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Is Procedural Fairness Applicable to All Courts?

Victor E. Flango

In a white paper of the American Judges Association published in this journal, Judges Kevin Burke and Steve Leben present a powerful case for using the principles of procedural fairness:

> 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.[1]

They further summarized Professor Tom Tyler's expectations of procedural fairness as:

- *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; and
- *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. [2]

These are laudable expectations. If they can help operationally define the desirable characteristics of judges in a way that the more ambiguous and abstract concepts, such as "judicial temperament," do not, they could help sitting judges improve and could also help guide the public (in elective states) and governors and legislators (in appointive states) select new judges.

Many judges and academics have provided lists of the qualities a good judge should have. These usually include professional competence (legal abilities and intellect), integrity, and judicial temperament (neutral, decisive, respectful, and composed). For example, in his essay, "What Makes a Good Judge?," Sir Gary Hickinbottom divides the attributes of a good judge into professional, personal, and administrative components.[3] Professional attributes include knowledge of the law, legal analytic skills, "good judgment," and intellectual concentration, whereas personal attributes include such qualities as integrity, objectivity, and temperament.

Do the four basic "expectations" of procedural fairness cover these desirable qualities of a judge? My contention here is that the role of courts has evolved over time and that the role of judges has adapted to match the changing role of courts. Thomas Henderson and his colleagues have clearly distinguished three adjudication processes—procedural, decisional, and diagnostic—and have noted that *all* three, along with variations on each, are used by contemporary courts in varying combinations.[4] Thomas Clarke and I have gone a step further and suggested that court structures be modified to be more congruent with adjudication processes.[5] In any event, the contention here is that different adjudication processes require different judicial attributes and skills, and that procedural fairness was developed with the image of the traditional trial court in mind. So I ask: Are procedural-fairness concepts equally effective and applicable to judges serving in courts that do not fit the traditional image of trial courts?

PROCEDURAL ADJUDICATION AND PROCEDURAL FAIRNESS

The classic image of judge as neutral arbiter has its roots in the adversary system. The very conception of courts, and therefore the expectations we have of them, is derived from the adversary process. The image of a court is that of a judge in a trial setting. Even though trials are "vanishing", *i.e.,* becoming a smaller and smaller portion of the way cases are resolved, tri-

Footnotes

1. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction* (A White Paper of the American Judges Association), 44 Ct. Rev. 4, 4 (2007-08).
2. *Id.* at 6. Some other sources use "respect" for "respectful treatment," "participation" for "voice," and "trust" or "trustworthiness" for "trustworthy authorities." *See generally*, David B Rottman, *Adhere to Procedural Fairness in the Justice System* 6 Criminology & Public Pol'y 835 (2007); Tom R. Tyler, *Procedural Justice and the Courts*, 44 Ct. Rev. 26, 30-31 (2007-08).
3. Gary Hickinbottom, *What Makes a Good Judge?*, *in* Judicial Appointments: Balancing Independence, Accountability and Legitimacy 55-66 (2010), *available at* http://www2.americanbar.org/calendar/young-lawyers-division-spring-conference-2011/Documents/independentjudiciaryprogrammaterials.pdf (last visited June 1, 2012).
4. Thomas A. Henderson, Cornelius Kerwin & Hildy Saizow, Structuring Justice: The Implications of Court Unification Reform (1984).
5. Victor E. Flango & Thomas Clarke, *Which Disputes Belong in Court?* 50 Judge's J. 22 (2011).

als provide the drama of courts and are the images that are televised and covered in the news.[6]

The adversary process assumes that there are two sides to the case—perhaps rooted in the medieval process of trial by combat.[7] The core of the adversary system is the *form* of participation accorded to the parties. Lon Fuller defines these as the "institutionally protected opportunity to present proofs and arguments for a decision in his favor."[8] Each side has the opportunity to present arguments in his or her favor. Logically, the requirement for the participant to be able to provide proofs and arguments requires a neutral arbiter before whom to present the arguments and a set of standards or laws so that the litigants know the basis upon which the decision will be made.

Accordingly, the role of the judge in the adversary process is to preside over the proceedings and maintain order. Henderson and his colleagues called this process procedural adjudication. During a trial, the judge rules on whether any of the evidence the parties want to use is illegal or improper. If the trial is before a jury, the judge gives instructions about the law that applies to the case; if the trial is before the court, the judge determines the facts and decides the case. After the trial (bench or jury), the judge may decide on damages or mete out the sentence to the convicted. Note also the role of the judge in this idealized conception—a very passive umpire enforcing the procedural rules of the game. In the language of one recent confirmation hearing, the judge's role is a passive referee who just "calls balls and strikes."[9]

Procedural fairness comports well with the adversary process. Voice is the most important component of procedural fairness, not only because it is important for litigants to have their say in court but also because it shapes the other components—neutrality, trust, and respect.[10] The structure of the adversary process provides ample opportunity for voice because time is allotted for each side to tell their side of the story before a decision is made. A trial in particular is a place "where a citizen can effectively tell his own story publically in a forum of power."[11] Moreover, the expectation of neutrality—honest and impartial decision makers who base decisions on consistent application of law to facts—is built into the role of the judge in the adversary process as is the expectation that defendants will be treated with dignity and respect.

Procedural fairness comports well with the adversary process.

PROCEDURAL FAIRNESS IN PROBLEM-SOLVING COURTS

Procedural fairness is also compatible with the problem-solving process. The idea of providing voice to litigants in a non-adversarial setting was one of the reasons this cooperative approach to dispute resolution was created. Particularly in family law, once a fertile source of trials, there have been calls to abandon adversarial proceedings "in favor of more informal approaches with the goal of encouraging parents to develop positive post-divorce co-parenting relationships."[12]

More recent "problem-solving" courts[13] originated from the efforts of "practical, creative, and intuitive judges and court personnel, grappling to find an alternative to revolving door justice, especially as dispensed to drug-addicted defendants."[14] From the opening of the first drug court in Dade County, Florida, in 1989,[15] drug courts spread rapidly based upon anecdotal reports of success in reducing recidivism, as well as the infusion of federal dollars. By the end of 2009, there were 2,459 drug courts and an additional 1,189 problem-solving courts in the United States, including courts for DWI, mental health, domestic violence, truancy, child support, homeless, prostitution, reentry, and gambling.[16]

Problem-solving courts require judges to be more active, less formal, and more personally engaged with each offender. One *New York Times* article summarized:

> The judges often have an unusual amount of information about the people who appear before them. These people, who are often called clients, rather than defendants, can talk directly to the judges, rather than communicating through lawyers. And the judges monitor these defendants for months, even years, using a system of rewards and punishments, which can include jail time. Judges also receive training in their court's specialty and may have a psychologist on the staff.[17]

6. *See* the special issue of the *Journal of Empirical Legal Studies* (Nov. 2004) devoted to the issue of "vanishing" trials.
7. Anne Strick, Injustice for All 21 (1977).
8. Lon L. Fuller, *Adjudication and the Rule of Law*, *in* Proceedings of the American Society of International Law 2 (1960).
9. It is interesting to note how this perception of judging permeates the traditional conception of what a judge is. Even John Roberts at his confirmation hearing to be Chief Justice of the United States noted that the judge, in this case an appellate judge, is merely an umpire, calling balls and strikes. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).
10. *See* Tyler, *supra* note 2, at 30.
11. Paul Butler, *The Case for Trials: Considering the Intangibles,* 1 J. Empirical Legal Stud. 634 (2004).
12. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. Cin. L. Rev. 891, 895 (2010).
13. The conventional term "problem-solving courts" has passed into the language even though most are not separate courts but separate dockets or calendars of larger courts or divisions. In most instances, they involve a single judge handling a single type of case on a periodic schedule.
14. David B. Wexler, *Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore*, in Future Trends in State Courts 2004 (C. Flango, N. Kauder, K. Pankey, and C. Campbell eds.), and citing Bruce J. Winick & David B. Wexler, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts 6 (2003).
15. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, Law and Pol'y 23 (2001).
16. C. West Huddleston III and Douglas B. Marlowe, Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Programs in the United States 1 (2011).
17. Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y.Times, April 26, 2005.

The use of procedural fairness principles for disposition-oriented resolution of cases is more problematic because of the focus on expeditious decision making.

This personal involvement creates a tension with the neutral arbiter role of the judge and sometimes leads to the characterization of problem-solving judges as "social workers" or "therapists."[18] Problem-solving judges are not neutral—they hope that treatment succeeds. They praise and sanction defendants, rather than remain aloof, but this active engagement could create the perception that they are not impartial. Some may also consider collaboration in "staffings," where the judge and treatment team meet in advance of hearings to discuss the offender's progress in treatment and to reach consensus about rewards and sanctions, to be in conflict with the neutral arbiter judicial role.

Problem-solving courts would seem to be the ideal setting for procedural fairness, especially voice, but stumbles on the concept of neutrality because a judge cannot both give the impression of neutrality and be a cheerleader for the success of treatment.

There is a way out of this dilemma, however—bifurcate cases into adjudication and sentencing phases—"emphasize traditional due process protections during the adjudication phase of a case and the achievement of tangible, constructive outcomes post-adjudication."[19] Especially in criminal cases with a substance-abuse component, such as DWI cases, the full adversary process with all of its due process protections could be employed until guilt has been established. After guilt is established, problem-solving principles designed to prevent repeat offenses could be used to select the best sentencing options, whether they be therapeutic or punitive. If problem-solving processes were used primarily after adjudication, procedural-fairness principles could be put into play for treatment.

DISPOSITIONAL ADJUDICATION AND PROCEDURAL FAIRNESS

The use of procedural fairness principles for disposition-oriented resolution of cases is more problematic because of the focus on expeditious decision making. Although a small proportion of "important" cases are resolved by trial (only about 2% in 2008), trials have never been the way most cases, even felonies, were resolved. The justice system would simply break down if most cases went to trial. Instead, most criminal cases are resolved by plea agreements, and have been since the 19th century. Civil cases are settled, and traffic cases and ordinance violations are resolved by the payment of a fine. About 80% of criminal cases are misdemeanors and most (more than 70%) are handled in courts of limited jurisdiction by municipal judges, justices of the peace, or magistrates.[20] In the sense that these lower criminal courts hear the bulk of criminal cases, including disorderly conduct, drunkenness, prostitution, petty theft, and simple assault cases, they *are* the courts with the most contact with offenders, and it is in these courts that the stereotype of "assembly line" justice was created. [21] One Albany lawyer described the situation in the lower courts of New York:

> The biggest problem with our court system is the volume of cases. The volume is so large that the courts have to rely on assembly line justice. It really is an assembly line. The police officer prepares the initial papers and files them with the clerk. The clerk gives the papers to the prosecutor who reviews them and discusses the case with the lawyer or the pro-se defendant. The papers then go back to the clerk, who then hands them to the judge. The judge calls the case. There's a brief discussion at the bench. Then the papers go back to the clerk, who then processes the result (fine notice, schedule next date, etc.). Think about this: If a court has 100 cases on for a particular session (a typical number for courts like Colonie, Guilderland, Albany, etc), and each case takes 15 minutes, that would take 25 hours. That's not going to work. If each case takes only 5 minutes, it still takes 8 hours, so that's still not going to work. Most courts end up at about 1-2 minutes per case. That's assembly line justice.[22]

These types of cases require facts to be established so that the law can be quickly applied; sentences and financial penalties are limited so that dispositions can be expeditious.[23] Clearing the docket then becomes very important, and the task becomes processing large numbers of individual cases, a more bureaucratic process not unfamiliar to the executive branch of government. Judges must decide large numbers of lower-stakes cases every day, rather than spend days or weeks making a decision in one case at trial, and so the procedures must be streamlined. Consequently, judges may take a more active role in all phases of case processing to ensure that the attorneys, many of whom may be court appointed, are devoting the proper attention to their clients. The point here is with that

18. *Id.* ("Now, in drug treatment courts, judges are cheerleaders and social workers as much as jurists.").
19. J. Feinblatt, Gregg Berman & D. Denckla, *Judicial Innovation at the Crossroads: The Future of Problem Solving Courts*, 15(3) Ct. Manager 28-34 (2000).
20. Even that 70% is an underestimate because ten states plus the District of Columbia and Puerto Rico are unified and thus do not distinguish courts of general jurisdiction from courts of limited jurisdiction, but often use a different category of judge, such as an associate judge, to handle these cases.
21. *See, e.g.*, Malcolm Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court (1979).
22. Warren Redlich, *Assembly Line Justice*, at Albany Lawyer (blog), http://albany-lawyer.blogspot.com/2007/04/assembly-line-justice.html (last visited June 1, 2012).
23. *See* Henderson, Kerwin & Saizow, *supra* note 4, at 11 (summarizing "decisional adjudication").

many cases to dispose of in such a short time, can lower court judges really be expected to provide litigants with meaningful *voice*—the ability to participate in a case by expressing their viewpoint—and still keep ahead of their dockets? Is there time to express their caring, to explain and to justify their decisions? In sum, is procedural fairness possible in high-volume lower courts?

With respect to judges, I think the answer is "no," but there is no reason why the principles of procedural fairness would not apply to other court employees. A study conducted by the Administrative Office of the Courts in California found that experience with traffic and other low-stakes courts were a particular source of litigant dissatisfaction.[24] Because judges have such short interactions with litigants in these high-volume courts, the way litigants are treated by court staff becomes more important.

In summation, the principles of procedural fairness were created for an adversarial process and work well there. They can be adapted for the problem-solving process that happens after adjudication, but they can only be employed in the vast numbers of ordinary, run-of-the-mill cases by court staff, not by judges.

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24. David B. Rottman, Trust and Confidence in the California Courts (Administrative Office of the Courts, Calif. 2005).