

Can Legal Representation Foster Perceptions of Legitimacy and Fairness in America's Courts?¹

Alyx Mark²

Procedural fairness – the feeling that outcomes are arrived at through a nondiscriminatory, transparent process – influences whether an individual feels satisfied with a legal proceeding. This is true for proceedings in which they have participated and for an individual's satisfaction with and perceptions of the courts and court actors. Although scholars have studied institutional legitimacy and procedural fairness as they relate to individuals' interactions with judicial institutions, we lack consensus about the impact of legal representation in fostering perceptions of these important judicial norms. Current research does not systematically consider the role of lawyer as an educator of sorts. Legal representation should not only be measured as assistance in the courtroom, but should also be operationalized as a rights and skills teaching tool, especially for those claimants in the greatest need of assistance. Without consideration of these potential roles of legal representation, it is not surprising that mixed evidence exists with regards to its influence. In this essay, I describe the limitations of existing studies and propose an alternative approach to explaining the conditional impact of legal representation, particularly for indigent litigants.

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² Ph.D. Candidate at George Washington University; alyx@gwu.edu

1. The Importance of Procedural Fairness

Procedural fairness is a strong predictor of an individual's satisfaction with process-based outcomes. For those involved in dispute resolution, perceived fairness of legal proceedings shapes the reaction people have to the administration of justice and delivery of outcomes. Often, the perception that a decision was reached in a fair, evenhanded manner leads to higher levels of acceptance of unfavorable decisions (Thibaut and Walker 1975, 1978). More recent research suggests that litigant satisfaction is more closely related to procedural fairness than case disposition or time to disposition (Resnik *et al.* 1996, 372). Indeed, procedural fairness is a unique predictor of satisfaction, in that individuals, winning or losing, are more likely to accept the results of a decision if it is perceived as a fair one (Tyler 2006, 23; *see also* Tyler 1994, 1997, 2000; Hibbing and Theiss-Morse 2001).

Procedural fairness may not only be a mechanism for engendering litigant satisfaction with case outcomes, but may also extend more broadly to evaluations of courts and court actors. When an individual has an opportunity to interact with her local courts, fair processes tend to enhance perceived legitimacy of legal institutions, as well as increase the likelihood of accepting legal rules and acceptance of future decisions by the courts. Individuals may also demonstrate their perceptions of court legitimacy through “willingness to proactively help society and social authorities” (Tyler *et al.* 1997, 82). Many studies have linked evaluations of procedural fairness to fostering institutional legitimacy (Tyler and Huo 2002, 55; Eckberg and Podkopacz 2004; Tyler 2006) and confidence in courts (Rottman 2005).

There are several components researchers have identified that contribute to an individual's evaluation of fair procedures – voice, neutrality of decision makers, respect, and trust. A claimant's ability to express themselves in legal proceedings (voice) greatly influences

satisfaction of those proceedings; individuals appreciate the opportunity to exercise voice in front of decision makers (O'Barr and Conley 1985). Claimants are also affected by the neutrality of the process – but might not comprehend that a process is neutral without further explanation by decision makers (Hensler 2002; Tyler 2006). Claimants also seek respectful treatment from legal authorities, which might be operationalized as equal provision of information, regardless of social status (Graecen 2002, 16-19). Finally, individuals evaluate the fairness of procedures based on trust of authorities; the perception that decision-makers care and are sincere greatly influences satisfaction (Lind *et al.* 1989, 61-67; *see also* Rottman 2005).

2. The Expression of Voice

Special attention has been paid in the literature to *voice* as the principal predictor of claimant satisfaction. But, it is unclear if voice needs to be expressed directly (via self-representation) to enhance feelings of procedural fairness. When asked, individuals respond that they prefer situations in which they can exercise voice directly, such as through mediation or alternative dispute resolution. But when measuring the differences in perceptions of the exercise of voice as a result of participating in different kinds of resolution methods (or with or without a lawyer in a traditional court setting), there is often no significant difference between indirect and direct voice on feelings of legitimacy and fairness (Tyler *et al* 2007). Those who do have a lawyer do not feel that indirect participation is a deprivation of voice (Tyler and Huo 2002), but there is no conclusive evidence that one is “better” at fostering these norms than the other.

Individuals who represent themselves are placed in a situation that can conceivably be both empowering and educating (Barclay 1996). Certainly, for the skilled layperson, representing oneself in court has the potential to have these effects. But, because of the

complexities of the legal system, it is difficult for the average litigant to fully comprehend the intricacies of both legal procedure and the substance of the law (Robbins and Herman 1975). Without such an understanding, lay litigants may fail to identify the element of their problem that is justiciable in a court – likely detrimental to a favorable outcome (Conley and O’Barr 1990). As such, it may be difficult for the indigent litigant to exercise voice in a manner that would lead to positive evaluations of the courtroom experience, and may instead lead to frustrations with both self and legal institutions (Zimmerman and Tyler 2010, 510).

3. The Value of Representation

The impact of legal representation might be the greatest in an area that is not comprehensively addressed by current scholarship – that which connects the skills and knowledge of litigants with the value of representation. What skills are required to successfully utilize voice, as it pertains to solving a legal problem? As noted above, if individuals cannot understand the complexities of the legal procedures, it would be very difficult for them to express voice in an effective and satisfying manner. Lawyers can potentially assist litigants in the development of these skills through discussions of case materials and preparations for trial or mediation, as well as help them more successfully navigate the legal system.

Research on civic skill development suggests that for an individual to successfully and efficiently exercise political voice, one must possess “organizational and communication skills,” which are typically developed in primary and secondary education (Verba *et al.* 1995, 304; Brady *et al.* 1995). These skills, such as collaborative problem solving and decision-making, as well as verbal and written communication skills, can also be learned later in life through

organizational and work affiliations, but most relevant to this discussion, through interactions with institutions and their representatives (Marston 1993).

To better understand representation as a mechanism for fostering important judicial norms, researchers would do well to better tease out the reasons why we would expect lawyers to matter. Lawyers assist individuals unfamiliar with complex legal procedures in their interactions with legal institutions. Lawyers also help those least likely to understand how to solve their present legal problems by supporting them through the legal process. Additionally, legal representation can provide opportunities for individuals to learn and use valuable civic skills, applicable to both their satisfaction with the case at hand as well as more broad evaluations of courts.

Relevant work in the policy feedback literature presents evidence of this relationship through studies of individuals' interactions with other kinds of institutions, demonstrating that certain kinds of institutional arrangements and interactions facilitate skill building and personal empowerment (see Bruch *et al.* 2009). For example, low-income parents participating in Head Start not only receive educational services for their children, but also develop valuable skills as a result of participating in the program (Bruch *et al.* 2009). Although the provision of representation might not have a deliberate skill development component, through conversations with attorneys, individuals might gain confidence in their ability to communicate with people in positions of authority and gain more experience in working with a partner to make decisions. Without an understanding of the role of lawyers in this context, it is difficult to assess their influence on norms of fairness and legitimacy. Additionally, research should focus more on client populations that stand to benefit the most from legal representation. By considering lawyers as "teachers," we might gain a better understanding of their influence on perceptions of

voice, as well as evaluations of fairness and legitimacy.

4. Empirical Concerns, In Brief

While I think it is most important that researchers consider reframing the role of a lawyer for studies of the impact of representation, it is also important to consider how to better empirically evaluate the role representation plays in fostering important judicial norms. Most research that seeks to link representation to procedural fairness and legitimacy outcomes involves surveying either a targeted group of people who have already interacted with the courts (Tyler *et al.* 2007) or a random sample of a population with the aim of identifying a smaller group that has previously interacted with the courts (Tyler 2006). Without identifying individuals *before* they interact with the courts, it is difficult to track the changes in their attitudes on institutions, which potentially muddles the impact of a mechanism like representation. Without baseline measurements before an individual interacts with an attorney, or representation more broadly conceived, it is difficult to assess the impact of the process itself on an individual's perceptions of the case at hand or institutions generally. This is potentially problematic for both researchers and practitioners seeking to use works on the role of representation as motivation for policy change.

5. Conclusion

While significant scholarly energy has been dedicated to the study of procedural fairness and institutional legitimacy, we still lack consensus on the role of representation in fostering these valuable court norms. The reasons underlying this disagreement may stem from both theoretical and empirical concerns. Representation need not only be thought of as an indirect

mechanism for expressing voice in the courtroom. Representation is way by which individuals can learn about their rights and learn how to solve problems using an unfamiliar, complex system – particularly those individuals lacking the skills necessary to navigate such a system successfully. Empirically, researchers would do well to think about designs that would allow for measurement before and after an individual accesses the legal system – with and without representation. By taking these considerations into account, researchers can vastly improve our understanding of the role of representation and its consequences for legitimacy and fairness.

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