

You Can Change Judging & Justice

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When I was sworn in as a state district court judge in Colorado, I had been a trial lawyer for more than thirty years. I thought I knew a lot about judging and justice. Now, eleven years later—nine on the bench and two working as a mediator—I realize that I was wrong about important parts of the job.

When I took the bench, I believed that good judging is mainly about applying the right law to the facts. A (the law) + B (the facts) = C (the right decision). Rulings arrived at in this way would be just, I thought, and as such would likely be accepted by the parties involved and appellate courts.

I believed that treating people well in court is important because it is the right thing to do. Additionally, I knew I needed to consider my demeanor if I wanted to be retained, as cranky judges have a harder time being retained than congenial ones. I thought I treated people in the courtroom with dignity and respect, and I believed that this is important. But what mattered most to justice, I thought, were *correct* legal decisions.

PROCEDURAL JUSTICE: FAIRNESS MATTERS MOST

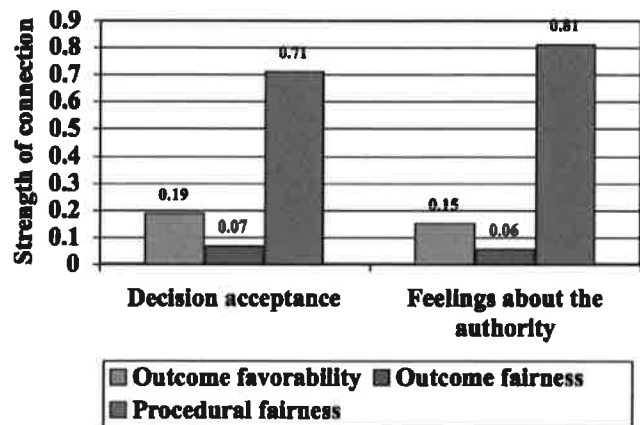
I began to think differently two or three years into my tenure on the bench when I learned about procedural justice. Also known as procedural fairness, procedural justice is a field of social psychology devoted to understanding how people respond to decision making and authorities.¹ It is not the same as procedural due process. Procedural justice deals less with legal protections afforded people in our system than with how to increase the perception among participants of being treated fairly.

Social scientists have consistently found that acceptance of court decisions and overall approval ratings by those who have had cases in court are closely related to how people are treated by judicial officers.² Researcher after researcher has found this to be true.³ Further, recidivism decreases and long-term compliance with court orders increases when court participants perceive that they have been treated fairly by judicial officers.⁴

Perhaps most surprising, acceptance of court decisions and overall approval of the court system by those who have cases in court are more closely connected to perceptions of fair treatment than to outcome favorability (Did I win?) and outcome fairness (Did the right party win?).⁵ That is, what court participants think

about the system and the outcomes of their cases is more closely related to “how did the judge treat me” than evaluations of “did I win” or “did the right side win.”⁶ Winning and fair outcomes matter less than fair treatment.

WHY DO PEOPLE ACCEPT COURT DECISIONS?



Source: Survey of court users in Oakland and Los Angeles, California, reported generally in TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002).

The above graph⁷ summarizes a study that shows the importance of the perception of fairness. The study found that in 2002, when these findings were published, this perception was nearly four times as important to participants in determining their acceptance of rulings in their cases as whether they won or lost.⁸ It was five times as impactful as winning or losing in forming their opinions of the judicial system in general.⁹ In other words, what court participants care most about is how they are treated in court.

Because these findings were a big surprise to me, I began to look more deeply into the principles involved.

Yale Law School professor Dr. Tom Tyler, a preeminent researcher in this field, identifies four key factors in determining whether procedural fairness has been provided: voice, neutrality, respectful treatment, and the trustworthiness of authorities.¹⁰

Footnotes

1. Tom R. Tyler & David B. Rottman, *Thinking About Judges and Judicial Performance: Perspective of the Public and Court Users*, 4 ONATI, SOCIO-LEGAL SERIES 1046, 1049 (2014).
2. Victor D. Quintanilla & Michael A. Yontz, *Human-Centered Civil Justice Design: Procedural Justice and Process Value Pluralism*, 54 TULSA L. REV. 113, 115–116 (2018).
3. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 5–6 (2007).
4. *Id.* at 7.
5. Kevin Burke & Steve Leben, *The Evolution of the Trial Judge from*

Counting Cases to a Commitment to Fairness, 18 WIDENER L. J. 397, 404 (2009).

6. Burke & Leben, *supra* note 3, at 6.

7. AM. JUDGES ASS'N, CTR. FOR CT. INNOVATION, NAT'L CTR. FOR STATE CTS. & NAT'L JUD. COLL., PROCEDURAL FAIRNESS/PROCEDURAL JUSTICE: A BENCH CARD FOR TRIAL JUDGES 1 (2018), <https://www.courtinnovation.org/publications/procedural-justice-bench-card>.

8. *Id.*

9. *Id.*

10. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007).

Voice: Voice has to do with people being given the opportunity to tell their side of the story before decisions are made in their cases. If they can give their view of what happened, they are more likely to view the legal system positively regardless of the outcome of their cases.¹¹

Neutrality: People with cases in court appropriately expect judges to be neutral and principled decision makers who consistently apply legal rules. Unbiased decisionmaking enhances perceptions of fairness. Neutrality involves transparency about how decisions are made.¹²

Respectful treatment: People want to feel that their legal problems are taken seriously by the system and that they are treated with dignity and respect. When they are so treated, they know that their needs are considered important. Considerate treatment includes courtesy, politeness and observance of constitutional rights.¹³

Trustworthy authorities: Researchers have consistently found that character is the most important factor in the public's evaluation of legal authorities. Character includes sincerity, a caring attitude, and benevolence.¹⁴

Researchers have also discovered that the perception of fair treatment is the primary determinant of people's willingness to accept court decisions.¹⁵ In other words, getting a fair shake matters more than "winning."

MY EXPERIENCE WITH PROCEDURAL JUSTICE

These tenets of procedural justice didn't fit with my understanding that justice is mainly a function of applying the right law to the right facts to come up with the right decision. It seemed counterintuitive to me that getting the "right decision" was not as important as being fair and courteous in conducting business. I wanted to see what would happen if I applied what I was learning about procedural justice in the courtroom. So, I began to do my own one-judge experiments. These were not scientific, yielding empirical validation of hypotheses. They were my efforts to see if making special efforts to treat people well would make a difference in my experience. I wanted personal substantiation of what researchers were saying.

Initially I relied upon a "bench card" jointly produced by the American Judges Association, the Center for Court Innovation, the National Center for State Courts, and the National Judicial College to help me understand more about procedural fairness and give me new ideas on how to interact with people in my courtroom.¹⁶ The following are suggestions from this bench card that I tried to implement:

MAKE EYE CONTACT. Eye contact from an authority figure is perceived as a sign of respect. Try to make eye contact when speaking and listening. Consider other body language that might demonstrate that you are listening and engaged. Be conscious of court users' body language too, looking for signs of nervousness or frustration. Be aware that court users who avoid making eye contact with you

may be from a culture where eye contact with authority figures is perceived to be disrespectful.

ASK OPEN-ENDED QUESTIONS. Find opportunities to invite the defendant to tell his/her side of the story, whether directly or via defense counsel. Use open-ended questions to invite more than a simple "yes" or "no" response. Warn litigants that you may need to interrupt them to keep the court proceeding moving forward.

Example: "Mr. Smith: I've explained what is expected of you, but it's important to me that you understand. What questions do you have?"

EXPLAIN SIDEBARS. Sidebars are an example of a court procedure that can seem alienating to litigants. Before lawyers approach the bench, explain that sidebars are brief discussions that do not go on the record and encourage lawyers to summarize the conversation for their clients afterward.

STAY ON TASK. Avoid reading or completing paperwork while a case is being heard. If you do need to divert your attention briefly, pause and explain this to the audience. Take breaks as needed to stay focused.

Example: "I am going to take notes on my computer while you're talking. I will be listening to you as I type."

PERSONALIZE SCRIPTED LANGUAGE. Scripts can be helpful to outline key points and help convey required information efficiently. Wherever possible, scripts should be personalized—reading verbatim can minimize the intended importance of the message. Consider asking defendants to paraphrase what they understood the scripted language to mean to ensure the proper meaning was conveyed.

INTRODUCE YOURSELF. Introduce yourself at the beginning of proceedings, making eye contact with litigants and other audience members. Court staff can recite the basic rules and format of the court proceedings at the beginning of each court session. Written procedures can be posted in the courtroom to reinforce understanding.

GREET ALL PARTIES NEUTRALLY. Address litigants and attorneys by name and make eye contact. Show neutrality by treating all lawyers respectfully and without favoritism. This includes minimizing the use of jokes or other communication that could be misinterpreted by court users.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 31.

15. *Id.* at 28.

16. AM. JUDGES ASS'N ET AL., *supra* note 7.

ADDRESS ANY TIMING CONCERNS. If you will be particularly busy, acknowledge this and outline strategies for making things run smoothly. This can help relax the audience and make the process seem more transparent and respectful.

Example: “I apologize if I seem rushed. Each case is important to me, and we will work together to get through today’s calendar as quickly as possible, while giving each case the time it needs.”

EXPLAIN EXTRANEOUS FACTORS. If there are factors that will affect your conduct or mood, consider adjusting your behavior accordingly. When appropriate, explain the issue to the audience. This can humanize the experience and avoid court users’ making an incorrect assumption.

Example: “I am getting over the flu. I’m not contagious, but please excuse me if I look sleepy or uncomfortable.”

EXPLAIN THE COURT PROCESS AND HOW DECISIONS ARE MADE.

The purpose of each appearance should be explained in plain language. Tell the defendant if and when she will have an opportunity to speak and ask questions. Judges and attorneys should demonstrate neutrality by explaining in plain language what factors will be considered before a decision is made.

Example: “Ms. Smith: I’m going to ask the prosecutor some questions first, then I’ll ask your lawyer some questions. After that, you’ll have a chance to ask questions of me or your attorney before I make my decision.”

USE PLAIN LANGUAGE. Minimize legal jargon or acronyms so that defendants can follow the conversation. If necessary, explain legal jargon.¹⁷

When I conducted these “experiments,” I had somewhere between 200 and 300 active felony cases. I held an “advisement docket” two days a week, informing defendants of their rights, setting bond, taking pleas, and holding sentencing hearings. I wrote and memorized a script and used it every time I started this docket. My goal was to incorporate principles and suggestions from the bench card. This is the script:

Good morning. My name is Tom French, and I am the judge assigned to this courtroom and to your case. Let me start by telling you what you can expect this morning. If you are in custody, I will call your case, see if you would like to be represented by the public defender, advise you of your rights, set bail, and set a new court date. If you are not in custody, I will advise you of your rights, talk to you about your plans for a lawyer, and give you a new court date. If you want to

hire a lawyer or see if you qualify to be represented free of charge by the public defender, I will give you time to do that and have you come back to court another day.

If this is your first time in court, your case may not be resolved or completed today. You will probably get a new court date two or three weeks from today. I will call the cases of the folks in custody first of all because that helps the sheriff’s department do its job administratively. Then I will call those folks who are not in custody. I usually call the cases alphabetically. If you have another obligation this morning—like a doctor’s appointment or you have to get to work as soon as possible—let me know, and I will call your case out of order to let you meet your other obligations.

Let me talk with you about expectations. Here are the expectations that I have for myself: I expect that I will be on time; I expect that I will be prepared; and I expect that I will treat everyone in the courtroom with dignity and respect. Here are my expectations for you: I expect you to be on time; I expect you to do everything that you were supposed to do on your case before you came to court; and I expect that you will treat everyone with dignity and respect.

There will be a time when I would like to hear everything that you would like to tell me about your case, and I will be glad to hear all that you have to say. Today is probably not that day when I want to hear all about your case. But, if you have questions about your rights, bail, or what is going to happen next, I will be glad to talk with you about those things.

Memorizing and giving this introduction connected me to the people in court in a way I didn’t expect. I could make constant eye contact because I knew exactly what I was going to say, and I could talk with people in simple terms about my expectations of them and myself and what was going to happen. I looked forward to making this connection and talking to people about the big issues they were facing.

I don’t know exactly how people in the room felt when I talked about the expectations I had for myself. But a surprising thing usually happened. Many, especially those in custody, had their heads down when I started to talk, as if they didn’t really care to hear what this white-haired guy in a black robe had to say. Then heads rose, and people seemed to be listening intently. This happened repeatedly. I took this to mean that when I showed that I held myself accountable and responsible to them, it appeared that I cared about them and that I expected only from them what I expected from myself. I concluded that this was an example of what could happen when people were afforded basic and reciprocal fairness.

Disclosing my expectations to those in court led me to believe that other efforts at transparency could be appropriate and increase the perception that I am fair in word and deed, as I try to be. Many disclosures, certainly, would be inappropriate or not

17. *Id.* at 2.

sufficiently "judicial." But some could be beneficial. For example, after I lost my patience in court or otherwise showed anger or frustration, I made efforts to apologize to lawyers or others with whom I had acted inappropriately. I thought it best to apologize in the moment but at times, for one reason or another, did so after a recess or the next day. People were usually surprised at first. Then they usually seemed grateful that I recognized my failings. This basic civility was appreciated, I believe, and I never felt that it compromised my ability to retain control in the courtroom. In fact, it seemed to improve the atmosphere, perhaps because it indicated honesty and fairmindedness.

Also, I began to send lawyers and self-represented litigants a "Great Expectations" letter before trials. The purpose was to let everyone know what would otherwise have been my unstated expectations. That letter said something like this:

**"GREAT EXPECTATIONS"
My Expectations for Counsel,
Parties and Myself**

Trial lawyers and self-represented parties have hard jobs when their cases go to trial. I know because I was a trial lawyer for more than 30 years before I was a judge. One of the hardest parts of a trial lawyer or a self-represented party is to know and meet the unspoken expectations of the judge.

So, here are my expectations of myself. I expect my written decisions and orders to be accurate, brief and clear. I call this the "ABCs" of good legal writing.

In court and on the telephone, I expect to be punctual, prepared, polite and professional. I expect to treat everyone with dignity and respect. I expect that I will not be impatient, irritable or rude. My expectation and goal for myself is never to intentionally embarrass anyone or to make someone look bad. I hope to listen well, to be fair, to be candid, to work hard, to issue rulings based upon the law and the facts of cases, to be just, and to make decisions in a timely manner.

I won't always meet my expectations. But you deserve my best efforts. If I fail at any one of these expectations, you deserve an apology or an explanation for why I did not meet my expectation.

My expectations for you as a lawyer or self-represented party are similar. I expect your writing and filings to be accurate, brief and clear. Less is usually more with legal writing.

I expect you to be punctual, prepared, and polite. I expect you be fair and courteous to all and not waste anyone's time. I believe that less is usually more persuasive in court. I am an old school guy, so if you are trying to decide whether to be more formal or less formal in the courtroom, more formal is probably the better way to go.

I don't expect perfection. But I expect my best efforts and your best efforts. If you are not meeting my expectations in trial or a hearing, I prefer to handle that by a "heads up" or a "gentle nudge" at the bench. Here is an example. "_____, I don't know

if you are aware of this, but it seems to me as if you are asking the same questions of this witness over and over." I believe that lawyers and self-represented parties usually try to meet the stated expectations of the court.

Please know I have deep respect for the important and difficult work that is done by lawyers and self-represented parties in this court.

Respectfully,

District Court Judge

In this way I have tried to show respect for lawyers and those representing themselves. I believe they have appreciated this.

I also tried to incorporate procedural justice principles in sentencing hearings. These events were difficult for me. However, when I began to implement what I was learning about courtroom dynamics, I had dramatic opportunities, particularly in the most serious cases, to show just treatment and compassion for all concerned. Especially in challenging and hotly contested cases, sentencing hearings can be opportunities for a judge to acknowledge publicly the important and differing positions of all stakeholders in the process. A judge can declare, for example, that the community deserves to be protected from dangerous, thoughtless and repeated criminal acts. A judge can describe how a victim has been harmed and say that he or she deserves to be protected. A judge can acknowledge the courage of victims in participating in a legal process that can be callous. And a judge can talk about how defendants need to change, how they can use the tools they have been given to take steps in new directions, and how they have many strengths and supports in that process.

Sentencing of defendants who have drug addictions was particularly difficult for me because incarceration without treatment offers little hope for recovery. It may seem like the only option, however, to protect family, community, and defendants from addictive behaviors and violations of the law. In these cases, after acknowledging the pain and harm caused to the community, family and any victim, I tried to offer defendants with addictions hope. At times I said something like this:

Ms. Defendant, let me talk with you about how I look at you and your prospects for the future. I see myself as deeply flawed and infinitely valuable. I see you the same way: deeply flawed and infinitely valuable. I hope you can work on your flaws and show us all of the ways in which you are infinitely valuable. I believe there is much hope that you will become a valuable member of this community and make your friends and family very proud of you.

I hope this conveyed my respect for and hope in people in difficult situations.

If you have never had a videotape made of yourself in court, I strongly suggest that you do so. When I did it, I was surprised at how little eye contact I made with lawyers and others in the courtroom. Of course, I had lots to do when I was in court, but lack of eye contact connotes disrespect. My lack of eye contact, I am sure, indicated that I didn't really care about the people

appearing before me. When I saw the recording, I was also surprised at how fast I talked and how I seemed to want nothing more than to get done with each case as soon as possible. It is hard to slow down when you have a 100-case docket that must be completed in one day. But justice afforded is an important goal and justifies slowing down.

You can also use resources from The Center for Court Innovation and/or the State of Utah to see if you are providing procedural justice. "Measuring Perceptions of Fairness: An Evaluation Toolkit," from the Center for Court Innovation,¹⁸ has a self-assessment feature for judicial officers, an instrument for observers to use in gauging the presence of procedural justice in courtroom settings, and an exit survey for defendants asking for their viewpoint on how they were treated. Utah's version of this helps courtroom observers rate judicial officers in terms of fairness, and it gives them feedback.¹⁹

After a number of years of trying to incorporate procedural justice principles into what I did every day in court, I have no empirically verified results to show that these principles or tools increase justice. I can say, however, that concentrating on equitable, respectful, and dignified treatment of others changed me. I came to see more of court participants' individual dignity, intrinsic worth, and goodness. I began to treat them with greater understanding and compassion than I had in previous years. I don't know if new vision led me to different behavior or if different behavior led me to see people differently. Either way, I believe, the objective of more justice for more people was realized.

Many of the suggestions on the bench card and my suggestions may seem like common sense, and they are probably things that you already do as a judge. But I concluded that the suggestions were important and probably made a difference to those that appeared before me in court. I had defendants and their family members tell me that my treatment of them made a difference, and that they were changed persons because of how they were treated.

One case stands out to me. I sentenced a man to a prison term after he committed a particularly egregious crime that followed many other related offenses. I don't have an exact memory of what I said to him at the sentencing hearing, but I probably spoke with him as I had learned from procedural justice teachers and as I usually did in sentencing hearings involving aggravated cases. Many years later he contacted me. He thanked me for what I said to him when he was sentenced. He said he had turned his life around, and that he frequently remembered what I said to him when he was sentenced. He asked me to come to a church service at the alternative sentencing unit where he was super-

vised on parole. I went to the service. He spoke to those attending about my words, which gave him hope and changed his life. He apparently has changed his life and is working hard to remain a valuable citizen.

That was not the norm for people that I sentenced to prison. But something about what I said and how he was treated made a life-changing difference. I believe the difference was my efforts to use procedural justice principles in court. And I had other similar experiences that led me to believe that the application of procedural justice principles made significant differences to people in my courtroom.

My experiments convinced me that empirical evidence is not the only measure of justice. Human experience and perception count as well. Ultimately, the essence of justice is seen in a society that recognizes the decisions from the justice system as legitimate and fair. I believe that applying the tenets of procedural justice are a means to the goal of justice for all.

RACIAL INJUSTICE & THE JUDICIARY

Justice for all must involve confronting the grievous plagues of individual and institutional racism in our country. No part of the justice system, including the judiciary, is without blame for racism and racial injustice.²⁰ Racial injustice has prompted many recent reforms and efforts to reform the justice system. However, the role of the judiciary in recent reforms and efforts at reform has received little attention apart from sentencing reforms.²¹ Members of minority groups differ in the degree to which they have trust and confidence in the legal system, and African-Americans have pervasive levels of distrust of it.²² Can procedural justice from judges be a part of what is done to lessen racial injustice? More specifically, can judges use procedural justice principles to increase racial justice provided to members of minority groups who have pervasive levels of distrust of the justice system?

In an examination of whether procedural justice can be used to reduce racial injustice, the initial inquiry should be whether procedural fairness principles are accepted by members of minority communities. If members of minority communities do not typically believe that procedural fairness principles are important factors in dispensing justice, the importance of such principles in reducing racial injustice is seriously limited.

A study of California residents sheds light on the question of whether members of minority and majority communities accept the general principles of procedural fairness.²³ The research studied 1,656 African-American, Caucasian, and Hispanic residents of Los Angeles and Oakland who had a recent experience with the police or courts. The study examined the participants' will-

18. EMILY GOLD LAGRATTA & ELISE JENSEN, CTR. FOR CT. INNOVATION, MEASURING PERCEPTIONS OF FAIRNESS: AN EVALUATION TOOLKIT (2015), <https://www.courtinnovation.org/publications/measuring-perceptions-fairness-evaluation-toolkit>.

19. UTAH JUD. PERFORMANCE EVALUATION COMM'N, COURTROOM OBSERVATION REPORT (2016), <https://site.utah.gov/judges/wp-content/uploads/sites/33/2015/10/Courtroom-Report-2016-final.pdf>.

20. It is beyond the purview of this article to detail how the judiciary in this country has been involved in racial injustice. If you have doubts about whether the judiciary has been involved in racial injustice, I

suggest that you read: BRYAN STEVENSON, JUST MERCY (2015); *Pace v. State*, 69 Ala. 231, 232–33 (1881), *aff'd*, 106 U.S. 583 (1883); *Jackson v. City & Cty. of Denver*, 124 P.2d 240, 241 (Colo. 1942).

21. *See, e.g.*, George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020). This proposed legislation failed to pass, but there were no provisions which dealt with reforms of the judiciary to accomplish racial justice.

22. Burke & Leben, *supra* note 3, at 17.

23. Tyler, *supra* note 10, at 27.

ingness to accept legal system decisions as well as their overall view of the courts and the law.

The researchers found the primary factor shaping peoples' willingness to accept legal decisions was the fairness of the court proceedings.²⁴ Procedural fairness was also found to be the main determinant of the participants' views about the court system.²⁵ The researchers in this study concluded that their findings were true regardless of ethnicity, socio-economic status, or gender and whether the contact was with the courts or the police.²⁶ Dr. Tom Tyler summarized this research as finding that procedural justice judgments "[D]ominate the reactions of all of the people who deal with legal authorities across ethnic/racial groups, among the rich and the poor, and for both men and women. Most important, they dominate the concerns of the members of the major minority groups in the United States, in particular African-Americans and Hispanics."²⁷ Dr. Tyler also concluded from this study that, "[F]ocusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who the people using the courts are."²⁸

This study of California residents is strong evidence for the view that, irrespective of ethnicity, socio-economic status, and gender, people in our country care most about being treated fairly in the legal system.

The importance of these findings is hard to overstate. We do not have, based upon this study, communities divided by ethnicity, income, or gender as to the fundamental premise that all should be treated fairly in our justice system. Rather, fundamental beliefs about the importance of fair treatment for all are shared by people of different races, different genders, and different incomes. In these times of polarization in this society such agreement is an encouraging sign of unity.

Although African Americans, Caucasians, and Hispanics believe in the importance of fairness in the judicial system, according to the research above discussed, "[W]hen 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."²⁹ More specifically, African-Americans "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."³⁰ Judge Kevin Burke, ret., and Judge Steve Leben, ret., conclude that these negative perceptions "[m]ay 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."³¹

As such, there appears to be strong societal support for the idea that procedural justice is an important part of our justice system for majority and minority communities, but major groups in our society also believe that procedural justice is not afforded to all, especially to African Americans.

Judges Burke and Leben logically conclude that because African Americans perceive less fairness in the justice system, it is critical to look at "what alleviates or aggravates that difference."³² They note that the Red Hook Community Court in New York City "seems to have eliminated the distinctions between perceived levels of fairness among economic and ethnic divisions."³³ Red Hook Community Court is a community court, which is distinctive because procedural justice principles are basic to how participants are treated by judges and others who work in this court and because this treatment seems to be a critical factor in eliminating perceptions of unfairness in how people of different ethnic and socio-economic groups are treated.³⁴ If community courts can neutralize distrust they can be an important means to increase perceptions of fairness in courts by the African-American community.³⁵

The lessons from Red Hook Community Court may offer tools to reduce distrust and to increase racial justice. But the issue of how to reduce distrust by minority groups in the legal system is complicated and probably without one simple solution. Procedural fairness may, however, provide important tools to increase racial justice.

To see if procedural justice principles can be used by judges to increase racial justice, it makes sense to review scholarship and research concerning procedural justice. The following are basics of procedural fairness important to the issue of racial justice:

1. Procedural justice or procedural fairness (two terms for the same concept) refers to the perceived fairness of court proceedings.³⁶
2. Social scientists have consistently found the acceptance of court decisions and approval ratings by those who have cases in court are closely related to how people are treated by judicial officers.³⁷
3. "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."³⁸
4. Perceived fairness provided to litigants is five times more important to them than winning or

24. *Id.* at 28.

25. *Id.*

26. *Id.*

27. *Id.* at 30.

28. *Id.* at 28.

29. Burke & Leben, *supra* note 3, at 17 (quoting DAVID B. ROTTMAN, JUD. COUNCIL OF CAL., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS 30 (2005), http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

30. M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER 4 (2006),

https://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf.

31. Burke & Leben, *supra* note 3, at 17.

32. *Id.*

33. *Id.*

34. See FRAZER, *supra* note 30.

35. *Id.* at iv.

36. AM. JUDGES ASS'N ET AL., *supra* note 7, at 1.

37. Quintanilla & Yontz, *supra* note 2, at 115–116.

38. Burke & Leben, *supra* note 3, at 5.

losing their case. Fairness matters more than winning or losing.³⁹

5. There are four basic components to procedural fairness:
 - a. Voice: The ability of a person to participate in their case by expressing their viewpoint.
 - b. Neutrality: Consistently applied legal principles, unbiased decision makers, and a transparency about how decisions are made.
 - c. Respectful treatment: Treating individuals with dignity and protecting their rights.
 - d. Trustworthy authorities: Authorities who are benevolent, caring, and who sincerely try to help litigants.⁴⁰
6. "Procedural fairness is the primary factor that shapes perceptions of the legal system."⁴¹
7. "For most citizens . . . the core of the justice system is about the fair treatment of an individual in the courtroom."⁴²
8. "[T]he perception of unfair or unequal treatment 'is the single most important source of popular dissatisfaction with the American legal system.'"⁴³
9. "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."⁴⁴
10. "Most judicial education programs teach judges how to get outcomes right, but not how to handle procedural matters in a way that enhances perceptions of fair treatment."⁴⁵
11. "Policies that promote procedural fairness offer the vehicle with the greatest potential for changing how the public views the state courts."⁴⁶
12. "[P]rocedural justice is a key to the development of stable and lasting solutions to conflicts."⁴⁷
13. Social scientists have found that procedural justice judgments dominate the reactions of all of the people who deal with legal authorities across ethnic/racial groups, among the rich and the poor and for both men and women.⁴⁸
14. "[A]dherence to procedural fairness principles seems to lessen the *appearance* of bias."⁴⁹
15. "[F]ocusing on procedural fairness is a very good

way to build trust and encourage compliance" within the legal system.⁵⁰

It is a ready conclusion from this research and scholarship that procedural justice is a critical element of racial justice. In fact, the four factors which produce procedural fairness—respectful treatment, equal treatment, benevolent treatment, and giving voice to court participants—seem to be indispensable elements of our justice system. Racial justice cannot be the product of a legal system that fails to provide equal treatment, respect, benevolence, or a voice to people in our system.

Fair treatment of all must be the essence of racial justice. It bears repeating because of its profound importance that, "For most citizens . . . the core of the justice system is about the fair treatment of an individual in the courtroom."⁵¹ Fair results, involving proper factual findings and proper application of the law, are important components of our justice system. But without procedural fairness there cannot be justice because we know that, in this country, procedural fairness is the main factor that determines litigant's views of the court system.⁵² Therefore, the perceived legitimacy of our system depends on perceptions of fairness and procedural fairness. Fair treatment for all in the justice system helps approach the goal of racial justice in our society.

As such, treatment of litigants by judges that increases perceptions of fairness must be an element in the quest for racial justice. And judges can advance this quest for fairness by using the four tools that yield procedural fairness, i.e., respectful treatment, equal treatment, compassionate treatment, and allowing participants a voice.

The idea that judges can increase racial justice by benevolence, listening, respect, and equal treatment for all may seem simplistic or naive. But, this notion is consistent with procedural fairness research, logic, common sense, my anecdotal experience in the courtroom, and the goal of our justice system to dispense justice to all. And this idea is consistent with how most citizens view our justice system.

There are reasons to believe that my suggestions may not transform judging or increase racial justice. Significant institutional and individual training and change in the judiciary will be necessary for my goals to be attained. There are more than 28,000 judges in this country, most of whom will need to be trained to judge differently than they do at this time. Many judges may not "buy" the need for change or the tools that can lead to the needed changes. Judges are notoriously independent and resistant to being told what to do. I know because I was a judge, worked with other judges, and trained judges in Colorado for many years.

39. AM. JUDGES ASS'N ET AL., *supra* note 7, at 1.

40. Tyler, *supra* note 10, at 30–31.

41. Burke & Leben, *supra* note 3, at 17.

42. Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts*, 52 CT. REV. 8, 13 (2016).

43. Burke & Leben, *supra* note 3, at 4 (quoting Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC'Y REV. 513, 517 (2003)).

44. *Id.*

45. Burke & Leben, *supra* note 5, at 403–404.

46. DAVID B. ROTTMAN, JUD. COUNCIL OF CAL., *TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS* 7 (2005), http://www.courts.ca.gov/documents/4_37pubtrust1.pdf.

47. Tyler, *supra* note 10, at 27.

48. *Id.* at 28.

49. Kevin Burke & Steve Leben, *Procedural Fairness in a Pandemic: It is Still Critical to Public Trust*, 68 DRAKE L. REV. 685, 699–700 (2020).

50. Tyler, *supra* note 10, at 28.

51. MacKenzie, *supra* note 42, at 13.

52. Tyler, *supra* note 10, at 17.

53. MacKenzie, *supra* note 42, at 9.

There are also reasons to believe that my proposals offer substantial opportunities for more racial justice. The training to teach judges the principles of procedural justice does not have to be complicated, long or extremely expensive. Dr. Tom Tyler is perhaps the preeminent procedural justice scholar in this country. He teaches police officers the essence of procedural justice in daylong classes. I learned the essence of procedural justice and how to apply those principles in a training session that took about one day. The essence of procedural justice is not complicated: Perceptions of fairness are enhanced when judges listen well, when they treat all with dignity and respect, when they are unbiased and when they are benevolent. Judges can also learn about procedural justice online and by reading such publications as *Court Review*, published by the American Judges Association.

There are many unanswered questions about the role of the judiciary in the quest for more racial justice. One basic question is whether judges can be change agents to increase perceptions of racial justice. I am unaware of research that addresses the specific issue of whether traditional trial court judges can be effective change agents to increase perceptions of racial justice by using principles of procedural justice.

There is substantial research that the success of drug treatment courts is dependent upon judicial application of the four principles of procedural fairness and that “[p]rocedural fairness is the tool that drives the judge’s influence upon DTC [drug treatment court] participants.”⁵³ Drug treatment courts differ substantially from traditional trial courts in many ways and some of the differences are significant to an offender’s desistance.

However, despite the differences in drug treatment courts and traditional courts it seems a fair conclusion from drug treatment court research that the judicial application of the four principles of judicial fairness may be a tool to increase perceptions of racial justice. Drug treatment court researchers have learned that judicial application of procedural fairness tools creates perceptions by participants in drug courts of judicial legitimacy and judicial fairness.⁵⁴ Procedural justice creates circumstances where a judge is perceived as a legitimate and fair authority. If judges are seen as being fair in drug treatment courts because they apply procedural justice principles, it is reasonable to conclude that applying those same principles in traditional courts can lead to perceptions of judicial legitimacy and fair treatment. My understanding of justice also leads me to conclude that judicial legitimacy and perceptions of judicial fairness are basic factors that can lead to perceptions of racial justice by participants in the justice system. If so, it is reasonable to conclude that judicial officers can be strong change agents in the quest for racial justice.

Procedural justice is not a panacea for all the evils of racism. But it offers strong opportunities to help all people learn to place greater trust in our justice system. In 2014 President Barack Obama created the 21st Century Task Force on Policing in response to unrest in Ferguson, Missouri following the shooting of Michael Brown by a police officer. Procedural justice principles were important enough to this group to declare as its first recommendation that:

[L]aw enforcement agencies should adopt procedural justice as the guiding principle for internal and external policies and practices⁵⁵

This task force was focused on policing, not the courts, but researchers have found, as detailed above, that procedural fairness principles have just as much potential to improve the quality of justice in courtrooms as they do in police work.⁵⁶

The lessons of Red Hook Community Court and the research lessons about procedural fairness offer promise for *how* to reduce distrust. Judicial application of the principles of procedural fairness appears to be an underutilized but promising tool to reduce distrust and to increase racial justice.

CONCLUSION

The essence of procedural justice is fair treatment for all in our justice system, and procedural fairness is the primary factor that shapes perceptions of the legal system. Judges should learn and apply the important tools of procedural justice to ensure perceptions of fair treatment. Fair treatment of all must be the basis of racial justice. Judges have an important opportunity to be change agents for racial justice by their fair treatment though application of procedural justice principles. Fair treatment of all is a simple sounding aspirational goal, but it has not been and will not be easy to accomplish. Fair treatment of all will require wise, brave, and concerted efforts by judges. Our country and citizens deserve no less.



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54. *Id.* at 12.

55. OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1 (2015),

https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf,
56. Tyler, *supra* note 10, at 27.