

PROSECUTORIAL PROCEDURAL JUSTICE: A LITERATURE REVIEW

Elevating Trust and Legitimacy for Prosecutors



This short report summarizes the procedural justice framework as it has been applied to prosecutors. This is a comprehensive summary that includes studies conducted in the United States and overseas, but it is not intended to be exhaustive. This document is meant to assist researchers and partners involved in the “Elevating Trust and Legitimacy for Prosecutors” project.

Below we describe relevant research conducted with victims, defendants, and the general public on perceptions of procedural justice in their interactions with prosecutors. Lastly, we describe how prosecutors themselves perceive procedural justice in such interactions and within their offices.

VICTIMS

While research on victims’ perceptions of prosecutorial procedural justice is lacking in the United States, such research has been conducted in Australia and Europe, particularly the Netherlands. Overall, the studies conducted in the Netherlands reveal only low to moderate victim perceptions of prosecutorial procedural justice. For example, one study showed that 67% of felony victims felt they were treated “neither fairly nor unfairly” by the prosecutor (Wemmers, 1998). However, victims who did feel that they were treated fairly were more likely to increase their self-reported compliance with the law (Wemmers, 1995).

Relatedly, a few U.S. studies have examined the factors influencing victim satisfaction with prosecutors. Research suggests that victim satisfaction with prosecutors—and the criminal justice system as a whole—is higher when prosecutors enact procedural justice tenets, though these studies did not use the term “procedural justice” explicitly. For example, one study found that victims being given a voice (specifically, feeling involved in the case) was a strong predictor of reporting an overall positive interaction with the prosecutor (Carr et al. 2003). Another way that prosecutors can give victims voice is by consulting with them on the sentence. A study of 1,308 U.S. victims of violent crime found that when prosecutors consulted with victims on the sentence, victims reported significantly higher satisfaction with the prosecution and the criminal justice system as a whole (Fisher, 2014). However, 62% of victims reported that the prosecutor did *not* consult with them about sentencing (Fisher, 2014).

Notably, the results also appear to suggest that prosecutorial procedural justice has the potential to remedy racial differences in satisfaction with the criminal justice system. During the law enforcement phase, there was a significant difference across races in satisfaction with the criminal justice system, with white victims reporting higher satisfaction than non-white victims. But when victims’ positive experiences of feeling heard by the prosecutor were taken into account, the effect of race on satisfaction with the system disappeared (Fisher, 2014).

Similarly, interviews with Australian sexual assault victims echoed the importance of voice; victims emphasized their desire to feel heard and to have their story reflected in the court proceedings. Victims also expressed the

desire to feel validated, believed, and supported, all of which fits into the procedural justice tenet of respect (Clark, 2010). Victim interview studies in the U.S. have also pointed to the importance of respect, specifically perceived sympathy from the prosecutor (Goodrum, 2013 & 2016).

DEFENDANTS

A series of studies by the Center for Court Innovation have measured U.S. defendants' perceptions of prosecutorial respect, trustworthiness, and fairness. When it comes to respect, the majority of defendants surveyed had positive perceptions of prosecutors. For example, when Brooklyn defendants were asked whether the prosecutor treated them with respect, their mean answer was "agree" (Frazer, 2006). However, defendants tended to rate prosecutors as less respectful than judges. Specifically, 64% of Newark and Cleveland defendants agreed that the prosecutor treated them respectfully (compared to 78% when asked about the judge) (Swaner et al. 2018). Likewise, 66% of Manhattan misdemeanor defendants agreed that the prosecutor treated them with respect (compared to 86% for judges) (Swaner et al., 2019).

However, regarding trust, defendants appear to have a more negative image of prosecutors. Only 16% of Manhattan misdemeanor defendants "had confidence" in prosecutors (compared to 40% for judges) (Swaner et al., 2019). And when asked whether the prosecutor was helpful, the average Brooklyn defendant answered "neither agree nor disagree" (Frazer, 2006). Notably, Black defendants and male defendants were less likely to agree that the prosecutor was helpful (Frazer, 2006).

Defendant perceptions of overall prosecutorial fairness also appear low. On average, California juvenile defendants perceived the prosecutor as "unjust" (Kaasa et al. 2018). And Milwaukee misdemeanor defendants, on average, saw prosecutors as "unfair". Notably, the perception of the prosecutor as fair was a significant predictor of self-reported expected future compliance (Farley et al., 2014).

Studies also show that to encourage the perception of fairness—and in turn promote future compliance—prosecutors should apply procedural justice tenets, such as voice and neutrality. In several interview studies, defendants emphasized the roles of voice and neutrality in driving their perceptions of prosecutorial fairness. When asked why they perceived prosecutors as fair or unfair, defendants consistently pointed to voice elements. For example, some defendants in a Netherlands study reported feeling treated unfairly when prosecutors did not appear to listen or adequately consider information they had put forth (Ansems et al., 2020). The defendants who did report feeling heard, based their perception on the prosecutor's positive behaviors: taking notes, making eye contact, and summarizing defendants' stories (Ansems et al., 2020). In a different study conducted in Brooklyn, defendants also highlighted not having an opportunity to explain themselves, either because the process moved along too quickly or the prosecutor did not listen (Frazer, 2006).

PROSECUTORIAL PROCEDURAL JUSTICE

Both Ansems et al.'s (2020) study in the Netherlands and an Evaluation of the Hartford Community Court (2002) showed that defendants consider neutrality to be a determinant of perceived fairness. Specifically, the Dutch study found that defendants who felt treated fairly perceived a lack of prejudice. One defendant appreciated that his prosecutor was willing to admit the evidence against him was unreliable. But other defendants felt that the prosecutor could only see one side of the story and that the prosecutor was out to get a conviction no matter what.

THE PUBLIC

The literature on public perceptions of prosecutorial legitimacy is scarce, as most studies focus on those directly involved in the criminal justice system. However, one recent study gathered its sample from the general public of Hong Kong. A random survey revealed that the perceived procedural justice of prosecutors was positively associated with 1) perceived moral alignment between prosecutors and the public, and 2) perceptions of court legitimacy. In turn, perceptions of legitimacy were positively associated with self-reported cooperation and compliance with the law (Cheng, 2017).

PROSECUTORS

Many prosecutors already value and practice the tenets of procedural justice, even if they have yet to embrace that terminology. The Vera Institute found that prosecutors saw the fair treatment of defendants as *the* most important outcome defining both individual and organizational success. Specifically, prosecutors emphasized the importance of neutrality; 75% of prosecutors surveyed considered similar outcomes for similar cases within units to be important or very important in defining organizational success, and only 3% considered it to be of little importance or unimportant.

At the same time, prosecutors noted an absence of formal policies about decision-making, except in very few cases. Even when formal policies did exist, they were not well-publicized or well-communicated to staff. As one ADA noted, "Office policies are urban legends" (Frederick & Stemen, 2012). Research supports this sentiment; in an experiment that gave 500 prosecutors the same hypothetical case, researchers found extreme heterogeneity in prosecutors' charging practices and a lack of meaningful supervision guiding line attorneys' decisions (Wright et al., 2021).

However, to date, there have been no empirical studies of prosecutors' perceptions of how fairly they treat victims, witnesses, or defendants. Further, prosecutors' perceptions of procedural justice in their internal organizations are yet to be thoroughly studied empirically.

VICTIMS

Carr, P. J., Logio, K. A., & Maier, S. (2003). Keep Me Informed: What Matters for Victims as they Navigate the Juvenile Criminal Justice System in Philadelphia. *International Review of Victimology*, 10(2), 117–136.

After Pennsylvania passed legislation requiring that victims be updated on the status of their case, Carr et al. conducted a study on victims of juvenile crime. They found that 79% of victims agreed that the DA was empathetic and explained the system well. And 41% of victims felt “not at all involved” in the prosecution of their case, while 59% felt “somewhat” or “very involved”. 87% felt informed about the status of their case. Feeling involved and being informed about the case status were strong predictors of reporting an overall positive interaction with the prosecutor’s office.

Further, there was a significant positive association between victims’ satisfaction with interactions with the prosecutor’s office and their satisfaction with the juvenile justice system as a whole.

Clark, H. (2010). "What is the justice system willing to offer?" Understanding sexual assault victim/survivors' criminal justice needs. *Family Matters*, (85), 28-37.

Interviews with Australian sexual assault victims revealed an emphasis on the procedural justice tenets of voice and respect. Reflecting on the prosecution of their cases, victims expressed the desire to feel heard and to have their story reflected in the court proceedings. Victims also touched on ideas related to respect, namely the desire to feel that their case is important to someone and that the prosecution has their best interests in mind.

Fisher, C. (2014). *What Matters: An Analysis of Victim Satisfaction in a Procedural Justice Framework* (Doctoral dissertation).

Fisher studied victims of violent crime in America. She found that 73% were “satisfied” or “somewhat satisfied” with the prosecution (compared to 74% with the judge), while 18% were “not at all satisfied” (compared to 18% with the judge). 62% reported that the prosecutor did not consult with them about sentencing.

Whether the prosecutor consulted the victim on the sentence and whether there was a trial are both significantly and positively related to victim satisfaction with both the prosecution and the criminal justice system as a whole.

The results also appear to suggest that prosecutorial procedural justice has the potential to remedy racial differences in satisfaction with the criminal justice system. During the law enforcement phase, there was a significant difference across races in satisfaction with the criminal justice system. But when white victims and non-white victims’ experiences with prosecutorial procedural justice were taken into account, the effect of race on satisfaction with the system disappeared.

Goodrum, Sarah. 2013. “Bridging the Gap Between Prosecutors’ Cases and Victims’ Biographies in the Criminal Justice System Through Shared Emotions.” *Law & Society Review* 38(2): 257–287.

Interviews with bereaved victims emphasized a desire to receive sympathy from prosecutors and have

ANNOTATED BIBLIOGRAPHY

their anger heard. Two out of the 20 victims interviewed believed that the prosecutor handling their loved one's case offered them less sympathy because of their loved one's criminal history and gang affiliation. These two victims belonged to racial minority groups.

Goodrum, S. (2016). Expecting an ally and getting a prosecutor. *Voices from Criminal Justice: Insider Perspectives, Outsider Experiences*, 305.

Goodrum's interviews with victims revealed that victims expect a prosecutor to play two roles: 1) a key informant on dates and expectations for court proceedings, the status of the investigation and evidence, and the prosecutor's plan for resolving the case; 2) "sympathetic warrior", displaying emotional connection and understanding.

The former might be interpreted as transparency, relating to the trust tenet of procedural justice, while the latter might be coded as respect and trust.

Wemmers, J. A. (1995). Victims in the Dutch criminal justice system: The effects of treatment on victims' attitudes and compliance. *International Review of Victimology*, 3(4), 323-341.

A study of Dutch felony victims revealed moderate to low victim satisfaction with the prosecution. An overwhelming 87% felt the prosecution showed little or no interest in them. 67% said they were treated neither fairly nor unfairly. Victims who did feel that they were treated fairly were almost significantly likely to increase their self-reported compliance with the law.

Wemmers, J. A. (1998). Procedural justice and Dutch victim policy. *Law & Policy*, 20(1), 57-76.

Dutch victims of felonies judged the prosecution as less fair than the police; while 79% thought the police were fair, only 19% thought the prosecution was fair.

Further, victims who felt the prosecution treated them fairly were significantly more likely to be satisfied with the performance of the police, prosecution, and courts.

DEFENDANTS

Ansems, L. F., Van den Bos, K., & Mak, E. (2020). Speaking of justice: A qualitative interview study on perceived procedural justice among defendants in Dutch criminal cases. *Law & Society Review*, 54(3), 643-679.

This study consisted of open-ended interviews with Dutch defendants on perceptions of "being treated justly or unjustly" by prosecutors and judges. Instead of prompting defendants with specific procedural justice concepts, researchers allowed them to answer spontaneously to see which criteria for justness would arise naturally.

One third of the subjects mentioned *voice*. For example, some defendants felt they were treated unfairly when prosecutors did not appear to listen or adequately consider information that defendants put forth. Other defendants *did* feel heard based on the prosecutor's positive behaviors: taking notes, making eye contact, summarizing defendants' stories, and asking questions to get the full picture.

One third of the subjects mentioned *neutrality*. Defendants who felt treated fairly noted a lack of

ANNOTATED BIBLIOGRAPHY

prejudice. One defendant appreciated that his prosecutor was willing to admit the evidence against him was unreliable. But still other defendants felt that the prosecutor could only see one side of the story and that the prosecutor was out to get a conviction no matter what.

Evaluation of the Hartford Community Court. The Justice Education Center, Inc. (2002).

The Justice Education Center evaluated the Hartford Community Court; however, there was no comparison to a control group. The 36-person sample was 53% female and 64% non-white.

When defendants were asked whether they had met with a prosecutor regarding their case, 65% said “Yes.” Of those clients who reported that they had met with a prosecutor, 76% said that the prosecutor was fair, and 60% said that the prosecutor had allowed them to explain their case.

Of the 76% who said the prosecutor was fair, the major themes were that the prosecutor listened, was polite and explained the process and the options. Of the 24% who said the prosecutor was not fair, two themes emerged: clients did not have an opportunity to explain themselves, either because the process moved along too quickly, or the prosecutor did not listen; and the prosecutor was not sympathetic.

Farley, E. J., Jensen, E., & Rempel, M. (2014). *Improving courtroom communication: A procedural justice experiment in Milwaukee*. New York: Center for Court Innovation.

The Center for Court Innovation conducted another procedural justice intervention in Milwaukee Criminal Courts. The sample was 81% non-white. While the intervention did *not* focus on prosecutors, the study did gather data on misdemeanor defendants’ perceptions of prosecutors.

They found that the perception of the prosecutor as fair was a significant predictor of self-reported expected future compliance. Further, when asked how fair the prosecutor was, the average defendant answered “unfair” on a four-point Likert scale from “very unfair” to “fair” (1.71/4).

Frazer, M. S. (2006). The Impact of the Community Court Model on Defendant Perceptions of Fairness.

The Center for Court Innovation studied the Red Hook Community Court in Brooklyn. Using an 85% non-white sample, researchers compared the community court to traditional court. In traditional courts, they found that of all individual court actors (judges, defense attorneys, prosecutors), defendants were least satisfied with prosecutors. When asked whether the prosecutor treated them with respect, the mean score was “agree”. But when asked whether the prosecutor was helpful, the mean score was “neither agree nor disagree”. Black defendants ($r = -.17, p < .05$) and male defendants ($r = -.16, p < .01$) were less likely to agree that the prosecutor was helpful.

Kaasa, S. O., Tatar II, J. R., Dezember, A., & Cauffman, E. (2018). The impact of waiver to adult court on youths’ perceptions of procedural justice. *Psychology, Public Policy, and Law*, 24(4), 418.

On average, juvenile defendants perceived the prosecutor as “unjust”, whether they were tried in juvenile or adult court. For comparison, they also perceived the judge as “unjust”).

White defendants perceived significantly more procedural justice than non-white defendants. And defendants with a prior arrest history perceived less procedural justice than those without an arrest

ANNOTATED BIBLIOGRAPHY

history, though this effect did not quite reach statistical significance.

Swaner, R., Ramdath, C., Martinez, A., Hahn, J., & Walker, S. (2018). What do defendants really think. *Procedural Justice and Legitimacy in the Criminal Justice System*. New York: Center for Court Innovation.

The Center for Court Innovation conducted a study of defendants in Newark and Cleveland. 89% of the sample was non-white, and 60% had ever been charged with a felony.

64% of defendants agreed that the prosecutor treated them respectfully (compared to 78% with the judge). Only 24% of defendants were “satisfied” or “somewhat satisfied” with the prosecutor (compared to 38% with the judge.)

Subjects were then asked the follow-up question “What did the prosecutor do to make you feel respected or disrespected?” One defendant felt dehumanized by a prosecutor who called him a “menace to society” in a parole board letter. Someone also reported that the prosecutor did not seem neutral based on his emphasis on the defendant’s past convictions, which he had already served time for. Further, several Black defendants reported feeling that a white person with their same crime would have received more lenient treatment.

Swaner, R., White, E., Kralstein, D., & Lyons, L. (2019). Procedural justice at the Manhattan Criminal Court. *Center for Court Innovation*.

The Center for Court Innovation conducted a procedural justice intervention in Manhattan Criminal Courts. The sample was 94% non-white, and 86% were charged with misdemeanors. While the intervention did *not* focus on prosecutors, the study did gather data on defendant perceptions of prosecutors.

Before the intervention, 66% of defendants agreed that the prosecutor treated them with respect (compared to 86% for judges); however, only 16% “had confidence” in prosecutors (compared to 40% for judges).

THE PUBLIC

Cheng, K. K. Y. (2017). Prosecutorial procedural justice and public legitimacy in Hong Kong. *British Journal of Criminology*, 57(1), 94-111.

A random telephone survey of Hong Kong residents revealed that the perceived procedural justice of prosecutors was positively associated with 1) perceived moral alignment between prosecutors and the public, and 2) perceptions of court legitimacy. In turn, perceptions of legitimacy were positively associated with self-reported cooperation and compliance with the law.

PROSECUTORS

Frederick, B., & Stemen, D. (2012). The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making Technical Report.

ANNOTATED BIBLIOGRAPHY

The U.S. Department of Justice sponsored a Vera Institute investigation of prosecutorial decision-making. Researchers found that prosecutors saw the fair treatment of defendants as the most important outcome defining both individual and organizational success.

Prosecutors also highlighted the importance of neutrality; 75% of respondents considered similar outcomes for similar cases within units to be important or very important in defining organizational success, and only 3 percent considered it to be of little importance or unimportant.

However, prosecutors noted an absence of formal policies about decision-making except in a very few select cases. Even when formal policies did exist, they were not well-publicized or well-communicated to staff. As one ADA noted, “Office policies are urban legends.”

Phone Interview with Tori Verber Salazar, San Joaquin County District Attorney, 9/20/16. Reported by GLANCE, A. (2005). FAIR AND JUST PROSECUTION. *Prison Journal*, 85(2), 127-44.

Some offices already practice procedural justice. For example, prosecutors in San Joaquin County, CA door-knock in the community after a shooting, giving members of the public an opportunity to voice their concerns and answering questions about the investigation.

Wright, M. S., Baughman, S. B., & Robertson, C. T. (2021). Inside the Black Box of Prosecutor Discretion. *UC Davis Law Review*, *Forthcoming*.

This study asked prosecutors to charge a hypothetical case and explain their decisions. Given identical cases and identical substantive law, researchers found extreme variation in prosecutor charging practices, with some dismissing the case while others demanded years of incarceration. They also found that many prosecutors lacked meaningful guidelines or supervision.