
PROCEDURAL FAIRNESS IN A PANDEMIC: IT'S STILL CRITICAL TO PUBLIC TRUST

*Kevin S. Burke & Steve Leben**

ABSTRACT

Social science research shows that when judges apply procedural fairness (procedural justice) principles while handling cases, litigant satisfaction with the court system and willingness to comply with court orders increases. These principles call for judges to be sure people in court have a chance to be heard, are dealt with by a neutral but empathetic judge, and have a good explanation of both procedures and outcome.

The COVID-19 pandemic has disrupted normal court operations, putting additional pressures on both courts and litigants. The pandemic has also occurred when public trust in institutions generally is lower than normal. Since adherence to procedural fairness principles has been shown to improve trust, courts should renew their focus on adhering to them. In addition, courts should use procedural fairness measurements to frame budget needs and to redesign court procedures for modern times.

TABLE OF CONTENTS

I. Introduction	686
II. Where We Were Before the Pandemic: A Climate of Distrust.....	687
III. What We Know About Procedural Fairness	694
IV. Focusing on Fairness During and After the Pandemic.....	697
A. Keeping the Focus on Individual Proceedings	698
B. Measuring Fairness.....	700
C. Redesigning the Legal System to Better Provide Procedural Fairness	702
V. Conclusion.....	705

* Kevin S. Burke retired at the end of September 2020 as a judge on the Hennepin District Court in Minneapolis, where he served since 1984. He is also an adjunct law professor at the University of Minnesota School of Law (teaching trial practice) and the University of St. Thomas School of Law (teaching criminal procedure). Steve Leben is a visiting professor of law at the University of Missouri-Kansas City School of Law. He was a judge on the Kansas Court of Appeals from 2007 to 2020 and a Kansas state trial judge from 1993 to 2007.

I. INTRODUCTION

In spring 2020, justice in the United States changed quickly. Courthouses closed, and judges turned to Zoom, Webex, and Skype to handle essential business. A restraining order might have just been entered in a divorce case or an alleged stalking case. That order might well have left someone homeless—and then the courts closed for an indefinite period. Or maybe the courts closed just before someone could seek emergency help in one of those situations or one of dozens of others in which ordinary citizens need the judicial system's help. Someone seeking help at that moment—shut out of the courthouse—would no doubt be frustrated and perhaps disillusioned.

Courts face many challenges serving the public in a pandemic. Court closures during stay-at-home orders and statewide emergency orders will one day be modified to allow more court business to be done. Jury trials will resume but with substantial backlogs and facing speedy trial deadlines in criminal cases.¹ There will be an influx of new cases in some areas, like litigation over coverage under business-interruption insurance policies.

Some of the resumptions in litigation will be quite personal: as humane as it might be to delay evictions in a time of mass unemployment, the courts cannot independently delay evictions forever.² The unemployment that leads to nonpayment of rent will also lead to requests to change child support and alimony payments. Courts will need to deal with all of these people and their problems in a time of immense stress on state budgets. In many states, just as courts are ramping back up, judicial staff may well be subject to furloughs.³

Especially in this environment, we argue courts must pay attention to the importance of procedural fairness, also called procedural justice. As we will explain in more detail, we are talking about the ways judges and court

1. See U.S. CONST. amend. VI.

2. See, e.g., *In the Matter of Prioritization of Cases and Duties, Supervisory Order*, IOWA SUP. CT. (July 9, 2020), <https://www.iowacourts.gov/collections/529/files/1147/embedDocument/> [<https://perma.cc/5C4T-NHAW>] (placing foreclosure proceedings among the non-prioritized matters effectively delaying foreclosures).

3. See, e.g., Ryan Tarinelli, *As NY State Courts Report Budget Cuts, Lawyers Fear Delays, Employee Unions Worry Over Jobs*, N.Y. L.J. (Sept. 30, 2020), <https://www.law.com/newyorklawjournal/2020/09/30/as-ny-state-courts-report-budget-cut-lawyers-fear-delays-employee-unions-worry-over-jobs/?slreturn=20200903170053> [<https://perma.cc/4D4W-FBS7>].

staff interact with those who come through the judicial system—ways in which litigants and others feel heard, respected, and treated fairly.

One might counter that simply keeping the courts open and functioning is all we can ask right now. When the house is metaphorically burning down around us, should we really be concerned about being polite, caring, and respectful—or should we just deploy the fire extinguisher as quickly as possible?

We argue in this Article that it is critical to keep the focus on procedural fairness, even in what is perhaps the most challenging time facing our courts in many generations. There will be monumental judicial decisions in areas of great disagreement; there will be a vast number of decisions few will notice except the litigants involved. But collectively, all those decisions need to be received by people who have a level of trust in the judicial system.

Michael J. Herbert said, “A relationship without trust is like a car without gas. You can stay in it all you want but it won’t go anywhere.”⁴ The gas that runs the courts is the trust people have in them. After all, courts depend on voluntary compliance to enforce the vast majority of judicial orders.

We do not have—and would not want—armed officers enforcing court orders in most civil cases. When you get a small-claims judgment against your neighbor for damaging your property, your neighbor may pay the amount or you may be able to garnish the neighbor’s wages or bank account for the money. But we do not have an armed sheriff’s deputy show up to demand the money. While there are some toxic child custody cases, we rarely expect parents in those disputes to need the transfer to occur at the police station under the watchful eye of an officer two or three times each week. Instead, our judicial dispute-resolution process is premised on having the vast majority of those who receive orders and judgments voluntarily comply with them. For that, we need public trust. Attention to procedural fairness principles, even in the throes of a pandemic, should help foster that trust.

II. WHERE WE WERE BEFORE THE PANDEMIC: A CLIMATE OF DISTRUST

Before we talk about procedural fairness principles and why we think they are particularly important today, we should take a look at the baseline public trust in the courts before the pandemic. Courts today are in a tough

4. *Quotations of Michael J. Herbert*, GOODREADS, https://www.goodreads.com/author/quotes/958257.Michael_J_Herbert [<https://perma.cc/6V2C-SX86>].

situation.⁵ There is a lack of trust in public institutions generally.⁶ While it is not specifically focused on courts, the lack of trust is especially problematic for courts because they rely so much on voluntary acceptance of their orders.⁷

The general loss of confidence in institutions in the United States has been significant over the past several decades.⁸ Gallup has asked about confidence in seven institutions from 1973 to the present: “organized religion, public schools, the Supreme Court, Congress, newspapers, organized labor, and big business.”⁹ Respondents rate their confidence as either a great deal, quite a lot, some, very little, or none, with Gallup considering “a great deal” and “quite a lot” as expressions of confidence.¹⁰ The average confidence among those seven institutions ranged from 44 percent to 46 percent from 1973 to 1976, fell to 32 percent in 1991 before rebounding slightly to 38 percent in 2001, and more recently has settled in at about 27 percent from 2007 to 2019.¹¹ More than three-quarters of Americans say that, compared to 20 years ago, they are less confident in the federal government.¹²

At the state-court level, confidence in state courts dropped 11 percent from 2018 to 2019, though approval remained at a reasonably solid 65 percent.¹³ That data came from a series of annual surveys commissioned by the National Center for State Courts.¹⁴ Overall, confidence fell from 2018 to

5. See *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/3MG6-4Y52>] (showing annual data through 2020); Lydia Saad, *Military, Small Business, Police Still Stir Most Confidence*, GALLUP (June 28, 2018), <https://news.gallup.com/poll/236243/military-small-business-police-stir-confidence.aspx> [<https://perma.cc/GHL2-SFU7>] [hereinafter Saad, *Military*].

6. *Confidence in Institutions*, *supra* note 5; Saad, *Military*, *supra* note 5.

7. *Confidence in Institutions*, *supra* note 5.

8. *Id.*; Saad, *Military*, *supra* note 5.

9. *Confidence in Institutions*, *supra* note 5; Saad, *Military*, *supra* note 5.

10. *Confidence in Institutions*, *supra* note 5.

11. *Id.*; Saad, *Military*, *supra* note 5.

12. Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RES. CTR. (July 22, 2019), <https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> [<https://perma.cc/G8A8-7P8U>].

13. GBAO Strategies, *State of the State Courts—Survey Analysis 2* (Jan. 3, 2020), https://www.ncsc.org/_data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf [<https://perma.cc/YGR7-RCQF>].

14. *Id.*

2019 for local police departments (falling by 12 percent to 77 percent),¹⁵ the U.S. Supreme Court (falling by 4 percent to 69 percent), and for federal courts generally (falling by 9 percent to 65 percent).¹⁶

This trend toward lower public confidence can be seen in approval ratings of the U.S. Supreme Court, the long-perceived bellwether for approval of the court system.¹⁷ Gallup regularly asks respondents whether they “approve or disapprove of the way the Supreme Court is handling its job.”¹⁸ The overall numbers show a decline in approval and an increase in disapproval.¹⁹ In fall 2000, shortly before *Bush v. Gore*, the 5–4 ruling that decided the 2000 presidential election,²⁰ 62 percent approved and 29 percent disapproved of the Court; in fall 2019, 54 percent approved and 42 percent disapproved.²¹ Twice during that time period approval dipped to 42 percent,²² though overall approval was slightly positive in 2019.²³

Behind those numbers are several divides. Blacks and Hispanics generally have lower trust in U.S. institutions, and Gallup reports lower Supreme Court approval numbers for non-whites than for whites.²⁴ Approval of the Court by women has diminished since about the time of the nomination of Justice Brett Kavanaugh.²⁵ From 2000 through 2017, approval rates by men and women were quite similar.²⁶ In 2000, approval by men was

15. *Id.*; see also *George Floyd: Pew Survey on U.S. Attitudes to Police Reveals Changes*, BBC (July 9, 2020), <https://www.bbc.com/news/world-us-canada-53343551> [<https://perma.cc/U2VG-SHVX>].

16. GBAO Strategies, *supra* note 13, at 2.

17. *See id.*

18. *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/LR96-6QFP>].

19. *Id.*

20. 531 U.S. 98 (2000).

21. *Supreme Court*, *supra* note 18.

22. *Id.* In July 2016, disapproval led approval 52 percent to 42 percent, and in June 2005, disapproval led approval 48 percent to 42 percent. *Id.*

23. *Id.*

24. Rainie, Keeter & Perrin, *supra* note 12, at 1; Lydia Saad, *Supreme Court Enjoys Majority Approval at Start of New Term*, GALLUP (Oct. 2, 2019), <https://news.gallup.com/poll/267158/supreme-court-enjoys-majority-approval-start-new-term.aspx> [<https://perma.cc/84P8-DEKR>] (data available through link to “View complete responses and trends.”) [hereinafter Saad, *Majority Approval*]. In 2019, approval of the Court was 57 percent for whites and 48 percent for non-whites. *Id.*

25. Saad, *Majority Approval*, *supra* note 24.

26. *Id.*

60 percent and approval by women 59 percent; in 2017, approval by men was 50 percent and approval by women 49 percent.²⁷ But in 2018, approval by men had risen to 60 percent and approval by women had fallen to 43 percent.²⁸ As of Gallup's September 2019 survey, a 12-point gender gap remained.²⁹

There is also a substantial partisan divide; it too traces back to *Bush v. Gore*.³⁰ Overall approval of the Court was at 62 percent in September 2000, and the approval rate among Democrats was only slightly higher than that among Republicans as the eight-year Clinton presidency ended.³¹ But after *Bush v. Gore*, Republican approval shot up to 80 percent and Democratic approval fell to 42 percent.³² Since then, the views of partisans on both sides have swung dramatically as the White House changed hands (changing public perception of where the Court might head) or major decisions were announced in cases involving the Affordable Care Act or LGBTQ+ rights.³³ Republican approval fell to a low of 18 percent in 2015 after the Court upheld same-sex marriage rights and the Affordable Care Act.³⁴ Democratic approval in 2015 rose to 76 percent.³⁵ But with the confirmation of two appointees of President Donald Trump, Republican approval had rebounded by 2019 to 73 percent while Democratic approval had fallen to 38 percent.³⁶

27. Justin McCarthy, *Women's Approval of SCOTUS Matches 13-Year Low Point*, GALLUP (Sept. 28, 2018), <https://news.gallup.com/poll/243266/women-approval-scotus-matches-year-low-point.aspx> [<https://perma.cc/33MX-6LFU>] [hereinafter McCarthy, *Women's Approval of SCOTUS*].

28. *Id.*

29. Saad, *Majority Approval*, *supra* note 24 (within the data available through the link to "View complete questions responses and trends"). A 9-point gap had already emerged shortly before Kavanaugh was nominated. McCarthy, *Women's Approval of SCOTUS*, *supra* note 27.

30. See Justin McCarthy, *GOP Approval of Supreme Court Surges, Democrats' Slides*, GALLUP (Sept. 28, 2017), <https://news.gallup.com/poll/219974/gop-approval-supreme-court-surges-democrats-slides.aspx> [<https://perma.cc/CXN5-7NWB>].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Saad, *Majority Approval*, *supra* note 24; see Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RES. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> [<https://perma.cc/DB3B-4TTX>]. In the Pew data, 81 percent of

While we set out to survey opinion data before the pandemic, we now find ourselves somewhat like the meteorologist who is constantly receiving new data. Two sets of new data suggest potential change from the pre-pandemic world we have just described.

First, the focus on racial justice that has grown in reaction to the killing of George Floyd,³⁷ the Black Lives Matter movement,³⁸ and the underlying conditions that event and movement has helped to publicize have further diminished support for law enforcement in general.³⁹ The National Center for State Courts' June 2020 survey showed confidence in local police down nationally from 89 percent in 2018 to 79 percent in 2020.⁴⁰

Second, the most recent approval numbers for the U.S. Supreme Court showed across-the-board improvements after its October 2019 Term.⁴¹ Gallup's July 2020 survey showed approval of the Court at the highest level since 2009.⁴² Surprisingly, this year's Gallup survey showed neither the political party nor male-female schisms that had been present before.⁴³ Court approval by political party was similar for Republicans (60 percent),

Democrats and 76 percent of Republicans had a favorable view of the Supreme Court in 1997. *Id.* In 2019, 75 percent of Republicans had a favorable view but only 49 percent of Democrats did. *Id.*

37. See Haley Willis et al., *New Footage Shows Delayed Medical Response to George Floyd*, N.Y. TIMES (Aug. 11, 2020), <https://www.nytimes.com/2020/08/11/us/george-floyd-body-cam-full-video.html>.

38. See Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html>; Campbell Robertson, *What Black Lives Matter Has Revealed About Small-Town America*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/us/black-lives-matter-protests-small-towns.html>; James Wagner, *On Opening Day, a Rarity for M.L.B.: Support for Black Lives Matter*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/sports/baseball/mlb-black-lives-matter.html>.

39. See *Confidence in Institutions*, *supra* note 5.

40. *State of the State Courts in a (Post) Pandemic World*, NAT'L CTR. FOR ST. CTS. (June 8–11, 2020), https://www.ncsc.org/__data/assets/pdf_file/0005/41000/COVID19-Poll-Presentation.pdf [<https://perma.cc/XH3C-ETCR>] (presenting the results of a June 2020 survey of 1,000 registered voters).

41. Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx> [<https://perma.cc/7EQ4-MQ22>] [hereinafter McCarthy, *Approval of the Supreme Court*].

42. *Id.*

43. See *id.* (gender differential is found through the complete data link).

Democrats (56 percent), and Independents (57 percent).⁴⁴ Approval by women (60 percent) had moved slightly ahead of approval by men (55 percent).⁴⁵ As for the racial divide, Gallup's sample size apparently did not allow for a breakdown of Blacks and Hispanics.⁴⁶ However, the approval level among non-whites (52 percent) was only slightly below that of whites (61 percent).⁴⁷

Despite this single July 2020 survey that seems to show general agreement in approval of the Court among groups that have been divided for many years, we suspect this is more likely an anomaly. The divisions in U.S. society do not seem to be on the decline. In 2020, though, the Court had just ruled on an abortion case in which the Court upheld abortion rights while apparently adopting, through Chief Justice John Roberts's opinion, a test that would be more likely to uphold abortion restrictions going forward.⁴⁸ Late in the Term, the Court also had well-publicized rulings that protected LGBTQ workers from employment discrimination⁴⁹ and rejected President Trump's attempt to end the Deferred Action for Childhood Arrivals (DACA) program.⁵⁰ At least in the short run, these rulings may have led to the improved approval of the Court among Democrats and women while not dampening support too much among Republicans and men.⁵¹ The apparent narrowing of the perception gap by race is harder to understand, but the lack of subgroup reports for Blacks and Hispanics makes it less meaningful.⁵²

44. *Id.* The cited data can be accessed by clicking the link, "[View complete question responses and trends \(PDF download\)](#)," at the end of the McCarthy article.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring); Melissa Murray, *The Supreme Court's Abortion Decision Seems Pulled from the "Casey" Playbook*, WASH. POST (June 29, 2020), <https://www.washingtonpost.com/opinions/2020/06/29/problem-with-relying-precedent-protect-abortion-rights/>.

49. *See generally* Bostock v. Clayton Co., 140 S. Ct. 1731 (2020).

50. *See* DHS v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1916 (2020).

51. McCarthy, *Approval of the Supreme Court*, *supra* note 41. Republican approval dropped from 73 percent in 2019 to 60 percent in 2020, while Democratic approval rose from 38 percent to 56 percent. But the approval rate for Republicans, Democrats, and Independents in 2020 was above each group's average approval level for a 20-year period. *Id.*

52. *See id.*

One important note must be made, though, about the effects of the pandemic on the Court and perceptions of its work. Like other courts, the Supreme Court was unable to hold in-person hearings during spring 2020.⁵³ For the first time, the Court held oral arguments by teleconference, with justices and counsel all appearing remotely.⁵⁴ Also for the first time, the Court allowed simultaneous public access to the oral arguments.⁵⁵ The Court has often been criticized for not allowing live or even same-day access to recordings of its arguments.⁵⁶ Most state supreme courts have for many years provided livestreaming of their oral arguments; many have suggested our nation's highest court should do so too.⁵⁷

It is possible that the Court's well-publicized move in the spring 2020—providing live access to its oral arguments—played a role in the improved public approval of the Court in the July 2020 survey.⁵⁸ Given the limited data available from the Gallup survey, though, we cannot test whether there is a cause-and-effect relationship between the increased openness and the improved public-approval ratings.⁵⁹

Despite these recent positive signs, we remain in a time of diminished confidence in government and in institutions.⁶⁰ Courts are stuck in that milieu of diminished confidence. As we explain in the next Part of this

53. See Erwin Chemerinsky, *SCOTUS Should Embrace Technology Reforms Prompted by Pandemic*, A.B.A. J. (May 28, 2020), <https://www.abajournal.com/news/article/chemerinsky-scotus-should-embrace-technology-reforms-prompted-by-pandemic> [<https://perma.cc/AZH6-XXH6>].

54. See *id.*; Kalvis Golde, *Public Approves of Live Access to Supreme Court Arguments, Polls Show*, SCOTUSBLOG (May 21, 2020), <https://www.scotusblog.com/2020/05/public-approves-of-live-access-to-supreme-court-arguments-polls-show/> [<https://perma.cc/642C-5JBC>].

55. Golde, *supra* note 54.

56. See, e.g., Erwin Chemerinsky, *The Supreme Court Shrouds Itself in Secrecy That Needs to End*, L.A. TIMES (Oct. 17, 2019), <https://www.latimes.com/opinion/story/2019-10-17/supreme-court-transparency-television-rules>.

57. *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*, HOUSE COMMITTEE ON THE JUDICIARY (Sept. 26, 2019), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2282> [<https://perma.cc/4BCK-HCWQ>]. The House Judiciary Committee held a hearing that addressed public access to Supreme Court hearings in September 2019; the chief justices of the state supreme courts in Michigan, Ohio, and West Virginia submitted letters supporting livestreaming of Supreme Court hearings. See *id.*

58. McCarthy, *Approval of the Supreme Court*, *supra* note 41.

59. *Id.*

60. See Rainie, Keeter & Perrin, *supra* note 12.

Article, attention to procedural fairness is one proven way the courts can maintain or improve public confidence.

III. WHAT WE KNOW ABOUT PROCEDURAL FAIRNESS

The two of us together have spent more than six decades as judges; we bring to this topic both things we have seen in practice and what we have learned from the research of others. We will try to give a sense here both of the key fairness principles and of how our journey through the court system has led to our focus on procedural fairness.

One of us, Kevin Burke, served four terms as Chief Judge of the 62-judge Hennepin District Court in Minneapolis. While Chief Judge, he brought social scientists onto the court's staff and brought one of the nation's leading experts on procedural fairness, Larry Heuer,⁶¹ to explain the basic concepts to all the court's judges. After that, with some help from Heuer, the social scientists working for the court did a series of studies to see how court participants perceived the fairness of courts handling domestic violence, family law, and low-level criminal and traffic offenses.⁶²

Family law cases have an emotional overlay that make many judges leery of handling them.⁶³ Judges rightly wonder whether handling that sort of docket will result in high levels of complaints about, and dissatisfaction with, the judge. But what the Hennepin fairness studies showed was that perceptions of fair treatment in the ways we will discuss here provided a better explanation of litigant satisfaction than whether the litigant won or lost the case.⁶⁴ Overall, in several studies, the Minnesota researchers found

61. See Diane Sivasubramaniam & Larry Heuer, *Decision Makers and Decision Recipients: Understanding Disparities in the Meaning of Fairness*, 44 CT. REV. 62, 70 (2007–2008); Diane Sivasubramaniam & Larry Heuer, *Procedural Justice: Theory and Method*, in RESEARCH METHODS IN FORENSIC PSYCHOLOGY 283–305 (Barry Rosenfeld & Steven D. Penrod, eds. 2011); see generally Larry Heuer et al., *A Deservingness Approach to Respect as a Relationally Based Fairness Judgment*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1279 (1999).

62. A series of fairness studies done by the Hennepin District Court from 2004 to 2007 are archived on its website. *Publications & Reports*, MINN. JUD. BRANCH, <http://www.mncourts.gov/Find-Courts/Fourth-Judicial-District/Publications-and-Reports-Hennepin.aspx> [https://perma.cc/2954-YAPU].

63. See DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, FAMILY COURT FAIRNESS STUDY 3 (2004), [http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Family_Court_Fairness_Report_Final_\(2004\).pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Family_Court_Fairness_Report_Final_(2004).pdf) [https://perma.cc/N9J4-4G33].

64. *Id.*

“perceptions of fairness are approximately twice as important as case [outcomes] when it comes to measuring litigant satisfaction with the court.”⁶⁵

For many judges, it is counterintuitive that most people’s view of the court system is determined more by how they are treated—what we call procedural fairness—than by whether they win or lose. But that has been the consistent finding from the social scientists (mostly social psychologists) who have studied this.⁶⁶

Before we get more specific about what shapes these perceptions of fairness, we need to discuss two terms often used to encapsulate these concepts—procedural fairness and procedural justice. If one looks at social-psychology publications, the term used is procedural justice.⁶⁷ We have generally used procedural fairness instead so as not to confuse readers with other procedural justice concepts, like procedural due process. But whether we are talking about procedural justice from the literature of social psychology or procedural fairness from literature aimed at lawyers and judges, we are talking about the same thing. It is what one commentator describes as the proposition that “providing fair and transparent court procedures would result in greater satisfaction and compliance regardless of the substantive outcome of their case.”⁶⁸

So what specific things go into these perceptions of fairness? Yale Law’s Professor Tom Tyler, a social psychologist and the most-cited scholar in the field, has settled on four key components:

- *Voice*: the litigants’ ability to participate in the case by expressing their viewpoint before decisions about them are made;

65. DEBORAH A. ECKBERG, HEARING OFFICE SATISFACTION STUDY: 2006 UPDATE 16 (May 2007), [http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Hearing_Office_Satisfaction_Study\(2007\).pdf](http://www.mncourts.gov/mncourtsgov/media/assets/documents/4/reports/Hearing_Office_Satisfaction_Study(2007).pdf) [<https://perma.cc/NEQ2-U7HT>].

66. See, e.g., E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 61–127 (1988); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 67–96 (1975); TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 75–102 (1997); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC’Y REV. 483, 486–87, 504 (1988); David B. Rottman, *Adhere to Procedural Justice in the Justice System*, 6 CRIMINOLOGY & PUB. POL’Y 835, 840 (2007) [hereinafter Rottman, *Adhere to Procedural Justice*].

67. See, e.g., TYLER ET AL., *supra* note 66, at 11–13.

68. Lynn Mather, *Law and Society*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 681, 691–92 (Keith E. Whittington et al. eds., 2008).

- *Neutrality*: consistently applied legal principles, unbiased decisionmakers, and transparency about how decisions are made;
- *Respect*: the treatment of individuals with dignity and explicit protection of their rights; and
- *Trust*: that authorities are benevolent, caring, and sincerely trying to help the litigants—a trust garnered by listening to individuals and by explaining or justifying the decisions that address litigant needs.⁶⁹

As we have already noted, when judges adhere to these principles, litigants are more satisfied with their court experience.⁷⁰ But the benefits extend beyond individual cases and the judges who handle them. In an extensive study of California state courts, perceptions of procedural fairness were “the strongest predictor by far” of public confidence in the state court system itself.⁷¹ Researcher David Rottman, who led the California study, concluded, “Policies that promote a sense of procedural fairness are the vehicle with the greatest potential to change how the public views the state’s courts and how litigants respond to court decisions.”⁷²

In addition to improving satisfaction with the individual proceeding and the overall court system, there is another important effect—increased compliance with court orders.⁷³ Tyler finds that adherence to procedural fairness principles leads to a greater sense of the legitimacy of an authority figure, which leads to greater compliance.⁷⁴ Whatever the sequence, studies

69. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007–2008) [hereinafter Tyler, *Procedural Justice*]; Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1105–07 (2013–2014).

70. See Mather, *supra* note 68, at 691–92.

71. DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 6, 24 (2005), http://www.courts.ca.gov/documents/4_37pubtrust1.pdf [<https://perma.cc/SZ9G-Z4VL>].

72. *Id.* at 24; see also David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 CT. REV. 32, 32–33 (2007–2008).

73. See, e.g., ECKBERG & PODKOPACZ, *supra* note 63, at 3, 29, 32–33, 34–35, 38; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 8, 172 (1990); Kevin J. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 56–58 (2010); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379 (2006).

74. Tyler & Sevier, *supra* note 69, at 1102–05.

show a relationship between people's judgments about the fairness of a proceeding and their decision adherence over time; rule-breaking behavior, well-being, and recovery; and cooperation with courts and police.⁷⁵

Because of this research about the positive impact of adherence to procedural fairness principles, judges and court leaders have been receptive to promoting attention to them.⁷⁶ In 2007, we wrote a white paper for the American Judges Association on procedural fairness.⁷⁷ That paper was endorsed by the Conference of State Court Administrators (representing the administrative leaders of the state courts) in 2008⁷⁸ and by the Conference of Chief Justices (representing all state chief justices in the United States) in 2013.⁷⁹

Since 2007, we have provided training programs on procedural fairness to thousands of state and federal judges throughout the United States and Canada. Most attendees seem receptive to the information, but most of the programs are one to three hours and lack a follow-up plan to help judges turn the training into on-the-bench habits. To help make information available to judges outside of training efforts, working with the National Center for State Courts, we co-founded a website, proceduralfairness.org, that has information for both judges and court staff.⁸⁰ One key product is a bench card for judges.⁸¹

Whatever training methods are used, though, a solid body of research supports the use of procedural fairness principles.⁸²

IV. FOCUSING ON FAIRNESS DURING AND AFTER THE PANDEMIC

Based on the discussion so far, we hope that you are convinced it is important to follow the principles of procedural fairness in court

75. *Id.*

76. *See, e.g., id.*

77. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007–2008).

78. *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*, *supra* note 57.

79. *See* Rainie, Keeter & Perrin, *supra* note 12.

80. *See Welcome!*, PROCEDURAL FAIRNESS, <http://www.proceduralfairness.org/> [https://perma.cc/G3W2-X9KH].

81. *See* Steve Leben, *New Bench Card for Trial Judges*, PROCEDURFAIRNESSBLOG.ORG (Mar. 15, 2018), <https://proceduralfairnessblog.org/2018/03/15/new-bench-card-for-trial-judges/> [https://perma.cc/ZLJ5-CLSG].

82. *See, e.g.,* ROTTMAN, *supra* note 71, at 6, 24.

proceedings.⁸³ Now, we want to proceed to consider some of the effects of the pandemic.

A. *Keeping the Focus on Individual Proceedings*

As we suggested at the outset of this Article, the COVID-19 pandemic has greatly disrupted the U.S. court system. For some period of time in both state and federal courts, holding any court hearing at all was difficult. Consider what that meant in some of the proceedings that are vitally important to the participants.

For example, assume a civil protection order was entered shortly before the courts shut down in-person business. A temporary order may well have kicked someone out of their home. The temporary order would have set a quick review hearing, often within a week or two. But that hearing would have been automatically set aside—and court deadlines suspended—based on the pandemic.

Even if that temporary order was fair, the party on the receiving end—who had not yet been heard—may perceive its fairness differently. And now he or she would not be able to seek relief from the order for some unknown time period, namely when the courts were able to reopen.

If we think through what could be done from a procedural fairness perspective, we would first want to make sure notice is quickly provided to all the parties that the court is going to have to postpone the scheduled review hearing. That notice would need to explain why that was being done in a transparent way. In addition, the court would want to provide *some* means for the parties to seek relief from the original order or changes to it. That might be in writing, through a telephone hearing, or through some video hearing. Taking these steps would meet important procedural fairness objectives—both providing an explanation and some forum in which the court would listen to the parties.⁸⁴ The worst possible option would be leaving the temporary order in place, not contacting the parties to explain what court processes were now available, and not responding to calls or inquiries with some way to obtain a court hearing.⁸⁵

83. *See supra* Part III.

84. *See* Tyler, *Procedural Justice*, *supra* note 69, at 30–31.

85. *See id.*

Another important principle of procedural fairness is showing respect for those coming through our court system.⁸⁶ A judge can do that by recognizing the demands on all of us may have changed during a pandemic.⁸⁷ Many were faced with the need to take care of children or other family members while still interacting with the courts.

Texas trial judge Emily Miskel entered an order suspending the normal business dress code for both in-person and remote appearances.⁸⁸ She held remote hearings through Zoom, and she appeared in a robe with the virtual background of her courtroom behind her to maintain a professional appearance.⁸⁹ But for other participants, she recognized that their situations might require appearing in different attire than might ordinarily be required in court.⁹⁰ Considering litigants' and attorneys' possible pandemic situations was both thoughtful and respectful. Since attire did not affect the parties' substantive rights, she applied a new rule for the pandemic.⁹¹

Coinciding with the pandemic has been renewed focus on racial disparities in the justice system. We have suggested elsewhere that greater focus on procedural fairness may help to lessen the impact of implicit bias in court.⁹² We know that even though studies often find that racial and ethnic minorities have less trust in the justice system than whites, the positive effects of procedural fairness apply to both majority and minority populations.⁹³ From that, we can say that adherence to procedural fairness

86. *Id.*

87. *See id.*

88. *See* Emily Miskel, *Zooming into Remote Law Practice*, SMITH L. GROUP (Mar. 31, 2020), <https://appealsplus.com/zooming-into-remote-law-practice-judge-emily-miskel/> [<https://perma.cc/U5XQ-FGW3>].

89. *Id.*

90. *Id.*

91. *See id.*

92. *See* Kevin Burke & Steve Leben, *Procedural Fairness*, in *ENHANCING JUSTICE: REDUCING BIAS* 229, 242–43 (Sarah E. Redfield ed., 2017).

93. *See* TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 207 (2002); Rottman, *Adhere to Procedural Justice*, *supra* note 66, at 835; Rick Trinkner & Phillip Atiba Goff, *The Color of Safety: The Psychology of Race & Policing*, in *THE SAGE HANDBOOK OF GLOBAL POLICING* 63–64 (Ben Bradford, Beatrice Jauregui, Ian Loader & Jonny Steinberg eds., 2016); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from Law and Legal Institutions?*, 19 *BEHAV. SCI. & L.* 215, 233–34 (2001) [hereinafter Tyler, *Public Trust*].

principles seems to lessen the *appearance* of bias.⁹⁴

More research is needed to figure out whether it succeeds in lessening *actual* bias. But there is some reason to think it might. Judges have been shown to be better at overcoming bias when they focus on the need to do so.⁹⁵ Focusing on procedural fairness principles might have a similar impact—focusing on respect, for example, would lead the judge to consciously think of each person as an individual.⁹⁶ To give voice, the judge would concentrate on what each participant said and often would repeat some of it back to show that it was understood.⁹⁷ Collectively, these steps may help lessen the effects of bias. It at least appears that they lessen the appearance of it.

Procedural fairness considerations could arise in a great many contexts during a pandemic, and we will not try to list all of the possibilities. We would say, though, that judges, attorneys, and court administrators should consider how participants will perceive any modified procedures (or the inability to access the court) from a procedural fairness perspective.⁹⁸ Providing as much access as possible and explaining what is being done would be key components to any court's pandemic response.⁹⁹

B. *Measuring Fairness*

We have urged judges and courts to measure the extent they are meeting—or failing to meet—procedural fairness objectives. Management guru Peter Drucker said, “Work implies accountability . . . [and] the measurement of results,” while “[w]hat we measure . . . determine[s] . . . what we—and others—do.”¹⁰⁰ Despite this, our

94. See TYLER & HUO, *supra* note 93, at 207; Rottman, *Adhere to Procedural Justice*, *supra* note 66, at 835; Trinkner & Goff, *supra* note 93, at 63–64; Tyler, *Public Trust*, *supra* note 93, at 233–34.

95. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009).

96. *See id.*

97. *See id.*

98. *See* ROTTMAN, *supra* note 71, at 6, 24.

99. Tyler, *Procedural Justice*, *supra* note 69, at 30–31.

100. Joe Maciariello, *Joe's Journal: On Measuring Performance*, DRUCKER INST. (Aug. 30, 2011), <https://www.drucker.institute/thedx/joes-journal-on-measuring-performance/> [<https://perma.cc/GF4L-36CN>] (quoting Peter F. Drucker).

sense is that few courts today regularly check their procedural fairness performance.

This is not because of a lack of methods to do so. The procedural fairness bench card we helped put together has links to three tools that can be used to measure fairness from three different entities: (1) the Center for Court Innovation;¹⁰¹ (2) the National Center for State Courts;¹⁰² and (3) the Utah Judicial Performance Evaluation Commission.¹⁰³ Any of the three could be used by a local court to evaluate how well it is doing.

For courts that have not yet used or emphasized fairness measurements, we suggest the pandemic is a good reason to start. State and local budgets are strained, and they likely will be for quite some time. There will be courts that may face significant budget cuts.

Recycling rhetoric about courts being a coequal branch of government and judges being overworked is not likely to be effective—all sectors of government are likely overworked. But if court leaders can provide funders with meaningful performance data, there is a far better chance that budget cuts will not be draconian.

Data showing whether litigants feel like they had an adequate opportunity to be heard in court can frame what the stakes are when budget cuts are on the table.¹⁰⁴ So too for data about whether litigants understood what happened in their cases based on the explanations provided.¹⁰⁵ These are tasks that courts need to perform well, and it takes resources to have the time with each litigant to do that—even in a pandemic.¹⁰⁶

101. EMILY GOLD LAGRATTA & ELISE JENSEN, MEASURING PERCEPTIONS OF FAIRNESS: AN EVALUATION TOOLKIT (2015), http://www.courtinnovation.org/sites/default/files/documents/P_J_Evaluation.pdf [<https://perma.cc/33X5-G5AC>].

102. *Trial Court Performance Measures: Access and Fairness*, COURTOOLS, <http://www.courtools.org/trial-court-performance-measures> [<https://perma.cc/GK6M-E727>]. The National Center for State Courts has a comprehensive set of measurement tools for courts at courtools.org. *See id.*

103. UTAH JUD. PERFORMANCE EVALUATION COMMISSION, COURTROOM OBSERVATION REPORT (2016), <https://site.utah.gov/judges/wp-content/uploads/sites/33/2015/10/Courtroom-Report-2016-final.pdf> [<https://perma.cc/DS5M-PCLR>].

104. *See* ROTTMAN, *supra* note 71, at 6, 24.

105. *See id.*

106. *See id.*

C. Redesigning the Legal System to Better Provide Procedural Fairness

Despite the heavy toll the COVID-19 pandemic will leave behind, it will play a positive role in improving our court system. Courts, judges, and lawyers are institutionally conservative; they rely on precedents and tend to do things tomorrow the same way they were done yesterday.¹⁰⁷ Change is usually quite slow.

But in the COVID-19 pandemic, courts have been forced to adapt—and change.¹⁰⁸ The U.S. Supreme Court has long refused to allow live or even same-day release of an audio recording of its oral arguments.¹⁰⁹ During the pandemic, however, the Court was not able to assemble in its majestic courtroom to hear oral arguments. So, the Court decided to handle the arguments through a telephone conference call instead.¹¹⁰

Once that decision had been made, it was a fairly easy call—even for the Supreme Court—to allow real-time access to the arguments.¹¹¹ After all, members of the Court, its staff, and the participating attorneys would already be able to hear it live.¹¹² With the broadcast already out of the building, it would have been hard to find a rationale to keep that same argument stream from the public.

For years, many have argued for live telecast of the Court's oral arguments.¹¹³ But the Court has been steadfast in refusing even to allow same-day release of the audio recording of the arguments.¹¹⁴ By contrast, most state supreme courts have been providing livestreaming of their oral arguments for many years now.¹¹⁵ The pandemic forced the Supreme Court

107. Chemerinsky, *supra* note 53.

108. John Kruzel, *Supreme Court Unveils Conference Call Protocol Ahead of May Arguments*, THE HILL (April 28, 2020), <https://thehill.com/regulation/court-battles/495057-supreme-court-unveils-conference-call-protocol-ahead-of-may> [<https://perma.cc/SH8R-2XHP>].

109. Anthony Marcum, *Live Audio of Oral Arguments Works. The Supreme Court Should Keep It.*, R STREET (May 5, 2020), <https://www.rstreet.org/2020/05/05/live-audio-of-oral-arguments-works-the-supreme-court-should-keep-it/> [<https://perma.cc/V59Q-H3RE>].

110. Kruzel, *supra* note 108.

111. Marcum, *supra* note 109.

112. *See id.*

113. *Id.*

114. *Id.*

115. *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts*, *supra* note 57.

to move toward greater transparency in a way that it would not have—at least at this time—in the absence of the pandemic.¹¹⁶

The main argument that has been made against livestreaming the Supreme Court's arguments has been that it would change the behavior of the participants in some negative way.¹¹⁷ But the most significant change people noticed from the live audio stream was that Justice Clarence Thomas, given a specific time to ask questions, did so, while normally he does not.¹¹⁸

The Supreme Court's change in handling its oral arguments is just a single example of the sort of change that might occur. As Michigan Supreme Court Chief Justice Bridget Mary McCormack has put it, our justice system is “held together with the threads of 20th century technology and 19th century processes[.]”¹¹⁹ Parole officers in some states must submit paper updates in person; prosecutors in other states have weeks to respond to court orders to allow time for paper processing.¹²⁰ Yet in the pandemic, courts and attorneys have quickly changed the procedures in many case types to allow for electronic communications and remote video hearings, among other changes.¹²¹

McCormack has urged courts take advantage of the COVID-19 disruption by reimagining how the justice system should operate.¹²² As she recognizes, this gives an opportunity to put procedural fairness into the design: “[T]he chance to reimagine what we do also gives us an opportunity to build something based in procedural fairness—a big advantage.”¹²³

116. Marcum, *supra* note 109.

117. See Chemerinsky, *supra* note 53.

118. See Devin Dwyer, *Clarence Thomas Captivates with 63 Questions on Supreme Court Livestreams*, ABC NEWS (May 15, 2020), <https://abcnews.go.com/Politics/clarence-thomas-captivates-63-questions-supreme-court-livestreams/story?id=70687233> [<https://perma.cc/VL5Y-3BS2>].

119. Bridget Mary McCormack, *Leveraging Technology for Long-Term Change in the Face of COVID-19*, THE HILL (June 22, 2020), <https://thehill.com/opinion/technology/503919-leveraging-technology-for-long-term-change-in-the-face-of-covid-19> [<https://perma.cc/R9ZG-E8EZ>].

120. *Id.*

121. See *id.*

122. *Id.*; Bridget Mary McCormack & David Freeman Engstrom, *Courts Will Need to Adapt to the Coronavirus Crush*, BLOOMBERG (July 15, 2020), <https://www.bloomberg.com/opinion/articles/2020-07-15/michigan-eviction-cases-show-how-courts-must-adapt-to-coronavirus> [<https://perma.cc/9V3A-YW3C>].

123. Email from Bridget Mary McCormack to the Authors (Aug. 16, 2020) (on file with the Authors).

Indeed, a redesign could build greater procedural fairness into the system. Providing easy access is obviously an important part of allowing people to be heard.¹²⁴ Courts have shown the ability to hear people remotely—why not build that into the system going forward? If a person can spend 15 or 30 minutes making a remote appearance—rather than spending an hour heading to the courthouse, time at the courthouse waiting for the hearing, and another hour heading home (or back to work)—that would greatly improve the experience for most people. But it would do more than that—it would make it *possible* for more people to participate. Depending on a person's obligations, it may simply be next to impossible to attend a hearing when it takes many hours, instead of a much smaller time block.

Some disputes may not require a trip to the courthouse at all.¹²⁵ Work had already been underway with online dispute resolution,¹²⁶ but those efforts got a jump start while in-court dispute resolution was largely unavailable.¹²⁷ In the future, McCormack argues we should “make sure that all self-represented litigants can resolve their legal issues without the burden of taking off work, getting child care and going to court.”¹²⁸ When that can be done, access to the courts will be increased and respect for participant needs will be shown.¹²⁹

We know people are more willing during a pandemic to consider online court proceedings as an option.¹³⁰ The National Center for State Courts asked in 2014 and again in the summer of 2020 whether people with business with the courts would be likely to use online services for their own case.¹³¹ The number saying it was likely they *would* do so rose from 43 percent in 2014 to 64 percent in 2020.¹³²

Many other aspects of improving court interactions with the public can also be reimaged from a procedural fairness perspective.¹³³ For example,

124. See McCormack, *supra* note 119.

125. See Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 167 (2017).

126. See *id.*

127. See McCormack, *supra* note 119.

128. *Id.*

129. See *id.*

130. *State of the State Courts in a (Post) Pandemic World*, *supra* note 40.

131. *Id.*

132. *Id.*

133. EMILY GOLD LAGRATTA, PROCEDURAL JUSTICE: PRACTICAL TIPS FOR COURTS (Oct. 2015), <http://www.courtinnovation.org/sites/default/files/documents/>

one of the problems often encountered in the criminal justice system is the failure of a defendant to appear.¹³⁴ Often that results in a warrant for the defendant's arrest—and some time spent in custody that might otherwise have been avoided.¹³⁵ That is, at best, an inconvenience for the defendant, and it comes at public expense, too.¹³⁶

It has been shown that sending some sort of reminder, just as our dentists or doctors do, reduces the failure-to-appear rate.¹³⁷ Courts are now beginning to use text messages for these reminders.¹³⁸ From a procedural fairness standpoint, that is good.¹³⁹ But it can be even better: a Nebraska study with postcard reminders showed that adding a short procedural fairness message in the reminder made it even more effective.¹⁴⁰

V. CONCLUSION

Paying attention to procedural fairness principles is a proven method for improving litigant satisfaction with the court system and for gaining greater compliance with court orders.¹⁴¹ When disruptions happen in the court system, it can be easy to lose sight of these principles when so much

P_J_Practical_Tips.pdf [https://perma.cc/AU9Y-8QA3].

134. Brian H. Bornstein, Alan J. Tomkins & Elizabeth M. Neely, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach* 5 (May 2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf> [https://perma.cc/2UZ9-TPW2].

135. See Marcy R. Podkopacz, *Using Reminders to Reduce Failure to Appear in Court*, HENNEPIN COUNTY DISTRICT CT. 5 (Sept. 2019), https://www.mncourts.gov/mn/courtsgov/media/fourth_district/documents/Research/Hennepin-County-Court-eReminders-Project-September-2019.pdf [https://perma.cc/LG2D-U8Q6].

136. Bornstein, Tomkins & Neely, *supra* note 134.

137. See Podkopacz, *supra* note 135, at 12.

138. *Id.* at 3.

139. See *id.*

140. Alan J. Tomkins et al., *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 100 (2012). The procedural fairness message told defendants that the court sought to serve the best interests of both defendants and the public by “[p]roviding neutral and consistent judgments to all defendants,” being “fair and open-minded,” “[t]reating all defendants politely, with courtesy, dignity, and respect,” and by “[a]llowing defendant to explain the situation from their perspective.” *Id.* at 99. Telling the defendants in the reminder about possible sanctions for failing to appear also lowered failure-to-appear rates. *Id.* at 100. One would suspect, though, that satisfaction with the court system would be better with the addition of the procedural fairness information than with sanctions information alone. See *id.*

141. Mather, *supra* note 68, at 691–92.

effort must be given just to move cases forward at all.¹⁴² But providing access for litigants to be heard, explaining why delays must occur and how the court will consider emergency matters, and otherwise recognizing the demands on litigants as well as the court, will pay dividends.¹⁴³

The pandemic has also shown greater and swifter change than judges and lawyers would have thought possible in 2019 was achievable in 2020.¹⁴⁴ That lesson suggests we should work to reimagine court procedures that more fully account for procedural fairness research findings.¹⁴⁵ That research has largely taken place in the past three decades, and court procedures for the most part were not designed with that research in mind. We now have a chance to do that.

142. See Tarinelli, *supra* note 3 (showing other problems courts are facing while trying to restart proceedings).

143. See Tyler, *Procedural Justice*, *supra* note 69, at 30–31.

144. See *supra* Part IV.C.

145. See, e.g., Tyler, *Procedural Justice*, *supra* note 69, at 30–31.