

# Fair Procedures, Yes. But We Dare Not Lose Sight of Fair Outcomes

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**B**urke and Leben's<sup>1</sup> White Paper on procedural justice and what judges can do to enhance it in the courtroom is an important work for several reasons, two of which especially stand out. First, their paper illustrates how effectively laboratory-based social-science research (often referred to as *basic* research) and more naturalistic studies performed in real-world contexts (often referred to as *applied* research) can be combined in addressing public policy matters.<sup>2</sup> Second, it contains practical, feasible, and specific recommendations for improving courtroom practice based on that research. We believe that much goodwill come from Burke and Leben's calling judges' attention to issues of procedural fairness. The purpose of this commentary is not to dispute their claims regarding procedural justice, but rather to discuss the related concept of distributive justice and its implications for the courts.<sup>3</sup>

## THE MANY FLAVORS OF JUSTICE

At times it seems like the field of justice research resembles the ice cream market: Every vendor has an array of flavors, and no one can agree on how many flavors there are or ought to be. One encounters arguments for procedural justice, distributive justice, corrective justice, interactional justice, restorative justice, therapeutic justice, and retributive justice, among others.<sup>4</sup> They differ in terms of their antecedents, consequences, phenomenological characteristics, motives, and situations in which they arise; what they share is an emphasis on what is more or less fair in some aspect or arena of interpersonal relations. Amidst this mélange of flavors, the ones with the greatest staying power—to belabor the metaphor, the chocolate and

vanilla of the justice world—are procedural and distributive justice.

As Burke and Leben describe, procedural justice concerns whether the *processes* used to arrive at some outcome are fair, whereas distributive justice concerns whether the *outcome* itself is fair (i.e., the actual *distribution* of rewards, punishments, or some resource). Due to the groundbreaking work starting in the early 1980s by Tyler, Lind, Thibaut, Walker, and others, procedural concerns have acquired increasing importance in both scientific investigation and practical contexts (e.g., business, law enforcement)—and deservedly so.<sup>5</sup> An abundance of research has demonstrated that perceptions of procedural and distributive justice are distinct psychological constructs.<sup>6</sup> It is precisely because of this separation between them that individuals are more accepting of unfavorable outcomes when procedural fairness is high, and conversely, that they are relatively dissatisfied with favorable outcomes when procedural fairness is low. From these observations flow, quite logically, Burke and Leben's recommendations for enhancing procedural justice in the courtroom. The need to do so seems obvious, given the high frequency of unfavorable outcomes for someone involved: In civil disputes, at least one litigant (and potentially both) is going to leave unhappy; in criminal cases, convictions are necessarily unfavorable, and even acquittals and relatively lenient sentences can carry unpleasant consequences (e.g., the stigma of having been charged with and prosecuted for a crime).

Thus, there is no denying the importance of procedural fairness in the court system; yet the growing emphasis on proce-

## Footnotes

1. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (this issue), available at <http://aja.ncsc.dni.us/htdocs/AJWhitePaper9-26-07.pdf>.
2. See generally, Richard L. Wiener, *Law and Everyday Decision Making: Rational, Descriptive, and Normative Models*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 3, 3-32 (Richard L. Wiener et al. eds., 2007); Sean M. Lane & Christian A. Meissner, *A "Middle Road" Approach to Bridging the Basic-Applied Divide in Eyewitness Identification Research*, 22 APPLIED COGNITIVE PSYCHOL. 779 (2008).
3. The justice literature uses the terms "procedural justice" and "procedural fairness," likewise "distributive justice" and "distributive fairness," a practice we adopt in this article. As a matter of convention, the term "justice" more often refers to the abstract concept, whereas the term "fairness" more often refers to subjective perceptions, but we use the terms more or less interchangeably.
4. The literature is too vast to list all of the major representative works, and it is beyond the scope of the present article to attempt

- a full taxonomy; for useful overviews, see BARBARA MELLERS & JONATHAN BARON, *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATION* (1993); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* (1999); JOSEPH SANDERS & V. LEE HAMILTON, *HANDBOOK OF JUSTICE RESEARCH* (2001); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Alan J. Tomkins & Kimberly Applequist, *Constructs of Justice: Beyond Civil Litigation*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 163 (Brian H. Bornstein et al. eds., 2008).
5. The most influential early works, at least those arising from the psychological research tradition, are those by JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975), and E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1986).
6. See, e.g., Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. & SOC. PSYCHOL. 850 (1994).

dural justice can obscure the equally important issue of distributive justice. The concern with how best to allocate resources or outcomes has a long history, dating back at least as far as Aristotle,<sup>7</sup> and modern work on distributive justice—from both theoretical and experimental perspectives—continues unabated.<sup>8</sup> Without denying the benefits to be gained from improving procedural justice, one could even argue that concerns about distributive justice should be paramount. Questions about process are, in a sense, contingent on questions about outcome. Unless some outcome occurs, the procedures used to arrive at that outcome are moot.<sup>9</sup> Thus, we should not lose sight of what courts can do to enhance perceptions of distributive fairness, in addition to enhancing perceptions of procedural fairness.

### OUTCOME VERSUS PROCESS IN THE COURTS

The outcomes that occur to citizens from actions by the justice system can be, and often are, life altering: loss of liberty, life, or reputation; compelled or prohibited behaviors; transfer of substantial sums of money. One can construe these outcomes as a distribution of punishment and/or rewards to the affected parties. Courtroom procedures, for their part, are foreign and time-consuming at best, and terrifying at worst. In light of the high stakes, it would seem to be a “no-brainer” for judges and other court personnel to make the procedures as fair and “user-friendly” as possible, for litigants as well as other affected parties (e.g., witnesses, jurors).<sup>10</sup> Significantly, judges have more leeway in the procedures they use than in the outcomes they deliver, which are constrained by evidentiary guidelines, legal precedent, sentencing guidelines, and the spectre of appellate review, among other factors.

Perhaps because of these constraints, “judges focus on the fairness of case outcomes instead of the process.”<sup>11</sup> The problem here is not that judges focus on outcomes *more than* processes, but that they focus on outcomes largely *to the exclusion* of processes. A simple thought experiment illustrates the desirability of focusing on outcomes more than processes. Suppose that Defendant A and Defendant B have both been charged with first-degree murder, a crime that they did not commit. They are tried separately, in the same courtroom and with the same evidence. In Defendant A’s trial, he is not allowed to testify, the judge shows clear favoritism to the prosecutor, and court personnel treat A in a rude and condescending manner. Nonetheless, the jury acquits. In Defendant B’s

trial, he is allowed to address the court, the judge is scrupulously impartial, and court personnel are extremely solicitous and respectful. Nonetheless, the jury convicts. Clearly, the process in B’s trial is more fair, and anyone would prefer the B court’s procedures. But on the whole (taking distributive and procedural concerns together), which situation is better?

Would you rather be Defendant A or Defendant B? A’s situation seems better from a societal perspective, because the court reached the right outcome, albeit by suboptimal procedures. Moreover, most, if not all, people would choose to be Defendant A rather than Defendant B. In this situation, outcome trumps process.

Now suppose the hypothetical is the same, except that A and B did, in fact, commit the crime. What then? Again, most, if not all, people would choose to trade places with Defendant A, even though, from a societal perspective, a murderer has been set free. The manner of B’s trial might provide him some consolation, but it is likely to offer him only small comfort. Of course, in more ambiguous cases, outcome would not necessarily trump process; and as Burke and Leben describe, a fair process can go a long way toward softening a harsh outcome. Similarly, an unfair process can make a positive outcome less satisfying. But pushed to the extremes, outcome matters more than process.

### PRINCIPLES OF DISTRIBUTIVE JUSTICE

As mentioned above, judges’ allocation of outcomes is constrained by a variety of factors. Nonetheless, except where mandatory sentencing guidelines apply, criminal judges retain a fair degree of discretion, and civil judges also have considerable flexibility in fashioning a remedy, in terms of both the type of remedy (e.g., monetary vs. other restitution) and the amount. In allocating some resource, decision makers can rely on several different principles of distributive justice. When judges mete out punishment (in criminal cases) or redistribute money (in civil cases), it behooves them to be sensitive to the various principles that could be applied, and the different goals that those principles serve.

**The concern with how best to allocate resources or outcomes has a long history, dating back at least as far as Aristotle....**

7. See, e.g., MILLER, *supra* note 4; John T. Scott et al., *Just Deserts: An Experimental Study of Distributive Justice Norms*, 45 AMER. J. POL. SCI. 749, 750-51 (2001).

8. See, e.g., MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE* (1985); NORMAN FROHLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY* (1992); MELLERS & BARON, *supra* note 4; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Philip Michelbach et al., *Doing Rawls Justice: An Experimental Study of Income Distribution Norms*, 47 AMER. J. POL. SCI. 528 (2003); Scott et al., *supra* note 7.

9. In some circumstances, the failure to reach an outcome is the outcome. This happens, for example, when there is a hung jury, when

a law firm postpones a decision about making a junior associate a partner, or when a university places an applicant on a waiting list. Because these “non-decisions” nonetheless carry consequences for those involved (e.g., the defendant still can be retried, the associate still does not share in the firm’s profits, the applicant still does not have a university to attend), they function as unique outcomes and therefore do not change the analysis.

10. For a review of some of the procedural innovations that have been tried, especially with jurors, see Monica K. Miller & Brian H. Bornstein, *Juror Stress: Causes and Interventions*, 30 T. MARSHALL L. REV. 237 (2004).

11. Burke & Leben, *supra* note 1, at 14.

**It is clear from this brief overview that multiple distributive justice principles are relevant to both the criminal and civil justice systems.**

Theoretical and experimental research on distributive justice has identified a number of distinct principles that people rely on in making (or in expressing preferences for) allocation decisions. Different researchers use slightly different taxonomies, but the most commonly cited principles are equality, efficiency, need, and merit (also referred to as desert or proportionality).<sup>12</sup> *Equality* dictates that all affected parties

receive the same allocation. So, for example, all workers receive the same raise, all families on welfare receive the same amount of food stamps, and so forth. Strict mandatory sentencing is an example of the equality principle in criminal justice.<sup>13</sup> Perhaps the best example of equality in civil contexts is workers compensation, by which injured parties receive compensation according to a predetermined schedule. In such a system, the same injury is always worth the same amount, regardless of individual circumstances.<sup>14</sup>

Departures from equality reflect an adherence to other justice principles. For example, a concern with *efficiency* means that aggregate productivity can be increased by awarding some individuals more of a resource than others. It might make sense to award higher raises to more senior, more productive employees than to less productive ones, if doing so makes them still more productive, and the company as a whole benefits.<sup>15</sup> The goal of general deterrence in legal contexts can be explained in terms of efficiency. One can justify punishing some defendants—either criminally or civilly—more severely than others, for comparable actions, if doing so would make society as a whole function better in some way. For example, it might make sense to force a financially robust product manufacturer to pay more in damages for a defective product than a less solvent manufacturer, if requiring equal payment would force the less solvent company out of business, thereby losing other valuable products and services that it might provide.

Inequality can also be justified by a disparity in *need*. In the food stamp example given above, one could argue that a fam-

ily of eight should receive more aid than a family of four because the family of eight has greater needs.<sup>16</sup> Need plays an important role in the resolution of legal disputes, especially in civil cases. So, for example, if the sole breadwinner in the family of eight were incapacitated due to another's negligence, he or she would typically recover greater damages than the sole breadwinner in the family of four (all else being equal).

Finally, the distribution of resources can vary according to *merit*, in which some individuals *deserve* more/less than others. Multifarious factors contribute to merit, subsuming things that are both mostly innate (e.g., intelligence, beauty) and those that are largely acquired (e.g., wealth, prestige).<sup>17</sup> Importantly, there is also a strong behavioral component, in terms of how much the individual's own actions have helped generate particular outcomes. Merit-based distribution systems are widespread in capitalist societies;<sup>18</sup> consider, for example, that most businesses, especially in the private sector, determine salary based primarily on an employee's individual efforts, productivity, and success. Experimental research on distributive justice supports the centrality of concerns about merit, especially in terms of income distribution.<sup>19</sup> It is also a cardinal concern in both civil and criminal law, where it is often referred to as *proportionality*. Thus, a civil litigant's penalty/reward is often explicitly tied to his or her contribution to the outcome, as in applying comparative negligence or market share liability. Similarly, criminal punishment is tied closely to a defendant's culpability (i.e., desert), and a variety of aggravating or mitigating factors can raise or lower the punishment.

It is clear from this brief overview that multiple distributive justice principles are relevant to both the criminal and civil justice systems. The choice is not simply between one or another principle, as multiple principles can, and do, apply simultaneously. Research on allocation preferences has shown that individuals take a pluralistic approach and rely on multiple principles in a "complex yet structured" manner.<sup>20</sup>

Although these principles lurk beneath the surface of judicial decision making, they are rarely explicit. A rare instance where a judge-like arbiter did explicitly consider which distributive norms were most appropriate occurred in the September 11th Victim Compensation Fund, administered by Special Master Kenneth Feinberg.<sup>21</sup> The statute that enabled the Fund<sup>22</sup> required a calculation of each claimant's presumed

12. See, e.g., Scott et al., *supra* note 7, at 524-25; see generally MILLER, *supra* note 4; RAWLS, *supra* note 8.

13. In practice, most "mandatory" sentencing guidelines provide at least a little wiggle room by setting a range of allowable sentences rather than specifying a precise, invariant sentence. These ranges allow for the influence of other principles, such as need or merit, in conjunction with a rough sense of equality.

14. Though even here, departures from equality may be justified by other factors, such as the injured person's age, showing again the influence of the other justice principles.

15. This would especially be true in an employee-owned company, where less productive employees share directly in their coworkers' increased productivity.

16. In ordinary discourse, people are often tempted to say that the family of eight deserves more, but that conflates the principle of need with the principle of merit, or desert (discussed *infra*). For

present purposes, the family of eight has done nothing to make themselves more "deserving," beyond having produced more mouths in need of feeding.

17. See generally RAWLS, *supra* note 8, at 73-74.

18. Justice preferences can be quite different in non-capitalist societies; see, e.g., Duane F. Alwin et al., *Comparative Referential Structures, System Legitimacy, and Justice Sentiments: An International Comparison*, in SOCIAL JUSTICE AND POLITICAL CHANGE 109 (James R. Kluegel et al. eds., 1995).

19. E.g., Michelbach et al., *supra* note 8, Gregory Mitchell et al., *Judgments of Social Justice: Compromises between Equality and Efficiency*, 65 J. PERS. & SOC. PSYCH. 629 (1993); Scott et al., *supra* note 7.

20. Scott et al., *supra* note 7, at 764; see also FROHLICH & OPPENHEIMER, *supra* note 8; MILLER, *supra* note 4; Michelbach et al., *supra* note 8; Mitchell et al., *supra* note 19.

economic loss based on a variety of factors (e.g., age, income), thereby relying primarily on principles of efficiency and merit. However, Feinberg implemented an equality norm for non-economic loss, awarding \$250,000 per victim and \$100,000 per spouse and dependent child. Many claimants, and Special Master Feinberg himself, thought the Fund should have adhered to a principle of equality for all compensation.<sup>23</sup> As we discuss below, an awareness of these principles can inform judicial performance.

Most experimental research has focused on the distribution (or redistribution) of desirable resources (i.e., *goods*) rather than the distribution of undesirable commodities, or *bads*. In the context of the justice system, civil cases are concerned mainly with the redistribution of a good (money), while criminal cases are concerned mainly with the distribution of a bad (punishment). This is an important distinction, as several theorists have argued that different distributive norms should predominate in allocating different types of goods or in allocating the same good in different contexts.<sup>24</sup> For example, Elster contends that the principle of need should be central in allocating organs for transplantation, whereas merit should prevail in admitting students to college.<sup>25</sup> Thus, the same principles might reasonably not apply in civil versus criminal cases, or even for different types of cases within each system (e.g., crimes against persons vs. crimes against property).

#### INDIVIDUAL DIFFERENCES IN PERCEPTIONS OF DISTRIBUTIVE FAIRNESS

The experimental literature on distributive justice shows that people's preferences differ depending on a number of demographic characteristics, such as race/ethnicity, gender, nationality, and socioeconomic status.<sup>26</sup> As suggested by Burke and Leben, minorities differ in their approval ratings of the court system.<sup>27</sup> These perceptions are based not only on the way in which minority group members are treated by the jus-

tice system, but also the probability of an unfair outcome. The threat of "worse results" is most prominent for African-Americans, who account for almost half of the incarcerated population and represent 41% percent of the population on death row.<sup>28</sup> In general, African-American citizens have lower opinions of the criminal justice system and are less confident than others in the neutrality and legitimacy of the courts.<sup>29</sup>

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In a study by Miller and colleagues, the researchers found that black and white men and women differed in their recommended criminal sanctions for convicted offenders.<sup>30</sup> Whereas blacks tended to ascribe to a justice philosophy that considered the individual offender, whites were more likely to employ a justice philosophy that focused on meting out punishment that was proportionate in severity to crime seriousness. In other words, whites' judgments were more centered on characteristics of the offense (i.e., the seriousness of the crime), whereas blacks' judgments were more centered on the social characteristics of the offender. Research on justice preferences in non-legal contexts has similarly found that individuals of different races favor different justice principles. Specifically, minorities are more skeptical than whites about the relationship between merit and outcomes, and they are correspondingly less sensitive to variations in merit.<sup>31</sup>

One's perceptions of distributive justice outcomes will also vary as a function of socioeconomic status, which is correlated with race in the U.S. As blacks are considered, on average, to be closer to crime than whites (i.e., more likely to be victim-

21. The Fund has generated considerable commentary, much of it written from a social justice perspective. The following sources are especially helpful: LLOYD DIXON & RACHEL K. STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS (RAND Corp. 2004); KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) [hereinafter WHAT IS LIFE WORTH]; KENNETH R. FEINBERG ET AL., FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001 (2004), available at [http://www.usdoj.gov/final\\_report.pdf](http://www.usdoj.gov/final_report.pdf); *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003) (special issue on the Fund).

22. Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 49 U.S.C. § 40101 (2001).

23. FEINBERG, WHAT IS LIFE WORTH, *supra* note 21, at 177-88 (on Feinberg's evaluation of the Fund); Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 94 (2007) (on claimants' perceptions).

24. See, e.g., JON ELSTER, LOCAL JUSTICE (1992); MILLER, *supra* note 4; MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Jon Elster, *Justice and the Allocation of Scarce Resources*, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND

APPLICATIONS 259, 259-278 (Barbara A. Mellers & Jonathan Baron eds., 1993).

25. Elster, *Justice and Allocation*, *supra* note 24, at 259.

26. See generally Michelbach et al., *supra* note 8; Scott et al., *supra* note 7; Peter B. Wood & David C. May, *Racial Differences in Perceptions of the Severity of Sanctions: A Comparison of Prison with Alternatives*, 20 JUST. Q. 605 (2003).

27. See, e.g., David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24 (1999); DAVID B. ROTTMAN ET AL., PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY: FINAL REPORT (National Center for State Courts, 2003).

28. Wood & May, *supra* note 26, at 605-606.

29. M. SOMJEN FRAZER, THE IMPACT OF THE COMMUNITY COURT MODEL IN DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER (2006), available at [http://courtinnovation.org/uploads/documents/Procedural\\_Fairness.pdf](http://courtinnovation.org/uploads/documents/Procedural_Fairness.pdf).

30. John L. Miller, Peter H. Rossi & Jon E. Simpson, *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 L. & SOC'Y REV. 313 (1986).

31. Michelbach et al., *supra* note 8 at 530, 536.

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ized, arrested, and incarcerated), one's proximity to the criminal justice system clearly influences an individual's view of appropriate penal sanction.<sup>32</sup> Research shows a difference in the fairness of outcome ratings between whites and affluent blacks<sup>33</sup> and also between whites and low-income blacks.<sup>34</sup> As one might conclude, race and socioeconomic status are intimately tied and pose a "double threat"

for minority offenders.

Race is not the only demographic variable that influences attitudes toward the criminal justice system. Men and women have also been found to vary in their views toward crime and correctional policies.<sup>35</sup> Whereas men are more likely to support capital punishment as a means for corrective action, women tend to focus more on the individual and show greater support for rehabilitative efforts for criminal offenders. Both agree that the government should punish and hold convicted criminals accountable, but women favor a standard of care that provides assistance to meet the needs of offenders, suggesting that their goals in distributing penalties are different from men's.<sup>36</sup>

This attitudinal difference between men and women in recommendations for legal outcomes is also prominent in other domains. For example, Sweeney and McFarlin found gender differences in men's and women's reliance on distributive or procedural justice in expressing job satisfaction.<sup>37</sup> For women, fair processes were more important in their job satisfaction evaluations, lending to a procedural justice philosophy. Satisfaction for men, however, was more outcome-oriented and therefore based more on an assessment of distributive fairness.<sup>38</sup> Women show a stronger preference for equality than men, and they are also more sensitive to variations in merit and

need.<sup>39</sup> Scott and colleagues speculate that women's greater sensitivity to factors such as merit and need might reflect more general gender differences in moral reasoning, in particular a greater sensitivity among women to contextual features.<sup>40</sup> There is reason to suppose that gender differences in distributive justice may be applied to other contexts, such as legal dispute resolution.

Overall, these findings on individual differences suggest two things. First, litigants will have different expectations and preferences about what sorts of outcomes are most fair, depending on their demographic characteristics. Although there are criminal and civil codes, sentencing practices, and informal norms that serve to ensure fair treatment under the law, one person's notion of what is fair is not necessarily the same as another's. Second, judges who come from different backgrounds will have a different sense of what constitutes a fair and just outcome.

## RECOMMENDATIONS AND CONCLUSIONS

Burke and Leben conclude their article by offering a number of recommendations for change. Specifically, they ask: "What can an individual judge, individual court, court administrators, researchers, judicial educators, and court leaders do to enhance procedural fairness?" We have no quarrel with their recommendations, the vast majority of which are reasonable, feasible, inexpensive, and likely to accomplish their desired aim. We do not make analogous recommendations for what judges and courts can do to enhance distributive fairness;<sup>41</sup> rather, in this concluding section we highlight the importance of distributive justice with the goal of raising awareness of the factors that can influence perceived outcome fairness.

A hallmark characteristic of both the criminal and civil justice systems is that only one side wins; and often both sides walk away disappointed.<sup>42</sup> Criminal convictions are "wins" for the prosecution (and are touted as such in election campaigns) and "losses" for defendants; whereas most civil cases are essentially zero-sum games, with one party's losses mirroring the opposing party's gains. Thus, there would seem to be little

32. Miller et al., *supra* note 30, at 316.

33. John Hagan & Celesta Albonetti, *Race, Class, and the Perceptions of Criminal Justice in America*, 88 AM. J. SOCIOLOGY 329 (1982).

34. Martha L. Henderson et al., *The Impact of Race on Perceptions of Criminal Injustice*, 25 J. CRIM. JUST. 447 (1997).

35. Brandon K. Applegate, Francis T. Cullen & Bonnie S. Fisher, *Public Views Toward Crime and Correctional Policies: Is There a Gender Gap?* 30 J. CRIM. JUST. 89 (2002).

36. *Id.* at 98.

37. Paul D. Sweeney & Dean B. McFarlin, *Process and Outcome: Gender Differences in the Assessment of Justice*, 18 J. ORGANIZATIONAL BEHAVIOR 84 (1997).

38. *Id.* at 92.

39. Michelbach et al, *supra* note 8, at 536 (finding women are more egalitarian and more sensitive to need); Scott et al., *supra* note 7, at 763-64 (finding women are more egalitarian and more sensitive to merit).

40. E.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

41. Doing so would entail a normative discussion of the principles that the civil and criminal justice systems should adhere to in

resolving disputes, and such philosophical discursions would take us too far afield from our more modest aim of describing the importance of distributive justice for the courts.

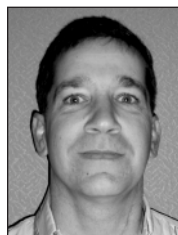
42. It is theoretically possible for both sides to leave the process satisfied with the outcome. In a criminal case, for example, the prosecution and the defendant might both be satisfied with conviction on a lesser charge, as opposed to either conviction on the most serious charge (best outcome from the prosecution's perspective) or an acquittal (best outcome from the defendant's perspective). Similarly, a civil plaintiff and defendant might both be pleased that the award was not more (from the defendant's perspective) or less (from the plaintiff's perspective) than it might have been otherwise. However, such "win-win" situations rarely, if ever, happen. More often, both sides would experience disappointment from these sorts of compromise outcomes. See Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J., 420 (1982); Val Reid, *Small Claims, Big Questions*, LEGAL ACTION, March 2007, at 11, 11-12, available at <http://www.asauk.org.uk/fileLibrary/pdf/smclmsbq.pdf>.

doubt that aspirations for, and satisfaction with, particular outcomes reign supreme in litigants' minds. Distributive justice might not be litigants' favorite justice flavor, but it is the flavor they care about the most. It is therefore the flavor that judges should care about the most as well.

Procedures of the utmost fairness do not necessarily mean that litigants will readily accept a court's outcome or decision. Hence it is important for legal advisors, professionals, and judges to be willing to explain outcomes and to express a willingness to answer litigants' questions, particularly if an outcome is undesirable or unexpected. As mentioned in the individual differences section, *supra*, it is important further for legal professionals to recognize that litigants are not cookie-cutter replicas. What makes people different will also influence how they approach, interpret, and understand the law. This will help to ensure that litigants have a better understanding of their outcomes and why those particular outcomes were reached, which would potentially lead to greater satisfaction with the justice system and fewer appeals.

Burke and Leben also emphasize the importance of social science research in helping legal professionals understand how the general population interprets fairness in the legal system. We support this proposition with respect to distributive, as well as procedural fairness. We similarly recommend that legal professionals not only educate themselves by becoming familiar with the existing literature, but also support ongoing research. There are two ways in which judges can facilitate this goal. First, they can allow researchers to survey litigants about their perception of legal outcomes as well as legal procedures. Second, they can serve as research participants themselves. Social scientists who conduct research on the legal system know much less about how judges make decisions than they do about how juries (and especially individual jurors) make decisions. This state of affairs exists for a number of reasons, but primarily because compared to the average juror (or mock juror), judges are fewer, busier, harder to obtain access to, and less swayed by offers of token compensation for participating in research studies.

As fact finders, judges and juries are similar in many respects, yet they differ in subtle ways as well.<sup>43</sup> Judges differ from jurors in terms of their training, background, legal knowledge, and experience with similar cases; evidentiary rules also mean that judges might make decisions on slightly different constellations of facts than juries. Moreover, precisely because of their experience and training, judges are much more likely than jurors to have reflected on the nature of their task and to have formulated principles to which they adhere in adjudicating the cases before them. Interviews with judges, as well as judge-jury comparisons, could shed a great deal of light on the justice principles that legal fact finders rely on in determining trial outcomes. Reflection by judges on the principles and goals that they use, often unconsciously, in reaching verdicts would produce a more thoughtful and better informed judiciary.



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43. See, e.g., Brian H. Bornstein, *Judges vs. Juries*, 43 CT. REV. 56 (2006).