

Policy briefing

To be fair: procedural fairness in courts

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About the Criminal Justice Alliance

The Criminal Justice Alliance is a coalition of 74 organisations – including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions – involved in policy and practice across the criminal justice system.

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The Centre for Justice Innovation is an initiative of the New York Center for Court Innovation. It seeks to introduce and support new ideas, new projects and new practice in the British criminal justice system, and has a commitment to sharing learning between the US and UK.

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Introduction

Judges and lawyers in Britain who had practiced in the criminal courts for many years were somewhat affronted when, on the introduction of the Human Rights Act in October 2000, they were told that Article 6 of the European Convention of Human Rights now obliged them to provide a fair trial: most judicial officers considered that they had been doing this for many years. There is no question that striving to deliver ‘fairness’ in our criminal court system has been a central goal for centuries. Indeed, Britain’s courts should be rightly proud of having been a major battlefield on which arguments about the legal rights of the accused and the rights of victims have been fought.

But, as prominent as the battle over legal and constitutional rights has been in Britain’s history, fairness has a wider meaning than ensuring just outcomes and upholding due legal process. The concept of ‘procedural fairness’ – that the process by which decisions are made needs to *feel* fair to people coming to court – takes the conversation a step further. It promotes the idea that how a defendant (or witness or victim) is treated has a profound effect on their perception of the process and their ongoing likelihood of complying with court orders and the law generally.

This briefing:

- Situates procedural fairness within the wider discussion about the legitimacy of criminal justice institutions;
- Defines procedural fairness, its key principles, and its research basis in various legal and justice settings;
- Explains how the principles have been applied in court reform to improve the experiences of defendants and others who come to the court;
- Recommends practical ways in which procedural fairness can be strengthened in the courts in England and Wales.

Situating procedural fairness

Why should we obey the law? When asked to do something by a police officer or a judge, why should we follow their instructions? Why don’t communities impose their own justice, instead of relying on the police and the courts to do it for them? The vast majority of us go about our day to day lives and we don’t take advantage of the many opportunities we have to break the law. One only has to think back to the riots in England in 2011 and it is easy to see how quickly compliance with the law can break down.

Unpicking the ‘mystery’ of compliance with the law has become prominent within

academic literature in recent years. This has in part stemmed from a recognition that “Criminology has given... too much attention to questions about why people break the law... and insufficient attention to questions about why people comply with the law.”¹ Some criminologists contend that seeing crime as simply a direct consequence of self-interested behaviour produces only a limited band of effective crime control solutions. Asking instead what influences compliance with the law produces a different set of solutions.

One promising solution is procedural fairness. The concept is not a new one – most famously, it is at the heart of the British principle of policing by consent. Established during the disputes over the creation of a professional police service in London in the 1820s, policing by consent founded the legitimacy of the police’s authority on the importance of fair treatment – “by constantly demonstrating absolutely impartial service to law... offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour; and by ready offering of individual sacrifice in protecting and preserving life.”²

Perhaps not surprisingly, this Victorian language aligns with the key dimensions of procedural fairness that researchers have identified some two hundred years later. In particular, researchers³ have identified four elements that seem to drive citizens’ perceptions of fairness:

- **Neutrality** – do citizens perceive that decisions are made in an unbiased and trustworthy manner?
- **Respect** – does the citizen feel that he was treated with dignity and respect?
- **Understanding** – do citizens understand how decisions are made and what is expected of them?
- **Voice** – has the citizen had an opportunity to be heard?

These elements help define what we mean by procedural fairness. The concept holds that citizens’ perceptions regarding the legitimacy of state authority is closely tied to the fairness of how they were treated (namely, whether the above dimensions are present). It is not enough to be fair; citizens must perceive that the process is fair.

Renewed interest in this theory has its origins in organisational management^{4 5} but has garnered increasing attention within a criminal justice context. The fundamental concept – that fair treatment is more influential in improving public perceptions than outcome – has been well documented in a variety of criminal justice contexts, from police stop and searches to family court to prisoner release and reintegration.⁶ As recent Ministry of Justice research puts it: “Fair and respectful handling of people, treating them with dignity, and listening to what they have to say, all emerge as

significant predictors of legitimacy, and thus preparedness to cooperate with legal authorities and comply with the law. In other words, procedural fairness may not only be valued in its own right, but it may actually be a precondition for an effective justice system.”⁷

There is also significant evidence that procedural fairness can deliver more specific benefits through improved compliance with the law. To date, much of this work has, not surprisingly, focused on the police. A recent study by the National Policing Improvement Agency and the London School of Economics found that “the most important factor motivating people to cooperate and not break the law was the legitimacy of the police.... Crucially, police legitimacy had a stronger effect on these outcomes than the perceived likelihood of people being caught and punished for breaking the law.”⁸ Other studies have suggested that a poor police interaction is likely to significantly decrease that individual’s willingness to engage with the police if they are a victim of crime, especially amongst individuals with already low levels of public trust in the police.⁹ It appears the Victorians really were on to something when they stumbled upon policing by consent.

Procedural fairness in courts

The logic applies equally well in the court context. When defendants perceive the court process to be fair, they are more likely to view the system to be legitimate and to comply with court orders. But the unfortunate truth is that a trip to court is rarely a positive experience. Of course, the very reasons that citizens must appear in court – to file a small claims case, to respond to a criminal charge, to resolve a child care case or to seek redress in an employment tribunal – are rarely pleasant ones. But busy court lists and the need to communicate complex, legal information as quickly as possible (sometimes to non-English speakers), can further undermine the court’s ability to promote procedural fairness.

What procedural fairness research has taught us, however, is that when citizens are given the respect, information, and an opportunity to be heard, huge gains are realised.¹⁰ Compliance with court orders, such as a court summons, go up;¹¹ and re-offending, even among the most violent offenders, goes down.¹² The same is true for victims – victims who feel their views and concerns are ignored are less likely to be witnesses again and likely to make that view known to others in a similar situation.¹³

There is also evidence that improving procedural fairness can rectify perceptions of racial bias and inequality among marginalised communities who, not surprisingly, have particularly low perceptions of the criminal justice system.¹⁴ In a study of a court in Brooklyn, New York City, researcher Somjen Frazer states, “Members of

racial and ethnic minority groups generally come into the courtroom with lower expectations; they report less trust in other people, less trust in the legitimacy of the court, less identification with the community and country, and more negative experiences with legal authorities.”¹⁵ The same study also found that black respondents were less likely to believe that court personnel are helpful and courteous, that juries are representative of the community, or that courts are “in-touch” with what is going on in their communities.”

Enhancing the procedural fairness of courts

So how can procedural fairness in practice be enhanced, especially within courts that serve populations that have particularly low expectations of the justice system? Recently, a handful of studies have aimed to test how the principles of procedural fairness can be translated into specific interventions, testing concrete strategies and tools that practitioners can employ to enhance procedural fairness.

Written communication to defendants

Ensuring people understand what’s happening to them is probably the most intuitive of the dimensions of procedural fairness: how can people coming to court be expected to turn up on time, know what is expected of them and comply with court orders if they do not understand the basic information communicated to them? And yet we know that people involved in the criminal justice system are often let down when it comes to having transparent and relevant information about their case. Victim Support found many victims “do not hear anything further at all after initial contact with police. In some cases, victims are explicitly told that they will be kept updated and then find that they are not.”¹⁶

The courts have a clear interest in ensuring people understand the court process. For example, much of the written material that courts use – forms, reminders, and other paperwork – are written with the requirements of the legal system in mind, rather than the people receiving them. These written communications often contain crucial information about what is expected of people coming to court and can be key in ensuring that court cases progress speedily. Take the example of being summoned to appear at court. With an average 81-day waiting time between the offence and the listing of the first information at court, and an average of 57 days between the listing of the first information at court and case completion, there is plenty of time for both defendants and witnesses to forget or misremember what is required of them, resulting in missed court dates.¹⁷ Last year, over 4,500 trials at Magistrates’ Court and almost 2,000 Crown Court trials did not happen as a result of the absence of witnesses and defendants – this amounts to around 40% of all ‘ineffective trials’¹⁸ in our criminal courts.

Or take managing people's understanding of what may happen when they get to court. A quarter of victims and witnesses surveyed under a Government's victims and witness survey were not told what would happen in the court room. Around half of victims and witnesses were not informed about what would happen if the defendant or other witnesses did not turn up.¹⁹

Procedural fairness research tells us that if we can improve the perceptions of people who come to court through this process, compliance – *i.e.* appearance at court – will improve. A study in the United States tested this exact theory which is outlined in the Nebraska case study below.

Information provision in Nebraska

A study in Nebraska examined the effects of using different types of reminder postcards mailed to criminal court defendants to increase appearance in court. The study used three versions of the reminder— one that was a reminder only, one that included an outline of the sanctions for failure to appear, and one that included sanctions language with procedurally fair language, describing the court's aims to serve the interests of the public— and a control group were not given a reminder at all.

Not surprisingly, people receiving any reminder had significantly higher appearance rates than the control. In all cases, reminders yielded higher compliance rates. However, the language used in the reminder also had important effects. The sanctions language plus the procedurally fair language was significantly more likely to increase court appearance than the other two types of reminder.

The study also interviewed defendants to gauge levels of trust in the courts, prior to their appearance. Defendants with low trust in the courts were less likely to appear than those with higher trust when there was no reminder. However, when there was a reminder, there was no statistically significant difference between defendants with low or high confidence in the courts prior to appearance. In other words, this suggests that a one-time communication from the courts was able to mitigate the low levels of trust that some defendants hold toward court prior to appearance.

A similar approach has been tested, to a limited degree, in England. In a randomised control trial, people who had not paid their court fines were texted reminders, some receiving standard text, some personalised texts and some nothing (as a control group). The results are impressive – texting nearly doubled the amount paid in fines during the observation period; and “comparing the effectiveness of alternative messages among those who received them, personalisation was the message ingredient that most enhanced the effectiveness.” While this study did not explicitly draw on procedural fairness theory, the authors do state that the pilot is “an important first step in the development of theories about cognitive and social psychological mechanisms that cause people to comply with requests.”²⁰

Interpersonal communication in the courtroom

Written correspondence is only one type of communication that courts have with the citizens they serve. Personal interactions at court play a significant role in shaping procedural fairness. Promising practices in enhanced interpersonal communication include a combination of behavioural and environmental changes. Behavioural changes can include having judges provide an overview of how decisions are made at the beginning of each court session and swapping legal jargon for plain language throughout each court appearance.

Indeed, and unsurprisingly, the judge's role in effective communication in the courtroom is particularly important in driving perceptions of procedural fairness. The use by judges of paraphrasing is a particularly powerful tool to enhance understanding and demonstrate respect – both having defendants repeat back their understanding of next steps and the court's expectations, as well as the judge repeating back what they understood the defendant's concerns to be. Judges can rephrase yes/no questions such as "Do you understand?" (common-place in courts but known to trigger false positives) with open-ended questions that are more likely to generate honest answers, such as, "What questions do you have?" These interactions between judge and defendant or judge and witness don't necessarily take any longer than current practice, but they have significant impacts down the road. Simpler, more subtle practices such as making eye contact and addressing defendants by name can work to improving perceptions of respect. Research has shown that when these techniques of judicial engagement are used, defendants are more likely to rate their experiences favourably and to comply with the court's orders.

In addition, the majority of communication in a given case occurs between the person appearing in court and the court staff. Therefore, the quality of these inter-personal communications can have a significant impact on how people perceive the process. Promising techniques include practices like clearly explaining court etiquette, using a respectful tone when interacting with citizens, and providing written resources that anticipate and address frequently asked questions. Strategies may also include scripting a set of opening remarks that outline the purpose of court proceedings, courtroom rules, and other useful information.

Moreover, courts can make efforts to review their facilities with fresh eyes. Do court signs provide the information necessary to find courtrooms, toilets, payment centres etc? Do the signs use clear and respectful language, supplemented by images or other graphics to communicate more effectively to those with limited English language proficiency? Other considerations include security screening procedures, courtroom layout, and acoustics that may make court proceedings difficult to hear.

Improving courtroom communication in the USA

A multi-disciplinary team of advisers from the Center for Court Innovation, the Bureau of Justice Assistance, and the National Judicial College, developed and tested a one day training in four courts, aimed at helping judges and other staff improve their courtroom communication skills.

The training explains the research base for procedural fairness and highlights dozens of verbal and nonverbal communication strategies geared towards the four dimensions of procedural justice. The training concluded with implementation planning, helping participants make commitments to changed practices at the individual, agency, and system level. All trainings included judges, court staff, and other relevant court-based agencies, such as corrections and probation. All of the sites were also supported in collecting and analysing data, including court surveys and courtroom observations.

Over a two year period, the team partnered with four local court systems across the US to implement the training. Each training session included judges, court staff, and other relevant court-based agencies, such as corrections and probation. Participants brought to the training varying degrees of familiarity with the concept; many were hearing about procedural fairness for the first time. All of the sites were also supported in collecting and analysing data, including court user surveys and courtroom observations.

The project's evaluation revealed that the one day training resulted in improved communication in almost all of the targeted areas, evidenced by pre- and post-training observations conducted by researchers. These strategies included the creation of local training committees on the topic; new and improved floor plans and other signage within the court building; and information leaflets for citizens coming to the court that define key terms (e.g. "filing," "adjudication").

As a result of the training, an evaluation toolkit – including courtroom observation instruments, self-assessments, and surveys – is being developed to help American jurisdictions, as well as creating an online learning system that highlights the content from the in-person trainings in a series of short (5 to 7 minute) modules geared towards judges and other court practitioners.²¹

Procedural fairness in problem solving courts

The evidence suggests that procedural fairness has some exciting applications in traditional courts, but may also help explain the enduring benefits that have come out of problem-solving courts in the past two decades.²² Research has documented that there is growing evidence that problem solving courts— like drug courts, domestic violence courts and community courts— contributed to reductions in re-offending, reduced drug use, increased victim satisfaction, judicial satisfaction and court processing efficiencies.²³ However, until recently, it remained unclear which parts of the problem solving court model were the primary causes of these positive results.

However, new research has consistently identified that the techniques used by judges in a problem solving court – regular judicial monitoring, rewards and sanctions for compliance and improved courtroom communication – have a particularly powerful impact in generating these positive outcomes, in both the USA and Australia. Evaluations of the Community Court in Red Hook in New York compared defendants passing through traditional court to those passing through Red Hook. The study found that “Defendant perception of the judge was the most important predictor of overall perceptions of the court’s fairness.” There is substantial evidence that these perceptions of fairness increase compliance and improve outcomes.²⁴ Evaluations of drug courts show similar findings. For example, following regression analysis which explored which policies and practices predict drug court effectiveness, a multi-site evaluation of drug courts stated that, “Judicial interactions with drug court participants are key factors in promoting desistance... perceptions of the judge were the strongest predictor of reduced drug use and crime.” (see box opposite)

Moreover, these studies suggest that, for example, the use of regular reviews to monitor compliance in front of the same judge enhances defendants’ perceptions of procedural fairness.²⁶ Importantly, not any old review hearing will do – how the monitoring is done, how it adopts procedurally fair practice seems to be the animating ingredient. A study on drug courts found that, “Significantly better outcomes were achieved by participants who rated the judge as being knowledgeable about their cases and who reported that the judge knew them by name, encouraged them to succeed, emphasized the importance of drug and alcohol treatment, was not intimidating or unapproachable, gave them a chance to tell their side of the story, and treated them fairly and with respect.”²⁷

There is not just American evidence for this. The Ministry of Justice’s review of six drug court pilots in England and Wales highlighted that continuity between the offender and the judiciary helped develop a relationship which ‘played a key role in providing concrete goals, raising self-esteem and engagement and providing a degree of accountability for offenders about their actions.’²⁸ In our own work on the Hammersmith Drug Court, which uses a consistent bench of magistrates to monitor offenders, we have found evidence of positive perceptions amongst the sentencers, staff and defendants about the consistent and credible use of judicial monitoring.²⁹

Harnessing Procedural Fairness: London's Family Drug and Alcohol Court (FDAC)

FDAC is a specialist family court which hears cases where families are at risk of having their children removed due to parental substance misuse. The court seeks to help parents keep custody of their children, where possible, by working closely with a specialist treatment team to address the addictions and other issues which the families are facing. A family's case at FDAC is presided over by the same judge for their whole duration and families return to court fortnightly during the proceedings for brief and relatively informal 'non-lawyer review hearings' at which they are able to openly and frankly discuss their treatment progress with the judge.

Evidence suggests that FDAC is improving things for families and children. A recent Nuffield Foundation funded evaluation by Brunel University²⁵ concluded that FDAC families are more likely to stay together, that parents are more likely to reduce their drug use, and that children are less likely to experience further neglect and abuse, compared to similar families going through normal care proceedings.

The Brunel evaluation pointed to the important role played by the interactions between judges and families in the court's success. Families valued the opportunity to share their experiences in the non-lawyer review hearings, and pointed to the encouragement given by the judge as important in sustaining their motivation to change. Where decisions did go against them, families felt they understood why that had happened, leading to far less appeals than the standard family court process.

FDAC offers an example of how the principles of procedural fairness can be used to enhance a court process. In the case of FDAC, respect, understanding and voice come together to not only legitimise the court's decisions, but also to create better outcomes for children and families.

Conclusion

This briefing strongly suggests the potential for further investment in procedural fairness as a way to advance court reform. Despite its well-established benefits, however, there is limited recognition of the issue at national policy level nor even at a local practice level. The 'Government Action Plan on Transforming the Criminal Justice System' discusses fairness purely from the point of trying to recognise diversity and respond to disproportionality but says very little about the experience and perceptions of the treatment people coming to court will and do receive.³⁰ Victims' and witnesses' satisfaction with the process used to be measured under a national survey, which was dismantled in 2011.³¹ At the local court level, there is no way to accurately and consistently measure how those who come to court perceive the fairness of the process.

There are two important ways to change this landscape. First, courts can incorporate the promising practices identified which are designed to enhance procedural fairness. They can tap into the robust research literature – including articles written by practitioners themselves that aim to adapt the research into practice³² – as well as the range of training tools that are being developed. These efforts do not require large-scale investment, but rather could be incorporated into existing training and outreach mechanisms. In certain circumstances, enhancing procedural fairness is a simple case of ensuring that communication between the court and those present is more clear and respectful – not necessarily that the amount or substance of communication needs to fundamentally change.

The other powerful shift would be to establish perceptions of fairness as an essential metric by which courts measure success. This could include a public facing component that announces to the public – much like policing by consent has – that the very mission of the courts includes a commitment to promoting public trust and legitimacy, as the Alaskan court system has recently done.³³ But there would also need to be a re-investment in the data tracking of people’s perceptions – either through regular comment boxes or more structured annual surveys. This data would allow courts to identify problem areas and track progress over time.

Taking on these recommendations would not be revolutionary. But it does require the court service and the judiciary to accept an additional duty beyond the simple need to ensure legal due process. The research suggests that their efforts would be well rewarded. We urge the courts to promote their own legitimacy, and justify the taxpayer pounds spent on it, by more actively contributing to crime reduction through a variety of techniques, including the promotion of procedural fairness. A court system that neglects procedural fairness is vulnerable to becoming an institution with no clear public argument about its value to the communities it is there to serve.

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This briefing is the second in a series which explores different policy ideas to make the criminal justice system more effective. This paper discusses the concept of procedural fairness and whether how a defendant, victim or witness is treated has an effect on their perception of the process and their ongoing likelihood of complying with court orders and the law generally.

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