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# 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."[1] 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.[2] 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

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**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.**

Most 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.[3] This discovery has been called "counterintuitive"[4] and even "wrong-headed,"[5] 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://courtinnovation.org/_uploads/documents/ Procedural_Fairness.pdf.
5. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22 (2006) [hereinafter WHY PEOPLE OBEY].

nomenon exists.[6] 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."[7] People value fair procedures because they are perceived to "produce fair outcomes."[8]

Psychology professor Tom Tyler, a leading researcher in this area, suggests that there are four basic expectations[9] 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.[10]

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."[11] 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 Greenburg, *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

Procedural fairness reduces recidivism because fair procedures cultivate the impression that authorities are both legitimate and moral.[12] 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."[13] 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."[14] 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"[15] 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,"[16] 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."[17] Batterers are even less likely to violate an order for protection if they feel that their cases were handled in a fair manner.[18]

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."[19] 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."[20]

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.
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.**

The 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,[21] but public confidence in the judicial branch is still quite low when it is compared with many other institutions.[22]

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."[23] 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."[24] 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."[25] 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.[26] 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.[27] After two years in operation, the public's positive perception of the local court system in Red Hook increased to an impressive 78%.[28]

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.
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.
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.**

People 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. [29] After jury duty ends, approximately 55% of jurors reported being "somewhat more" or "much more" confident in the court system.[30] But direct experience does not always lead to an increase in approval, especially in high-volume courts like family or traffic court.[31] 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.[32]

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.[33] 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.[34] 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."[35] 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.[36]

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.[37] 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,[38] 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.[39] 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,"[40] 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 & POL'Y 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.[41]

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.[42]

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

The 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.[43] 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.[44] And nonverbal communication is the main means for expressing or experiencing emotion.[45]

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."[46] 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)."[47]

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.[48] 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."[49]

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.[50]

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.[51] 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.**

While 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."[52] Attorneys may perceive procedures to be fairer because that is not as much of a critical point of attention for them,[53]

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.[54]

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.[55] 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.[56]

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,"[57] 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.[58] 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.[59]

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.[60] 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."[61] 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.[62] 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"[63] 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.[64]

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.[65] Procedural fairness is the primary factor that shapes perceptions of the judicial system.[66] 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."[67] 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." [68]

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.

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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.

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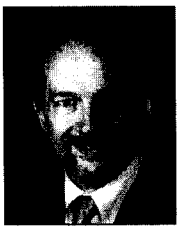

**Steve Leben** is a judge on the Kansas Court of Appeals, which he joined in June 2007 after nearly 14 years as a general-jurisdiction trial judge in Johnson County, Kansas. He served as president of the American Judges Association in 2006-2007 and has served on the AJA's Board of Governors since 1999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

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## 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.

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