

Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom¹

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Abstract

Extensive research shows that adherence to procedural-justice principles by law-enforcement officers and judges leads to greater compliance with orders, a greater sense of the legitimacy, and greater overall satisfaction. The main principles leading to positive views of procedural justice in this research are voice (allowing participants to be heard), neutrality (applying neutral rules transparently), respect (treating participants with dignity while respecting their rights), and trustworthiness (appearing sincere and caring). Separate research on emotion regulation suggests ways in which judges may successfully regulate their own emotions and those of other courtroom participants. Several threads in these separate fields suggest potential overlap and areas for further research. There are many ways in which good procedural-justice practices are also recommended practices for emotion regulation. Scholars in the emerging emotion-regulation field could gain greater awareness of their work by exploring ties to procedural justice, which is more often being included in judicial education.

Key words

Procedural justice; judges; emotion; emotion regulation

Resumen

Extensas investigaciones han demostrado que la alineación de jueces y de oficiales encargados de aplicar la ley con los principios de justicia procesal conduce a un mejor cumplimiento de las órdenes, un mayor sentido de legitimidad y mayor satisfacción general. Los principios más importantes que llevan a una visión positiva de la justicia procesal, en esta investigación, son la voz, la neutralidad, el respeto y la confianza (ser sincero y atento). Distintas investigaciones sobre la regulación de las emociones indican formas en que los jueces pueden regular adecuadamente sus emociones y las de los participantes en la sala. Hay muchas formas en las que buenas prácticas de justicia procesal son también prácticas recomendadas para regular emociones. Los académicos del área naciente de la regulación de emociones podrían adquirir una

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mayor conciencia de su trabajo al explorar la relación con la justicia procesal, que ahora se incluye cada vez más en la formación judicial.

Palabras clave

Justicia procesal; jueces; emoción; regulación de las emociones

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1. Introduction

In the past few years, procedural justice – the perceived fairness of a process for participants based on their experience – has emerged as a dominant theme when considering how courts should function. Indeed, researcher David Rottman (2007-2008, p. 32) of the National Center for State Courts has called procedural justice “the organizing theory for which 21st-century court reform has been waiting”.

Considering procedural-justice concepts isn’t by itself an adequate checklist of what judges or a justice system must do: besides procedural aspects, judges still need to get the outcome right. And they need to process cases expeditiously, which is not an explicit procedural-justice construct. But there’s substantial evidence that procedural-justice concepts best match what the public looks for from its justice system, and that adherence to procedural-justice principles improves public acceptance of the courts and compliance with court orders.

This article starts by summarizing the commonly accepted elements of procedural justice, as well as some of the research about how adherence to these principles affects public and litigant perceptions. It then discusses areas of overlap among research into procedural justice, judicial self-regulation of emotion and judicial regulation of emotions of others. It then suggests that these areas of overlap offer the opportunity for collaboration. Among other things, there has been an increased focus in recent years to procedural justice in judicial education. That could be a useful entry point for those seeking to educate judges about emotion regulation if emotion-regulation scholars give at least some focus to these areas of overlapping interest.

2. An Overview of Procedural-Justice Concepts

In 2006, Minneapolis trial judge Kevin Burke and I began work to draft a white paper on procedural justice (often called procedural fairness by judges in the United States) for the American Judges Association. Judge Burke had served three terms as chief judge of the 62-judge Minneapolis trial court, where he worked to incorporate procedural-justice principles throughout his court. I had found the same concepts invaluable in my own work as a trial judge.

Our paper was based on the extensive research work of psychology professor Tom Tyler and other social scientists (Tyler *et al.* 1997), who have shown that how disputes are handled shapes people’s evaluations of their experience in the court system. In fact, these researchers have convincingly shown that the public’s view of the justice system is driven more by how they are treated by the courts than whether they win or lose their particular case (see, e.g., Thibaut and Walker 1975, pp. 67-96, Casper *et al.* 1988, pp. 483, 486-487, 504, Tyler *et al.* 1997, p. 75, Sunshine and Tyler 2003, pp. 514–515, Rottman 2007, p. 835).

The American Judges Association approved the procedural-fairness white paper in 2007, and the Conference of State Court Administrators representing the administrative leaders of the American judiciary formally endorsed the AJA’s white paper in early 2008 (Conference of State Court Administrators 2008). Since then, there has been growing acceptance in both academia and the justice system that courts must heed procedural-justice principles (see Leben 2014).

Tyler (2008, pp. 30-31) has identified four basic concepts that create a person’s sense of procedural justice and drive public opinion about the courts:

1. *Voice*: litigants’ ability to participate in the case by expressing their viewpoint;
2. *Neutrality*: consistently applied legal principles, unbiased decision makers, and a transparency about how decisions are made;
3. *Respect*: individuals are treated with dignity and their rights are explicitly protected; and

4. *Trust*: authorities are benevolent, caring, and sincerely trying to help the litigants – a trust garnered by listening to individuals and by explaining or justifying decisions that address the litigants' needs.

Farley, Jensen, and Rempel (2014, pp. 1, 5, 7-8, 36) have noted the related concepts of "helpfulness" and "understanding". Recently, several court-education organizations in the United States (American Judges Association *et al.* 2018) produced a procedural-justice bench card for trial judges listing the four Tyler elements plus helpfulness and understanding. However one lists these overlapping elements, the central finding is the same: people view fair procedures as a way to produce fair outcomes.

An extensive 2005 study in California found that perceptions of procedural justice were "the strongest predictor by far" of public confidence in the California court system – if litigants or members of the public perceived that the court provided fair treatment in the aspects Tyler identified, their overall opinion of the court system was much more positive (Rottman 2005, pp. 19-20, 24). The elements of procedural justice dominate people's reactions to the legal system across ethnic groups, across gender, and across income and educational levels (Burke and Leben 2007-2008, 2009, Tyler 2008).

While the public focuses on the fairness of the process, judges and lawyers tend to focus on fair outcomes, often at the expense of meeting the criteria of procedural justice that are critical to public perceptions of the courts (see Heuer 2005). Figure 1, a chart provided in the report of California's separate surveys of attorneys and the public, shows the different ways in which these two groups look at the importance of procedural fairness and outcome fairness.

FIGURE 1

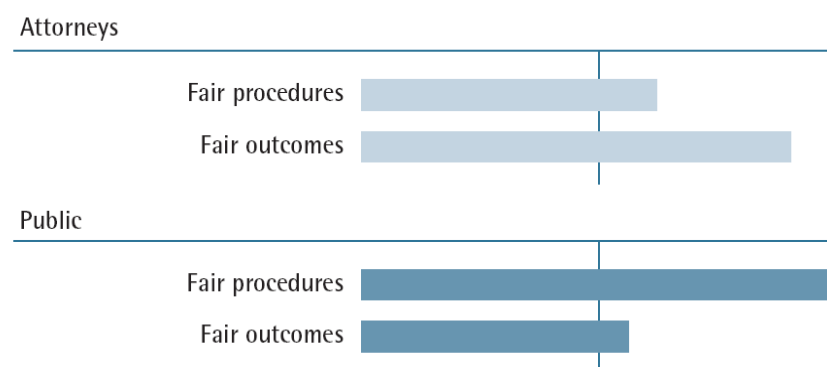


Figure 1. Relative importance of significant factors on overall court approval.

Source: Rottman (2005, p. 25).

One can only speculate about the reasons for this. Traditional law-school education focuses on outcomes; first-year students learn the holding of each case and then take those legal rules and make them into an outline of the key legal principles of substantive courses. Attorneys are more familiar than others with a court's typical procedures and thus do not feel as lost during the process (Rottman 2005, pp. 11, 18).

But whatever the cause for these differences in the views of the public and those of the law-trained community of attorneys and judges, the justice system depends upon public trust. That trust is enhanced when those in the justice system focus on making sure that all who pass through it feel that they were treated fairly.

All of this must be considered in the context of diminished public trust in almost all institutions. While public opinion in the United States has become even more polarized since the 2016 election (and 2017 inauguration) of President Donald J.

Trump, diminished levels of trust in key institutions were already in place before then. In a June 2016 Gallup survey (Norman 2016), the percentage of people with a “great deal” of confidence had fallen to only 3% of people for the U.S. Congress, 16% for the U.S. president, 15% for the U.S. Supreme Court, 9% for the criminal-justice system, and 25% for the police. Even if we add those who had “quite a lot” of confidence (the next highest of five categories), the totals rise only to 9% for Congress, 36% for the president, 36% for the Supreme Court, 23% for the criminal-justice system, and 56% for the police. The police were one of only two government institutions – the other being the military – to have more than 50% of respondents express overall confidence. For the criminal-justice system, a key part of the court system, a majority showed some level of skepticism: 40% had only “some” confidence, 34% had “very little” confidence, and 2% had no confidence at all. Given the lack of trust in public institutions generally and the criminal-justice system in particular, judges must pay special attention to what they can do to maintain or improve the public’s trust in its justice system.

Along with the important role procedural fairness plays in affecting the public’s overall opinion of the court system (Rottman 2007, p. 838, Rottman and Tyler 2014, pp. 1049–1055), it also plays an important role in improving compliance with court orders. The data show that when litigants perceive that they’ve been treated fairly, they are more likely to comply with the court orders that follow (see, e.g., Tyler 1990, 2003, 2006, 2008, Kitzmann and Emery 1993, Eckberg and Podkopacz 2004, Redlich 2005, Burke and Leben 2007-2008, 2009, Tyler *et al.* 2007, pp. 570-78, Burke 2010, 56–58, Lee *et al.* 2013, pp. 139-141, 177-178, Rottman and Tyler 2014, p. 1051, Tyler and Sevier 2014, pp. 1103–04).

Before closing this introduction to procedural justice, I would note one emotion-related factor suggested in the procedural-justice research – judges practicing procedural justice may be a bit happier than their non-practicing colleagues. Judges who are assigned to problem-solving courts like drug courts – where procedural-justice principles are applied and judges see positive results (Burke 2010, p. 39, MacKenzie 2016) – often report being happier. One study found that judges were happier even in family-law courts (traditionally a hard docket for judges) that applied problem-solving-court methods (Chase and Hora 2009).

3. There Appear to Be Significant Areas of Overlap Between Procedural Justice and Emotion Regulation Teaching and Scholarship

As some have noted before, there’s overlap between concepts and recommended practices in procedural justice and emotion regulation (see, e.g., Roach Anleu *et al.* 2016, pp. 62-64). This article considers some ways in which the insights of emotion-regulation scholarship might be useful in procedural-justice training – and vice versa.

One might start with a typical courtroom situation in which litigants are involved in a case with a high emotional overlay, like a divorce case or one in which a parent’s rights to her child might be terminated. For many reasons, the judge will try to keep the emotions of courtroom participants in check. One way to help with that is to follow procedural-justice principles and make sure that each participant feels listened to. It’s reasonable to think that applying procedural-justice techniques can lessen the incidence of anger among courtroom participants. One observational report suggests that’s the case (Casadonte and Contini 2018).

Much more of the emotion-regulation research focuses on how the judge might regulate her own emotions. Many of those situations highlight overlap between these fields of research.

The angry judge is perhaps the best example of a situation in which everyone would agree there’s a need for better emotion regulation. In this situation, there’s no tension between the traditional view that judges are dispassionate arbiters and the need for emotion regulation.

In the angry-judge literature, there are many examples of judges getting mad when the judge perceived he wasn't being listened to (see, e.g., Maroney 2012, Roach Anleu *et al.* 2016, pp. 66–68). Angry-judge cases sometimes involve judges who *begin* an interaction by telling someone just to answer every question the judge asks yes or no (e.g., Roach Anleu *et al.* 2016, pp. 66–67). That was the case recently with a Florida judge whose brief interchange with a wheelchair-bound woman went viral and led to the judge's early resignation (Madan and Miller 2018). The judge got frustrated – and angry – when the woman wanted to say more than “yes” or “no.”

Of course, what the judge was doing went against everything procedural-justice principles would have suggested. Among those concepts, the most important to litigants and the public is voice (Zimmerman and Tyler 2010, pp. 488-489). Litigants want to have a chance to express themselves and to be listened to as part of the process. So one of the most important parts of procedural-justice training is teaching judges how to be better listeners.

Could better listening-skills training for judges help prevent some of these angry-judge situations? One would like to think so. Focusing on what courtroom participants have to say and making sure they feel listened to may move the judge from focusing so much on his own emotions. And providing courtroom participants the chance to be heard should help keep their emotions in check and avoid escalating tensions in which the judge and another courtroom actor (usually a criminal defendant) may, in lay terms, egg each other on.

There may be a few judges whose personalities are simply not a good match for the unchecked power a judge often has within his own courtroom. Alas, there will still be angry judges – and there will still be angry judges who must be disciplined. But there might well be fewer of them if judges were better trained as listeners – and taught from the outset that one of their key roles as a judge is giving voice to those who come through the courtroom.

Delay is another technique some have suggested for emotion regulation. The passage of time can help dissipate the force of emotional or affective responses (Wistrich *et al.* 2015, p. 910). That emotion-regulation insight might be combined with procedural-justice qualities and applied to sentencing.

In trainings we copresent, Minnesota trial judge Kevin Burke recounts a situation in which one of his colleagues had to sentence someone in a highly publicized, emotionally charged case. Several emotionally intense victim-impact statements were made at the sentencing hearing. In an unusual move, the judge announced at the hearing's end that he wanted to consider carefully everything that had been said that day, so he would ponder the matter overnight and announce his decision the next morning. That gave everyone a chance to let emotions cool, openly showed that the judge wanted to consider everyone's input, and let the judge carefully prepare his comments to show that he had taken everyone's views into account.

Maroney (2013, pp. 105–06) has noted another sentencing case that met both emotion-regulation and procedural-justice goals in a different way – by disclosing the judge's emotional reaction. It was the sentencing of a serial killer who was already serving many terms of life in prison. So the sentence to be issued by this judge would make no practical difference. But it was still the sentence for the murders of real people with very real families. When entering the sentence, the judge cried. As Maroney reports: “The victims' families reported that those tears meant a lot to them: they felt that their suffering had been acknowledged, turning a hearing that could have been painfully *pro forma* into one that was meaningful”.

That sentencing judge recognized that voice and acknowledgement are important. From the procedural-justice vantage point, he also recognized that it's okay to show some emotion at a sentencing. The trustworthy judge is one who is sincere and caring, so an outward display of empathy is perfectly appropriate (Leben 2011-2012).

From the emotion-regulation vantage point, disclosure can be a helpful technique for processing emotion (Maroney 2013, pp. 11-12).

Disclosure can be helpful in another way too. Although judges are deemed by law as fact-finders who can tell the truthful witness from the liar, in fact judges are no better at this than others might be (Schauffler and Burke 2013). A judge handling a case in which there's a close factual dispute should rightly have some emotional qualms about whether he has it right. In my view, disclosing that to the litigants tracks procedural-justice principles. In short, the judge could say, "I've done the best I can to get it right, but to be honest, there may well be some ways in which what I think happened is different from what you actually experienced".² That disclosure – if coupled with factual findings showing that the judge *did* listen and try to get it right – could help litigants accept a bad outcome. And from an emotion-regulation vantage point, that disclosure of doubt might help the judge and parties to process it too.

A significant message in the emotion-regulation scholarship is simply that judges should pay more attention to their own emotions (Maroney 2012, pp. 1273–79, Wistrich *et al.* 2015, p. 910). At least in theory, that should make the judge more attuned to the emotions others may have too. That could help judges fashion explanations that better meet the expectations of participants who likewise will have emotions – not just legal points – in their minds and hearts during court proceedings. If judges who recognize their own emotions also recognize those of others better, the judges will be more empathetic and trustworthy.

Two other messages from emotion-regulation scholarship seem of particular interest from a procedural-justice perspective.

First, emotion-regulation scholars have recognized some emotions and emotion-regulation techniques that simply should be avoided (Maroney 2013, pp. 108–12) – and that's true from the procedural-justice perspective too. One such emotion is contempt, which leads one to regard another as less than human. With that understanding, a judicial attitude or expression of contempt for a participant would be inconsistent with procedural-justice principles. One emotion-regulation technique to avoid is distraction – by, say, multitasking on the bench while an emotionally difficult situation is at hand. The emotion-regulation scholar would note that distraction in this context leads to poor recall of what happened. Another emotional-regulation technique, suppression and denial, uses up much of a person's working mental capacity, causing lesser ability to process the information the judge still must consider. From the procedural-justice standpoint, a judge who has poor recall won't be able to show that she has listened, and a judge with limited cognitive abilities may not be able to do any number of things important to the procedural-justice perspective.

A final note: judges need training to master the techniques of both emotion regulation and procedural justice. As Maroney has noted, in psychology-lab experiments, people could use a neutral-observer approach – pretending to be doctors who must look at matters through a professional lens – and lessen their emotional reaction to disturbing images. But she quickly added: "To be pulled off by real judges in real situations, this species of reappraisal must be trained and practiced" (Maroney 2013, p. 111). So too in procedural justice. It's one thing for a judge to read (or even memorize) the elements of procedural justice. It's another to see them demonstrated in a brief vignette of a courtroom encounter. But more training is needed to

² I did this (in a few more words) in many civil cases as a trial judge (see Leben 2000). Such a disclosure *before* trial can also be helpful. The parties in a divorce case – who have lived their case for years – might realize that a judge isn't going to understand from a three-hour trial nearly as well as they do. Those parties might then give greater effort to settling, thus controlling the result themselves. Even if the case still goes to trial, they will be better prepared for a potentially faulty, though well-intentioned, result. In either case, procedural-justice principles would be furthered.

internalize the concepts, incorporate them into daily routine, and hold to them in real-life courtroom encounters.

4. Tying Judicial Education on Emotion Regulation Together with Procedural-Justice Training Could Help Spread the Message

Over the past decade, I've personally provided training to judges about procedural-justice principles in more than 20 states within the United States. I can say that participant evaluations are uniformly good. What I can't say is how much the efforts have changed behavior because – in most states – improvement on procedural-justice performance in the courtroom isn't measured.³

Over the past few years, an emphasis on training in procedural-justice principles has been gaining steam in the United States. Many states now include that training in programs for new judges. The National Judicial College has begun to offer a two-day program that was presented twice during 2018. The Federal Judicial Center has provided procedural-justice training for all its bankruptcy judges.

This emphasis on procedural justice in the courts can be expected to continue given the data already noted here. Something that increases public satisfaction with judges and the court system – while also increasing compliance with court orders – is important and interesting to the average judge.

Training judges about emotion regulation may be harder to normalize as a part of judicial education. For many, a shared professional norm in judging remains that judges are dispassionate arbiters of legal cases decided simply by applying legal rules. As long as adherents to that view remain in leadership positions in a jurisdiction, it will be hard to get judicial-education programming to cover the full range of materials that scholarship in emotion regulation could provide.

Yet much of what emotion-regulation scholarship has to offer could be a natural accompaniment to procedural-justice training. Judges know that those who lose emotional control on the bench can diminish respect for the courts (see Maroney 2012, p. 1205, Madan and Miller 2018). And many examples in emotion-regulation scholarship tap into themes of procedural-justice scholarship. So there's a natural connection between procedural justice and emotion regulation.

Scholarship focused on emotion regulation among judges has emerged more recently than procedural-justice scholarship (see Roach Anleu *et al.* 2016, p. 62). Yet it has been only recently that judicial-education programs in the United States have included procedural justice as a topic – and even now, the percentage of judges who have studied procedural justice in a concentrated way would be relatively small.

Getting the new scholarship on emotion regulation before judges and into judicial-education programming will be a challenging process. As emotion-regulation scholars are well aware, judges tend to diminish the role emotion plays in their judicial lives – both how it may affect their decision-making (where emotion-based decision-making seems contrary to rule-of-law values) and how it may affect their own well-being (where even acknowledging emotions might make them seem weak or unsuited to the work) (see Maroney 2011, 2013, pp. 100–01, Roach Anleu *et al.* 2016, p. 61, Roach Anleu and Mack 2017, pp. 113–14). Those factors may make it important to try to get emotion-regulation concepts before judicial audiences in many ways, not just in the few programs that may become available directly on emotion regulation.

Given the overlap between procedural justice and emotion regulation, both fields may reach greater awareness by focusing on those areas of overlap. Collaboration

³ There are exceptions, with Utah perhaps the most notable. It has both regular evaluations of procedural-justice performance in each courthouse and a program through which citizen observers evaluated judicial performance based on procedural-justice principles (see Leben 2014, pp. 60-61).

between researchers in these fields and a search for common ground could be useful at a practical level in judicial education.

With both procedural justice and emotion regulation, scholarship and education could usefully focus not just on individual judges but on the overall courthouse environment. Along with judges, case-handling involves court clerks, prosecutors, public defenders, private attorneys, probation officers, social workers, and others. The interactions between these parties affect both emotions and perceptions of justice of court participants.

In judicial-education programs, my frequent copresenter, Kevin Burke, and I try to get judges to make procedural justice a courthouse project. Judges are often supervisors of some of the other players. Even when they aren't direct supervisors, they are leaders who can help build a courthouse culture.

Although somewhat different nomenclature is used in the literature of the employee-supervision world, the principles of procedural justice apply there too. Employees who are treated fairly – given voice, supervised by someone who is sincere and caring – are happier and more productive. And that can have real impacts: Two studies of large police departments showed better job performance when those officers reported a perception that procedural-fairness principles guided their supervision (Rottman 2007, p. 835, Goff and Martin 2013, pp. 26–27). A study of police officers in Las Vegas by Goff and Martin (2013, p. 26) concluded that “the more officers feel they are treated well in the department, the less we observe racially disparate patterns of force use”.

The same might be true for emotion regulation. Judges and others in the courthouse interact, so one would expect that helping all participants to better regulate emotion would be beneficial. This approach might also help get around the objection that judges don't need to deal with emotion because they are simply dispassionate arbiters. If everyone in the courthouse is involved, judges might feel more free to participate.

The areas of overlap between procedural justice and emotion regulation noted in this article would be good candidates for research. Can attention to procedural-justice teaching help judges to regulate their own emotions and those of other courtroom participants? Can attention to emotion-regulation teaching help promote perceptions of fair treatment in court? We don't have – and could use – extensive research on those questions.

For now, though, there are significant areas of overlap between these two fields, and judges would benefit from education about them. Since teaching procedural justice has become a staple in judicial education, emotion-regulation scholars may want to emphasize the areas of overlap as another way of gaining the attention of judges.

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