

Procedural Fairness and Judicial Decision Making

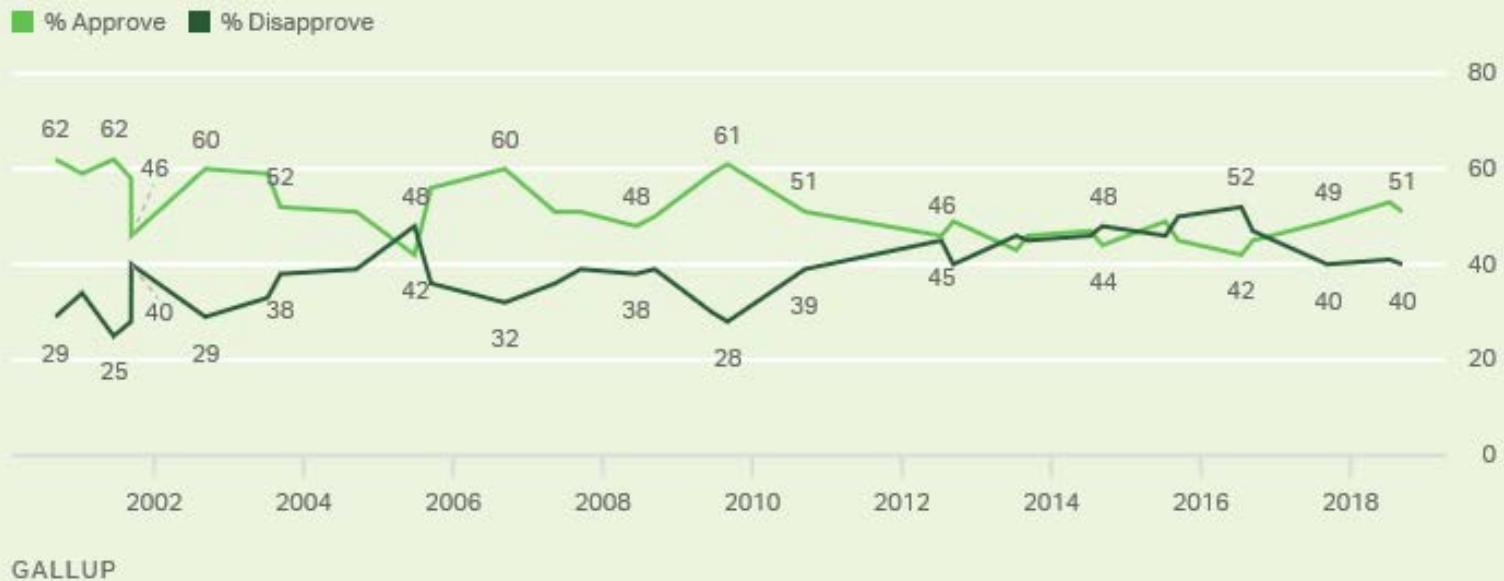
Judge Kevin S. Burke
American Judges Association

Topics

- What the public thinks about courts and judges
- An in-depth tour of procedural fairness
- The mental aspects of judging

There is a lack of trust in our public institutions that, although not focused specifically on courts, is troublesome.

Do you approve or disapprove of the way the Supreme Court is handling its job?



U.S. Supreme Court Approval

Americans' Views of Supreme Court Ideology Shift

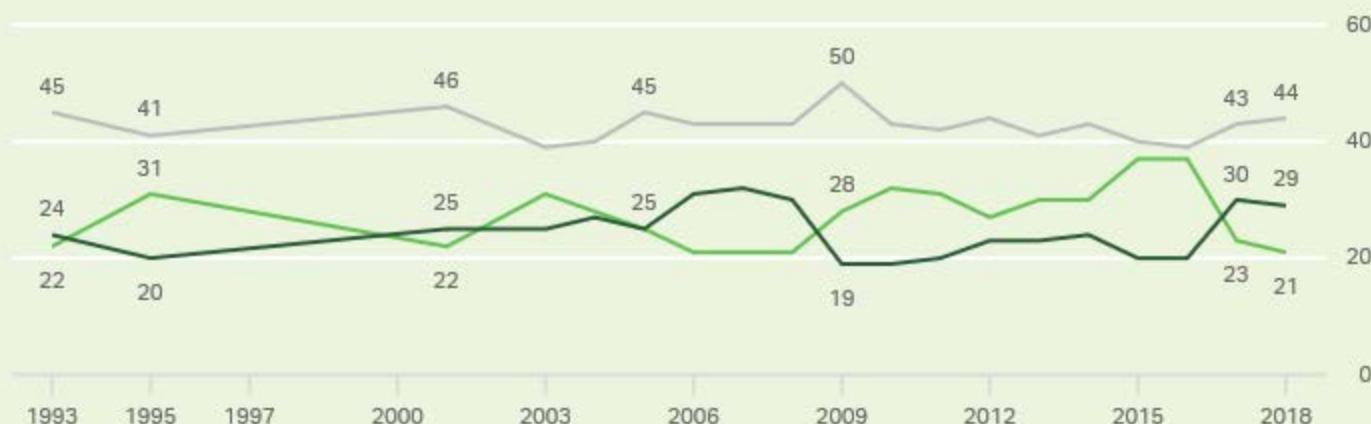
Americans' Views of the Supreme Court's Ideology

In general, do you think the current Supreme Court is too liberal, too conservative, or just about right?

% Too liberal

% Too conservative

% About right



GALLUP

Too Liberal: 21% / Too Conservative: 29%

Is corruption widespread throughout the government in this country or not?

	Yes, widespread
Mauritius	75%
United States	75%
United Kingdom	46%
Ireland	40%
Germany	37%
New Zealand	27%

Confidence in Institutions

How much confidence do you have in each one?

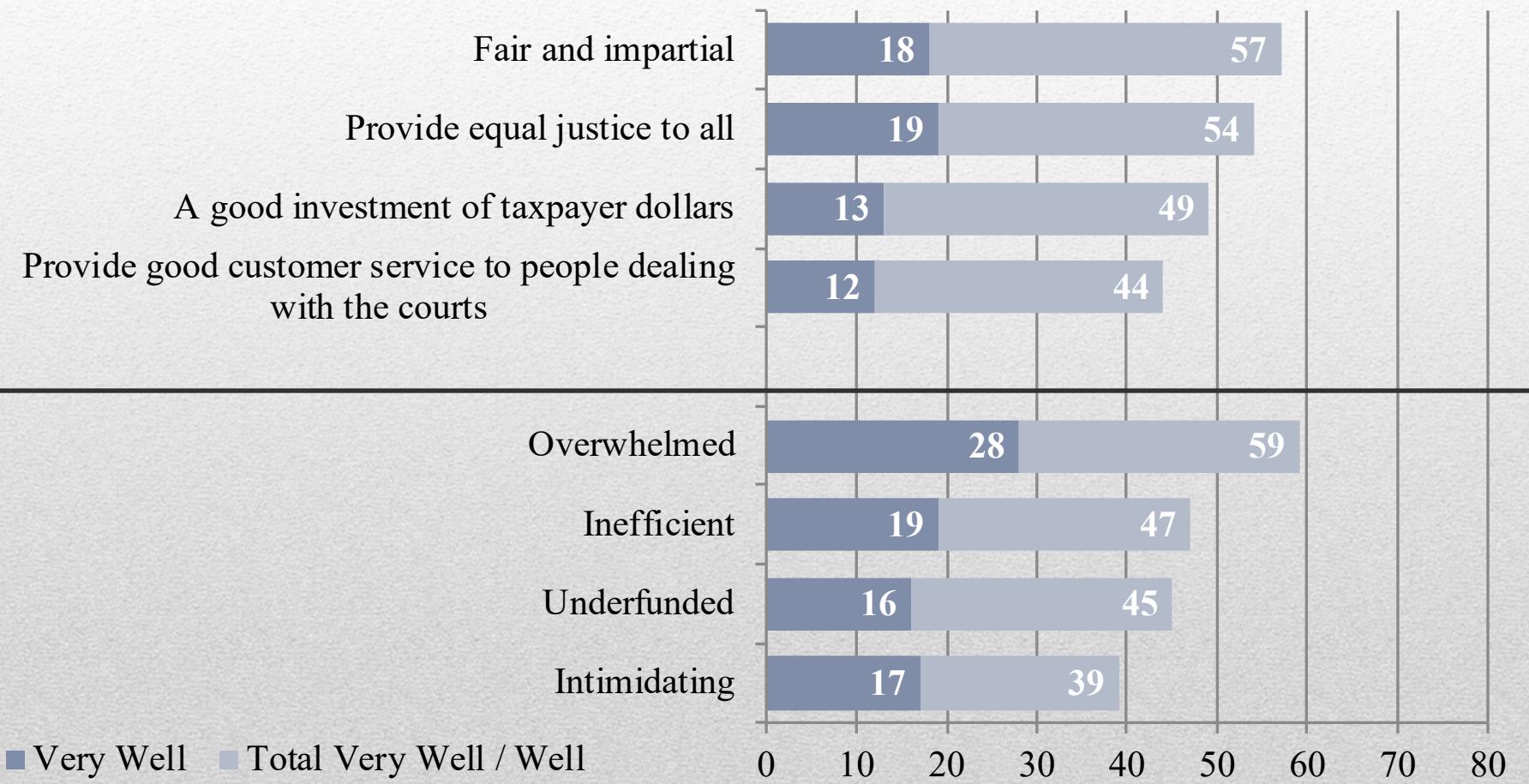
Institution	Great Deal	Quite a Lot	Some	Very Little	None
The Military	43	31	20	5	<0.5
The Police	29	25	31	14	1
Church or Organized Religion	20	18	33	24	3
The Supreme Court	16	21	42	17	2
The Medical System	16	20	37	25	<0.5
Banks	13	17	46	21	1
Public Schools	12	17	44	25	2
Newspapers	12	22	35	38	2
Television News	10	10	34	41	4
Big Business	10	15	43	29	1
The Criminal Justice System	9	13	41	34	2
Congress	6	6	39	46	3

Chart excludes percentage who had "no opinion"

Source: Gallup Poll, 2018 Responses

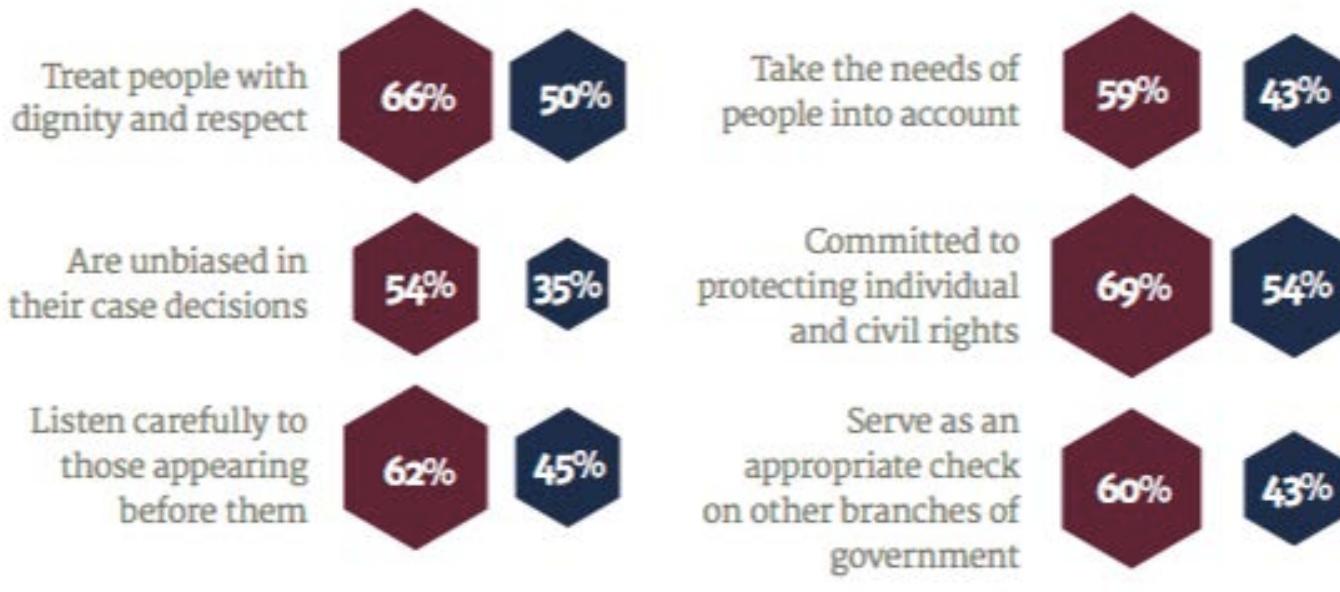
Weak Numbers on Key Principles of the Court System

Thinking about the (STATE) court system, please tell me whether, in your opinion, each of the following words or phrases describes the state's courts very well, well, not very well, or not well at all.



Source: NCSC/Justice at Stake survey, June 2012 (MOE ± 3%)

Q: “Do you agree or disagree with the following statements about state courts?”*



◆ Overall

◆ African Americans

Race impacts perceptions of fairness

Source: NCSC survey, Oct. 2015

Q: “How well does each of the following describe state courts?”**

Fair and impartial



Provide equal justice to all



● Overall

● African Americans

Racial perceptions of court fairness differ nationally too

Source: NCSC survey, Oct. 2015

In your opinion, to what extent do you think a judge's ruling is influenced by his or her personal political views?

Great extent	30%
Moderate extent	45%

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center, 2007 Survey. MOE \pm 3.0%.

www.annenbergpublicpolicycenter.org (<http://goo.gl/dyjEjn>)

In general, to what extent do you think a desire to be promoted to the next higher court would affect a judge's ability to be fair and impartial when deciding a case?

Great extent	35%
Moderate extent	40%

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center, 2006 Survey. MOE \pm 3.0%.

www.annenbergpublicpolicycenter.org (<http://goo.gl/SK49bl>)

- Record six Colorado judges recommended not to be retained or resigned during evaluation process.
- Commission recommended against Judge Ben McClelland: “Commentators described him as ‘arrogant, defensive, impatient, and lacking appropriate judicial demeanor.’” The Commission credited him for hard work and efficiency.
- Judge McClelland responded: “The appeals courts have upheld all of my trial court rulings. I’m strict in the application of law.”
 - Source: *Denver Post*, Sept. 26, 2014.

Lawyers vs. the Public

The differences in trust of the courts are not significant between those with experience in court and those whose perception is through the media



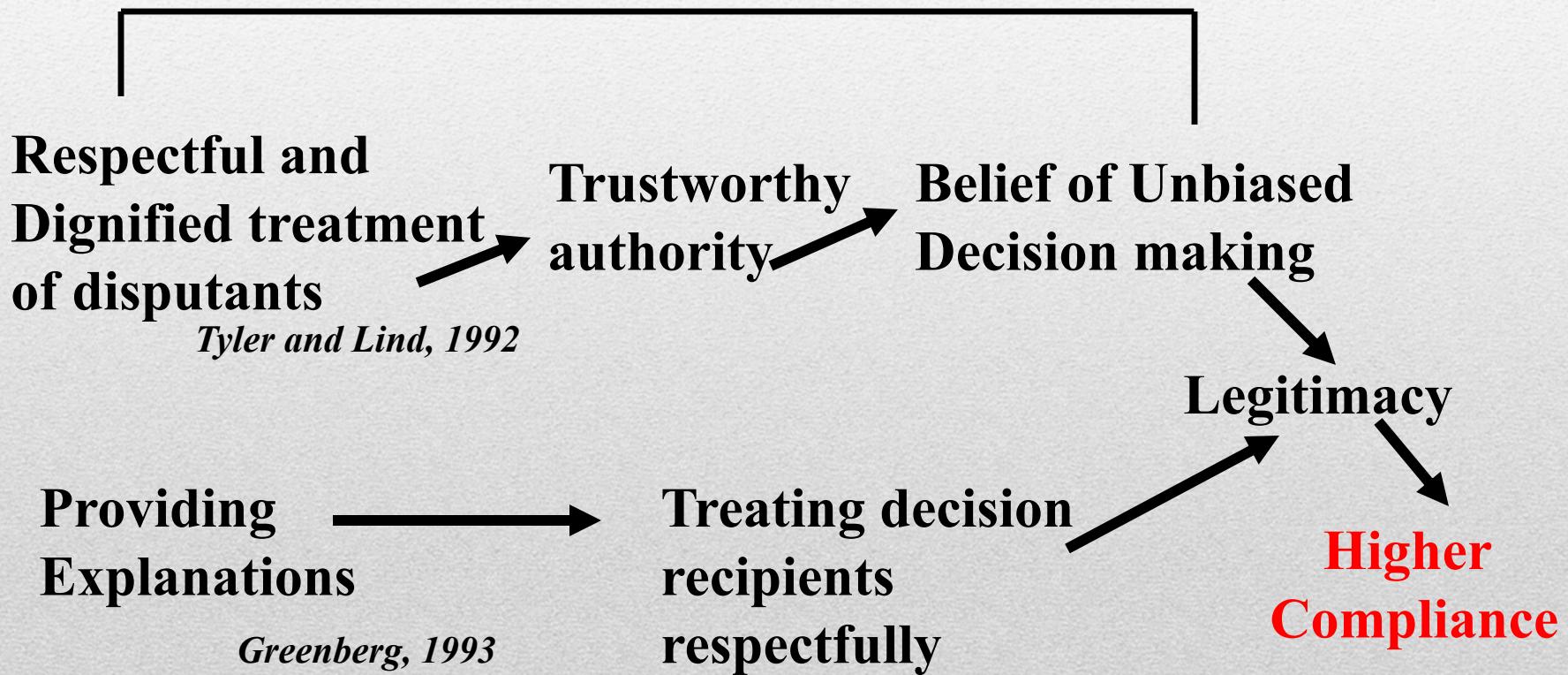
PROCEDURAL FAIRNESS

Factors that could matter to perceptions of fairness

- Outcome favorability – Did I win?
- Outcome fairness – Did I get what I deserve?
- Procedural fairness – Was my case handled through fair procedures?

Procedural Fairness

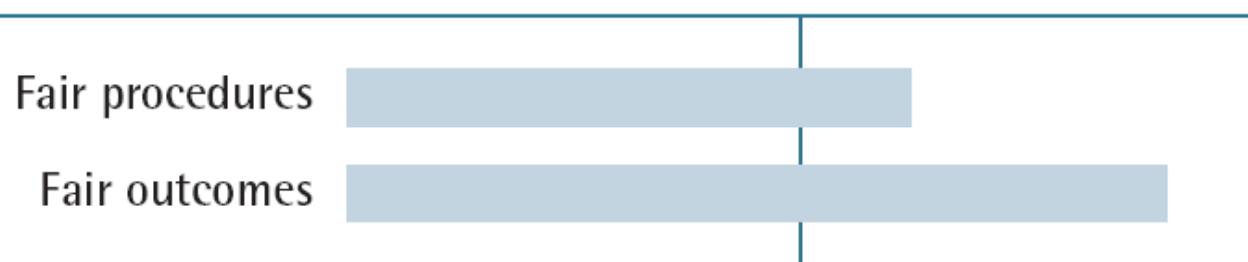
Aspects of Procedural Fairness



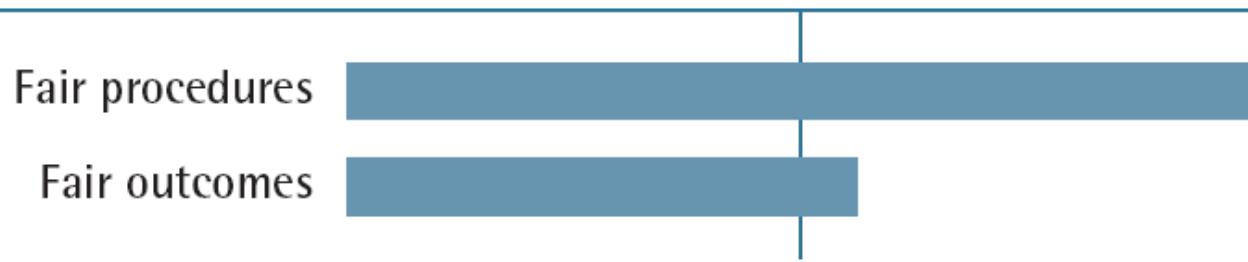
Lawyers vs. the Public: Predictors of Confidence

Relative importance of significant factors on overall court approval

Attorneys



Public



Source: 2005 California survey.

EXPLAIN THIS

Who's a good deal happier?

Fairness registers in a part of the brain that also responds to pretty faces and eating chocolate, a study finds.

By ELENA CONIS
Special to The Times

What's new: The sinking feeling that creeps in after you've paid too much for a house, car or new pair of shoes may actually be a hard-wired, neurological response to being treated unfairly.

On the flip side, getting a fair deal on that same car or pair of shoes stimulates parts of the brain associated with reward and happiness.

The finding: Researchers at UCLA's Semel Institute for Neuroscience and Human Behavior recently reported in the journal Psychological Science that getting a fair deal activated the same parts of the brain — the ventral striatum, the amygdala and the ventromedial prefrontal cortex, together known as the reward circuit — that are stimulated by earning money, looking at attractive faces or eating chocolate (in those who like the stuff).

Maybe we've got something here . . .

- Study reported in 2008 says perceived fairness triggers brain reactions similar to eating chocolate or seeing a pretty face

- Voice
- Neutrality
- Respect
- Trust (trustworthy authorities)

**Four key components
of procedural fairness**

- People want the opportunity to tell their side of the story and have their stories told to a judge who listens carefully.

Voice

- Be transparent and open about how decisions are being made.
- Give an explanation in terms understandable by a lay person.
- Cite to relevant statutes, rules, or court policies.

Neutrality

Neutrality

Neutrality is important, but if applied improperly, it can mask that you care.



- Taking people's concerns seriously
 - Shows respect for them as people and as citizens who have the right to address the court about their issues.
 - People come to court about issues that are important to them, irrespective of whether they have a strong legal case.
 - Make clear that you have heard the needs and concerns that people are expressing.
 - Explain why those concerns can or cannot be accommodated in a legal setting.
 - People take cues about respect for them as they encounter all government employees in the building.

Respect

- Give evidence that you have listened.
 - Restate the party's basic position.
- Explain your decision, including an explanation about why rules preclude you from adopting the party's position.
- Express awareness of and empathy for their situation—this need not eliminate neutrality.

Trustworthy Authorities

- Learned Hand said:
 - “The spirit of liberty is the spirit which is not too sure that it is right.”
 - Which judge listens better?
 - The one who already knows the answer.
 - The one who is willing to admit he or she may not.

Why not be up-front about your limitations?

- Are we better than others at figuring out who is telling the truth?
- No. In a controlled study of 110 judges with an average of 11.5 years on the bench, judges did not better than chance in telling who was being truthful and who wasn't.
 - See Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 Am. Psychologist 913 (1991); Richard Schauffler & Kevin S. Burke, *Who Are You Going to Believe?*, 49 Court Rev. 124 (2013).

Judicial Humility: Judges as Truth-Finders

Stay Focused

- PREPARE: Clear your mind.
- MONITOR: Recognize when your concentration has strayed.
- CORRECT: Refocus your mental attention on the speaker.

Source: HRDQ

Capture the Message

- BE OPEN MINDED: Let go of your assumptions, biases, and expectations.
- THINK: Mentally interact with the speaker's ideas or information.
- CLARIFY: Ask questions to get more information and settle points that aren't clear.
- CONFIRM: Offer summaries to check your understanding.

Source: HRDQ

Help the Speaker

- **SCREEN:** Avoid distracting verbal comments.
- **CONTROL YOURSELF:** Avoid distracting nonverbal actions.
- **RESPOND:** Offer verbal encouragement.
- **ASSIST:** Offer nonverbal support.

Why Should you Collect Data?

Tony Judt, the British historian, put it this way (see Moyn, 2015): “When the facts change, I change my mind. What do you do?”



MAKING BETTER DECISIONS

- Reflexive
 - Automatic, rapid, unconscious
 - Relies on patterns—or *schemas*—that develop based on your experiences with the world
- Reflective
 - Deliberate, slow, conscious
 - Requires attention
 - Because of the need for conscious attention, there's limited capacity, so the “principle of least effort” applies.
 - So we tend to process reflexively based on schemas where possible

Dual System of Information Processing



- “Most of the time we solve problems without coming close to the conscious, step-by-step analysis of the deliberative approach. In fact, attempting to approach even a small fraction of the problems we encounter in a full, deliberative manner would bring our activities to a screeching halt. Out of necessity, most problem-solving is intuitive.”
 - Brest & Krieger, *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policymakers* (2010)

Limited Capacity

- May be better than a deliberative approach in some situations (especially with training)
 - Firefighters
- But schemas may be
 - Based on inaccurate information (*e.g.*, assuming that there's a cause-and-effect relationship between two events that take place in sequence)
 - Be only partially correct (*e.g.*, stereotypes)
 - Be applied incorrectly (*e.g.*, assuming a gesture used by one culture means the same thing to another group)

Effects of Schema-Based, Reflexive Decision Making

- Cognitive heuristics
 - Heuristics are schemas that rely on only some of the information that's available to make a decision quickly and with little effort.
 - Examples: Anchoring, Reliance on small samples, Framing, Hindsight, Egocentric
- Implicit Biases
 - Implicit biases are schemas based on implicit attitudes and stereotypes that operate below the radar.

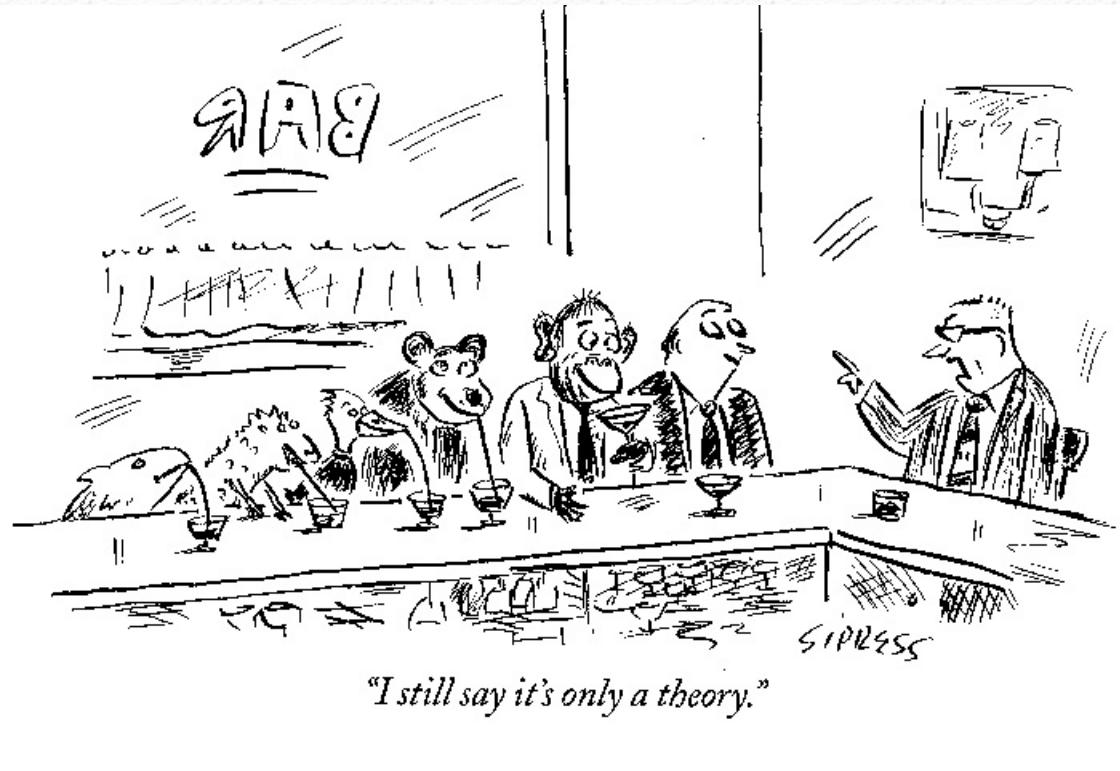
Two Types of Schemas That May Lead to Inaccurate Decisions

Other Examples of Heuristics

- Reliance on small samples
- Framing
- Egocentric



A Theory: Judges have been specifically trained to follow procedural rules designed to minimize the influence of irrelevant information. So maybe they aren't subject to common heuristic errors.



Are judges immune from common heuristic errors?

- Anchoring: when making numeric estimates, people commonly rely on the initial value available to them. It becomes a starting point to adjust away from but tends to greatly affect the result.
- Case study: judges given a civil case with substantial damages. Half the judges are told that the defendant moved to dismiss for lack of federal diversity jurisdiction (<\$75,000 damages).
- Judges differed in estimated damages:
 - Told of motion: \$882,000 average.
 - Not told of motion: \$1.25 million average.
 - Guthrie, Rachlinski & Wistrich

Judges & Heuristic Errors: Anchoring

- Fatigue
 - Sleep deprivation leads to lack of innovation, inflexibility of thought processes, excess attention to distractions, over-reliance on past strategies, unreliable memories, loss of empathy, and inability to deal with unexpected events.
 - These effects can occur when sleep is reduced to 6 or fewer hours over a 14-day period, which caused problems equal to those caused by 2 full nights of sleep deprivation.

Factors Detracting from Mindful Decision Making



- Mood
 - Those in a positive mood engage in more reflexive, automatic processing.
 - Those in a negative mood engage in more reflective, deliberative processing.
 - Reliance on stereotypes may be more likely if you're in a good mood—and just cruising along.
 - Vigilance—and conscious thought—is important.

- Multitasking
 - The brain “multitasks” by rapid task switching, not actually multitasking.
 - Almost universally (97% of people), multitasking has a cost in performance.
 - Are you *really* among the 3%?
 - Note: Multitasking in the courtroom also has a procedural-fairness cost—litigants may perceive that the judge is not paying attention.

Factors Detracting from Mindful Decision Making

Multitasking on the Bench: Norway



And finally...

BLACK ROBE DISEASE

It is fatal.

There is no known cure.

If you don't think you can get it,
you are practicing unsafe judging.



Black robe disease most likely will
affect not just litigants, but will
permeate your court culture.

It took me a long
time to learn to never
get mad, just to get
sensibly irritated.

Sam Snead

Other-directed



Unhappy witnesses,
defendants, jurors,
spectators, and
family members;
Feuding lawyers;
Cranky clerks; etc.

Self-directed



Handling
your own
emotions

Judges Perform Emotional Labor

- Stop what you are currently doing
- Take a deep breath and focus on the sensation of breathing
- Observe what you are thinking, feeling, and doing, and
- Proceed with new awareness

STOP Meditation

- Was the person listened to?
- Were litigants treated with respect?
- Do they understand:
 - What the decision was?
 - Why the decision was made?
 - Neutral principles

Procedural Fairness in a Nutshell



PLEDGE OF FAIRNESS

The fundamental mission of the Alaska Court System is to provide a fair and impartial forum for the resolution of disputes, according to the rule of law. Fairness includes the opportunity to be heard, the chance to have the court process explained, and the right to be treated with respect. The judges and staff of the Alaska Court System therefore make the following pledge to each litigant, defendant, victim, witness, juror, and person involved in a court proceeding:

We will LISTEN to you

We will respond to your QUESTIONS about court procedure

We will treat you with RESPECT



Proceduralfairnessblog.org

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<http://proceduralfairness.org/>

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 **Procedural Fairness**
FOR JUDGES AND COURTS

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PROCEDURAL FAIRNESS THEORY RELEVANT RESEARCH COURT IMPLEMENTATION POLICING RESOURCES


Dedicated to promoting the implementation of procedural fairness principles within the nation's justice systems

Spotlight
Procedural Fairness Principles Useful in Judicial Performance Evaluations!
The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission

Welcome!
Procedural fairness (also referred to as procedural justice) is an evidence-based practice reliably associated with higher levels of compliance with and greater amounts of satisfaction with decisions by authority figures. We focus on helping judges and courts implement policies and practices that promote procedural fairness in courtrooms and courthouses. In addition, we look at policing, currently the focus of the majority of criminal justice research on procedural fairness, but we retain an emphasis on the courts.

We also seek to bridge the gap between academic research and actual practice. This site is a collaborative effort by judges, researchers, and university professors who share a belief that an emphasis on procedural fairness can make judges and court managers more effective decision makers, improve compliance with court orders, and increase public satisfaction with the court system. Yet we also share a desire to engage with one another—as well as a broader community—to test our ideas. So we provide a forum linking judges and court managers to the academic and research community engaged in the study of procedural fairness.

The Procedural Fairness Blog will offer a forum to discuss current issues and events through posts by founding

Procedural Fairness For Courts and Judges

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 **Procedural Fairness**
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Judging Procedural Fairness in Utah [Leave a comment](#)

The Utah Judicial Performance Evaluation Commission has posted its first formal evaluation of judges based on procedural-fairness criteria. The commission has evaluated the 25 Utah judges up for retention in the November 2012 election.

Utah is the first state to provide detailed evaluations of judges' behavior in the courtroom based on procedural-fairness criteria. The Utah commission is required by law to provide a public evaluation of each judge up for retention, and the statute setting up the commission requires that its evaluations be based in part on observation of each judge in the courtroom. The commission adopted an administrative regulation providing for a corps of trained citizen volunteers who would observe each judge in the courtroom. Those administrative regulations also require that the judges be evaluated on procedural-fairness criteria: voice (e.g., whether the judge gave parties an adequate opportunity to be heard), neutrality (e.g., whether the judge displayed fairness and provided transparency in rulings), and respect (e.g., whether the judge demonstrated courtesy toward all who appeared before him or her). At least four different observers are used for each judge.

Through this program, Utah became the first state to evaluate judges specifically on procedural-fairness criteria. Two other states—Alaska and Colorado—have used courtroom observers as part of a judicial-evaluation program, but neither provided specific criteria for evaluating the judge's adherence to procedural-fairness principles.

For the 25 judges up for retention this year, all were approved for retention, though three judges were approved with one dissent in 11-to-1 votes. In two of those cases, although the judges had positive ratings from attorneys, courtroom observers had raised some concerns and at least one courtroom observer had said that he or she would feel uncomfortable appearing in front of the judge.

Skeptics might suggest that when all 25 judges are approved for retention, the evaluation process isn't meaningful. But there can be effects that are not obvious

For More on Procedural Fairness . . .

Steps I Would Take If I Were You

Ways to follow up:

- AJA bog
 - blog.amjudges.org
- Procedural Fairness Website
 - Proceduralfairness.org
- Call me
 - (612) 348-4389

