confidence assessment was the major public stakeholder vehicle used to integrate Californians' views into a new strategic plan for the state's courts. *Justice in Focus: the Strategic Plan for California's Judicial Branch, 2006–2012* builds on past successes to meet the challenges of delivering quality justice.<sup>3</sup> Informed by a wide, representative array of judges and branch stakeholders, including members of the public, community leaders, and other justice system partners, the plan renews and amplifies a branchwide commitment to ensuring access and quality services for all Californians, including court procedures that are fair and understandable to court users. The plan affirms the importance of listening to the public, effective information sharing, and outreach and education in improving public understanding of the courts.

Most procedural fairness initiative activity will be designed to help the courts respond to policy directions in *Justice in Focus* that directly relate to procedural fairness. These excerpts show some examples:

- “California's courts will treat everyone in a fair and just manner.”
- “Members of the judicial branch community will strive to understand and be responsive to the needs of court users from diverse cultural backgrounds.”
- “Work to prevent bias, and the appearance of bias, in all parts of the judicial branch.”
- “Work to achieve procedural fairness in all types of cases.”
- “Ensure that statewide policies, rules of court, standards of judicial administration, and court forms promote the fair, timely, effective, and efficient processing of cases and make court procedures easier to understand.”
- “Provide services that meet the needs of all court users and that promote cultural sensitivity and a better understanding of court orders, procedures, and processes.”
- “Provide necessary resources to all courts—particularly high-volume courts such as traffic, small claims, juvenile dependency, and family courts—and support the branchwide implementation of effective practices to enhance procedural fairness...”

With the adoption of a strategic plan containing a strong focus on elements of procedural fairness, the time was right to

3. JUDICIAL COUNCIL OF CALIFORNIA, JUSTICE IN FOCUS: THE STRATEGIC PLAN FOR CALIFORNIA'S JUDICIAL BRANCH, 2006–2012 (2006), available

at [http://www.courtinfo.ca.gov/reference/documents/strategic\\_plan\\_2006-2012.pdf](http://www.courtinfo.ca.gov/reference/documents/strategic_plan_2006-2012.pdf).

# CONFERENCE OF STATE COURT ADMINISTRATORS

## RESOLUTION 6

### *In Support of AJA White Paper on Procedural Fairness*

WHEREAS, the perception of unfair or unequal treatment is the single most important source of popular dissatisfaction with the American legal system; and

WHEREAS, judges can alleviate much of the public dissatisfaction with the judicial branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities; and

WHEREAS, judges should pay attention to creating fair outcomes, they should also tailor their actions, language, and responses to the public's expectations of procedural fairness; and

WHEREAS, procedural fairness lessens the difference in how minority populations perceive and react to the courts; and

WHEREAS, the America Judges Association (AJA) drafted a white paper, *Procedural Fairness: A Key Ingredient to Public Satisfaction*, to examine research on courts within the United States and make recommendations for the judiciary; and

WHEREAS, the AJA white paper identified and advocated for more changes to improve the daily work of the courts and its judges.

**NOW, THEREFORE, BE IT RESOLVED that the Conference of State Court Administrators endorses the AJA white paper and encourages state court leaders, trial court judges, court administrations, and judicial educators to consider implementation of the recommendations outlined in the white paper.**

Adopted at the Conference of State Court Administrators (COSCA) 2008 Annual Meeting on July 30, 2008. COSCA's membership consists of the top court administrator in each of the 50 states of the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands.



speak directly with the courts to gauge their views on the concept. In spring 2007, staff from the Administrative Office of the Courts (AOC) and Dr. David B. Rottman, principal researcher at the National Center for State Courts and author of the 2005 *Trust and Confidence in the California Courts* survey findings report, visited various courts, small and large, in urban and rural areas around the state. The goals of these visits were to:

- Learn about existing court programs and solicit ideas and suggestions from court leadership regarding strategies and priorities for California to enhance public trust and confidence by emphasizing procedural fairness;
- Briefly discuss enhancing public trust and confidence through a procedural fairness focus in the California courts and compare the experiences of other state courts;
- Prompt court leaders to express what the concept of procedural fairness means to them, its benefits, and any reservations they may have; and
- Identify potential topic areas and focuses for branch efforts.

Visits to the courts revealed a wide array of innovative programs already in place to help court users understand proceedings and navigate the court process. These programs show how courts in California have intuitively and creatively begun to address concerns of procedural fairness even before the launch of the initiative. This article concludes with illustrations of two of these programs—one that assists court users at the beginning of the court process, and another that helps court users at the end of the process.

In our visits, we found robust activity within the courts to enhance public trust and confidence and to reach out to local communities to improve service delivery. Court leaders do not share a common approach or opinion regarding what efforts might help the courts realize the branch's procedural fairness goals. Some courts suggested that educational efforts be targeted directly toward new judges or commissioners who often are often given family, small-claims, or traffic assignments where they will handle a high volume of matters or cases. Other courts suggested that resource allocations affect the success of procedural fairness efforts. For example, having a sufficient number of judges allows judges time to focus on procedural fairness practices, for example, to fully explain a decision to parties or to ensure that litigants have more of a voice in court proceedings.

Visits to a small sample of courts confirmed that California is a large and diverse state, and the complexity is enhanced by a variety of court cultures, constituent needs, judicial staffing, internal communications, and available resources. California has 58 trial courts, one in each county; the California courts serve nearly 34 million people. During 2005–2006, 9.2 million cases were filed in these courts. Rather than trying to come up with a one-size-fits-all approach to procedural fairness, we determined that in order for procedural fairness efforts to have the most impact, they would best be focused on:

- Information and awareness for judicial officers;
- Branch awareness to understand the value and benefits of procedural fairness for the courts (e.g., order compliance, enhanced trust and confidence by the public);

- Highlighting the need for improved court user satisfaction in under-resourced courts (e.g., family court); and
- Ensuring that improvement is measurable and demonstrating accountability to the public.

**"[E]very time you make a decision as a judge, you make one permanent enemy and one temporary friend."**

The procedural fairness initiative is particularly timely with the adoption in April 2008 of the *Operational Plan for California's Judicial Branch, 2008–2011*. The operational plan represents a concerted effort by the council and many other judicial branch stakeholders to establish clear objectives and outcomes for accomplishing the long-term goals and policies of the branch. For example:

- Practices, procedures, and service programs to improve timeliness, quality of service, customer satisfaction, and procedural fairness in all courts—particularly high-volume courts.
- Curriculum and associated training programs and other professional development opportunities addressing cultural competency, ethics, procedural fairness, public trust and confidence, and public service for judges and court staff.

As noted below, realization of the strategic plan goals and operational plan objectives will necessitate a concerted effort by the branch to create tools for the courts and strong educational programs.

## **ANNOUNCING AND IMPLEMENTING THE INITIATIVE**

Taking into account feedback from the court visits and input from the Judicial Council and Administrative Director of the Courts William C. Vickrey, it was determined that a long-term, multifaceted branch initiative was necessary to help achieve procedural fairness.

**Presentations at the California Bench Bar Biannual Conference.** The California Bench Bar Biannual Conference in September 2007 was an ideal forum to present the effort to an audience of more than 850 judicial branch leaders, judicial officers, and court professionals. Cohosted by the Judicial Council, the California Judges Association, and the State Bar of California, the conference explored procedural fairness in the courts and offered collaborative courses planned by the bench and the bar. The opening plenary session afforded an opportunity for Chief Justice Ronald M. George to announce the launch of the procedural fairness initiative and to encourage judicial members to reassess a commonly held view in the courts:

I often have repeated good advice I was given as a novice judge 35 years ago by an experienced colleague: every time you make a decision as a judge, you make one permanent enemy and one temporary friend. That precept may need to be amended—instead of settling for making one enemy, perhaps we should focus on creating one

**The resource guide... will contain effective techniques, tools for judges and court staff, best practices, and model court programs....**

individual unhappy with the outcome, but two who felt that they were given a fair shake by the system.<sup>4</sup>

The conference also marked the release of a publication for members of the branch that describes the goals of the initiative and defines procedural fairness within the context of the California court system:

Procedural fairness refers to court users' perceptions regarding the fairness and the transparency of the processes by which their disputes are considered and resolved, as distinguished from the outcome of their cases. Perceptions of procedural fairness are also significantly affected by the quality of treatment they receive during every interaction with the court. The perceived fairness of court outcomes is also important but is consistently secondary to how court users perceive their cases to have been handled and the quality of treatment they received. Court users' perceptions of procedural fairness are most significantly influenced by four key elements: respect, voice, neutrality, and trust.<sup>5</sup>

The subject of procedural fairness set the tone for the conference through an opening plenary session that featured a lively Fred Friendly Seminars® Socratic dialogue on procedural fairness and its impact on public trust and confidence in the California courts. In addition to video vignettes that depicted the complexities of achieving elements of procedural fairness in a court setting, the Fred Friendly Seminars dialogue also employed fictional judicial characters to represent different voices and approaches that exist within the branch. Arthur R. Miller, a professor at the New York University School of Law, moderated and led a diverse panel through a hypothetical scenario in which three fictional trial judges in a California court reflected differing views regarding procedural fairness.

Both the plenary and a follow-up, targeted course on procedural fairness designed for court leadership by Professor Tom R. Tyler (New York University) focused on how judicial officers and attorneys can foster public understanding and trust in the courts and also explored how the values associated with procedural fairness support judicial branch independence and impartiality.

**Resource Guide for the Courts on Procedural Fairness.** Following the Bench Bar Conference, initiative lead staff determined that a resource guide on procedural fairness would best

serve the courts in accomplishing branch goals. Programs and policies that explicitly reference procedural fairness concepts are relatively new for many courts, and a comprehensive toolkit would provide both a better understanding of procedural fairness and applicable best practices for the courts.

Through a competitive bidding process, the Center for Court Innovation (New York City) was chosen to work with the AOC on the development of the resource guide. Founded as a public/private partnership between the New York State Unified Court System and the Fund for the City of New York, the Center for Court Innovation is a nonprofit think tank that helps courts and criminal justice agencies aid victims, reduce crime, and improve public trust in justice. In New York, the center functions as the court system's independent research and development arm, creating demonstration projects that test new ideas. The center has collaborated on a number of other projects with the California judicial branch, and we look forward to working with their researchers in this endeavor.

The resource guide, which is currently in the initial stages of development, will contain effective techniques, tools for judges and court staff, best practices, and model court programs—contents that are readily adaptable to court, education, and interactive Web environments. Ultimately, the guide will highlight a variety of strategies and programs that support the branch policy to achieve procedural fairness in all types of

ELEMENT	COMMON CHALLENGE	RECOMMENDATION
Respect	Court users may experience a lack of respect because of cultural differences	Educational programs that reflect specific cultural differences or that enhance court knowledge about cultural miscommunications
Voice	Court users may be disappointed about the length of time they are able to speak to a judge	Tools for court staff to help manage expectations and to educate the public about what to expect in the courtroom
Neutrality	Court users may be confused regarding different outcomes that may emerge from family court	Guides for court staff to explain what occurs in family court and what options exist to help individuals resolve their matter
Trust	Court users may have a hard time developing trust if they try to avoid the legal system altogether	Resources to help make court less intimidating and to explain the impartial role of the courts and judges

4. Chief Justice Ronald M. George, Plenary Address to the Bench Bar Conference (Sept. 26, 2007).  
 5. JUDICIAL COUNCIL OF CALIFORNIA, PROCEDURAL FAIRNESS IN THE

CALIFORNIA COURTS 2 (2007), available at [http://www.courtinfo.ca.gov/programs/profair/documents/profair\\_brochure\\_092507.pdf](http://www.courtinfo.ca.gov/programs/profair/documents/profair_brochure_092507.pdf).

cases. On its completion in 2009, the guide will be distributed to every court in the state, will be available on the Web and in print, and will further serve as a resource to develop educational courses and to identify best practices for trial and appellate courts.

Following the model used for the public-trust-and-confidence assessment, which included surveys, interviews, and focus groups, development of the resource guide on procedural fairness will be an iterative process that solicits input from court leadership, branch members, and the public (e.g., court users). An informal working group on procedural fairness has been established at the AOC with a variety of representatives, and this group will work closely with the courts, consultants, and an editorial board composed of national experts and leaders from the California courts.

**Educating Stakeholders About Procedural Fairness.** The initiative includes an important educational component, and a variety of activities have taken place to expand outreach and education on procedural fairness. The educational sessions, originally designed by Professor Tyler and presented at the Bench Bar Conference, have been repurposed for stakeholders. These educational sessions present an opportunity to dispel common misconceptions regarding procedural fairness (e.g., procedural fairness does not suggest that people are happy if they lose; however, using fair procedures makes it more likely that a losing party will be willing to accept an adverse decision) and benefits (e.g., increased order compliance, acceptance of the court as a legitimate authority, and improved confidence in the process by litigants).

In particular, focusing on the elements of procedural fairness—respect, voice, neutrality, and trust—has been an important tool in educational settings for members of the branch. The elements of procedural fairness are interdependent and interrelated. However, it has been helpful to have workshop participants break into groups and discuss each element at length, identify common challenges that exist for realizing the element, and suggest solutions for meeting challenges. The table on the preceding page gives some examples.

The workshops offer judges, commissioners, mediators, and court staff a unique opportunity to identify common court user misperceptions, highlight areas of confusion and breakdowns in communication between court staff and court users, and develop tools and strategies to meet public expectations and achieve procedural fairness. Course attendees may not have an initial deep understanding of procedural fairness; however, most quickly and readily identify with procedural fairness in the court setting once the elements are explained in depth. The discussions have allowed the concept of procedural fairness to become more tangible to court staff and help them identify what may be needed to improve court interactions and the ultimate experience of court users.

Presentations to various advisory committees of the Judicial Council—composed of judicial officers, court staff, and justice system partners—have been helpful to forge further collaboration. A number of advisory committees (e.g., Access and Fairness Advisory Committee, Collaborative Justice Courts Advisory Committee) see a natural alignment between their goals for improved access and fairness in the courts, or prob-

lem-solving courts where litigants would have more interaction with a judge, with the goals of the procedural fairness initiative. The committees have expressed interest in developing a formalized educational module for new judges and commissioners on the importance of procedural fairness. This will be especially valuable for bench officers who work in high-volume case venues such as family and juvenile, small claims, and traffic.

Assistant Presiding Judge Charles W. McCoy, Jr., Superior Court of Los Angeles County, has been particularly active in leading efforts to familiarize the court's new bench officers regarding the importance and benefits of procedural fairness.

Court administrative staff also supported development of an interactive program on procedural fairness at the request of the bench of the Superior Court of Santa Clara County. Judge Kevin Burke (Hennepin County, Minnesota, Fourth Judicial District) and Dr. R. Dale Lefever (Emeritus Faculty, University of Michigan, Department of Family Medicine) worked closely with Presiding Judge Catherine A. Gallagher and Assistant Presiding Judge Jamie A. Jacobs-May (Superior Court of Santa Clara County) and presented the course in fall 2007. Judge Burke and Dr. Lefever drew on their expertise in procedural fairness and nonverbal communication to help the attending judges review their demeanor and style of interaction from the bench. They did this by using videotape and feedback. A number of Santa Clara judicial officers volunteered to be videotaped while they performed normal duties on the bench. It was made clear to the participants that the workshop was not performance related but was designed simply as a developmental program to help the Santa Clara bench increase public trust and confidence. One-on-one review and discussion was followed by a group evening session where a large number of the court's bench officers discussed the video and how the public might interpret and receive a variety of approaches from the bench. Additional bench officers expressed interest after attending the group session, and they also volunteered to later be videotaped and participate in one-on-one review and discussion sessions with the consultants. In program evaluations, 84 percent of the participating officers recommended that it be repeated in their court at a future date. The AOC is considering repeating the bench officer program in another volunteer court.

In addition, a number of courts within the state have requested funding for one-day programs for judges and court staff to help increase internal understanding and discussion of procedural fairness and improve public trust and confidence among their court users. To ensure cost efficiency, consistency, and effective delivery of these programs, the AOC will work with the courts and educational consultants so that such programs can be repurposed and replicated in other courts.

**Measuring Procedural Fairness.** Increased use of the National Center for State Courts (NCSC) *CourTools*® account-

**[T]he concept of procedural fairness [has] become more tangible to court staff and help[ed] them... to improve court interactions and the ultimate experience of court users.**

**[T]he AOC will be better able to identify the effects of best practices or process changes that are driving the results.**

ability instruments is currently being linked with improving public trust and confidence. Although not formally included in the procedural fairness initiative at this time, these tools are helping measure the achievement of procedural fairness and are demonstrating branch accountability. Measure 1,

Access and Fairness, uses a survey to measure individual satisfaction with the ability to make use of the court's dispute resolution services (access) and how the legal process dealt with their issue, interest, or case (fairness). Survey content for court users in Measure 1 reflects elements of procedural fairness and relates to the goals of the initiative. For example:

- The way my case was handled was fair.
- The judge listened to my side of the story before he or she made a decision.
- The judge had the information necessary to make good decisions about my case.
- I was treated the same as everyone else.
- As I leave the court, I know what to do next about my case.

Measure 1 has been tested in four courts around the state, and the number of participating courts is expected to grow. Current plans are under way for several California courts to pilot the Measure 1 survey to gauge court user satisfaction with their court experience and solicit suggestions for service improvements. The AOC is working closely with the NCSC to reduce the resources needed to implement the surveys. By bringing the survey instrument and the collection process to scale across multiple jurisdictions using the same data-collection tool, the AOC will be better able to identify the effects of best practices or process changes that are driving the results.

After three years of conducting the Measure 1 survey, the Superior Court of Santa Mateo County is considering making public the results on its Web page to increase public trust and confidence, demonstrate accountability to the public, and make the survey process and results transparent. As the initiative develops, we will be looking to this and other methods to evaluate the success of procedural fairness efforts taking place in the California courts.

**Current Court Programs Highlighting Procedural Fairness.** In addition to increasing the use of accountability instruments to help meet public expectations regarding the reporting of court performance, other innovations are already taking place within the California courts. Both of the court programs highlighted below received the 2006–2007 Ralph N.

Kleps Award for Improvement in the Administration of the Courts, established in 1991 in honor of the first Administrative Director of the Courts in California.<sup>6</sup> The Kleps Awards recognize individual court innovations that improve the administration of justice. The award-winning programs address important public needs and help demonstrate procedural fairness in action.

**Recruiting Students to Help Court Users.** The JusticeCorps program is an innovative approach to addressing the needs of a key court user group highlighted in the trust and confidence survey: self-represented litigants. JusticeCorps recruits and trains 275 diverse university students annually to augment overburdened court and legal-aid staff who assist self-represented litigants in court-based self-help programs in select locations throughout California.

In response to the flood of self-represented litigants accessing the self-help programs of the Superior Court of Los Angeles County, the court, in partnership with the AOC, conceived JusticeCorps, which trains and provides an educational stipend for university students who commit to a full academic year of service in court-based self-help centers. These highly motivated and well-trained students provide in-depth and individualized services to self-represented litigants, often in their native languages.

For the pilot project in 2004, the court initially partnered with four universities—the University of California at Los Angeles and California State Universities at Northridge, Dominguez Hills, and Pomona—four nonprofit legal-aid agencies, and the Los Angeles County Small Claims Advisor. With the help of AOC staff, the court obtained funding from AmeriCorps for JusticeCorps.

Each year, the Los Angeles program places 150 students in eight court-based self-help centers throughout Los Angeles County. Students agree to serve at least 300 hours in a year, during which they:

- Triage long lines at court-based self-help centers to determine each litigant's need and degree of urgency and help litigants complete the proper forms;
- Make referrals to other court services;
- Teach people to use self-help computer resources; and
- Provide services to litigants after hearings.

Parties are given clear information and options and then connected quickly to the right resources. Litigants are assisted in completing appropriate and accurate pleadings, written orders, and judgments under attorney supervision and, in the process, provided with a better understanding of the court system. Many of these litigants have low literacy skills, which hampers their ability to fill out forms, participate in self-help workshops, or use computerized resources.

In short, the volunteers enhance the quality and the quan-

6. Information about innovative programs and initiatives that help the California courts continue to improve access to justice, including the JusticeCorps and ACTION programs described here, is drawn from JUDICIAL COUNCIL OF CALIFORNIA, INNOVATIONS

IN THE CALIFORNIA COURTS: STRENGTHENING THE JUDICIAL BRANCH (2007), available at <http://www.courtinfo.ca.gov/programs/innovations>.



tivity of self-help services to those who most need it.

The students also benefit. The experience of helping litigants is rewarding, and the students often feel that they are making an important difference for the litigants they serve. After the students fulfill their service commitment, they receive a \$1,000 award to be used for tuition or student loans. They also participate in JusticeCorps Shadow Day, which partners them with mentor judges and attorneys for a view of other aspects of the judicial system and the value of public service.

To evaluate the effectiveness of JusticeCorps, program staff members track the number of self-represented litigants assisted by JusticeCorps members and measure the accuracy of documents prepared and referrals made. The program has, to date, far exceeded its target measures.

The JusticeCorps program expanded to the Bay Area in 2006—with participation from the Superior Courts of Alameda, Contra Costa, San Francisco, San Mateo, and Santa Clara Counties. In 2007, the Superior Court of San Diego county launched its JusticeCorps program. Currently, 150 students serve self-represented litigants in Los Angeles, 100 students work with the Bay Area program, and the court in San Diego County is supported by 22 students.

Impacts of the program have been significant:

- Self-help programs supplemented by JusticeCorps members increased by 11 percent the number of self-represented litigants assisted in the program's first year.
- Evaluations showed that litigants got appropriate referrals 98 percent of the time when JusticeCorps members referred them to other legal resources.
- Legal forms prepared by self-represented litigants with JusticeCorps assistance showed a 94 percent accuracy rate.
- Focus groups of litigants reported a high level of satisfaction with the JusticeCorps program and the services they received.
- On average, each class of JusticeCorps volunteers has been collectively fluent in more than 20 languages.

In the current program year, AOC staff will be looking to more thoroughly track the more than 400 alumni from the JusticeCorps program (to date) across California to determine how many went on to law school and careers in law-related fields. From what staff know anecdotally, many of the alumni do apply and go on to law school or to careers in the courts, such as clerk-training programs. Many of the students come from ethnically diverse backgrounds. Given that the trust and confidence survey showed that equal treatment and the ability to be heard are important concerns among minorities, the JusticeCorps program's ability to infuse the court system with more minority representation may significantly increase diversity within the branch.

**Helping Offenders Navigate the Legal System.** The After Criminal Traffic Infraction One-Stop Network (ACTION) Center was designed by the Superior Court of Fresno County to enhance the delivery of court services and increase public access to the courts by having everything for these cases available in one location. Fresno County is one of the most diverse in the state, with Latinos making up 47 percent of the popula-

tion. The county is also home to the second-largest Hmong community in the United States. In all, nearly half of the county population speaks a language other than English at home.

From 2000 through 2005, the population in Fresno County grew by more than 7 percent, almost twice as quickly as the overall state rate. Over that same period, the court saw a 55 percent increase in criminal case filings for that fiscal year. Thus, the court calendars are packed—especially in high-volume traffic and misdemeanor courts—and courtroom action is swift. The process was leaving too many offenders overwhelmed, especially those whose sentences involved more than one program or remediation.

The court found that a lack of understanding could lead to a lack of offender compliance, which undermined public confidence. And an offender's noncompliance generally resulted in additional court appearances.

In July 2000, the court collaborated with the Probation Department and the Auditor-Controller's Office to develop an innovative program that would:

- Increase an offender's accountability to the court;
- Make it easier for an offender to comply with court orders and get connected to court-mandated programs; and
- Restore and promote the public's trust and confidence in the judicial system.

Located in Fresno's downtown courthouse, the ACTION Center enables offenders to:

- Ask questions about court orders in the disposition of their cases;
- Obtain information necessary to fulfill their sentence;
- Pay fees and fines or set up a schedule for restitution; and
- Get referrals (and often initial appointments) to court-ordered services, such as work furlough, anger management, batterer intervention, traffic school, and probation instructions.

Many court users in the Fresno community have low incomes, limited literacy, and no Web access. But at the center, each court user gets one-on-one assistance until the assigned staff worker is certain that the court user understands the case disposition and has the tools to help ensure compliance.

Two judicial assistants and one Probation Department employee staff the center. The court and Probation Department cover operating costs from their budgets and also contribute supplies and equipment. Most important, they have cross-trained their staffs in each other's procedures and have given each other access to their respective information systems, a collaboration unique in the state. To guarantee fair administration of justice to all residents, the ACTION Center staff provides assistance in English, Spanish, and Hmong.

**[T]he court found that a lack of understanding could lead to a lack of offender compliance, which undermined public confidence.**



Impacts of the ACTION program:

- Offenders find it easier to follow court orders; 90 percent reported that the ACTION Center information increased their ability to comply with their case disposition.
- Compared with 2003, the number of services provided by the center in 2005 increased by 72 percent; the amount of revenue collected increased by 87 percent.
- In 2006, the staff serviced more than 25,000 court users and collected more than \$1.5 million in fees and fines.
- Freed from having to manage service delivery, the court can now process cases more efficiently: in fiscal year 2005–2006, the court disposed of 40 percent more cases than in the year before the center opened.

## CONCLUSION

California is the largest court system in the nation and one of the most innovative. The two programs highlighted above are just samples of ongoing endeavors in the state designed to meet court user needs and address procedural fairness concerns.

As we move forward with the procedural fairness initiative in California, we will not only continue to build tools for judicial officers and court staff to better understand and implement the elements of procedural fairness, but will also highlight and leverage the good work that is currently taking place within the branch. There is a possibility for collaboration with other states that also are looking for the best way to implement procedural fairness concepts to benefit the public and the courts.

“I just want to be treated the same, like you treat anybody else that has money. . . . You got a tie, I don’t. I’m still a man, a human being.” The court user in a focus group who said this was responding to a question presented at the conclusion of

each court user focus group: “Before we adjourn, is there anything else you’d like to say about how the California courts might be improved?” His answer—a clear and simple request to be treated as an equal within the courts no matter his income or appearance—resonates with procedural fairness concerns and reflects the goals of the initiative. Indeed, the courts of California are listening to the public. The branch is working to ensure that everyone who enters our courts is treated with dignity and respect and that all members of the public are given a meaningful opportunity to be heard.



*Douglas G. Denton (A.B. Economics, University of California at Berkeley) is a senior court services analyst at the California Administrative Office of the Courts, San Francisco (douglas.denton@jud.ca.gov). He would like to acknowledge the following people for their invaluable assistance: the members of the Judicial Council of California, including Chief Justice Ronald M. George, Assistant Presiding Judge Jamie A. Jacobs-May, Assistant Presiding Judge Charles W. McCoy, Jr., and Mr. William C. Vickrey, the Administrative Director of the Courts in California; Mr. Ronald G. Overholt, Chief Deputy Director; Mr. Kenneth L. Kann, Director; Ms. Dianne Bolotte, Assistant Director; Professor Tom R. Tyler; Dr. David B. Rottman and the National Center for State Courts; Dr. Brenda J. Wagenknecht-Ivey; Judge Kevin Burke; Judge Steve Leben; the Center for Court Innovation; the dedicated members of the California judicial branch; and staff at the AOC, particularly Mr. John A. Larson and the Promising and Effective Programs team.*

## Court Review Author Submission Guidelines

*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

*Court Review* is received by the 2,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general-jurisdiction, state trial judges. Another 40 percent are limited-jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative-law judges.

**Articles:** Articles should be submitted in double-spaced text with footnotes, preferably in Word format (although WordPerfect format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the current edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better-state-bar-association law journals and/or other law reviews.

**Essays:** Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews:** Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

**Editing:** *Court Review* reserves the right to edit all manuscripts.

**Submission:** Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editors: Judge Steve Leben, 301 S.W. 10th Ave., Suite 278, Topeka, Kansas 66612, email address: sleben@ix.netcom.com; or Professor Alan Tomkins, 215 Centennial Mall South, Suite 401, PO Box 880228, Lincoln, Nebraska 68588-0228, email address: atomkins@nebraska.edu. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

# The Perceptions of Self-Represented Tenants in a Community-Based Housing Court

Rashida Abuwala and Donald J. Farole

This study examines the impact of the Harlem Community Justice Center, a community-based housing court that attempts to achieve speedier and more durable outcomes in landlord-tenant disputes. However, it may be particularly beneficial to *pro se* litigants (i.e., those who represent themselves without an attorney). In New York City, most landlords are represented, while the vast majority of tenants are not. In fact, one report notes that only 12% of tenants are able to afford counsel while 98% of landlords are represented.<sup>1</sup>

The primary objective of this study was to examine the experiences of *pro se* tenants whose cases are heard in Harlem, surveying their perceptions of the fairness, accessibility, timeliness, respectfulness, and comprehensibility of the court process. We conducted a survey of *pro se* tenants both in Harlem and in New York City's centralized housing court located in southern Manhattan (hereinafter referred to as "downtown housing court"). Survey results were supplemented with structured court observations, also conducted at both locations.

## BACKGROUND

The vast majority of housing-court cases in New York City are filed by landlords to evict tenants for nonpayment of rent. These tenants are often hampered by their inability to navigate the complexities of the legal system. Unable to afford legal representation, often unaware of their rights and responsibilities, and afraid of losing their apartments, many tenants must file their own pleadings and responses to pleadings in court—an intimidating and complex process. These problems are compounded by the high-volume of housing-court cases such as New York City's, which hears more than 300,000 cases annually.<sup>2</sup> According to one description: "housing court, with its unruly atmosphere of lawyers and tenants negotiating in the hallways or yelling into cell phones, can be overwhelming . . . the hearings before some of the most overworked judges in the system are usually brief, so litigants often have but a few minutes to recount their emotional slide into debt."<sup>3</sup>

Recently, community-based models have emerged, which

offer alternative approaches to resolving housing cases in New York City, as well as the possibility of enhanced access to justice for *pro se* litigants. Community courts hearing housing cases were opened in Harlem and Red Hook, Brooklyn.

Opened in May 2001, the Harlem Community Justice Center is located in East Harlem and handles all housing-court cases from two Harlem zip codes (10035 and 10037). All other housing cases in Manhattan are heard at the centralized housing court.

The Harlem Community Justice Center seeks to address many of the underlying problems that give rise to housing cases. The court is staffed by a single judge and handles cases only from a limited geographic area. It also seeks to provide the judge with access to comprehensive and up-to-date information. The court works closely with an on-site housing resource center that is staffed by case managers, a *pro se* attorney, and personnel from partner city agencies. The resource center seeks to link clients to services, including mediation, benefits assistance, budget counseling, and loan-assistance programs.

Aspects of the Harlem Community Justice Center—its neighborhood location, smaller caseload, single judge and courtroom, on-site services—might be expected to improve the court experience for tenants in terms of both perceptions and outcomes. The importance of enhanced tenant *perceptions* should not be underestimated. Studies show that litigants place great weight on having their problems settled in a way they view as fair.<sup>4</sup> To date, there has been no systematic evaluation of the impact of a community-based housing court. By drawing on the perspectives of unrepresented tenants appearing in both the Harlem and downtown housing courts, our study provides the first indications of the comparative advantages (and/or disadvantages) of a community-based housing court.

Between January and May 2007, a total of 343 tenants were interviewed: 196 in the Harlem Housing Court and 147 in the downtown housing court. The survey measures tenant perceptions about, and satisfaction with, their court experience. Tenants were asked to assess their experience in a variety of procedural fairness domains, including:

## Footnotes

1. COMMUNITY TRAINING AND RESOURCE CENTER AND CITYWIDE TASK FORCE ON HOUSING COURT, INC., HOUSING COURT, EVICTIONS, AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL (1993), available at <http://www.cwtfhc.org/about.html>.
2. Paula Golowitz, *The Housing Court's Role in Maintaining Affordable Housing*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK

CITY 177, 177-202 (Michael Schill, ed., 1999).

3. David Chen, *Boom Times in the City's Housing Courts*, N.Y. TIMES, May 27, 2003, at B1.
4. See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW (1990); Tom R. Tyler & E. A. Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115 (Mark P. Zanna ed., 1992).

- Opportunity to participate in the process;
- Clarity of the process;
- Polite and fair treatment from the judge and court staff;
- Fairness of the outcome; and
- Satisfaction with the outcome.

Tenants were also asked to rate their preparation for court, difficulties faced in preparing for the appearance, awareness and use of available services, and suggestions for improvement.<sup>5</sup>

To complement the survey, research staff conducted structured court observations in the Harlem and downtown housing courts. Using court observation instruments, we formally assessed tenant court appearances in terms of preparation, behavior during the appearance, treatment by other parties (judge, court clerks, attorneys, etc.), and case outcomes. In total, 406 court appearances were observed: 109 in the Harlem housing court, and 297 in various downtown court parts.

## II. DESCRIPTION OF SURVEY SAMPLE

Overall, survey respondents appear to be generally representative of housing-court tenants. Most of those interviewed were racial/ethnic minorities—half African-American and another quarter Hispanic. Two in three (67%) were female. The majority had at least one indicator of low socioeconomic status: 59% reported being unemployed, receiving Section 8 rental assistance, or living in public housing (Table 1).

	<b>HARLEM</b>	<b>DOWN-TOWN</b>	<b>TOTAL</b>
<b>RACE</b>			
Black***	63%	36%	51%
Latino†	21%	31%	25%
White	4%	16%	9%
Other	12%	18%	15%
<b>GENDER</b>			
Female**	70%	63%	67%
<b>HIGH SCHOOL DIPLOMA/GED</b>	86%	86%	86%
<b>EMPLOYED***</b>	68%	59%	64%
Part-time	11%	17%	14%
Full-time	57%	42%	50%
<b>RECEIVE SECTION 8 RENTAL ASSISTANCE***</b>	21%	13%	17%
<b>LIVE IN PUBLIC HOUSING**</b>	29%	25%	28%
†p<.10 **p<.01 ***p<.001			

5. Data was collected via in-person interviews which took approximately five minutes to administer. The survey relied on a convenience sample, with litigants approached by research staff or court personnel to participate in the survey. Tenants were assured that participation was strictly voluntary, would in no way affect their court cases, and that their responses would be kept confidential

Those interviewed in the Harlem and at the downtown housing courts were similar in many, but not all, respects. There were no significant differences across sites in gender, education level, and employment status. However, those interviewed in Harlem were more likely to identify themselves as African-American (63% compared to 36% downtown) and less likely as white (4% compared to 16% downtown).

## CASE CHARACTERISTICS

Not surprisingly, more than 8 in 10 (85%) of those surveyed were involved in a nonpayment of rent case. A larger percentage of downtown litigants were in court on a holdover case (19% vs. 7% downtown).<sup>6</sup> Also not surprisingly, the overwhelming majority of tenants, both downtown (87%) and particularly in Harlem (97%), appeared *pro se*. By contrast, very few tenants reported that their landlord was *pro se* (5% in Harlem; 6% downtown). The majority of tenants (53%) also reported that they are facing eviction as a result of their current court case. Importantly, despite the fact that public-housing (NYCHA) cases comprise a larger percentage of Harlem's than downtown's caseload, the Harlem tenants interviewed for this study were not significantly more likely to be public-housing residents than were those downtown (29% vs. 25%, respectively).

	<b>HARLEM</b>	<b>DOWN-TOWN</b>	<b>TOTAL</b>
<b>CASE TYPE</b>			
Nonpayment***	92%	76%	85%
Holdover***	7%	19%	13%
Other***	2%	4%	3%
<b>TENANT IN PUBLIC HOUSING (NYCHA)</b>	29%	25%	28%
<b>FIRST APPEARANCE IN COURT CASE†</b>	26%	19%	23%
<b>TENANT PRO SE*</b>	97%	87%	93%
<b>LANDLORD PRO SE</b>	5%	6%	5%
<b>TENANT FACING EVICTION*</b>	45%	62%	53%
†p<.10 **p<.01 ***p<.001			

## APPEARANCE OUTCOME

Harlem tenants are much more likely to report having agreed to a stipulation or stipulation with final judgment (75% compared to 53% downtown). While stipulations do not necessarily result in a final case resolution, often they do. Note too

and reported in the aggregate only.  
6. A holdover case is brought to evict a tenant or person in the apartment who is not a tenant for reasons other than the nonpayment of rent—for example, violating a lease provision, illegally putting others in the apartment, being a nuisance to other tenants.

	<b>HARLEM</b>	<b>DOWN-TOWN</b>	<b>TOTAL</b>
APPEARANCE OUTCOME			
Stipulation*	49%	36%	43%
Stipulation with final judgment*	26%	17%	22%
Order to show cause granted	7%	12%	9%
Order to show cause denied	1%	2%	2%
Adjourned***	8%	24%	15%
Discontinued	8%	4%	6%
Set for trial	2%	1%	2%
Unsure	0%	2%	1%
AGREED TO PAY MONEY TO LANDLORD***	69%	46%	59%
* <i>p</i> <.05 *** <i>p</i> <.001			

that Harlem litigants are far less likely to have reported an adjournment (8% vs. 24% downtown), suggesting less delay in case processing. Harlem tenants are much more likely to report having agreed to pay money to their landlord (69% vs. 46% downtown).

### III. HOUSING RESOURCE CENTER

Both the Harlem and downtown courts feature housing resource centers, which attempt to link clients to needed resources, including mediation, entitlement-assistance, budget-counseling, and loan-assistance programs. The majority of tenants interviewed at both sites (57% in Harlem, 59% downtown) report being knowledgeable about the housing resource center (Table 4).

Most of those (56% overall) who know about the resource centers report having visited them for assistance related to their current court case. Those at the downtown housing court, however, were more likely than those in Harlem to report having visited the resource center (64% downtown vs. 51% in Harlem). Note too that downtown tenants are far more likely than those in Harlem (57% vs. 29%, respectively) to say they intend to visit the resource center in the future.

Why Harlem tenants are less likely to have visited the housing resource center, or to intend to visit the center, is unclear. It might suggest that previous experiences with the resource center among tenants in Harlem were less likely to live up to their expectations than among those downtown. Alternatively, it may be that Harlem tenants were linked to services the day of the court appearance in which they were interviewed, thus precluding the need to return to the resource center. Once again, however, the survey findings provide no conclusive evidence as to why tenants in Harlem have less contact with the resource center.

### IV. COURT EXPERIENCE

Survey respondents were asked about their preparedness for and understanding of the court process, their views about the judge and other court actors, and their overall satisfaction with the court process (Table 5).

	<b>HARLEM</b>	<b>DOWN-TOWN</b>	<b>TOTAL</b>
KNOWLEDGE OF RESOURCE CENTER	57%	59%	58%
HOW FOUND OUT ABOUT RESOURCE CENTER <sup>a</sup>			
Referred	61%	56%	59%
On own	39%	44%	42%
REFERRAL SOURCE <sup>b</sup>			
Judge	31%	22%	27%
Court clerk	32%	26%	30%
Court attorney	9%	7%	8%
Housing resource center coordinator	7%	2%	5%
Other/Not sure***	21%	44%	30%
VISITED RESOURCE CENTER FOR CURRENT CASE <sup>a</sup>	51%	64%	56%
INTEND TO VISIT RESOURCE CENTER*** <sup>a</sup>	29%	57%	41%
<sup>a</sup> Asked only of those who have knowledge of the Resource Center (n=198). <sup>b</sup> Asked only of those referred to the Resource Center (n=114). * <i>p</i> <.05 *** <i>p</i> <.001			

### TENANT PREPAREDNESS

The vast majority (83%) of tenants “strongly agree” or “agree” that they felt prepared for their court appearance, with tenants in Harlem more likely to feel prepared (90% in Harlem vs. 73% downtown). These percentages, which may appear high at first glance, are likely due in part to some survey respondents’ inclination to provide socially desirable responses, particularly when compared to the fact that less than half report having received any information about the housing court process. Indeed, research staff conducting structured court observation reported that the tenant appeared to understand what happened in court (i.e., did not appear confused or unable to follow the proceedings) in only 47% of the observed appearances. Note that those who reported having received information or materials about the housing-court process are slightly more likely to “strongly agree” that they understood what happened in court (22% vs. 14% for those who did not receive materials).

### V. PERCEPTION OF THE JUDGE AND COURT

Tenant perceptions of the judge were overwhelmingly favorable in both the Harlem and downtown housing courts, although on most measures those in Harlem tended to view the judge somewhat more favorably than those downtown (Table 6). Specifically, Harlem tenants were more likely to “strongly agree” or “agree” that the judge:

- treated them with respect (99% vs. 87% downtown);
- carefully considered their input in making a decision (92% vs. 72% downtown);
- listened to them (99% vs. 83% downtown);
- treated them fairly (98% vs. 85% downtown); and
- understood the facts of the case (99% vs. 81% downtown).



**TABLE 5: TENANT PREPAREDNESS FOR AND UNDERSTANDING OF THE COURT EXPERIENCE<sup>+</sup>**

	HARLEM	DOWN-TOWN	TOTAL
FELT PREPARED FOR COURT APPEARANCE***	90%	73%	83%
UNDERSTOOD WHAT HAPPENED IN COURT***	99%	90%	95%
RECEIVED MATERIALS ABOUT THE HOUSING COURT PROCESS	43%	47%	45%

<sup>+</sup> Percentages refer to the percent “strongly agree” and “agree.” Other choices given were “neither agree not disagree,” “disagree,” and “strongly disagree.”  
\*\*\*  $p < .001$

**TABLE 6: PERCEPTIONS OF JUDGE<sup>a</sup>**

	HARLEM	DOWN-TOWN	TOTAL
JUDGE WAS AUDIBLE***	99%	90%	95%
JUDGE'S DECISION WAS CLEAR TO YOU***	99%	89%	95%
JUDGE TREATED YOU WITH RESPECT***	99%	87%	95%
JUDGE UNDERSTOOD THE FACTS OF YOUR CASE***	99%	81%	93%
JUDGE LISTENED TO YOU***	99%	83%	93%
JUDGE TREATED YOU FAIRLY***	98%	85%	93%
JUDGE EXPLAINED YOUR CASE TO YOU***	94%	80%	89%
JUDGE CAREFULLY CONSIDERED WHAT YOU SAID WHEN MAKING DECISION***	92%	72%	85%
JUDGE'S INSTRUCTIONS WERE CONFUSING	19%	16%	18%

<sup>a</sup> Percentages refer to the percent “strongly agree” and “agree.” Other choices given were “neither agree not disagree,” “disagree,” and “strongly disagree.”  
\*\*\*  $p < .001$

When looking only at the “strongly agree” responses, the cross-site differences are starker. For example, Harlem tenants are much more likely than those downtown to “strongly agree” that the judge treated them with respect (38% vs. 19% downtown), listened to them (30% vs. 16% downtown) and treated

**TABLE 7: OBSERVATION OF JUDGES' BEHAVIOR**

	HARLEM	DOWN-TOWN	TOTAL
GREETED TENANT***	90%	56%	65%
EXPLAINED CASE	80%	72%	74%
ASKED IF TENANT UNDERSTANDS	40%	37%	37%
MADE EYE CONTACT*	67%	80%	77%
MENTIONED HOUSING RESOURCES/SERVICES	7%	11%	10%

\* $p < .05$  \*\*\* $p < .001$

them fairly (30% vs. 17% downtown). In sum, tenant perceptions of the judge, while positive in both sites, are significantly more favorable in Harlem.

**OBSERVED INTERACTIONS BETWEEN THE JUDGE AND TENANT LITIGANT**

Structured court observation noted characteristic interactions between litigants and the judge (Table 7). On some measures, no differences emerge between Harlem and downtown. Of note is that at both sites, the judge asked if the tenant understood what was occurring in the court proceeding in fewer than half the observed appearances.

On other measures, differences across sites do emerge. The observations indicate that tenants in Harlem were much more likely to have been directly greeted by the judge at the beginning of the court appearance (90% vs. 56% downtown). The judge in Harlem was also observed more often to explain the case to the tenant (i.e., summarizing the case history and current case status, describing resolution options available to the tenant, describing court procedures, etc.). By contrast, downtown judges were more likely to have made eye contact with the tenant (80% downtown vs. 67% in Harlem).

Note that both in Harlem (7%) and downtown (11%), the judges were seldom observed to have mentioned the housing resource center and available services. These findings do raise concern about how consistently tenants learn about the housing resource center (both in Harlem and downtown) from the judge, and perhaps suggest a need for housing-court judges to be more proactive.<sup>7</sup>

**OTHER ATTITUDES**

Court officers and court attorneys were rated favorably both in the Harlem and downtown courts. More than 9 in 10 at both courts “strongly agree” or “agree” that the court officers were respectful. Most at both sites believed court attorneys’ explanation of the stipulation was sufficient, although again, those in Harlem were more likely to believe so (84% compared to 73% at downtown court).

7. These findings may not at first appear consistent with the findings from the survey that about 3 in 10 of those referred to the housing resource center were referred by the judge (see Table 4). The apparent discrepancy is due to the fact that the research staff administering the survey asked about referral source only to ten-

ants who indicated that they both had knowledge about the resource center and had been referred to the center. While 27% of this subset of tenants report having been referred by the judge, this constitutes only 9% of the entire sample of surveyed litigants.

**TABLE 8: SATISFACTION WITH COURT EXPERIENCE**

	HARLEM	DOWN-TOWN	TOTAL
YOUR LEGAL RIGHTS WERE TAKEN INTO ACCOUNT <sup>a***</sup>	85% (16%)	73% (8%)	80% (13%)
CASE HANDLED FAIRLY BY THE COURT <sup>a***</sup>	92% (19%)	75% (11%)	95% (16%)
THE RESULT OF YOUR CASE WAS FAIR <sup>a***</sup>	86% (15%)	66% (10%)	77% (13%)
OVERALL SATISFACTION			
- VERY PLEASED <sup>***</sup>	63%	40%	53%
- SOMEWHAT PLEASED <sup>*</sup>	24%	31%	27%
- NOT VERY PLEASED <sup>*</sup>	13%	29%	20%

<sup>a</sup> Percentages refer to the percent “strongly agree” and “agree.” Percentages in parentheses refer only to the percent “strongly agree.” Other choices given were “neither agree nor disagree,” “disagree,” and “strongly disagree.”  
\*  $p < .05$  \*\*\*  $p < .001$

While court personnel were rated positively at both courts, ratings of the court atmosphere were much more positive in Harlem. Six in 10 (58%) “strongly agree” or “agree” that the court atmosphere in Harlem is “pleasant;” only 28% of those in the downtown court felt the same way.

**VI. OVERALL EVALUATION OF THE COURT EXPERIENCE**

The majority of tenants both in Harlem and downtown provided favorable overall evaluations of their housing-court experience, with the Harlem Housing Court receiving slightly higher marks than downtown on all measures (Table 8).

Harlem tenants were more likely to “strongly agree” or “agree” that their legal rights were taken into account (85% vs. 73% downtown), that the case was handled fairly (92% vs. 75% downtown), and that the case result was fair (86% vs. 66% downtown). Harlem tenants were also more likely to say that they were “very” or “somewhat” pleased with the outcome of their court appearance (87% vs. 71%). Note that Harlem tenants have especially favorable perceptions with respect to both the fairness of the court procedures and the fairness of the outcome of their court appearance. Note too that in both sites, tenant perceptions were not significantly correlated with the outcome of their court appearance. For example, tenants who reported having signed a stipulation were no more likely than those who did not to be satisfied with their court experience, suggesting that evaluations of the court experience are not associated with the resolution of the dispute.<sup>8</sup>

- 8. As previously noted, this interpretation assumes that tenants who agree to a stipulation are more likely to have concluded the court process (or nearly so). This is not the case in all situations.
- 9. Specifically, an ordered logistic regression analysis was conducted to identify factors predicting overall satisfaction. This is the most appropriate method for dependent variables measured on a three-point scale (here, the dependent variable has three response categories: “very pleased,” “somewhat pleased,” and “not very pleased.”)

**TABLE 9: MULTIVARIATE MODEL MEASURING IMPACT ON OVERALL SATISFACTION**

VARIABLES	MODEL 1 COEFFICIENTS	MODEL 2 COEFFICIENTS
HARLEM COURT	.709***	.278
DEMOGRAPHICS		
Gender (Female)	.310	.573*
African-American	.583 <sup>†</sup>	.470
Hispanic	.246	-.001
SIGNED STIPULATION	.511 <sup>†</sup>	.192
FAIR RESULT		1.293***
FAIR PROCEDURES		.553***

<sup>†</sup> $p < .10$ , \*  $p < .05$ , \*\*\*  $p < .001$ .

**PREDICTORS OF SATISFACTION**

To examine which factors are related to tenants’ satisfaction with the outcome of their housing-court appearance, a multivariate regression analysis was conducted to predict variance in respondents’ satisfaction. The purpose of a regression analysis is to examine the impact of factors—demographic characteristics, attitudes, etc.—that might influence an individual’s satisfaction with their court experience while at the same time accounting (“controlling”) for other factors that might provide alternative explanations for satisfaction.<sup>9</sup>

Two statistical models are presented to fully illustrate which factors most influence satisfaction (Table 9). In Model 1, the positive coefficient for Harlem Court (.709) indicates an increased chance that a tenant appearing in the Harlem Housing Court (vis-à-vis downtown) will rate the court experience more highly, even after controlling for a variety of demographic factors as well as whether a stipulation was agreed to (our proxy measure for whether the appearance may have resulted in a resolution of the dispute). In other words, tenants in the Harlem Housing Court were significantly more satisfied with their court experience than those in the downtown housing court.<sup>10</sup>

Model 2 reveals why tenants in the Harlem Housing Court had a more positive overall view of their court experience. This model shows that the perceived fairness of court procedures and the outcome of the court appearance are the most influential factors affecting *pro se* tenants’ evaluation of their housing-court experience. The statistically significant, positive coefficients for Fair Result (1.293) and Fair Procedures (.553) indicate an increased chance that individuals with more positive

- 10. Other factors (for example, whether the tenant felt prepared for the court appearance, visited the resource center, etc.) are not included in the statistical models presented in Table 9 because they are not significant predictors of overall satisfaction, are highly intercorrelated with other variables included in the analysis, or are measures for which there is considerable missing data.

perceptions of fairness—in procedures and outcomes—will rate their court experience more highly, even after controlling for a variety of factors. By contrast, those with more negative perceptions of fairness have an increased chance of rating their court experience less highly. Importantly, after tenants' perceptions of fairness are taken into account, tenants' court location (i.e., Harlem vs. downtown) is no longer a statistically significant predictor of satisfaction. Thus, *pro se tenants perceive the court experience in Harlem more positively because they are more likely to perceive the court process and appearance outcome as fair.*

## VII. CONCLUSIONS

This study was designed to determine how *pro se* tenants perceived their court experiences in the community-based Harlem Housing Court and the centralized housing courts located in southern Manhattan. The survey findings indicate that, in most areas, Harlem tenants viewed their court experience in somewhat more positive terms. Harlem tenants give the court higher marks with regard to taking their legal rights into account, fairness both in court procedures and the outcomes of the court appearance, and overall satisfaction with the court experience.

To be sure, both the downtown and Harlem housing courts fare very well in terms of tenant perceptions of the court experience. Contrary to some accounts,<sup>11</sup> our findings indicate generally positive perceptions even among tenants appearing in the high-volume downtown housing court. Across nearly all measures, the community-based Harlem Housing Court appears to achieve its goal of improving tenants' comprehension of their court experience as well as their perception that they were treated fairly, in terms of both the court process and the outcome of that process.

Importantly, our analysis demonstrates that the more positive perceptions of the Harlem Housing Court experience are due largely to the fact that Harlem tenants are more likely than those downtown to feel that the court process and outcomes are fair. While this finding is not surprising in so far as it is consistent with a broad literature emphasizing the importance of perceived procedural justice, its implications for housing court are potentially far-reaching. Enhanced perceptions of procedural fairness are *not* necessarily inherent to a community-based court model—indeed, the centralized downtown housing courts also receive high marks on procedural justice measures. The findings suggest that steps can be taken to further improve perceptions of procedural fairness in all court settings. Educating judges and court staff about procedural fairness, and identifying and implementing best practices for promoting procedural fairness, are two examples of such steps.

The results do raise areas for potential follow-up by both the Harlem and downtown housing courts. For example, court observation indicates that the judges in both Harlem and downtown ask if the tenant understands the proceedings and if the tenant agrees with the stipulation (in cases where one existed) less than half of the time. These results suggest that judges in both sites could do more to verify and to improve tenant understanding of the court process.

Certainly, there are limits to what this study can tell us about the Harlem Community Justice Center. Most important, since we lack data about case outcomes and future tenant appearances in housing court, we cannot evaluate whether or to what extent the Harlem Community Justice Center has achieved its goal of reaching speedier and more durable case resolutions. Future research might address this issue.

Note too that other potentially confounding factors for which we lack data may also help to shape tenant perceptions. For example, we do not know whether tenants are of the same race or gender as the judge before whom they appeared. It is possible that these or other factors may affect litigant perceptions of the judge as well as their overall perception of how they were treated by the court.

Nevertheless, the survey results offer encouraging news as to the benefits of a community-based housing court. The Harlem model does appear to enhance *pro se* litigants' perceptions of fair treatment and their overall satisfaction with the court process. It is hoped that the results of our research will help court planners, both in New York City and nationwide, when deciding whether to advocate for a greater number of community-based housing courts and/or to apply features of the Harlem Community Justice Center model on a broader scale.



Rashida Abuwala is a research associate at the Harlem Community Justice Center, an innovative community court in the East Harlem neighborhood of New York City that focuses on housing, prisoner reentry, youth programming and addressing other community needs. She graduated with honors from Wesleyan University earning a BA in Government.



Donald J. Farole, Jr., Ph.D., is a principal research associate at the Center for Court Innovation in New York City. His current research focuses on problem-solving courts and other innovative criminal and civil justice programs. Dr. Farole received a Ph.D. in Political Science from Indiana University in 1996. He can be reached at [DFAROLE@courts.state.ny.us](mailto:DFAROLE@courts.state.ny.us).

The authors would like to thank the Honorable Fern Fisher, Administrative Judge of the Civil Court of the City of New York, and all of New York City's housing-court judges, for their support and cooperation in helping to administer the survey upon which this research is based. We thank Greg Berman, Alfred Siegel, Raye Barbieri, Chris Watler, and Michael Rempel for feedback on earlier versions of this article. Any opinions and interpretations are those of the authors; they do not necessarily represent the official positions of the New York City Housing Court or the Center for Court Innovation/Harlem Community Justice Center.

11. E.g., Golowitz, *supra* note 2.

# Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness

Diane Sivasubramaniam and Larry Heuer

Since World War II, psychologists have devoted considerable attention to understanding the factors that shape people's satisfaction with the outcomes of social or economic exchanges—outcomes of events not unlike the encounters occurring between judges and litigants in civil and criminal courtrooms, encounters between police officers and civilians, or encounters between mediators and disputants in alternative dispute resolution centers throughout the United States every day. In one classic early study, it came as somewhat of a surprise when it was discovered that satisfaction was not easily explained by economic theories of human behavior.<sup>1</sup> This finding launched an inquiry guided by theories and empirical research that has continued to this day.

In this article, we offer an overview of the major developments in these theories and the accompanying research with an eye toward their implications for understanding the factors that shape citizens' satisfaction with the U.S. legal system. Then, we note that the vast majority of this research has focused primarily on only a portion of the individuals who are engaged in the legal encounters that are taking place—the subordinates (the litigants, civilians, and disputants whose outcomes are being decided) rather than the authorities (the judges, police officers, and mediators who are deciding the cases), and we describe some recent research suggesting that the satisfaction of decision makers might be guided by different principles than the satisfaction of those who receive their decisions.

## DEVELOPMENT OF PROCEDURAL FAIRNESS RESEARCH

In an extensive body of research on the psychology of fairness, psychologists have investigated factors that determine people's satisfaction with conflict resolution processes. Early research on the psychology of fairness focused on *distributive* fairness. These early studies examined people's beliefs that the outcomes of their conflicts were fair, and showed that disputants' satisfaction with conflict resolution was more strongly influenced by the fairness than the favorability of the outcomes they received.<sup>2</sup> However, research on the psychology of fairness shifted to a focus on *procedural* fairness when Thibaut and Walker demonstrated that disputants' satisfaction with conflict resolution was influenced by the fairness of the conflict reso-

lution procedures, as well as the fairness of the outcomes produced by those procedures.<sup>3</sup>

Importantly, Thibaut and Walker showed that disputants judged procedures to be fair to the extent that they felt they were granted "voice" or input into the procedure, and influence over the process. Their theory of procedural fairness posited that process control was a critical determinant of disputants' judgments of procedural fairness and satisfaction. Since this research was conducted in high conflict settings (simulated legal disputes), it was assumed that disputants valued "voice" or process control because they were motivated to obtain fair outcomes, and therefore preferred procedures that permitted them to express their views and to be influential in shaping those outcomes.

Although this theory was well supported, some findings did not fit well with Thibaut and Walker's reasoning about why voice was important to disputants. Their procedural justice theory predicted that process control was important because of its potential *instrumental* value—it increased the likelihood of obtaining fair and beneficial outcomes. However, subsequent research showed that voice enhanced fairness judgments even when disputants did not think their voice would influence their outcome.<sup>4</sup> This non-instrumental voice effect led two psychologists, Tom Tyler and E. Allan Lind, to propose a group value theory of procedural fairness. This theory has profoundly influenced subsequent research and theory on procedural fairness.

Tyler and Lind's research was supportive of their claim that certain non-instrumental procedural features were particularly influential for people's evaluations of these processes: trustworthy authorities, neutral procedures, and respectful treatment. If disputants felt that the authority figure in a procedure was trustworthy, the procedure was neutral, and the disputant's rights were generally respected in the procedure, then the disputants generally judged the procedure to be fair.<sup>5</sup>

According to the group value model of procedural fairness, this occurs because such procedural features convey to disputants that they are valued and respected members of their valued social groups. When a procedure conveys that a person is valued by their group, and that they are held in high regard

## Footnotes

1. SAMUEL A. STOFFER ET AL., *THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE* § 1 (1949).
2. E.g., J. Stacey Adams, *Inequity in Social Exchange*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 267 (Leonard Berkowitz ed., 1965); ELAINE WALSTER, et al., *New Directions in Equity Research*, in 9 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1 (Leonard Berkowitz ed., 1976).

3. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).
4. E. A. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 952 (1990).
5. E.g., Tom R. Tyler & E. A. Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115 (Mark P. Zanna ed., 1992).



by the authorities representing that social group, then that person will generally judge that procedure to be fair. Essentially, the group value model posits that people do not judge procedures to be fair because those procedures deliver fair or favorable outcomes, and people do not value procedural features like voice or respectful treatment because they signal the likelihood of favorable outcomes. Rather, procedural features like trust, neutrality, respect (and voice) convey important symbolic or relational information—they convey that the individual is respected by his or her group—prompting people to judge those procedures as fair.<sup>6</sup> An extensive body of research provides strong support for these central claims of the group value model.

Notably, the ascendancy of the group value model in the procedural fairness literature is the culmination of a significant shift from the parameters that defined early conflict research. Psychologists have progressed from early economic models of satisfaction that focused primarily on obtaining *favorable outcomes*, to distributive fairness models that focused primarily on obtaining *fair outcomes*, to procedural fairness models that focused primarily on procedures as *instruments for shaping fair outcomes*, to a procedural fairness model that views procedures as an important source of largely *symbolic information*: information about one's relationship with valued social groups. Each of these developments has moved psychologists further away from the proposition that outcomes are critical determinants of procedural fairness judgments.

Psychologists have also demonstrated that procedural fairness judgments themselves have important social and legal consequences. For example, Tyler conducted large-scale surveys of Chicago, Illinois and Oakland, California residents.<sup>7</sup> Across four studies, Tyler showed that process concerns were more important than instrumental concerns in shaping citizens' evaluations of the police and courts. Judgments about the fairness with which the police and courts exercised their authority predicted citizens' confidence in and support for legal authorities, their perceived obligation to obey the law, and their willingness to cooperate with legal authorities and legal institutions in the future—findings that have been replicated in numerous studies

since Lind and Tyler proposed their group value theory.<sup>8</sup>

Procedural fairness research has clearly demonstrated that disputants attach a great deal of importance to the way they are treated by the authorities who represent legal institutions.<sup>9</sup> Disputants' evaluations of the legal system are heavily influenced by their perception that they were treated fairly in encounters with judges, police, and other legal authorities, and this procedural fairness effect often trumps the effect of distributive fairness and outcome favorability.<sup>10</sup> When procedural features like trust, neutrality, respectful treatment, and voice increase procedural fairness judgments, this functions as a non-coercive means to increase compliance with the law and cooperation with legal authorities.

**[F]airness and satisfaction judgments [of decision makers like judges may not be] dominated by treatment and relational concerns.**

### NEW FINDINGS IN PROCEDURAL FAIRNESS: DECISION MAKERS VS. DECISION RECIPIENTS

Several studies have suggested the dominant influence of procedural fairness on satisfaction may not apply equally to all actors in the legal system. Some studies suggest that, among decision makers (e.g., judges), fairness and satisfaction judgments are shaped by quite different factors and are not dominated by treatment and relational concerns. For example, Lissak and Sheppard found that managers tended to emphasize cost and efficiency more strongly than fairness as criteria for resolving organizational conflict.<sup>11</sup> Some early procedural fairness research also suggested that when assessing their satisfaction with dispute resolution procedures or outcomes, decision makers were more influenced by instrumental criteria (such as control over decisions and financial considerations), and less concerned with relational criteria (such as treatment and trustworthiness), than were decision recipients.<sup>12</sup>

One recent paper focused directly on judgments of procedural fairness by judges.<sup>13</sup> Heuer and his colleagues point to

6. E. A. LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

7. Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 *BEHAV. SCI. & L.* 215 (2001).

8. TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997); Jason Sunshine & Tom R. Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 *SOC. PSYCHOL. Q.* 153 (2003); Tom R. Tyler et al., *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 *PSYCHOL. PUB. POL'Y & L.* 1138 (2000).

9. NAT'L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY* (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf); DAVID B. ROTTMAN, *TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS* (JUDICIAL COUNCIL OF CALIFORNIA/ADMINISTRATIVE OFFICE OF THE COURTS 2005), avail-

able at [http://www.courtinfo.ca.gov/reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

10. But see Linda J. Skitka, *Do the Means Always Justify the Ends, Or Do the Ends Sometimes Justify the Means? A Value Model of Justice Reasoning*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 588 (2002).

11. Robin I. Lissak & Blair H. Sheppard, *Beyond Fairness: The Criterion Problem in Research on Dispute Intervention*, 13 *J. APPLIED SOC. PSYCHOL.* 45 (1983).

12. E.g., Richard H. G. Field & Robert J. House, *A Test of the Vroom-Yetton Model Using Manager and Subordinate Reports*, 75 *J. APPLIED PSYCHOL.* 362 (1990); Madeline E. Heilman et al., *Reactions to Prescribed Leader Behavior as a Function of Role Perspective: The Case of the Vroom-Yetton Model*, 69 *J. APPLIED PSYCHOL.* 50 (1984); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 *J. EXP. SOC. PSYCHOL.* 13 (1978).

13. Larry Heuer et al., *The Role of Societal Benefits and Fairness Concerns among Decision Makers and Decision Recipients*, 31 *LAW & HUM. BEHAV.* 573 (2007).



**[Judges']  
procedural  
fairness and  
outcome fairness  
judgments were  
largely determined  
by outcomes,  
rather than by  
procedural criteria.**

several cases in which the Supreme Court was considering the propriety of police search procedures and in which the Justices appear to have relied heavily on search outcomes rather than procedural fairness. For example, the Supreme Court has considered whether the use of drug courier profiles in U.S. airports violated a passenger's Fourth Amendment rights.<sup>14</sup>

In these cases, the courts described their decision-making task as a balancing of several considerations, including the risk of false positive errors and the harms they inflict on search targets, versus the societal benefits achieved by using the profiling technique.<sup>15</sup> In other words, the Justices describe their own decision making as a utilitarian balancing of outcome concerns: societal benefits against individual harms.

This judicial reasoning poses a challenge to the procedural fairness theorizing described above, which has emphasized the dominant influence of procedures and which has gradually moved away from characterizing procedures as instruments for obtaining fair or beneficial outcomes, to characterizing procedures as symbols—cues to social relationships and group standing.

The tension between these contrasting perspectives was the starting point for the Heuer et al.<sup>16</sup> inquiry. If a decision maker–decision recipient disparity in concerns with procedures versus outcomes exists, it could have important ramifications: decision makers' best efforts to act fairly might leave decision recipients feeling unfairly treated, with all of the attendant negative consequences. The findings of their four studies, summarized below, suggest the presence of this disparity.

### **THE IMPORTANCE OF OUTCOMES AMONG JUDGES**

In the first two studies, state appellate court judges (Study 1) and state trial court judges (Study 2) read a summary of a fictitious appellate case involving a search and seizure. The appellant in this case had been required to answer a series of questions before boarding a flight, and his answers were analyzed using a technology called Voice Stress Analysis (VSA). Because his responses indicated stress, federal agents searched his luggage, and the passenger was arrested when they discovered illegal materials in his possession. The summary indicated that the defendant was convicted, and was presently appealing his conviction on the grounds that the interrogation procedure violated his Fourth Amendment protection against unreasonable search and seizure. The case summary described the search procedure and the search outcome. However, the information that participants received about these two factors varied depending on their randomly assigned experimental condition.

Half of the judges read a case in which the procedure was administered in a *respectful* manner: The defendant was permitted to explain why he was triggering the VSA, and the police treated him politely. The remaining judges read a case in which the procedure was administered in a *disrespectful* manner: The defendant was not permitted to explain why he was triggering the VSA, and the police treated him rudely and with some hostility.

Similarly, half of the judges read a case summary in which the outcome of the search was of *high societal benefit*: Upon searching the passenger's luggage, the officers found a .45 caliber pistol. In addition, these judges learned that there had been 130 attempted airline hijackings in the past year, and the state's attorney pointed out that VSA was expected to cut the rate of such attempts in half. The other half of judges read a summary in which the outcome of the search was of relatively *low societal benefit*: The officers' search revealed one marijuana cigarette (Study 1) or several stolen credit cards (Study 2). These judges also learned that there had been *four* attempted airline hijacking attempts in the past year, and the state's attorney pointed out that VSA was expected to cut the rate of such attempts in half.

The judges completed a questionnaire about their reactions to this case, and their likely decisions in this appeal. They also answered questions about the way that the defendant was treated by the police, the costs and benefits of the search, the fairness of the search procedure, and the outcome of the search.

Both of these studies indicated that these judges evaluated procedures and reasoned about fairness in a different way than typically has been reported in the procedural fairness literature. Among these judges, the (high vs. low) societal benefit produced by the search influenced their decisions, and this effect was completely due to the judges' perceptions of outcome fairness. In other words, when the benefit to society was high (i.e., when a gun was found, as opposed to a joint of marijuana or stolen credit cards), judges considered the outcome of the search procedure to be more fair, and this increased the likelihood that they would uphold the appellant's conviction. In addition, neither of these studies found any evidence that the description of the search procedure—the variable typically shown to be a powerful determinant of procedural evaluations among decision recipients—influenced these judges' decisions once the outcome was known.

In short, the judges' procedural evaluations in these experimental scenarios were more heavily influenced by outcome fairness than by procedural fairness, and both their procedural fairness and outcome fairness judgments were largely determined by outcomes, rather than by procedural criteria. These findings are suggestive of a decision maker–decision recipient disparity in the criteria that shape procedural fairness and satisfaction. However, they are based exclusively on fairness reasoning among decision makers. The claim for the existence of a disparity that is a function of one's role in an encounter as

14. E.g., *U.S. v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *U.S. v. Montoya De Hernandez*, 473 U.S. 531 (1985); *U.S. v. Sokolow*, 490 U.S. 1 (1989).

15. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE AND LAW: CASES AND MATERIALS* (3d ed. 1994).

16. Heuer et al., *supra* note 13.

either a decision maker or a decision recipient would be more convincing if decision makers and decision recipients were shown to respond differently to procedures and outcomes when confronted with a common scenario in a single experimental design. This was the goal of Studies 3 and 4 and by Heuer et al.<sup>17</sup> In these follow-up studies, decision makers and decision recipients evaluated procedures that were: (a) more or less respectful responses to (b) more or less serious threats to a social group. These studies tested the authors' predictions that: (1) outcome concerns would have a stronger influence on the procedural evaluations of decision makers than decision recipients, and (2) procedural concerns would have a stronger influence on the procedural evaluations of decision recipients than decision makers.

Study 3 also addressed another important limitation of the studies described above. Studies 1 and 2 revealed that judges were more focused on outcome concerns than procedural ones—however, this could be due to a number of factors. For example, the judges surveyed in Studies 1 and 2 tended to be older than the undergraduate populations that typically participate in procedural fairness studies, and Finkel<sup>18</sup> has shown that an emphasis on outcomes in fairness judgments tends to become more pronounced with age. Additionally, judges might differ from other segments of the population on certain value dimensions, such as power-distance, which refers to beliefs about the appropriate social distance between authorities and subordinates.<sup>19</sup> In several studies, Tyler, Lind, and Huo have shown that, when evaluating procedures, people high on power-distance (who believe that there should be a greater social distance between authorities and subordinates, and that societies and organizations function better when there is a more hierarchical, clearly defined power structure) place less importance on treatment than do low power-distance people.<sup>20</sup> If judges tend to be high on power-distance relative to other sectors of the population, this, rather than their position of authority, could be the reason why they placed less value on relational concerns and more value on instrumental concerns in Studies 1 and 2.

In other words, judges' focus on instrumental concerns in Studies 1 and 2 may not be the result of a disparity between decision makers and decision recipients in fairness reasoning, but may instead be the result of a disparity between older and younger people in fairness reasoning, or a disparity between high and low power-distance people in fairness reasoning. Since Studies 1 and 2 simply surveyed judges on their reactions to the appellate case, these studies cannot rule out the possibility that judges' focus on outcome concerns is due to age or power-distance, rather than their role as decision makers.

Study 3 addresses this concern by employing an experimental design, and randomly assigning participants to take the perspective of either a decision maker or a decision recipient

in the experiment. When random assignment is employed, there is no reason to believe that the participants who are randomly assigned to these two roles are systematically different in any way, other than the role that they were assigned in the experiment. Study 3 therefore tests whether the decision maker-decision recipient disparity appears in this experimental setting, independent of the numerous characteristics that may be confounded with decision-making status in natural settings.

**Studies 1 and 2 revealed that judges were more focused on outcome concerns than procedural ones....**

### **DECISION MAKERS AND FAIRNESS IN AN EXPERIMENTAL STUDY**

In Study 3, undergraduate participants read one of multiple versions of a vignette describing an encounter between an authority and a subordinate. In this fictional case, a student resident assistant (RA) in campus housing searched a resident's room after receiving a tip that she was violating campus-housing regulations. On discovering a violation, the RA reported the student, who was consequently banned from campus housing for one month. The vignette described the student's appeal of the sanction on the grounds that the RA's search procedure was inappropriate. The vignettes in this experiment varied on three dimensions: (a) the benefit produced by the outcome of the search, (b) the respectfulness of the RA's search procedure, and (c) whether the participant read the vignette from the perspective of an authority or a subordinate.

The outcome manipulation in this study varied whether the search resulted in an outcome of high or low benefit to the campus-housing community. In the *high-benefit* search condition the RA discovered cocaine, whereas in the *low-benefit* search condition the RA discovered burning incense (both the high- and low-benefit discoveries constituted violations of actual campus-housing regulations). The procedure manipulation varied whether the search procedure was conducted in a more or less respectful manner. In the *high-respect* condition the RA was described as treating the resident in a polite and respectful manner, whereas in the *low-respect* condition the RA was described as treating the resident in a rude and disrespectful manner.

Participants were informed that appeals were heard by a board composed of student residents, RAs, and a campus administrator. Participants imagined themselves either in the role of an authority or a subordinate in this story. Participants assigned to the *authority* perspective responded to the case while imagining themselves as an RA member of the appellate board. Participants assigned to the *subordinate* perspective were

17. *Id.*

18. Norman J. Finkel, *But It's Not Fair! Commonsense Notions of Unfairness*, 6 PSYCHOL. PUB. POL'Y & L. 898 (2000).

19. GEERT H. HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED ATTITUDES (1980); GEERT H.

HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2d ed. 2001).

20. Tyler et al., *Cultural Values*, *supra* note 8.

**Study 3 is important because it demonstrates that the authorities' outcome focus is not a byproduct of other factors such as age or power-distance....**

asked to imagine the case from the perspective of either the student appellant, a student representative to the appellate board, or a student resident of campus housing who was learning the facts of the case from a report in the campus newspaper.

All participants completed a questionnaire that included questions about the search procedure, the outcome, and their preferred decision (regarding the propriety of the

search procedure) in this case. The findings of this study supported the prediction of an authority-subordinate disparity in the determinants of their reactions to this case: The search outcome had a stronger influence on the decision among participants who adopted the authority perspective, while the search procedure had a stronger influence on the decision among participants who adopted the subordinate perspective. Furthermore, procedural fairness did not have a significant influence on the decision of authorities, thus replicating this finding from Studies 1 and 2.

As noted above, Study 3 differs from the Studies 1 and 2 in its use of an experimental design, and random assignment of participants to take the perspective of either an authority or a subordinate in the experimental scenario. Since participants in this study were randomly assigned to take the role of either the authority or the subordinate, we have no reason to believe that the participants in these two roles are systematically different in any way, other than the decision maker or decision recipient role that they were assigned in the experiment. Therefore, Study 3 is important because it demonstrates that the authorities' outcome focus is not a byproduct of other factors such as age or power-distance, which were controlled for in this random assignment study. Study 3 demonstrated that simply asking people to take the perspective of a decision maker, as opposed to the perspective of a decision recipient, changed the way they thought about fairness—it reduced their concern with respectful treatment and increased their concern with outcomes.

### **DECISION MAKERS AND PREVENTIVE PROCEDURES**

The studies described so far share an important feature: participants evaluated procedures that had already been effectively applied—that is, the search procedure always revealed that the target of the procedure had violated a law or regulation. Of course, judges, or other legal authorities, are also often called upon to judge the propriety of procedures that have been proposed, but not implemented (a recent lawsuit filed in the Federal District Court in Honolulu has requested a

restraining order prohibiting the European Center for Nuclear Research, or CERN, from proceeding with its work on the Large Hadron Collider in order to prevent a considerable *anticipated* threat: that that collider could produce a tiny black hole which could eat the Earth). With the goal of addressing the role of fairness and outcomes for anticipated procedures as well as procedures already implemented, in Study 4 authorities and subordinates evaluated a procedure that had been proposed to respond to a health threat to their workplace.

Asking participants to evaluate a proposed procedure, rather than one that has already been executed, allows one additional limitation of Studies 1-3 to be addressed: Participants in these first three studies read about a procedure directed toward someone who was known to have violated a law (Studies 1 and 2) or a community regulation (Study 3). It is possible that the authorities in these studies were less concerned with the target's treatment because their offense rendered them undeserving of respectful treatment. This deservingness view of procedural fairness has been supported in several previous studies.<sup>21</sup> If Study 4 were to obtain the same authority-subordinate disparity observed in Studies 1-3, we could be more confident that this effect is not limited to settings in which someone has already committed an offense.

Participants in Study 4 were restaurant managers and restaurant employees in New York City. They were asked to read a (fictitious) newspaper story, which reported on a recent outbreak of Hepatitis A in a New York City restaurant, and which described a procedure that had been proposed by city health officials to minimize this threat. The newspaper stories that participants read varied on two dimensions: (a) the respectfulness and dignity of the proposed procedural intervention, and (b) the magnitude of the threat the procedure was intended to minimize.

Participants in the *respectful* procedure condition read that all restaurant employees would be required to sign a contract agreeing to wash their hands after a visit to the restroom. Participants in the *disrespectful* procedure condition read that a manager or designated employee would be required to observe all employees wash their hands after a visit to the restroom.

Participants in the *high-threat* condition were told that the disease was easily transmitted, that its symptoms were nausea and jaundice, and that few restaurants that experienced an outbreak would be able to survive the resulting lawsuits. Participants in the *low-threat* condition were told that transmission was as unlikely as winning the lottery, that its symptoms were a mild headache and scratchy throat, and that lawsuits were unlikely to be successful. Participants then completed a questionnaire in which they indicated whether they thought the procedure was fair and whether they approved of its use.

The results of Study 4 again supported the prediction that subordinates would be more influenced than authorities by procedural concerns: (a) perceived respectful treatment favor-

21. Larry Heuer et al., *A Deservingness Approach to Respect as a Relationally Based Fairness Judgment*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1279 (1999); Jason Sunshine & Larry Heuer,

*Deservingness and Perceptions of Procedural Justice in Citizen Encounters with the Police*, in THE JUSTICE MOTIVE IN EVERYDAY LIFE 397 (Michael Ross & Dale T. Miller eds., 2002).

ably influenced judgments of procedural fairness among restaurant employees but not among restaurant managers, and (b) perceived procedural fairness favorably influenced procedural approval among restaurant employees, but not among restaurant managers. Study 4 also supported the prediction that authorities would be more influenced than subordinates by outcome concerns: (c) perceived efficacy of the procedure at reducing the Hepatitis threat had a more favorable effect on procedural fairness among restaurant managers than among restaurant employees, and (d) perceived efficacy of the procedure had a favorable effect on procedural approval among restaurant managers but not among restaurant employees.

Therefore, despite numerous differences between Study 4 and the preceding studies (e.g., a shift from a legal context to a business context, a shift from a retrospective evaluation in which the procedure's outcomes were known to a prospective evaluation in which the procedure's outcomes are unknown, and a shift in the nature of the decision-maker and decision-recipient roles), the findings of this study are consistent with those of Studies 1-3. These results supported the hypothesis that decision makers' fairness judgments and procedural evaluations are shaped by outcome concerns, in contrast with decision recipients, whose fairness judgments and procedural evaluations are primarily influenced by treatment and relational concerns.

#### NEW DIRECTIONS IN PROCEDURAL FAIRNESS RESEARCH

In each of the studies described above, decision makers and decision recipients adopted different criteria when judging procedural fairness and procedural satisfaction. Decision recipients' fairness judgments were driven primarily by concerns about treatment—respectful treatment increased judgments of procedural fairness and satisfaction—but decision makers' fairness judgments were driven primarily by concerns about outcomes—effective threat reduction and beneficial outcomes increased judgments of procedural fairness and satisfaction. While these findings point to potentially important limitations regarding the generalizability of some procedural fairness effects, they also leave a fundamental question unanswered: *Why does this disparity between decision makers and decision recipients occur?* In order to understand why decision makers and decision recipients focus on different concerns when judging procedural fairness and satisfaction, we will consider the motivational assumptions of two important and influential psychological theories of fairness: the group value and relational theories. We propose that while those motivational assumptions are well suited to the situation confronting subordinates in their encounters with authorities, they might be less well suited to the situation confronting authorities.

#### PROTECTING THE GROUP VS. ASCERTAINING STATUS IN THE GROUP

According to the group value<sup>22</sup> and relational<sup>23</sup> theories of procedural fairness, respectful, trustworthy, and unbiased procedures matter because they communicate information to people about their standing in valued social groups. These theories have been consistently supported in studies of decision recipients (who are highly motivated to be perceived as valued group members) reflecting on their encounters with decision makers (who are representatives of the group's values).

On the other hand, decision makers or authorities might be less concerned with their group standing, since it is clearly high, and instead more concerned with other issues. We suspect that group authorities (including legal, as well as political and organizational authorities) are likely to see protecting their group's welfare—a motivation that Stangor and Leary<sup>24</sup> claim is a primary human motivation—as a particularly important responsibility. If so, when they encounter tension between protecting the group and treating group members with dignity and respect, they might perceive a responsibility to attend to the pragmatic rather than the relational concerns.

In one recent study, we investigated whether authorities' relatively greater reliance on outcomes might be driven by their relatively greater concern with protecting their group's welfare. In part because we think these processes are not limited to legal settings, and because we are interested in testing these effects in diverse contexts, this study, like one of our studies described above, relied on a vignette that described a threat in an organizational context.<sup>25</sup>

Participants were instructed to imagine themselves as part of a small company as they read a letter written by the CFO to the company employees. The letter described a financial threat to the company—the escalating cost of employee health insurance—and indicated that the CFO was considering changes to employees' coverage to respond to this threat. In this experiment, as in our previous ones, we systematically varied the perspective participants adopted as they read the letter. Participants who were randomly assigned to the *decision-maker* role imagined themselves as the CFO who wrote the letter, while participants who were randomly assigned to the *decision-recipient* role imagined themselves as a company employee.

The letters themselves varied on two other dimensions: (a) the magnitude of threat to the company posed by the escalating costs, and (b) whether the CFO would permit the employee-to

**[D]ecision makers' fairness judgments and procedural evaluations are shaped by outcome concerns....**

22. Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989).

23. Tyler & Lind, *supra* note 5.

24. Charles Stangor & Scott P. Leary, *Intergroup Beliefs: Investigations from the Social Side*, in 28 ADVANCES IN EXPERIMENTAL SOCIAL

PSYCHOLOGY 243 (Mark P. Zanna ed., 2006).

25. Diane Sivasubramaniam et al., *Respect and Threat: Authority-Subordinate Disparities in Responses to Transgression*, paper presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL (March, 2008).



**[O]ur questions to participants included measures of three motives that we expected might explain why authorities and subordinates differ in their fairness and satisfaction judgments....**

voice their opinion and concerns about the proposed changes before deciding on a course of action (the opportunity to “voice” one’s views before a decision is made has been clearly established as an important procedural fairness concern<sup>26</sup> and has been linked to perceptions of respectful treatment<sup>27</sup>).

Participants in the *high-threat* condition learned that the increased costs were sufficiently large to pose a threat to the company’s survival,

whereas participants in the *low-threat* condition learned that the increased costs were moderate and not a serious threat to the company’s survival. Participants assigned to the *high-voice* condition learned that the CFO had decided to meet with them before making his decision, whereas participants assigned to the *low-voice* condition learned that the CFO had decided not to meet with them before making his decision.

Because this study was designed to examine *why* these variables affect authorities and subordinates differently, our questions to participants included measures of three motives that we expected might explain why authorities and subordinates differ in their fairness and satisfaction judgments: protecting the company’s welfare, demonstrating a concern for the welfare of individual employees, and treating the employees with respect.

Several results of this study are noteworthy. First, the findings of this study replicated those of Heuer et al.<sup>28</sup> Among participants who adopted the perspective of the CFO, there was virtually no effect of voice on procedural fairness judgments, but voice did affect the procedural fairness judgments of participants in the role of the decision recipient, or employee. Further, perceptions of procedural fairness more strongly influenced the satisfaction of decision recipients than decision makers.

Second, our prediction that a concern with protecting the group’s welfare would be more important for decision makers than decision recipients was supported for both procedural fairness and satisfaction judgments. Thus, the findings of this study extend the findings of Heuer et al.<sup>29</sup> by pointing to authorities’ motivation to protect the group as at least one reason for their greater concern with outcomes than with procedures.

Finally, two of our predictions were not supported. We predicted that the employees’ fairness and satisfaction judgments

would be more favorably influenced than the authorities’ judgments by evidence that the authority had demonstrated a concern for the welfare of individual employees and had been respectful. In fact, concern for individuals’ welfare was more important among the decision makers, and respect was equally important for decision makers and decision recipients. While additional research is necessary before we can speak authoritatively about these effects, we offer the following speculation: We suspect that in this study, a concern for employee welfare might have mattered more to the authorities because they do not view this concern as a symbol of group standing (as it is characterized by the group value theory), but rather as a pragmatic concern for protecting the individual employee’s economic welfare (protecting their job). We think this interpretation is consistent with the general pattern of findings throughout our studies. Second, we propose that respect was equally important for fairness and satisfaction among authorities and subordinates because our analysis tested its influence while controlling for the effect of the CFO’s course of action on the company’s welfare. Essentially, we propose that once the authority’s concern for protecting the group is controlled for, there is no tension between treating employees respectfully and protecting the group’s welfare; respectful treatment—a communication that the subordinate is valued by the group—is seen as desirable by both decision makers and decision recipients.

In sum, this study replicated and extended the findings of Heuer et al.,<sup>30</sup> demonstrating that voice is less important for the fairness judgments of authorities, and fairness is less important for the satisfaction of authorities. But the findings of this study also supported the prediction that authorities are more concerned with instrumental motives related to protecting the group and its members. It therefore appears that authorities are focused on using procedures that they feel will protect the group, rather than trying to communicate a relational message to the group’s members. However, the relational message is not unimportant to authorities—in essence, when concerns about protecting the group are taken into account, there was no difference between authorities and subordinates in the importance they placed on respectful treatment. As long as the decision makers felt that they were protecting the decision recipients’ and the group’s welfare, they were as concerned as decision recipients were about decision recipients being treated respectfully.

The findings of this study indicate that increased concern with group protection is one feature that differentiates decision makers and decision recipients, and more strongly influences the fairness and satisfaction judgments of decision makers. This finding is important because it begins to illuminate *why* decision makers and decision recipients reason differently

26. THIBAUT & WALKER, *supra* note 3; Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in *SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH* 27 (Kenneth J. Gergen, et al. eds., 1980); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541(1978).

27. LIND & TYLER, *supra* note 6; Tyler, *supra* note 22.

28. Heuer et al., *supra* note 13.

29. *Id.*

30. *Id.*

31. *Id.*

about fairness, as they did in the Heuer et al.<sup>31</sup> studies.

While this study has initiated an investigation of the motivational underpinnings of an authority-subordinate disparity in the role of outcomes and procedures for procedural fairness and satisfaction, additional research on this topic is needed. Numerous other candidates exist as causal mechanisms that may help to account for the increased emphasis that decision makers place on instrumental concerns, relative to decision recipients. We briefly consider two potential candidates here.

## DIFFERENCES BETWEEN DECISION MAKERS AND DECISION RECIPIENTS

### Who Is Targeted by Procedures and Outcomes?

While we have focused on a distinction between authorities and subordinates, we have so far neglected to consider the ways in which this distinction is, in most natural settings, confounded with several other distinctions—each of which are candidates for explaining the phenomenon of different degrees of concern with outcomes versus procedures. For example, in the studies summarized above, as in much of the procedural fairness literature, the decision maker is typically the source, rather than the target of the procedures under consideration. So when, in the restaurant study described above, both managers and employees evaluated a procedure targeted at the employee, the employee, not the manager, was the one who was to be observed in the restroom. Thus, restaurant managers evaluated a procedure targeted at *someone else*, but employees evaluated a procedure targeted at them. It is possible that people will place a greater emphasis on respect when considering their own treatment, rather than the treatment of someone else. This possibility requires further investigation, so that we can establish whether decision makers' reduced concern with respect may result from the fact that decision recipients are the targets of the treatment or procedures being evaluated, whereas decision makers are not. The studies described above do not tease apart the potentially independent contributions of the authority-subordinate distinction from the source-target distinction.

In addition, decision recipients are also generally more likely than decision makers to be affected by the *outcome* that results from the procedure. In one study that examined people's reactions to a smoking ban, smokers were more sensitive than non-smokers to the procedures that were used to implement that new policy.<sup>32</sup> The same distinction might matter as judges interact with litigants—by virtue of the fact that most of the procedures employed by the court will produce outcomes of considerably greater consequence to the litigants than the judges, the litigants might be more sensitive to procedural subtleties. For the purposes of gaining a better understanding of the disparate reactions to procedures and outcomes we have described above, this distinction should also be investigated independently of the authority-subordinate distinction and the source-target distinction.

### The Macroscopic Perspective

So far, we have emphasized the extent to which most of the procedural fairness research has focused on the subordinates in their encounters with authorities. Recently, other researchers have pointed to another potentially important variable that has received relatively little attention, and that might also play a role in producing some of the effects we have obtained

in our own studies. Most of the existing fairness research asks participants to evaluate procedures directed at individuals (e.g., encounters between a judge and a litigant, or between a police officer and a civilian, or a manager and an employee). Recently, some studies have begun to investigate fairness reasoning in settings in which procedures are directed at groups of people. Tyler and colleagues<sup>33</sup> point out that some procedures can involve a macroscopic perspective, and Leung, Tong, and Lind<sup>34</sup> investigated whether respectful treatment, so well-established as a critical fairness concern when procedures are directed at individuals, holds for policy and social decisions that are primarily concerned with collective rather than with individual outcomes. In a series of surveys that asked participants about large-scale social issues (asylum seekers, an economic intervention, and accountability of principal government officials), Leung et al., showed that, contrary to findings usually seen with individual-level decisions in procedural fairness studies, collective outcome favorability was more important than procedural fairness in influencing participants' endorsements of policy decisions.<sup>35</sup>

In natural settings, decision makers, such as judges, administer dispute resolution procedures regularly, and may thus be exposed to the wider implications of a procedure's outcome for many individuals, across many different scenarios, often across long periods of time. It therefore appears that, in naturalistic settings, group-level and societal-level concerns may be more salient for decision makers, rather than decision recipients. It is therefore plausible that decision makers and decision recipients differ in their focus, with decision makers taking this macroscopic perspective, while individual concerns are more salient for decision recipients. As noted above, decision recipients, typically of lower or less secure status than decision makers, are highly motivated to seek out information about their status in social groups when interacting with authorities. According to the group value<sup>36</sup> and relational<sup>37</sup> models of procedural fairness, treatment is central to fairness reasoning because it conveys this important relational information. In

**It is possible that people will place a greater emphasis on respect when considering their own treatment, rather than the treatment of someone else.**

32. Jerald Greenberg, *Using Socially Fair Treatment to Promote Acceptance of a Work Site Smoking Ban*, 79 J. APPLIED SOC. PSYCHOL. 288 (1994).

33. TYLER ET AL., SOCIAL JUSTICE, *supra* note 8.

34. Kwok Leung et al., *Realpolitik Versus Fair Process: Moderating*

*Effects of Group Identification on Acceptance of Political Decisions*, 92 J. PERSONALITY & SOC. PSYCHOL. 476 (2007).

35. *Id.*

36. Tyler, *supra* note 22.

37. Tyler & Lind, *supra* note 5.

addition, Fairness Heuristic Theory<sup>38</sup> posits that fair treatment is an indication that the authority is trustworthy and that complying with their direction will not lead to exploitation. These concerns about group status and exploitation may be ones that are not shared by authorities or decision makers, and above, we provide evidence that authorities are more focused on group protection than are decision recipients when evaluating procedures.<sup>39</sup>

In addition to affecting the information that people are motivated to seek out, decision-making status may also change the way that information about a scenario is processed. Smith and Trope conducted an experiment in which they primed participants for either high or low power, and found that those primed for high power engaged in more abstract, less detailed processing of stimuli than did those primed for low power, and did so even when this resulted in worse performance on a task.<sup>40</sup> Their findings indicate that high power leads people to view stimuli in a different way, focusing on gist and “big picture” trends rather than details, and categorizing events broadly. If those with legal decision authority are more focused on group-level and societal-level concerns than are decision recipients, this may influence the way that they process information, as well as the information that they attend to, when evaluating a legal procedure. In line with the findings of Leung et al.,<sup>41</sup> this group-level focus may result in an emphasis on collective outcome favorability when evaluating procedures.

## CONCLUSIONS AND IMPLICATIONS

Thus far, the research suggests that decision makers are less affected by procedural concerns than are decision recipients. In three of four studies conducted by Heuer et al.,<sup>42</sup> there was no effect of respectful or dignified treatment on the procedural fairness judgments of the authorities—this effect was observed only among the subordinates. Recently, we have begun to investigate why this might be the case, and findings indicate that decision makers’ fairness judgments are shaped by concern for group protection to a greater extent than are those of decision recipients. However, there are a number of other factors that might lead to the discrepancy between decision makers and decision recipients, and further research is required to identify the priorities that occupy the focus of decision makers, and lead them to emphasize instrumental concerns in their

fairness judgments, when decision recipients are clearly focused on treatment.

An important point to note in this work is its demonstration that the applicability of procedural fairness research is more nuanced than has previously been acknowledged. While a number of procedural fairness theorists have argued that the meaning of fairness changes across situations,<sup>43</sup> and others have suggested that outcome concerns and relational concerns can be differentially important in different contexts,<sup>44</sup> none of these perspectives have explored the contrast between decision makers and decision recipients. The recognition that decision makers’ fairness judgments operate differently to those of decision recipients opens new avenues for inquiry in the procedural fairness literature, and calls for better understanding of the psychological underpinnings of fairness reasoning among decision makers, including judges.



Diane Sivasubramaniam was awarded a PhD in psychology from the University of New South Wales in Sydney, Australia in 2006, and is currently a postdoctoral fellow at Barnard College, Columbia University. She is working with Professor Larry Heuer on a National Science Foundation grant, investigating the topic outlined in this paper: the disparity in decision makers’ and decision recipients’ justice reasoning,

the conditions under which this disparity occurs, and the reasons for its existence. Her research also examines procedural justice reasoning in restorative justice conference processes, which are rapidly emerging in legal systems worldwide. In Fall, 2008, she will join the Faculty of Criminology, Justice and Policy Studies at the University of Ontario Institute of Technology (UOIT). She can be reached at [diane.sivasubramaniam@uoit.ca](mailto:diane.sivasubramaniam@uoit.ca).



Larry Heuer (PhD, University of Wisconsin-Madison) is a professor of psychology at Barnard College of Columbia University. His primary research interests are the psychology of fairness and jury decision making. Some of his work can be found at [www.columbia.edu/~lbh3](http://www.columbia.edu/~lbh3). His e-mail address is [LBH3@Columbia.edu](mailto:LBH3@Columbia.edu).

38. E. Allan Lind, *Procedural Justice and Culture: Evidence for Ubiquitous Process Concerns*, 15 ZEITSCHRIFT FÜR RECHTSZOLOGIE 24 (1994).

39. Sivasubramaniam et al., *supra* note 25.

40. Pamela K. Smith & Yaacov Trope, *You Focus on the Forest When You're in Charge of the Trees: Power Priming and Abstract Information Processing*, 90 J. PERSONALITY & SOC. PSYCHOL. 578 (2006).

41. Leung et al., *supra* note 34.

42. Heuer et al., *supra* note 13.

43. E.g., Francis J. Flynn & Joel Brockner, *It's Different to Give Than to Receive: Predictors of Givers' and Receivers' Reactions to Favor Exchange*, 88 J. APPLIED PSYCHOL. 1034 (2003); Gerald S. Leventhal et al., *Beyond Fairness: A Theory of Allocation Preferences*, in JUSTICE AND SOCIAL INTERACTION 167 (Gerold Mikula

ed., 1980); Robin I. Lissak & Blair H. Sheppard, *Beyond Fairness: The Criterion Problem in Research on Dispute Intervention*, 13 J. APPLIED SOC. PSYCHOL. 45 (1983); Blair H. Sheppard et al., *Procedural Justice from the Third-Party Perspective*, 54 J. PERSONALITY & SOC. PSYCHOL. 629 (1988); Tomas Ståhl et al., *On the Psychology of Procedural Justice: Reactions to Procedures of Ingroup vs. Outgroup Authorities*, 34 EUROPEAN J. SOC. PSYCHOL. 173 (2004).

44. E.g., Kees van den Bos et al., *Procedural and Distributive Justice: What Is Fair Depends More on What Comes First Than on What Comes Next*, 72 J. PERSONALITY & SOC. PSYCHOL. 95 (1997); Skitka, *supra* note 10; Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305 (2001).

# Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes

Brian H. Bornstein and Hannah Dietrich

Burke and Leben's<sup>1</sup> White Paper on procedural justice and what judges can do to enhance it in the courtroom is an important work for several reasons, two of which especially stand out. First, their paper illustrates how effectively laboratory-based social-science research (often referred to as *basic* research) and more naturalistic studies performed in real-world contexts (often referred to as *applied* research) can be combined in addressing public policy matters.<sup>2</sup> Second, it contains practical, feasible, and specific recommendations for improving courtroom practice based on that research. We believe that much goodwill come from Burke and Leben's calling judges' attention to issues of procedural fairness. The purpose of this commentary is not to dispute their claims regarding procedural justice, but rather to discuss the related concept of distributive justice and its implications for the courts.<sup>3</sup>

## THE MANY FLAVORS OF JUSTICE

At times it seems like the field of justice research resembles the ice cream market: Every vendor has an array of flavors, and no one can agree on how many flavors there are or ought to be. One encounters arguments for procedural justice, distributive justice, corrective justice, interactional justice, restorative justice, therapeutic justice, and retributive justice, among others.<sup>4</sup> They differ in terms of their antecedents, consequences, phenomenological characteristics, motives, and situations in which they arise; what they share is an emphasis on what is more or less fair in some aspect or arena of interpersonal relations. Amidst this mélange of flavors, the ones with the greatest staying power—to belabor the metaphor, the chocolate and

vanilla of the justice world—are procedural and distributive justice.

As Burke and Leben describe, procedural justice concerns whether the *processes* used to arrive at some outcome are fair, whereas distributive justice concerns whether the *outcome* itself is fair (i.e., the actual *distribution* of rewards, punishments, or some resource). Due to the groundbreaking work starting in the early 1980s by Tyler, Lind, Thibaut, Walker, and others, procedural concerns have acquired increasing importance in both scientific investigation and practical contexts (e.g., business, law enforcement)—and deservedly so.<sup>5</sup> An abundance of research has demonstrated that perceptions of procedural and distributive justice are distinct psychological constructs.<sup>6</sup> It is precisely because of this separation between them that individuals are more accepting of unfavorable outcomes when procedural fairness is high, and conversely, that they are relatively dissatisfied with favorable outcomes when procedural fairness is low. From these observations flow, quite logically, Burke and Leben's recommendations for enhancing procedural justice in the courtroom. The need to do so seems obvious, given the high frequency of unfavorable outcomes for someone involved: In civil disputes, at least one litigant (and potentially both) is going to leave unhappy; in criminal cases, convictions are necessarily unfavorable, and even acquittals and relatively lenient sentences can carry unpleasant consequences (e.g., the stigma of having been charged with and prosecuted for a crime).

Thus, there is no denying the importance of procedural fairness in the court system; yet the growing emphasis on proce-

## Footnotes

1. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (this issue), available at <http://aja.ncsc.dni.us/htdocs/AJWhitePaper9-26-07.pdf>.
2. See generally, Richard L. Wiener, *Law and Everyday Decision Making: Rational, Descriptive, and Normative Models*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 3, 3-32 (Richard L. Wiener et al. eds., 2007); Sean M. Lane & Christian A. Meissner, *A "Middle Road" Approach to Bridging the Basic-Applied Divide in Eyewitness Identification Research*, 22 APPLIED COGNITIVE PSYCHOL. 779 (2008).
3. The justice literature uses the terms "procedural justice" and "procedural fairness," likewise "distributive justice" and "distributive fairness," a practice we adopt in this article. As a matter of convention, the term "justice" more often refers to the abstract concept, whereas the term "fairness" more often refers to subjective perceptions, but we use the terms more or less interchangeably.
4. The literature is too vast to list all of the major representative works, and it is beyond the scope of the present article to attempt

5. A full taxonomy; for useful overviews, see BARBARA MELLERS & JONATHAN BARON, *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATION* (1993); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (1999); JOSEPH SANDERS & V. LEE HAMILTON, *HANDBOOK OF JUSTICE RESEARCH* (2001); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Alan J. Tomkins & Kimberly Applequist, *Constructs of Justice: Beyond Civil Litigation*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 163 (Brian H. Bornstein et al. eds., 2008).
6. The most influential early works, at least those arising from the psychological research tradition, are those by JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975), and E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1986).
7. See, e.g., Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. & SOC. PSYCHOL. 850 (1994).



dural justice can obscure the equally important issue of distributive justice. The concern with how best to allocate resources or outcomes has a long history, dating back at least as far as Aristotle,<sup>7</sup> and modern work on distributive justice—from both theoretical and experimental perspectives—continues unabated.<sup>8</sup> Without denying the benefits to be gained from improving procedural justice, one could even argue that concerns about distributive justice should be paramount. Questions about process are, in a sense, contingent on questions about outcome. Unless some outcome occurs, the procedures used to arrive at that outcome are moot.<sup>9</sup> Thus, we should not lose sight of what courts can do to enhance perceptions of distributive fairness, in addition to enhancing perceptions of procedural fairness.

### OUTCOME VERSUS PROCESS IN THE COURTS

The outcomes that occur to citizens from actions by the justice system can be, and often are, life altering: loss of liberty, life, or reputation; compelled or prohibited behaviors; transfer of substantial sums of money. One can construe these outcomes as a distribution of punishment and/or rewards to the affected parties. Courtroom procedures, for their part, are foreign and time-consuming at best, and terrifying at worst. In light of the high stakes, it would seem to be a “no-brainer” for judges and other court personnel to make the procedures as fair and “user-friendly” as possible, for litigants as well as other affected parties (e.g., witnesses, jurors).<sup>10</sup> Significantly, judges have more leeway in the procedures they use than in the outcomes they deliver, which are constrained by evidentiary guidelines, legal precedent, sentencing guidelines, and the spectre of appellate review, among other factors.

Perhaps because of these constraints, “judges focus on the fairness of case outcomes instead of the process.”<sup>11</sup> The problem here is not that judges focus on outcomes *more than* processes, but that they focus on outcomes largely *to the exclusion* of processes. A simple thought experiment illustrates the desirability of focusing on outcomes more than processes. Suppose that Defendant A and Defendant B have both been charged with first-degree murder, a crime that they did not commit. They are tried separately, in the same courtroom and with the same evidence. In Defendant A’s trial, he is not allowed to testify, the judge shows clear favoritism to the prosecutor, and court personnel treat A in a rude and condescending manner. Nonetheless, the jury acquits. In Defendant B’s

trial, he is allowed to address the court, the judge is scrupulously impartial, and court personnel are extremely solicitous and respectful. Nonetheless, the jury convicts. Clearly, the process in B’s trial is more fair, and anyone would prefer the B court’s procedures. But on the whole (taking distributive and procedural concerns together), which situation is better?

Would you rather be Defendant A or Defendant B? A’s situation seems better from a societal perspective, because the court reached the right outcome, albeit by suboptimal procedures. Moreover, most, if not all, people would choose to be Defendant A rather than Defendant B. In this situation, outcome trumps process.

Now suppose the hypothetical is the same, except that A and B did, in fact, commit the crime. What then? Again, most, if not all, people would choose to trade places with Defendant A, even though, from a societal perspective, a murderer has been set free. The manner of B’s trial might provide him some consolation, but it is likely to offer him only small comfort. Of course, in more ambiguous cases, outcome would not necessarily trump process; and as Burke and Leben describe, a fair process can go a long way toward softening a harsh outcome. Similarly, an unfair process can make a positive outcome less satisfying. But pushed to the extremes, outcome matters more than process.

### PRINCIPLES OF DISTRIBUTIVE JUSTICE

As mentioned above, judges’ allocation of outcomes is constrained by a variety of factors. Nonetheless, except where mandatory sentencing guidelines apply, criminal judges retain a fair degree of discretion, and civil judges also have considerable flexibility in fashioning a remedy, in terms of both the type of remedy (e.g., monetary vs. other restitution) and the amount. In allocating some resource, decision makers can rely on several different principles of distributive justice. When judges mete out punishment (in criminal cases) or redistribute money (in civil cases), it behooves them to be sensitive to the various principles that could be applied, and the different goals that those principles serve.

**The concern with how best to allocate resources or outcomes has a long history, dating back at least as far as Aristotle....**

7. See, e.g., MILLER, *supra* note 4; John T. Scott et al., *Just Deserts: An Experimental Study of Distributive Justice Norms*, 45 AMER. J. POL. SCI. 749, 750-51 (2001).

8. See, e.g., MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE* (1985); NORMAN FROHLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY* (1992); MELLERS & BARON, *supra* note 4; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Philip Michelbach et al., *Doing Rawls Justice: An Experimental Study of Income Distribution Norms*, 47 AMER. J. POL. SCI. 528 (2003); Scott et al., *supra* note 7.

9. In some circumstances, the failure to reach an outcome is the outcome. This happens, for example, when there is a hung jury, when

a law firm postpones a decision about making a junior associate a partner, or when a university places an applicant on a waiting list. Because these “non-decisions” nonetheless carry consequences for those involved (e.g., the defendant still can be retried, the associate still does not share in the firm’s profits, the applicant still does not have a university to attend), they function as unique outcomes and therefore do not change the analysis.

10. For a review of some of the procedural innovations that have been tried, especially with jurors, see Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 T. MARSHALL L. REV. 237 (2004).

11. Burke & Leben, *supra* note 1, at 14.

**It is clear from this brief overview that multiple distributive justice principles are relevant to both the criminal and civil justice systems.**

Theoretical and experimental research on distributive justice has identified a number of distinct principles that people rely on in making (or in expressing preferences for) allocation decisions. Different researchers use slightly different taxonomies, but the most commonly cited principles are equality, efficiency, need, and merit (also referred to as desert or proportionality).<sup>12</sup> *Equality* dictates that all affected parties

receive the same allocation. So, for example, all workers receive the same raise, all families on welfare receive the same amount of food stamps, and so forth. Strict mandatory sentencing is an example of the equality principle in criminal justice.<sup>13</sup> Perhaps the best example of equality in civil contexts is workers compensation, by which injured parties receive compensation according to a predetermined schedule. In such a system, the same injury is always worth the same amount, regardless of individual circumstances.<sup>14</sup>

Departures from equality reflect an adherence to other justice principles. For example, a concern with *efficiency* means that aggregate productivity can be increased by awarding some individuals more of a resource than others. It might make sense to award higher raises to more senior, more productive employees than to less productive ones, if doing so makes them still more productive, and the company as a whole benefits.<sup>15</sup> The goal of general deterrence in legal contexts can be explained in terms of efficiency. One can justify punishing some defendants—either criminally or civilly—more severely than others, for comparable actions, if doing so would make society as a whole function better in some way. For example, it might make sense to force a financially robust product manufacturer to pay more in damages for a defective product than a less solvent manufacturer, if requiring equal payment would force the less solvent company out of business, thereby losing other valuable products and services that it might provide.

Inequality can also be justified by a disparity in *need*. In the food stamp example given above, one could argue that a fam-

ily of eight should receive more aid than a family of four because the family of eight has greater needs.<sup>16</sup> Need plays an important role in the resolution of legal disputes, especially in civil cases. So, for example, if the sole breadwinner in the family of eight were incapacitated due to another's negligence, he or she would typically recover greater damages than the sole breadwinner in the family of four (all else being equal).

Finally, the distribution of resources can vary according to *merit*, in which some individuals *deserve* more/less than others. Multifarious factors contribute to merit, subsuming things that are both mostly innate (e.g., intelligence, beauty) and those that are largely acquired (e.g., wealth, prestige).<sup>17</sup> Importantly, there is also a strong behavioral component, in terms of how much the individual's own actions have helped generate particular outcomes. Merit-based distribution systems are widespread in capitalist societies;<sup>18</sup> consider, for example, that most businesses, especially in the private sector, determine salary based primarily on an employee's individual efforts, productivity, and success. Experimental research on distributive justice supports the centrality of concerns about merit, especially in terms of income distribution.<sup>19</sup> It is also a cardinal concern in both civil and criminal law, where it is often referred to as *proportionality*. Thus, a civil litigant's penalty/reward is often explicitly tied to his or her contribution to the outcome, as in applying comparative negligence or market share liability. Similarly, criminal punishment is tied closely to a defendant's culpability (i.e., desert), and a variety of aggravating or mitigating factors can raise or lower the punishment.

It is clear from this brief overview that multiple distributive justice principles are relevant to both the criminal and civil justice systems. The choice is not simply between one or another principle, as multiple principles can, and do, apply simultaneously. Research on allocation preferences has shown that individuals take a pluralistic approach and rely on multiple principles in a "complex yet structured" manner.<sup>20</sup>

Although these principles lurk beneath the surface of judicial decision making, they are rarely explicit. A rare instance where a judge-like arbiter did explicitly consider which distributive norms were most appropriate occurred in the September 11th Victim Compensation Fund, administered by Special Master Kenneth Feinberg.<sup>21</sup> The statute that enabled the Fund<sup>22</sup> required a calculation of each claimant's presumed

12. See, e.g., Scott et al., *supra* note 7, at 524-25; see generally MILLER, *supra* note 4; RAWLS, *supra* note 8.

13. In practice, most "mandatory" sentencing guidelines provide at least a little wiggle room by setting a range of allowable sentences rather than specifying a precise, invariant sentence. These ranges allow for the influence of other principles, such as need or merit, in conjunction with a rough sense of equality.

14. Though even here, departures from equality may be justified by other factors, such as the injured person's age, showing again the influence of the other justice principles.

15. This would especially be true in an employee-owned company, where less productive employees share directly in their coworkers' increased productivity.

16. In ordinary discourse, people are often tempted to say that the family of eight deserves more, but that conflates the principle of need with the principle of merit, or desert (discussed *infra*). For

present purposes, the family of eight has done nothing to make themselves more "deserving," beyond having produced more mouths in need of feeding.

17. See generally RAWLS, *supra* note 8, at 73-74.

18. Justice preferences can be quite different in non-capitalist societies; see, e.g., Duane F. Alwin et al., *Comparative Referential Structures, System Legitimacy, and Justice Sentiments: An International Comparison*, in SOCIAL JUSTICE AND POLITICAL CHANGE 109 (James R. Kluegel et al. eds., 1995).

19. E.g., Michelbach et al., *supra* note 8, Gregory Mitchell et al., *Judgments of Social Justice: Compromises between Equality and Efficiency*, 65 J. PERS. & SOC. PSYCH. 629 (1993); Scott et al., *supra* note 7.

20. Scott et al., *supra* note 7, at 764; see also FROHLICH & OPPENHEIMER, *supra* note 8; MILLER, *supra* note 4; Michelbach et al., *supra* note 8; Mitchell et al., *supra* note 19.

economic loss based on a variety of factors (e.g., age, income), thereby relying primarily on principles of efficiency and merit. However, Feinberg implemented an equality norm for non-economic loss, awarding \$250,000 per victim and \$100,000 per spouse and dependent child. Many claimants, and Special Master Feinberg himself, thought the Fund should have adhered to a principle of equality for all compensation.<sup>23</sup> As we discuss below, an awareness of these principles can inform judicial performance.

Most experimental research has focused on the distribution (or redistribution) of desirable resources (i.e., *goods*) rather than the distribution of undesirable commodities, or *bads*. In the context of the justice system, civil cases are concerned mainly with the redistribution of a good (money), while criminal cases are concerned mainly with the distribution of a bad (punishment). This is an important distinction, as several theorists have argued that different distributive norms should predominate in allocating different types of goods or in allocating the same good in different contexts.<sup>24</sup> For example, Elster contends that the principle of need should be central in allocating organs for transplantation, whereas merit should prevail in admitting students to college.<sup>25</sup> Thus, the same principles might reasonably not apply in civil versus criminal cases, or even for different types of cases within each system (e.g., crimes against persons vs. crimes against property).

#### INDIVIDUAL DIFFERENCES IN PERCEPTIONS OF DISTRIBUTIVE FAIRNESS

The experimental literature on distributive justice shows that people's preferences differ depending on a number of demographic characteristics, such as race/ethnicity, gender, nationality, and socioeconomic status.<sup>26</sup> As suggested by Burke and Leben, minorities differ in their approval ratings of the court system.<sup>27</sup> These perceptions are based not only on the way in which minority group members are treated by the jus-

tice system, but also the probability of an unfair outcome. The threat of "worse results" is most prominent for African-Americans, who account for almost half of the incarcerated population and represent 41% percent of the population on death row.<sup>28</sup> In general, African-American citizens have lower opinions of the criminal justice system and are less confident than others in the neutrality and legitimacy of the courts.<sup>29</sup>

**The experimental literature on distributive justice shows that people's preferences differ depending on a number of demographic characteristics....**

In a study by Miller and colleagues, the researchers found that black and white men and women differed in their recommended criminal sanctions for convicted offenders.<sup>30</sup> Whereas blacks tended to ascribe to a justice philosophy that considered the individual offender, whites were more likely to employ a justice philosophy that focused on meting out punishment that was proportionate in severity to crime seriousness. In other words, whites' judgments were more centered on characteristics of the offense (i.e., the seriousness of the crime), whereas blacks' judgments were more centered on the social characteristics of the offender. Research on justice preferences in non-legal contexts has similarly found that individuals of different races favor different justice principles. Specifically, minorities are more skeptical than whites about the relationship between merit and outcomes, and they are correspondingly less sensitive to variations in merit.<sup>31</sup>

One's perceptions of distributive justice outcomes will also vary as a function of socioeconomic status, which is correlated with race in the U.S. As blacks are considered, on average, to be closer to crime than whites (i.e., more likely to be victim-

21. The Fund has generated considerable commentary, much of it written from a social justice perspective. The following sources are especially helpful: LLOYD DIXON & RACHEL K. STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS (RAND Corp. 2004); KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) [hereinafter WHAT IS LIFE WORTH]; KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf); *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003) (special issue on the Fund).

22. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 49 U.S.C. § 40101 (2001).

23. FEINBERG, WHAT IS LIFE WORTH, *supra* note 21, at 177-88 (on Feinberg's evaluation of the Fund); Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 94 (2007) (on claimants' perceptions).

24. See, e.g., JON ELSTER, LOCAL JUSTICE (1992); MILLER, *supra* note 4; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Jon Elster, *Justice and the Allocation of Scarce Resources*, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND

APPLICATIONS 259, 259-278 (Barbara A. Mellers & Jonathan Baron eds., 1993).

25. Elster, *Justice and Allocation*, *supra* note 24, at 259.

26. See generally Michelbach et al., *supra* note 8; Scott et al., *supra* note 7; Peter B. Wood & David C. May, *Racial Differences in Perceptions of the Severity of Sanctions: A Comparison of Prison with Alternatives*, 20 JUST. Q. 605 (2003).

27. See, e.g., David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24 (1999); DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY: FINAL REPORT (National Center for State Courts, 2003).

28. Wood & May, *supra* note 26, at 605-606.

29. M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL IN DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), available at [http://courtinnovation.org/uploads/documents/Procedural\\_Fairness.pdf](http://courtinnovation.org/uploads/documents/Procedural_Fairness.pdf).

30. John L. Miller, Peter H. Rossi & Jon E. Simpson, *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 L. & SOC'Y REV. 313 (1986).

31. Michelbach et al., *supra* note 8 at 530, 536.

**[W]e highlight the importance of distributive justice with the goal of raising awareness of the factors that can influence perceived outcome fairness.**

ized, arrested, and incarcerated), one's proximity to the criminal justice system clearly influences an individual's view of appropriate penal sanction.<sup>32</sup> Research shows a difference in the fairness of outcome ratings between whites and affluent blacks<sup>33</sup> and also between whites and low-income blacks.<sup>34</sup> As one might conclude, race and socioeconomic status are intimately tied and pose a "double threat"

for minority offenders.

Race is not the only demographic variable that influences attitudes toward the criminal justice system. Men and women have also been found to vary in their views toward crime and correctional policies.<sup>35</sup> Whereas men are more likely to support capital punishment as a means for corrective action, women tend to focus more on the individual and show greater support for rehabilitative efforts for criminal offenders. Both agree that the government should punish and hold convicted criminals accountable, but women favor a standard of care that provides assistance to meet the needs of offenders, suggesting that their goals in distributing penalties are different from men's.<sup>36</sup>

This attitudinal difference between men and women in recommendations for legal outcomes is also prominent in other domains. For example, Sweeney and McFarlin found gender differences in men's and women's reliance on distributive or procedural justice in expressing job satisfaction.<sup>37</sup> For women, fair processes were more important in their job satisfaction evaluations, lending to a procedural justice philosophy. Satisfaction for men, however, was more outcome-oriented and therefore based more on an assessment of distributive fairness.<sup>38</sup> Women show a stronger preference for equality than men, and they are also more sensitive to variations in merit and

need.<sup>39</sup> Scott and colleagues speculate that women's greater sensitivity to factors such as merit and need might reflect more general gender differences in moral reasoning, in particular a greater sensitivity among women to contextual features.<sup>40</sup> There is reason to suppose that gender differences in distributive justice may be applied to other contexts, such as legal dispute resolution.

Overall, these findings on individual differences suggest two things. First, litigants will have different expectations and preferences about what sorts of outcomes are most fair, depending on their demographic characteristics. Although there are criminal and civil codes, sentencing practices, and informal norms that serve to ensure fair treatment under the law, one person's notion of what is fair is not necessarily the same as another's. Second, judges who come from different backgrounds will have a different sense of what constitutes a fair and just outcome.

## RECOMMENDATIONS AND CONCLUSIONS

Burke and Leben conclude their article by offering a number of recommendations for change. Specifically, they ask: "What can an individual judge, individual court, court administrators, researchers, judicial educators, and court leaders do to enhance procedural fairness?" We have no quarrel with their recommendations, the vast majority of which are reasonable, feasible, inexpensive, and likely to accomplish their desired aim. We do not make analogous recommendations for what judges and courts can do to enhance distributive fairness;<sup>41</sup> rather, in this concluding section we highlight the importance of distributive justice with the goal of raising awareness of the factors that can influence perceived outcome fairness.

A hallmark characteristic of both the criminal and civil justice systems is that only one side wins; and often both sides walk away disappointed.<sup>42</sup> Criminal convictions are "wins" for the prosecution (and are touted as such in election campaigns) and "losses" for defendants; whereas most civil cases are essentially zero-sum games, with one party's losses mirroring the opposing party's gains. Thus, there would seem to be little

32. Miller et al., *supra* note 30, at 316.

33. John Hagan & Celesta Albonetti, *Race, Class, and the Perceptions of Criminal Justice in America*, 88 AM. J. SOCIOLOGY 329 (1982).

34. Martha L. Henderson et al., *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. CRIM. JUST. 447 (1997).

35. Brandon K. Applegate, Francis T. Cullen & Bonnie S. Fisher, *Public Views Toward Crime and Correctional Policies: Is There a Gender Gap?* 30 J. CRIM. JUST. 89 (2002).

36. *Id.* at 98.

37. Paul D. Sweeney & Dean B. McFarlin, *Process and Outcome: Gender Differences in the Assessment of Justice*, 18 J. ORGANIZATIONAL BEHAVIOR 84 (1997).

38. *Id.* at 92.

39. Michelbach et al, *supra* note 8, at 536 (finding women are more egalitarian and more sensitive to need); Scott et al., *supra* note 7, at 763-64 (finding women are more egalitarian and more sensitive to merit).

40. E.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

41. Doing so would entail a normative discussion of the principles that the civil and criminal justice systems should adhere to in

resolving disputes, and such philosophical discursions would take us too far afield from our more modest aim of describing the importance of distributive justice for the courts.

42. It is theoretically possible for both sides to leave the process satisfied with the outcome. In a criminal case, for example, the prosecution and the defendant might both be satisfied with conviction on a lesser charge, as opposed to either conviction on the most serious charge (best outcome from the prosecution's perspective) or an acquittal (best outcome from the defendant's perspective). Similarly, a civil plaintiff and defendant might both be pleased that the award was not more (from the defendant's perspective) or less (from the plaintiff's perspective) than it might have been otherwise. However, such "win-win" situations rarely, if ever, happen. More often, both sides would experience disappointment from these sorts of compromise outcomes. See Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J., 420 (1982); Val Reid, *Small Claims, Big Questions*, LEGAL ACTION, March 2007, at 11, 11-12, available at <http://www.asauk.org.uk/fileLibrary/pdf/smclmsbq.pdf>.

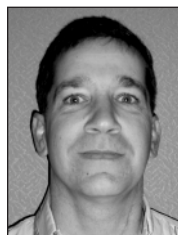


doubt that aspirations for, and satisfaction with, particular outcomes reign supreme in litigants' minds. Distributive justice might not be litigants' favorite justice flavor, but it is the flavor they care about the most. It is therefore the flavor that judges should care about the most as well.

Procedures of the utmost fairness do not necessarily mean that litigants will readily accept a court's outcome or decision. Hence it is important for legal advisors, professionals, and judges to be willing to explain outcomes and to express a willingness to answer litigants' questions, particularly if an outcome is undesirable or unexpected. As mentioned in the individual differences section, *supra*, it is important further for legal professionals to recognize that litigants are not cookie-cutter replicas. What makes people different will also influence how they approach, interpret, and understand the law. This will help to ensure that litigants have a better understanding of their outcomes and why those particular outcomes were reached, which would potentially lead to greater satisfaction with the justice system and fewer appeals.

Burke and Leben also emphasize the importance of social science research in helping legal professionals understand how the general population interprets fairness in the legal system. We support this proposition with respect to distributive, as well as procedural fairness. We similarly recommend that legal professionals not only educate themselves by becoming familiar with the existing literature, but also support ongoing research. There are two ways in which judges can facilitate this goal. First, they can allow researchers to survey litigants about their perception of legal outcomes as well as legal procedures. Second, they can serve as research participants themselves. Social scientists who conduct research on the legal system know much less about how judges make decisions than they do about how juries (and especially individual jurors) make decisions. This state of affairs exists for a number of reasons, but primarily because compared to the average juror (or mock juror), judges are fewer, busier, harder to obtain access to, and less swayed by offers of token compensation for participating in research studies.

As fact finders, judges and juries are similar in many respects, yet they differ in subtle ways as well.<sup>43</sup> Judges differ from jurors in terms of their training, background, legal knowledge, and experience with similar cases; evidentiary rules also mean that judges might make decisions on slightly different constellations of facts than juries. Moreover, precisely because of their experience and training, judges are much more likely than jurors to have reflected on the nature of their task and to have formulated principles to which they adhere in adjudicating the cases before them. Interviews with judges, as well as judge-jury comparisons, could shed a great deal of light on the justice principles that legal fact finders rely on in determining trial outcomes. Reflection by judges on the principles and goals that they use, often unconsciously, in reaching verdicts would produce a more thoughtful and better informed judiciary.



*Brian H. Bornstein, Ph.D. (University of Pennsylvania), M.L.S. (University of Nebraska), is professor of psychology and courtesy professor of law at the University of Nebraska-Lincoln, where he is associate director of the Law-Psychology Program. His main research interests are jury decision making, eyewitness testimony, and perceptions of justice. He can be reached at [bbornstein2@unl.edu](mailto:bbornstein2@unl.edu).*



*Hannah Dietrich (M.A.) is a doctoral student at the University of Nebraska—Lincoln in the joint Social Psychology PhD and Master of Legal Studies program. She can be reached at [hl.dietrich@gmail.com](mailto:hl.dietrich@gmail.com).*

43. See, e.g., Brian H. Bornstein, *Judges vs. Juries*, 43 CT. REV. 56 (2006).



# Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence

David B. Wexler

Judges Kevin Burke and Steve Leben, in *Procedural Fairness: A Key Ingredient in Public Satisfaction*,<sup>1</sup> have produced a most impressive White Paper. It is handy, brief, crisp, readable, and immensely practical.

The document draws on, and makes most accessible, the research on procedural justice, demonstrating convincingly the importance of judges understanding and implementing in their courtrooms concepts such as “voice” and “respect.” Judges Burke and Leben claim procedural justice to be “the” critical element in public trust and confidence regarding the court system. They note, too, the role procedural fairness likely plays in increased compliance with court orders and even in reduced recidivism.

The latter contention—regarding compliance and reduced recidivism—is an area where the literature of procedural justice spills over substantially into the related and indeed overlapping area of therapeutic jurisprudence (TJ). The present essay argues that therapeutic jurisprudence is “the” critical element in how courts can reduce re-offending,<sup>2</sup> and urges that judges should similarly familiarize themselves with that area, a process that, like the introduction to procedural fairness, can also begin by judges perusing a few key sources and websites.<sup>3</sup>

In fact, there is a perfect single-source TJ counterpart to, and companion for, the procedural fairness White Paper. In the beginning of their White Paper, Judges Burke and Leben note that the American Judges Association has about 150 members in Canada and that “although we make no recommendations regarding the courts of Canada, we believe that the baseline social-science research upon which this paper is based would also be applicable there, given the similarities between the legal systems of these two countries.”<sup>4</sup> As it turns out, the TJ companion to which I am referring is a handy, brief (about 50 pages), crisp, readable and immensely practical judicial manual, available online,<sup>5</sup> produced in 2005 by the National

Judicial Institute of Canada (and spearheaded by Justice Paul Bentley of the Toronto Drug Treatment Court), and titled *Judging for the 21st Century: A Problem-Solving Approach*.<sup>6</sup>

## THERAPEUTIC JURISPRUDENCE

TJ’s view of the law as a potential therapeutic agent—and of law as one of the helping/healing professions—leads it to search for promising developments in the behavioral sciences and to think creatively about how those developments might be imported into the legal system without offending due process and related justice goals. Accordingly, TJ has profitably employed insights regarding relapse prevention planning, health care compliance, and the reinforcing of law-abiding behavior.<sup>7</sup>

Naturally, procedural justice has been high on TJ’s list of highly pertinent branches of social-science inquiry. This is no wonder, given the relationship and close connection between procedural fairness and therapeutic consequences.

In the area of civil commitment, for example, procedural fairness at a commitment hearing is likely to increase a respondent’s acceptance of a judicial order of commitment as well as a patient’s cooperativeness with treatment professionals and with the taking of recommended medications.<sup>8</sup> In the criminal law context, procedural fairness factors also affect an offender’s readiness for rehabilitation, and unfairness may indeed lead to a “defiance” effect and increased offending.<sup>9</sup>

## A. BEYOND PROCEDURAL FAIRNESS

In criminal law matters, therefore, TJ often draws heavily on the psychology of procedural justice. But it then typically draws on some other psychological principles to maximize the rehabilitative clout of a recommendation. TJ work on enhancing compliance with probation conditions is illustrative. The TJ literature draws on procedural fairness principles in recommending giving an offender voice in the appropriateness of

## Footnotes

1. 44 CT. REV. 4 (this issue).
2. David B. Wexler, *Robes and Rehabilitation: How Courts Can Help Offenders “Make Good,”* 38 CT. REV. 18 (2001).
3. *Id.* See generally NAT’L JUDICIAL INST., *JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH* (2005), available at <http://www.nji.ca/nji/Public/documents/Judgingfor21stCenturyDe.pdf> (written for the National Judicial Institute of Canada by Susan Goldberg); *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003); *REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* (David B. Wexler ed., 2008). The principal website is that of the

International Network on Therapeutic Jurisprudence at (<http://www.therapeuticjurisprudence.org/>). The Australian Institute of Judicial Administration has recently created an excellent Australasian Therapeutic Jurisprudence Clearinghouse for that part of the world ([http://www.ajja.org.au/index.php?option=com\\_content&task=view&id=206&Itemid=103](http://www.ajja.org.au/index.php?option=com_content&task=view&id=206&Itemid=103)).

4. Burke & Leben, *supra* note 1, at 5.
5. See *supra* note 3.
6. See Wexler, *supra* note 2.
7. See *supra* note 3.
8. E.g., *JUDGING IN A THERAPEUTIC KEY*, *supra* note 3, at 131.
9. *REHABILITATING LAWYERS*, *supra* note 3, at 171.

proposed conditions, in the judge clearly explaining to the offender the terms of release, in conceptualizing probation as a type of bilateral behavioral contract rather than a unilateral judicial fiat.<sup>10</sup>

But the TJ recommendation of having agreed-upon family members present at the hearing who are aware of the release conditions is drawn from an important psychological compliance principle that transcends the area of procedural justice.<sup>11</sup> So is the recommendation that compliance is enhanced if the offender is asked to respond to mild counterarguments about the likelihood of his or her compliance.<sup>12</sup> And so too is the relapse prevention planning recommendation that the offender be asked to think about the chain-of-events that led to past offending behavior, to ascertain situations that put the offender at high-risk, and to suggest how such high-risk situations can best be avoided in the future.<sup>13</sup>

The point, of course, is that procedural fairness takes us a good distance—especially regarding public perception and satisfaction with the court system—but it needs to be combined with TJ if judges are to realize their potential in enhancing compliance and reducing re-offending. The Canadian TJ judicial manual does all this and more.

## B. THE CANADIAN TJ MANUAL AND MORE

In fact, the Canadian manual even adds some meat to the bones of the very core topics of the White Paper. For example, regarding respectful behavior, the TJ manual suggests that judges “refer to defendants as ‘sir’ or ma’am, or by title and name (e.g., Mr. Smith; Ms. Jones), rather than by first name, the word ‘defendant’, or by case number.”<sup>14</sup> And, in a recommendation clearly relevant to the White Paper’s concern regarding minority groups and non-native English speakers, the TJ manual urges judges to “pronounce names correctly; when in doubt, ask court participants for guidance in pronouncing names.”<sup>15</sup>

In discussing needed research, the White Paper notes that “while there is a lot of research at the trial-court level on the issue of procedural fairness, there is little research about how the concept applies at the appellate level. This could be an important area for additional thought and research.”<sup>16</sup>

Additional thought and research is indeed needed, but TJ has already made some substantial strides in the appellate arena, including an entire special issue of the *Seattle University Law Review* dedicated to it.<sup>17</sup> The Canadian TJ manual also devotes some space to the matter, including a suggestion about the importance of appellate courts in their opinions “providing the appellant with the assurance that his or her story was heard and the salient facts considered by the court.”<sup>18</sup> And other TJ

writing even takes appellate opinion writing to the level of recommendations for continuing judicial education. Drawing on the implications of Nathalie Des Rosiers’s important 2000 article in *Court Review*,<sup>19</sup> I once noted that one of her TJ proposals is for opinion writing to take the form of a “letter to the loser,” and

if past opinions are read through this prism, we are likely to find admirable, abominable, and average illustrations. It may be useful to collect, clarify, and use these illustrations in educational programs for judges, lawyers, and law students.<sup>20</sup>

There is also TJ writing regarding the relationship between sensitively written appellate opinions and the tricky and nuanced issue of how a defense lawyer might go about explaining an appellate affirmance to a client—and in a way that shows the client that the lawyer was indeed a vigorous advocate but that the unsuccessful client has been provided by the court with voice and validation.<sup>21</sup>

## C. CRAFTING STATEMENTS OF REASONS IN SENTENCING

Mostly, of course, both procedural fairness and TJ in the criminal context will involve trial-level rather than appellate pronouncements and explorations. Not surprisingly, therefore, there is also TJ work speaking to the drafting of statements of reason in the sentencing sphere, and the role of counsel in explaining those decisions and reasons.<sup>22</sup> Even when imposing incarcerative penalties, judges have been urged to condemn the act rather than the actor and to search for and comment on any offender strengths that might be used as building blocks in shaping a future with hope.<sup>23</sup> Training of judges in the drafting of statements of reasons may be especially relevant in jurisdictions—like some federal circuits<sup>24</sup>—where courts are required to address directly defense sentencing arguments. How rejected defense arguments are responded to can, in TJ terms, be either helpful or devastating to defendants and their responsiveness to rehabilitative efforts. If courts follow the traditional approach of showing why the government should surely win, why the defense arguments are stretches—in other words, if they write such opinions as congratulatory “letters to the winner”—the practical results could be quite negative. But if they follow the Des Rosiers advice of crafting a sensitive “letter to the loser” (but always remaining

**TJ has already made some substantial strides in the appellate arena...**

10. *Id.* at 31.

11. *Id.*

12. *Id.*

13. *Id.*

14. JUDGING FOR THE 21ST CENTURY, *supra* note 3, at 11.

15. *Id.*

16. Burke & Leben, *supra* note 1, at 20.

17. 24 SEATTLE U. L. REV. 217 (2000).

18. JUDGING FOR THE 21ST CENTURY, *supra* note 3, at 7.

19. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Roles of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54 (2000).

20. JUDGING IN A THERAPEUTIC KEY, *supra* note 3, at 315.

21. REHABILITATING LAWYERS, *supra* note 3, at 39-40.

22. *Id.* at 172-73 and 178-79

23. *Id.* at 172-73. See also Wexler, *supra* note 1.

24. U.S. v. Thomas, 498 F.3d 336 (6th Cir. 2007) (interpreting reasonableness review test of *Rita v. U.S.*, 127 S. Ct. 2456 (2007)).

**The public will not and should not regard the court system with satisfaction and perceived fairness unless the incarcerative crisis is tackled and the rehabilitative challenge is met.**

mindful of the victim), the stage may be set for a more positive long-term outcome.

#### **D. VOICE NOT AFFECTING THE LITIGANT'S CASE**

TJ, then, can roost very well with procedural fairness. Consider one final issue from the *White Paper*. Judges Burke and Leben note the well-established but curious finding that litigants feel good about having voice even in a post-decision context, where their voice cannot in any way influence

the decision. Still, in policy terms, the authors agreed, for ethical reasons, that “litigants should not be granted an arbitrary voice in the courtroom merely to pacify this need to speak and participate.”<sup>25</sup>

But TJ has tackled a similar problem in the context of victim participation in the criminal process. A victim often participates by preparing a Victim Impact Statement. But a recent TJ suggestion proposes also a *Legal System* Victim Impact Statement (LSVIS), where a victim after-the-fact discusses the process from the time of victimization until after the trial: treatment by the police, treatment during trial, etc.

Of course, a LSVIS cannot have any impact in the victim's case itself. But its preparation can satisfy a victim's need for voice and the statement can, with proper distribution/dissemination, be useful in improving the system for *future* cases. So long as the victim is fully aware that the statement solicited can have no impact on his or her own case, the ethical issue evaporates, the need for voice is satisfied, and the system can perhaps be improved for future cases and for the treatment of future victims.<sup>26</sup>

#### **CONCLUSION**

In recent years, TJ has “partnered” with related approaches, such as preventive law and with problem-solving courts, especially drug treatment courts. In the case of preventive law, TJ gave preventive law an ethic of care and a rich interdisciplinary approach, and preventive law gave TJ practical office procedures, such as the “legal checkup,” whereby lawyers could work with clients to apply the relevant law therapeutically.<sup>27</sup> In the case of drug treatment courts, those courts offered TJ actual laboratories with practical procedures to examine through a TJ lens, and TJ offered drug treatment courts a number of principles or “instrumental prescriptions” that may enhance their functioning.<sup>28</sup>

In the case of procedural justice, TJ has long looked to the

procedural fairness literature to improve the therapeutic functioning of the law. Now, procedural fairness should look to TJ and develop a relationship that is a truly two-way street.

The need for a robust reciprocal relationship is actually an urgent one. One need only consider the chilling statistics of the recently released Pew Report,<sup>29</sup> showing 1 in 100 U.S. adults (and numbers much, much higher for persons of color) behind bars, placing the U.S. in first place worldwide in incarcerating its population, to know we are in desperate need of all sensible solutions. We might expect the federal criminal justice system to offer some leadership. But consider Judge Merritt's lament in his recent dissent in the Sixth Circuit case of *U.S. v. Jeross*:

This is another drug case in which our system of criminal law has imprisoned for many years two more lives and torn up two more families by grossly excessive sentences imposed in the “War on Drugs.” There are many reasons that our federal system of punishment has turned in this direction, not the least of which is the advent during the last 20 years of our irrational set of sentencing guidelines that judges apply by rote on a daily basis. We are constantly adding new prisoners like these defendants with long periods of incarceration to the more than two million men and women now incarcerated in the hundreds of prisons and jails around the country. These sentencing guidelines hold that mitigating factors like family ties, mental illness, education, and the likelihood of rehabilitation are simply “not relevant” in the sentencing process. Judges' minds are closed down and sentences ratcheted up by applying convoluted conversion formulas like the one just recited in the majority opinion. The recent Blakely-Booker-Cunningham line of Supreme Court cases has given judges an opportunity to rid the system of some of the worst aspects of guidelines, but we judges soldier on by applying the old mandatory system as though nothing of significance had happened. The cost to the taxpayers and in human lives has become enormous and shows no signs of change.<sup>30</sup>

For all we know, the defendants in *Jeross* may have received all the procedural fairness called for in the *White Paper*. But there comes a time—and we now seem to be well past it—where outcome is as important as process. The public will not and should not regard the court system with satisfaction and perceived fairness unless the incarcerative crisis is tackled and the rehabilitative challenge is met. Of course, this is everyone's business, not just the courts'. But for the courts to play their

25. Burke & Leben, *supra* note 1, at 12.

26. REHABILITATING LAWYERS, *supra* note 3 at 325.

27. PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis Stolle et al. eds. 2000).

28. JUDGING IN A THERAPEUTIC KEY, *supra* note 3.

29. PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, available at <http://www.pewcenteronthestates.org/uploaded/Files/One%20in%20100.pdf>.

30. *U.S. v. Jeross*, No. 06-2257 (6th Cir. April 4, 2008) (Merritt, J., dissenting).

role optimally, procedural fairness literacy shall be joined with TJ literacy, the Canadian TJ manual should be distributed along with the White Paper, and judges should strive to change the legal culture in their courts and among the lawyers practicing there.<sup>31</sup>



David B. Wexler is professor of law and director, International Network on Therapeutic Jurisprudence (INTJ), University of Puerto Rico; Distinguished Research Professor of Law and professor of psychology, University of Arizona. He has received a Distinguished Service Award from the National Center for State Courts. His latest book is *REHABILITATING LAWYERS:*

*PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* (Carolina Academic Press 2008). The INTJ website ([www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org)) is a major resource with a comprehensive bibliography. He may be contacted at [davidBwexler@yahoo.com](mailto:davidBwexler@yahoo.com).

31. For how courts might set standards of expected lawyering, see Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT. REP. 76 (2002) (setting out Judge Marcus's views on sentencing, and instructing attorneys on how to argue sentencing matters before him).





# The Resource Page



## AN ONLINE COURSE: OPINION WRITING IN CONTROVERSIAL CASES

<http://www.ncsconline.org/opinionwriting/>

One of the keys to procedural fairness is making sure that a judge's order is understood and the reasons for the decision are understood too. This can be especially difficult in a controversial case in which emotions are running high and understanding may run low.

The National Center for State Courts, working with the Missouri Judiciary, has prepared an online course on "Opinion Writing in Controversial Cases." We all know that trial judges can face high-profile cases that suddenly appear on the docket and explode into the public's interest. The United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding use of eminent-domain powers for economic development) showed that this is true at the appellate level as well. There actually was a short-term drop in public opinion of the Court after the *Kelo* decision.

This online course discusses *Kelo* as well as more typical cases. The first part of the course is a video discussion between Missouri Chief Justice Laura Stith and Missouri Court of Appeals Judge Ronald Holliger on the changing context in which judicial opinions are being reported in the media, in which judicial opinions feed into economic, political, and social controversies. The second part of the course is a one-hour video lecture from Professor Nancy Wanderer, a law professor at the University of Maine. She presents an approach for writing opinions and orders in controversial, high-profile cases. The third part of the course is a web-based seminar led by Professor Wanderer and retired Washington Superior Court Judge Robert H. Alsdorf; they build on Professor Wanderer's lecture and lead

participants through an interactive critique of judicial opinions in selected cases, including *Kelo*. The final part of the course gives participants an opportunity to practice some of the techniques and even to receive faculty feedback on submitted opinion-writing samples.

There are lots of online materials included with the course, along with the video discussions and lectures, the interactive seminar, and the practice exercises.

## CALIFORNIA COURTS WEBSITE ON PROCEDURAL FAIRNESS

<http://www.courtinfo.ca.gov/programs/profair/>

In September 2007, when the American Judges Association unveiled its White Paper on procedural fairness, the California court system simultaneously launched its own procedural-fairness initiative. The AJA and the California courts have shared our work, and we're pleased to note that the California courts have a permanent website devoted to tracking their initiatives in this area and resources that may be helpful to all interested judges.

Douglas Denton's article in this issue (page 44) discusses the work already underway in California. The effort there is ambitious, creative, and ongoing. Denton described the California court system as "one of the most innovative" in the United States; we agree. And certainly no court system is more involved at present in efforts to improve procedural fairness—and the public's perception of fairness—than the California court system is.

California has prepared tools that can be used in judicial workshops, such as the template found on page 50. AJA presenters have used that template in workshops in other states. We suggest you check the California website on procedural fairness periodically to find new resources and updated information on this topic.

## RESOURCES ON PROBLEM-SOLVING JUSTICE

### National Center for State Courts

<http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=ProSol>

### Center for Court Innovation

<http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=505&documentTopicID=31>

### National Judicial Institute (of Canada)

<http://www.nji.ca/nji/Public/documents/Judgingfor21stCenturyDe.pdf>

### International Network on Therapeutic Jurisprudence

<http://www.therapeuticjurisprudence.org>

Whatever difference there may be between what some call problem-solving justice and what others call therapeutic jurisprudence, there is sufficient overlap between those concepts and procedural fairness that anyone interested in any of those topics will find in the websites we list here of interest. The National Center for State Courts has extensive Web-based resources on problem-solving justice, including the Problem-Solving Justice toolkit, an interactive resource for finding solutions to problems your court may face. New York's Center for Court Innovation also has a useful website, full of links, fact sheets, and self-assessment tools.

Professor David Wexler points to two other resources in his article in this issue (page 74). One is a site he updates called the International Network on Therapeutic Jurisprudence. The other is from the National Judicial Institute of Canada: a 61-page monograph titled *Judging for the 21st Century: A Problem-Solving Approach*. This monograph combines much of Professor Wexler's therapeutic jurisprudence material with a discussion of ways in which a judge may improve his or her skills in procedural fairness in areas such as empathy, respect, active listening, positive focus, clarity, avoiding coercion, and avoiding paternalism.