What Fairness-and-Denial Research Could Have Told the Florida Supreme Court (and Can Tell the Rest of Us)

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Peron brought us social justice—and ruined the country.
—Remark of an Argentine tourist guide, Buenos Aires, 1996

On November 21, 2000, the Florida Supreme Court ordered the resumption of manual vote recounts in selected Florida counties, overruling the Florida secretary of state and a lower court, and triggering one of the bitterest debates in recent U.S. history. At stake was whether Al Gore or George W. Bush had won Florida's presidential election and thereby the U.S. presidency.

National cable news stations featured contending experts analyzing the Florida court's action and its aftermath around the clock. Both the Bush and the Gore advocates followed a basic unfairness/denial strategy: (1) use the same evidence and arguments repeatedly to accuse the other side of unfair tactics, and (2) deny the validity of the other side's arguments or simply ignore them.

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To those familiar with fairness-and-denial research results, the aftermath of the Florida Supreme Court's action came as no surprise. It was, in fact, typical of nonmarket situations in which the stakes are sufficiently high. For example, government policy on who gets an organ transplant has passed through cycles of similarly bitter debates: the policy seems set in stone, only to be attacked by a group alleging that its members are being treated unfairly; the policy is then changed and is seemingly fixed for good—until the next cycle. Likewise, immigration policy has passed through similar cycles.[1] Many other examples might be cited. Most of these situations, however, affect only a small fraction of the population, so they do not capture the attention of the entire nation, and the phenomenon's predictability is not appreciated.

Research on fairness and denial makes clear the reasons for the predictability. Here, I am not referring to prescriptive writings about how we *ought* to act. Instead, I refer to descriptive and analytic research that attempts to determine how humans actually *do* act when faced with a fairness decision. In the jargon currently fashionable in the social sciences, this research focuses on developing *positive* rather than *normative* fairness theories and on the empirical studies to undergird them.[2]

As I spell out in more detail below, this research shows that what we consider to be "fair" is both complex and opaque. We do not really understand fairness. Yet, paradoxically, we have no problem recognizing "unfair" behavior when we see it. Also, to a large extent, context and the institutional setting determine what is regarded as "fair." "Fair behavior" in one institution is not necessarily considered to be fair in another.

In addition, we tend to suppress that which does not accord with our self-interest. Usually, the need for stable institutions keeps this tendency in check and subdues the use of fairness claims as a strategic weapon to gain self-interest. When the stakes are high enough, however, self-interested forces can come to the fore and give rise to fairness strategizing.

Family members may always sit in the same places at the dinner table. Suzie concludes that her parents are favoring her brother Johnny, and, consciously or unconsciously, she decides to test them. One day Johnny comes to dinner only to find Suzie sitting in "his" spot. He demands that Suzie move. A terrific row breaks out, with both Johnny and Suzie each yelling that the other is "unfairly" demanding the now-privileged spot and with Suzie tearfully accusing her parents of favoring Johnny.

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1. See Elster 1995 for a description of the fairness fights over kidney transplants and U.S. immigration policy as well as other examples of long-lasting and controversial fairness controversies. More recently, Barnett, Saliba, and Walker (2001) have surveyed the literature on fair (equitable) allocation of kidney transplants, arguing that the free market is the fairest allocation method of all.

2. Some researchers reject the positive/normative dichotomy. After all, normative theory must be based on facts—on some positive theory of what exists—and positive theorists may easily slip their own normative outlook into their work. This view has merit. Nonetheless, I find the positive/normative distinction to be a useful way to organize the research on fairness. The research I cite in this article is generally, but not completely, focused on the development of positive theory.

In political disputes, interest groups playing Suzie's role engage in what might be called a fairness game. Contestants—mainly politicians and interest groups—trot out their best unfairness attacks and jockey for the most advantageous institutional setting. Their goal is to gain voter support by demonstrating that they, or others, have been treated unfairly. Players who think that fairness (social justice, equality, equity) is self-evident and requires no delineation can go down to humiliating defeats by opponents more skilled in the use of unfairness/denial weapons. Indeed, skilled players have often taken over entire nations by using the same demagogic technique: convince your followers that they have been treated unfairly. They will soon shut out any arguments to the contrary and will follow you enthusiastically as you lead them to the promised land of "social justice" and your dictatorship.

The unfairness/denial phenomenon and accompanying fairness tactics are not confined to politics. They have become more and more common in our court system, as Lawrence Friedman has described in his book *Total Justice* ([1985] 1994). He attributes toleration of such tactics to the courts' bowing to the popular will. In effect, he argues that supply and demand are at work: there is a demand for courts to rectify "unfairnesses" or "injustices"—as he puts it, to institute "total justice"—and the courts have found that their own interests are served by responding to that demand. In the presidential imbroglio, the Florida Supreme Court, already famous for its "judicial activism," just did what it was used to doing, in complete confidence that it was acting with the highest and purest of motives.

The Structure of Fairness/Unfairness

In my experience, the public's view of fairness seems to vacillate between "fairness is arbitrary—it's in the eye of the beholder" and "what is fair is obvious." These views are not as contradictory as they might seem.

Most of us have little knowledge of the complex biological, physiological, and anatomical elements of the human body and how they all interact to allow us to function. Still, we generally know when we are sick. Similarly, if we happen to look under the hood of our car, we are shocked to see the jumble of wires and tubing. How they cause the car to respond to our commands to go forward or backward or to turn is a mystery. Yet we know when the car won't start or when it makes strange noises.

In general, we know little in detail about most things. As economists routinely teach in their courses, this prevailing ignorance is to be expected. To learn about something requires spending that most precious resource, our time. We spend it only if the expected benefits exceed the cost. In the current economic jargon, we remain "rationally ignorant" of most things, and we become "rationally knowledgeable" about only a few things—those that pass our individual benefit/cost test. Luckily, for many things, such as our body or our car, warning systems indicate when we should seek expert help or prepare to battle for our interests.

Similarly, we go through life interacting with others according to fairness norms to which we give no thought. Like the structure and rules that regulate our bodies or our automobiles, the structure and rules of fairness are complex. Moreover, they are subject to manipulation. Although we are "rationally ignorant" of their detailed structure, we have a warning system; we know when we have been treated unfairly—when we have been "screwed," "shafted," "taken to the cleaners," and so forth.

Rational ignorance of the fairness structure results in the common view that fairness is completely arbitrary, but it isn't. I cannot assign my students their course grades based on the color of the shirts they wore on the first day of class, nor can faculty salaries be based on a faculty member's grandmother's maiden name. Students or faculty would revolt. Likewise, because a warning system quickly alerts us that we are being treated unfairly, we perceive that "what is fair is obvious."

Research on discovering and organizing the structure of fairness and its rules began approximately four decades ago. Psychologists pioneered the research. Economists, sociologists, philosophers, and political scientists have joined them. The main research tools have been surveys, case studies, and laboratory experiments using human subjects.

Much remains to be done. Nonetheless, the outlines of the structure of fairness seem clear. Here is a brief summary.[3]

Genetic Roots and Reciprocation

In his book *Influence: The Psychology of Persuasion,* Robert Cialdini ([1984] 1993) describes an experiment in which a university professor colleague sent Christmas cards to a sample of perfect strangers. A high proportion of the strangers reciprocated by sending Christmas cards to him even though they had never met or heard of him. Reciprocation, both positive and negative, seems to be a common practice.

Recent research indicates that reciprocation, like the ability to learn a language, may be hardwired into our brains, the evolutionary result of millennia of survival of the human species (for a summary of the recent research on reciprocation in evolutionary biology and psychology, see V. Smith 1998).

Whatever its origins, reciprocation has given rise to much moral theorizing. Witness the Golden Rule and its counterpart in most major religions. Our hardwired need and ability to reciprocate seems to have evolved into a complex set of fairness norms that govern human behavior. Still, little is known about how we got from the genetic roots to where we are today, why and how societies have evolved fairness norms, and why we have a warning system that alerts us to unfair treatment.

3. For other taxonomies of fairness principles, see Young 1994 (six axioms as the basis of a mathematical characterization of distributive justice); Sheppard, Lewicki, and Minton 1992 (eighteen principles of distributive, procedural, and systemwide justice); and Gilliland 1993 (nine procedural rules that enhance the perceived fairness of personnel selection procedures). The reader interested in positive fairness research can also find more in Bar-Hillel and Yaari 1984; Cropanzano and Greenberg 1997; Elster 1995; Greenberg 1996; and Jasso 1990.

The Formal Principle of Distributive Justice, Material Principles

Suppose you and I stumble across four $100 bills lying on the sidewalk. How would we divide them? Probably equally, $200 for you and $200 for me. On the other hand, suppose we jointly make something and sell it for $400, but I put in three hours of work to make it, and you put in only one hour. In this case, we would probably divide the $400 in proportion to our respective work efforts, $300 for me and $100 for you. Finally, suppose we are given a frosted cake, but you have a disease that requires you to consume three times as much sugar as a normal person, whereas I have normal dietary requirements. I might readily agree that you should eat three-quarters of the cake and I just one-quarter.

These three cases illustrate a general principle of justice or fairness. In the case of finding money on the sidewalk, we believed that we had equal claims, so we divided the money equally. In the case in which we profited $400 through our work efforts, I had a claim to three times as much as you because of our respective work efforts: I deserved three times as much as you, so we used the principle of *desert* to divide the $400. Finally, in the case of dividing the cake, we applied the principle of *need* to award you three times as much cake as we awarded me.

The general principle at work here goes back to Aristotle, and philosophers variously call it the *Aristotelian* or *Formal Principle* (see Buchanan and Mathieu 1986 for further discussion). It states that if we have equal claims to an economic pie, we divide the pie equally. If we have unequal claims, we divide it in proportion to the values of our claims. A standard expression of the idea is:

> *Formal Principle:* Equals should be treated equally and unequals unequally, in proportion to relevant similarities and differences.

The important point here is that you should not treat unequals (people with different claims) in an arbitrarily unequal way, but rather in proportion to something *relevant*—their claims. These claims might be similar (perhaps their work effort) or different (perhaps their needs).

If I present the Formal Principle to students without any explanation, they find it confusing and meaningless, but if I explain and illustrate it with examples, they find it a convenient shorthand for a general principle of fairness that is deeply ingrained in us and that we all use repeatedly. In fact, it is so universal that some writers reserve the term *fairness* to mean the Formal Principle, and they coin other terms for other fairness principles.

One such term, *material principle,* is used to designate a fairness principle that assigns specific meanings to the phrases "in proportion to" and "relevant similarities and differences" in the Formal Principle. We have already encountered two material principles, *desert* and *need*, but many others have been advanced, including *merit* (some colleges admit students strictly on the basis of merit, as determined by such

indicators as SAT scores and high school grades) and *seniority* (union contracts often specify that pay be based solely on length of employment). *Ethnicity, age,* and *sex* are material principles that have undergone a change. Formerly, the "wrong" ethnicity, age, or sex entailed that you received less pay than others. Under today's legal codes, however, none of these attributes is supposed to be used in the determination of pay.

Still other material principles are intended to assure that any process for dividing an economic pie be free of bias. For example, the allocation system should be:

- *nondiscretionary*—the distribution rules should be set in advance and administered without discretion
- *nonmanipulative*—the rules should be impervious to strategic manipulation
- *noncoercive*—the allocator should not have undue power

Means of ensuring nondiscretion, nonmanipulability, and noncoerciveness include the use of lotteries, rotation (taking turns), and queuing.

Still other material principles deal with the effects of history. An example is the idea that one is entitled to retain a beneficial status quo, an entitlement sometimes called a "status quo property (equity) right." Johnny evoked this entitlement in the family dinner example. When an occupation is first licensed, practitioners with experience are typically "grandfathered in"—not required to pass examinations or meet the educational requirements of new licensees. Likewise, when a building code is changed, it is common to "grandfather in" existing buildings—that is, to exempt them from the code's new requirements. In other contexts, however, such as athletic contests, the criminal-justice system, and competitive bidding on contracts, institutions go out of their way to ensure that history has no effect, that no status quo property rights are respected.[4]

The preceding list of common material (specific) principles is not meant to be exhaustive, especially inasmuch as the principles overlap. For example, basing pay on seniority might be viewed as basing it at least partially on desert under the supposition that employees who have a longer period of loyal and conscientious service to an employer deserve more pay. Further, material principles are usually applied in combinations, which generates still more material principles.

An open research question is, "Does there exist a minimal set of nonoverlapping fairness principles that describe all of human fairness behavior, and, if such a set exists, what principles belong to it?"

Institutional Framing

A key finding is that context heavily influences how we perceive fairness. Laboratory experiments involving human subjects trying to divide an economic pie for payoffs in dollars are illustrative. In such experiments involving a large number of subjects (say,

4. For more on status quo property rights, see Elster 1995; Isaac, Mathieu, and Zajac 1991; Kahneman, Knetsch, and Thaler 1986; and Zajac 1995.

more than twenty) in impersonal trades in a marketlike setting, the fairness of the payoffs almost *never* becomes an issue. On the other hand, in experiments with a small number of subjects (say, fewer than six) in face-to-face interactions, the fairness of the payoffs almost *always* becomes an issue. Little is known about the in-between cases (see Isaac, Mathieu, and Zajac 1991 for further discussion of this experimental finding).

These findings reflect what we see outside the laboratory. In market transactions—purchasing groceries, buying a home, playing the stock market—the fairness of resource-allocation decisions rarely comes up. In market transactions, money is often exchanged for something tangible and material. Money depersonalizes exchange and makes fairness a minor issue, if one at all.

On the other hand, in nonmarket transactions involving a small number of persons in face-to-face situations, the transaction may be intensely personal, as it is, for example, in the division of assets in a divorce, in a law firm's distribution of its annual proceeds among its partners, or in an academic department head's assignment of office space to the faculty. In those cases, the fairness of the allocation is often the *central* issue.

Thus, when we study fairness, a useful dichotomy is market versus nonmarket institutions. Although this dichotomy is helpful, however, it still leaves us with a tough job: to understand fairness within each of the large number of nonmarket institutions in which we function—the family, the workplace, the PTA and other civic associations, and so forth.

A useful starting point may be the following insight: the Formal Principle may be so universal because we typically make our decisions in the context of institutions that assign meanings to its vague terms; we expect institutions to perform that function and accept their doing so as a fact of life. In the jargon introduced above, *institutions materialize the Formal Principle,* and we expect them to do so. For example, you and your boss probably have different size offices; the boss's office probably has nicer furniture than yours, and the boss probably has a larger travel budget. At your work place, everyone accepts such inequalities. If you and your boss play tennis on the weekends, however, both of you as players of that game are equally bound by the rules of tennis.

The philosopher Michael Walzer has introduced the similar notion of "spheres of justice." He points out that although complete equality has great appeal, it is impossible to attain: "we may dream of a society where everyone has the same amount of money. But we know that money equally distributed at twelve noon of a Sunday will have been unequally redistributed before the week is out. Some people will save it, and others will invest it, and still others will spend it (and they will do so in different ways)" (1983, 11). Walzer goes on to formulate a normative theory of "complex equality," stressing that *equality* will and should be interpreted differently in different spheres of society. As illustration, he presents an example similar to the distinction between the workplace and the tennis court: "Thus, citizen X may be chosen over citizen Y for political office, and then the two of them will be unequal in the sphere of politics. But they will not be unequal generally so long as X's office gives him no

advantages of Y in any other sphere—superior medical care, access to better schools for his children, entrepreneurial opportunities, and so on" (1983, 19).

Likewise, from the psychological literature, we have the following statement by J. Greenberg: "What makes a set of questions appropriate in one context may not make them equally appropriate in another. Questions about justice should be carefully matched to the context of interest" (1996, 402).

The point is that fairness depends heavily on the context. What is considered fair in one institution is not necessarily considered fair in another. *Institutions frame perceptions of fairness* (Isaac, Mathieu, and Zajac 1991).

Fairness Overdetermination

Jan Elster has observed insightfully that "procedures are over-determined by principles" (1995, 294). Typically, an institution can choose to govern itself by many overlapping and potentially conflicting material principles. Big external disturbances or great opportunities for some members to gain, however, give rise to pressures for institutional change. On such occasions, overdetermination provides a basis for change and strategic behavior.

Needless to say, the law is overdetermined, as the Florida election episode demonstrates. In resolving the difficult issues of that dispute, the justices of the U.S. Supreme Court and of the Florida Supreme Court seemed at times to be relying on the laws of different countries, as they cited different precedents and different principles of constitutional law to justify their reasoning.

Contract-Breaking Behavior

Perceived unfair treatment is a great energizer, and the rectification of unfairness strongly motivates the creation of new policy. Often the feeling of unfair treatment is the feeling that a contract, implicit or explicit, has been broken. The perceived unfairness of contract-breaking behavior seems to be universal and important.

Denial, Rationalization, Self-Serving Behavior, and Adam Smith's "Veil of Self-Delusion"

> He is . . . bold who does not hesitate to pull off the veil of self-delusion which covers from his view the deformities of his own conduct. . . . This self-deceit, this fatal weakness of mankind, is the source of half the disorders of human life.
>
> **—Adam Smith, *The Theory of Moral Sentiments***

> [F]ew of the criminals in Sing Sing regard themselves as bad men. They are just as human as you and I. So they rationalize, they explain. . . . Most of them attempt by a form of reasoning, fallacious or logical, to justify their

> antisocial acts even to themselves, consequently stoutly maintaining that they never should have been imprisoned at all.
>
> **—Lewis Laws, former warden of Sing Sing Prison, qtd. in Dale Carnegie's *How to Win Friends and Influence People***

The rejection of reality is a commonly observed human trait. We may think that we are smarter, abler, and handsomer than we really are. Almost every organization has employees who, by deluding themselves, have acquired inflated opinions of their abilities and contributions. We may reject evidence that does not serve our purpose, or we may obfuscate or distort it, putting it in the best possible light. Further, our rejection of reality may be self-serving or self-defeating. We may even ignore the symptoms of a serious illness and thereby deprive ourselves of lifesaving medical treatment. For lack of a better word, I use *denial* as a general term to denote reality-rejecting behavior.

Leon Festinger's 1957 book *A Theory of Cognitive Dissonance* presents a theory of denial in this general sense. Festinger's basic argument is that our brains are filled with simplified models of reality that reduce to such elements as beliefs, opinions, and worldviews. We dislike contradictory evidence that clashes with our simplified models because it gives rise to "cognitive dissonance." We therefore strive to reduce that dissonance in various ways. We might change our self-serving beliefs—Sing Sing prisoners might finally admit their guilt and accept the evidence supporting it. On the other hand, we might reject the evidence that causes the dissonance—as Warden Laws claimed that Sing Sing prisoners actually did—either ignoring it or finding alternative evidence that supports our own models. We are all prone to such mental maneuvers. Moreover, we can reject reality with great conviction. According to news accounts, Timothy McVeigh, the "Oklahoma City bomber," went to his execution convinced that his killing of 168 innocent people was totally justified ("McVeigh Says" 2001).

Not all psychologists accept Festinger's theory completely. Many alternative explanations may account for the casually observed human behavior in question. Some of Warden Laws's inmates might have been acting cynically, knowing full well they were guilty but continually maintaining their innocence in the hope that such protestations might somehow shorten their sentences. In addition, cognitive dissonance sweeps up various sorts and degrees of behavior, from the self-delusion emphasized by Adam Smith to the rejection of evidence that contradicts our beliefs or to the interpretation of evidence in a way that favors us.

Many of these problems can be overcome by using surveys and controlled laboratory experiments and by narrowing the focus to test for the existence of self-serving biases. A large body of psychological research takes this approach, demonstrating the existence of not only individual self-serving biases but group self-serving biases as well. Among the findings cited by L. Babcock and G. Lowenstein are the following:

individual self-serving bias:

> over half of survey respondents typically rate themselves in the top 50 percent of drivers, . . . [and as having great] ethics, . . . managerial prowess, . . . productivity, . . . health, . . . and a variety of desirable skills.
>
> When married couples estimate the fraction of various household tasks they are responsible for, their estimates typically add to more than 100 percent.
>
> People also tend to attribute their successes to ability and skill, but their failures to bad luck.

Group self-serving bias:

> [Princeton and Dartmouth] students viewed a film of [a football] game and counted the number of penalties committed by both teams. Princeton students saw the Dartmouth team commit twice as many flagrant penalties and three times as many mild penalties as their own team. Dartmouth students, on the other hand, recorded an approximately equal number of penalties by both teams. While the truth probably lies somewhere in between, the researchers concluded that it was as if the two groups of students "saw a different game." (1997, 111)[5]

Politicians vie with each other to show that their only goal is to promote the "public interest" and that they do not and will not cave in to "special interests." At the same time, op-ed articles and interviews with interest-group leaders show that the "special interests" do not view themselves as working against the public interest. Of course, the group may be acting cynically, trying to manipulate public opinion to advance its own purposes. More likely, it will have found a public-interest argument to support its position—doing so is rarely difficult. Thus, it will have convinced itself that its cause is righteous and that it is advancing the public interest and the common good. That its position is self-serving may happen to be true, but the group may sincerely feel that self-service is not its main concern.

The Florida Fairness Games

The preceding discussion provides helpful background for understanding the Florida Supreme Court's first major decision in the 2000 presidential election dispute. Fairness is a jumble of intertwined and overlapping norms that, applied in different contexts and institutional settings, may lead to contradictory conclusions. Although fair-

5. The interested reader can find a recent survey of this literature and the general literature on cognitive dissonance in Konow 2000. Konow also builds and experimentally verifies a theoretical model that assumes that human subjects apply a combination of a refinement of the Formal Principle and cognitive-dissonance resolution in deciding how to share resources "fairly."

ness is not as simple and self-evident as it is usually assumed to be, people are nonetheless quick to perceive unfair treatment and to demand that public officials, and certainly judges, not treat them unfairly. Any hint of unfair action may provoke an unfairness/denial attack by an adversely affected interest group, which in turn may give rise to an unfairness/denial counterattack by another interest group. The higher the stakes, the more likely are these attacks and counterattacks.

Obviously, to avoid setting off an unfairness/denial explosion, the Florida Supreme Court needed to walk extra miles to base its decision and remedies on explicit and firm rules. Instead, it walked into a mine field.

To the court came a lower-court decision upholding an order by the Florida secretary of state Katherine Harris. That order denied requests by three counties that had given Gore large majorities to continue manual recounts beyond the statutory deadline of 5:00 P.M., November 14. It set the stage for Harris to certify Bush as the winner of Florida's electoral votes. The court knew that the initial vote tabulation had Bush winning by 1,784 votes out of nearly 6 million counted, or by a margin of 0.03 percent, well within the estimated measurement error.[6] This margin diminished with each manual recount and partial manual recount. Within the range of measurement error, the election had yielded a tie.

The machine count was subject to machine error. Attempts to divine the intent of the voter whose ballot had been spewed out as ambiguous by the machine were also subject to human error. Probably no amount of further counting by any means, machine or manual, would have been able to remove all measurement errors and break the tie cleanly. We will never know with certainty who won Florida.[7]

Given these facts, the court might sensibly have refused to assume jurisdiction, which would have ended the matter. Instead, it took the appeal and started to chase the will-o-the-wisp of fairness.

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6. Voting experts interviewed on television estimated that typical election-vote tabulation errors ranged from 2 percent to 4 percent. In Florida, there were 177,655 undervotes—ballots that showed no vote for president (see footnote 33 of the Harding dissent, F2, 94)—and an estimated 110,000 overvotes—ballots that showed two or more votes for president (see section B of the per curiam opinion, US2, 110). Thus, almost 300,000 or 5 percent of the nearly 6 million ballots cast were ambiguous. This number is in line with voting experts' estimates of the margin of error and is more than one hundred times Bush's margin of victory.

7. As I write, we also have the results of recounts commissioned by various newspapers (see, for example, Cauchon and Drinkard 2001). These recounts show that, by almost any standard, Bush is the winner by a hair. We also have several books on the Florida election (for example, Sammon 2001; Correspondents of the *New York Times* 2001; and Dionne and Kristol 2001) that describe the details of what happened as events unfolded. These books note further controversies about disenfranchised or deceived voters. Sammon, a Bush partisan, estimates that Bush lost more than 10,000 votes in the Florida panhandle because the major networks declared Gore the winner more than an hour before the polls closed in the counties there, a heavily Bush region. Gore supporters claim that Gore lost even more votes because of confusing ballots and because blacks were denied access to the polls. Other organizations still have not completed recounts, but it is unlikely that their efforts will change opinions. Hardcore Democrats will remain convinced that Bush "stole the election," and hardcore Republicans that Bush is in every way a legitimate president.

By the time the affair had ended, the Florida Supreme Court had handed down two major decisions—*Palm Beach Canvassing Board v. Harris* and *Gore v. Harris* (hereafter referred to in the text and in parenthetical text citations as F1 and F2, respectively) and several minor ones, and the U.S. Supreme Court had handed down two as well—*Bush v. Palm Beach Canvassing Board* and *Bush v. Gore* (hereafter referred to as US1 and US2, respectively; see the section "Major Court Cases" in the references for full citations for all four cases). The four major decisions contained no less than eleven separate opinions. Sprinkled throughout them are the words *fair* and *fairness.*

Following the first, unanimous Florida Court decision of November 21 (F1), came the first, unanimous U.S. Supreme Court decision (US1) of December 4 that vacated it. Next came the Florida Court's four to three decision (F2) of December 8 reversing a lower-court decision that had upheld the secretary of state's certification of Bush as the winner in Florida. It had a majority opinion and two separate dissenting opinions. Finally, the U.S. Supreme Court brought the matter to an end on December 12 with the fourth decision (US2), which reversed F2 in an order that contained six opinions, the majority, per curiam ("by the court") opinion, a concurring minority opinion, and four dissenting opinions.

In accepting the first appeal, the Florida Supreme Court set off both a political fairness game and a legal fairness game involving themselves and the U.S. Supreme Court. The two games were connected and involved many of the same issues, in spite of the legal game's being clothed in arcane language and legal citations.

The Political Fairness Game

F1 concluded that Florida law was ambiguous and that the Florida secretary of state and the Florida attorney general had issued conflicting advisory opinions regarding the propriety of conducting manual recounts of undervotes to infer voter intent. Therefore, the court declared, "because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the *equitable powers* of this Court to fashion a remedy that will allow a *fair* and expeditious resolution of the questions presented here" (F1, 46, emphasis added).

In invoking its "equitable powers," the Florida Supreme Court in effect applied the Formal Principle.[8] However, because of its "reluctance to rewrite the Florida Election Code," it refused to clarify the meanings of the Formal Principle's abstract and therefore vague terms. Instead, it simply extended the deadline for the completion of the manual recounts until November 26—five days after its decision—leaving

8. An anonymous referee of this article points out, "equitable powers have a very precise and narrow legal definition. Briefly, they are a set of remedies—basically injunctions—that allow a court to stop some ongoing activity that has harmed (or will harm) someone." In this case, the Florida Supreme Court stopped the secretary of state from ordering the manual recounts to come to an end. The court presumably wished to prevent harm to those voters whose votes would not be counted because of the secretary of state's action. Thus, it wished to ensure that those voters would be treated equally with other voters.

each of the three counties still conducting manual recounts to fashion its own recount procedures.

Presumably the Florida court assumed that it could safely accept county canvassing boards as relevant institutions for managing the recounts. In its first order, the court also stressed that under Florida law "the will of the people is the paramount consideration," thus implicitly identifying another group—"all of the people [of Florida]"—as having supreme authority.

These choices rendered the court vulnerable to an unfairness/denial attack on several grounds. First, the counties conducting manual recounts adopted different recount rules, thus contradicting the notion that the whole body of Florida voters should be the relevant authority. Democrats controlled all of the canvassing boards conducting the manual recounts, and the different boards adopted different standards for how to count ambiguously punched ballots. These actions flouted the fairness principles related to impartiality—that fairness requires a nondiscretionary, nonmanipulative, and noncoercive process. Bush observers complained vigorously that the Democrats controlling the canvassing boards were in fact exercising discretion, were manipulative, and were coercing results in Gore's favor.

The Gore forces countered by reinforcing the F1 decision and by applying the Formal Principle: all the voters of Florida should be seen as equals and treated equally. Hence the mantra, repeated endlessly throughout the Florida ordeal, that "every vote should be counted, and every vote should count." Logically, this position should have led Gore to demand a statewide recount. Instead, he demanded a recount of only the undervotes, ballots for which the machine count showed no vote for president, and only in counties that had voted heavily for him. The strategy was clear: demanding such a recount in those selected counties would probably yield more new votes for Gore than for Bush. The illogic of the position did not deter Gore supporters from repeating the mantra incessantly.[9]

The Legal Fairness Game

In US1, the U.S. Supreme Court told the Florida Supreme Court, in effect, "you guys picked the wrong institution, and you forgot an important fairness principle." Article II, §1, cl.2 of the U.S. Constitution gives the state legislature the power to select presidential electors. The power of the voters to elect them is a derived power that the legislature can take back at any time, as reaffirmed in the U.S. Supreme Court's 1892 decision *McPherson v. Blacker*. The Florida court's stress on "all of the people of [Florida]" is therefore stress on the wrong authority. US1 also cited an 1887 federal statute (3 U.S.C. §5) providing that the election rules for choosing pres-

9. At one point, Gore announced that if Bush preferred, he would agree to recount the votes of all of the counties of Florida (Sammon 2001, 130). Sammon argues that this offer was an empty gesture because "[a] day earlier, Bush spokesman James Baker had said: 'The idea that you're going to have a manual recount of all the state of Florida is crazy'" (131).

idential electors could not be changed ex post, thereby invoking another standard fairness principle—contracts shall not be broken.

In F1, the Florida court had discussed neither *McPherson v. Blacker* nor 3 U.S.C. §5. Stating that it is "unclear as to the extent to which the Florida Supreme Court saw the Florida constitution as circumscribing the legislature's authority under Art. II, §1, cl.2" and "as to the consideration the Florida Supreme Court accorded to 3 U.S.C. §5," the U.S. Supreme Court vacated F1 and remanded the case to the Florida court for "clarification" (US1, 52).

The Florida Supreme Court responded by simply ignoring the U.S. Supreme Court's remand until after it had decided F2. Florida law allows the decisions of canvassing boards to be appealed to the Florida courts, and the Gore forces used that provision to contest the secretary of state's November 26 certification of Bush. After hearing testimony, trial court judge N. Sanders Saul ruled against Gore on December 4, prompting the election's outcome to be once again appealed to the Florida Supreme Court, thus initiating F2.

In F2, the Florida court partially stuck to its F1 guns by ordering any aborted manual recounts to resume, but it also went further. Perhaps stung by the media attention given to the possible bias in the manual recounts because of a lack of uniform standards and the conduct of the manual recounts only in heavily democratic counties, it ordered that *all* of the undervotes in Florida be manually recounted. In addition, it ordered trial court judge Terry Lewis to supervise the recounts to ensure the application of uniform standards.

The U.S. Supreme Court then trumped F2. In US2, it again invoked the Formal Principle, this time in the form of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. It ruled that F2's order of a manual recount of all the undervotes was insufficient; a proper manual recount of the entire state—one that met the equal protection test—would have to satisfy a long list of requirements, and too little time remained to conduct such a recount.

US2 was written in haste: the Court heard oral argument at 11:00 A.M. on December 11 and rendered its decision at the unusual hour of 10:00 P.M. the following day. The per curiam part of the decision does not indicate how each individual justice voted; the individual votes must be inferred.[10] It is clear, however, that there was much disagreement among the justices.

10. Some of the media reported that the U.S. Supreme Court vote was five to four and some that it was seven to two. This ambiguity remains, reinforcing the righteousness of each side's cause. Gore supporters are convinced that the Supreme Court gave the election to Bush, whereas Bush supporters believe that the overwhelming majority on the Court supported their view. The seven to two interpretation is supported by the language of the per curiam decision that says, "[S]even justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. . . . The only disagreement is as to the remedy" (US2, 108). It is also supported by the Souter and Breyer individual dissents, which admit that the equal-protection argument has merit, and by the Stevens and Ginsburg dissents, which heap scorn on the equal-protection argument. All this would lead one to conclude that all justices except Stevens and Ginsburg concurred in the equal-protection part of the ruling. On the other hand, in a seeming contradiction, Breyer joined in the Stevens dissent. At the same time, five to four was clearly the vote on the per curiam remedy that ended the election.

A concurring minority opinion by Rehnquist, joined by Scalia and Thomas, invoked two fairness principles. First, it pointed out:

> In precincts using punch-card ballots, voters are instructed to punch out the ballot cleanly:
>
> > AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD. (US2, 114)

Enforcement of this instruction would have eliminated manual recounts of the ballots except in cases of fraud or of malfunction of the voting machines. No controversy would have arisen in Florida. The concurrence thus invoked the material principle of desert: voters with ambiguously punched ballots did not deserve to have their votes counted. Second, the concurrence emphasized the importance of the "safe harbor" provision of 3 U.S.C. §5. This provision makes a state legislature's choice of presidential electors absolute as long as it is made on or before December 12. Because of the December 12 deadline, the Florida Supreme Court's extensions of the deadline for certification of the winner necessarily shortened the time available for court challenge. This shortening, the concurrence argued, was contrary to the legislature's intent. Thus, the Florida court was also violating the implied contract that it not make new law, and F2 should be reversed on these bases as well as on the equal protection basis.

Each of the four dissenters wrote a separate opinion, joined by the other dissenters in various combinations. All four took issue with the choice of the U.S. Supreme Court as the institutional battlefield for this fairness fight. They argued that the matter should have been left to the Florida court. Justice Souter went further (as did Justices Breyer and Ginsburg) to argue that a failure to meet the December 12 "safe harbor" deadline is not significant. It simply means that the institutional battlefield then shifts to the U.S. Congress, and that shift should not concern the U.S. Supreme Court.

Justice Stevens also brushed aside (as did Justice Ginsburg) the equal protection basis of the majority's opinion:

> Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter" . . . is to be determined rises to the level of a constitutional violation. . . . [T]here is no reason to think that the guidance provided to the fact finders, specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient—or will lead to results any less uniform—than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country. (US2, 118–19)

Justice Breyer again invoked the unfairness principle of "you violated a contract," this time with regard to the hearing of evidence. As usual in appeals, the U.S. Supreme Court did not hear any evidence, which led Breyer to argue: "The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court" (US2, 134, emphasis in original).

Finally, the U.S. Supreme Court justices simply disregarded arguments that opposed their own. To take two examples from US2, none of the dissenters dealt with the point raised in the Rehnquist concurrence that Florida voters had been given written warning that they were responsible for submitting unambiguously punched ballots. Likewise, neither the majority nor the concurring minority considered Breyer's point that the majority shut down ballot counting without hearing evidence that too little time remained to recount the ballots manually.

An oft-repeated anecdote concerns a petitioner before the U.S. Supreme Court who asked for justice and to whom Justice Oliver Wendell Holmes Jr. supposedly replied, "Sir, this is not a court of justice, this is a court of law!" The implication is that "justice" is subjective, pliable, and arbitrary, whereas "law" is objective, concrete, and definitive.

Whatever it might have been in Holmes's day, the law was hardly so sharp-edged in Florida. In fact, the sixteen justices of the Florida and U.S. Supreme Courts showed themselves to be fierce fairness fighters, adept at playing the legal fairness game. The combination of Florida and federal law made the legal basis of the fight abundantly overdetermined. Either the pro-Bush or pro-Gore outcome was possible. In the end, the justices revealed themselves to be only too human. Consciously or unconsciously, they refused to lift the veil of self-delusion.

The Florida Supreme Court ordered the Florida election officials to go forth and render fairness. On the face of it, compliance with that order seems desirable (who can be against fairness?) and simple. The research on positive models of fairness and denial indicates otherwise. In fact, it was extraordinarily difficult because of possible self-contradictory conclusions of the materialization of fairness principles and because of people's marvelous ability to self-servingly pull the "veil of self-delusion" over their eyes.

The U.S. Supreme Court's final order also rested on fairness grounds—the U.S. Constitution's equal protection clause. By contrast, it was an order not to render fairness but to cease and desist from trying to render it. With this order, compliance was extraordinary simple, but the order was highly controversial and undoubtedly will be fodder for much popular and scholarly writing for years to come. Regardless of how one views the order, it mercifully brought the nation's most significant recent fairness game to an end.

What Fairness and Denial Research Can Tell the Rest of Us

The results of fairness-and-denial research have many implications for policymaking and for policy and opinion research. I can touch on only a few of these implications without going beyond the scope of this article, however. The interested reader can find a discussion of others in Zajac 1995.

Proposing New Legislation

Fairness-and-denial research suggests several principles that those proposing legislation should heed. Here are a few:

- Sell your legislation by stressing how it remedies unfairnesses.

  For example, legislation to reduce or remove the capital-gains tax has typically been justified as a means of increasing economic growth or stimulating the economy. This appeal makes it vulnerable to the charge that it is a "give-away to the rich." Why not simply stress that taxing nominal gains arising from inflation is unfair and amend the tax code to eliminate it? Tell the electorate: suppose you started your business thirty years ago by investing $100,000 to buy the equipment you needed. Adjusted for inflation, that investment is equivalent to $440,000 today. If you sell it for that amount, you will have made no real profit. According to the tax laws, however, you will have profited by $340,000. The 20 percent tax on your "profit" amounts to a theft of $68,000 of your hard-earned money. UNFAIR!

- Be prepared for an unfairness/denial attack; respond with an unfairness/denial attack of your own.

  The wisdom of this precept should be clear from the description of what happened in Florida. The larger the number of people affected and the greater the economic or political stakes, the more likely it is that your legislation will be vulnerable to an unfairness/denial assault. Because of the abundance of material fairness principles and possibilities for institutional framing, opponents will probably have little difficulty in mounting such an attack. You will be in trouble if you do not have a counterattack ready.

- Denial is a powerful force that must be reckoned with.

  Renters typically far outnumber landlords and therefore have much more voting power. Attempts to repeal rent controls must contend with this reality. Renters will probably be in denial and uninterested in hearing arguments why their rents should be raised. London and Paris instituted rent controls during World War I as an emergency measure; New York City did likewise during World War II. The controls still persist in all three cities. In New York, meetings of the rent-control

board to consider rent increases often disintegrate into shouting matches that sometimes lead to violence (Zajac 1985, 140). In the United States today, a majority of voters pays little or no income tax. This situation has unsettling implications for initiatives to make major changes in the federal tax code.

Policy Research

Public choice and political science are the primary disciplines that study the governing process. Both can be enriched by incorporating fairness-and-denial findings. Hernando de Soto (2000) argues that laws must accord with accepted social norms; otherwise, people will ignore them, and an informal, extralegal system will arise to replace them. De Soto also cites an extensive legal literature to support this view.

Economists correctly assume that self-interest is the primary motive of political initiative, and they keep the gains from trade foremost in their analysis. This stance leads them to focus on the economic (allocative) efficiency consequences of policy. Economic efficiency and fairness, however, are intertwined (Zajac 1995). An analysis that ignores the powerful forces of fairness and denial will be incomplete and may as a result lack predictive power. Economists failed to predict the sudden and sweeping deregulatory movement of the 1970s and 1980s. M. Levine succinctly characterizes the prevailing scholarly explanation of regulation that existed in the mid-1970s:

> While no single explanation gained unanimous acceptance, a kind of "cluster consensus" appeared. This consensus characterized regulation as a device used by relatively small subgroups of the general population, either private corporations or geographic or occupational groups, to produce results favorable to them which would not be produced by the market. . . . The operational significance of this view of regulation is that government processes are used by organized subgroups of the population to enforce inefficient arrangements which transfer wealth or power to them. (1981, 180)

That consensus view missed something. The public will accept inefficiencies up to a point, but if those inefficiencies become too big and blatant, people can be led to view them as unfair—as denials of benefits to which they are entitled. Academics overlooked this aspect of reality, but in the case of the airlines, as Levine argues, key politicians noticed and exploited it. The result was airline deregulation, which started a deregulatory movement that spread to utilities, railroads, agriculture, and the financial sector.

Normative prescriptions that ignore fairness and denial may likewise go nowhere. Benefit-cost analyses give health-and-safety regulators and policymakers invaluable information. A mechanistic policy based solely on benefit-cost analyses, however, runs the risk of representing a utilitarian, one-size-fits-all approach. This approach may gloss over profound ethical issues at the level of the individual. An economist may believe that a benefit-cost approach makes sense, and he may even

argue that a corporation can rationally base policy on it, but a jury hearing a wrongful-death suit may find it repugnant.

Public Opinion Research: Polling and Focus Groups

Increasingly, polling and focus-group research guides political leaders and legislators. Although rarely put in such terms, to a large extent this research merely tries to uncover what voters think is unfair and what they will resist. To my knowledge, however, neither polling nor focus-group methodology is systematically informed by the results of fairness-and-denial research. Worse, most such research seems to be conducted by either Republican or Democratic professionals, a recipe for promoting denial.

Because of ignorance of the overall structure of fairness and denial, obvious questions seem not to be raised. For example, in the major news media, so-called reforms are reported uncritically as though they were actual reforms—self-evident cures for self-evident unfairness—without any mention of the unfairness they may cause. Until serious legislation for campaign finance "reform" was introduced, the major media almost totally ignored arguments against the reform. Likewise, the major media have almost totally ignored the unfairness that would result from the reforms advocated by gun-control advocates.

Observers of focus groups can also uncritically accept a group's reaction and thereby be misled. The group reacts only to questions posed by the leader. To get a complete picture, the leader must probe with questions that bring out the group's views on all sides of an issue. The 1994 congressional elections sent the Democratic Party into shock. Their pollsters and focus-group researchers had evidently failed to notice that the Republican "Contract with America" was resonating with voters.

Of course, the potential for fairness-and-denial research to improve public-opinion research methods points to another important implication: such research might also allow political leaders to steer public opinion more effectively. If they do, we can only hope that they steer in the right direction. We do not need leaders in the United States who will do what the tour guide asserted Peron had done in Argentina: bring us social justice—and ruin the country.

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The page numbers given at the end of each entry refer to *Bush v Gore,* edited by E. J. Dionne and W. Kristol (Washington, D.C.: Brookings Institution Press, 2001).

F1: *Palm Beach Canvassing Board v. Harris,* November 21, 2000, Supreme Court of Florida, SC00-2346,SC00-2348, and SC00-2349: 24–47.

F2: *Gore v. Harris,* December 8, 2000, Supreme Court of Florida, SC00-243: 58–96

US1: *Bush v. Palm Beach Canvassing Board,* December 4, 2000, No. 00-836: 48–52.

US2: *Bush v. Gore,* December 12, 2000, No. 00-949: 100–143.

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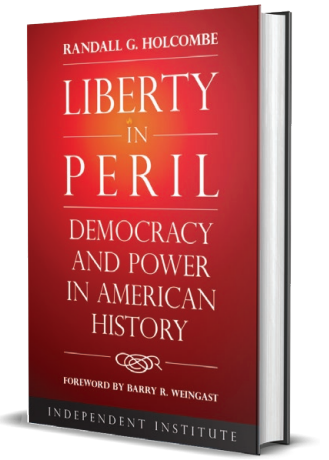

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