



Fairness and Mindfulness: Key Ingredients for Successful Court Leadership

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Judge Steve Leben
Judge Kevin S. Burke
San Antonio, Texas
July 18, 2013



Leadership focuses on...

- Relationships
- Motivating
- The ability to engage colleagues and employees around a shared vision



- What can we do as court leaders to improve performance and give people a justice system as good as the promise of justice?
- The AJA's two-step plan:
 - Improved procedural fairness
 - Better decision making



- AJA White Papers
 - 2007: Procedural Fairness
 - 2010: Judicial Elections
 - 2012: Judicial Decision Making
- Today's Presentation
 - What the public thinks of us
 - Thoughts on how we make decisions—and how we can do better in approaching decision making
 - A quick tour through procedural fairness
 - How all of this fits together
 -



Public Knowledge and Views about the Courts

Consider:

- Depth of knowledge
- Views of our legitimacy as an institution




Can the U.S. Supreme Court declare an act of Congress unconstitutional or not?

Can declare an act unconstitutional	55%
Cannot declare an act unconstitutional	22%
Don't know	23%
Refused	*

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center

www.annenbergpublicpolicycenter.org




In your opinion, to what extent do you think a judge's ruling is influenced by his or her personal political views—to a great extent, moderate extent, small extent, or not at all?

Great extent	33%
Moderate extent	42%
Small extent	16%
Not at all	5%
Don't know	3%

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center

www.annenbergpublicpolicycenter.org



In general, to what extent do you think a desire to be promoted to the next higher court would affect a judge's ability to be fair and impartial when deciding a case—to a great extent, moderate extent, small extent, or not at all?

Great extent	35%
Moderate extent	40%
Small extent	9%
Don't know	3%
Refused	1%

Source: Princeton Survey Research Associates International Poll for the Annenberg Public Policy Center

www.annenbergpublicpolicycenter.org

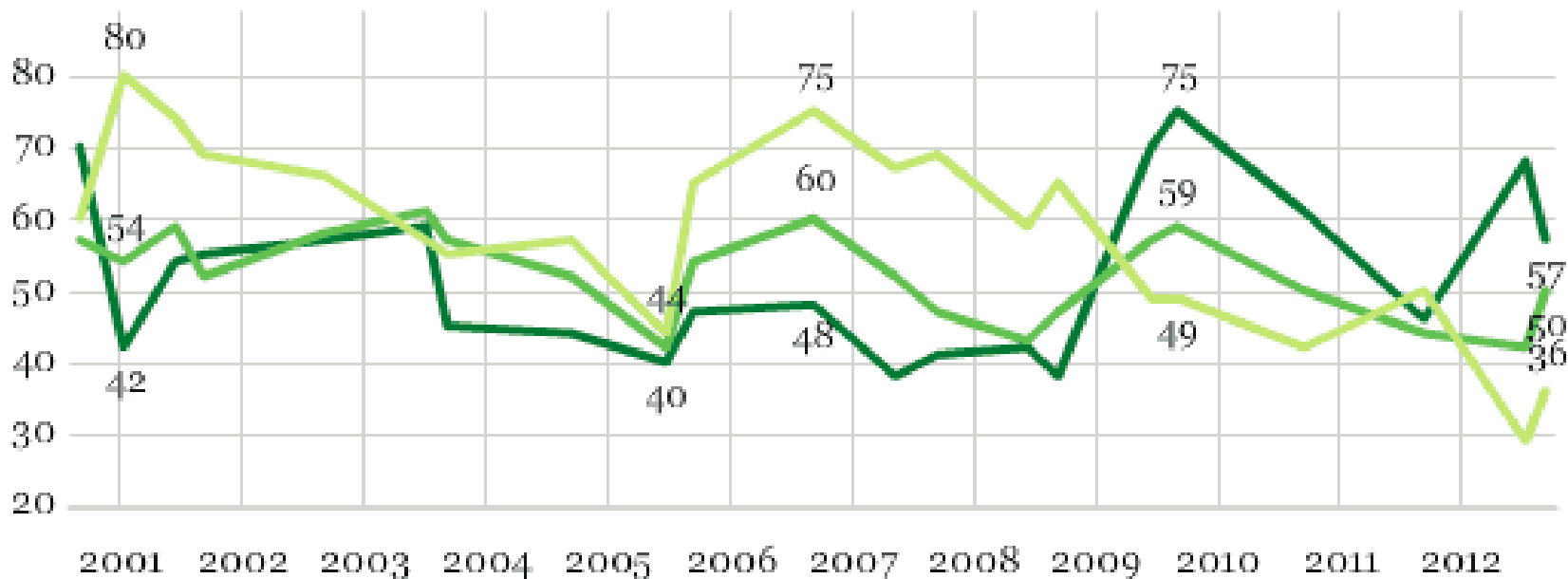
U.S. Supreme Court Approval: The Partisan Divide since *Bush v. Gore*

Supreme Court Approval, Historical Trend, by Political Party

■ % Democrats

■ % Independents

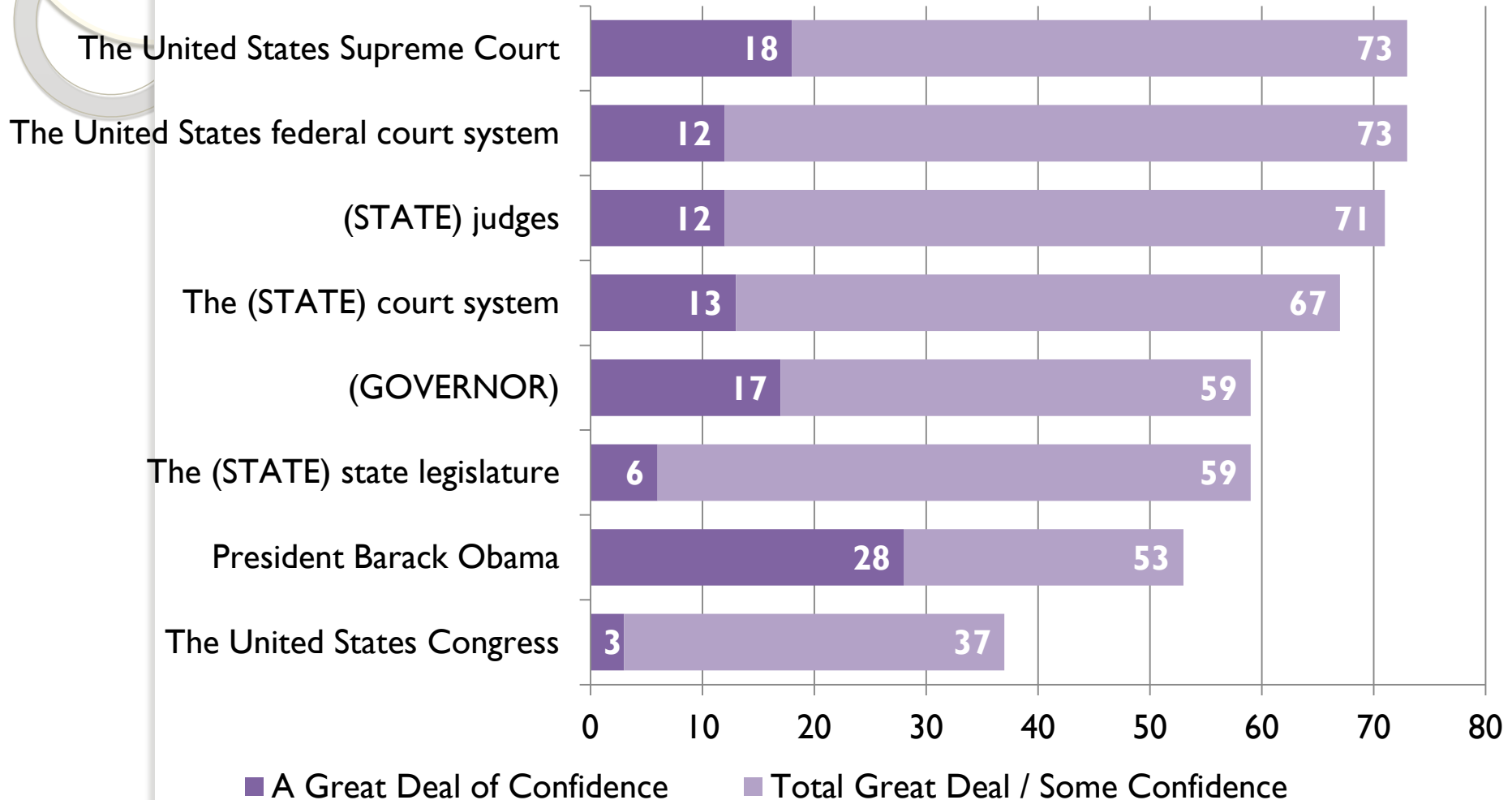
■ % Republicans



GALLUP®

Limited Confidence in Public Institutions

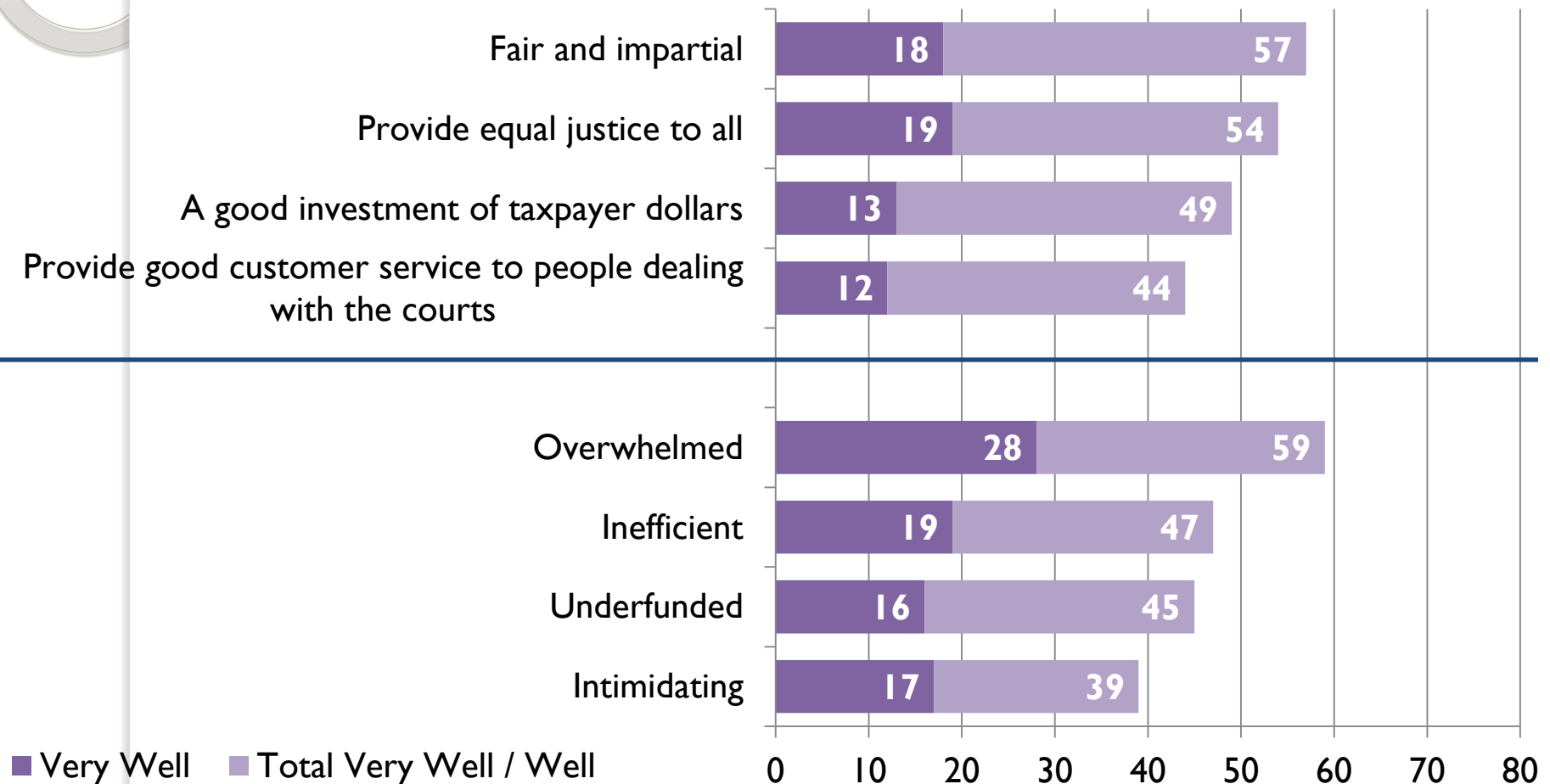
Please tell me how much confidence you, yourself, have in each one – a great deal of confidence, some confidence, not very much confidence, or no confidence at all.



Source: NCSC/Justice at Stake survey, June 2012 (MOE \pm 3%).

Weak Numbers on Key Principles

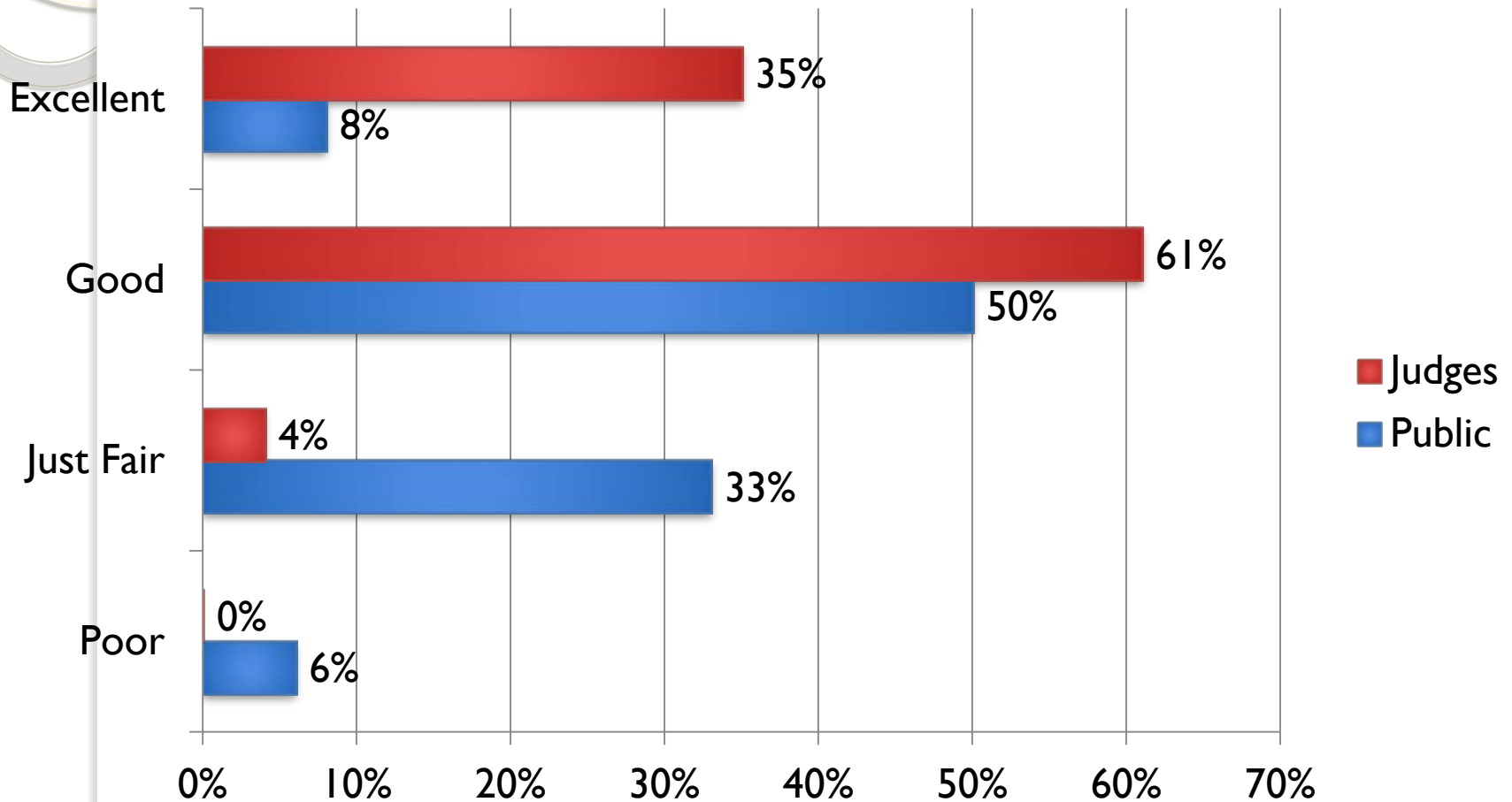
Thinking about the (STATE) court system, please tell me whether, in your opinion, each of the following words or phrases describes the state's courts very well, well, not very well, or not well at all.



Source: NCSC/Justice at Stake survey, June 2012 (MOE \pm 3%).

Judges v. The Public

Rating the Courts in Your State



Source: 2001 National Center for State Courts survey.

Lawyers vs. the Public: Predictors of Confidence

Relative importance of significant factors on overall court approval

Attorneys

Fair procedures

Fair outcomes

Public

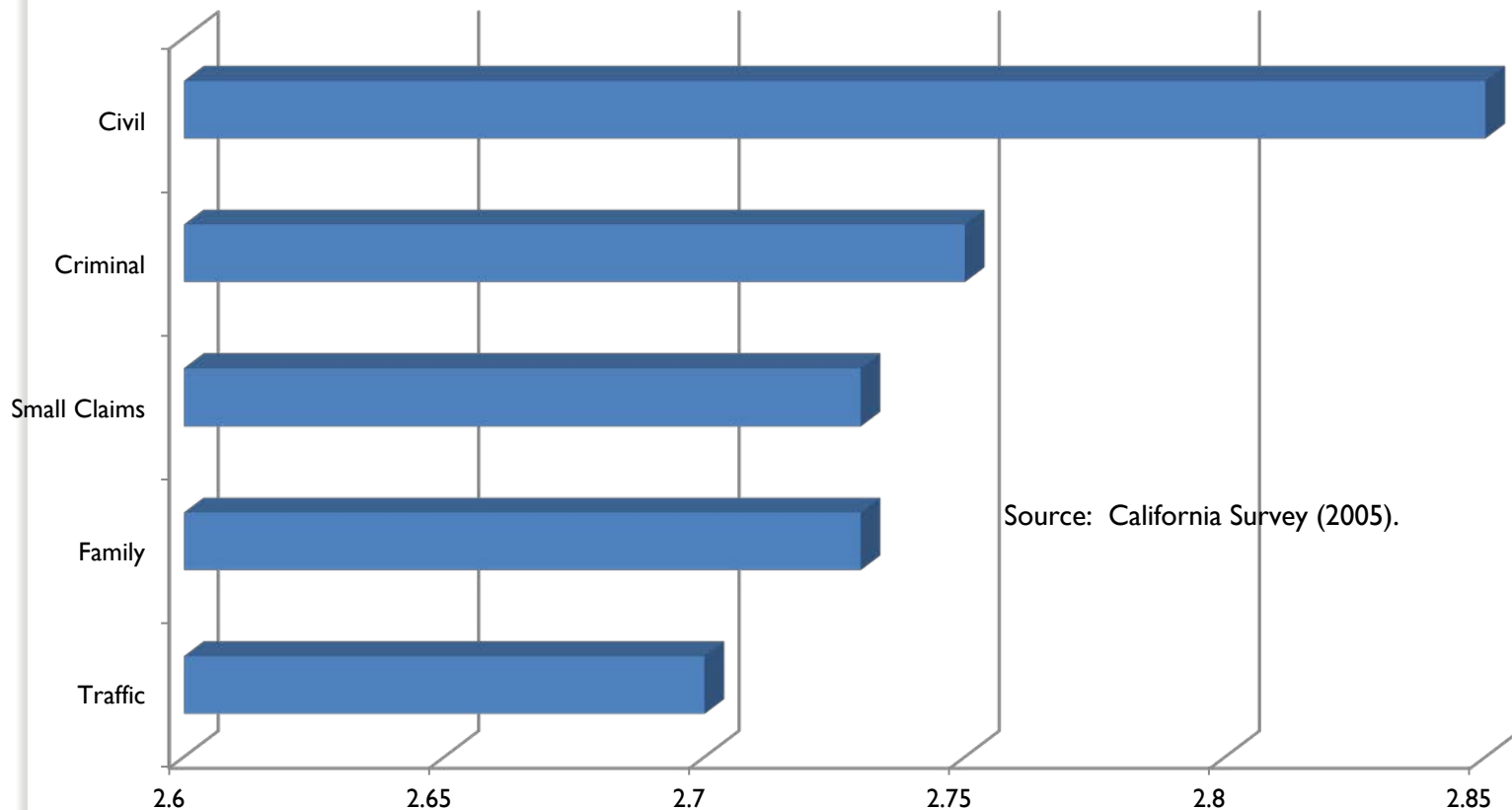
Fair procedures

Fair outcomes

Source: California State Courts study, 2005.

Biggest Room for Improvement Is in High-Volume Dockets

**Relative Public Approval Levels
By Court Case Type**





A Quick Tour: Procedural Fairness



What Does Fair Mean?

Outcome favorability – Did I win?

Outcome fairness – Did I get what I deserve?

Procedural fairness – Was my case handled through fair procedures?

Procedural fairness develops from research showing that *how disputes are handled* has an important influence upon people's evaluations of their experience in the court system.



Why should you be interested? Procedural fairness works.

- It encourages decision acceptance.
- It leads to positive views about the legal system.

EXPLAIN THIS

Who's a good deal happier?

Fairness registers in a part of the brain that also responds to pretty faces and eating chocolate, a study finds.

By ELENA CONIS
Special to The Times

What's new: The sinking feeling that creeps in after you've paid too much for a house, car or new pair of shoes may actually be a hard-wired, neurological response to being treated unfairly.

On the flip side, getting a fair deal on that same car or pair of shoes stimulates parts of the brain associated with reward and happiness.

The finding: Researchers at UCLA's Semel Institute for Neuroscience and Human Behavior recently reported in the journal *Psychological Science* that getting a fair deal activated the same parts of the brain — the ventral striatum, the amygdala and the ventromedial prefrontal cortex, together known as the reward circuit — that are stimulated by earning money, looking at attractive faces or eating chocolate (in those who like the stuff).

Maybe we've got something here ...

- Study reported in 2008 says perceived fairness triggers brain reactions similar to eating chocolate or seeing a pretty face

Procedural Fairness

Aspects of Procedural Fairness

Respectful and
Dignified treatment
of disputants

Tyler and Lind, 1992

Trustworthy
authority

Belief of Unbiased
Decision making

Providing
Explanations

Greenberg, 1993

Treating decision
recipients
respectfully

Legitimacy

**Higher
Compliance**

Procedural fairness does not suggest that people are happy if they lose.

No one likes to lose.



A Common Misconception

- Studies suggest that procedural fairness issues remain important when...
 - The monetary stakes are high.
 - People are very invested (child custody).
 - Important moral or value based questions are at issue.

Perceptions don't fade

- The elements of procedural fairness (Voice, Neutrality, Respect, Trustworthy Authorities) dominate people's reactions to the legal system.
 - Across ethnic groups
 - Across income/education levels
 - Across genders

- Four key procedural fairness components.
 - Voice
 - Neutrality
 - Respect
 - Trust



Voice

- People want the opportunity to tell their side of the story and have their stories told to a judge who listens carefully.

Neutrality

- Decision maker is transparent and open about how decisions are being made.
- Gives an explanation in terms understandable by a lay person.
- Cites to relevant statutes, rules, or court policies.

Respect

- Taking people's concerns seriously
 - Shows respect for them as people and as citizens who have the right to address the court about their issues.
- People come to court about issues that are important to them, irrespective of whether they have a strong legal case.
 - Judges need to explain why those concerns can or cannot be accommodated in a legal setting.
 - The same concerns apply to court employees.
- Respect for their rights
 - Give people information about what their rights are. Tell them how to complain to higher authorities.

Trust

- Studies of legal authorities constantly show that the central attribute influencing public evaluations of judges is an assessment of the character of the decision maker (sincere, caring).
 - Are you listening to and considering people's views?
 - Are you trying to do what is right for everyone involved?
 - Are you acting in the interests of the parties, not out of personal prejudice?

CourTools

° Definition: Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect.

Purpose: Many assume that "winning" or "losing" is what matters most to citizens when dealing with the courts. However, research consistently shows that positive perceptions of court experience are shaped more by court users' perceptions of how they are treated in court, and whether the court's process of making decisions seems fair. This measure provides a tool for surveying all court users about their experience in the courthouse. Comparison of results by location, division, type of customer, and across courts can inform and improve court management practices.

Encuesta de Acceso e Igualdad

Sección I: Acceso al Tribunal

Indique con un círculo el número:

1. Encontrar el tribunal fue fácil.
2. Los formularios que necesitaba fueron fáciles y claros de entender.
3. Me sentí seguro en el tribunal.
4. El tribunal realiza esfuerzos razonables para eliminar las barreras físicas y de idioma al brindar servicios.
5. Logré cumplir con mis asuntos en el tribunal en un tiempo razonable.
6. El personal del tribunal respondió atentamente a mis necesidades.
7. Se me trató con cortesía y respeto.
8. Encontré fácilmente la sala del tribunal u oficina que necesitaba.
9. Fue útil la página de Internet del tribunal.
10. El horario del tribunal facilitó el cumplimiento de mis asuntos.

	Muy en Desacuerdo	En Desacuerdo	Ni de Acuerdo ni en Desacuerdo	De Acuerdo	Muy de Acuerdo	No aplica
	1	2	3	4	5	n/a
1. Encontrar el tribunal fue fácil.	1	2	3	4	5	n/a
2. Los formularios que necesitaba fueron fáciles y claros de entender.	1	2	3	4	5	n/a
3. Me sentí seguro en el tribunal.	1	2	3	4	5	n/a
4. El tribunal realiza esfuerzos razonables para eliminar las barreras físicas y de idioma al brindar servicios.	1	2	3	4	5	n/a
5. Logré cumplir con mis asuntos en el tribunal en un tiempo razonable.	1	2	3	4	5	n/a
6. El personal del tribunal respondió atentamente a mis necesidades.	1	2	3	4	5	n/a
7. Se me trató con cortesía y respeto.	1	2	3	4	5	n/a
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9. Fue útil la página de Internet del tribunal.	1	2	3	4	5	n/a
10. El horario del tribunal facilitó el cumplimiento de mis asuntos.	1	2	3	4	5	n/a

Si usted es parte de un asunto legal y compareció ante un juez el día de hoy, le pedimos que conteste las preguntas del 11-15:

Sección II: Igualdad

11. Mi caso fue tramitado de forma justa.
12. El juez escuchó mi versión de los hechos antes de tomar una decisión.
13. El juez tenía toda la información necesaria para tomar buenas decisiones con respecto a mi caso.
14. Se me trató igual que a los demás.
15. Al irme del tribunal, sé lo próximo que debo hacer con respecto a mi caso.

11. Mi caso fue tramitado de forma justa.	1	2	3	4	5	n/a
12. El juez escuchó mi versión de los hechos antes de tomar una decisión.	1	2	3	4	5	n/a
13. El juez tenía toda la información necesaria para tomar buenas decisiones con respecto a mi caso.	1	2	3	4	5	n/a
14. Se me trató igual que a los demás.	1	2	3	4	5	n/a
15. Al irme del tribunal, sé lo próximo que debo hacer con respecto a mi caso.	1	2	3	4	5	n/a

Sección III: Datos Generales

¿Qué hizo hoy en los tribunales?
(Indique todas las cosas que se apliquen)

- ☐ Buscar expedientes judiciales/obtener documentos
- ☐ Presentar papeles
- ☐ Hacer un pago
- ☐ Obtener información
- ☐ Comparecer como testigo
- ☐ Abogado representando a un cliente
- ☐ Obligación de jurado
- ☐ Asistir a una audiencia o juicio
- ☐ Personal de agencia del orden público/libertad condicional/servicio social
- ☐ Parte en un asunto legal

¿Qué tipo de caso lo trajo al tribunal hoy?

- ☐ Tráfico
- ☐ Penal
- ☐ Civil
- ☐ Divorcio, custodia infantil o pensión alimenticia
- ☐ Asunto de menores
- ☐ Testamentario
- ☐ Demanda de cuantía menor
- ☐ Otro: _____

¿Cómo se identifica usted?

- ☐ Indígena norteamericano o nativo de Alaska
- ☐ Asiático
- ☐ Negro u Afroamericano
- ☐ Hispano o Latino
- ☐ Nativo de Hawái u otra isla del Pacífico.
- ☐ Blanco
- ☐ Raza mixta
- ☐ Otro: _____

¿Con qué frecuencia está usted en el tribunal?
(Escriba la estimación más cercana)

- ☐ Primera vez en este tribunal
- ☐ Una vez al año o menos
- ☐ Varias veces al año
- ☐ Con regularidad

Indique su sexo:

- ☐ Masculino
- ☐ Femenino

Why should court leaders care?

- Fact 1: You're not getting significantly more resources anytime soon.
- Fact 2: Enhanced procedural fairness has been shown to increase compliance with court orders, which *reduces* caseload
- Fact 3: Courts compete with education, health care, and roads for funding.
- Opinion: Saying we're overworked isn't enough to get adequate resources; other governmental entities are overworked too. Courts need to focus on something important to the public (fairness) and measure that. Demonstrate how poor funding leads to lack of voice by the legislature's constituents.
 - Analogy: class size in education.



Summing Up

- This stuff works with the public.
- We aren't naturally attuned to the way court participants view us.
- We face a time of budgetary limits, but application of these concepts can help us to improve perceptions of our performance even in times like these.
- Becoming more mindful *and* understanding these concepts can lead to better decisions.

- 
- **Monkey Business Illusion slide**

Part II

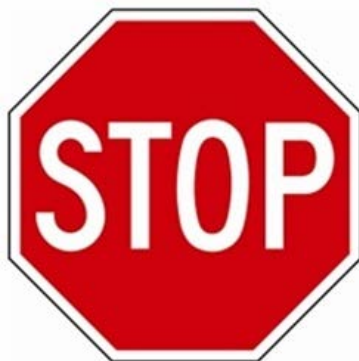
- **MAKING BETTER
DECISIONS**



Dual System of Information Processing

- Reflexive
 - Automatic, rapid, unconscious
 - Always working
- Reflective
 - Deliberate, slow, conscious
 - Limited capacity

Schemas Aid Fast Processing





Reliance on Reflexive Processing

“Most of the time we solve problems without coming close to the conscious, step-by-step analysis of the deliberative approach. In fact, attempting to approach even a small fraction of the problems we encounter in a full, deliberative manner would bring our activities to a screeching halt. Out of necessity, most problem-solving is intuitive.”

- Brest & Krieger, *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policymakers* (2010)



Effects of Schema-Based, Reflexive Decision Making

- May be better than a deliberative approach in some situations (especially with training)
 - Firefighters
- But schemas may be
 - Based on inaccurate information (e.g., assuming that there's a cause-and-effect relationship between two events that take place in sequence)
 - Be only partially correct (e.g., stereotypes)
 - Be applied incorrectly (e.g., assuming a gesture used by one culture means the same thing to another group)



Two Types of Schemas That May Lead to Inaccurate Decisions

- Cognitive heuristics
 - Heuristics are schemas that rely on only some of the information that's available to make a decision quickly and with little effort.
 - Examples:
 - Anchoring
 - Reliance on small samples
 - Framing
 - Hindsight
 - Egocentric
- Implicit Biases
 - Implicit biases are schemas based on implicit attitudes and stereotypes that operate below the radar.

Are judges immune from common heuristic errors?

A Theory: Judges have been specifically trained to follow procedural rules designed to minimize the influence of irrelevant information. So maybe they aren't subject to common heuristic errors.



"I still say it's only a theory."



Judges & Heuristic Errors: Anchoring

- Anchoring: when making numeric estimates, people commonly rely on the initial value available to them. It becomes a starting point to adjust away from but tends to greatly affect the result.
- Case study: judges given a civil case with substantial damages. Half the judges are told that the defendant moved to dismiss for lack of federal diversity jurisdiction ($< \$75,000$ damages).
- Judges differed in estimated damages:
 - Told of motion: \$882,000 average.
 - Not told of motion: \$1.25 million average.
 - Guthrie, Rachlinski & Wistrich



How About Your Decisions?

- Since we know about faulty decision making by judges, what about your decisions? How about your staff? Are we as court leaders at a point where there is an imperative that judges, court administration and staff all need to become better decision makers?

Implicit Bias

- Common method for testing implicit bias is measuring reaction times.
 - The reflexive system more quickly pairs two stimuli already strongly associated (e.g., elderly and frail) than two less strongly associated (e.g., elderly and strong).
- Research about judges (Rachlinski, *et al.*)
 - White judges showed a strong white preference.
 - Black judges showed no clear overall preference.
 - Some evidence suggested effects on sentencing.
 - Key finding: “[W]hen judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”



Implicit Bias

- Implicit bias decision making can and does occur in courtrooms. It can occur throughout the courthouse. But the more all of us know about implicit bias and understand our own tendencies the more likely we can make better decisions.



Implicit Bias

- You can take one of the standard tests for implicit bias at:
 - Harvard's "Project Implicit"
 - Just Google "Harvard Project Implicit"



Other Factors that Detract from Mindful Decision Making



Stroop Test Part I

- On the next slide:
 - Name ***the color*** of each word that you see as it appears

Stroop Test Part I

Red

Blue

Orange

Purple

Orange

Blue

Green

Red



Stroop Test Part 2

- On the next slide:
 - Name ***the color*** of each word that you see as it appears

Stroop Test Part 2

Blue

Purple

Green

Red

Orange

Blue

Red

Green

What's going on?

- Functional interference – our ability to read overrides our ability to abstract
 - There is a finite number of things we can concentrate on – The rest is below the radar, ***but active***
 - In this case the reflective function is overridden by the reflexive function
- ➔ Sometimes you have to *consciously engage* in the (reflective) decision-making process.

- 
- Rick Perry forgets the three agencies video



Factors Detracting from Mindful Decision Making

- Fatigue
 - Sleep deprivation leads to lack of innovation, inflexibility of thought processes, excess attention to distractions, over-reliance on past strategies, unreliable memories, loss of empathy, and inability to deal with unexpected events.
 - These effects can occur when sleep is reduced to 6 or fewer hours over a 14-day period, which caused problems equal to those caused by 2 full nights of sleep deprivation.

Factors Detracting from Mindful Decision Making

- Depleted Resources
 - Glucose levels are important for (and are depleted by):
 - Maintaining self-control
 - Maintaining attention
 - Coping with stress
 - When glucose levels are low, we are more likely to rely on reflexive processes; reflective processes take more energy.







Factors Detracting from Mindful Decision Making

- Mood

- In general,
 - Those in a positive mood engage in more reflexive, automatic processing.
 - Those in a negative mood engage in more reflective, deliberative processing.
- Reliance on stereotypes may be more likely if you're in a good mood—and just cruising along.
- Vigilance—and conscious thought—is important.



Factors Detracting from Mindful Decision Making

- Fluency

- Information that's easy to process (*i.e.*, highly fluent) is *perceived* as more trustworthy.
- Cognitive Reflection Test
 - When put in hard-to-read type, people get more of the answers right. Researchers concluded that the difficult font served as a cue to the reflective system that the task would require some effort to process.



Factors Detracting from Mindful Decision Making

- Multitasking
 - The brain “multitasks” by rapid task switching, not actually multitasking.
 - Almost universally (97% of people), multitasking has a cost in performance.
 - Are you *really* among the 3%?
 - Note: Multitasking in the courtroom also has a procedural-fairness cost—litigants may perceive that the judge is not paying attention.

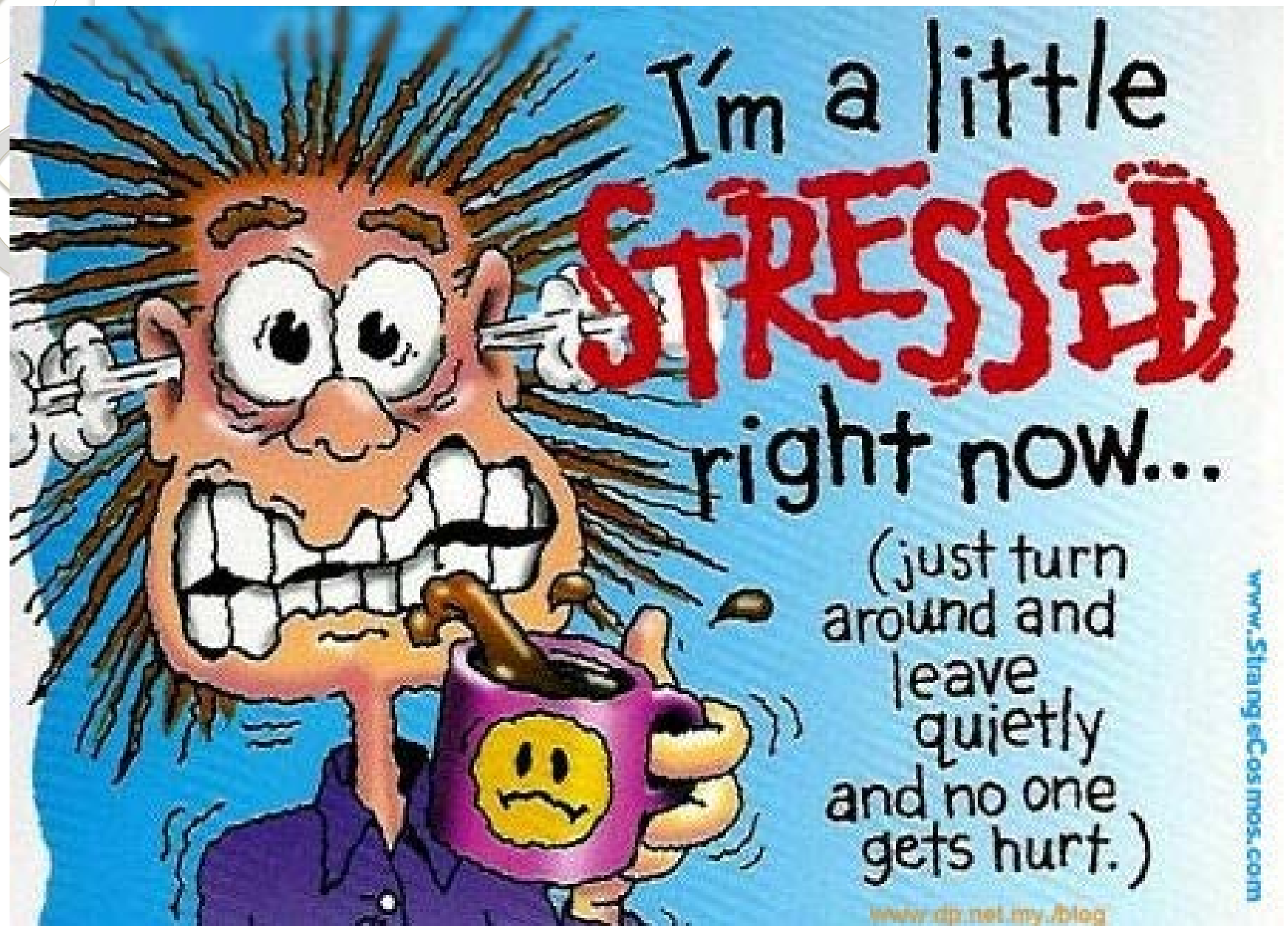
Multitasking on the Bench: Norway





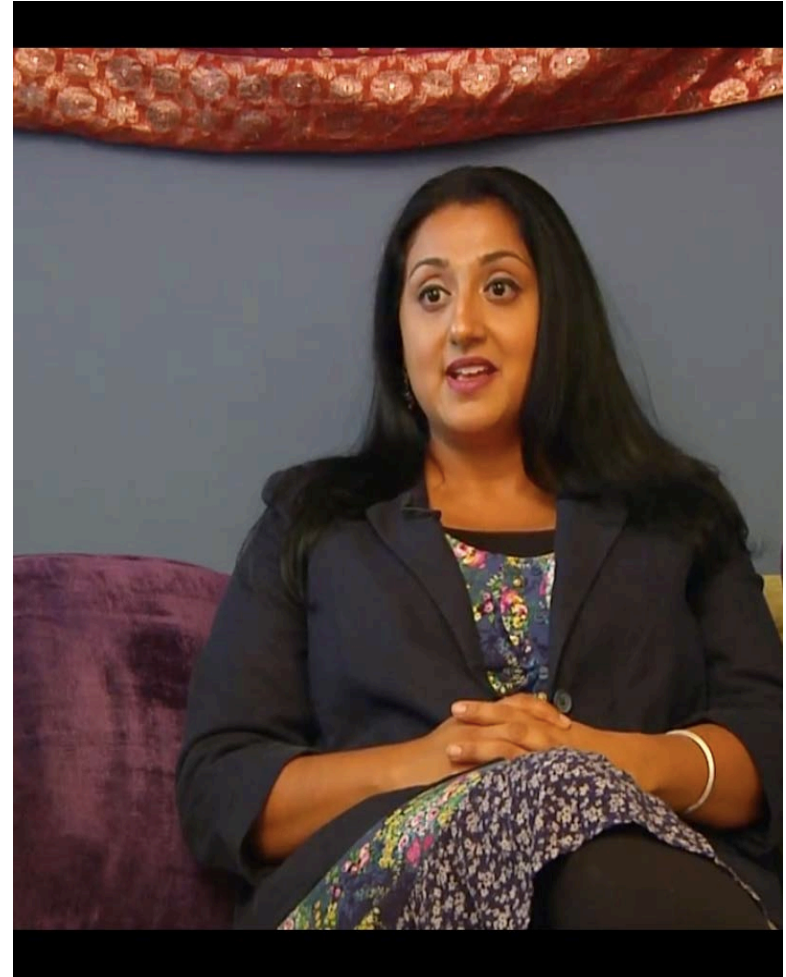
Becoming More Mindful

- Focus on *Purpose*
 - Why did you become a court leader?
 - Justice and fairness are the goals.
 - What do these people expect and deserve from their justice system?
 - How can you and your staff contribute to a justice system that is fair and just—and to a fair and just result that the parties to each case understand and consider to be fair?



Some Thoughts on Mindfulness

- Prof. Amishi Jha,
University of Miami
 - www.amishi.com
 - The Jha Lab: Exploring the Stability and Mutability of Attention and Working Memory
 - On her website, she provides an overview and tells how mindfulness training improved the mental faculties of Marines training for deployment.
 - Mind Fitness Training





Becoming More Mindful

- Be mindful and read the dials
 - Is it time for a break?
 - Is it time for a snack?
- Meditation practices
 - STOP meditation
 - Stop what you are doing.
 - Take a deep breath and focus on breathing.
 - Observe what you're thinking, feeling, and doing.
 - Proceed with new awareness.
- Justice Breyer
 - Pauses for 10 to 15 minutes, twice a day.
 - “My wife said this would be good for [my] blood pressure and she was right.”



The Mindful Court Administrator

- Seek feedback and foster accountability.
 - Professional athletes have coaches who provide continual feedback and who demand accountability.
 - Court leaders can become isolated and don't seek feedback.
 - Accountability generally lessens the effects of bias in decision making.
 - Simply asking yourself, "Why?," as you take various actions in a case can help to keep you accountable and to be deliberative in your decision making.



Procedural Fairness in a Nutshell

- Was the person listened to?
- Were litigants treated with respect?
- Do they understand:
 - What the decision was?
 - Why the decision was made?
 - Neutral principles



PLEDGE OF FAIRNESS

The fundamental mission of the Alaska Court System is to provide a fair and impartial forum for the resolution of disputes, according to the rule of law. Fairness includes the opportunity to be heard, the chance to have the court process explained, and the right to be treated with respect. The judges and staff of the Alaska Court System therefore make the following pledge to each litigant, defendant, victim, witness, juror, and person involved in a court proceeding:

We will LISTEN to you


We will respond to your QUESTIONS about court procedure

We will treat you with RESPECT

For More on Procedural Fairness ...

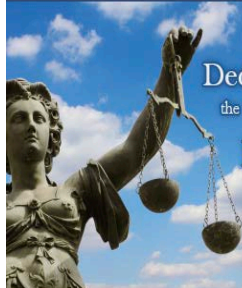
Procedural Fairness Home

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Dedicated to promoting the implementation of procedural fairness principles within the nation's justice systems

Spotlight

Procedural Fairness Principles Useful Judicial Performance Evaluations!

The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission



Welcomel

Procedural fairness (also referred to as procedural justice) is an evidence-based practice reliably associated with higher levels of compliance with and greater amounts of satisfaction with decisions by authority figures. We focus on helping judges and courts implement policies and practices that promote procedural fairness in courtrooms and courthouses. In addition, we look at policing, currently the focus of the majority of criminal justice research on procedural fairness, but we retain an emphasis on the courts.

We also seek to bridge the gap between academic research and actual practice. This site is a collaborative effort by judges, researchers, and university professors who share a belief that an emphasis on procedural fairness can make judges and court managers more effective decision makers, improve compliance with court orders, and increase public satisfaction with the court system. Yet we also share a desire to engage with one another—as well as a broader community—to test our


o we provide a forum linking judges and court managers to the academic and research community engaged dy of procedural fairness.

Procedural Fairness Blog will offer a forum to discuss current issues and events through posts by founding



Procedural Fairness For Courts and Judges

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Judging Procedural Fairness in Utah [Leave a comment](#)

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Procedural "Unfairness"

Funny People's Court

Through this program, Utah became the first state to evaluate judges specifically on procedural-fairness criteria. Two other states—Alaska and Colorado—have used courtroom observers as part of a judicial-evaluation program, but neither provided specific criteria for evaluating the judge's adherence to procedural-fairness principles.

For the 25 judges up for retention this year, all were approved for retention, though three judges were approved with one dissent in 11-to-1 votes. In two of those cases, although the judges had positive ratings from attorneys, courtroom observers had raised some concerns and at least one courtroom observer had said that he or she would feel uncomfortable appearing in front of the judge.

Skeptics might suggest that when all 25 judges are approved for retention, the evaluation process isn't meaningful. But there can be effects that are not obvious



Procedural Fairness & Mindfulness

- Procedural fairness is about more than appearance.
 - To give “Voice,” you must be an active listener. You are a leader in the court house and you model behavior for your staff
- Through active, mindful engagement, you will enhance perceptions of fairness.

WAYS TO FOLLOW UP

Ways to follow up:

- AJA bog
 - blog.amjudges.org
- Two special issues of *Court Review* in (Spring and Summer 2013) on judicial decision making
 - Available on the AJA website
 - AJA decision-making white paper plus several other articles
- Procedural fairness website
 - Proceduralfairness.org
- On the way home make a plan and engage your judges and staff

To Be A Leader: All You Need Is Commitment



"Very good. Now go out there and convince others."

If you want the slides: pcasey@ncsc.org.