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ESSAY

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.[1] Management theories drawn from the business field provided the blueprint for court reform by (a) simplifying trial court structure though 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.[2] 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.[3]

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.[4]

Procedural fairness can also explain why some court reforms proved successful. Problem-solving courts, of which some 3,200 now populate the court landscape,[5] 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 1 (National Drug Court Institute 2008), *available at* 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.[6] 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."[7]

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.[8]

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.[9] 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 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.

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.[10]

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.[11]

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.[12] 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

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.
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_37pubtrust1.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.
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.[13]

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."[14] 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.[15]

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.[16]

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.[17] 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.[18]

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*.[19] Some aspects of that experience are summarized here for purposes of illustration.

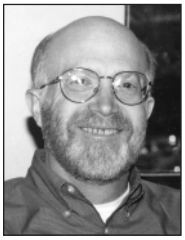
The California Judicial Council sponsored a public opinion survey in 2005, that was discussed extensively within the branch. The report emphasized the critical role of perceptions of procedural fairness in establishing trust and confidence in the courts. In 2006, the survey themes were pursued in a program 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 procedural 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.



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