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THE EVOLUTION OF THE TRIAL JUDGE FROM COUNTING CASE DISPOSITIONS TO A COMMITMENT TO FAIRNESS

Hon. Kevin Burke* & Hon. Steve Leben**

While trial judges have been called dinosaurs in recent years, along with a great many other things, we are neither brontosauruses nor even the mighty tyrannosaurus rex, extinct and immortalized in sterile museums across the country. Trial judges today are evolving from the ones who simply dispose of cases to those who are committed to enhancing procedural fairness in our courts.

The focus on procedural fairness is a rapidly growing trend over the last decade. This evolution recognizes that judges need to be independent, procedurally fair, and accountable for achieving procedural fairness for every litigant before them. But judicial independence is not an end in and of itself; rather, it is a means that will enable the creation of an effective judiciary. Even when accountability—as a more politically correct mantra—is discussed, we still have to wonder: what are we accountable for and what does our independence allow us to accomplish? And, above all, why should we continue to nurture the evolving focus on procedural fairness in the court system?

I. WHY WE NEED TO SHIFT THE FOCUS TO FAIRNESS

For many judges, these are interesting times; indeed, even times of danger for some courts. There is danger fostered by attacks on courts that are allegedly populated with activist judges. There is danger fostered by the legislated restriction of judicial discretion. And danger surely lurks when states will not or cannot

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provide adequate, stable funding for their courts. A lot of states are radically slashing court budgets due to economic conditions, and municipal courts often are dependent upon fines for their budgets, which compromise the public's perceptions of their fairness.¹ Even sympathetic legislators too often are presented with bewildering arguments to justify spending on court budgets that must compete for scarce dollars against education, health care, and other important needs.

Neither the judiciary nor the other two branches of government can afford the temptation to follow the easy path or to rest in the comfort of old ways of viewing our courts. Nor, indeed, can we expect the citizens of our country to wait for us to rise to meet their needs. For the courts, the times demand the creation of a new paradigm to assess performance more accurately.

Current measures do little to help courts respond to criticism, constructive or otherwise. There will always be debate and occasionally tension between the branches of government. Those debates strengthen our democracy. But state courts often react defensively in response to such inevitable attacks by noting how much work they do. After all, the state courts process more than 100 million cases per year.² But, as John Wooden put it, we should "[n]ever mistake activity for achievement."³ To ensure that the debate between the branches is directed toward achievement, not just activity, judges are increasingly focusing on guaranteeing procedural fairness in their courts.

From the judges' perspectives, this shift in focus to procedural fairness has substantial benefits. While the court system engenders

¹ See generally Lawrence G. Myers, *Judicial Independence in the Municipal Court: Preliminary Observations from Missouri*, 41 CT. REV. 26 (2004) (discussing the lack of judicial independence of Missouri municipal courts due to a variety of factors, including the necessity of generating revenue through fines).

² In 2006, the last year for which data are available, the total number of "newly filed, reopened, and reactivated cases" totaled 102.4 million. EXAMINING THE WORK OF STATE COURTS, 2007, at 12 (2008) (Robert C. LaFountain et al. eds., 2008), available at http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007%20-%201%20-%20Whole%20Doc.pdf.

³ THE 101 GREATEST BUSINESS PRINCIPLES OF ALL TIME 64 (Leslie Pockell & Adrienne Avila eds., 2004).

more trust and satisfaction than critics might lead one to believe, it is easy for those of us in the judiciary to feel a bit under siege. Changing the focus to fairness can simultaneously improve both judicial performance and public satisfaction, while helping judges to avoid preoccupation with judicial critics.

It would be naïve not to acknowledge that the American judiciary faces difficult times. In some states, special interest groups have spent large sums of money to achieve a "favorable" judiciary.⁴ Even the victor in a bruising judicial election can feel battered. In an even larger group of states and in the federal courts, the discourse about judges has become highly politicized and often demagogic. In another context, former Vice President Al Gore wrote that the quality of debate in America had deteriorated but that the problem was not altogether new.

Why has America's public discourse become less focused and clear, less *reasoned*? Faith in the power of reason—the belief that free citizens can govern themselves wisely and fairly by resorting to logical debate on the basis of the best evidence available, instead of raw power—was and remains the central premise of American democracy. This premise is now under assault.

We often tend to romanticize the past, of course, and there was never a golden age when reason reigned supreme, banishing falsehood and demagoguery from the deliberations of American self-government.⁵

Gore's words are an apt description of the challenges that the judiciary faces. In this charged political environment, can judges

⁴ The Justice at Stake campaign, with the assistance of its member organizations, tracks spending on judicial elections. For an overview, see JAMES SAMPLE, LAUREN JONES & RACHEL WEISS, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, at 15-29 (Jesse Rutledge ed., 2006), *available at* <http://www.gavelgrab.org/wp-content/resources/NewPoliticsOfJudicialElections2006.pdf>; *THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000–2008*, at 3-10 (Jesse Rutledge ed., 2008), *available at* <http://www.gavelgrab.org/wp-content/resources/NPJEGreatLakes2000-2008.FINAL.pdf>.

⁵ AL GORE, *THE ASSAULT ON REASON 2* (2007).

believe that citizens will see through the demagogues and understand what our courts are about? Was there really a romantic past of respect for judges and courts? What can judges do to ensure better understanding and support for courts in the future?

Today's critics of judges are not always fair, but criticism of judges has been part of our political culture since the founding of our nation. The romantic past for the judiciary is as much a legend as George Washington's famous episode with a cherry tree. Even Thomas Jefferson was at times a demagogic critic of judges, although he is nearly always mentioned among our nation's greatest presidents and one of the architects of a democracy that continues to thrive after more than two centuries. Jefferson was such a critic that Chief Justice John Marshall feared that he might be impeached by Jefferson's supporters.⁶ Indeed, Marshall was forced to come to the defense of another member of the Court, Samuel Chase, whom the House impeached but the Senate acquitted.⁷ Marshall, who lacked the support of a court information officer or a bar association fair response committee, wrote letters to the editor under assumed names to garner public support.⁸

Jefferson's disdain for Chief Justice Marshall was not confined to a personal feud. Indeed, Jefferson wrote that each branch of government had an equal right to decide what its duty may be under the Constitution; he railed against the concept that the

⁶ See Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 107-08 (2007); Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 165-66 (2006). For general background on the differences between Jefferson and Marshall, see generally JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 63-64, 333-34 (1996).

⁷ See Neumann, *supra* note 6, at 191-94.

⁸ Professor Gerald Gunther has collected the pieces that Marshall wrote under the pseudonyms "A Friend to the Union" and "A Friend to the Constitution," along with the pieces to which they responded. JOHN MARSHALL'S DEFENSE OF *MCCULLOH V. MARYLAND* 78-105, 155-214 (Gerald Gunther ed., 1969). He provides both a useful introduction about how Marshall came to write letters to the editor in defense of his court and the letters and essays Marshall wrote. See *id.* at 1-2, 13-17. In all, Marshall wrote two pieces as "A Friend to the Union," written to the editor of the Philadelphia Union, and nine as "A Friend of the Constitution," written as essays for the same paper. *Id.* at 78-105, 155-214.

judiciary had the final say: "The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."⁹

Jefferson was not alone in his critique of the judiciary. Nearly a century later, President Theodore Roosevelt was upset with a ruling from the Supreme Court of the United States and declared that he "could carve out of a banana a Justice with more backbone" than Justice Oliver Wendell Holmes.¹⁰ Such criticisms have dogged judges through the years; billboards even once populated the nation demanding the impeachment of Chief Justice Earl Warren.¹¹ Also, former President Gerald R. Ford at one time wanted to impeach Justice William O. Douglas.¹² Every state shares a unique piece of this conflict.

Yet the conflict between the judiciary and the other two branches has twisted in a new direction because the frequent political discourse of our time is to take the other guy's idea, mischaracterize it, and then announce profound outrage. Outrage, of course, does not move the debate forward. As former Senator Daniel Patrick Moynihan once said, "You're entitled to your own opinions. You're not entitled to your own facts."¹³

Some criticism of the courts is understandable: the justice system can be frustrating. It certainly isn't as good as we would like, and it isn't nearly as good as it should be. Highly publicized cases or pop culture, like the Stella Awards, illustrate that Moynihan's observation is true with respect to some critics of the justice system.¹⁴ The Stella Awards are named after Stella Liebeck,

⁹ 1 THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 190 (John P. Foley ed., Russell & Russell 1967) (1900).

¹⁰ THE YALE BOOK OF QUOTATIONS 649 (Fred R. Shapiro ed., 2006).

¹¹ Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 236 (2004).

¹² *Id.* at 314.

¹³ Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 968 n.48 (2007).

¹⁴ One website claims to be the source of the "true" Stella Awards, a name applied to any "wild, outrageous, or ridiculous lawsuits." See The TRUE Stella Awards—Exposing Lawsuit Abuse With Real Cases, <http://www.stellaawards.com> (last visited Mar. 31, 2009). Whatever their origin, the Stella Awards have been widely questioned for their factual accuracy. See

the now-infamous plaintiff who purchased a cup of coffee at McDonald's and was severely burned when the lid came off.¹⁵ The jury awarded nearly \$3 million.¹⁶ But people discussing this case rarely mention that the trial judge subsequently significantly reduced the verdict or that McDonald's did not appeal.¹⁷ When someone studies the entire record of the McDonald's case, reasonable people may conclude that Ms. Liebeck's financial recovery was understandable, if not justified. But how could anyone justify the huge verdict for a man from Oklahoma who wrecked her new recreational vehicle on the way home from the dealership? The man turned on the cruise control as if it were an autopilot feature and went to try out the built-in coffee maker.¹⁸ He crashed, and the jury awarded \$1.75 million plus a new motor home.¹⁹ The case has been listed as "[t]he 'winner' every year" of a Stella Award.²⁰ Does the case prove the insanity of our civil justice system? It would certainly do so if it was true, but the story 'is not true.'²¹ Instead, the case is the product of someone who successfully fabricated his or her own set of facts in order to justify his or her opinion about the civil justice system.

But why do we as judges care about such attacks on the courts, especially when made-up stories support the argument? It's simple. Judges need public support to thrive as an independent branch of

Lynn A. Baker & Charles Silver, *Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1541 (2002) (stating that the website TruthOrFiction.com had checked court records and news archives and not found "any documentation" for any of the case stories told by the Stella Awards).

¹⁵ For factual background about the case and how it became legendary, see Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113, 119-21 (2001).

¹⁶ *Id.* at 113.

¹⁷ *Id.* at 130.

¹⁸ Stella Awards: Decidedly NOT the Stellas, <http://stellaawards.com/bogus.html> (last visited Mar. 31, 2009).

¹⁹ *Id.*

²⁰ *Id.* (emphasis omitted).

²¹ The story was widely circulated, though demonstrably false, and may not have been associated with those who initiated the Stella Awards. See Posting of Paul Cassell to The Volokh Conspiracy, <http://volokh.com/posts/1220992216.shtml> (Sept. 9, 2008, 16:30 EST).

government. Irrational and inaccurate public discourse about courts undermines public trust and confidence.

Courts have not been particularly effective in countering attacks like these in the present political environment. We believe this failure is largely caused by the failure to embrace what is the simplest of performance measure: fairness.

The first goal of the justice system is to provide people with justice. Judges decide individual cases and seek to do so in ways that lead participants to accept and abide by the decision. Judges have an opportunity with each case that they handle to ensure that litigants retain, and even enhance, their trust and confidence in the courts, judges, and the rule of law. That personal opportunity in each case is exactly what an increasing number of judges and court leaders want to focus on in the future.

Procedural fairness has been an expanding field of research for the last decade, and we, as the authors of this article, first developed a detailed argument for increased court focus on fairness in a white paper we wrote in 2007 for the American Judges Association, which approved the paper.²² Since then, the Conference of State Court Administrators, which is a group composed of the top court administrative officers in each state, endorsed the paper in 2008.²³ In the last eighteen months, more than 1000 judges in the United States have attended our presentations on the basic concepts that we discuss in this article; those judges have been quite receptive.

There have always been judges who were intuitively very effective in achieving procedural fairness in their courtrooms, but few judges (and even fewer judicial educators and administrators) until recently gave it much thought. Most judicial educational programs teach judges how to get outcomes right, not how to

²² The paper was recently published as Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2008), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf>. Much of the remainder of this article is based on our work in *Procedural Fairness*.

²³ See Conference of State Court Administrators, Resolution 6, *In Support of AJA White Paper on Procedural Fairness*, Resolution 6 (July 30, 2008), in Douglas Denton, *Procedural Fairness in the California Courts*, 44 CT. REV. 44, 48, (2008), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>.

handle procedural matters in a way that enhances perceptions of fair treatment.

The concept of procedural fairness developed from research that showed that how disputes are handled has an important influence upon people's evaluations of their experience in the court system.²⁴ That research has shown that litigants have a powerful need to express themselves during court proceedings.²⁵ This powerful need can range from a simple expression of regret in a traffic court to a more complicated and arguably legally-irrelevant desire to explain why a marriage failed in a no-fault dissolution jurisdiction. Once judges come to fully appreciate this, the job of a trial judge becomes far more interesting and far less tedious. If enough judges fully embrace the concept with action, public support for the courts will rise, and there is every reason to expect greater compliance with court orders. So this subject is not merely of importance to judges—it is of great importance to the public as well.

II. UNDERSTANDING CONCEPTS OF PROCEDURAL FAIRNESS IN THE COURTROOM

For judges, the single most difficult concept to accept is that most people care more about procedural fairness—the kind of treatment they receive in court—than they do about winning or losing the particular case.²⁶ This discovery has been called "counter-intuitive"²⁷ and even "wrong-headed," but researcher after researcher has demonstrated that this phenomenon exists.²⁸

²⁴ See, e.g., Burke & Leben, *supra* note 22, at 4-25.

²⁵ *Id.* at 12-13.

²⁶ TOM. R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75 (1997); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 *LAW & SOC'Y REV.* 483, 483, 486-87, 504 (1988); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC'Y REV.* 513, 514-15 (2003).

²⁷ M. SOMJEN FRAZER, *THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER* 3 (2006).

²⁸ See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61-127 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-96 (1975); Jerald

People have high expectations for how they will be treated during their encounters with the judicial system. In particular, they focus on the principles of procedural fairness because "people view fair procedures as a mechanism through which to obtain equitable outcomes."²⁹ People value fair procedures because they are perceived to "produce fair outcomes."³⁰

Psychology Professor Tom Tyler, the leading researcher in this area, suggests that there are four basic expectations³¹ that encompass procedural fairness:

1. Voice: the ability to participate in the case by expressing their viewpoint;
2. Neutrality: consistently applied legal principles, unbiased decision makers, and a "transparency" about how decisions are made;
3. Respectful treatment: individuals are treated with dignity and their rights are obviously protected; and
4. Trustworthy authorities: authorities are benevolent, caring, and sincerely trying to help the litigants—this

Greenberg, *Looking Fair vs. Being Fair: Managing Impressions of Organizational Justice*, in 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 111, 111-57 (Barry M. Staw & L.L. Cummings eds., 1990); Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, in BASIC GROUP PROCESSES 235, 235-56 (Paul B. Paulus ed., 1983); Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 J. APPLIED PSYCHOL. 340, 340-42 (1986); Larry Heuer et al., *A Deservingness Approach to Respect as a Relationally Based Fairness Judgment*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1279, 1279-92 (1999); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 850-63 (1994); Tom R. Tyler, *The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments About the Procedure?*, 9 SOC. JUST. RES. 311, 311-25 (1996); Kees van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOC. PSYCHOL. 1493, 1493-1503 (1998); Kees van den Bos et al., *Sometimes Unfair Procedures Have Nice Aspects: On the Psychology of the Fair Process Effect*, 77 J. PERSONALITY & SOC. PSYCHOL. 324, 324-36 (1999).

²⁹ TYLER ET AL., *supra* note 26, at 75.

³⁰ Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 182 (2005).

³¹ Tom R. Tyler, *Procedural Justice*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 435, 445 (Austin Sarat ed., 2004).

trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.³²

Every litigant appearing before a judge cares about procedural fairness, but "[w]hat is particularly striking about procedural justice judgments is that they shape the reactions of those who are on the losing side."³³ We have observed that "[p]eople are in fact more willing to accept a negative outcome in their case if they feel that the decision was arrived at through a fair method."³⁴ Even a judge who faithfully respects litigants' rights may nonetheless be labeled "unfair" if he or she fails to meet these expectations for procedural fairness.

Procedural fairness does not suggest that people are happy if they lose. No one likes to lose, but people will accept losing more willingly if the procedure that is used is fair. Studies suggest that procedural fairness issues remain important when the monetary stakes are high, people are very invested, such as in child-custody cases, or where there are important moral or value-based questions at issue.³⁵ The elements of procedural fairness—voice, neutrality, respect, and trustworthy authorities—dominate people's reactions to the legal system across ethnic groups, across gender, and across income and educational levels.³⁶

While the public desires fair procedures, judges and attorneys focus on fair outcomes, often at the expense of attention to meeting the criteria of procedural fairness that are so important to the public's perception of the court. Perhaps because of this different focus, in California, "[o]n average, attorneys tend . . . to view procedures in the California courts as fairer than do members of

³² Tyler, *supra* note 31, at 445-47; *see also* David B. Rottman, *Adhere to Procedural Fairness in the Justice System*, 6 CRIMINOLOGY & PUB. POL'Y 835, 835 (2007).

³³ TOM R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS 39 (2007), *available at* http://stanford.edu/~mldauber/workshop/Tyler_paper.pdf.

³⁴ Burke & Leben, *supra* note 22, at 6.

³⁵ Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28 (2008).

³⁶ Burke & Leben, *supra* note 22, at 7 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 23 (2006)).

the public: an average of 3.0 for attorneys compared to 2.85 for the public."³⁷ Attorneys may perceive procedures to be fairer because that is not as much of a critical point of attention for them³⁸ or also because they are more familiar with the court's typical procedures and thus do not feel as lost during the process.³⁹

An interesting study provides some insight. Some federal appellate judges reviewed police-citizen encounters raising Fourth Amendment issues.⁴⁰ One half of the panel read about a search that was conducted fairly, with polite police who identified themselves from the outset and who listened to the citizen's side of the story; the other half read about a search conducted without much procedural fairness, with rude and hostile officers who did not initially identify themselves and who prohibited the citizen from explaining their side.⁴¹ Although they recognized the differences in the scenarios, those differences did not alter the way the judges decided the cases under the Fourth Amendment.⁴² Judges are trained to provide fair outcomes by focusing on the relevant legal issues. But to the public, disrespect and blatant bias are certain ways to create dissatisfaction and to be perceived as procedurally unfair in the court of public opinion. The gulf between the judges' and the public's expectations suggests "that the meaning of fairness among judges is considerably different . . . [and] outcome concerns had a greater influence among judges than the procedural criteria of trust, neutrality, and standing" that constitute the public's conception of procedural fairness.⁴³

This difference could actually be quite serious since the public's perception of procedural fairness greatly impacts both public satisfaction and compliance. This difference does not only affect judges and litigants; indeed, this is perhaps the inherent

³⁷ DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 10, 25 (2005), *available at* http://www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf.

³⁸ Rottman, *supra* note 32, at 839-40.

³⁹ ROTTMAN, *supra* note 37, at 11, 18.

⁴⁰ Larry Heuer, *What's Just About the Criminal Justice System?: A Psychological Perspective*, 13 J.L. & POL'Y 209, 215 (2005).

⁴¹ *Id.* at 216.

⁴² *Id.* at 217.

⁴³ *Id.*

dissonance that exists between those who *make* decisions and those who *receive* them. Social psychology professor Larry Heuer found generally, in an experiment involving college students who were asked randomly either to be the decision maker or the decision recipient, that "decision recipients [were] oriented primarily to procedural information, while decisionmakers [were] oriented primarily to societal benefits,"⁴⁴ which are generally the outcomes. As decision makers, judges, who are aware of these differences are better able to cater their remarks to the needs and expectations of litigants and the public to ensure better satisfaction and compliance.

The mediation process provides an opportunity to connect this divide by meeting the needs of both groups.⁴⁵ Judges—seeking, legal solutions—historically have employed a various types of procedures, including settlement conferences. But Many litigants have been on the outside looking in, and have missed the opportunity to participate in key moments during these conferences. As a result, these litigants often reacted with anger and frustration when their lawyers announced they had reached a good outcome because the litigant hadn't been involved in a transparent process. While many judges and lawyers were confused, since they had arrived at a legally appropriately outcome, the litigants felt that their concerns were not seriously addressed because they had no voice, no ability to determine whether the judge was neutral, and the entire process lacked transparency. Thus, the parties' dissatisfaction could be high, and some parties may choose to ignore the agreement. Mediation addresses these concerns. As we noted in 2008:

Mediation, or court-annexed arbitration, was initiated to give people a forum that was more consistent with what they were expecting out of their involvement with the court. Mediation leads to greater satisfaction and compliance with the agreements. People are directly involved in a mediation

⁴⁴ Heuer, *supra* note 40, at 218.

⁴⁵ See Tom R. Tyler, *The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 428-33 (1989).

session; they get to have a voice and see evidence that the authority figure is listening to and addressing their concerns.⁴⁶

For trial court judges, there is a natural tendency to see the courts' work as what the judge does with the cases and at times to under-appreciate the effect a decision has on shaping how litigants view the judiciary as a whole. Although judges speak of being a branch of government, we too often act as an office-sharing arrangement of solo practitioner lawyers who specialize in judging. What a judge does not only affects how litigants view that judge, but it also significantly shapes how the litigant views courts as a whole. Procedural fairness is a critical part of understanding how the public interprets their experience with the court system and translates that experience into a subjective valuation of the court system as a whole. This gives the judiciary, therefore, a unique opportunity. The volume of our workload gives us the opportunity to shape public opinion.

While many court dockets in this country do have too many cases, a crowded docket is a *management* challenge for judges, not an excuse for de-emphasizing procedural fairness. All judges face real-world pressures. For many judges, volume creates pressure to move cases in assembly-line fashion—a method that obviously lacks in opportunities for the people involved in that proceeding to feel that they were listened to and treated with respect.

Generally speaking, about nine out of ten cases never reach the trial stage.⁴⁷ Consequently, judges cannot rely on the same safeguards at trial to provide those in court, particularly litigants, with a feeling of respect, voice, and inclusion. These litigants' impressions of judges and of our justice system largely will be formed by their participation in mass-docket arraignments, probation revocations, calendar calls, and other settings, not trials.

Judges are trained to think about—and hopefully to provide—due process. But litigants, jurors, witnesses, and other court room observers are not trained in legal due process. Yet they do form opinions based on their observations and experiences. For

⁴⁶ Burke & Leben, *supra* note 22, at 16.

⁴⁷ Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994).

example, "[e]ven if minimum standards of procedural due process are met at all times, damage may be done to the court system in mass-docket proceedings that leave large segments of the public feeling that the courts were not fair."⁴⁸ As one California survey found, those involved in high-volume dockets, such as traffic or family law, have significantly greater dissatisfaction with the courts.⁴⁹

Everyone who comes into the court system has a right to be treated with respect 100% of the time, a right to be listened to during the process, and a right to have key rulings explained in terms they can understand. For decades, judges have presented proposed court budgets with the justification that "we are overburdened." The new rationale for determining funding levels—if procedural fairness is the core performance measure of a court—should be whether the funder's constituents are being treated fairly in our courts.

Historically, judges have been resistant to the use of performance measures. In 1990, the National Center for State Courts promulgated the Trial Court Performance Standards.⁵⁰ In fairness to the drafters, they mention fairness but the standards provided little guidance as to how to achieve fairness in a courtroom.⁵¹ More recently, the National Center promulgated CourTools,⁵² the first tool being a rudimentary template for assessing court fairness.⁵³ Although many courts have embraced the term fairness and prominently display the term in everything from strategic plans to historic quotations in marble walls of the courthouse, most of the performance measures adopted by courts

⁴⁸ Burke & Leben, *supra* note 22, at 16.

⁴⁹ ROTTMAN, *supra* note 37, at 27.

⁵⁰ Pamela Casey, *Defining Optimal Court Performance: The Trial Court Performance Standards*, 35 CT. REV. 24, 24-25 (1998).

⁵¹ *Id.* at 25-27.

⁵² The National Center for State Courts devotes a section of its website to an explanation of these CourTools. The National Center for State Courts: CourTools, http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm (last visited Mar. 31, 2009).

⁵³ *Id.*

have focused on court efficiency and timeliness.⁵⁴ In part, this is because it is easy to measure those concepts.

Timeliness is important. The adage "justice delayed is justice denied" in fact can understate the importance of timeliness. In family law, timeliness allows a fifth-grade child to know which parent he or she will live with permanently before he or she reaches the eighth grade. Timeliness in family law is a major factor in ensuring that parents do not spend their child's college-education savings on the college education of their divorce lawyer's child. Timeliness in criminal law may be one of the most important contributions the judiciary can make to reduce recidivism. In civil law, timeliness and efficiency in courts allow business to contain litigation costs.

Even though timeliness is critical, there is a sense that the public is unaware of the extent to which most trial courts have steadily reduced delay. That courts are slow is a kind of stereotype the public holds on to; in the absence of well-publicized evidence to the contrary, the public's perception will not change. But a generation of social science research shows that delay is the kind of factor that is of secondary importance to the public, and, thus, the perception of being slow does not hurt the judiciary's image to any great extent.⁵⁵ Put another way, courts need to be timely, but advertising the effort probably will not do much to strengthen public support and understanding about courts.

What you measure is what you care about, and while all of us express the commitment of a fair justice system, few courts regularly measure it and then commit to doing something about the data. Lots of courts have had "calendar-cleaning blitzes" or temporary "rocket dockets" to catch up. Those courts that do not measure fairness fail themselves and their public. They contribute to the unfortunate rhetoric of some court critics: by failing to focus

⁵⁴ Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, 41 CT. REV. 4, 7 (2004).

⁵⁵ See ROTTMAN, *supra* note 37, at 19-20, 24 (noting that procedural fairness was "the strongest predictor by far" of public confidence in California court system; study also tracked concern over time it took to get cases decided in court); Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POLITICS 697, 703-04 (2006) (noting strong relationship between procedural fairness and confidence in the courts).

on the right issues, we leave our critics free to define the courts' image to the public in ways less flattering and less relevant.

But how do courts measure fairness? If you do not measure fairness in your court, it is pretty hard to envision the "rocket docket" of procedural fairness.

People do not have a right to win in court. They do have a right, however, to be listened to in every case. They do have a right to leave the courthouse in every case understanding the court order. The combination of these two concepts is what fairness is about. People need to be heard and to understand court orders. The first answer to the question of "Are our courts doing well?" should, therefore, be measured by the percentage of people who come to our courts feeling that they were heard. The second response should be measured by the percentage of people who leave our courts understanding what the court ordered. Anything less than a desire to get a 100% response is unacceptable.

The "box score" for court performance might look like this:

Trial Court: Measuring Fairness

- The judicial officer gave reasons for his or her decision.
- The judicial officer made sure I understood the decision.
- The judicial officer seemed to be a caring person.
- The judicial officer treated me with respect.
- The judicial officer listened carefully to what I (or my lawyer) had to say.
- I understand what is required of me in order to comply with the judicial officer's decision.⁵⁶

If we concentrate on fairness, the volume of business in the state courts has the power to transform the public's view of its courts. With more than 100 million case filings per year, lots of people have a personal stake in the state courts.⁵⁷ And a generation of social science research tells us a lot about those litigants. Those millions of people who came to court had expectations that the court would "get the right result" and, for the most part, courts do

⁵⁶ Burke, *supra* note 54, at 8.

⁵⁷ *Id.* at 7.

get the right result. Moreover, what the social scientists tell us is that those people knew they might not win, and, although disappointed, they could accept and obey court orders with which they disagreed.⁵⁸ Their willingness to comply with orders, however, is driven by their perception of how they were treated in court, whether they were heard, and whether they understood the order or expectations of the court.

The late congresswoman Barbara Jordan of Texas once said that what the people want is "an America as good as its promise."⁵⁹ A court as good as its promise looks at fairness and respect as well as efficiency. Measuring the performance of courts, particularly the court's' fairness, is an achievable goal. It is what sparks the evolutionary leap from judges who count case dispositions to ones who embrace a commitment to fairness as a commitment to the public they serve.

⁵⁸ Burke, *supra* note 54, at 6-7.

⁵⁹ *Id.* at 4 (internal quotation marks omitted).

