Procedural Justice and What Every Municipal Lawyer Should Know

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Years ago a former employee of the city where I was an attorney was engaged in a protracted battle with the city and on the verge of litigation. Although the battle began a year earlier, I became involved when the matter garnered media attention and the employee hired an attorney. City management wanted to facilitate a resolution to end the matter and in preparation for meeting with the employee, I was providing the legal basis for the city's position when the city manager informed me that sometimes people just want to hear that you are sorry.

Internally I was indignant. My experience with hostile, litigious folks was that it wasn't about an apology. Of course, there were times that attorneys and their clients professed lofty goals about achieving justice and ensuring no other person would suffer a same or similar fate. Yet in my experience, at the end of every claim and lawsuit, my client wrote a check and rarely was the settlement predicated on a policy change.

Years later I will confess that the city manager was right, as was I. I was correct because at the point in time where I typically became involved, opportunities to resolve the matter in any manner other than monetary payment were far behind. He was right in that most people do not start out intending to engage in protracted battle with the city. Most people, whether they are employees or citizens, begin any interaction with the city with the intent of being heard, understood and having their concerns validated.

Fast forward to the present and the post-Ferguson media attention and national dialogue concerning law enforcement and their interaction with the public they serve. Law enforcement, as well as the municipal courts, are some of the largest employee groups in any city and arguably have the most contact with constituents--certainly if not the most contact, generally the most memorable contact. A person is unlikely to remember the routine transaction of paying a water bill versus going to court as a juror or defendant or being pulled over for speeding.

Undoubtedly, a city's entire image and all the things it does right can be erased by one negative encounter with law enforcement. This is where procedural justice makes the difference in perception by changing the reality. Procedural justice describes a theory of interaction in the criminal justice system based upon basic principles of fairness, unbiased decision-making, transparency and engagement. The precept behind procedural justice is simple: if people understand the process and are treated respectfully during the process, then even when they don't like the outcome, they will be more apt to accept the decision as just. Consider two examples of two very unfortunate encounters with law enforcement and the very different community and media reaction.

On October 21, 2014, the life of Laquan McDonald ended when Chicago Police Officer Jason Van Dyke shot him. Van Dyke was one of the last officers to arrive at the scene of a call about a person vandalizing vehicles. Police videotape captured Van Dyke exiting his vehicle, gun raised and immediately firing. The first shot hit McDonald, holding a 3 inch knife, who fell to the ground.[1] While McDonald lay motionless, Van Dyke continued to unload his magazine, firing a total of sixteen shots.[2] The City of Chicago, after intense scrutiny and public outcry, released the police video thirteen months post-incident after a Judge ordered the release in response to a media request.[3] The national press covered the incident extensively with a largely negative portrayal of police behavior. Department of Justice scrutiny continues regarding this incident as well as systemic concerns. The city created a Police Accountability Task Force which recently issued its findings, again bringing Chicago back into the headlines. As the *New York Times* reported, the city's own data

provided "validity to the widely held belief the police have no regard for the sanctity of life when it comes to people of color."[4]

On August 7, 2015 in the early morning hours, Arlington Texas Police Officer Brad Miller fatally shot 19 year old Christian Taylor, who was unarmed, during a burglary call at car dealership. The incident began after private security for the car dealership called 911 shortly after 1 a.m. to report that Taylor was damaging a car in the parking lot. Officer Miller was a rookie who was on his last day of field training and arrived at the scene with his field training officer along with other officers. Before a plan and perimeter was set, Officer Miller entered the dealership through the broken glass front alone and without backup, where he encountered Taylor who was agitated and began to approach Officer Miller. Officer Miller indicated he was in fear for his life and thought Taylor might have a weapon and fired several shots killing Taylor.[5]

On August 11, 2015, Police Chief Will Johnson gave a press conference wherein he provided details regarding the investigation, admitted that he had concerns regarding the judgment of the officer, apologized to the family, promised a thorough criminal investigation and announced that Officer Miller had been terminated. Chief Johnson also advised the department was sharing information and facts of the case with the FBI as they become available.[6] As with any incident, there were criticisms as to the outcomes, but by and large the consensus from the community and the media was that the process was handled correctly. The *Dallas Morning News* stated, "mistrust only grows when police brass circle the wagons. Chief Johnson has made a good start as Arlington finds itself in the spotlight in the national debate over police tactics."[7]

Although these incidents can be differentiated in many ways, the facts are that two young men were killed at the hands of an officer while engaging in criminal activity related to property damage. In Chicago, even though the incident was on video, the many versions of the facts that seemed to blame the deceased in the days and weeks following the incident led to extensive community outrage and a conclusion that distrust is warranted. Further, in Chicago, the failure to release the video for thirteen months based upon advice of counsel and others within the city management even after the litigation with the McDonald family was settled, further eroded community trust.[8] In Arlington, the quick review and singular version of events and accountability by the department for the officer's conduct openly communicated to the public and the family allowed a measured reaction and legitimacy. The incident in Arlington is a textbook example of not only embracing procedural justice from the police chief down but what procedural justice looks like when it is incorporated as a way of doing business in law enforcement. Chicago is an example of a city where legitimacy was compromised. Chicago's Police Accountability Task Force report drew the following conclusions when asking itself, "How did we reach this point":

- We arrived at this point in part because of racism.
- We arrived at this point because of a mentality in CPD that the ends justify the means.
- We arrived at this point because of a failure to make accountability a core value and imperative within CPD.
- We arrived at this point because of a significant underinvestment in human capital.[9]

In sum, Chicago PD's problems were seen as symptoms of an outcome-driven departmental culture that did not embrace procedural justice and thus its actions did not represent the principles and tenets that value the sanctity of human life.

Because of the national dialogue with regard to law enforcement and municipal courts, cities are being encouraged to review their processes and procedures to ensure fairness to the diverse populations they serve. In 2015, U.S. Attorney General Holder stated, "[t]he Department of Justice is committed to using innovative strategies to enhance procedural justice, reduce bias and support reconciliation in communities where trust has been eroded." The initiative is a $4.75 million partnership between the Department of Justice and criminal justice experts which includes investment in training, police development and research to combat distrust between law enforcement agencies and the communities they serve.[10] Holder's announcement came hours after two police officers were shot in Ferguson, Mo., during a protest sparked by a DOJ report that accused the Ferguson Police Department of making discriminatory traffic stops, creating years of racial animosity.[11] The DOJ's focus on procedural justice is not limited to officers on the streets. Municipal court systems that sometimes create "a life sentence served in 30-day installments" are also under scrutiny.[12] Also, police chiefs across the country are applying concepts of internal procedural justice to performance management and discipline of the employees. Procedural justice, although not a new concept, is being embraced as a practice to help municipalities move forward and navigate public scrutiny. In doing so, cities will not only improve legitimacy and thus ultimately the functions of employee management, law enforcement and municipal courts but may also prevent outcomes wherein litigation seems the only recourse.

What is Procedural Justice?

Procedural Justice is a theory that has long been professed by the Department of Justice and policing community as having benefits that presumably would prevent the types of demonstrations and riots that occurred in Ferguson. Although the development of practices and policies consistent with procedural justice in urban policing date back to the 1970s, trust and confidence in police has not increased.

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Recent data confirms that confidence in police is the lowest it has been in 22 years.[13] The lack of confidence persists even though violent crime rates have dropped 48% nationwide since 1993.[14] In 2014, researchers saw improvement in the perceptions of the courts but noted that while gains were encouraging, respondents did not have deeply rooted beliefs. Further, the survey was conducted prior to high profile events such as the grand jury decisions in Ferguson and Staten Island, causing researchers to caution that only time would reveal how deep of an impact those events have on perceptions.[15]

Procedural justice research and theory attempts to explain how individuals perceive the justice system and particularly the fairness of the process. Tom Tyler, the father of procedural justice, began with the question of why do people obey the law and cooperate with legal authorities. Tyler's research debunks the common myth that people obey the law and cooperate because they want to minimize personal costs and maximize attainment of rewards. In other words, under traditional theories, society controls individuals through a system of deterrence and sanctions of certain behaviors. Although risk of punishment and severity of punishment have some influence on deterrence of crime, the level of manpower needed to effectively impact risk and severity enough to alter behavior and significantly deter crime is often cost prohibitive.[16] In contrast, experiencing procedural justice changes people's values concerning the law and thus increases feelings of responsibility and obligation to the law.[17] Procedural justice creates a paradigm wherein belief in the system fosters legitimacy, encouraging cooperation and voluntary compliance.

Procedural justice embodies the notion that the criminal justice system must demonstrate its legitimacy to the public it serves. When the police are perceived as legitimate, they will have the public trust, citizens will defer to the law and police authority and police actions will be perceived as morally just and appropriate.[18] Thus, procedural justice is a means by which to obtain legitimacy. The critical components of procedural justice are voice, respect, neutrality, understanding and helpfulness.[19] In practical terms, when an officer stops a person for speeding, whether that act is perceived as legitimate and how that person reacts to the action is based upon the way the officer conducts the traffic stop, not the outcome. Similarly, in municipal court, the importance of a favorable outcome may be outweighed by the impact of an unfair process. It is the difference between a person looking back on their court experience thinking "Yes, I won but I don't know if it was worth it. It cost too much, the judge wouldn't let me speak, I didn't understand what the attorneys were saying, I was treated like dirt. I never want to go through that again" versus "I lost my case but I had my day in court, I was treated fairly, I can move on." Research supports that the process is more important than the outcome of the encounter in shaping the community's assessment of the interaction with its local government.[20]

The four pillars of procedural justice are: (1) fairness and consistency of rule application, (2) voice and representation in the process, (3) transparency and openness of process and (4) impartiality and unbiased decision making.[21] This seemingly common sense approach provides the parameters for mutually respectful engagement focusing primarily on the conduct of those in power. Officers and judges are in control on the streets or in the court room. The natural tendency for both is to focus on the rule of law. Procedural justice does not ignore the law but rather recognizes that laws, to be effective, require buy-in from those that will be impacted. Persons who enforce the law are in positions of authority granted to them by the citizens they serve. Respectful discourse with those you serve is more important to the perception of legitimacy than being right about the law.

Why Do I Need to Know About Procedural Justice?

If you represent municipalities then in all likelihood you represent the police force as well as have some involvement with a municipal court. As with representing any client, an attorney should be aware of industry standards as they pertain to the conduct giving rise to potential liability. It is fair to conclude that procedural justice has become the standard for the criminal justice system. Procedural justice has long ago left the ivory towers of academia and made its way to the streets of our cities. Procedural justice is also a cornerstone of the legal system that is more than legal theory focused on outcomes but also scrutinizes the process.[22] In the policing community, procedural justice may not be the panacea for all that ails a police department but it provides a method to change perception and shift reality for officers on the street and the relationship with the community. Maurice Classen of the MacArthur Foundation discusses why and how Chicago began to see the value of shifting paradigms:

> In the last couple years, we have funded programs with the Chicago Police Department to help with the John Jay College supported Violence Reduction Strategy as well as the Police Executive Research Forum reform efforts or managing the reform efforts for Superintendent Gary McCarthy a lot which is related to procedural justice. And over the last few years what we've learned from that is how much a little investment can actually have in terms of reducing violence and also helping it improve the health of a community and to know we've begun to look at policing on a broader, national scale which brings into play a lot of the issues the COPS office deals with related to violence deterrents and procedural justice. [23]

Ironically, as stated by Mr. Classen, Chicago PD was implementing and adhering to principles of procedural justice at the time of the McDonald shooting. However, the lack of a complete paradigm shift not only in the police department but among the attorneys, the management and the elected officials resulted in not only a large settlement but erosion of community trust, national negative publicity and continued scrutiny long after the initial incident. As evidenced in Chicago, procedural justice must be embraced as city policy not just police policy.

Adherence to the tenets of procedural

justice to create legitimacy is not just anecdotal but rather is supported by research. More importantly, the DOJ has embraced procedural justice and recommended a robust system of community policing as a priority to restore community relations in Ferguson as well as other communities. Focusing on procedural justice, the DOJ specifically instructed Ferguson police department to fundamentally change the way it conducted stops and searches, issuance of citations and summonses, and arrests. Enforcement efforts were to be reoriented so that officers take enforcement action because it promotes public safety, not simply because they have legal authority to act.[24] Again, the focus is not the rule of law but rather the implementation of the legal system. More recently, the DOJ's Community Oriented Policing Services Office (COPS Office) released a report produced in partnership with PERF, the Police Executive Research Forum, which clearly defined a roadmap for any police chief to implement procedural justice programs in their community.[25]

Whether a city's police department adheres to a procedural justice model should be apparent on its face. The police department will model behavior that provides dignity to all citizens in all interactions. Supervisors will treat both their officers and the community members with respect. Supervisors lead by example. Starting with the police chief, mentoring and evaluating appropriate behaviors will be apparent. The police department's mission statement will reflect the core belief regarding the value and sanctity of human life. If it is obvious that the department defines, models, mentors, evaluates and instills the behavior consistent with procedural justice then it is on the right track. Procedural justice is the recommended methodology to obtain achievable goals for lasting changes in police agency culture, attitudes and interactions with the communities whom they serve. Moreover, it is a logical conclusion that if implementing procedural justice increases voluntary compliance with law enforcement, then presumably use of force incidents decrease, which in turn increases officer safety while lowering the risk of civil rights lawsuits. Additionally, any negative citizen encounter with law enforcement is not only a potential lawsuit or claim but also can create political havoc in a community. With body cameras, cell phone cameras, video and recording devices and all other kinds of private recording devices, the actions of police officers and all public officials who interact with the public are more and more apt to be published and scrutinized from a post-incident perspective. The more that cities implement procedural justice in dealing with citizens, the more opportunity to avoid negative publicity and litigation.

A Deeper Look at Municipal Courts

Procedural justice in the municipal court system is not a post-Ferguson concept. In 2000, the Center for Court Innovation established a community court in Red Hook, a neighborhood in Brooklyn, New York once dubbed "the crack capital of America." In 2006, the concept was replicated in Newark, New Jersey.[26] The purpose of the courts was to end the cycle of people in poor communities being jailed and released dozens of times for petty crimes. The fundamental precept of the community courts was that people are more likely to obey the law if the justice system does not humiliate them. The Judge is tough but does not talk over or down to the defendants but rather encourages engagement and questions. Instead of jail time and additional fines that are unlikely to be paid, sentences consist of writing essays, community service, social services such as anger management and signing up for school. After all, the goal of the judicial system is to reduce crime not create criminals.

The DOJ's focus on Ferguson's municipal court has brought to the forefront an issue that was previously outside of the mainstream awareness. Unacceptable practices noted in Ferguson municipal courts by the DOJ include:

- Arrest warrants not on the basis of public safety but rather as a routine response to missed court appearances and required fine payments.
- 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations.
- Warrants for arrest and incarceration for violations that would not receive jail time alone or for failing to timely pay related fines and fees.
- Severe penalties for missed appearances and payments even as several of the court's practices created unnecessary barriers to resolving a municipal violation.
- Failure to provide clear and accurate information regarding a person's charges or court obligations.
- Fine assessment procedures that do not adequately provide for a defendant to seek a fine reduction on account of financial incapacity or to seek alternatives to payment such as community service.[27]

An example from the DOJ's report on Ferguson highlights these concerns:

> We spoke, for example, with an African-American woman who has a still-pending case stemming from 2007, when, on a single occasion, she parked her car illegally. She received two citations and a $151 fine, plus fees. The woman, who experienced financial difficulties and periods of homelessness over several years, was charged with seven Failure to Appear offenses for missing court dates or fine payments on her parking tickets between 2007 and 2010. For each Failure to Appear, the court issued an arrest warrant and imposed new fines and fees. From 2007 to 2014, the woman was arrested twice, spent six days in jail, and paid $550 to the court for the events stemming from this single instance of illegal parking. Court records show that she twice attempted to make partial payments of $25 and $50, but the court returned those payments, refusing to accept anything less than payment in full. One of those payments was later accepted, but only after the court's letter rejecting payment by money order was returned as undeliverable. This woman is now making regular payments on the fine. As of December 2014, over seven years later, despite initially owing a $151 fine and having already paid $550, she still owed $541.[28]

As stated in the Ferguson report, city

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and court officials adhered to court practices despite acknowledging their needlessly harmful consequences. In August 2013, for example, one Ferguson Councilmember wrote to the City Manager, the Mayor, and other city officials lamenting the lack of a community service option and noted the benefits of such a program, including that it would "keep those people that simply don't have the money to pay their fines from constantly being arrested and going to jail, only to be released and do it all over again."[29] An obvious consequence for the warrant system is the disparate impact on the poor which results in increased negative interactions with police resulting in potential use of force and jail time. This unnecessarily increases the probability of a negative outcome where the impetus was a parking ticket. Further, legitimacy is decreased which decreases cooperation and impacts perceptions of fairness and overall effectiveness of the justice system for both police and the courts.

Municipal Lawyers' Takeaway

A reasonable conclusion is that if the city's police department is not embracing the tenets of procedural justice, it should. If the city's police department does not know what procedural justice is, then the problem is even bigger. The DOJ advocates the application of the principles of procedural justice in law enforcement and thus any negative event will be reviewed with those tenets in mind. Of particular concern is if an event occurs wherein DOJ becomes involved or investigates, most assuredly those departments who do not have a strong community policing program will be critiqued. Further, the inquiry does not end with the police department. The municipal courts cannot operate in isolation. If a city has a police department that implements procedural justice, the impact is nullified if the court system does not. Post- Ferguson it is patently clear that if the DOJ investigates for any reason, the expectation is that a city's judicial system will also comport with the ideas of procedural justice. If a city's municipal court is considered a revenue source, that is a problem. The DOJ blasted Ferguson for allowing the focus on revenue generation to fundamentally compromise the role of the municipal court. The municipal court stopped being a check on unlawful conduct but rather became a means, through use of judicial authority, to compel the payment of fines and fees advancing the city's financial interests. Importantly to municipal lawyers, the DOJ identified these practices as violations of the Fourteenth Amendment's Due Process and Equal Protection requirements.

Beyond the legal implications of failing to understand and comply with principles of procedural justice, the operational impact may be significant. Municipalities tend to be service oriented, but even with the best of intentions, bureaucratic tendencies and automated systems that provide outcomes without regard to the impact of the process can produce unintended consequences of disparate impact and disconnect between the organization and its constituents and employees. Tenets of procedural justice applied beyond the criminal justice arena would presumably have the same positive outcomes: increased compliance with rules, increased organizational legitimacy and decreased negative outcomes. At the end of the day, the simple premise that sometimes people just want to hear that you are sorry goes a long way when it is part of an open, transparent process of engagement and not as a last resort to defuse an adversarial situation.

Notes

1 Monica Davey & Mitch Smith, *Chicago Braces After Video of Police Shooting Is Released*, N.Y. Times, November 24, 2015.
2. Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between Chicago Police and the Communities they Serve*, https://assets.documentcloud.org/documents/2801130/Chicago-Police-Accountability-Task-Force-Report.pdf. (april 13, 2016).
3. Kyung Lah, *Laquan McDonald shooting: Why did it take 13 months to release video?* CNN, http://www.cnn.com/2015/12/01/us/chicago-police-shooting-explainer/. (last updated December 2, 2015).
4. Monica Davey & Mitch Smith, *Chicago Police Dept. Plagued by Systematic Racism, Task Force Finds*, N.Y. Times, April 13, 2016.
5. Mitch Mitchell, *Arlington officer fired 4 shots during deadly altercation*, Fort Worth Star Telegram, August 8, 2015.
6. Mitch Mitchell, *Arlington chief fires officer who shot teen*, Fort Worth Star Telegram, (August 11, 2015).
7. Editor, *Editorial: After fatal shooting of Christian Taylor, Arlington PD sets right tone*, Dallas Morning News, August 10, 2015 at http://www.dallasnews.com/opinion/editorials/20150810-good-call-by-arlington-pd.ece.
8. Kyung Lah, *supra note 3.*
9. Police Accountability Task Force at 7.
10. *Attorney General Holder Announces First Six Pilot Sites for the National Initiative for Building Community Trust and Justice, Office of Public Affairs*, U.S. Dept. of Justice (March 12, 2015), *available at* https://www.justice.gov/opa/pr/attorney-general-holder-announces-first-six-pilot-sites-national-initiative-building-0.
11. Jason Anderson, *DOJ names Stockton for police-community pilot program*, Record-Net.com (March 12, 2015, 8:00 PM), http://www.courtinnovation.org/sites/default/files/DOJnamesStockton.pdf.
12. Tina Rosenberg, *The simple idea that could transform US criminal justice*, The Guardian (June 23, 2015), http://www.theguardian.com/us-news/2015/jun/23/procedural-justice-transform-us-criminal-courts.
13. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, Gallup.com (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx.
14. Jennifer Truman, Lynn Langton & Michael Planty, *Criminal Victimization, 2012*, Bureau of Justice Statistics, 3, http://www.bjs.gov/content/pub/pdf/cv12.pdf (October 2013).
15. Gerstein Bocian Agne Strategies, *Analysis of National Survey of Registered Voters*, National Center for State Courts (2014), http://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx.
16. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 301-4 (2003).
17. *Id.* at 307.
18. Craig Fischer, Ed. *Legitimacy and Procedural Justice: A New Element of Police Leadership*, 9, U.S. Department of Justice, Bureau of Justice Assistance: Police Executive Research Forum, (March

2014), http://www.policeforum.org/assets/docs/Free_Online_Documents/Leadership/legitimacy%20and%20procedural%20justice%20-%20a%20new%20element%20of%20police%20leadership.pdf.
19. Tom R. Tyler, *Why People Obey the Law*, (1991).
20. Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 Swiss J. Econ. & Statistics, 219: (1997).
21. Laura Kunard and Charlene Moe, *Procedural Justice for Law Enforcement Agencies: Organizational Change through Decision Making and Policy*, Chicago: Center for Public Safety and Justice, (2015), *available at* http://ric-zai-inc.com/Publications/cops-p333-pub.pdf.
22. Lawrence B. Solum, *Procedural Justice*, University of San Diego Public Law and Legal Theory Research, Paper Series, Paper 2, (2004), *available at* http://digital.sandiego.edu/lwps_public/art2.
23. U.S. Dept. of Justice, COPS (Community Oriented Policing Services), (January 2015), http://cops.usdoj.gov/html/podcasts/the_beat/03-2015/The-Beat-032015_Classen.txt.
24. United States Department of Justice – Civil Rights Division, *Investigation of Ferguson Police Department*, 92 (March 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
25. Shannon Branly, Andrea Luna, Sarah Mostyn, Sunny Schnitzer, & Mary Ann Wycoff, *Implementing a Comprehensive Performance Management Approach in Community Policing Organizations: An Executive Guidebook*, Office of Community Oriented Policing Services, (2015), http://ric-zai-inc.com/Publications/cops-p331-pub.pdf.
26. Rosenberg, *supra* note 12.
27. United States Department of Justice – Civil Rights Division, *supra* note 24 at 55-61.
28. *Id.* at 4.
29. *Id.*

Author's Note: This article was written before the tragic events of July 2016–the killings of citizens by law enforcement in Baton Rouge and St. Paul and the murder of five police officers in Dallas. The issue of race relations and police-public interaction-and the need for dialogue and procedural justice–is clearly even more pressing today. ML

