

Procedural Justice from the Bench

HOW JUDGES CAN IMPROVE THE EFFECTIVENESS OF CRIMINAL COURTS

By Greg Berman and Emily Gold

Improving both compliance with court orders and public trust in justice are goals that judicial reformers have struggled with for years. A broad range of initiatives (many of them quite expensive) have been tried—new technology, new sanctioning schemes, judicial outreach initiatives, and other efforts. Moving the needle hasn't been easy. But what if there were a simpler way to enhance perceptions of courts and encourage defendants to do things like show up for court dates, pay their fines, and comply with community service mandates?

A new study conducted by the Urban Institute, the Center for Court Innovation, and the Research Triangle Institute with funding from the National Institute of Justice offers some potential clues.¹ The evaluation compared defendants in 23 drug courts with those in six traditional courts.

The study confirmed what anecdotes and earlier reports have shown: Drug courts work. Drug court participants were significantly less likely to report drug use 18 months after admission to the program. And those participants who continued using drugs did so less frequently than the

comparison group. Drug court participants also reported significantly fewer criminal acts than the comparison group, reducing their criminal activity by over 50 percent.

The drug courts in the study also saved money: over \$5,600 per participant. While the costs of operating a drug court are not insignificant (including case managers, substance abuse treatment, and increased court oversight), the return on investment in terms of reduced criminality more than outweighs the expenditure. The benefits are particularly dramatic for those drug courts working with serious offenders.

Remarkably, the success of these courts seems to stem not from their nature as specialized courts with additional resources but rather from an element common to all courts: the judge. The study showed that the strongest predictor of reduced future criminality was a defendant's attitude toward the judge. Having positive perceptions of the judge was also the greatest predictor of reduced drug use and reduced violations of supervision.

This impact was seen across all demographics, regardless of race, gender, or criminal history. Even defendants with extensive prior involvement in the system or those who had received unfavorable sentences reported reduced criminality when they perceived the judge to have treated them fairly and respectfully.

The study's findings are no surprise to advocates of procedural justice. Procedural justice suggests that how litigants regard the justice system is tied more to the perceived fairness of the *process* than to the perceived fairness of the *outcome*. In other words, even litigants who "lose" their cases rate the system favorably if they feel that the outcome is arrived at fairly.

Tom Tyler, author of *Why People Obey the Law*, argues that the benefits of procedural justice extend beyond the satisfaction of individual litigants; indeed, he argues that procedural justice enhances the legitimacy of the entire justice system and pro-

motes a general adherence to the law.

According to Tyler and others, the key elements of procedural justice include

- *Voice*: litigants are given the opportunity to tell their story;
- *Respect*: litigants perceive that the judge, attorneys, and court staff treat them with dignity and respect;
- *Neutrality*: litigants perceive that the decision-making process is unbiased and trustworthy;
- *Understanding*: litigants understand their rights and the decisions that are made; and
- *Helpfulness*: litigants perceive that court actors are interested in their personal situation to the extent that the law allows.

The influence of procedural justice on litigant perceptions and future behavior has been analyzed in a variety of court contexts—drug courts, community courts,² family courts,³ and small claims courts.⁴ The findings from these studies have been consistent: Courts that exhibit procedural justice elements produce more satisfied and compliant litigants.

This research raises several important questions: How can courts enhance procedural justice? Are there specific practices that judges and court administrators can implement in order to improve perceptions of fairness?

Spending a few minutes in a typical criminal courtroom underlines how difficult it can be to improve procedural fairness. For the average defendant, a trip to court often involves an impersonal if not intrusive security screening, difficulty finding the right courtroom, and a long wait before a case is called. Once in front of the judge, legal jargon dominates much of the proceedings, which can unfold rapidly. In the end, many defendants leave court baffled by what happened. Many victims, jurors, and witnesses feel the same way.

The multisite study suggests that drug courts have found a way to overcome at least some of these obstacles. It may be that the unique orientation of drug courts, which tend to be less adversarial and more rehabilitation-focused than typical crimi-

nal courts, helps to achieve procedural fairness. Skeptics might argue that given time and resource constraints, conventional courts are ill-equipped to produce the same perceptions of procedural justice that drug courts do. This may be true in some places (although it is worth noting that California has made a statewide commitment to improving these kinds of conditions).⁵ But the drug court study shows that even in places with substandard facilities and overwhelming caseloads, it may be possible to reap enormous benefits from relatively minor modifications of judicial interaction with defendants.

The drug court study evaluated judicial interaction in two ways. First, researchers surveyed defendants about their perceptions of the judge. Defendants rated the judge on indicators such as approachability, respectful treatment, knowledge of the defendant's case, efforts to help the defendant succeed, and allowing the defendant to tell his or her side of the story.

Second, researchers used structured court observations to document each judge's use of certain interactive behaviors, such as making regular eye contact, addressing the defendant directly and allowing him or her to ask questions, and providing explanations of court orders. Judges were then rated by their level of engagement in these activities. The common thread here is communication—in terms of both substance and style.

Building on the drug court study, the Center for Court Innovation and the National Judicial College—with support from the Bureau of Justice Assistance—have convened a multidisciplinary advisory group to think through some concrete examples of how to improve procedural justice in the criminal court context.⁶ Sample recommendations include

- *Humanize the experience*: Appearing approachable and accessible is a key component of procedural justice. Judges should consider addressing defendants by name and thanking them and audience members for their cooperation while court is in session. Judges might also publicly acknowl-

edge problems that are beyond their control, such as long wait times to get through courthouse security.

- *Use plain English*: For many defendants, standard legal jargon like “complaint” and “cross examination” is completely foreign. Even defendants with legal knowledge may have inaccurate or incomplete working definitions of these terms. Adapting courtroom language to be understood by all—including defendants, witnesses, and other audience members—encourages understanding of the process and makes the system more user-friendly. Interested judges should investigate “plain English” projects like the Indiana Judges Association's effort to interview potential jurors to flag legal terms that need to be rephrased or explained, like “proximate cause” and “in camera.”⁷
- *Engage defendants in dialogue*: Giving defendants an opportunity to be heard in court can be difficult given constitutional protections against self-incrimination. Plea bargaining offers an opportunity: Instead of using a rote series of questions during plea allocutions, judges can ask defendants to repeat back their understanding of the plea agreement. This can help give



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defendants an opportunity to be heard, as well as ensure understanding.

- *Focus on the case at hand:* Judges who make eye contact and appear alert, engaged, and knowledgeable about the case before them demonstrate greater respect for the defendant and the process. By taking brief and frequent breaks, judges can help refocus their energies on the experience of defendants appearing before them.
- *Manage the courtroom to promote perceptions of fairness:* Calendaring cases in a way that minimizes wait times demonstrates respect for the busy lives of defendants, witnesses, family members, and jurors. Treating courtroom staff and attorneys courteously can also reinforce the impression that the courtroom is a place of mutual respect.

To some, the above list may seem little more than a list of aspirations—practices that fall outside the scope of a judge’s responsibilities. But Judge Kevin Burke of the Hennepin County (MN) District Court and Judge Steve Leben of the Kansas Court of Appeals have argued that, just as defendants are entitled to due process, “[e]veryone who comes through the court system has a right to be treated with respect 100% of the time.”⁸

Learning to balance constitutional mandates with procedural justice principles may take some adjustment. Fortunately, judges don’t have to do it alone. Court officers can rethink how courtroom rules are posted, explained, and enforced in a way that is clear and respectful. Court administration can ensure that directional signage within the courthouse is clearly worded and easy to read to minimize confusion. Attorneys, particularly the defense bar, can enhance understanding by ensuring that defendants know the status of their case and what is required for compliance with court orders. Defense attorneys can also use language in court that demonstrates their understanding of each client’s unique story and circumstances to give a voice to the defendant, albeit indirectly.

“I understand that practitioners feel beleaguered by what’s already on their

plate,” said professor Tom Tyler, “but the argument for procedural justice is that if you spend a little more time up front, you save time and resources down the road.”⁹ Cases will be expedited as defendants become more likely to show up for court appearances and comply with sentence mandates the first time around. And dockets will shrink overall as defendants commit fewer future crimes. Indeed, Yale Law School professor Tracey Meares published a study showing that parolees who spent an extra one to two hours with relevant authority figures—receiving support and information about the rules of parole and the supportive services available to them—reoffended 40 percent less than parolees who received the status quo.¹⁰ And some time savings can be seen immediately. Explaining courtroom procedures and rules at the beginning of each court session may reduce frequent interruptions and the need to answer questions and make reprimands.

The next step for the procedural justice project convened by the Center for Court Innovation and the National Judicial College is to test these ideas in a real-world criminal court setting. Together, the two agencies are developing a training that aims to help judges and other court staff infuse procedural justice practices into their daily routine, with a particular focus on courtroom communication. Researchers will track the impact, using defendant interviews and court data to measure defendants’ perceptions of the court process and their future compliance (e.g., payment of fines and restitution, completion of probation mandates, and avoiding re-arrest).

With budget cuts and the resulting pressure on the justice system to do more with less, the judge’s role has not gotten any easier. Thankfully, procedural justice research provides some clear direction for judges interested in improving the efficiency and effectiveness of their courts without significant costs. The power to improve compliance and reduce reoffending may be within the reach of any judge who is willing to rethink the way he or she talks in the courtroom.

For more information on this topic,

visit <http://www.courtinnovation.org/topic/procedural-justice>. ■

Endnotes

1. SHELLI B. ROSSMAN ET AL., THE MULTI-SITE DRUG COURT EVALUATION (2011), available at <http://www.courtinnovation.org/multi-site-adult-drug-court-evaluation>.

2. See, e.g., M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL IN DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), available at http://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf.

3. See, e.g., Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents’ Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553 (1993).

4. See, e.g., W.M. O’Barr & J.M. Conley, *Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives*, in LANGUAGE IN THE JUDICIAL PROCESS 97–131 (J.N. Levi & A. Graffam Walker eds., 1990).

5. RACHEL PORTER, CTR. FOR COURT INNOVATION, PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, AND RECOMMENDATIONS, (2011), available at http://www.courtinnovation.org/sites/default/files/documents/Procedural_Fairness_CA.pdf.

6. Advisory group members include Greg Berman, director, Center for Court Innovation; Kevin Burke, judge, Hennepin County (MN) Family Justice Center; William Dressel, president, National Judicial College; Malcolm Feeley, professor of legal theory, University of California–Berkeley; Mark Juhas, judge, Los Angeles County (CA) Superior Court; Judy Harris Kluger, Chief of Policy and Planning, New York State Unified Court System; Noreen Sharp, former special deputy court administrator for the Maricopa County (AZ) Superior Court and former division chief counsel of the Arizona Office of the Attorney General; Alfred Siegel, deputy director, Center for Court Innovation; Larry Solan, professor of linguistics and the law, Brooklyn Law School; Robin Steinberg, executive director, The Bronx Defenders; David Suntag, judge, Vermont Judiciary; Kelly Tait, communication consultant and instructor, University of Nevada; and Tom Tyler, professor of social psychology, Yale Law School.

7. IND. JUDGES ASS’N, INDIANA MODEL CIVIL JURY INSTRUCTIONS (2010).

8. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007–2008).

9. Interview with Tom Tyler, professor, New York University (2011), available at <http://www.courtinnovation.org/research/tom-tyler-phd-professor-new-york-university>.

10. Andrew V. Papachristos, Tracey Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223 (2007).