

Procedural Fairness: A Treat for the Brain

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People are hardwired for fairness, and the justice system is the social context they count on most to provide it. The human sense of fairness is intriguing, partly because it goes so far beyond self-interest. The reward regions of the human brain—those associated with pleasures such as the taste of chocolate—tend to be activated both when we’re treated fairly and when we see others being treated fairly.¹ In addition, people react negatively not just to getting less than someone else, but also sometimes to getting more.²

Researchers from multiple disciplines are examining the complex nature of perceptions of fairness. Most recently, findings in social psychology have been augmented by research in neuroscience.

These investigations have confirmed that people care deeply about the processes by which decisions are made, even when the decisions are unfavorable to them. This “fair process effect” has been demonstrated with a wide range of methodologies across contexts and cultures.³ For instance, neuroimaging technology provided support for the idea that the human brain perceives procedural fairness (fair treatment) and distributive fairness (fair outcomes) as distinct constructs in a 2009 study using fMRI (functional magnetic resonance imaging, which measures brain activity based on the increase of blood flow to regions of the brain that are in use).⁴

Clearly judges should be concerned about fair outcomes in the court system. However, because evaluations of the fairness of the justice system can be even more strongly influenced by the procedural fairness aspects—by people’s perceptions of how they were treated by legal

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1. ¹Tabibnia, Golnaz and Lieberman, Matthew D., Fairness and Cooperation Are Rewarding. *Annals of the New York Academy of Sciences*, 1118: 90–101 (2007).
[http://www.scn.ucla.edu/pdf/Tabibnia%20\(2007\).pdf](http://www.scn.ucla.edu/pdf/Tabibnia%20(2007).pdf)
 2. ²Brosnan, Sarah F., and de Waal, Frans B. M. Evolution of Responses to (Un)Fairness. *Science* 17: Vol. 346, Issue 6207, (Oct. 2014) <http://science.sciencemag.org/content/346/6207/1251776>
 3. ³ MacCoun, Robert J. Voice, Control, and Belonging: The double-edged sword of procedural fairness. *Annual Review of Law and Social Science*, 1:171–20 (2005).
<http://www.annualreviews.org/doi/bs/10.1146/annurev.lawsocsci.1.041604.115958?journalCode=lawsocsci>
 4. ⁴Dulebohn, James H, et al. The Biological Bases of Unfairness: Neuroimaging Evidence for the Distinctiveness of Procedural and Distributive Justice. *Organizational Behavior and Human Decision Processes*; Vol.110(2), 140-151 (2009)
 5. See, for instance, Tyler, T.R. (2001). Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions? 19 *BEHAV. SCI. & L.* 215.
<http://onlinelibrary.wiley.com/doi/10.1002/bsl.438/pdf>; and Leben, Steve (2011). Considering procedural-fairness concepts in the courts of Utah. Procedural Fairness for Judges and Courts website.

authorities and how those legal authorities made their decisions—than by whether they “win” or “lose,” judges need to be equally concerned about those aspects.⁵

Over four decades of research into procedural fairness have taught us a lot about what tends to lead to perceptions that a process is fair as well as the likely consequences of that judgement. Four procedural factors that consistently have an impact on court users are: (1) *Respect* - being treated with dignity and respect; (2) *Understanding* - understanding the process enough to participate meaningfully and understanding how decisions are made; (3) *Voice* - having an opportunity to be heard and considered; (4) *Neutrality* – having a trustworthy, impartial decision-maker who is trying to be fair.⁶

Positive perceptions of procedural fairness have major consequences, significantly increasing litigants’ acceptance of case outcomes, voluntary compliance with court orders, and likelihood of engaging in future law-abiding behavior, as well as improving overall trust and confidence in the justice system.⁷ One of the main ways judges can have these critical impacts is through paying close attention to their communication behaviors and considering how they might be perceived by court participants.

Understanding of the role of communication in affecting perceptions of procedural fairness has been expanded by research into how the human brain processes information.⁸ People are highly sensitive to social information—to cues related to relationships, emotions, and power—and they are especially attuned to what they think is being communicated by someone in a position of authority.⁹ While all justice system professionals’ behaviors can have an impact on perceptions of fairness, the judge is seen as the highest level of authority within the system; court users are hyper-sensitive to the judge’s communication behaviors.

Communication behaviors can be grouped into two main categories. Verbal communication consists of the words, oral and written. Nonverbal communication includes all behaviors *except* the words: gestures, eye contact, facial expressions, tone of voice, vocal inflections, volume, pauses, body positioning, dress, proximity, etc. Recent neuroimaging research confirms that nonverbal cues exert a greater influence on our perceptions than verbal

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6. ⁶ See, for example, Thibaut, J. & Walker, L. *Procedural Justice: A Psychological Analysis*. Lawrence Erlbaum Associates, Hillsdale, NJ (1975); and Tyler, Tom R. *Why People Obey the Law*. Princeton University Press, Princeton, NJ (2006).
 7. See, for example, Gottfredson, Denise C. et al. How Drug Treatment Courts Work: An Analysis of Mediators.” *Journal of Research in Crime and Delinquency* 4: 3: 3-35 (2007); E.A. et al. Procedural Context and Culture: Variation in the antecedents of procedural justice judgments. *J. Pers. Soc. Psychol.* 73:767–80 (1997); and Tyler, Tom R. Procedural justice and the courts. *Court Review*, 44 (1/2), 27-31 (2007).
 8. See, for example, Kahneman, Daniel. *Thinking Fast and Slow*. Farrar, Straus and Giroux, New York, NY (2011).
 9. Goleman, Daniel. *Social Intelligence: The New Science of Human Relationships*. Bantam Books, New York, NY (2006).

cues in communication of emotion, and nonverbal cues exert an influence even when attention is focused on verbal cues.¹⁰

While procedural fairness principles are important in all cases, they are especially relevant to cases involving self-represented litigants (SRLs). One reason for this is that the key components of procedural fairness align closely with some of the especially challenging aspects of self-representation in a complex legal system, aspects that can make these cases challenging for judges as well.

Respect: For SRLs, a lot is at stake in court, not only the reason for their appearance but also their social identities. “Social-evaluative threat” is when a person is in a context in which the self could be judged negatively by others. This condition creates extra stress with physical and psychological consequences.¹¹ Clearly court is one of those contexts, with SRLs in a position to be judged by someone with a high level of authority as well as by other citizens.

Authorities are often seen as representative of an entire group or society; perceptions of one’s relation to an authority are considered important indicators of one’s relation to the entire group.¹² Respectful behaviors from judges carry extra weight.

In addition, people tend to “synchronize” with the authority figure’s attitudes and emotions, which are often communicated through nonverbal paths such as tone of voice, length of pause, amount of eye contact, etc.¹³ So if the judge is purposefully and consistently respectful, this increases the chances that the SRL will follow suit.

Understanding: Issues in understanding can relate to distributive fairness and procedural fairness. The challenges come from an SRL having a grasp of what is happening and what is required *and* being able to access and apply that information in the intimidating, cognitively demanding environment of the courtroom. SRLs often have heightened emotions including anxiety, stemming from both the events that led them to be in court as well as from the actual experience of representing themselves. Anxiety impacts cognitive performance; high anxiety impairs the efficiency of the central component of the working memory system.¹⁴

Taking this into account and enhancing SRLs’ understanding of processes, terms, expectations, and decisions can have positive impacts in several ways. Providing relevant

10. ¹⁰ Jacob, Heike et al. Neural Correlates of an Attentional Bias toward Nonverbal Emotional Cues. *Cerebral Cortex* June 2014; 24:1460–1473 (2014). <https://cercor.oxfordjournals.org/content/24/6/1460.full.pdf>

11. ¹¹ Bishop, S. J. et al. Prefrontal cortical function and anxiety: Controlling attention to threat-related stimuli. *Nature Neuroscience*, 7, 184-188.

12. ¹² Lind E. Allen et al. Procedural context and culture: variation in the antecedents of procedural justice judgments. *J. Pers. Soc. Psychol.* 73:767–80 (1997).

13. ¹³ Goleman, Daniel. *Social Intelligence: The New Science of Human Relationships*. Bantam Books, New York, NY (2006).

14. ¹⁴ Derakshan, N., and Eysenck, M. W. Anxiety, Processing Efficiency, and Cognitive Performance: New Developments from Attentional Control Theory. *European Psychologist*; Vol. 14(2):168–176 (2009). <http://econtent.hogrefe.com/doi/abs/10.1027/1016-9040.14.2.168>

information increases perceived fairness.¹⁵ Knowing what’s happening, even if a court participant has limited or no control over it, gives a perception of control, which reduces stress.¹⁶ And of course, increasing SRLs’ understanding makes it more likely that they will be able to participate in a meaningful way in the process. This is good for everyone involved, judges included.

Voice: There is an overwhelming body of evidence supporting the positive consequences of providing a voice to people in the justice system.¹⁷ People want an opportunity to tell their story to a well-intentioned authority figure.

It seems logical that providing an opportunity for voice would be considered fair because of the chance it offers participants to influence outcomes (“instrumental participation”). However, research has shown that while pre-decision voice with the potential to influence outcomes is preferable and leads to the greatest increases in procedural fairness, there still is some increase in perceived fairness even when participants know that their input will not have any impact on the decision.¹⁸ This powerful effect of a symbolic voice has led to some concern that “process voice” (non-instrumental participation) could be manipulated just to get an appearance of justice.

Since SRLs are often unsure when to speak and what is relevant, protecting their instrumental voice is of particular concern. Building in ways for SRLs to constructively participate (and being sure to clearly explain them) can help ensure that judges hear the information they need to make the best decision possible and that SRLs feel they’ve been heard by a trustworthy decision-maker.

Neutrality: A major aspect contributing to evaluations of procedural fairness is whether people think legal authorities are using their power appropriately. Here again the behaviors of judges can have both a direct and a symbolic significance. Impartiality is one of the hallmarks of the judge’s role, but justice has to be seen to be done.

This requires the judge to consider not only what it takes to make a fair, impartial decision, but also what communication behaviors will convey that impartiality to SRLs and other

15. ¹⁵ Lind E. Allen et al. Procedural context and culture: variation in the antecedents of procedural justice judgments. *J. Pers. Soc. Psychol.* 73:767–80 (1997).

16. ¹⁶ See, for instance, Weinstein, S.E. Sense of control eases physical toll of stressful situation *Psychophysiology*, 2002 <http://news.bio-medicine.org/medicine-news-2/Sense-of-control-eases-physical-toll-of-stressful-situation-7200-1/>

17. ¹⁷ MacCoun, Robert J. Voice, Control, and Belonging: The double-edged sword of procedural fairness. *Annual Review of Law and Social Science*, 1:171–20 (2005); and Platow, M.J. et al. Social Identification Predicts Desires and Expectations for Voice. 28 SOC. JUST. RES. 526 (2015). <http://link.springer.com/article/10.1007/s11211-015-0254-6>

18. ¹⁸ Lind, E.Allen, Kanfer, R., & Earley, P.C. Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments. *Journal of Personality and Social Psychology*, 10/1990; 59(5):952-959 (1990).

court participants. Some of those behaviors might include acknowledging the parameters of or constraints on decisions and explaining decisions, making it clear that arguments from both sides were considered.

Obviously the four major components of procedural fairness interrelate in many ways. For instance, the suggestions above will not only make it clear the judge is impartial but will also add to the SRL's understanding. Demonstrating that arguments from both sides were heard and considered also connects to the component of voice. Being transparent about how decisions were made is also respectful. Each of these components can build on and support the others.

Drawing on the multi-disciplinary research into fairness, it is clear that the choices judges make, big and small, can have profound implications for individuals and for our justice system as a whole. Emphasis needs to be on both fair outcomes and fair procedures; to make connections in the brain, justice needs to be perceived to be fully achieved.

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