

Public Trust and Procedural Justice

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Popular dissatisfaction with the administration of justice isn't new. As Roscoe Pound reminded us almost 100 years ago in his famous 1906 address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice," it is "as old as law." But today, unlike in 1906, we have the benefit of sophisticated public opinion survey research to help us clarify the causes of popular dissatisfaction. With support from the Hearst Corporation, the National Center for State Courts last year conducted a national survey on "How the Public Views the State Courts" to examine the causes of popular dissatisfaction as we enter the 21st century.

In these remarks, I will first briefly summarize current public opinion about the performance of our state courts, focusing on public concerns in key areas that implicate the fundamental values that courts embody. Second, I will identify the key issues affecting public confidence in the courts, and the actions which must be taken at a national level to address those issues, as identified at the National Conference on Public Trust and Confidence in the Justice System held in Washington, D.C., in May 1999. Third, and most important, I will examine the relationship between "public trust" and "procedural justice," and the implications of that relationship—especially for trial judges.

The National Center's 1999 survey found that the public had some good things to say about the courts' performance. Seventy-nine percent agreed, for example, that judges are generally honest and fair in deciding cases, and 74% agreed that other court personnel are helpful and courteous. Eighty-five percent agreed that courts do a good job at protecting defendants' constitutional rights.

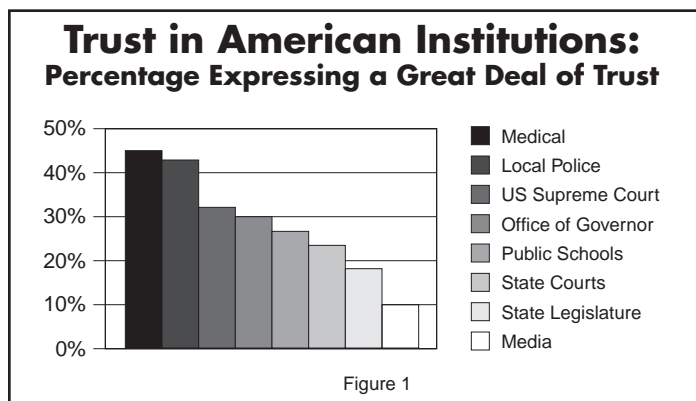
But the survey also revealed important areas of dissatisfaction, many going to the heart of what the American court system is all about. Let's quickly review a few of these key findings and their relation to fundamental goals and values of our judicial system.

I. THE TRIAL COURT PERFORMANCE STANDARDS AND PUBLIC OPINION

One source to which we may look for an expression of the fundamental goals of American courts is the Trial Court Performance Standards, which establish basic standards by which to measure the performance of general jurisdiction trial courts. The 22 standards are organized into five areas, or goals: (1) access to justice; (2) expedition and timeliness; (3) equality,

fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence. The fifth goal, public trust and confidence, appears to be the most important because, as the commentary to the standards points out, public trust and confidence in a court is likely to be present where a court's performance as measured against the other four goals is good, and the court's public communications are effective.

What is the current state of public trust and confidence in America's state courts? As depicted in Figure 1, 23% of the American public expressed a great deal of trust in the state courts. That is approximately half the degree of trust expressed in the medical profession, but more than twice the extent of trust expressed in the media. Other polls indicate, for example, that the military also enjoys particularly high levels of trust, but that lawyers and the United States Congress do not.



What are the sources of public dissatisfaction within each of the Trial Court Performance Standards' goal areas that appear to diminish the overall level of public trust in America's courts?

Access to Justice

More than two-thirds of those surveyed felt that it was not affordable to bring a case to court. Eighty-seven percent of respondents indicated that the cost of lawyers contributed "a lot" to the cost of going to court; more than a majority of respondents said that the complexity of the law, and slow pace of litigation, also contributed "a lot" to the cost of going to court. Forty-four percent felt that courts were "out of touch" with what's going on in their communities; more than half of Hispanic respondents, and two-thirds of African-American respondents, felt courts were "out of touch" with their communities.

Editor's Note: This article is based upon the Honorable Tom C. Clark Lecture presented at the 40th Annual Conference of the American Judges Association. It was presented on September 11, 2000, in Kansas City, Missouri.

Expedition and Timeliness

About half of all respondents felt that courts did not adequately monitor the progress of cases, and 80% said cases are not resolved in a timely manner.

Equality, Fairness, and Integrity

The American public seems to seriously question whether all Americans receive equal treatment from the courts. Eighty percent felt that the wealthy receive better treatment in the courts than others, and almost a majority of Americans feel that African-Americans and Hispanics are treated worse. More than a majority of Americans feel that non-English-speaking people are treated worse. It is particularly noteworthy that although 43% of white Americans agree that African-Americans are treated worse by the courts, fully two-thirds of the African-American community feel that African-Americans are treated worse.

Independence and Accountability

More than 81% of respondents felt that judges' decisions are influenced by political consideration, and 78% agreed that elected judges are influenced by having to raise campaign funds.

In short, we can conclude from these findings that a substantial majority of Americans feel that the actual performance of the courts does not live up to the courts' own goals and values.

II. THE NATIONAL CONFERENCE ON PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM

In May 1999, the National Center convened a national conference on public trust and confidence in the justice system to determine what should be done at both state and national levels to address these issues.¹ The conference was sponsored by the Conference of Chief Justices, American Bar Association, Conference of State Court Administrators, and League of Women Voters. More than 90% of the participants agreed that the relatively low level of trust in the American court system was a real problem for the courts; more than a majority felt that the judiciary had the primary responsibility for addressing the issue. The conference led to development of a national action plan on public trust and confidence, which is available on the National Center's Web site at <http://www.ncsc.dni.us/ptc>. Almost three-quarters of the conference participants agreed that implementation of the national action plan would, in fact, improve public trust in the courts.

The 500 conference participants used electronic voting devices to prioritize the issues affecting public trust and confidence, as well as the strategies and actions to be pursued to address those issues. Not surprisingly, in light of the public opinion survey responses reviewed earlier, fully two-thirds of the conference participants felt that it was "critical and essential" that the courts address the issue of unequal treatment in

the justice system. A majority of participants felt that the high cost of access to the justice system and lack of public understanding of the role of the courts were also critical issues that must be addressed.

Conference participants prioritized the actions that should be taken at the national level in order to improve public trust in the court system. The three top priority national activities called for were: (1) development and dissemination of models and "best practices"; (2) examination of the role of lawyers and their impact on public trust; and (3) education programs to improve public understanding of the court system. Building upon these priorities, the national action plan provides a useful guide to state and national organizations that wish to undertake activities to improve public trust in the court system.

III. PUBLIC TRUST AND PROCEDURAL JUSTICE

But what about individual trial judges? What are the implications of public opinion survey findings for trial judges and how does the courtroom conduct of trial judges affect public trust in the court system?

In order to address these questions, one must first determine which sources of public dissatisfaction actually affect the overall level of public trust in the court system. The National Center's 1999 survey, as well as other research conducted by the National Center and other organizations, demonstrates that, among the various sources of public dissatisfaction, perceptions of the relative fairness of court dispute resolution processes are what ultimately determine the level of public trust.² Although, for example, the public expresses great dissatisfaction with the high cost of access to the courts and the slow pace of litigation, it is not primarily those factors, but rather the fairness of court processes, that is associated with varying levels of public trust. This is especially true for minorities.

Importantly, it is the fairness of court processes, not the fairness of court outcomes or decisions, that are most important. Literature in the procedural justice field indicates that both litigants and the general public can—and do—distinguish between the fairness of the process, and the fairness, or even favorability, of the outcomes.³ In evaluating judicial performance, and in determining the level of trust in judicial authority, the fairness of the dispute resolution process is more important than even a favorable outcome. In the minds of litigants, the importance of a favorable outcome is consistently outweighed by the impact of an unfair process. In other words, a prevailing litigant might look back upon a recent court experience and say, "Yes, I won the case, but I don't know if it was worth it. It cost me too much, the judge wouldn't let me speak, I didn't understand what the judge was talking about, I was treated like dirt. I hope I never have to go through that again." On the other hand, an unsuccessful litigant can leave the courtroom saying, "I lost my case but I had my day in court, I was treated fairly, I can move on."

Footnotes

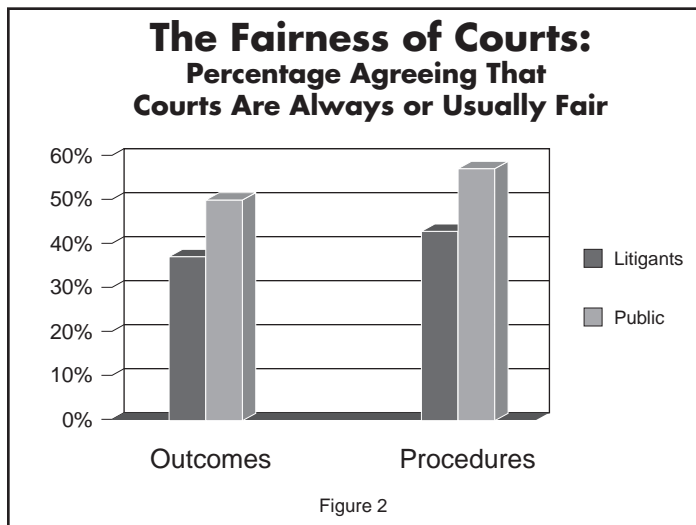
1. The Fall 1999 issue of *COURT REVIEW* was a special issue on public trust and confidence, containing the major addresses made at the national conference and other materials related to the topic. The full Fall 1999 issue on public trust and confidence issues can be

found on the American Judges Association's Web site at <http://aja.ncsc.dni.us/courtrv/review.html>.

2. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

3. See, e.g., Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 *SWISS J. ECONOMICS & STATISTICS* 219 (1997).

Not only do litigants and the public feel that fair processes are more important than favorable outcomes, but they also feel that courts do a somewhat better job in using fair procedures than in arriving at fair outcomes. The most recent public opinion survey conducted by the National Center in spring 2000 demonstrated, as shown in Figure 2, that 43% of litigants and 57% of the general public feel that court procedures are “always” or “usually” fair, whereas only 37% of litigants and 50% of the public feel that court outcomes were “always” or “usually” fair. Equally important, however, is that recent litigants are significantly less likely than the public generally to feel that either court procedures or court outcomes are fair.⁴ The percentage of recent litigants who feel that courts are fair is 13% to 14% lower than the comparable percentage of the general public.⁵



These findings on the relationship between procedural justice and public trust are important for a number of reasons. First, most judges tend to focus on outcomes, not process, *i.e.*, on the legal correctness of their rulings and decisions rather than on the fairness of their decision-making processes. Yet it is often the fairness of these decision-making processes, rather than the judicial decisions themselves, that are important to litigants and the general public, and it is this sense of fairness that forms the basis of judicial performance evaluation and determines the level of trust in judicial authority. As judges, we should pay more attention to the fairness of our decision-making processes.

Second, it is the fairness of our decision-making processes that makes our courts unique. The fundamental goals and values of the American court system are procedural, not substantive. It is *how* decisions are reached in our judicial system, rather than the decisions themselves, that distinguishes the work of American courts from the work of the other two branches of government and explains why the American judi-

cial system is increasingly the envy of both developed and developing countries throughout the world. It is the values inherent in the Trial Court Performance Standards and in the concept of the rule of law that distinguish the decision-making processes of the judicial branch from those of the political branches. As former New York Governor Mario Cuomo said in his remarks at the National Conference on Public Trust and Confidence in the Justice System: “The judicial system is different from the political branches of our government and that difference makes all the difference to our strength and glory as a democracy.”⁶

Finally, procedural justice is a fundamental shared value—shared by litigants, the American public, and people around the world. It is the courts’ commitment to procedural justice that can allow the courts to connect much more successfully with the communities that we serve.

But what is procedural justice? Procedural fairness can mean different things to different people. Among judges and lawyers, procedural justice is often defined as procedural due process, *i.e.*, notice and opportunity to be heard before a neutral and detached magistrate. But what does fairness mean to litigants and the public? Something quite different. For litigants and the public, fairness appears to consist of four principal elements: (1) neutrality; (2) respect; (3) participation; and (4) trustworthiness.⁷

The first element, “neutrality,” is very familiar to judges. The notions of a “neutral” magistrate, an impartial decision maker, a judicial officer free of bias, interest, or improper motive, and committed to equality under the law, are central to the concepts of judicial independence and the rule of law. Maybe Supreme Court Justice Anthony Kennedy puts it best when he refers to our law’s “constitutional promise of neutrality.”

The element of “respect” refers to whether the judicial officer is viewed as courteous and respectful, and the manner in which proceedings are conducted. The third element, “participation,” refers to the extent to which the judicial officer allows the litigants an active voice in the decision-making process, whether litigants feel they have “been heard” and whether the judicial officer has good communication and “attentive listening” skills.

The fourth, and probably most important, element is “trustworthiness.” Whether a judicial officer is trustworthy does not depend primarily on the officer’s honesty or reliability. It is generally assumed that judges are honest. Rather, “trustworthiness” is based upon a perception of the judge’s motives, *i.e.*, whether the judge truly cares about the litigant (demonstrates “an ethic of care”) and is seeking to do right by the litigant. Trustworthiness is not a measure of the judge’s knowledge, skills, or abilities. It is a measure of the judge’s character, not the judge’s competence. The litigant usually does not feel qualified to evaluate the judge’s competence, but often feels fully

4. Recent litigants were those who had been to court within the previous year.

5. On the more general issue of the relationship between court experiences and public trust, see David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?*, Winter 1998 COURT REVIEW at 14. Dr. Rottman is the associate director of research at the National Center and directs the National

Center’s public opinion survey research.

6. Mario Cuomo, *We Must Lead the Charge*, Fall 1999 COURT REVIEW 14, 16.

7. See, e.g., Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Service Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 887 (1997).

qualified, based upon the judge's reputation, demeanor, and behavior, to evaluate the judge's motives.

I noted earlier that the National Center's most recent survey found that litigants tend to be significantly less satisfied with the fairness of court procedures and outcomes than the general public. In the same survey, we questioned recent litigants regarding the four elements of procedural justice described above in order to determine the extent to which recent litigants feel that the courts demonstrate those qualities of fairness. The survey responses indicated that more litigants feel that courts are neutral and respectful than feel they are participative or trustworthy. As noted in Figure 3, respondents felt that the quality of trustworthiness was least often demonstrated by the courts.

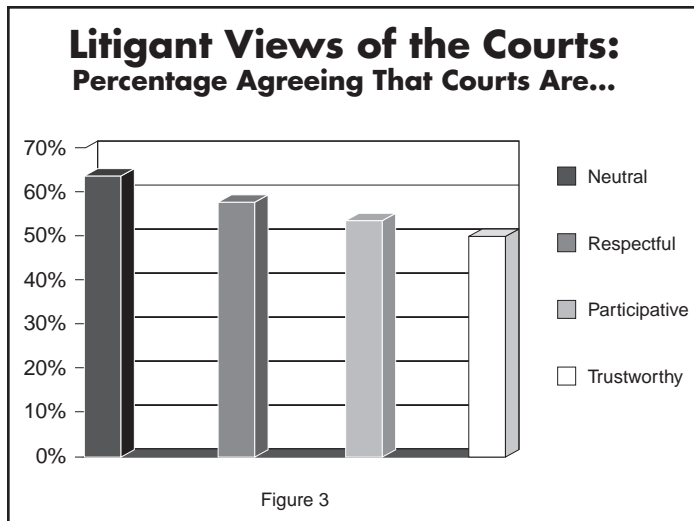


Figure 3

How do these criteria—by which litigants evaluate judicial performance—compare with the criteria by which we as judges evaluate our own performance? An analysis of the criteria utilized by those states with court-sponsored judicial performance evaluation programs reveals that there are six basic criteria commonly used in such evaluations.⁸ The six criteria are set forth in Figure 4. In comparing these criteria with the four elements of procedural fairness described above, several observations emerge.

First, knowledge of the law and the rules of legal procedure play a very limited role in evaluating judicial performance, both from the perspective of litigants as well as in court-sponsored evaluation programs. The criterion of substantive knowledge of law and legal procedure is but one of the six criteria set forth in Figure 4. Second, three of the four fairness qualities identified by litigants and the public (neutrality, respect, and participation) are also addressed by the performance criteria in court-sponsored evaluation programs.⁹

Third, and most important, trustworthiness, one of the most critical elements of fairness to litigants and the general public,

Judicial Performance Evaluation Criteria

- Knowledge of the Law and Court Rules
- Integrity / Impartiality
- Ability to Communicate
- Preparation, Attentiveness, Courtesy, and Temperament
- Administrative Skills
- Punctuality

Figure 4

does not appear to be recognized at all in traditional judicial self-evaluation programs. Neither our current judicial self-evaluation processes, nor our current judicial education programs for that matter, appear to promote “an ethic of care” on the part of judges. The quality of trustworthiness is often most important to litigants, but least often demonstrated by the courts, and least often recognized in our own self-evaluation processes.

Recently, “problem-solving courts” (including drug courts, domestic violence courts, mental health courts, truancy courts, gun courts, etc.) have sought to introduce an “ethic of care” and principles of therapeutic jurisprudence into court processes. Focusing on the extent to which court practices promote the psychological or physical well-being of the people affected, these courts often try to address the social and psychological problems that underlie legal disputes. But they also seek to introduce an “ethic of care” into court processes and to generally refocus on the qualities of respect, participation, and trustworthiness often cited by litigants and the general public.

What is the foreseeable impact on the level of public trust in the judiciary of initiatives like problem-solving courts, which refocus attention on these qualities of procedural fairness? In the National Center's most recent public opinion survey, we described some of the characteristics of problem-solving courts to respondents and asked whether, and how strongly, the respondents supported or opposed such courts. As depicted in Figure 5, 82% of the respondents indicated support for such courts and 50% of the respondents indicated “strong” support. Efforts by the courts to improve the fairness of court processes in ways often identified by litigants and the general public appear to win strong public support. This finding supports the conclusion that improvement in the fairness of court processes would result in significantly higher levels of public trust.¹⁰

8. KEVIN M. ESTERLING AND KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES 24-27 (Am. Jud. Soc. 1998).

9. Court-sponsored evaluation programs include two additional criteria (“administrative skills” and “punctuality”) that tend not to be explicitly identified by litigants and the public.

10. Greater procedural justice may also reduce recidivism. One study, for example, has shown that among men arrested for

domestic violence those who felt that they were treated respectfully by the police went on to commit 40% fewer offenses. See Raymond Paternoster, Robert Brame, Ronet Bachman, & Lawrence Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spousal Assault*, 31 LAW & SOC. REV. 163 (1997).

Public Support for Problem-Solving Courts

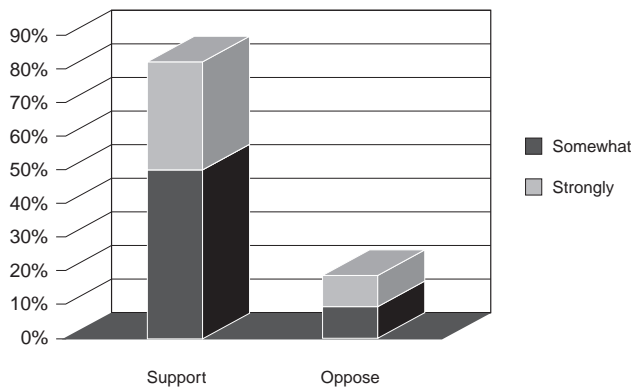


Figure 5

In addition, a less formal survey reported in *Court Review* indicated that judges who work in problem-solving courts report a higher level of litigant respect and gratitude than judges assigned to more traditional courtrooms.¹¹ Ninety-two percent of judges working in drug treatment courts reported feeling respected by litigants, compared to 72% of judges serving in traditional family courts. Eighty-one percent of the drug court judges reported feeling that litigants were grateful for the help received from the court compared to 33% of the judges serving in traditional family court.¹² The same survey also reported higher levels of judicial satisfaction among drug court judges. Ninety-one percent of drug court judges reported that their assignment had affected them in a positive way, compared with 64% of traditional family court judges. Moreover, it was the fact that litigants were grateful that appeared to result in the higher satisfaction levels of the drug court judges. The factor of litigant gratitude was the most common predictor of whether drug court judges felt positively affected by their assignment.¹³

CONCLUSION

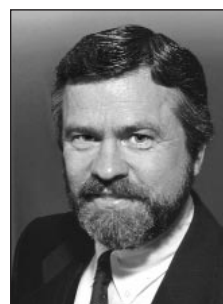
In order to improve public trust in the justice system, courts must improve their performance in key performance areas affecting fundamental goals and values: access, timeliness, fairness, equality, integrity, independence, and accountability. The area of court performance that most directly affects litigant and public evaluation of court performance—and levels of public trust—is the fairness of court processes.

As viewed by litigants and the general public, the fairness of court processes depends on the extent to which judicial officers are neutral and unbiased, respectful, allow those affected

to participate meaningfully in the decision-making process, and, most importantly, are trustworthy. Trustworthiness depends, in the minds of litigants and the public, not on the competence of the judicial officer but on the judge's motives and character. Ultimately, as Justice Felix Frankfurter reminded us, the authority of the court is a moral one, rooted in fundamental shared values and the good character of its officers. And, ultimately, that authority rests on our ability as judges to live up to those values, to meet the reasonable expectations of litigants and the public, to put a human face on who we are, what we do, and how we do it, to show that we care about the people affected by our processes and decisions—in short, to demonstrate that we are worthy of the public's trust.

“The Court’s authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.”

– Justice Felix Frankfurter



Roger K. Warren became the president of the National Center for State Courts in 1996, leaving behind a successful career as a trial judge in California. His judicial career began as a municipal judge in Sacramento, California, where he served for six years. He then became a judge on the Sacramento Superior Court, where he served from 1982 to 1996, including several years of service as a presiding judge of the court or its divisions. A graduate of the University of Chicago Law School, Warren was named the California Jurist of the Year in 1995 by the California Judicial Council.

11. Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, Spring 2000 COURT REVIEW at 12-19.

12. *Id.* at 16, Tables 4-5.

13. *Id.* at 16-17, Table 7.