

Justice Sotomayor and the Jurisprudence of Procedural Justice

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In this Essay, Professors Tyler and Meares highlight the ways in which recent social science research supports the model of jurisprudence articulated by Justice Sotomayor. Her model defines building identification with political and legal institutions as an important goal for the Court. It further suggests that this goal is best achieved when the Court exercises its authority using just procedures. That perspective is consistent with research on the foundations of popular legitimacy demonstrating that perceived procedural justice of the Court most strongly shapes it. Social science findings further reveal the factors shaping popular conceptions of procedural justice.

In her recent concurring opinion in *United States v. Jones*,¹ Justice Sotomayor addressed the question of what a lawful search means within the context of the Fourth Amendment. At issue in *Jones* was whether the government's use of an electronic tracking device attached to the undercarriage of a Jeep Grand Cherokee beyond the ten days authorized by a warrant violated the Fourth Amendment.² As she discussed the problems inherent to discretionary governmental decisions to target and track individuals, Justice Sotomayor framed her response not only as a question of physical trespass under the Fourth Amendment, which was the focus of Justice Scalia's opinion for the Court, but also in terms of the impact of government actions on the "relationship between citizen and government in a way that is inimical to democratic society."³

Justice Sotomayor further developed this theme of avoiding distrust and alienation and instead focusing on how to further a desirable relationship between people, law, and government in her recent James A. Thomas Lecture, delivered at Yale Law School on February 3, 2014. In that lecture, the Justice

1. *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring).

2. *Id.* at 948 (majority opinion).

3. *Id.* at 956 (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

argued that the goal of the law is to express our shared ideals as a society – and, through doing that, to enable everyone to identify with law and with our democracy and its political and legal institutions.⁴

There are different methods of constitutional interpretation: originalism, textualism, purposivism, and so on. We think Justice Sotomayor’s initial opinions reflect a jurisprudence of process that emphasizes making decisions fairly. In carrying out this approach, Justice Sotomayor highlighted in her Thomas Lecture more than just her efforts to make transparent to readers that the Court’s decision in a particular case is fair. She also pointed to her own endeavors to humanize judges, helping people to see that they are well-meaning individuals sincerely trying to do what is right, rather than people motivated by prejudice or ill will. In this manner, she noted, she hoped to encourage the public to have respect for the law as an important institution in our society as well as in their own lives. And through building respect for judges and the Court, Justice Sotomayor further indicated that she seeks to build support for government overall.⁵ While Justice Sotomayor did not cite to social science evidence as a justification for her position on these matters, we find the degree to which her model of jurisprudence accords with and is supported by the findings of recent social science research on the legal system striking. In particular, a large and diverse body of social science evidence on legitimacy and procedural justice supports the central arguments she outlines. This research focuses upon how law and the policies and practices of legal authorities are experienced by the public.

I. PROCEDURAL FAIRNESS MATTERS

Our concern in this analysis is with people’s judgments about the fairness of the procedure that legal authorities use when they make decisions. Unlike the procedural justice of objective features of the legal system (e.g. adversarial vs. inquisitorial trial procedures), this concern is with whether people evaluate a legal procedure as being just or unjust. This question is important because the primary factor that people consider when they are deciding whether they feel a decision is legitimate and ought to be accepted is whether or not they believe that the authorities involved made their decision through a fair

4. Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J. F. 375 (2014), <http://yalelawjournal.org/forum/a-conversation-with-justice-sotomayor>.

5. *See id.*

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procedure, irrespective of whether members of the public are evaluating decisions made by the Supreme Court or by local courts, or reacting to the decisions made or rules enacted by any legal authorities. Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair.⁶

Some of the elements researchers have found to be important when the public is evaluating the justice of decision-making procedures include whether they believe that all parties to a case are being given an opportunity to present evidence and state their views, whether they think the decisionmakers get the information they need to make good decisions, whether they believe the authorities consider the evidence impartially, and whether they view them as making unbiased and rule-based decisions that apply rules consistently across people and cases. These elements are all related to the fairness of decisionmaking, a core element in both objective⁷ and psychological evaluations of legal procedures.⁸

While it was once commonly thought the people cared about procedurally fair decisionmaking because of its potential contribution to accurate outcomes or a person's ability to control an outcome, much research now supports the view that people care about a much broader set of issues. Specifically, people understand the way in which they are treated by legal authorities to provide them with information about how that authority views them and the group or groups to which they belong. In other words, the way people interpret the fairness of procedures has a substantial relational component.⁹

Justice Sotomayor indicated in her Thomas Lecture that her own goal has been to deal with cases through fair procedures. She said: "What I view as driving my jurisprudence is process. I can't control the outcomes of cases. . . . And I can live with that if I perceive the process to be fair."¹⁰ Her quote reflects a basic insight in the literature: procedures might be considered more "trait-

6. See, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

7. See, e.g., DENIS JAMES GALLIGAN, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* (1996); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183-90 (2004).

8. See, e.g., THIBAUT & WALKER, *supra* note 6.

9. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115 (1992).

10. See Sotomayor & Greenhouse, *supra* note 4, at 2.

like”¹¹ than outcomes, which are variable, or which may be extremely indeterminate in a particular case. For example, while it may not be obvious how a particular case should come out, it is almost always clear how parties should proceed and be treated in that particular case.¹² Although the argument Justice Sotomayor presented in the Thomas Lecture focused upon her own efforts to pay close attention to facts and use objectively fair procedures when handling cases, studies suggest that this perspective on jurisprudence is a model for making decisions in ways that will be well received by the public, because the public is also strongly influenced by whether or not they believe judges are exercising their authority through fair procedures. And the consequences of a commitment to procedural justice, research shows, are congenial to Justice Sotomayor’s own aims for decisionmaking—greater trust in, and commitment to, law and government. People who believe the authorities are procedurally just also comply with the law more frequently on an everyday basis.¹³

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11. See Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice: The Role of Trust*, in *TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH* 390, 404 (Roderick M. Kramer & Tom R. Tyler eds. 1996).
 12. Tracey L. Meares et al., *Updating the Study of Punishment*, 56 *STAN. L. REV.* 1171, 1194-95 (2004).
 13. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (a study of the residents of Chicago indicating that those who believe the police are procedurally just comply with the law more frequently in their everyday lives); Denise C. Gottfredson et al., *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 *J. OF RES. CRIME & DELINQUENCY* 3, 3 (2007) (a study of drug courts indicating that they reduce recidivism relative to alternatives, because “perceptions of procedural justice reduce crime”); Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 *BRITISH J. CRIMINOLOGY* 1051, 1062 (2012) (a study of the public in England and Wales indicating that there is a pathway “from the procedural fairness of the police to compliance”); Michael D. Reisig et al., *Compliance with the Law in Slovenia*, *EUR. J. ON CRIM. POL’Y & RES.* (2013), <http://link.springer.com/article/10.1007/s10610-013-9211-9> (finding that the procedural justice of the police influenced self-reported compliance with the law among young adults); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC’Y REV.* 513, 535 (2003) (two surveys of the people in New York City “identify[ing] procedural justice as the primary antecedent of legitimacy” and shaping both compliance with the law and cooperation with police); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 *PSYCHOL. PUB. POL’Y & L.* 78, 78-79 (2014) (a study of a random sample of Americans’ views about the police and the courts demonstrating that procedural justice shapes legitimacy, compliance, and cooperation); Heathcote W. Wales et al., *Procedural Justice and the Mental Health Court Judge’s Role in Reducing Recidivism*, 33 *INT’L J.L. & PSYCHIATRY* 265, 265 (2010) (“Observed reductions in recidivism from participation in MHC [mental health court] are caused in part by the role of

II. RELEVANT SOCIAL SCIENCE RESEARCH

A. Decision-Making Fairness

There is a large body of empirical literature supporting Justice Sotomayor's focus on process. The Justice suggests that she focuses upon making decisions through fair procedures, believing that this leads to high-quality decisions. The public shares this view and, when evaluating authorities such as judges, asks whether that authority used fair procedures to make a decision. That judgment, more than who wins or loses their case, shapes people's views about the decision and the judge and their willingness to defer to judicial authority. It also shapes their views about the legitimacy of the courts and their overall willingness to comply with laws and cooperate with legal institutions.

1. U.S. Supreme Court

Tom R. Tyler and Gregory Mitchell have examined public acceptance of Supreme Court decisions in the context of the controversial issue of abortion rights.¹⁴ They inquired whether people who disagreed with the Court might nonetheless feel obligated to accept its decisions on this, or any other, issue. Utilizing interviews with a sample of members of the public, they found that a key issue underlying public acceptance of Supreme Court judgments was an evaluation of the procedural justice of Court decisionmaking. In their sample, people considered whether the Justices were honest, impartial, and based their decisions on case-relevant information, and respondents were further influenced by whether they felt the Justices respected citizens and their rights, considered their views, and cared about their concerns. The study identified a broad set of procedural justice concerns, including concerns about the

the judge in conveying elements of procedural justice.”); Cynthia G. Lee et al., *A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center Final Report*, NAT'L CENTER ST. CTS. 176 (2013), <http://www.courtinnovation.org/sites/default/files/documents/RH%20Evaluation%20Final%20RRepor.pdf> (“The Red Hook Community Justice Center appears to bring about a robust and sustained decrease in recidivism among adult misdemeanor offenders.”); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization* (Yale Law & Econ. Research Paper No. 476, 2013), <http://ssrn.com/abstract=2289244> (finding that young men who viewed the police as acting through procedural justice were more willing to help by reporting crimes).

14. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

neutrality of decisionmaking that were central to the Court's legitimacy. Tyler and Mitchell ultimately found that procedural justice meaningfully legitimated the Court and its decisions. The results of the study strongly supported the procedural justice argument in that those citizens who believed that the court used fair procedures to make their decisions both felt obligated to defer to them and did not support efforts to strip the Court of authority to make decisions in this area.

2. *Local and State Courts*

Most studies of procedural justice are of local or state courts rather than the United States Supreme Court. These studies support the argument that people are more satisfied with decisions when they believe those decisions are made through fair procedures.¹⁵ Further, people more willingly *accept* court decisions

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15. See STEPHEN SHUTE ET AL., *A FAIR HEARING?* (2013) (finding that minority defendants' confidence in the courts is linked to their procedural justice judgments); TYLER, *supra* note 13 (studying residents of Chicago and indicating that those who believe the police are procedurally just comply with the law more frequently in their everyday lives); Ben Bradford, *Voice, Neutrality and Respect: Use of Victim Support Services, Procedural Fairness and Confidence in the Criminal Justice System*, 11 CRIMINOLOGY & CRIM. JUST. 345, 345 (2011) ("By providing [crime] victims with voice and a sense that someone is listening to and taking their concerns seriously, contact with victims services seems to be linked to more favourable overall assessments of the criminal justice system."); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988) (finding, based on interviews with people whose felony cases were disposed through the courts, that satisfaction with the handling of one's case was linked to judgments about the procedural justice of the courts); Peter Dillon & Robert Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131, 131 (finding that nine years after a custody hearing those parents who thought the hearing was procedurally fair had "more frequent current contact with their children and greater involvement in current decisions about them"); Katherine M. Kitzmann & Robert E. Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCHOL. 150 (1994) (finding in a longitudinal study that judgments about the fairness of child custody hearings had long-term implications for satisfaction and compliance); Katherine M. Kitzmann & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolution*, 17 LAW & HUM. BEHAV. 553 (1993) (reporting that interviews with parents following child custody hearings indicated that satisfaction was linked to judgments about whether the hearing was fairly conducted); Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 97 (2010) ("In contrast with the common assumption in the plea bargaining literature, we show fairness related concerns systematically impact defendants' preferences and judgments."); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983 (2000) (arguing that procedural justice shapes the willingness of the

if they believe court procedures are fair,¹⁶ and they are also more willing to cooperate with the courts, for example by testifying, if they believe that the courts function through fair procedures.¹⁷ Of particular importance is the finding that procedural justice promotes decision adherence that lasts over time.¹⁸

members of both majority and minority ethnic groups to defer to law and legal authorities); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 215 (2001) [hereinafter Tyler, *Public Trust*] (“Analysis from several studies exploring the basis of public views support this procedural justice based model of public evaluation.”); Jo-Anne Wemmers, *Victims’ Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT’L REV. VICTIMOLOGY 221, 221 (2013) (“[U]nfair procedures were found to impact victims’ recovery.”); Jo-Anne Wemmers et al., *What Is Procedural Justice: Criteria Used by Dutch Victims to Assess the Fairness of Criminal Justice Procedures*, 8 SOC. JUST. RES. 329 (1995) (finding that Dutch crime victims evaluated the criminal justice process through a procedural justice frame); Rashida Abuwala & Donald J. Farole, Jr., *The Effects of the Harlem Housing Court on Tenant Perceptions of Justice*, CENTER FOR CT. INNOVATION (2008), http://www.courtinnovation.org/sites/default/files/Harlem_Housing_Court_Study.pdf (finding that interviews with people appearing in the Harlem and downtown project courts suggest that fairer treatment was linked to higher satisfaction with the courts); Donald J. Farole, Jr., *Public Perceptions of New York’s Courts: The New York State Residents Survey*, CENTER FOR CT. INNOVATION 17 (2007), http://www.courtinnovation.org/sites/default/files/documents/NYS_Residents_Survey.pdf (suggesting that procedural justice was the most important factor in overall approval of courts).

16. See ROBERT J. MACCOUN ET AL., ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM 56-57 (1988) (finding that people are more willing to accept ADR awards if they feel that the procedures were procedurally just); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS, at xv, 123-29 (2002) (finding that people who have dealt with the courts were more willing to accept court decisions if they believed that the courts made those decisions in a procedurally just way); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993) (finding that individual and corporate litigants were more accepting of the results of court-annexed arbitration hearings if they believed that the hearings were procedurally just).
17. Tyler & Jackson, *supra* note 13 (finding that people who viewed the police and courts as exercising their authority fairly were more willing to report crime and be a witness in court).
18. PENELOPE EILEEN BRYAN, CONSTRUCTIVE DIVORCE: PROCEDURAL JUSTICE AND SOCIOLEGAL REFORM (2006); Robert E. Emery et al., *Child Custody Mediation and Litigation: Parents’ Satisfaction and Functioning One Year After Settlement*, 62 J. CONSULTING & CLINICAL PSYCHOL. 124 (1994); Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC’Y REV. 553, 563-65 (2007)

3. Police

Like courts, police are legal authorities with which the public interacts. An even larger body of research on the police suggests that people are more satisfied with police decisions when they believe that the police are exercising their authority through fair procedures.¹⁹ Studies further indicate that people

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19. TYLER, *supra* note 13 (a study of the residents of Chicago indicating that those who believe the police are procedurally just comply with the law more frequently in their everyday lives); TYLER & HUO, *supra* note 16 (finding, in a study of everyday interactions with the police in Oakland and Los Angeles, that people are more satisfied with interactions when they believe that the police acted with procedural justice); Irina Elliott et al., *Procedural Justice in Contacts with the Police: Testing a Relational Model of Authority in a Mixed Methods Study*, 17 PSYCHOL. PUB. POL'Y & L. 592, 592 (2011) (“[F]indings supported the predictions that higher perceived antecedents of procedural justice would be associated with higher perceived legitimacy.”); Jacinta M. Gau & Rod K. Brunson, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy*, 24 CRIM. JUST. POL'Y REV. 759, 759 (2013) (finding that “consent requests . . . damage perceptions of procedural justice and, moreover, of the legitimacy of the stop itself”); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255 (2010) [hereinafter Gau & Brunson, *Procedural Justice*] (finding that interviews with young people suggest that stops are viewed as unfair harassment); Lyn Hinds, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 195 (2007) (“Young people’s attitudes toward police legitimacy are positively linked to police use of procedural justice.”); Lyn Hinds & Kristina Murphy, *Public Satisfaction with Police: Using Procedural Justice to Improve Police Legitimacy*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 27, 27 (2007) (“People who believe the police use procedural justice when they exercise their authority are more likely to view police as legitimate, and in turn are more satisfied with police services.”); Tal Jonathan-Zamir & David Weisburd, *The Effects of Security Threats on Antecedents of Police Legitimacy: Findings from a Quasi-Experiment in Israel*, 50 J. RES. CRIM. & DELINQ. 3, 4 (2013) (finding that in Israeli communities “procedural justice is consistently the primary antecedent of police legitimacy”); Lorraine Mazerolle et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33 (2013) (showing through a randomized field experiment varying procedural justice that procedural justice shaped police legitimacy); Andy Myhill & Ben Bradford, *Can Police Enhance Public Confidence by Improving Quality of Service? Results from Two Surveys in England and Wales*, 22 POLICING AND SOC'Y 397, 397 (2012) (finding that the key issue in the effect of encounters with police on perceived legitimacy is quality of “personal treatment”); Jennifer Norman, *Seen and Not Heard: Young People's Perceptions of the Police*, 3 POLICING 364, 364 (2009) (finding that “unfair targeting and treatment from the police” undermined what “young people thought of the police”); Ralph B. Taylor & Brian A. Lawton, *An Integrated Contextual Model of Confidence in Local Police*, 15 POLICE Q. 414, 414 (2012) (finding, in a study of people in Pennsylvania, the “importance of police simultaneously maintaining order and treating citizens fairly”); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Cooperate with the Police?*, 6 OHIO ST. J. CRIM. L. 231 (2008) (finding that procedural justice shaped legitimacy in a sample of New York City residents); Tom R. Tyler & Cheryl J.

are more willing to defer to police decisions when they feel the police are acting fairly.²⁰

The police benefit from cooperation with the community beyond mere compliance with rules. One form of cooperation involves helping the police to solve crimes or apprehend criminals. Providing tips about the location of crimes and criminals is a key issue, as is the willingness to aid with

Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253 (2004) (analyzing several datasets to show that unfair treatment leads to inferences of racial profiling and undermine police legitimacy).

20. JOHN D. MCCLUSKEY, *POLICE REQUESTS FOR COMPLIANCE: COERCIVE AND PROCEDURALLY JUST TACTICS* (2003) (suggesting, based on several studies involving both interviews with people who have dealt with the police and observation of police-citizen encounters, that procedural justice promotes compliance with police directives); Christina E.W. Bond & David John Gow, *Policing the Beat: The Experience in Toowoomba, Queensland*, 6 *CRIME PREV. STUD.* 153 (1996) (suggesting, through a qualitative analysis of a beat policing program, that it led to heightened satisfaction with police services); TYLER & HUO, *supra* note 16 (finding in a study of police-citizen encounters in California that people more willingly accepted fairly made decisions); Mengyan Dai et al., *Procedural Justice During Police-Citizen Encounters: The Effects of Process-Based Policing on Citizen Compliance and Demeanor*, 39 *J. CRIM. JUST.* 159, 159 (2011) (“Two types of procedurally fair behavior by the police, police demeanor and their consideration of citizen voice, are significant in reducing citizen and noncompliance.”); Stephen D. Mastrofski et al., *Compliance on Demand: The Public’s Response to Specific Police Requests*, 33 *J. RES. CRIM. & DELINQ.* 269 (1996) (demonstrating through a study of people’s personal experience with the police that procedural fairness increases compliance); Alex R. Piquero et al., *Discerning Unfairness Where Others May Not: Low Self-Control and Unfair Sanction Perceptions*, 42 *CRIMINOLOGY* 699 (2004) (finding that perceiving sanctions as unfair leads to anger); Clifford Stott et al., “Keeping the Peace”: *Social Identity, Procedural Justice and the Policing of Football Crowds*, 52 *BRIT. J. CRIMINOLOGY* 381 (2012) (finding that style of policing shaped compliance among European football crowds); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC’Y REV.* 103 (1988) (outlining the relationship of different procedural justice elements to decision acceptance); Jeffrey T. Ward et al., *Caught in Their Own Speed Trap: The Intersection of Speed Enforcement Policy, Police Legitimacy, and Decision Acceptance*, 14 *POLICE Q.* 251 (2011) (finding that unfair ticketing procedures led to less compliance); Amy C. Watson & Beth Angell, *The Role of Stigma and Uncertainty in Moderating the Effect of Procedural Justice on Cooperation and Resistance in Police Encounters with Persons with Mental Illnesses*, 19 *PSYCHOL. PUB. POL’Y & L.* 30, 30 (2013) (“Procedural justice is associated with more cooperation and less resistance.”); Andy Myhill & Paul Quinton, *It’s a Fair Cop? Police Legitimacy, Public Cooperation, and Crime Reduction*, NAT’L POLICING IMPROVEMENT AGENCY (2011), http://www.college.police.uk/en/docs/Fair_cop_Full_Report.pdf (finding that procedural justice shaped legitimacy, compliance and cooperation with the police among a national sample of the people of England).

prosecutions by participating in lineups and trials. Procedural fairness promotes such cooperation.²¹

A second type of cooperation is working with the police to co-police neighborhoods. This could involve attending community meetings or joining a group such as neighborhood watch.²² In contrast to the first category of behavior, these actions are more proactive and organized. Again, if people believe the police act fairly, they are more likely to join cooperative efforts in their community.²³

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21. See, e.g., JONATHAN JACKSON ET AL., JUST AUTHORITY? TRUST IN THE POLICE IN ENGLAND AND WALES 215 (2013) (“The procedural fairness of the police lies at the heart of people’s connections with legal authorities.”); Phillip Atiba Goff et al., *Crossing the Line of Legitimacy: The Impact of Cross-Deputization Policy on Crime Reporting*, 19 PSYCH. PUB. POL’Y & L. 250, 254 (2013) (finding that viewing the police as less legitimate lowers the likelihood of reporting a crime); Lyn Hinds, *Youth, Police Legitimacy and Informal Contact*, 24 J. POLICE & CRIM. PSYCHOL. 10 (2009) (finding that young people who view the police as legitimate are more willing to help them); Tammy Rinehart Kochel, *Can Police Legitimacy Promote Collective Efficacy?*, 29 JUST. Q. 384 (2012) (finding that legitimacy promotes collective efficacy among the residents of Trinidad and Tobago); Kristina Murphy, *Does Procedural Justice Matter to Youth? Comparing Adults’ and Youths’ Willingness to Collaborate with Police*, 23 POLICING & SOC’Y 1, 12 (2013) (finding that those respondents who feel fairly treated are more willing to collaborate with the police); Kristina Murphy et al., *Encouraging Public Cooperation and Support for Police*, 18 POLICING & SOC’Y 136, 136, 144-46 (2008) (observing that the results of several surveys suggest that “views about police legitimacy do influence public cooperation with the police, and that those who view the police as more legitimate are more likely to assist the police to control crime,” and that “[t]he key antecedent of legitimacy is procedural justice”); Michael D. Reisig & Camille Lloyd, *Procedural Justice, Police Legitimacy, and Helping the Police Fight Crime: Results from a Survey of Jamaican Adolescents*, 12 POLICE Q. 42, 56 (2009) (finding that among Jamaican high school students procedural justice and legitimacy led to the willingness to report suspects to the police); Sunshine & Tyler, *supra* note 13, at 526-27; Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim-Americans*, 44 LAW & SOC’Y REV. 365, 368 (2010) (finding, in a survey of Muslim Americans, that people’s willingness to help the police identify terrorist risks was linked to perceived police procedural justice); Tyler & Fagan, *supra* note 19 (finding that procedural justice shaped legitimacy in a sample of New York City residents); Tyler et al., *supra* note 13 (finding that young men who viewed the police as acting through procedural justice were more willing to help by reporting crimes); Tyler & Jackson, *supra* note 13, at 78-79 (finding, in a study of a random sample of Americans’ views about the police and the courts, that procedural justice shapes legitimacy, compliance and cooperation); Myhill & Quinton, *supra* note 20, at 2-3 (finding that police procedural fairness led to cooperation with the police in a national sample of the people in England).
22. See, e.g., Tracey Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593 (2002).
23. See Mazerolle et al., *supra* note 19, at 35; Sunshine & Tyler, *supra* note 13, at 526-27; Tyler et al., *supra* note 21, at 368; Tyler & Fagan, *supra* note 19, at 250-52.

What messages can judges, whether Supreme Court Justices or local magistrates, draw from these findings? The primary lesson is that commitment to fair procedures in decisionmaking is important, but that it is equally important to communicate to the public how justice is being done so that the public knows that judges are making decisions fairly. In other words judges need to both *be* fair and to *be seen as* being fair. These two factors, importantly, are not coincident. Being seen or perceived as fair involves transparency in procedures, explanation of rules and decisions, and the promotion of procedures that give interested parties a voice in the proceedings. Many judges devote their attention to being fair, i.e., to correctly applying the law to the facts of each case, but do not think about how they can communicate that they are being fair to the parties in the case or to the public more generally. Recognizing that those parties are themselves focused upon whether their case was handled fairly highlights the importance of attention to the issue of communicating how the case was handled and decisions were made.

B. Fair Procedures Communicate Relational Value.

Discussions of procedural fairness usually begin with a focus upon the decision-making elements we have already noted.²⁴ A focus on decisionmaking accords with the traditional legal framing of procedural design as being about how legal authorities structure trials and deliberations about cases. A fair judge is one who correctly applies the law to the facts in a particular case, usually with the goal of achieving the correct outcome. However, studies of the popular meaning of procedural justice suggest that the public considers a broader range of issues when evaluating the fairness of judicial decisionmaking. These broader issues are referred to as relational issues because they are related to the social messages communicated by the courts. The quality of the treatment that people receive is relational because it sends messages that people use to interpret their degree of inclusion within society and their social status/standing. In other words, decisionmaking is not only about the issues in dispute. Rather, it is about people's right to come before a court and to have their needs and concerns taken seriously by the authorities. As we have noted, the public is less concerned with whether the right outcome is achieved than they are about other relational matters. Interestingly, Justice Sotomayor touched directly upon this broader set of elements.

24. See *supra* note 8 and accompanying text.

What relational aspects of procedure matter to the public, and why? The public first focuses upon whether they feel treated with dignity and respect. This includes respect for people's rights as members of the community and for their status as people. They care about quality of treatment more than they care about the extent to which a decision favors them. The question, of course, is why this is the case. The quality of the treatment that people experience when dealing with societal authorities conveys social messages. High-quality treatment by legal authorities first conveys a message of inclusion, since respect for one's rights indicates standing with the community. Membership in the community ("citizenship") confers rights, and their recognition acknowledges that inclusion. Everyone in the community is an equally entitled human being, with the same rights as others. Quality of treatment communicates a message about whether authorities acknowledge that equality in standing.²⁵

Second, treatment with respect indicates one's status within society. When an authority is demeaning or disrespectful to someone who appears before them, or whose interests or values are involved in a case, that treatment communicates marginal social status. Being taken seriously, on the other hand, communicates social respect and high standing within the community. The standing of one's group or oneself is important to self-esteem because even when formally included within the general framework of rights, people can be treated as marginal, or, conversely, as valuable. While minorities have legal rights, they may nonetheless feel that they are viewed as socially inferior and less desirable than members of other social groups.

In addition to being concerned about issues involving the quality of treatment, people key in on their ability to trust in the character and motivation of judicial authorities. When people evaluate an authority, they make a judgment about that person's intentions. If they believe that the authority is sincerely seeking to do what is right, to consider the needs and concerns of the public to find a solution that is good for the people of the community, then people view that authority as trustworthy. Trust comes from the inference of such intentions. It is the expectation of future benevolence that is the product of repeated respectful interactions and a general sense of congruence of

25. Equality in standing is important in terms of public support because studies by social scientists find that the use of equality in groups fosters identification with and loyalty toward the group and its authorities. See MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE* 196-97 (1985). It is for this reason that when authorities want to make decisions that promote solidarity they use the principle of equality. David M. Messick & Terry Schell, *Evidence for an Equality Heuristic in Social Decision Making*, 80 *ACTA PSYCHOLOGICA* 311 (1992).

values.²⁶ Again, Justice Sotomayor touches directly upon this issue when she publicly recognizes the good intentions of other Justices and expresses her wish that the public were more widely aware that Justices are not motivated by ill will, but rather by good-faith efforts to do what they believe is right.²⁷

Yuen Huo's research on how the public deals with disliked groups is relevant here. A perennial issue in law is determining what obligations society owes to minority groups that want to express unpopular ideas through teaching, through public demonstrations, or in other ways. Huo presents members of the public with such groups and asks about several types of denials that might occur. The public regards the most acceptable form of denial as the refusal to provide resources to allow the group to promote its agenda. An intermediately acceptable denial is to deny the group rights, such as the right to speak or assemble. However, the least acceptable form of denial is to treat members of the group disrespectfully. In other words, of all the forms of injustice, disrespect is viewed as the most objectionable.²⁸

What is most striking about Justice Sotomayor's comments on legal procedures is how consistent they are with current psychological perspectives on why procedural justice is so central to people's evaluations of legal procedures. As we have noted, there are two elements to procedural justice: quality of decision making and quality of treatment. Early treatments of procedural justice developed out of models of court procedure; they emphasized the goals of finding accurate information and using that information to make objectively just substantive decisions. Early psychological research followed this model and focused upon using fair procedures as a mechanism for obtaining outcomes that those involved would judge to be substantively fair. Essentially, this model follows the line of argument outlined by Justice Sotomayor that the enactment of fair procedures maximizes the likelihood of obtaining substantively appropriate outcomes. This is the model that framed the classic research of John Thibaut and Laurens Walker on the perceived fairness of inquisitorial and adversarial trial procedures.²⁹

While this model has considerable plausibility and fits well within a legal framework, it has not been found to be a good description of the way that people actually evaluate the legal system. This is true irrespective of whether

26. Tyler & Jackson, *supra* note 13.

27. See Sotomayor & Greenhouse, *supra* note 4, at 3, 8.

28. Yuen J. Huo, *Justice and the Regulation of Social Relations: When and Why Do Group Members Deny Claims to Social Goods?*, 41 BRIT. J. SOC. PSYCHOL. 535 (2002).

29. THIBAUT & WALKER, *supra* note 6.

we are talking about people who are involved in actual cases as litigants or the general public when it is evaluating the court system as a legal institution. As we have noted, public evaluations center most heavily around issues of quality of treatment rather than upon evaluations of the quality of the decisionmaking of the courts.

How can we understand the public's focus on quality of treatment over the quality of decisionmaking by legal authorities? The key is the framework provided by the relational model of authority. When people evaluate legal authorities, their concerns are to some degree about particular issues or outcomes, but to a greater extent they are focused on whether authorities will acknowledge their right to bring issues and have their needs and concerns taken seriously. This perspective suggests that a central concern for many people is that authorities respect the public and acknowledge its right to respectful treatment. They also seek reassurance that authorities will take them seriously, considering their needs and concerns and making decisions that are responsive to them.

Fair procedures are important because they provide reassurance that those in positions of legal authority are attending to these relational issues. As a consequence, when people deal with an authority or are members of a group, organization, community, or society and see evidence that fair procedures are shaping decisions, rules, and policies, then they merge their sense of self with the group, intertwining their identities with group values. As people identify more closely with others and the institutions and authorities that unite them, they engage in a variety of group supporting behaviors, including following rules, accepting decisions, cooperating with authorities, and generally taking actions that people perceive will help their group.³⁰ Recent research, in fact, is able to disentangle the relative effects of people's commitment to fair procedures because of their belief that such procedures lead to more accurate or just outcomes from the effects of their commitment to fair procedures because such procedures support more positive self identity.³¹

30. TOM R. TYLER, *WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS* (2011); TOM R. TYLER & STEVEN L. BLADER, *COOPERATION IN GROUPS* (2000).

31. A recent analysis of public support for local courts provides an example of relational effects. This analysis compares the relative influence of people's belief that fairer procedures lead to greater substantive justice to the direct influence of fair procedures on legitimacy. It is this direct effect that reflects the relational influence of fairness upon legitimacy and law-related behaviors. In a comparison of influences upon legitimacy among Americans it was found that the primary factor was relational, with only a secondary influence of the decision-making aspects of fair procedures. See Tom Tyler & Justin Sevier, *How Do the Courts Create*

These findings support Justice Sotomayor's broader conception of what fairness looks like. Her efforts to humanize the Court by communicating respect to members of the public and to highlight the sincere and principled behavior of Justices touch on two core elements of public conceptions of fairness and hence are central to legitimating the court to the American public. Her comments suggest that the Justice has her finger on the pulse of the American public and hence has a good sense of how to create and maintain legitimacy for the Court and its decisions.

We live in an era of widespread distrust in our major social and political institutions. One focus of distrust is political authority, including the executive (51% of respondents express a great deal or a fair amount of trust), legislative (34%), and judicial (62%) branches of government.³² Although the judiciary fares reasonably well in contrast to the other branches of government, the proportion of Americans expressing a similar level of trust in the judiciary in 2003 was 75%.³³ Hence, Justice Sotomayor's effort seems timely.

Studies of public reactions to both the Supreme Court and to local courts, as well as to other legal authorities such as the police and administrative agencies, demonstrate that when people talk about having experienced a fair or an unfair procedure, they make their determination by considering both the fairness of decisionmaking and the fairness of treatment. These same studies further suggest that fairness of treatment is of particular importance.

1. *U.S. Supreme Court*

Recent efforts to understand public views about the Court have identified a broad set of issues that shape perceptions and presented an image of public support that includes relational concerns.

Professors Gibson and Caldeira interviewed a randomly chosen sample of Americans and found that legitimacy was linked to issues of principle and sincerity. Judges are viewed as acting out of a sincere effort to make decisions

Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly and/or Acting Through Fair Procedures, 77 ALB. L. REV. (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396945.

32. Jeffrey M. Jones, *Americans' Trust in Government Generally Down this Year*, GALLUP (Sept. 26, 2013), <http://www.gallup.com/poll/164663/americans-trust-government-generally-down-year.aspx>.

33. *Id.*

based upon principle, rather than in a strategic effort to advance their own self-interest (unlike members of Congress).³⁴

Professor Kahan argues that the challenge for the Court is to transcend the tendency for people to view it through the lens of their prior perceptions of policy-relevant facts (or “motivated reasoning”).³⁵ Kahan notes that “citizens of diverse values are prone to forming opposing *perceptions* of the Supreme Court’s neutrality.”³⁶ Kahan’s insight is interesting because he suggests that the key to gaining acceptance does not lie only in a greater effort by the Court to explain its decisionmaking procedures. He suggests that the Court may be required to “say *much more* than is required strictly to decide a case.”³⁷

Kahan argues that instead of elaborating its reasoning to promote confidence in its impartiality, the Court should consider social-psychological strategies for countering motivated reasoning. One principle is “*aporia*,” the acknowledgement of the complexity of the issues involved in a case.³⁸ This acknowledgement, as Kahan outlines it, reflects a willingness on the part of the Justices to be inclusive by acknowledging the arguments made by those on all sides of an issue. This shows everyone involved that the Court is giving fair and open-minded consideration to opposing arguments.³⁹ Kahan’s argument reflects the same spirit as Justice Sotomayor’s attempt to make her colleagues’ principled efforts to reason through cases transparent to the public.

Kahan’s second principle is affirmation.⁴⁰ Here, he emphasizes the idea of respect for people, their rights, and their standing in society. He argues that the Court should explicitly affirm people’s possession of valued traits and characteristics by communicating respect for the status and values of the groups with which they identify.⁴¹ This should be done for all the different parties involved in a case. Such recognition of people and the groups that shape

34. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 *LAW & SOC’Y REV.* 213 (2011) (“[L]egitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way.”).

35. Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *HARV. L. REV.* 19 (2011).

36. *Id.* at 58.

37. *Id.* at 71.

38. *Id.* at 62.

39. *Id.* at 63.

40. *Id.* at 67.

41. *Id.*

their identity not only promotes the Court's legitimacy, but also solidifies public identification with society and government.

Social-psychological research on minorities shows that displays of subgroup respect promote identification with social institutions, along with social engagement and psychological well-being among minority groups.⁴² This research builds upon the general finding, already noted, that when people deal with others—particularly authorities representing a group to which they belong—they are looking for information about the status they and their group have. In other words, are they, their values, and their identity respected within the larger society? If so, they identify more closely with the larger society and adopt its values, including loyalty to overarching legal and political authorities. On the other hand, messages of disrespect and exclusion promote extra-legal behaviors such as violence.⁴³

Tom Tyler and Margarita Krochik further explored the psychology of support for the Court or Congress in the context of ideological conflicts.⁴⁴ They used a vignette procedure in which those who completed a questionnaire were first told that the Court had made a decision consistent with or opposed to their own views on a controversial economic or social issue. Their findings suggest that judgments about the fairness of procedures did shape the willingness to accept Court decisions above and beyond whether those decisions reflected the person's own social or economic values. Overall, three factors mattered. The first was whether or not people assessed that the Court or Congress made decisions fairly (that is, principled decision making). The second was whether people felt that the Court or Congress considered public concerns when making decisions. And, the third was whether people felt that the Court or Congress respected public values. Of these three issues, the one most central to accepting Court decisions was whether the Court was seen as considering public concerns.⁴⁵

42. Yuen J. Huo & Ludwin E. Molina, *Is Pluralism a Viable Model of Diversity?: The Benefits and Limits of Subgroup Respect*, 9 GROUP PROCESSES & INTERGROUP RELATIONS 359 (2006); Yuen J. Huo et al., *Subgroup Respect, Social Engagement, and Well-Being: A Field Study of an Ethnically Diverse High School*, 16 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 427 (2010).

43. Joy D. Leary et al., *The African American Adolescent Respect Scale: A Measure of a Prosocial Attitude*, 15 RES. ON SOC. WORK PRAC. 462 (2005).

44. Tom Tyler & Margarita Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict*, 88 CHI.-KENT L. REV. 433 (2013).

45. *Id.* at 445.

2. *Local Courts*

It is also possible to consider the legitimacy of local courts. Tom Tyler & Justin Sevier used information collected from a national sample of Americans to examine the legitimacy of local courts.⁴⁶ They examined the degree to which court legitimacy was based upon the quality of the decisionmaking of the courts, defined as the frequency with which the courts were believed to make accurate decisions and to punish appropriately. Although their results indicate that legitimacy is, to some extent, based upon the evaluation of the quality of decisionmaking of the courts, the primary factor shaping legitimacy is the perceived quality of the treatment people received from judicial authorities. This includes whether people believe that they are respected when they deal with the courts and whether they think that judges care about and consider people's needs and concerns when making decisions. The study also shows that people are more willing to cooperate with the courts when they view them as legitimate. This includes a greater willingness to bring disputes to court instead of engaging in private violence and more willingness to be a witness in a court proceeding.

What implications do these findings have for the Court? First, they suggest the wisdom and value of the efforts that Justice Sotomayor is already undertaking to strengthen the connection between the Court and the public. And research findings support the Justice's intuition that this effort needs to be broader than focusing on the neutrality and factuality of Court decisionmaking. Those are important elements of the public's view of the Court, but research findings point to issues of trust in the motives of the Justices and their willingness to recognize and acknowledge public concerns. Hence, these are obvious points of contact with the public.

C. Fair Procedures Legitimize Authorities and Institutions, Promote Identification with Government, and Lead to Higher Levels of Compliance and Cooperation

In her comments, Justice Sotomayor suggests that the long-term goals in making and explaining judicial decisions should be to build respect for the law as an important institution in our lives and to enable people to identify with democracy. Again, social science findings suggest that the way to achieve these goals is in exactly the manner the Justice outlines. Studies suggest clearly that

⁴⁶ Tyler & Sevier, *supra* note 31.

authorities and institutions gain legitimacy and promote identification with themselves and the community they represent when they exercise their authority fairly.⁴⁷ Legitimacy has important consequences, therefore, for the viability of law, government, and society.

Procedural justice is important at several stages institutionally. First, it is important when rules are being formulated. Here, people value the opportunity to participate by being able to express their views and deliberate with others as rules are being formulated. Once rules exist, people focus on whether procedural justice occurs as rules are implemented, including fair decisionmaking and fair treatment. The connection of procedural justice to legitimacy is direct for both the Supreme Court and for local courts and other

47. TYLER, *supra* note 13 (suggesting, through a study of the residents of Chicago, that those who believe the police are procedurally just comply with the law more frequently in their everyday lives); Bradford, *supra* note 15, at 345 (“By providing [crime] victims with voice and a sense that someone is listening to and taking their concerns seriously, contact with victims services seems to be linked to more favourable overall assessments of the criminal justice system.”); Elliott et al., *supra* note 19, at 592 (“[F]indings supported the predictions that higher perceived antecedents of procedural justice would be associated with higher perceived legitimacy.”); Gau & Brunson, *Procedural Justice*, *supra* note 19; Badi Hasisi & David Weisburd, *Going Beyond Ascribed Identities: The Importance of Procedural Justice in Airport Security Screening in Israel*, 45 LAW & SOC’Y REV. 867 (2011) (finding that procedural justice during airport security screening shapes the legitimacy of the police and their procedures); Hinds, *supra* note 19, at 195 (“Young people’s attitudes toward police legitimacy are positively linked to police use of procedural justice.”); Hinds & Murphy, *supra* note 19, at 27 (“People who believe the police use procedural justice when they exercise their authority are more likely to view police as legitimate, and in turn are more satisfied with police services.”); Jonathan-Zamir & Weisburd, *supra* note 19, at 4 (finding that in Israeli communities “procedural justice is consistently the primary antecedent of police legitimacy”); Mazerolle et al., *supra* note 19; Myhill & Bradford, *supra* note 19, at 397 (finding that the key issue in the effect of encounters with police on perceived legitimacy is quality of “personal treatment”); Taylor & Lawton, *supra* note 19, at 414 (finding, in a study of people in Pennsylvania, the “importance of police simultaneously maintaining order and treating citizens fairly”); Tyler, *Public Trust*, *supra* note 15, at 215 (“Analysis from several studies exploring the basis of public views support this procedural justice based model of public evaluation.”); Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629 (1989) (showing that people on trial for felonies generalize from the procedural justice they feel they received in their trial to their views about law and government legitimacy); Wemmers et al., *supra* note 15 (finding that Dutch crime victims evaluated the criminal justice process through a procedural justice frame); Abuwala & Farole, *supra* note 15 (finding that interviews with people appearing in the Harlem and downtown project courts suggest that fairer treatment was linked to higher satisfaction with the courts); Farole, *supra* note 15, at 17 (finding that interviews with people appearing in the Harlem and downtown project courts suggest that fairer treatment was linked to higher satisfaction with the courts).

legal authorities. When judges act fairly, the public feels a stronger obligation to defer to their decisions and support the institutions they represent.

In addition, the use of fair procedures builds identification with authorities and the communities they represent. For example, research shows that when people evaluate the police in their community as acting fairly, their identification with the police is greater⁴⁸—a result that resonates deeply with Justice Sotomayor’s comments in her Thomas Lecture. As an example, people who were treated fairly by the police were more likely to think that they shared a similar background with police officers and could understand their actions. Further, they felt that those officers respected them and their values. They were also more likely to indicate that they felt they “belonged in their community” and that being a resident of their community was “important to the way they thought of themselves as a person.”⁴⁹

Research further demonstrates that, as Justice Sotomayor suggests, there are important positive consequences for communities in which people identify with legal and governmental authorities and institutions and the community they represent.⁵⁰ Studies by social psychologists demonstrate that when people identify with a group they blur the distinction between self-interest and group-interest. They increasingly view the well-being of the group as central to their own identify and work on behalf of the group. Of particular importance is the increasingly voluntary nature of cooperation with the group that develops out of identification. People want their group to be successful and group success becomes the same as personal success.⁵¹

Finally, the Justice’s comments are strikingly convergent with recent social science research concerning potential goals for the legal system and their relationship to popular legitimacy. Traditionally, legal authorities primarily focused on obtaining public compliance with the law. Both legitimacy and sanction threats are found to motivate compliance.⁵² Increasingly, discussions of law and legal authority have emphasized the importance of willing acceptance, voluntary acceptance, and cooperation as goals for legal authorities.⁵³ This shift is important because, unlike compliance, voluntary

48. Tyler & Fagan, *supra* note 19, at 260.

49. TYLER, *supra* note 30.

50. Tyler & Jackson, *supra* note 13.

51. TYLER, *supra* note 30, at 146-66 (summarizing factors contributing to group-based motivation).

52. TYLER, *supra* note 13.

53. Tyler & Jackson, *supra* note 13.

deference and willing cooperation are heavily dependent upon popular legitimacy, making having such legitimacy increasingly important just at a time when many institutions are seeing declines in public trust and confidence.

While cooperation is not the same goal as compliance, both of these goals are often conceptualized similarly in that their focus is on the issues associated with maintaining social order—i.e., reporting crimes and criminals, being involved in a neighborhood watch, testifying in court, or serving on juries. The legal system increasingly depends upon such cooperation as the number of societal resources that can be devoted to legal institutions declines.

However, police authorities increasingly recognize that the problem of social order cannot be separated from community problems, and you cannot arrest your way out of crime.⁵⁴ Hence the issue is whether legal authority can be exercised in ways that promote identification with communities, encourage economic and social activity, and promote the overall legitimacy of government. Studies suggest that experiences with the legal system do influence views about government.⁵⁵ Similarly, the results of a recent national survey of Americans suggest that when people evaluate their police and court systems as procedurally fair, they identify more with their communities and engage in them socially, by trusting neighbors; politically, by voting; and economically, by shopping and going to entertainment venues within that community.⁵⁶ Hence, trust in law and legal authorities can promote community well-being and support for government.

Justice Sotomayor's comments anticipate and complement this discussion of the important role of the local police and courts in creating a climate for social, political, and economic development. People thrive when they feel reassurance where they live and work. It is important for people to feel that if they call upon the police and courts their security will be protected, but also that they will be treated with respect and their rights recognized if they deal with those authorities. Of course, most people in a community seldom call upon the police or the courts for services, but the police and courts are in the background in every community and shape what people think, feel, and do.

54. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 WM. & MARY L. REV. 1865 (2012); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998).

55. *E.g.*, Tyler et al., *supra* note 47.

56. Tyler & Jackson, *supra* note 13.

People want to feel comfort, not fear, when the police are present and to anticipate that they will receive help and professional treatment if they need it. Similarly, as a prerequisite to making contracts and working with others, people want to feel that if they are involved in a dispute they can trust the courts to rectify injustices.

Of course, Justice Sotomayor is not the only Supreme Court Justice to recognize the role of law and legal authorities in promoting communities and government. Justice Breyer similarly argues that the courts are central to creating a context in which communities can “respond to a universal need present in every society, that for some method for resolving disputes among individuals.”⁵⁷ Further, Justice Breyer recognizes the importance of Court legitimacy, suggesting that “public acceptance is not automatic and cannot be taken for granted. The Court itself must help maintain the public’s trust in the Court, the public’s confidence in the Constitution, and the public’s commitment to the rule of law.”⁵⁸ And he notes the need to motivate political participation as a way of maintaining a viable democracy. He notes: “The Constitution’s efforts to create democratic political institutions mean little unless the public participates in American political life.”⁵⁹ However, Justice Breyer does not address the issue of how the Court can facilitate these goals. It is the pairing of these goals with a strategy for achieving them that brings Justice Sotomayor’s comments so sharply into line with recent social science findings.

SUMMARY

There is a striking correspondence between the findings of recent research on the psychology of popular legitimacy and the jurisprudence of Justice Sotomayor. While she does not do so, the Justice could cite a wide range of recent social science scholarship in support of her perspective on how the courts should function so as to best build a viable society.

There are several potential benefits of calling attention to that research. One reason is to provide support for her perspective. As we have noted, both judges in general and Supreme Court Justices in particular have approached

57. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 138 (2010).

58. *Id.* at xiii.

59. *Id.* at 215.

judging from a range of theories of interpretation.⁶⁰ How can we decide which perspective on interpretation ought to be used? One approach is to identify goals and then consider what we know from empirical research about how to achieve those goals.⁶¹

Social science research has illuminated some of these goals, including the ability to gain public deference to court decisions, the capacity to enhance public willingness to empower courts to resolve conflicts and evaluate laws and policies, and the capability of the communities and the overall structure of government within which the court system exists. All of these goals are addressed both by local courts and, at a national level, by federal courts, including the Supreme Court. How can these goals be achieved? As we have outlined, social science suggests that the key to public support is popular legitimacy. Further, the central factor shaping popular legitimacy is an evaluation of the fairness with which the courts exercise their authority. The widespread nature and strength of these findings argues for the value of relying upon this social science framing as a way of evaluating interpretive strategies of judicial decisionmaking both at the local and the federal level.

These social science findings can help to sharpen Justice Sotomayor’s general message. When she argues for the value of humanizing the justices and respecting the public, her argument is anecdotal and general in tone. The social science findings outlined here are more specific and provide a set of guidelines for implementing a strategy to achieve the goals she articulates. In particular, efforts to humanize judges can benefit from social science models of motive-based trust—the factors that shape inferences about the character and intention of authorities—and respect for the public can be bolstered by considering the important role that authorities such as judges play in communicating messages about inclusion and status.

60. Interestingly textualism is also defended by Justice Scalia by reference to public support for the courts. In his book with Bryan Garner, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012), Justice Scalia argues that “[t]he descent into social rancor over judicial decisions is largely traceable to nontextual means of interpretation, which erodes society’s confidence in a rule of law.” *Id.* at xxviii. He suggests this erosion then leads to a decline of faith in democratic institutions. Justice Scalia’s focus upon the content of opinions as a source of legitimacy is different from the perspective being advocated in this Essay, but the quote shows that, irrespective of how Justices think the Court is legitimated, they recognize that impact upon popular legitimacy is a criterion against which to evaluate the actions of the Court.

61. Tracey L. Meares & Bernard E. Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (1999).

Finally, the social science findings outlined above point to the limits of the type of instrumental models of legal and political authority that have dominated legal scholarship and judicial decisionmaking over the last several decades. The instrumental model suggests that people's connection to law and legal authority is primarily shaped by the outcomes that people experience. On this model, the central public concerns about local courts are about the cost of litigation, the time it takes, and the favorability of outcomes. Similarly, public concerns with federal courts mainly center around obtaining desirable policy decisions.

In contrast, the large body of research we note here highlights that the public connection to the courts is primarily motivated by a desire for non-instrumental notions of justice, a finding also supported by recent studies of the motivations underlying litigation. For example, Gillian Hadfield has found that litigation decisions by 9/11 victims were motivated by nonmonetary concerns about values and accountability;⁶² Tamara Relis has shown that the concerns of medical malpractice victims are shaped by principles that include the desire for treatment with dignity and respect, the desire to be heard, and the desire for those responsible to be blamed for their wrongdoing;⁶³ and Tess Wilkinson-Ryan and David Hoffman have demonstrated that reactions to contract breaches are influenced by inferences concerning the character of the other party and their perceived intentions in breaching the contract.⁶⁴ Similarly, decisions about whether or not to appeal court decisions are shaped by non-instrumental issues. In particular, litigants want to receive a hearing on issues that they feel were not heard in the trial court, with people interpreting the court's willingness to grant such a hearing as vindicating them in the sense that the court is acknowledging the importance of listening to them articulate their needs and concerns even if it does not accept their legal arguments.⁶⁵ People's relationship to judges and courts, in other words, is centered around the very type of non-instrumental issues we have outlined here—issues that Justice Sotomayor, in her writings and jurisprudence, seems to deeply understand.

62. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645 (2008).

63. Tamara Relis, "It's Not About the Money!": *A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 *U. PITT. L. REV.* 341 (2006).

64. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 *VAND. L. REV.* 1003 (2010).

65. SCOTT BARCLAY, *AN APPEALING ACT: WHY PEOPLE APPEAL IN CIVIL CASES* (1999).

THE JURISPRUDENCE OF PROCEDURAL JUSTICE

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