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# Procedural Justice

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*Procedural Justice*

## I. INTRODUCTION

Questions about procedural justice are remarkably persistent. From the Court of Star Chamber in the fourteenth century[1] to Guantanamo Bay in the twenty-first,[2] the common-law legal tradition is no stranger to the notion that procedural rights may be sacrificed on the altar of substantive advantage. Legal sophisticates will hardly be surprised to learn that academics in the utilitarian tradition have argued that procedural fairness can be reduced to the calculation of costs and benefits,[3] including, perhaps, a *taste* for participation.[4] Even the United States Supreme Court seems to have suggested that the most basic procedural rights, notice and an opportunity to be heard, may be denied if the balance of interests does not favor them.[5]

But the ascendancy of consequentialist reasoning in the courts and the academy has not laid the question of procedural justice to rest. Whenever life, liberty, or property is taken without affording the affected individual a meaningful opportunity to participate in the decision making process, the cry of procedural unfairness is heard. The thesis of this article is that such cries are grounded in reason as well as passion. "Yes," procedural justice *is* concerned with the benefits of accuracy and the costs of adjudication, but, "no," *not solely* with costs and benefits. Rather, procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms. Meaningful participation requires notice and opportunity to be heard, and it requires a reasonable balance between cost and accuracy.

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[1] Frank Riebli, Note, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807 (2002); CORA LOUISE SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER iii (Burt Franklin ed., 1969) (1900) (finding references to Star Chamber as early as 1356); William Hudson, *A Treatise of the Court of Star Chamber*, in COLLECTANEA JURIDICA, 1-241 (Francis Hargrave ed., 1980) (1792) (stating that Star Chamber dates from the Twelfth Century reign of Henry II); *see also infra* Part V.A.4, "Three Thought Experiments."

[2] Gherebi v. Bush, ___ F.3d ____, 2003 WL 23010235 (9th Cir. Dec 18, 2003); Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 Cardozo L. Rev. 1513 (2003); K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 Berkeley J. Int'l L. 662 (2003).

[3] LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 228 (2002); *see also* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES, 307 (1994).

[4] *See* David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996).

[5] Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (using a balancing approach to resolve question whether denial of an opportunity to be heard violates due process); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (using a balancing approach to resolve question whether notice of proceeding was required).

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My case for these simple and intuitively plausible claims is elaborated in the form of a theory of procedural justice for a system of civil dispute resolution. It is a commonplace of procedure scholarship to observe that theories of procedural justice are "thinly developed."[6] My aim is to begin the process of remedying this defect by providing a fully articulated and defended theory of procedural justice for a system of civil adjudication.

*A. Where to Begin? Ex Ante and Ex Post Perspectives*

Where can we begin? We need a point of entry into the question, "What makes a procedure just?" One obvious way to approach the question is to take up the *ex post* perspective.[7] Imagine that a legal proceeding is over and done with; a final judgment has been entered. From, the *ex post* perspective, we care about the outcomes of civil proceedings. Some outcomes are substantively just; others are unjust on the merits. Some judgments are legally correct; others are in error. Some findings of fact are true; others false. We want outcomes that are substantively just, judgments that are legally correct, and findings that are factually true.

What then about procedures? Do they matter and, if so, why? Without further reflection, one might be attracted to the view that, while outcomes matter in a deep way, procedures do not. "What real difference does a supposedly fair procedure make," we might ask, "if it results in an unjust outcome? What solace can procedural justice be to someone who has suffered a substantive wrong?"[8] Posing the questions in this manner suggests an answer: only substantive outcomes really count, and only substantive rules or their application can truly be said to be just or unjust. This answer deflates the claims of procedural fairness and cautions against "the ugly spectre of

[6] Robert Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488-89 (2003); *see also* Kaplow & Shavell, FAIRNESS VERSUS WELFARE, *supra* note 3, at 228 n.6 (noting the lack of developed theories of procedural justice); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646-47 (1985) (noting that fairness arguments about procedure are limited and narrow).

[7] *See* Bruce L. Hay, *Procedural Justice--Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997) (distinguishing between the *ex post* and *ex ante* perspectives on procedural justice).

[8] For a very clear example of this sort of argument, see Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1046-47 (2003) ("If the issue is framed as one of "procedural justice," then decision-makers might argue that they have solved the "fair treatment" problem through the creation of procedures that ensure participation of all groups in decision-making processes. It is not clear, however, that procedural requirements enhancing public participation will necessarily lead to substantive decisions that are more responsive to public opinion. While enhancing participation procedures to equalize opportunities is an important step in creating the preconditions for political justice, it provides no guarantee that the substantive decision will embody political justice.").

procedural rights."[9] The implication is that the very notion of procedural justice as an independent criterion of fairness is empty.

Even if we were to accept this deflationary view of procedural justice as our starting point, it would not follow that procedures are unimportant. If we begin with criteria for a just outcome, then it follows that our system of dispute resolution should be designed to decide controversies in accord with these criteria. From the bare premise that outcomes count from the *ex post* perspective, we can derive a minimal notion of procedural justice. A perfectly just procedure would guarantee correct outcomes; a procedure would be more or less fair or just insofar as it approximates this ideal. If we take the rules of substantive law (torts, contracts, property, and so forth) as applied to the facts (the state of the world) as the criteria for just outcomes, then the ideal procedure would discern the truth about the facts and apply the law to those facts with one-hundred percent accuracy. From the modest premise that outcomes count, we can derive the view that procedural justice is a function of accuracy.

There are, however, obvious problems with this simple theory. Even from the *ex post* perspective, formal legal outcomes, such as judgments for plaintiffs and defendants, are not the only effects of adjudication. Dispute resolution systems impose costs on the parties to the dispute and on society at large. If we enlarge our view of outcomes to encompass all of the costs and benefits imposed by the litigation system, then our view of procedural justice will be enlarged as well. An outcome that includes a damage award that reflects an accurate application of the substantive law to the facts might nonetheless be unjust if the plaintiff who was entitled to prevail had to pay more in attorneys' fees than the value of the judgment. A dispute resolution system that achieved one-hundred percent accuracy would be viewed as monstrously unfair if it required each disputant to devote her entire life to a painstaking process of fact-finding and consumed the great bulk of the social product to finance the enterprise.[10] The addition of these uncontroversial premises to our modest assumption that outcomes count yields the conclusion that even from the *ex post* perspective a fair procedure must, at a minimum, strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures.[11]

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[9] Randy E. Barnett, "*Justice Entrepreneurship in a Free Market": Comment*, 3 J. LIBERTARIAN STUD. 427 (1979).

[10] Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975) ("It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving.").

[11] The claim made in text requires qualification. It might be argued that the *costs* of accuracy (and, for reasons that are established below, *see infra* Part V, The Value of Participation) are external to the concept of procedural justice. On this view, procedural fairness is one thing and the costs of procedure quite another. For an analagous argument in the context of distributive justice, see G.A. Cohen, *Rescuing Justice from Constructivism*, http://users.ox.ac.uk/~magd1534/JDG/cohen2.pdf (visited January 29, 2004). The assumption

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Procedural perfection is unattainable: no conceivable system of procedure can guarantee perfect accuracy. Approaching procedural perfection is unaffordable: a system that achieved the highest possible degree of accuracy would be intolerably costly. Even the application of an elaborate system of error correction mechanisms (for example, a system with motions for new trial, appeals, and for a some types of errors, collateral attacks) will result in many cases with substantively unjust outcomes—lawsuits in which fact finding went awry or the applicable rule of law was not correctly identified. Litigants themselves make procedural mistakes that thwart their own substantive rights. And litigants are bound by erroneous judgments that are truly final, beyond all further correction of mistake. This is a fact about procedure in the actual world, which we might call *the fact of irreducible procedural error*.

So far, our view of procedural fairness has been entirely *ex post*. But the *ex post* view is incomplete for many reasons. Not the least of these is the fact that final judgments are not the end of the story. From the *ex ante* perspective, the role of law is to provide a mechanism for the coordination of human conduct. Substantive rules of law define rights and responsibilities that provide reasons for action. Property law tells us who has what dominion over which resources. Tort and criminal law define our obligations towards others. Contract law enables us to create and enforce new obligations. Law is action-guiding. From the *ex post* point of view, however, it appears that the action-guiding work of law is done by *substance* and not by *procedure*. Is that conclusion correct?

To test the adequacy of the *ex post* view of procedural fairness, we need to ask the following question: can the substantive law perform its action-guiding function without the aid of procedure? Given certain idealizing (counterfactual) assumptions, the answer to this question would be "yes." Were we to *assume* (a) that citizens have perfect information about the state of the world and the content of the laws, (b) that the content of the laws is fully specified, and (c) that each and every citizen viewed the law and the facts impartially, *then* the rules of substantive law could perform their action-guiding function without the aid of a system of procedure. In the actual world, however, none of these three idealizing assumptions holds true; instead, the actual world is characterized by three problems of compliance with substantive legal norms: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality.[12] Notice that these three

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underlying this argument is that procedural justice should answer to the morally relevant properties that are *internal* to procedure. Morally relevant properties *external* to procedure may well be relevant to the question what should be done, all things considered, but are outside the domain of procedural justice. Even on this view, however, it could be argued that procedural systems impose *direct costs* that are properly considered as internal to procedure. Such direct costs include, for example, the monetary and nonmonetary cost of participation in the procedural system—time spent, attorneys's fees, filing fees, and so forth.

[12] *Cf.* RANDY BARNETT, THE STRUCTURE OF LIBERTY (1998) (discussing analagous problems of knowledge, interest, and power).

problems would hold, even if citizens saw themselves as obligated by the content of the substantive legal norms.

Each of these three problems requires a few words of explanation: in what ways does the actual world differ from the idealized world of perfect information, fully specified laws, and impartiality. First, the actual world is characterized by *the problem of imperfect knowledge of law and fact*. No one citizen has perfect information about the content of the law or the state of the world. Indeed, each of us knows only a small fraction of the information that would be required for perfect compliance with our legal obligations. Moreover, given human capacities, knowledge is local; different parties to a dispute may each possess different information about the facts. Without some process that can supply the parties to a dispute with a common understanding of the law and the facts, even citizens who attempt to use the law to coordinate their behavior may be unable to do so.

Second, the actual world is characterized by *the problem of incomplete specification of legal norms*. Legal rules are constructed using the tools provided by natural human languages. For rules to guide conduct, they must be comprehensible, and hence, they must be framed in relatively general and abstract language. As a consequence, the substantive law is inherently incomplete and ambiguous. Without a procedure whereby its content can be specified and disambiguated, different citizens will inevitably have different views about the content of the law.

Third, the actual world is characterized by *the problem of partiality*. Citizens are inevitably partial to their own interests, to the interests of the friends and families, and to the interests of causes and ideologies to which they are committed. The problem of partiality interacts with the problem of incomplete information about law and fact and the problem of incomplete specification of the law. So, citizens will be likely to form views about the content of the laws and the state of the world that favor the interests to which they are partial. Without a procedure whereby conflicting partial perspectives can be reconciled, different citizens will inevitably disagree about which actions the law requires.

Given these the problems of imperfect knowledge, incomplete specification, and partiality, legal disputes will arise. And the converse is also true, with perfect knowledge, complete specification, and impartiality, almost every dispute could settle.[13] From the *ex post* perspective, the role of procedure is to resolve these disputes, but from the *ex ante* point of view, procedure has another role—to guide action after the formal legal proceedings have ended and the judgment has become final.[14] *This is the real work of procedure—to guide primary conduct after the judgment is rendered.* The real work of procedure does not begin until the trial is over, the appeals exhausted,

[13] "Every dispute could settle" is an exaggeration. Settlement might be thwarted if the legal system provided incentives for delay, e.g. if the defendant was not required to pay the plaintiff pre-judgment interest. More generally, a procedural system can (but need not) provide perverse incentives to litigate a frivolous case or defense.

[14] This point is inspired by George Smith, *Justice Entrepreneurship in a Free Market*, 3 J. LIBERTARIAN STUD. 405 (1979).

and the judgment has become final. Legal proceedings communicate information about law and fact to parties and others. Legal proceedings specify the content of general and abstract legal rules. Legal proceedings provide authoritative resolutions of the differences in perspective generated by partial interests. Procedure provides the information, specificity, and impartiality that is required for citizens to conform their behavior to the requirements of law.

This point can easily be missed. The action-guiding role of procedure is not always transparent. Indeed, in the context of criminal procedure, the action-guiding role of procedure is almost totally opaque. One might easily imagine that the role of a system of criminal procedure is to impose just punishments, and that direct application of the coercive power of the state is the necessary and sufficient means to this ends: criminal defendants are coerced by force, not guided by legal norms specified by a procedure. But we should not overgeneralize from the criminal context: on the civil side, there are contexts in which the action-guiding role of procedure is crystal clear. One such context is the declaratory civil judgment.[15] In an action for declaratory relief, no coercive order issues; rather, the judgment simply declares what the legal rights and obligations of the parties are. Declaratory judgments can guide action without coercion, precisely because they provide information about law and fact that can overcome the problems of imperfect knowledge, incomplete specification, and partiality.[16]

The action-guiding role of procedure is important because it undermines an assumption that is implicit in the *ex post* view of procedural fairness. The *ex post* view assumes that there is a sharp division between the action-guiding role of substantive law (the rules of torts, contracts, and property) and the dispute-resolving role of procedural law (the rules of jurisdiction, pleading, discovery, trial, appeal, and preclusion). Once this assumption is exposed by the move to the *ex ante* view, we can begin to appreciate that the real work of procedure may be every bit as action-guiding as is the work of substance. As we shall see, the action-guiding work of substantive law is inextricably entangled in the action-guiding work of procedure.

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[15] *See* E. BORCHARD, DECLARATORY JUDGMENTS 12-13 (2d ed. 1941)(The more highly organized a society becomes, the less occasion there is to display force in order to secure obedience to its decrees and adjudications. . . . The mere authoritative declaration of the reciprocal rights and obligations of the parties sufficies to insure obedience.); *see generally* Borchard, The Declaratory Judgment--A Needed Procedural Reform, Part I, 28 YALE L.J. 1 (1918); Borchard, Declaratory Judgments, in 5 ASSOCIATION OF THE BAR LECTURES ON LEGAL TOPICS 243, 245 (1928); Borchard, The Declaratory Judgment--A Needed Procedural Reform, Part II, 28 YALE L.J. 105 (1918); Sunderland, A Modern Evolution in Remedial Rights--The Declaratory Judgment, 16 MICH. L. REV. 69 (1917); Sunderland, The Courts as Authorized Legal Advisors of the People, 54 AM. L. REV. 161 (1920); Note, Developments in the Law: Declaratory Judgments, 62 HARV. L. REV. 787 (1949).

[16] Coercion is in the background, of couse. I am not claiming that coercion is never required for civil adjudication to do its work of guiding action.

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For adjudicative procedure to perform its action-guiding function well, procedures and their outcomes must be regarded as legitimate sources of authority for officials, third-parties, and litigants. If adjudication works, the losing party will regard the judgment as authoritative and binding—i.e. as providing good and sufficient reason to pay the judgment or obey the injunction. If adjudication fails and the losing party resists enforcement, then further procedures are required. Remedial proceedings will require either officials (a sheriff or marshal) or third parties (a bank or employer) to regard the outcome of an adjudication as a source of legitimate authority—e.g. as good enough reason to confiscate property, turn over bank accounts, or garnish wages. If a system of procedure is widely regarded as a source of legitimate authority, then it will succeed in guiding action. If the system is seen as illegitimate or without authority, then the system may fail.

What is our basis for regarding procedures as the source of outcomes that are legitimately authoritative? One possible answer to this question might proceed as follows. We might begin with the assumption that the substantive rules of law are themselves legitimate. An accurate outcome could then derive its legitimate authority from the legitimacy of the underlying substantive rule. If a legitimate substantive rule of property law plus the true state of the world would result in awarding title to Blackacre to Smith, then a judgment that awards Blackacre to Smith might be said to be legitimate. Call this account of the legitimate authority of procedure, the *derivative theory*.

But the derivative theory of procedural legitimacy immediately runs into an obstacle in the form of the fact of irreducible procedural error. As an official or a third party, I cannot know whether any particular verdict is accurate or not. I may have reason to believe that it is highly likely that the verdict is accurate. But, then again, I may not, for example, if I have some independent knowledge of the case. Litigants usually have independent knowledge of the merits of the proceedings to which they are parties. As a losing litigant, I may, even after discounting for my own self interest, have a well-founded belief that the judgment against me is in error. Moreover, losing litigants will not always be able to discount for their self-interest, and hence will frequently have an ill-founded belief that unfavorable judgments are in error.

So a system of procedure cannot always confer legitimacy on outcomes by providing either objectively or subjectively adequate assurance that the outcomes the system produces are correct or even likely to be correct. The fact of irreducible procedural error raises what we might call the hard question of procedural justice: *How can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits?* The deflationary view of procedural justice, which claims that procedural justice can be reduced to justice in outcomes, cannot easily provide an answer to this question. When we know the outcome to be unjust, the justice of the outcome cannot be the source of its legitimate authority. This conceptual point has a crucial corollary: *only just procedures can confer legitimate authority on incorrect outcomes.*

Untangling the complex strands of argument that contain an answer to the hard question of procedural justice is the enterprise undertaken in this article. But even at this early stage, we can glimpse the broad outlines of an answer. We can regard

ourselves as legitimately bound by an erroneous judgment if it results from a procedure that affords us a meaningful opportunity to participate in a process that strikes a reasonable balance between the goal of accurate outcomes and the inevitable costs imposed by any system of dispute resolution. Procedural justice is the route to reconciliation with substantive error. Adjudicative procedures create legal norms, and like other norm creating procedures, rights of participation are essential to their legitimacy. This idea—which we shall call "the Participatory Legitimacy Thesis"—will be explicated in due course.[17]

### *B. A Roadmap to the Argument*

This Article responds to the challenge posed by the hard question of procedural justice. That theory is developed in several stages, beginning with some preliminary questions and problems. The first question—what is procedure?—is the most difficult and requires an extensive answer: Part II, "Substance and Procedure," defines the subject of the inquiry by offering a new theory of the distinction between substance and procedure that acknowledges the entanglement of the action-guiding roles of substantive and procedural rules while preserving the distinction between two ideal types of rules. Part III, "The Foundations of Procedural Justice," lays out the premises of general jurisprudence that ground the theory and answers a series of objections to the notion that the search for a theory of procedural justice is a worthwhile enterprise. These two sections set the stage for the more difficult work of constructing a theory of procedural legitimacy.

That work begins in Part IV, "Views of Procedural Justice," which investigates the theories of procedural fairness found explicitly or implicitly in case law and commentary. After a preliminary inquiry that distinguishes procedural justice from other forms of justice, Part IV focuses on three models or theories. The first theory, the *accuracy model*, assumes that the aim of civil dispute resolution is correct application of the law to the facts. The second theory, the *balancing model*, assumes that the aim of civil procedure is to strike a fair balance between the costs and benefits of adjudication. The third theory, *participation model*, assumes that the very idea of a correct outcome must be understood as a function of process that guarantees fair and equal participation. In Part V, "The Value of Participation," the lessons learned from analysis and critique of the three models are then applied to the question whether a right of participation can be justified for reasons that are not reducible to either its effect on the accuracy or its effect on the cost of adjudication. The most important result of Part V is *the Participatory Legitimacy Thesis*: it is (usually) a condition for the fairness of a procedure that those who are to be finally bound shall have a reasonable opportunity to participate in the proceedings.

[17] The Participatory Legitimacy Thesis is developed and defended in Part V, "The Value of Participation," *infra*.

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The central normative thrust of *Procedural Justice* is developed in Part VI, "Principles of Procedural Justice." The first principle, *the Participation Principle*, stipulates a minimum (and minimal) right of participation, in the form of notice and an opportunity to be heard, that must be satisfied (if feasible) in order for a procedure to be considered fair. The second principle, *the Accuracy Principle*, specifies the achievement of legally correct outcomes as the criterion for measuring procedural fairness, subject to four provisos, each of which sets out circumstances under which a departure from the goal of accuracy is justified by procedural fairness itself. In Part VII, "The Problem of Aggregation," the Participation Principle and the Accuracy Principle are applied to the central problem of contemporary civil procedure—the aggregation of claims in mass litigation. Part VIII offers some concluding observations about the point and significance of *Procedural Justice*.

## II. SUBSTANCE AND PROCEDURE

The first question that any theory of procedural justice must face is the obvious one: "What is procedure?" The second question follows directly from the first: "How can procedure be distinguished from substance?" Without some account of the substance-procedure distinction, the subject-matter of such a theory of procedural justice is not well-defined. But as we all know, the substance and procedure problem is a tough nut to crack. This purpose of this section is to put the theory of procedural justice on a solid foundation by providing a fully adequate account of the nature of procedure and the ways in which it is distinguishable from substance.

### *A. Substance and Procedure through the Lens of* Erie Railroad v. Tompkins

The distinction between substance and procedure distinction can be approached from many directions. We might attempt to begin *a priori* conceptual analysis, starting with general and abstract concepts of substance and procedure. Or we might begin *a posteriori* by compiling a list of legal rules that ordinary legal usage counts as procedural in nature—then moving inductively to general definitions. Yet another possible starting point is the United States Supreme Court's decision in *Erie R.R. Co. v. Tompkins*,[18] the case that gave rise to the familiar idea that when federal courts hear state law claims, they are obligated to apply state *substantive* law but may apply the federal rules that are *procedural* in nature. *Erie* and its progeny created a task for courts and commentators—establishing criteria that sort substance from procedure. Every lawyer educated in American procedure knows that this task created an enduring

[18] 304 U.S. 64 (1938). The *Erie* literature is vast. *See, e.g.*, John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 722-25 (1974); Richard D. Freer, *Some Thoughts on the State of Erie after Gasperini*, 76 TEX. L. REV. 1637 (1998) [hereinafter Freer, *Some Thoughts*]; Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 364-65 (1977).

problem for judges and lawyers. Justice Reed's concurring opinion in *Erie* stated that problem succinctly: "The line between procedure and substance is hazy."[19] Hazy, indeed—as generations of American law students have learned to their chagrin. More than sixty years of *Erie* jurisprudence has yet to result in any clear consensus on the line between substance and procedure.

### *1. Why Start with* Erie*?*

The *Erie* doctrine is notoriously complex and obscure; moreover, *Erie* is linked to considerations of federalism that are tangential to procedural justice. Nonetheless, *Erie* and its progeny have produced a substantial body of judicial opinion and scholarship that addresses the question "What is procedure?" in a wide variety of concrete contexts. Moreover, because *Erie* has been *the* context in which the substance and procedure problem has arisen for procedure scholars in the United States, it provides a common conceptual vocabulary that is well suited to the task at hand.[20] Any discussion of substance and procedure that does not start with *Erie* will nonetheless be interpreted by American judges, layers, and legal academics with *Erie's* legacy in mind. In a sense, the question—"What is procedure?"—begins with *Erie*—whether we like it or not.

Although proceduralists associate inquiry into the line between substance and procedure with *Erie*, that case itself did little more than introduce the problem. *Erie* addressed the question whether federal courts could substitute their own judgments about the content of the common law for the judgments of state courts. Justice Brandeis's Opinion for the Court answered this question in the negative: "there is no general federal common law."[21] The majority opinion in *Erie* uses the word "substantive" only once,[22] and does not discuss procedure at all. The relationship between substance and procedure, however, was the subject of a famous sentence in Justice Reed's concurring opinion: "The line between procedure and substance is hazy," goes the passage quoted in part above, but "no one doubts federal power over procedure."[23] So what is the line between substance and procedure? Or if these two sets are overlapping, what makes a legal rule substantive, procedural, both, or neither?

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[19] *Erie*, 304 U.S. at 92 (Reed, J., concurring).

[20] Of course, there are other important contexts. Closely related to the vertical choice of law context in *Erie* is horizontal choice of law. *See* Restatement (Second) of Conflict of Laws § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."); *see also* Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999). The locus classicus is Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

[21] 304 U.S. at 78.

[22] *See* id.

[23] *Erie*, 304 U.S. at 92 (Reed, J., concurring).

More radically, must we accept Linda Mullenix's conclusion, that the line between substance and procedure "is inherently unresolvable."[24]

*2. The Inadequacy of Intuitionist Formalism*

One approach to the substance-procedure distinction is the claim that "substance" and "procedure" have intuitively accessible meanings.[25] We know that torts, contracts, and property, are substance—these paradigm cases might serve as a premise for our reasoning. We could then add another premise: we know that jurisdiction, pleading, joinder, and discovery are procedures—again, we have paradigm cases. This general approach illustrated by Richard Freer in the following passage: "[W]hatever "substantive" means, it clearly encompasses the standard of tort liability to an invitee, which was at issue in *Erie*."[26] Moreover, when courts are required to distinguish substance and procedure, they often fail to provide any criteria for their classifications.[27] From these premises, we might conclude that the line between substance and procedure can be drawn in a fashion analogous to Justice Potter Stewart's method for sorting pornography into the categories of works that are obscene and those that are not: we may know it when we see it.[28] We might call this approach to the substance and procedure problem "intuitionist formalism."[29]

Whatever the virtues of intuitionist formalism as a decision procedure for practical purposes, it will not do for the purpose of defining the scope of a theory of procedural justice. That purpose requires more than a set of paradigm cases of procedural and substantive rules. And it requires more than an ability to do *ad hoc* sorting of particular procedures. *Why?* Because a theory of procedural justice must be formulated in

[24] Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 618 (1997).

[25] The distinction between substance and procedure might be understood as purely nominal. A nominalist theory of procedure would hold that a given legal rule is *procedural* if and only if we call it "procedural." If it is the case that the two sets of legal rules (substance and procedure) are nothing more than names given to arbitrary collections, then it should follow that there can be no adequate theory of procedural justice.

[26] Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. at 1102.

[27] *Id.* at 1108-1110.

[28] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[29] Michael Moore calls this aproach "the paradigm case theory," which he sees as a "conventionalist theory of meaning." *See* Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 295 (1985).

abstract and general terms,[30] the content of a theory of procedural justice necessarily requires a domain of application.

Moreover, there are good reasons to doubt the efficacy of intuitionist formalism as a practical decision procedure. If *Erie* has any lesson, it is that Justice Reed's observation—the line between substance and procedure is hazy—has been vindicated by experience. No one familiar with the cases is likely to concur with the observation that we can sort substance from procedure because "we know it when we see it." Quite the contrary, the lesson of *Erie* is that we often fail to *see* it even when we *know* it. Many of the settled issues in *Erie* jurisprudence remain hazy even after they are resolved.[31]

Nonetheless, our intuitions (or better "considered judgments") about particular cases are certainly relevant to the inquiry at hand. An adequate theory of substance and procedure must account for ordinary language and for the settled judgments of competent legal practitioners (scholars, judges, and lawyers). A theory of substance and procedure must *either* count pleading and joinder as procedural and classify the duty of care in negligence as substantive *or* offer a compelling explanation as to why our considered conviction about these paradigm cases is in error.

### *3. Outcome Determination: Ex Ante and Ex Post*

Does the Supreme Court's *Erie* jurisprudence have anything to teach us about substance and procedure? The first place to look is surely the case in which the Court itself first attempted to develop a deep answer to the question, *Guaranty Trust Co. v. York*.[32]

*Outcome Determination: Ex Post from Termination*. Simplifying greatly, the issue in *York* was whether a state statute of limitations or the federal equitable doctrine of *laches* would determine the question whether an action for breach of fiduciary duty would be time-barred; the former doomed the claim, while the latter allowed it to go

[30] This is not to say that we could not offer microtheories that address the fairness of particular procedures. For example, we could articulate a microtheory of procedural fairness that took pleading rules as its domain. Such a theory would require criteria for what counts as a pleading rule, but it would not necessarily require an answer to the question whether and why pleading rules are procedural in nature. One might produce a microtheory for each and every legal rule that our intuitions counted as procedural. The set consisting of these microtheories might then be said to comprise a "theory of procedural justice," but it would be more natural to say that if microtheories are the best we can do, then there is no macrotheory of procedural justice.

[31] Examples are numerous. Statutes of limitations are considered substantive for *Erie* purposes, *see* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), but intuitive formalism suggests the opposite result—that limitations periods are procedural rather than substantive in nature.

[32] 326 U.S. 99 (1945).

forward.[33] Given Justice Reed's statement in *Erie*, one might think that this question would turn on the question whether statutes of limitations should be classified as substantive or procedural. Justice Frankfurter's Opinion for the Court in *York* suggests that this question is not well framed:

> Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to *ex post* facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws.[34]

Frankfurter's suggestion is that the terms "substance" and "procedure" take on different meanings in different contexts. What is substantive in one context may be procedural in another. If that were all that Frankfurter said, then *York* might suggest that the search for a general theory of procedural fairness is doomed to failure, but that is not all he said:

> And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or *whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?*[35]

The italicized clause might provide us with a test for the line between "substance" and "procedure." That is, we might say that if a legal rule is outcome determinative *ex post* from the point of view of the termination of the litigation, then the rule is *substantive*, but if a legal rule did not determine who won or lost from the *ex post* perspective, then it is *procedural*. In *York*, the choice between the federal equitable doctrine of *laches* and the state statute of limitations was outcome determinative; under the former rule,

[33] *Id.* at 100-101; *see also id.* at 107 (stating "this case reduces itself to the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties.").

[34] *Id.* at 108.

[35] *Id.* at 109 (emphasis added).

the action should have been allowed to go forward, but under the latter rule, the action would have been barred.

Is this an adequate criterion for the sorting of legal rules into the categories of substance and procedure? The answer is "no," for reasons that are adumbrated in Chief Justice Warren's opinion in *Hanna v. Plumer*.[36] In *Hanna*, the plaintiff brought a state-law claim in federal court on the basis of diversity jurisdiction. The defendant was served pursuant to Federal Rule of Civil Procedure 4, which allowed process to be left at the defendant's home with a responsible person. Under Massachusetts law, in-hand service was required. Is the choice between these rules outcome-determinative? Chief Justice Warren answered:

> The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. *But in this sense every procedural variation is 'outcome-determinative.'* For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him.[37]

Why does every procedural variation *seem* outcome-determinative, *post hoc*, from the perspective of the termination of litigation? The assumption upon which the reasoning of *Hanna* rests is that procedural rules are enforced through outcome-affecting rulings.[38] That is, if you fail to serve process in compliance with the service of process rule, the sanction is that your action is dismissed. If you fail to plead in accord with the pleading rules, then you are subject to a motion to dismiss for failure to state a claim (or a demurrer). If you fail to properly join a defendant, you claim against that defendant will not be heard. This criticism of the *York* outcome-determination test is generally considered to be decisive. For our purposes, the point is that outcome-determination from *ex post* perspective of the termination of the litigation will not serve as the criterion for what counts as procedure for the purpose of a theory of procedural justice. In that context, the proper formulation of the test would be whether a given

[36] 380 U.S. 460 (1965).

[37] 380 U.S. at 468-69 (emphasis added).

[38] There is an ambiguity in this formulation. Some rulings affect the outcome of a particular civil action, but do not preclude the claim. For example, a dismissal based on jurisdiction (personal or subject-matter) may terminate the immediate civil action, but the claim may be refiled in another court. The general rule is that claim preclusive (*res judicata*) effect is only given to judgments that are "on the merits." *See* Lawrence Solum, *Claim Preclusion or Res Judicata*, 18 MOORE'S FEDERAL PRACTICE (3d ed. 1997).

procedural rule could affect the outcome of the litigation. Application of the test will yield the conclusion that the set of procedural legal rules is empty.[39]

*Outcome Determination: Ex Ante from Initiation*. If *Hanna v. Plumer* provides the rationale for rejection of the *ex post* outcome determination test, it also articulates a substitute test. Rather than asking whether a given legal rule is outcome-determinative *ex post*, we can instead whether it is outcome-determinative *ex ante* from the point of view of the initiation of the action. As Chief Justice Warren put it:

> Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served.[40]

The *ex ante* version of the outcome-determination test seems a more promising candidate for a general test of the line between substance and procedure. Our considered judgment is that the rules of tort, contract, and property law are substantive. And these rules are outcome determine from the point of view of a litigant choosing a forum, *ex ante* at the time litigation is initiated.

Consider the following example. Suppose there is a case where the choice is between two standards for the duty of care in negligence law. One jurisdiction employs Judge Learned Hand's test and balance the cost of precaution against the injury discounted by the probability of its occurrence (the B<PL formula). Another jurisdiction asks whether the level of care falls below that of the ordinary citizen (the median level of care in the relevant community). For a wide range of cases, these standards of care will be identical, but where they differ, the choice between them will be outcome determinative from the *ex ante* perspective.

The *ex ante* version of the outcome-determination test also fits well with our considered judgments about the paradigm cases of procedure. For example, service of process, pleading, and joinder rules are considered procedural, but it would seem that none of these is outcome determinative from the point of view a litigant choosing a forum. Take the *Hanna* case as an example. So long as the service of process rule is announced in advance, the plaintiff can comply with whatever rule is in effect.

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[39] More precisely, the proposed test makes the classification of a legal rule as substantive or procedural depend entirely on the method by which the rule is enforced. Thus, pleading rules become substantive if enforced by dismissal and procedural if enforced by fines. Measured against our considered judgments, the *ex post* outcome-determination test is still inadequate. Pleading rules and joinder rules are paradigm cases of procedural rules, whether they are enforced by dismissal or by monetary sanctions.

[40] 380 U.S. at 469 (footnotes omitted).

*4. A Critique of Ex Ante Outcome Determination*

Despite the first-blush attractiveness of *Hanna's ex ante* version of the outcome determination test, it is, in the end, wholly unsatisfactory for our purposes. *Ex ante* outcome determination fails as the criterion for sorting rules into substance and procedure for at least four reasons: (1) it fails to account for the existence of procedural rules with substantive purposes, functions, and effects; (2) it cannot account for the *ex ante* outcome-determinative nature of rule variations that systematically affect accuracy; (3) it is unable to account for the *ex ante* outcome-determinative nature of rule variations that systematically affect procedural costs; (4) it classifies forum-selection rules (e.g. venue and jurisdictional rules) as substantive. Each of these points deserves comment.

*Procedural Rules with Substantive Purposes, Functions, and Effects.* The first failure of *ex ante* outcome determination is that it fails to account for the fact that substantive rules can easily be cast in procedural guise. One way to illustrate this fact is to examine the text of the Rules Enabling Act, the federal statute that authorizes the Supreme Court to create rules of procedure and evidence for the federal trial courts.[41] The Act provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[42]

Section (a) of the Rules Enabling Act empowers the Supreme Court to create "general rules of practice and procedure" while section (b) prohibits the Court from making rules that "abridge, enlarge, or modify any substantive rights." If substance and procedure were two mutually exclusive categories, then 2072 (b) would be mere surplusage. But as Paul Carrington succinctly expressed the point, "the terms "substance" and "procedure" are not mutually exclusive."[43] That is, it is possible for a procedural norm to alter a substantive right.

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[41] Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); *see also* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1282-86 (2002) (discussing the substance/procedure dichotomy and the federal rules scheme).

[42] 28 U.S.C. § 2072.

[43] Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281, 287; *see also* Hanna v. Plumer, 380 U.S. at 471.

How can procedure modify substance? Consider a simple hypothetical: suppose that a pleading rule requires that plaintiffs provide the sort of detailed and particularized information in their complaint that is usually under the control of the defendant. Drawing on the model of Rule 9(b), which requires that fraud must be plead with particularity, we could imagine a rule that requires a level of particularity that is, in practice, unattainable. For example, the Private Securities Litigation Reform Act provides pleading rules[44] for securities fraud actions that are far more difficult for plaintiffs to meet than the transsubstantive rules of pleading contained in the Federal Rules of Civil Procedure.[45] If the pleading burden is raised high enough, the effect may be to change the substance of the law. A claim that cannot be successfully pled is in one sense, no claim at all. Borrowing terminology from Professor Meir Dan Cohen,[46] the point is that rules of procedure provide *decision rules* (directed at officials, e.g. judges) which can change the meaning of the *conduct rules* (directed at ordinary citizens) with which they are associated. This change in meaning may take time, because substance-affecting rules of procedure less transparent to the public than are rules of substantive law. But as time passes and legal advice translates the substance-affecting, procedural decision rules for those whose conduct is at issue, rules of procedure may well become *de facto* rules of conduct.

Before proceeding any further, we should note that this *criticism* of the *ex ante* outcome-determination test is not aimed at the usefulness of the test for *Erie* purposes. Rather, our point is that this test cannot, by itself, provide the criterion by which we define substance and procedure. *Why not?* Because the *ex ante* outcome-determination test does not distinguish between the category of procedural rules with substantive

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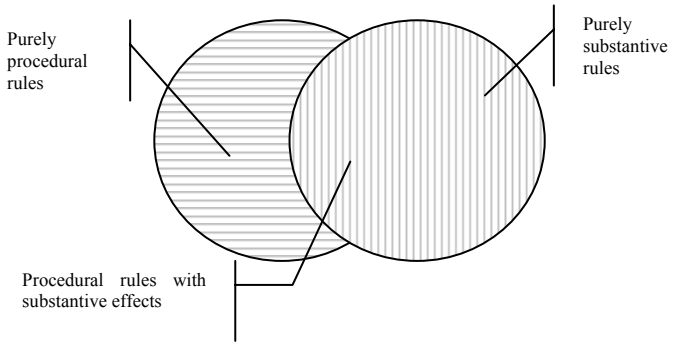
[44] See, e.g., William D. Browning, *Comment on 'The New Securities Fraud Pleading Requirement*,' 38 ARIZ. L. REV. 709 (1996); William S. Lerach & Eric Alan Isaacman, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996); Elliott J. Weiss, *Pleading Securities Fraud*, 64 LAW & CONTEMP. PROBS. 5 (2001); Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996); Michael B. Dunn, Note, *Pleading Scienter After the Private Securities Litigation Reform Act: Or, a Textualist Revenge*, 84 CORNELL L. REV. 193 (1998); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537 (1998); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002); Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996); Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 That the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457 (1998).

[45] Fed. R. Civ. P. 8 & 9.

[46] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

effects and the category of purely substantive rules. This point is illustrated by Figure One, below.

**Figure 1: Substance and Procedure**




*Accuracy Effects.* There is a second reason for rejecting the *ex ante* outcome determination test: that test misclassifies rule variations that systematically affect the accuracy of a system of procedure. Consider the following hypothetical. A litigant is given the choice of two systems of procedure. The first system has hyper-technical pleading rules and allows for almost no pretrial discovery. The second system has simplified pleading rules and provides for extensive pretrial discovery. Assume for the purposes of the hypothetical that the first system places a very high premium on lawyering skill, and hence that it systematically produces inaccurate results in cases where the litigant with the worse case on the merits has the better lawyer. This system might well be viewed as outcome-determinative from the point of view of a plaintiff choosing a forum. For example, a plaintiff with a weak case on the merits but a superb lawyer might prefer system one, whereas a plaintiff with a strong case on the merits but a weak lawyer might prefer system two.

The point of the hypothetical is that procedural systems may vary in systematic and predictable ways with respect to accuracy. Because accuracy effects can be outcome determinative from the *ex ante* point of view, they would be classified as *substantive* by the *Hanna ex ante* outcome-determination test. But this result is inconsistent with many of our considered pre-theoretical judgments about the line between substance and procedure. Discovery and pleading rules do not automatically become substantive because they can systematically affect accuracy. This conclusion needs to be qualified. If the rules of discovery or pleading are substance specific, so that they disfavor (or favor) particular plaintiffs with particular kinds of claims, then they can become quasi-substantive in nature. But setting this qualification to the side, we can conclude that simply because procedural improvements can make the system more accurate in a predictable way, we should not say that the difference between the less accurate procedure and the more accurate procedure *is* a difference of substantive law.

*Procedural Costs.* The third failure of *ex ante* outcome determination is closely related to the second. Some procedural systems are more costly than others, and this

fact may be viewed as outcome-determinative from the point of view of a litigant choosing a forum. As a plaintiff, if I must choose between two procedural systems, an expensive system which will require that I expend more than the value of the claim to get relief and a cheap system which will permit me to pursue my claim to judgment without such an expenditure, then, from my point of when I am choosing a forum, this choice is outcome determinative. Procedural systems impose a variety of costs, including directly-charged fees, the costs of representation, and the costs imposed by discovery.

Even though litigation costs may be outcome determinative from the point of view of a litigant choosing a forum, it does not follow that costs transforms procedure into substance. Once again, the outcome determination test seems to produce a false positive for substance, sweeping in variations that are procedural in nature.

*Forum-Selection Rules.* The fourth failure of *ex ante* outcome determination is very specific but nonetheless quite telling. Rules of jurisdiction and venue are paradigm cases of procedural rules, but they are, of course, outcome determinative from the point of view of a litigant choosing a forum. If the court lacks venue or jurisdiction, you claim will be dismissed. Once again, the *ex ante* outcome-determination test fails to sort properly.

*Summary.* In sum, *Hanna's ex ante* version of the outcome determination test simply is not appropriate for the job of sorting substance from procedure. As Justice Harlan wrote in his *Hanna* concurrence:

> In turning from the 'outcome' test of York back to the unadorned forum-shopping rationale of Erie, however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge.[47]

Both procedural rules and substantive rules may seem outcome-determinative from the point of view of a litigant choosing a forum.

### *5. Primary Conduct and Litigation Conduct*

Justice Harlan's concurrence in *Hanna* suggests yet another approach to the substance-procedure dichotomy. Harlan wrote:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect

[47] *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

> those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[48]

The key phrase is "primary decisions respecting human conduct" and this test, although never endorsed explicitly by the Supreme Court, has been influential in the *Erie* context.[49]

The meaning of Harlan's phrase can be explicated by a metaphor. Procedure, we might say, regulates conduct *inside the courtroom*. Substance, on the other hand, regulates conduct *outside the courtroom*.[50] Of course, this is only a metaphor. By "inside the courtroom," we mean to refer not only to the literal courtrooms, but also to clerks' offices, conference rooms where depositions are taken, lawyers' offices where pleadings are drafted, and so forth. By "outside the courtroom," we mean to refer to the full range of human conduct (from driving automobiles to selling real estate and entering into contracts); of course, such primary conduct may, as a matter of fact, take place inside a courtroom—where torts may be committed, property sold, and contracts made. The topographic metaphor—inside and outside the courtroom—stands for a larger distinction.

So what distinction stands behind the metaphor? Serving process, drafting complaints, and taking depositions are just as much "human conduct" as speeding, buying a home, or entering into personal services contract. What marks out the latter as "primary" (Harlan's word)? The danger of circularity is apparent. We cannot use "procedure" or "process" (or "substance" or "substantive") to mark the distinction—those are the terms for which we are seeking meaning.

But a second look at the metaphor is nonetheless revealing. Courts (as well as other adjudicative institutions, such as administrative tribunals or arbitration firms) are themselves identifiable. We know which institutions are courts are which are not. We do know what lawsuits (or civil actions) are, and we know under what conditions individuals (or firms or other entities) become parties to disputes and hence we also know when individuals (or firms or other entities) are *not* engaged in litigation. So when we speak of litigation related conduct, we are not begging the substance-procedure question. Rather, we are appealing to relatively certain and stable usages

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[48] *Id.*

[49] For example, Judge Richard Posner equates "substantive" with "designed to shape conduct outside the courtroom and not just improve the accuracy or lower the cost of the judicial process." S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District, 60 F.3d 305, 310 (7th Cir. 1995). Posner does not cite Harlan, but the connection is obvious as has been noted by Professor Freer. *See* Freer, *Some Thoughts*, 76 Tex. L. Rev. at 1661. For a discussion of the influence of Harlan's formulation, *see* Jed I. Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 975 n. 33 (1996); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46 n.200 (1985).

[50] This is the metaphor that Posner adopts in the passage quoted in footnote 49. *See* S.A. Healy Co., 60 F.3d at 310.

that do not depend directly upon the answer to the substance-procedure question. And once we are able to identify the contexts in which litigation (or arbitration, etc.) occurs, we then have what we need to apply Harlan's primary conduct test. A rule of law is procedural if its function is to regulate adjudication-related conduct. A rule of law is substantive if its function is to regulate conduct that occurs outside the context of adjudication. A rule of law is both substantive and procedural if its function is to regulate both kinds of conduct. Rules that have both procedural and substantive functions may, nonetheless, have a function that it dominant or characteristic.[51]

There is yet another technique for explicating the meaning of Justice Harlan's phrase, "primary decisions respecting human conduct." When looking at the outcome-determination test, we employed two perspectives—*ex post* (looking back from the end of litigation) and *ex ante* (looking forward from the point just before litigation has begun). We can, however, move the *ex ante* perspective back in our stylized chronology of a dispute—to the point in time that precedes the conduct that gave rise to the dispute. In other words, we can look at a dispute *ex ante* from the point in time before the accident occurred, before the contract negotiations began, etc. From that perspective, we can ask the question whether the legal rule in question would have altered the ways the parties to dispute would behave *before litigation commenced*. From this perspective, we might say that substantive rules are those that would alter pre-dispute conduct[52] ("primary conduct").

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[51] In the text, I used the word "function" in a crucial role, and I have chosen that word rather than two others: "effect" and "purpose." We might define the line between substance and procedure by referring to the effects of legal rules: tort law effects primary conduct; pleading rules effect litigation-related conduct. Or we might draw the same line by inquiring into the purpose of legal rules: contract law is intended to regulate agreements outside of the litigation context, whereas joinder rules are intended to affect the way lawsuits are put together and taken apart. "Function" is a sort of weasel word, which takes rules themselves as having a purpose or *telos*, which end is revealed in part by the effects that the rule has. The choice between effect, purpose, and function is not trivial, but for our purposes, we need not tarry long over this point. It may turn out that all three notions (function, purpose, and effect) are needed, and when the three diverge, the line between substance and procedure becomes ambiguous. That possibility, however, does not threaten the distinction. Many concepts are ambiguous in particular contexts, but that does not prevent them from being useful.

[52] The emphasis on "pre-dispute conduct" brings out an important fact about the relationship between procedure and conduct that occurs after the transaction or occurrence that is the subject of the lawsuit but before a complaint is filed. During this period, the parties may interact in a variety of ways: a demand letter may be dispatched, a settlement offer made and rejected, or informal mediation may occur. These activities take place "in the shadow of the law," both *substantive* and *procedural*. When parties settle, they calculate their expected liability or expected recovery minus litigation costs. In a very real sense, this bargaining takes place "in the shadow of procedure." *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Search Term Begin Shadow Search Term End of the Search Term Begin Law Search Term End : The Case of Divorce*, 88 YALE L.J. 950, 993-95 (1979); Phyllis Tropper Baumann, Judith Olans Brown, & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992).

*Lawrence Solum*

The *ex ante* perspective of a person deciding how to act before a dispute arises was employed by the *Restatement (Second) of Conflict of Laws* as an argument for the application by a forum of its own procedural rules to a dispute in which the substantive law may be that of a different jurisdiction:

> Parties do not usually give thought to matters of judicial administration before they enter into legal transactions. They do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary. Accordingly, the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum's rules in such matters.[53]

The Restatement paints with a brush too broad. In fact, rules of judicial administration can directly affect the way that litigants behave before disputes arise. Strict pleading rules may actually have the function (effect and/or purpose) of assuring potential defendants that they can engage in certain conduct with the confidence that claims based on such conduct will be dismissed at an early (and relatively low cost) stage of litigation.

### *B. A Thought Experiment: Acoustic Separation of Substance and Procedure*

So far, our approach to the substance and procedure question has been theoretically cautious and mostly doctrinal—closely tied to the development of the *Erie* doctrine in the context of concrete cases with particular facts. But before we proceed further, we need to acquire a firm grasp on the abstract and general distinction (such as it is) between substance and procedure. Such a grasp is elusive, precisely because of the entanglement of substance and procedure. What is needed is a thought experiment that will allow us to *see* substance and procedure in a simplified legal environment that avoids the complex particularity of the actual legal world. If the actual world of substance and procedure is a *jungle*, overgrown by intertwined strands of substance and procedure, we need a *desert landscape* in which substance and procedure stand out in splendid isolation.[54]

The requisite thought experiment posits a possible world in which citizens know only the content of the substantive law, and only legal officials know the content of the procedural law. We will explore the thought experiment in two stages, *informal* and *formal*. The informal version aims to make the possible world of the thought experiment vivid and simple enough for an immediate intuitive grasp. The formal version aims to make this possible world precise and transparent.

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[53] Restatement (Second) of Conflict of Laws § 122 Comment a (1971).

[54] *Cf.* Willard van Orman Quine, *On what there is*, 2 REVIEW OF METAPHYSICS (1948) *reprinted in* WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW: LOGICO-PHILOSOPHICAL ESSAYS 4 (1953) (source of "desert landscapes" metaphor). The irony in borrowing the desert landscapes metaphor from Quine in the context of introducing possible worlds talk flows from Quine's commitment to ontological minimalism.

*Procedural Justice*

*1. The Informal Thought Experiment: The Cone of Silence*

Start with the *informal* thought experiment. Imagine a possible world in which legal institutions (judicial, legislative, and executive officials) are *acoustically separated* from ordinary citizens (families, workers, businesses, churches, and so forth). It helps me to picture the government complex—the executive office building, the legislative assembly hall, the court of justice, and so forth—covered by a gigantic *cone of silence*, [55] which prevents any information passing from legal institutions to ordinary citizens or *vice versa*, with only a few exceptions. *What are the exceptions?* First, a code of conduct (e.g. contract, criminal, property, and tort rules) is promulgated by the legislature and allowed to pass through the cone of silence to the outside world, where each citizen commits the code to memory. Second, information relevant to particular legal disputes (e.g. documents, deposition transcripts, exhibits, and witnesses) is allowed to pass through the cone into the legal system, where it is processed by legal representatives and judges using a code of procedure. Third and finally, judgments (orders to pay money damages, injunctions, and order for incarceration) pass through the cone into the outside world. To those outside the cone of silence, the system of adjudication is a black box (information flows in, statutes and judgments flow out). The rules governing the operation of the courts inside the cone are the rules of procedure. The rules governing the conduct of ordinary citizens outside the cone are the rules of substance. Because of the acoustic separation between the institutions of adjudication and the outside world of parties, disputes, and facts, the categories of substance and procedure are well-defined and mutually exclusive.

[55] The "cone of silence" is borrowed from *Get Smart*, an 1960s television sitcom, as depicted below:

*See* Get Smart Photo Gallery, at http://www.cinerhama.com/getsmart/innovations.html (visited January 7, 2004).

*Lawrence Solum*

*2. The Formal Thought Experiment: The Possible World of Acoustic Separation*

This informal version of the thought experiment can be made precise by carefully defining the conceptual tools used and by precisely specifying its conditions. To build the formal version, we need to avail ourselves of three conceptual tools: (1) H.L.A. Hart's distinction between primary and secondary rules, (2) acoustic separation between conduct and decision rules, and (3) possible worlds semantics. Each of these three ideas requires brief explication:

- *Primary rules and secondary rules.* The first conceptual tool is the distinction between primary and secondary rules, made famous by H.L.A. Hart in his magisterial book, *The Concept of Law*.[56] Hart's distinction "discriminate[s] between two different though related types"[57] of rules:

  > Under rules of the one type, which may well be considered the basic of primary type, human beings are required to or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.[58]

  Secondary rules, in Hart's sense, encompass the rules of contracts and trusts, which permit private individuals to create, modify, and extinguish primary obligations. And the set of secondary rules encompasses the rules that define the powers of legislatures and administrative agencies—powers to make general laws and rules that create, modify, and extinguish both primary obligations *and* secondary rules. Finally, and for our purposes *crucially*, secondary rules allow adjudicators (courts and administrative tribunals *to determine the incidence and control the operation* of other primary and secondary rules in particular cases.

- *Acoustic separation between conduct rules and decision rules.* The second distinction that we need to formalize our thought experiment

[56] H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

[57] *Id.* at 80-81.

[58] *Id.* at 81.

is the idea of *acoustic separation between conduct and decision rules*. The idea of *acoustic separation* is itself a metaphor made more vivid by the picture of a *cone of silence*. Formulated in a more rigorous way the idea of *acoustic separation* specifies domains between which certain kinds of information does not flow. Here is Dan-Cohen's formulation of the idea of acoustic separation:

> The general public engages in various kinds of conduct, while officials make decisions with respect to members of the general public. Imagine further that each of the two groups occupies a different, acoustically sealed chamber. This condition I shall call "acoustic separation." Now think of the law as a set of normative messages directed to both groups. In such a universe, the law necessarily contains two sets of messages. One set is directed at the general public and provides guidelines for conduct. These guidelines are what I have called "conduct rules." The other set of messages is directed at the officials and provides guidelines for their decisions. These are "decision rules." [59]

Dan-Cohen's formulation is evocative but not formally complete. "Acoustic separation" is insufficient, since information could flow between the realms of conduct and decision through visual, electronic, or other means. The formal requirement is that no information regarding decision rules should pass from the one zone to the other.

- *Possible worlds.* In the actual world, there is only limited acoustic separation between the officials addressed by rules of decision and procedure, on the one hand, and citizens addressed by rules of conduct and judgments, on the other. Our thought experiment requires that we posit a hypothetical situation or *possible world*[60]—to use the notion made famous by Leibniz[61] and developed by the

[59] Dan-Cohen, *supra* note 46.

[60] *See* JOHN DIVERS, POSSIBLE WORLDS (2002) (providing a comprehensive introduction to the issues raised by the philosophical idea of possible worlds).

[61] The idea of possible worlds was introduced by Leibniz. *See* GOTTFRIED WILHELM VON LEIBNIZ, *The Theodicy* in LEIBNIZ: SELECTIONS 509-11 (Philip P Weiner ed. 1951). Leibniz's used the idea of a possible world in answer to the argument against the existence of good from the problem of evil. The argument is not proven, Leibniz maintained, until it is shown that the actual world is not the best of all possible worlds. *Id.* "World" here refers to the whole universe through time and not just the planet Earth.

> contemporary philosophers Saul Kripke[62] and David Lewis.[63] The point of thought experiment is not that that the actual world could *become* this possible world at some point in the future. Nor does the thought experiment require that the world of the thought experiment be consistent with the laws of natural science and human psychology and sociology that obtain in the actual world. The world of the thought experiment is simply one that resembles the actual world, except that acoustic separation obtains as specified. So long as we can imagine this possible world as required by the though experiment, further questions, such as the precise mechanism by which acoustic separation would operate, need not be answered.

The formal thought experiment can be stated in a stripped-down version, which contains the key features, but abstracts from the complex details of actual legal systems. So, we can posit a possible world with the following characteristics:

1. There is a single political entity, the State.
2. All general rules of law are promulgated by a single unicameral legislature and integrated into a Code.
3. All dispute resolution is accomplished through a unified judiciary which consists of a single trial court, with a single judge and no jury. All legal proceedings terminate in a judgment, which is an order that requires specific actions by the parties to a dispute. All litigation costs including attorney's fees are borne by the state.
4. The Code is divided into four parts:
   i. Part I is the *Constitutional Code*, which consists of secondary rules that confer power on the legislature to enact, modify, or terminate provisions of the Code.
   ii. Part II is the *Code of Conduct*, which consists entirely of conduct rules that are addressed to citizens, including primary rules (e.g. criminal prohibitions) and secondary rules (e.g. contract law).
   iii. Part III is the *Code of Decision*, which consists of decision rules addressed to legal officials, which attach legal consequences (e.g. liabilities or punishments) to violations of the primary and secondary rules either contained in or authorized by Part II.
   iv. Part IV is the *Code of Adjudication*, which consists of rules for conduct of dispute resolution by the unified judiciary specified above. These rules include (a) conduct rules for the legal representatives of parties to civil and criminal procedures and (b) decision rules for judges that define the actions the judges shall take in response to each possible action that could be

[62] *See* SAUL KRIPKE, NAMING AND NECESSITY (rev. ed. 1981).

[63] *See* DAVID LEWIS, ON THE PLURALITY OF WORLDS (1986).

undertaken by the legal representatives for the parties. These rules are designed so that the relevant facts and provisions of the Code of Decision are accurately presented to the judge.

5. The Constitutional Code requires the four part division of the Code that is specified above and further specifies that all legal rules that aim at the regulation of conduct shall be included in the Code of Conduct and that content of the Code of Decision shall conform to the Code of Conduct. The Constitutional Code also requires the Code of Adjudication to maximize accuracy, e.g. to maximize the extent to which findings of fact are in conformity with the state of the world and the extent to which the law is correctly applied to the facts. Legislators do in fact conform to the provisions of the Constitutional Code.
6. The Code is fully specified. For every possible action by citizens the code permits, forbids, or requires the action and/or the code specifies that the action can be permitted, forbidden, or required by a contract. For every possible action by the legal representatives of parties in the course of representation, the code specifies a legal consequence. Every possible action by legislative, judicial, and executive officials is either required, prohibited, or permitted by the Code.
7. Each natural person is either a citizen or an official. The class of officials includes members of the executive, legislative, and judicial branches, as well as lawyers and their staffs. Officials act only in their official capacity and act in full compliance with the provisions of the code.
8. There is acoustic separation between substance and procedure, specified as follows: (a) each citizen knows the content of Part II of the Code, but no citizen is aware of the content of Parts I, III, or IV of the Code; (b) legislative and executive officials are aware of the whole content of the Code; (c) judicial officials and lawyers are only aware of the content of Parts I, III, and IV of the code; (d) citizens have no knowledge of the content of legal proceedings with one exception: parties to a dispute do know the content of the judgments of their legal proceeding, and (e) citizens make no attempt to infer the content of the Constitutional Code, the Code of Decision, or the Code of Adjudication from the information they possess about the outcome of individual adjudications.

The thought experiment can be made more concrete by imaging a particular case:

> Ben drives negligently and hits Alice's automobile. The Code of Conduct contains a provision that specifies that negligent drivers will pay compensation to their victims. Alice contacts her legal representative—by passing a message through the barrier establishing acoustic separation. Behind the barrier, Alice's legal representative then initiates a proceeding against Ben in the Court as specified by Code of Adjudication. Also pursuant to the Code of Adjudication, Ben and Alice's lawyers prepare pleadings, conduct discovery, participate in a trial, and so forth—resulting in findings of

> fact and conclusions of law that accurately represent the state of the world and the content of the Code of Decision. Information regarding Ben and Alice's conduct flows into the Court, but the proceedings take place in secret, without information concerning their content flowing to Alice, Ben, or other citizens. At the end of the proceedings, the judge applies the law to the facts and issues a judgment requiring Ben to pay Alice $500 in damages. The judgment passes through the barrier and is then communicated to Ben and Alice. Ben pays Alice the $500.

In the world of acoustic separation between substance and procedure, we have no difficulty drawing a precise bright line between substance and procedure. The substantive law is divided into two parts, the Code of Conduct and the Code of Decision.[64] The procedural law is contained in the Code of Adjudication. Provisions are sorted into the Parts of the Code by reference to (1) the audience to whom they are addressed, and (2) the purposes for which they are enacted. Because of the provisions of the Constitutional Code and the fact of acoustic separation, no provision of the Code of Adjudication has any substantive effects or purposes. Because no officials are citizens, the substantive law only affects adjudication through the Code of Decision.

So the pleading rules that govern Ben and Alice's dispute are purely procedural. The standard of care, on the other hand, is divided into two parts—a rule in the Code of Conduct that is available to Ben and Alice *and* a rule in the Code of Decision that is not available to Ben or Alice, but is available to attorneys and judges.

*3. Implications of the Thought Experiment*

Of course, the actual world is not the world of acoustic separation of substance and procedure. For example, in the actual world, the Code of Conduct and the Code of Decision are generally conjoined in a single set of provisions which are simultaneously addressed to both citizens and officials. In the actual world, there is no guarantee of acoustic separation. Citizens can become aware of the content of the procedural rules and decision rules. In the actual world, legislatures can attempt to influence primary conduct by citizens by varying the rules of procedure. Moreover, procedural rules may have the unintended consequence of affecting conduct to the extent that they produce

[64] The Code of Conduct is clearly substantive in the sense that it is aimed at the regulation of primary conduct. The Code of Decision, however, is aimed at regulating the decisionmaking processes of judges. Our thought experiment assumes, however, that the content of the two codes are matched. Thus, if there is a provision in the Code of Conduct that says, "Murder is prohibited," then there will be a matching provision in the Code of Decision that states, "If some person P, commits murder, then P shall serve a twenty year sentence in a prison." Because provisions of the Code of Decision regulate litigaton-related conduct, there is an important sense in which they are also procedural. This point is explored below. *See infra* Part II.C.2, "Procedural Substance" (discussing procedural functions of rules of decision).

"inaccurate" results that can be systematically predicted. In the actual world, substance and procedure are entangled.

Nonetheless, the thought experiment performs important functions for theorists who wish to analyze the procedural and substantive dimensions of actual rules in which these two dimensions are entangled. For any particular entangled rule, we can imagine how that rule might be disentangled in the world of acoustic separation. By disentangling mixed rules into discrete rules of conduct, decision, and adjudication, we can identify their substantive and procedural aspects. The thought experiment gives us a conceptual tool that allows us to see the strands of substance and procedure in entangled rules clearly.

In other words, the thought experiment provides a rigorous way of "inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct [65]—to use Justice Harlan's felicitous phrasing. That the method is rigorous does not imply that it provides a determinate answer for every case. When we look at the history of actual rules, their functions (purposes and effects) may be difficult to discern. This is an epistemological problem—a problem that stems from our incomplete knowledge of legislative purpose and causal relationships in the actual world. *This kind of epistemological problem may be of substantial practical significance, but this does not entail that it undermines the ontological status of the distinction between substance and procedure that is revealed by the thought experiment.*

Some further explanation is required. The view advanced here is that *the line between substance and procedure is an idealization*. Useful application of the idealization to the actual legal rules requires knowledge about the world. When that knowledge is unavailable, we may have cases in which the characterization of an actual rule as procedural or substantive is impossible as well as cases in which the strands of substance and procedure cannot be untangled. Nonetheless, even in these cases the thought experiment provides a means of identifying the knowledge that *would be decisive* were it to become available.

The thought experiment performs another important function be providing a mechanism by which we can distinguish *form* and *function* in the context of the distinction between *substance* and *procedure*. In the world of the thought experiment, procedural form maps perfectly onto procedural function, and substantive form likewise maps perfectly onto substantive function. In the actual world, where acoustic separation and purity of procedural intention are counterfactual, perfect mapping does not hold. Nonetheless, the thought experiment provides a fairly precise and analytically rigorous mechanism for identifying the formal and functional dimensions of a given legal rule. In the actual world, we might then classify legal rules using a two-by-two matrix:

[65] *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

**Table 1: Form and Function**

| | | Form | |
|---|---|---|---|
| | | Substantive | Procedural |
| Function | Substantive | Pure substantive rule. | Procedural form with substantive function. |
| | Procedural | Substantive form with procedural function. | Pure procedural rule. |

This distinction between form and function is reflected in actual practice: for example, legal rules are divided into "Codes of Procedure" (e.g. the Federal Rules of Civil Procedure) and "Codes of Conduct" (e.g. the California Criminal Code).

Finally, we should bear in mind that the point of the thought experiment is not to provide a device that will allow actual rules to be sorted into rules of substance and rules of procedure—although in some cases a rough and ready approximation of such sorting may serve practical purposes. Quite the contrary, the point of the thought experiment is to allow us to see more clearly how substance and procedure are thoroughly entangled in the actual rules of existing legal systems.

### *C. The Entanglement of Substance and Procedure*

The idea that substance and procedure are not mutually exclusive is a familiar one. Justice Frankfurter wrote in the *York* case, "Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."[66] The New Jersey Supreme Court has opined that "it is simplistic to assume that all law is divided neatly between 'substance" and 'procedure.'"[67] As Scott Matheson put it, "Law is the product of interaction between substance and procedure, but the relationship between the two is more subtle and complex than simply their joinder in litigation."[68] And finally, Frank Easterbrook wrote: "Substance and procedure are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained."[69]

[66] Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

[67] Busik v. Levine 63 N.J. 351,364, 307 A.2d 571, 578 (1973).

[68] Scott M. Matheson, Jr., *Procedure in Public Personal Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215 (1987).

[69] Easterbrook, Substantive Due Process, 1982 SUP. CT. REV. 85, 112-13.

*Procedural Justice*

If the idea that substance and procedure are entwined is well accepted, the task that remains is to explicate that entanglement with the aim of clarifying rather than muddying the distinction between substance and procedure. What are the modes of entanglement? How do substance and procedure overlap and interact? My answer to these questions proceeds in steps. The initial step involves sorting the obvious cases of overlapping substance and procedure into two heuristic categories: (a) *substantive procedure* and (b) *procedural substance*. The initial category includes rules of law that are primarily procedural in form, but have a procedural function: these are rule of *substantive procedure*. The other category includes rules of law that are primarily substantive in form, but have a procedural function: these are rules of *procedural substance*. The next step is an exposition of the core idea of *the entanglement thesis*: procedure is an essential component of the action-guiding function of substantive law.

*1. Substantive Procedure*

The idealization of a pure rule of procedure is premised on the assumption that procedural rules regulate the sphere of adjudicative institutions—the courtroom, the clerk's office, the activities of attorneys. Similarly, the idealization of a pure rule of substance posits that the function the substantive law is to regulate primary conduct—the whole whirl of human activity outside adjudicative contexts. These idealizations allow us to identify the formal and functional characteristics of substance and procedure. For example, pleading rules are procedural in form, because they address the litigation process and not primary conduct. But rules that are formally procedural may have a substantive function. There are two types of rules that we might call "substantive procedure." Type one involves deliberate use of procedural forms to modify substantive decision rules. Type two involves the action-guiding role of procedures that particularize general legal norms. Let's begin with type one, the simplest case of substantive procedure.

*Substantive Procedure: Type One—Procedural Rules with Intentionally Substantive Functions.* In the world of acoustic separation, procedural rules are ill-suited to the function of regulating primary conduct—citizens cannot modify their behavior to accord with procedural variations because they are acoustically isolated from the adjudicative institutions. In the actual world, however, policymakers can take acoustic leakage into account and manipulate procedural forms in order to achieve substantive goals.[70]

A familiar example of a substantive rule cast in procedural form is the *parole evidence rule*—which excludes oral evidence of the content of a written contract. The "parole evidence rule" has the form of a rule of evidence, but it functions as a substantive rule of law. To confirm this conclusion, we can perform the thought

[70] *See generally* Jeffrey A. Parness, Amy M. Leonetti, & Austin W. Bartlett, *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412 (1999); Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L.J. 1109, 1131 (1993).

experiment of disentangling the substantive and procedural elements of the rule. Suppose we thought that the parole evidence rule *truly* was a rule of evidentiary procedure. In that case, the parole evidence rule would appear *solely* in the Code of Adjudication in the possible world of acoustic separation. Contracting parties would be unaware of the rule, and hence might try to modify or supplement their written agreements by oral statements. On this interpretation, the parole evidence rule would fail to perform its substantive function. The actual parole evidence rule is addressed to contracting parties: the rule informs the parties that in the case of an integrated writing, oral modifications or supplements do not have legal force. That is, the parole evidence rule is a *secondary rule* (in H.L.A. Hart's sense of "secondary") of substantive law. The parole evidence rule tells citizens what they must do to modify the primary rules of conduct provided by a contract. Thus, in the world of acoustic separation, the parole evidence rule would have two components: (1) a provision in the Code of Conduct—addressed to contracting parties; (2) a provision in the Code of Adjudication—addressed to judges. No special rule of evidence would be required, because parole evidence of oral supplements or modifications would be excluded by the general rule of relevance.

Another important example of a rule with substantive function and procedural form is provided by the pleading provisions of the Private Securities Litigation Reform Act (PSLRA)[71] and its sibling, the Securities Litigation Uniform Standards Act (SLUSA).[72] The Reform act modifies the transsubstantive rules of pleading provided by the Federal Rules of Civil Procedure[73] in Rule 8(a)(2) and 9(b). Rule 8(a)(2) embodies the principle of "notice pleading" and requires only a short and plain statement showing that the pleader is entitled to relief.[74] Rule 9(b) provides that allegations of fraud must be made with "particularity."[75] The general pleading standard of Rule 8(a)(2) requires only a minimal level of factual detail.[76] Even Rule 9(b)'s requirement that fraud be

[71] 15 U.S.C. § 78u-4(b). *See generally* Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517 (1998); Matthew Roskoski, Note, *A Case-By-Case Approach to Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 97 MICH. L. REV. 2265 (1999).

[72] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered portions of 15 U.S.C.); *see also* David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1 (Nov. 1998); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL LAW REV. 1 (1998).

[73] *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEXAS L. REV. 1749 (1998).

[74] FED. R. CIV. P. 8(a)(2).

[75] FED. R. CIV. P. 9(b).

[76] *See, e.g.,* Fed. R. Civ. P. Form 9 (providing only sketchy information in model complaint for negligence).

pled "with particularity" was interpreted to allow plaintiffs to allege fraud by specifying only the statement or conduct that was the basis of the allegation.[77] Not all false statements are fraudulent, and in the context of a securities fraud action, predictions of future success may give rise to allegations of "fraud by hindsight" when a business experiences unanticipated turbulence in the stream of commerce. But defending securities fraud actions is expensive and the fact that the action is pending may create uncertainties that interferes with the defendant firm's ability to raise capital. Because the Federal Rules of Civil Procedure permit extensive and time-consuming discovery and pretrial motion practice, claims that would eventually be defeated on the merits may nonetheless alter primary conduct—e.g. the kinds of statements made on behalf of firms to potential investors. In addition, the Federal Rules of Civil Procedure provide tough standards for summary judgment[78] and directed verdicts.[79]

The Private Securities Litigation Reform Act adopts pleading standards that are much tougher than those provided by Rule 8(a)(2) and Rule 9(b). For example, if the complaint alleges a state of mind, it must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"[80] Commentators on the Reform Act have observed that this language seems designed for a substantive purpose. For example, Leslie M. Kelleher observes,

> Partisan rule reformers recognized the importance of a particularity requirement to the outcome of a case and bypassed the Advisory Committee completely, taking their proposals for procedural amendments directly to Congress. The strict pleading requirement of the PSLRA . . . is designed to favor defendants over plaintiffs in securities lawsuits, not to implement some carefully planned vision of the procedural system.[81]

And Professor Kelleher concludes:

> The PSLRA is a clear illustration of the latest stage in the politicization of procedure. With the PSLRA, Congress has gone further than ever in providing procedural benefits to a particular group in order to vindicate the substantive goals of the Act. As Congress and partisan lobbyists have discovered the usefulness of procedural provisions in effectuating substantive purposes, the

[77] *See* Denny v. Carey, 72 F.R.D. 574 (E.D.Pa.1976) (reasoning that Federal Rule of Civil Procedure 9(b) is satisfied if there is a sufficient identification of the circumstances constituting fraud to allow a defendant to adequately answer the plaintiff's allegations).

[78] FED. R. CIV. P. 56.

[79] FED. R. CIV. P. 50.

[80] *See* 15 U.S.C. § 78u-4(b).

[81] Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 60 (1998).

> hazy line between substance and procedure has been blurred further, and we should expect to see even more instances of statutory procedural provisions.[82]

The PSLRA act is just one of many examples of type one (functionally substantive rules cast in procedural form).[83] The essential structure of this type of entanglement of substance and procedure can be analyzed using the model of acoustic separation. What the PSLRA does is to use procedural rules (i.e. rules that would be found in the Code of Adjudication) to indirectly modify substantive decision rules (i.e. rules found in the Code of Decision). Because of acoustic leakage, these modifications can have the same effects as changes in the substantive conduct rules (i.e. the Code of Conduct).

*Substantive Procedure: Type Two—Particularized Conduct Rules.* The second type of substantive procedure is more fundamental and pervasive than the first. Every civil action involves procedures that are substantive in the sense that they function to communicate particular rules of primary conduct—in other words, procedures that are "action guiding." The standard picture of substance and procedure is that substantive rules of law function to guide primary conduct (outside the litigation process) whereas procedural rules function to guide litigation-related conduct. But the standard picture omits an important action-guiding function of procedure—*the particularization of general legal norms*. Our exploration of type two of substantive procedure can begin with examples and then proceed to a more abstract analysis.

A very clear example of the particularization function is provided the declaratory judgment.[84] Declaratory judgments have two critical features: (1) a declaratory judgment takes a general legal rule and applies it to a particular factual context, and (2) a declaratory judgment can resolve a dispute by guiding primary conduct. A declaration that A's work does not infringe B's copyright enables A to enter into an agreement with C to distribute the work; the opposite outcome would communicate a message to C that distribution of the work would be contrary to law. A declaratory judgment acts as a kind of particularized statute or *ex post facto* law; whereas statutes declare obligations in general and abstract form, declaratory judgments legislative for particular individuals (or entities) on particular occasions.

Declaratory judgments provide a particularly perspicuous example of action-guiding particularization of general legal norms, but they are not the only example. Injunctions perform the same function, supplementing the declaration of rights with a coercive order backed by the force of punishment. The action guiding function of damage awards is not always as clear, because, on the surface, damage awards appear to operate backwards (*ex ante*). Sometimes this is the case: sometimes a damage award only guides action to the extent that it requires an act of payment in satisfaction of the

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[82] *Id.* at 61.

[83] *See* Parness, Leonetti, & Bartlett, *supra* note 70. (listing as examples (1) federal securities claims, (2) New Jersey and Georgia professional malpractice claims, (3) medical malpractice claims, (4) requests for punitive damages, (5) childhood sexual abuse claims, and (6) federal civil rights claims).

[84] *See supra* n. 15 (collecting sources on declaratory judgments).

judgment. But this is not always the case. Sometimes a damage award guides behavior by informing the parties (and others) about their particular legal obligations toward one another. Similarly, the doctrines of claim preclusion (or *res judicata*) and issue preclusion (*collateral estoppel*) guide action by making judgments, findings, and rulings explicitly binding on parties in contexts outside the four corners of a particular civil action.[85]

These examples of the action-guiding particularization of general legal norms are not accidental or exceptional. In the introduction, we established that the actual world is characterized by three problems of compliance with substantive legal norms: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality.[86] The possible world of acoustic separation of substance and procedure allows us to appreciate the significance of procedure's particularization function. When I laid out the conditions that specify acoustic separation, I stipulated that action-guiding outcomes (declaratory judgments, injunctions, and damage awards) could pass through the acoustic barrier. This specification was necessary for law to function effectively. If citizens were not allowed to learn of judgments, then the substantive law would effectively be crippled by the problems of imperfect knowledge, incomplete specification, and partiality. This fact leads to an important conclusion about the relationship between substance and procedure: *even an idealized model of substance and procedure requires procedures to play the substantive role of action-guiding particularization of legal norms*. This conclusion is important because it demonstrates the essential entanglement of substance and procedure.

### *2. Procedural Substance*

The entanglement of substance and procedure takes another form. Rules that are substantive in form may serve procedural functions. In the world of acoustic separation, courtrooms are insulated from the general rules of primary conduct. In the real world, rules aimed at primary conduct also regulate the litigation process. There are two types of procedural substance. Type one involves particular conduct rules that directly impact the litigation process. Type two involves the more general relationship between conduct rules and decision rules.

*Procedural Substance: Type One—Formal Conduct Rules with Intentionally Procedural Functions*. In the world of acoustic separation of substance and procedure, the Code of Conduct does not impinge on the system of adjudication. In the actual world, no acoustic barrier prevents application of general rules of primary conduct to

[85] The doctrine of issue preclusion, for example, has the effect of transforming factual and legal determinations in every case into the functional equivalent of declaratory judgments. What is "declared" in a summary judgment, verdict, finding of fact, or concluson of law in a prior adjudication, becomes binding on the parties to that adjudication.

[86] *See supra*, Part I.A, "Where to Begin? Ex Ante and Ex Post Perspectives. »

litigation-related behavior. Given this fact, procedural functions can be performed by rules cast in substantive guise. Among the many examples of such rules are criminal statutes prohibiting obstruction of justice, witness tampering, and destruction of evidence and the tort of spoliation of evidence.[87] These rules are substantive in form—criminal law and tort law are classified as substantive—but these substantive rules have procedural functions, deterring the destruction of evidence and correcting the injustices caused by procedural irregularities.

*Procedural Substance: Type Two—Particularized Decision Rules.* In the world of acoustic separation, what we ordinarily call the substantive law was divided into two parts, the Code of Conduct addressed to citizens and the Code of Decision addressed to judges. But the actual world of litigation does not involve this sort of acoustic separation. In the actual world, the articulation of the substantive law by appellate courts (as opposed to legislatures) *always* takes place in a particular procedural context.

One such context is the motion for judgment as a matter of law (the demurrer in some state systems or the 12(b)(6) motion in federal court).[88] Whether a demurrer is granted depends on the substantive law (the rules of conduct and decision), but the articulation of standards for granting or denying a demurrer will be phrased in terms of pleading. The pleading of some facts may be required for a particular cause of action; the pleading of other facts will defeat a claim.

Another context is the decision of a summary judgment motion.[89] Whether a summary judgment motion is granted depends on the substantive law, but the articulation of the standards for granting such motions will require appellate courts to decide when "a genuine issue of material fact" exists and when it doesn't. Operationally, summary judgment standards will require that affidavits, documents, or discovery responses containing certain types of facts be put before the court. Once again, the substantive law is translated into standards for resolution of a procedural question. Structurally, summary judgment is similar to motions for judgment as a matter of law (directed verdict of judgment notwithstanding the verdict).[90]

A final example of the translation of substance into procedure is the jury instruction. Rules governing jury instructions are clearly procedural in the sense that they regulate conduct inside the courtroom. The rules governing jury instructions translate rules of conduct and decision into rules of procedure. When an appellate court reviews a trial court's jury instruction, it performs a dual function. On the one hand, it reviews the *substance* of the instruction *de novo*. On the other hand, it reviews the *form* of the instruction for an abuse of discretion. This dual standard of review

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[87] *See generally* JAMIE GORELICK, STEPHEN MARZEN, & LAWRENCE SOLUM, DESTRUCTION OF EVIDENCE (John Wiley & Sons 1989); Stephen Marzen & Lawrence Solum, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L. J. 1085 (1987).

[88] FED. R. OF CIV. P. 12(b)(6).

[89] FED. R. OF CIV. P. 56.

[90] FED. R. OF CIV. P. 50.

reflects the entanglement of substance and procedure that is inherent in the process of instructing a jury. Jury instructions are procedures, but they are procedures that transform the abstract and general principles of substantive law into concrete and particular guidelines for deliberation.

### *D. The Entanglement Thesis*

We are now in a position to appreciate the various modalities of entanglement between substance and procedure. Rules that are formally procedural nonetheless perform substantive functions, e.g. the Private Securities Litigation Reform Act or declaratory judgments. Rules that are formally substantive perform procedural functions, e.g., the spoliation tort or the substantive standards for demurrers or summary judgments. Table 2 summarizes the modalities of entanglement.

**Table 2: Modalities of Entanglement**

| | Substantive Form Procedural Function | Procedural Form, Substantive Function |
|---|---|---|
| Type I | Type I: Formal Conduct Rules with Intentionally Procedural Functions *Example: Spoliation tort* | Type I: Procedural Rules with Intentionally Substantive Functions *Example: PSLRA* |
| Type II | Type II: Particularized Decision Rules *Example: Particularized standard for summary judgment* | Type II: Particularized Conduct Rules *Example: Declaratory judgment* |

In both the case of substantive procedure and the case of procedural substance, entanglement comes in two types. The first kind of entanglement (Type I) is most easily recognized. When a legislature intentionally uses a procedural form to achieve a substantive end, the entanglement between substance and procedure becomes unmistakable. The Private Securities Litigation Reform Act and the spoliation tort both involve a deliberate crossing of the line between substance and procedure. Type I entanglement is important because it draws our attention to the fact that substantive forms can be used to achieve procedural ends and vice versa.

But the second type of entanglement (Type II) is more fundamental and pervasive. Type II entanglement implicates every rule of procedure and every substantive law. Every legal proceeding is the source of particularized conduct rules. Every rule of substantive law is transformed into rules of pleading, summary adjudication, and jury instructions. Type II entanglement involves two kinds of particularization. First, general and abstract conduct rules are transformed into particular resolutions of claims and issues resulting in judgments that announce or imply standards of conduct that are

concrete and contextualized to individual cases. Second, general and abstract rules of procedure are transformed into particular standards for the resolution of motions for judgments on the pleadings, summary judgment, and jury instructions.

The pervasiveness of particularization involved in Type II entanglement is a necessary feature of any system of adjudication. In the introduction, we explored the reasons why particularization is necessary. Abstract and general rules must be applied to concrete and particular facts and procedural histories. And this process of application must respond to the three problems that we have identified: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality. Type II entanglement is the inevitable byproduct of the particularization required to overcome the problems of imperfect knowledge, incomplete specification, and partiality. Without Type II entanglement, the rubber would not meet the road—that is, general and abstract rules would not be applied. Although I have expressed this idea in a novel framework, my core thesis has been expressed by others in a variety of ways. Geoffrey Hazard puts it this way: "Substantive law is shaped and articulated by procedural possibilities."[91]

The entanglement thesis is simply the idea that *the entanglement of substance and procedure required by the application of abstract rules to concrete cases is a pervasive feature of adjudication*. This thesis can be confirmed by consulting our thought experiment of acoustic separation between substance and procedure. In the world of acoustic separation, Type I entanglement disappears. The Private Securities Litigation Reform Act could not achieve its goals in a world where those who issue securities were completely unaware of the operations of the adjudication process; an attempt to enact such a provision would violate the constitutional requirement that all conduct rules be promulgated in the Code of Conduct. But even in the world of acoustic separation, Type II entanglement would be pervasive. This is reflected in the fact that the acoustic separation between substance and procedure cannot be made complete in any possible world without magical connections between primary actors and the courts. For the system to work, facts must flow from the world of conduct into the world of adjudication and judgments must travel in the reverse direction.

### *E. Substance and Procedure Restated*

Justice Reed's *Erie* concurrence was premised on a picture of the relationship between substance and procedure. Substance was one thing, and procedure another—although the line between the two might be hazy. The development of *Erie* doctrine involves a series of attempts to operationalize this distinction—to render that which is hazy, clear. The outcome-determination test (in both its original form and as reinterpreted in *Hanna*) may have merit as a test for the resolution of *Erie* problems, but it is an utter failure for the purpose of distinguishing substance and procedure. A

[91] Geoffrey Hazard, The Effect of the Class Action on Substantive Law, 58 F.R.D. 307, 307 (1973)

more promising approach for that task was suggested by Justice Harlan's concurrence in *Hanna*—premised on the notion that substantive law regulates primary conduct and procedural law regulates the adjudicative process. But Harlan's suggestion runs into the problem of entanglement—as exemplified by the Private Securities Litigation Reform Act, which intentionally uses procedural forms to achieve substantive goals. The thought experiment of acoustic separation of substance and procedure allows us to precisely characterize this kind of entanglement by comparing actual legal rules to the form that they would take in a world where the system of adjudication was isolated from the realm of primary conduct. The thought experiment allows us to distinguish the various modalities of entanglement between substance and procedure, resulting in a typology of substantive procedure and procedural substance. A closer examination of the types of entanglement yielding the conclusion that one source of entanglement—the need to particularize general rules of substance and procedure—is ineliminable, even through use of the thought experiment of acoustic separation.

The upshot of our investigation is not a deconstruction of the distinction between substance and procedure. Quite the contrary, the thought experiment of acoustic separation yields a precise analytic tool for appreciating procedural forms and functions. But this conceptual apparatus also allows us to appreciate the ineliminable and inherent entanglement of substance and procedure. For the purposes of a theory of procedural justice, the important conclusion is that procedures particularize abstract and general substantive rules. That is, the real work of procedure is to provide particular action-guiding legal norms.

## III. THE FOUNDATIONS OF PROCEDURAL JUSTICE

We have begun to lay the foundation for a theory of procedural justice by giving an account of the nature of procedure. This Part of the essay completes the foundation by laying out the jurisprudential assumptions of the theory of procedural justice. The trick is to say enough about jurisprudential foundations to make the substance of the theory clear while avoiding unnecessary forays into the thorny and intractable problems of legal philosophy. This foundational work begins in Section A, "The Jurisprudential Framework for the Theory," which briefly sketches a plausible relationship between *Procedural Justice* and Ronald Dworkin's theory of law as integrity. In Section B, "The Role of Public Reason," I introduce an important qualification of Dworkin's view: political morality requires legal justifications to rely on public reasons, with the implications that the theory of procedural justice introduced here must be grounded in arguments that are accessible to the public at large. Finally, in Section C, "Some Objections to a Theory of Procedural Justice," I consider some of the most prominent objections that have been made to theoretical approaches to law in general and to a theory of civil procedure in particular.

Some readers may be willing to go along with my project, and forgo the discussion of foundational questions that is found in this Part of the essay. If you prefer to do so, turn to page 49, for Part IV, entitled "Views of Procedural Justice."

*Lawrence Solum*

*A. The Jurisprudential Framework for the Theory*

My aim is to develop a theory of procedural justice and not a theory of general jurisprudence. Theories of general jurisprudence are enormously controversial, and there is reason to doubt that such controversies will ever be resolved. My aim, therefore, is to avoid the question: What general normative theory should guide the law? Instead, I simply sketch one general theoretical framework, using that framework for convenience of exposition. The general approach that I will adopt is interpretive. That is, the theory of procedural justice that is offered here is intended to *fit* and *justify* the existing procedural landscape. This approach is, of course, familiar from the work of Ronald Dworkin.[92]

Dworkin's own elaboration of his theory utilizes a heuristic device, an imaginary judge named Hercules. In the early essay, "Hard Cases," Dworkin posited that Hercules was confronted with a hard case, one in which the settled law did not provide a clear answer.[93] In our context, we imagine that Hercules is faced with a case of first impression concerning an issue of procedural due process, the right to a fair procedure contained in the due process clauses of the fifth and fourteenth amendments of the United States Constitution. To decide this hard case, Hercules must construct a theory of procedural due process. We might imagine that his decision-making proceeds in two steps. First, he identifies the theories that fit the constitutional text as well as the already decided cases: Hercules asks, "Which theories of procedural justice are consistent with the langue of the due process clause, its history, and the general contours of the Supreme Court's procedural due process cases?" Second, from among these theories he selects the theory that provides the best supporting reason for due process doctrine as a matter of political morality: Hercules asks, "Of the theories of procedural justice that fit existing doctrine, which provides the best justification for that doctrine?"[94]

One caveat should be noted at once; I have presented Hercules's method as a linear two-step process, but this oversimplifies the theory for the purposes of simplicity and

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[92] *See* RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). Although I use Dworkin's framework, the argument that I offer here is independent of "law as integrity," the name Dworkin gives to his theory. My own views of general jurisprudence differ in important respects from Dworkin's views. Whereas Dworkin may require only a loose degree of "fit," before proceeding to justification, my view is that the criterion of fit should do *most* of the work if the task at hand is that of a judge deciding a case. On the other hand, if the task is legislation, then justification properly steps to the front as the primary criterion. Although important, this disagreement is not crucial for the current project which is not to offer an interpretation of the due process clause, but is, instead, the development of a theory of procedural justice.

[93] *See* DWORKIN, *Hard Cases* in TAKING RIGHTS SERIOUSLY, *supra* note 92.

[94] By adopting the interpretive method as an expository device, I do not mean to endorse Dworkin's approach to constitutional interpretation as against its rivals, e.g. textualism or originalism.

clarity of exposition.[95] Let us pause for a moment and examine the relationship between the two criteria for evaluating a theory of procedural justice, the criterion of fit and the criterion of justification. The criterion of fit measures the adequacy of a theory by its ability to explain the shape of existing law. Thus, to meet the criterion of fit, a theory of procedural justice must cohere with the constitutional text, the judicial decisions, and the general shape of the civil dispute resolution system in the United States. An adequate theory of procedural fairness should account for such basic features of the system of civil procedure as the following: procedural due process doctrine, personal jurisdiction, the rules of pleading and joinder, the system of discovery, the basic features of civil trials such as the rules of evidence, standards of appellate review, and the prior adjudication doctrines.

We should observe, however, that there may be features of the system of civil procedure for which we should not seek an explanation in a theory of procedural fairness. For example, the subject-matter jurisdiction of the federal courts and some aspects of personal jurisdiction doctrine can only be explained by the fact that ours is a federal system, with rules for the allocation of power between the federal government and the states. There may be aspects of civil procedure that are mostly a matter of convention.[96] Take the example of pleading. Not just any system of pleading would be fair, but there may be a broad range of pleading issues that can be settled by convention, e.g. whether there are to be pleadings beyond the answer or reply,[97] whether some issues are to be raised in the answer or by motions, and a variety of similar questions. The important thing is that the system of pleading should not unduly interfere with decision on the merits as opposed to procedural technicalities.[98]

In sum, the criterion of fit demands that our theory of procedural fairness be a theory that takes the current system of civil dispute resolution as its subject. The theory must fit existing doctrine where fairness is at stake, but need not fit features that are explained by other concerns such as federalism or those that are a matter of convention or arbitrary within certain limits.

The second criterion is justification: what theory of procedural fairness offers the best justification, i.e., the best argument of political morality, in support of our system of civil dispute resolution? This essay approaches the criterion of justification in two ways. First, we will assess proposed models of procedural justice using the familiar

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[95] For Dworkin, the line between fit and justification is not hard and fast: rather, the line between fit and justification "is a useful analytical device that helps us give structure to any interpreter's" working theory. *See* Dworkin, LAW'S EMPIRE, *supra* note 92.

[96] Here, I appeal to Aristotle's distinction between conventional and natural justice. *See* ARISTOTLE, *Nicomachean Ethics* in 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed. 1984).

[97] This is not to say that procedural justice does not imply some limits on pleading rules. A system that required many, many levels of pleading, with technical requirements that operated as a trap for the unsophisticated might run contrary to concerns for accuracy and efficiency.

[98] Charles Clark, *The Handmaid of Justice*, 23 Wash. U. L.Q. 297, 308-20 (1938).

tools of moral and political argument. This first method of assessment sticks close to common sense, utilizing argumentative strategies that might be employed in a judicial opinion or brief. The second approach to the criterion of fit is more theory-laden or philosophical. An inquiry into procedural justice can step back from existing legal practice and ask the following question of political philosophy: what conception of procedural justice should be adopted in a just society?[99]

The second dimension of the inquiry into justification is related to the first. Certainly our current practices and ideas about the reform of those practices will have much to tell us about the ideal case of a well-ordered society that was regulated by the best available conception of justice. But the two inquiries are not identical. In might be the case that core features of the current procedural system would not be included in the ideal case; for example, it might be argued that the best conception of procedural justice in the ideal case would not include the adversary system.

I would like to make one concluding point about the jurisprudential framework within which *Procedural Justice* operates. Although this framework is broadly Dworkinian, it relies on only a subset of Dworkin's ideas. Thus, I shall not rely on the right-answer thesis, Dworkin's claim that every case has a unique legally correct answer. Nor shall I rely on Dworkin's claim that judges may only rely on considerations of fairness or principle, and thus, that reasons of policy or social utility have no proper role in judicial interpretation. For the purposes of this essay, I want neither to agree nor to disagree with Dworkin on these issues. Rather my intention is simply to set these controversial features of Dworkin's theory aside for the time being, on the ground that their resolution is not necessary for the task at hand. Moreover, although my argument is couched within the framework of Dworkin's interpretivism—I shall claim that a certain conception of procedural justice is superior to its rivals on the criteria of fit and justification—this is not a necessary feature of my argument. The normative and descriptive arguments that I make here can be made clearly distinct, yielding an argument of political morality on the one hand and an argument of descriptive legal theory on the other. A final caveat concerning the relationship between *Procedural Justice* and Dworkin's theory of law as integrity follows immediately in the next Section.

### *B. The Role of Public Reason*

A further question arises with respect to the dimension of justification: what sorts of reasons count as good justifications for the law? One answer to this question is that the laws should be justified by the best available moral theory, whether that theory is a deontological theory like Kant's, a consequentialist theory like Bentham's

[99] For the purposes of the second approach, I shall work within a roughly Rawlsian paradigm. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (paperback ed. 1995). For a very brief summary of Rawls's theoretical framework as I understand it, *see* Lawrence B. Solum, *Situating Political Liberalism*, 69 CHICAGO-KENT L. REV. 549 (1994).

utilitarianism, or a virtue-centered theory like Aristotle's. On this account, when Hercules constructs a theory of procedural fairness, he may ultimately be required to resolve the great questions of moral theory, and decide whether utilitarianism, Kantianism, virtue-ethics, or some other view offers the best general account of morality.

The thesis that the deep premises of particular comprehensive moral doctrines are good legal reasons is problematic for two reasons. First, the question as to which moral theory is best is deeply controversial and as a practical matter no project in legal theory will get off the ground if the deep questions of normative ethics must be resolved as a preliminary step. Putting the same point somewhat differently, if a legal theory rests on the deepest truths of moral theory, then they may properly be put at issue by cogent attacks on the underlying moral view. Because the history of moral philosophy suggests that the deep disagreements between those with theological and secular views or between utilitarians and Kantians are unlikely to be resolved, at least any time soon, the reliance on deep moral reasons would render practical progress in legal theory an unreachable objective.

Second, given that deep moral consensus is not a practical possibility we must give public reasons if our justifications for the law are to inform or persuade our fellow citizens in general and the legal community in particular. This point involves more than simply a matter of instrumental efficacy. Respect for our fellow citizens requires that we give them reasons that are available to them; the legitimacy of a democratic society requires that good and sufficient reasons for the legal order be available to the citizenry at large.[100] That is, it would be a denial of respect to give our fellow citizens only reasons that conflict with their most deeply held moral and religious beliefs, and a regime that cannot provide such reasons cannot claim democratic legitimacy. Public reasons, which include common sense, the true and uncontroversial results of the sciences (broadly understood), and values embedded in our public legal and political culture, are available to our fellow citizens. Thus, when we assess a theory of procedural justice by the criterion of justification we ought to ask whether the justifications are of the right sort, i.e., if they are public reasons.[101]

The ideal of public reason to which I shall make appeal is similar to that offered by John Rawls. In summary forms, its features are as follows:

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[100] *See* Christopher Bertram, *Political Justification, Theoretical Complexity, and Democratic Community*, 107 ETHICS 563, 565 (1997); JEREMY WALDRON, *Theoretical Foundations of Liberalism* in LIBERAL RIGHTS 61 (1993).

[101] *See* JOHN RAWLS, POLITICAL LIBERALISM, *supra* note 101; *see also* Lawrence B. Solum, *Novel Public Reasons*, 29 LOYOLA OF LOS ANGELES L. REV. 1453 (1996); Lawrence B. Solum, *Law and Public Reason*, 95:2 APA NEWSLETTERS, Spring 1996, at 54 (1996); Lawrence B. Solum, *Inclusive Public Reason*, 75 Pac. Phil. Q. 217 (1994); Lawrence B. Solum, *Situating Political Liberalism*, 69 Chicago-Kent L. Rev. 549 (1994); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 U. SAN DIEGO L. REV. 729 (1993); Lawrence B. Solum, *Faith and Justice*, 39 DePaul L. Rev. 1083 (1990).

1. *Content of Public Reason:* The ideal specifies public reason as reason which relies on premises and modes of reason that are available to the public at large, including (a) the general features of all reason, such as rules of inference and evidence, and (b) generally shared beliefs, common-sense reasoning, and the noncontroversial methods of science.[102]
2. *Scope of Application:* As a minimum, the ideal applies to deliberation and discussion concerning the basic structure and the constitutional essentials.[103]
3. *Persons Obligated:* The duty of civility specified by the ideal creates obligations (a) for both citizens and public officials when they engage in public political debate, (b) for citizens when they vote, and (c) for public officials when they engage in official action -- so long as the debate, vote or action concerns the subjects specified in (2).[104]
4. *Structure of the Obligation:* The ideal requires (a) citizens and public officials (i) to include public reasons in public political debate, but (ii) nonpublic reasons may be included, provided that public reasons are offered in due course,[105] and (b) in special contexts, such as the decision of a legal dispute or the passage of a bill, public officials should exclude nonpublic reasons from official pronouncements such as judicial opinions or statements of legislative purpose.[106]
5. *Nature of the Obligation:* The duty of civility implied by the idea is an obligation of political morality, and the ideal does not justify legal restrictions on public political discourse.[107]

If Hercules complies with this ideal of public reason, he will proceed as follows. Because Hercules occupies the role of judge, he is bound by the strict requirement that the ideal imposes on judges acting in their official capacity. That is, Hercules may offer only public reasons for his decisions. Thus, Hercules's theory of procedural fairness may not rely on the deep and controversial premises of particular comprehensive views, e.g. he may not rely on the truth of a religious doctrine, of Kantianism, of utilitarianism, or of any other particular comprehensive view. Hercules's theory of procedural justice may incorporate values and principles drawn from the public political culture. Importantly, the fact that a publicly available value or principle is part of or supported by a variety of comprehensive doctrines does not render that value or principle nonpublic. Quite the contrary, public reasons will commonly find support in a variety of comprehensive doctrines, although the deep foundations for the public reason may vary from doctrine to doctrine.

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[102] *See* RAWLS, POLITICAL LIBERALISM, *supra* note 99, at 212-13, 220.

[103] *See id.* at 214; see also *id.* §5, at 227-230.

[104] *See id.* at 215.

[105] *See id.* at li-lii.

[106] *See id.* at 235.

[107] *See id.* at 216.

*Procedural Justice*

To the extent that Dworkin's own view does not incorporate an ideal of public reason with content similar to that outlined above, my theoretical framework does differs from his theory. Even if Hercules may voyage in the deep waters of ultimate value or ascend to the airy heights of abstract moral theory, *Procedural Justice* will remain on foot, relying for the most part on the familiar tools of legal theory and practical political argument. I shall endeavor to limit the conceptual ascent to those climbs that are necessary to counter rival views or to lay bare the bones of our shared intuitions about procedural fairness.

### *C. Some Objections to a Theory of Procedural Justice*

This Section considers three foundational objections to my project. The first foundational objection, discussed in Subsection 1, is rooted in legal pragmatism: big theories, like a theory of procedural justice, ought to be eschewed, in favor of mid-level or low-level principles, on pragmatic grounds. The second foundational objection, discussed in Subsection 2, is grounded in a radical critique of liberal legal theory: no theory of procedural justice can succeed because existing doctrine is fundamentally incoherent and can only be explained as a function of political struggle. The third foundational objection, discussed in Subsection 3, based on concerns raised in critical race theory and feminist jurisprudence, is that a supposedly neutral theory of procedural justice must be incomplete, unless it explicitly incorporates the perspectives of excluded groups.

My aim is not to lay these objections to rest; each of them raises large questions that are outside the scope of this essay. Rather, my aim to suggest that such foundational objections do not give us *a priori* reasons to turn aside from the project of developing a theory of procedural justice. If we are successful in the project of developing such a theory, then foundational questions can properly be raised, if they still seem cogent. At this point, let us consider each objection in turn.

#### *1. A Pragmatist Objection*

A legal pragmatist might make the following argument against the usefulness of developing a theory of procedural justice. We are not likely, the pragmatist begins, to reach agreement at the most general and abstract level, about what procedural justice requires.[108] Some will adhere to a utilitarian theory of procedural justice; others to a theory that is based on deontological (or rights based) concerns. Because ultimate agreement on a general theory is not a realistic goal, we ought, for pragmatic reasons, to seek instead agreement on relatively more particular and concrete principles. Rather that a theory of procedural justice, we ought to be developing mid-level principles.[109]

[108] *See* CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

[109] A mid-level principle might, for example, address questions such as: (1) should finders of fact be lay persons or judges? (2) should there be a right of representation by counsel? (3) should there be an extensive right to pretrial discovery? Mid-level principles address questions

Utilitarians and deontologists may agree that our pleading system ought to provide adequate notice and avoid the decision of disputes on the basis of technicalities, even though they disagree on the reasons for these principles. We ought to be seeking "incompletely theorized agreements," to use Cass Sunstein's felicitous phrase.[110]

This objection must be taken seriously. In the case of procedural justice, the objection has an especially strong appeal for the following reason: most thinking about procedure (certainly, most thinking by judges and lawyers, and much by legal scholars) has avoided the most general and abstract issues of procedural justice. Rather, the focus has been on relatively concrete and particular problems. For example, a great deal of attention has been devoted to issues of detail, working out the precise implications of the rules of procedure in relatively narrow contexts. At the next level of conceptual ascent, there has been a great deal of focus on the middle level of abstraction, e.g. on developing an adequate account of personal jurisdiction or of the *Erie* doctrine. The practice of proceduralists provides a good reason to believe that doctrinal detail and mid-level principles provide a better target for theorists than do general and abstract principles of procedural justice.

The practice of legal scholars is reflected in judicial opinion. The Supreme Court itself has stated, "We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[111] And it is well to bear this injunction in mind. The search for principles of procedural justice should not be confused with a much less promising enterprise, the quest for a universal set of procedures applicable in every factual and legal context. But the likelihood that this latter exercise would be futile does not entail that the former task—the identification of general principles of procedural justice—is without promise.

At this point, my claim is simply this: there is no way to settle, *a priori*, the question whether a theory of procedural justice will be fruitful or not. Such theories must stand on their merits—the reasons advanced in their favor, the answers to the objections raised, and their utility as a tool for analysis. In other words, we ought to have a pragmatic attitude about the usefulness of abstraction and generality in legal thinking. If pragmatic considerations sometimes counsel against big theories, that does not entail that such considerations will always so counsel. The only way for a pragmatist to judge the value of a theory of procedural justice is to put it to work, and see if it pays.

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that are relatively more particular and concrete that the questions addressed by the relatively general and abstract principles developed here. *See infra* Part VI, "Principles of Procedural Justice."

[110] *See id*. at 35 et seq.

[111] Kremer v. Chemical Const. Corp., 456 U.S. 461, 483 (1982) (internal quotation marks omitted).

"Does such a theory have 'cash value'?" as William James famously put the question.[112] If a theory of procedural justice can cut legal ice, then we have good reason to use it.

A bit more can be said about the pragmatist objection, however, especially in light of the role of public reason, as sketched in Section B, "The Role of Public Reason," above,[113] in the theoretical framework within which my theory of procedural justice is developed. There are strategies and resources available to a theory of procedural justice for coping with the problem of disagreement. We may not hope to get utilitarians and deontologists to agree all the way down about anything, procedural justice included. But a theory of procedural justice does not need to be expressed in a way that takes sides in the great debates of moral theory or religious belief. Rather, we may express the theory in terms of a set of principles, which might be affirmed for a variety of reasons, including legal reasons, such as fit with existing doctrine, and reasons of moral theory, such as those provided by utilitarianism, virtue ethics, or by some version of deontology. In Rawlsian terms, we might seek an overlapping consensus between those who affirm the principles for a variety reasons.[114] As Sunstein puts it, we can seek an incompletely theorized agreement.[115] When we put the case for the theory, I shall avoid reliance on particular comprehensive doctrines (e.g. on utilitarianism, Kantianism, virtue ethics, or particular religious views) and instead rely on public reasons, e.g. those reasons that are widely available to the public at large.[116]

*2. A Radical Objection*

Consider a more radical objection to the project of developing a theory of procedural justice. The very idea of a theory that "fits" existing law, assumes that there is some minimum degree of coherence in current procedure doctrine, but that assumption is open to question. For example, it might be argued that existing doctrine is strongly incoherent. The most extreme form of this claim would be the strong indeterminacy thesis: as applied to procedure, the claim that in all civil disputes, there is no outcome of any procedural question that cannot reasonably be seen as legally correct. More concretely, a 12(b)(6) motion can properly be granted or denied with respect to any conceivable complaint; any court can properly assert or reject personal

[112] As James puts it, "Pragmatism . . . asks its usual question. 'Grant an idea to be true,' it says, 'what concrete difference will its being true make in any one's actual life? How will the truth be realized? What experiences will be different from those which would obtain if the belief were false? What, in short, is the truth's cash-value in experiential terms.'" WILLIAM JAMES, *Pragmatism* in WRITINGS 1902-1910 573 (Library of America ed. 1987).

[113] *See supra* p. 42.

[114] *See* RAWLS, *supra* note 99, at 133-72.

[115] *See* Sunstein, *supra* note 108.

[116] *See id.* at 212-254. For clarification of Rawls's position, see the "Introduction to the Paperback Edition," *id.* at l-lvii.

[116] 424 U.S. 319 (1976).

jurisdiction over any conceivable defendant; indeed, any procedural motion can be properly granted or denied in any conceivable case. This form of the objection seems too strong to be plausible. In procedure, as elsewhere, there are easy cases. Some complaints clearly do state a claim upon which relief can be granted;[117] others clearly do not.[118] If there are easy cases in procedure, then the strong indeterminacy thesis is false in the procedural domain.[119]

But the strong indeterminacy thesis is not required for a radical critique of my project to succeed. For a theory of procedural justice to fit existing doctrine, it will not suffice for the doctrine merely to avoid total incoherence; rather, existing doctrine must meet such minimum threshold level of coherence if the project is to succeed. This is not to say that the project requires perfect coherence. Any plausible version of interpretivist legal theory must admit that there are mistakes. Some cases or rules will not fit the best available theory of procedural justice, and that with respect to them, the theory will maintain that the decision should be overruled or the rule amended.[120] But if it turns out that the underlying principles of fairness that best explain the law of personal jurisdiction are fundamentally inconsistent with those that explain the opportunity to be heard, and that yet a third set of inconsistent principles best explain pleading and joinder, then the interpretivist project will face severe obstacles. Interpretivism assumes that the law is a seamless web, but what if it is not?

A theory of procedural justice will lack good confirmation on the criterion of fit if there is moderately strong incoherence in existing doctrine. But once again, this objection does not provide an *a priori* reason to reject the project of developing a theory of procedural justice. If a theory can be developed and shown to fit existing doctrine, then the charge of incoherence will have been shown to be false. Unless one believes that there are good *a priori* reasons for believing that the law can never be coherent, then once again the issue should be postponed until after we have a particular theory of procedural justice in view.

### *3. A Perspectivialist Objection*

Consider yet another foundational objection to the project of developing a theory of procedural justice. It might be argued that such a theory is fundamentally misguided, because it fails to acknowledge the perspectives of those who have been excluded from the making and shaping of modern procedure doctrine, especially the perspectives of

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[117] The forms that accompany the federal rules provide paradigm cases of complaints that should not be dismissed on a motion under Rule 12(b)(6).

[118] A complaint with no allegations at all would seem to be an easy case for granting a 12(b)(6) motion.

[119] *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Lawrence B. Solum, *Indeterminacy and Equity* in RADICAL CRITIQUES OF THE LAW (Stephen J. Griffin & Robert A. Moffat eds. 1997).

[120] *See* DWORKIN, *Hard Cases* in TAKING RIGHTS SERIOUSLY, *supra* note 92, at 118-23.

women and persons of color.[121] Surely, there is something right about this objection. The method for theory construction that I have proposed is biased or tilted in the following sense: by taking existing doctrine as fixed, as the data for which the theory must account, the interpretive approach submerges the possibility that that existing procedure institutionalizes systematic unfairness.[122]

But the perspectivalist objection does not justify abstention from the project of theory building. First, the enterprise of articulating the notion of procedural fairness implicit in existing practice has substantial value even if the perspectivalist objection is correct: reconstructing the implicit ideal provides definition to a debate that would otherwise be murky. Second, the truth of the perspectivalist critique cannot be assumed in advance. After a theory of procedural justice has been articulated, perspectivalist critics can put forth their arguments, which can then be judged on the merits.

I have completed my sketch of a justification for the enterprise of developing a theory of procedural justice. I recognize that this sketch will be unsatisfying to many and that the issues that are raised by the objections to my project cannot be resolved in brief compass of this article. My goal is more modest. I hope that I have laid my cards on the table, so that the reader can evaluate the project with a sense of its foundational assumptions and with some notion of the objections that might be raised. At this point, I turn to the idea of procedural justice itself.

## IV. VIEWS OF PROCEDURAL JUSTICE

This Part surveys and critiques the notions of procedural justice that are implicit in judicial opinion and legal scholarship. Section A, "The Idea of Procedural Justice," sets out the basic framework for the theory by setting out a general framework for thinking about procedural fairness and delineating the subject matter the theory will cover. Current thinking about procedural fairness has been informed by three ideas

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[121] *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85 (1994); *see generally* Lawrence B. Solum, *Virtues and Voices*, 66 CHICAGO-KENT L. REV. 111 (1991). *Cf.* Jane Rutherford, The Myth of Due Process, 72 B.U. L. REV. 1, 4 (1992) ("Unfortunately, the myth of due process repeatedly has been corrupted to enhance the position of the powerful. Consequently, due process is a myth not only because it is a set of stories that transmit values, but also because it is a fantasy for many who claim its protection.").

[122] The theory of procedural justice articulated in this Article can be seen as a response to the perspectivalist critique in an important respect. By emphasizing rights of participation, procedural justice can at least insure that the voices of excluded groups are heard when the rights of individual members of such groups are at state. *Cf.* Eric K. Yamamoto, *Efficiency's Threat to the Value Of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 452-55 (1994) (suggesting that improved community participation procedures would make administrative agencies more responsive to poor and minority communities).

laid out and critiqued in Section B, "Three Models of Procedural Justice." The *accuracy model* assumes that the aim of civil dispute resolution is correct application of the law to the facts. The *balancing model* assumes that the aim of civil procedure is to strike a fair balance between the costs and benefits of adjudication. The *participation* model assumes that the very idea of a correct outcome must be understood as a function of process that guarantees fair and equal participation. Section C, "From the Three Models to a Theory of Procedural Justice" suggests the ways in which the three models can be integrated into a unified theory of procedural justice.

### *A. The Idea of Procedural Justice*

In this section, I set out some very basic preliminary points about the idea of procedural justice. In Section 1, "The Conceptual Framework," I define the topic, relating procedural justice to the related notions of corrective and distributive justice, and then lay out three possible views of procedural justice—perfect, imperfect, and pure. In Section 2, "The Limits of the Enterprise" I try to mark off the subject matter of the theory, setting out those issues that I bracket or reserve for another occasion.

#### *1. The Conceptual Framework*

The notion of justice can be analyzed in many ways, but one good place to start is with Aristotle. Aristotle divides the topic of justice into two main parts, which I shall call corrective justice and distributive justice. Distributive justice concerns the division of shares in social benefits and burdens; thus, many questions of tax policy are questions of distributive justice. Corrective justice involves the rectification of injustice, and thus includes a variety of topics from criminal law, torts, and contracts, among many others.[123] Supplementing Aristotle's account, let us say that "procedural justice" is concerned with the means by which social groups (including governments, private institutions, and families) institutionalize the application of requirements of corrective and distributive justice to particular cases. In the context of a modern nation-state, procedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and it is also concerned with the legislative processes by which the shares of social benefits and burdens are divided. In this essay, I shall be concerned with the procedures of corrective justice, and in particular, with the procedures of corrective civil justice, i.e. with civil procedure. A conception of procedural justice specifies the conditions under which the application of the norms of corrective justice to particular cases is fair.

Our approach to the idea of procedural justice may be made easier by using a simple example. Consider the familiar procedure for dividing a cake: the person who slices the cake picks last. What makes this a fair procedure? One answer to this

[123] ARISTOTLE, *Nicomachean Ethics* in 2 THE COMPLETE WORKS OF ARISTOTLE 1130b30-1131a9 (J. Barnes ed. 1984) (Page numbers are from the Bekker edition of Aristotle's work.).

question might be the following: there is an independent criterion of what constitutes a fair outcome, equal slices for all, and the slicer-picks-last rule assures that we will get to this outcome. Slicer-picks-last is fair because it guarantees *accuracy*. Or does it? If we really wanted to assure perfectly equal slices, then we could use a compass and the principles of plane geometry, with equal shares as a more reliable result. But this strikes us as an undue amount of fuss to go through when slicing a cake. Perhaps, the reason we believe that the slicer-picks-last rule is a fair procedure is that it strikes a fair balance between the importance of the outcome and the cost of getting there: the rule gets us close to equal shares most of the time at a reasonable price. Slicer-picks last might be considered fair, because does a good job of *balancing*. Or is there something more to the idea that the slicer-picks-last rule is fair? Maybe the reason we believe that the slicer gets a fair share is because the slicer was the one who did the cutting; the slicer's participation in the cutting validates the outcome, even if the slicer ends up with a smaller slice (or among the calorie conscious, a bigger slice).[124] Slicer-picks-last could be a fair rule, because of *process* independently of outcome.

These questions about the fairness of procedures for slicing a cake can be generalized by setting out a framework for analyzing the idea of procedural justice. In *A Theory of Justice*, John Rawls distinguishes three very general and abstract kinds of procedural justice: (1) *perfect* procedural justice, (2) *imperfect* procedural justice, and (3) *pure* procedural justice. Consider perfect procedural justice first. There are, he writes,

> two characteristic features of perfect procedural justice. First, there is an independent criterion of what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give that desired outcome.[125]

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[124] Strictly speaking, this argument only works for a two-person cake slicing game. The strategy can be generalized to a *n* person game. For example, if there are *n* potential cake consumers (call them $C_1$, $C_2$ . . . $C_n$), the procedure would be as follows: $C_1$ cuts a slice that $C_1$ considers to be 1/n of the cake. If $C_2$ believes the slice is 1/n or less, she passes. If $C_2$ believes the slice is more than 1/n, she trims the slice to equal what she believes is 1/n. This procedure is repeated until $C_n$ either trims or passes. The last person to touch the slice gets it. This procedure is then iterated, so that in the second and subsequent rounds, each consumer cuts a slice that she believes is 1/n of the original, until all of the slices have been distributed. Using this procedure, each consumer C receives a slice that she believes is 1/n of the original cake, with one possible exception. $C_n$ may not believe that the last slice is 1/n of the original cake, because $C_n$ might rationally believe that she was in error when she failed to trim some or all of the prior slices ($S_1$, $S_2$ . . . $S_{n-1}$). However, we might still believe that $C_n$ has received a fair share of the cake, because she had an opportunity to trim each of these slices ($S_1$, $S_2$ . . . $S_{n-1}$), and chose not to do so. *See* JOHN ALLEN PAULOS, A MATHEMATICIAN READS THE NEWSPAPER 8 (1995) (describing procedure in four person game). I owe thanks to David Leonard for calling my attention to the *n* person version of the familiar rule.

[125] JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 99, at 85.

Rawls argues that our rule for the slicing of cakes is an example of perfect procedural justice. The person who slices picks last; Rawls believes that this procedure insures the equal division of shares. "Equal shares for each" is the independent criterion of a fair division; the slicer-picks-last rule is the procedure that reliably produces that outcome.

In the case of imperfect procedural justice, the first characteristic, an independent criterion for fairness of outcome, is present, but the second, a procedure that guarantees that outcome, is not. Rawls contends:

> Imperfect procedural justice is exemplified by a criminal trial. The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. The theory of trials examines which procedures and rules of evidence, and the like, are best calculated to achieve this purpose consistent with the other ends of the law. Different arrangements for hearing cases may reasonably be expected in different circumstances to yield the right results, not always but at least most of the time.[126]

Thus, imperfect procedural justice incorporates the notion of an independent criterion for accuracy but adds the notion of "other ends of the law," e.g., considerations of cost that may be balanced against accuracy.

The final notion is "pure procedural justice." Rawls writes:

> [P]ure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed. This situation is illustrated by gambling. If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is.[127]

Pure procedural justice rejects an underlying assumption of both perfect and imperfect procedural justice—the assumption that there is an independent criterion for what constitutes the correct outcome. There are not criteria for the correct outcome except for an ideal (or actual) set of procedures.

I shall take Rawls's analysis as the beginning point for my inquiry into procedural justice. That is, as we begin to unpack our notions of procedural justice, I shall ask whether we are implicitly using the idea of perfect procedural justice, imperfect procedural justice, or pure procedural justice, or some other notion.

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[126] *Id.* at 85-86.

[127] *Id.* at 86. Rawls notes that this conclusion requires further assumptions, e.g. that the bets are fair in the sense that the expected payoff of each bet is zero, that the bets are made voluntarily, that no one cheats, that the players entered the game under fair conditions, and so forth. *Id.*

*2. The Limits of the Enterprise*

This essay develops a theory of procedural justice, and before I proceed any further, I should say a few words about the limits of this enterprise. First, I shall limit my consideration to civil justice, explicitly excluding consideration of criminal procedure. This limitation may be arbitrary, but it is, I think, necessary, if the enterprise is to get off the ground at all. Civil procedure is a large enough topic, indeed, perhaps too large a topic. Moreover, the criminal system is different in a number of respects: the burden of persuasion beyond reasonable doubt, the special protections for criminal defendants provided (or formerly provided) by the privilege against self-incrimination of the Fifth Amendment and the search and seizure provision of the fourth amendment.[128] A complete theory of procedural justice would address these differences between the civil and criminal systems, but this essay does not attempt to develop such a complete theory.[129]

There is a second limit on the enterprise of building a theory of procedural justice. Procedural fairness may be the most central principle of civil procedure, but it is not the only principle. Federal civil procedure in the United States, which I shall most frequently use as an example, is shaped by concerns for federalism that are not matters of procedural justice. For this reason, the theory that I shall offer does not fully account for a variety of doctrines in which federalism (or some other principle or policy) plays a shaping role. These topics include federal subject-matter jurisdiction, the federalism component of the due process limits on personal jurisdiction, and much of the *Erie* doctrine.

In addition, there is a third limit on the theory that is developed here. The theory of procedural justice that is developed here is focused on adjudication as the application of general rules to particular cases. Our investigation will be focused on the civil action at the trial level. This focus elides an important aspect to the system of civil adjudication—the role of the appellate courts in the development and modification of the general and abstract rules themselves. This role is thematized by the way in which the United States Supreme Court uses particular cases as the vehicle for announcing general rules of Constitutional law. In cases like *Miranda* and *New York Times v. Sullivan*, the Supreme Court acts in a legislative capacity, creating a constitutional code

[128] The civil-criminal distinction is the topic of a large literature. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can Be Done About It*, 101 YALE L.J. 1875, 1882 (1992); Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025 (1993); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

[129] At various points in the essay, I will offer remarks that point toward an account of the distinctiveness of criminal procedure. *See, e.g.*, Part IV.B.2.b), "Deontological Constraints on Balancing: Consideration of Cost and Recognition of Procedural Rights."

that supplements the actual text of the Constitution. A similar role is played by state courts in cases governed by the common law. In cases like *Li v. Yellow Cab* or *McPherson*, state courts of last resort create and modify general rules of contracts, property, and torts—once again playing a role that is analogous to that played by legislatures.

Because our focus will be on the application of general rules to particular cases, for the most part, we will simply set the special problems and issues raised by judicial lawmaking in civil litigation to the side. The theory offered here is not a theory of the common law-making process or of constitutional adjudication. Moreover, my focus on rule application puts to the side important questions regarding public-law litigation that others may believe should be at the center of a theory of procedural justice.[130] This does not mean that the theory of procedural justice cannot and should not be extended to these contexts; rather, those issues are simply put to the side in order to allow us to focus on the core case of civil adjudication—the case in which the general rules are fixed and application is the focus of the adjudicative process.[131]

### *B. Three Models of Procedural Justice*

In this section, we examine three simple conceptions or models[132] of procedural justice that are at least partially implicit in current legal practice.[133] Each model will be measured against the criteria of fit and justification. For each model our questions will be: does the model account for the shape of current doctrine and does it provide a normatively attractive grounding for that doctrine?

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[130] In this regard consider, Owen Fiss's concession that his theory may not apply to the adjudication of "purely private disputes." Owen Fiss, The Supreme Court, *1978 Term — Foreword: The Forms of Justice,* 93 HARV. L. REV. 1 (1979).

[131] In addition to the limits discussed in text, the scope of this article is limited in a variety of other ways. For example, the discussion focuses on procedural justice in the public sphere and does not consider the issue of procedural fairness in private associations. *Cf.* Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 550, 526 P.2d 253, 260, 116 Cal. Rptr. 245, 252 (1974) (en banc) (holding that public policy requires certain private associations "to refrain from arbitrary action" with respect to the admission, disciplining, or expulsion of members; "the association's action must be both substantively rational and procedurally fair.").

[132] I use "concept" and "conception" to refer the general idea of procedural justice on the one hand as opposed to particular theories of procedural justice on the other. *See* Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTLELIAN SOC'Y 167 (1956); *see also* RONALD DWORKIN, *Hard Cases* in TAKING RIGHTS SERIOUSLY 103 (1977).

[133] I use three models, labeled "accuracy," "balancing," and "process" to discuss the major families of ideas about procedural fairness. Similar distinctions have sometimes been mapped with different terminology. For example, Lawrence Tribe distinguishes between the "instrumental" and "intrinsic" values of due process. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 666 (2d ed. 1988), and Robert Bone distinguishes between outcome-oriented and process-oriented participation theories, Robert Bone, *supra* note 136, at 201, n.19.

*Procedural Justice*

We can begin with the utopian hypothesis that the current doctrine is structured by an implicit conception of perfect procedural justice—*the accuracy model*. This hypothesis is shown to be inadequate on grounds of fit. Although a concern for truth-seeking and accuracy does characterize existing procedure doctrine, there are a variety of doctrines that cannot be explained on the model of perfect procedural justice: examples include *res judicata* and other rules that protect the finality of judicial decisions. Moreover, the accuracy model suffers from a crucial ambiguity, between accuracy in particular cases and accuracy in the system as a whole.

The shortcomings of the accuracy model lead to a second hypothesis, that current doctrine is best explained as structured by a conception of imperfect procedural justice—*the balancing model*. Two variations of this hypothesis are explored. The first variation is utilitarian or consequentialist: procedure doctrine might be seen as structured by the balancing of accuracy and cost. The second variation is rights based: it assumes that procedural justice requires attention to the fair distribution of the costs imposed by the system of procedure. These two variations could be combined in a variety of ways to produce other, more complex, versions of the balancing model.

We then consider a third hypothesis: that a conception of pure procedural justice best fits and justifies existing doctrine: we shall call this *the participation model*. The key notion is that it is the process itself and not outcome that defines procedural justice. The question that naturally arises is, "What kind of process is intrinsically fair?" This question can be answered in at least two different ways. The first answer uses actual acceptability to the parties as the criterion for fair process. The second variation uses the notion of acceptability under ideal conditions. Both variations of the participation model suffer from serious flaws. Bluntly, because the participation model excludes *all* consideration of accuracy and cost as criteria for procedural fairness, it purchases conceptual purity at the price of plausibility

*1. The Accuracy Model*

The first model focuses exclusively on accuracy—the correct application of the law to the facts.[134] My exposition of this model begins with its utopian form—the ideal of perfect procedural justice.

*a) The Utopian Ideal of Perfect Procedural Justice*

Consider the possibility that current doctrine is informed by the utopian ideal of perfect procedural justice.[135] Substantive law (e.g. the substantive provisions of the

[134] *See* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics And Perfection*, 62 Fordham L. Rev. 833, 833 n. 1 (1994) ("I will use the term "procedural justice" broadly to suggest an assessment of the quality or success of procedural law in providing dispute-resolution participants what we think they are due.").

[135] *See* DENNIS GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 57-61 (1986); *see also* Susan Kneebone, *Natural Justice and Non-Citizens: A Matter of*

Constitution, of statutes, of rules and regulations, or of common law) provides an independent criterion for the correct outcome; Robert Bone has called this the rights-based view.[136] The procedural system is designed to insure that in each case, the substantively correct outcome actually issues. Let us call the conception that procedural justice is measured solely by the correctness of outcomes, "the accuracy model."

On the surface, it seems obvious that the system strives for correct outcomes. Consider the basic structure of the civil litigation system. Courts frequently articulate the *telos* of the civil litigation system as a "search for truth."[137] One federal court opines: "the ultimate aim of the judicial system is to ascertain the real truth."[138] Liberal pleading rules are designed to guard against erroneous resolutions on technical grounds.[139] Extensive discovery aims to provide the parties with all the relevant evidence.[140] Accuracy in fact-finding and in the application of law to fact is provided by elaborate trial procedures,[141] including cross examination,[142] neutral judges[143] and

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*Integrity?*, 26 Melb. U. L. Rev. 355, 374 (2002) (characterizing Galligan as maintaining "the main purpose of the doctrine of procedural fairness is to make the best (that is, the most accurate) decisions in terms of substantive outcomes.").

[136] Robert G. Bone, *Statistical Adjudication: Rights, Justice, And Utility in a World of Process Scarcity*, 46 Vand. L. Rev. 561, 598 (1993) ("A rights-based theory assumes that the purpose of adjudication is to determine each party's legal rights accurately. Because rights trump social utility, a deprivation of a right cannot be justified by direct appeal to the aggregate social benefits the offending activity makes possible. Thus, if an erroneous result counts as a deprivation of substantive right, procedures that increase error cannot be justified simply by citing the aggregate benefits to all resulting from reduced litigation and delay costs.").

[137] *See, e.g.*, Carroll v. The Jaques Admiralty Law Firm, P.C, 110 F.3d 290, 294 (5th Cir. 1997) (stating "the search for truth . . . is at the heart of the litigation process."); Millen v. Mayo Foundation, 170 F.R.D. 462, 464 (D. Minn. 1996) ("Justice is the search for truth in an effort to resolve conflict.").

[138] Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 n.21 (D. Mass. 1991).

[139] *See* Mahler v. Drake, 43 F.R.D. 1, 3 & n. 8 (D.S.C. 1967) ("While . . . statement [that the Federal Rules indicate a general policy to disregard technicalities and form and to determine rights of litigants on the merits, and to that end are to be liberally construed] is generally attributable to pleadings, it indicates the liberality in the search for truth as the ultimate of justice.").

[140] *See* Burke v. New York City Police Dept., 115 F.R.D. 220, 225 (S.D.N.Y.1987) ("stating that "the overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth in a federal question case."); Myers v. St. Francis Hosp., 91 N.J.Super. 377, 385, 220 A.2d 693 (App.Div.1966) ("The discovery rules are to be construed liberally, for the search for truth in aid of justice is paramount. Concealment and surprise are not to be tolerated in a modern judicial system.").

[141] *See* Latiolais v. Whitley, 93 F.3d 205, 207 (5th Cir. 1996) (stating that "fundamental fairness requires that plaintiffs have the opportunity to present their cases so that the trier of fact can make a meaningful search for the truth."); D'Auria v. Allstate Insurance Co., 673 So.2d 147

juries,[144] the rules of evidence,[145] and representation by counsel.[146] A multi-level appellate system provides for the correction of errors made at the trial level.[147] Even statutes of limitations have been explained on the basis that they enhance accuracy.[148] At least one commentator has suggested that the current system of procedural rule-making is utopian in aspiration and fails to take costs into account.[149] That the system is not actually perfect does not entail that perfect procedural justice is not the ideal to which it aspires; perfect procedural justice could be the animating principle of

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(Fla. Ct. App. 1996) (Antoon, J., concurring) (stating "trials . . . function as forums for the search of truth").

[142] *See* In the Matter of Grant, ---P.2d---, 1997 WL 186957, *4 (Kan. Sup. Ct. 1997) (Six, J., dissenting) ("As lawyers and judges, we acknowledge cross-examination as an aid in the search for truth.").

[143] Commonwealth v. Santiago, 405 Pa. Super. 56, 91, 591 A.2d 1095, 111 (Pa. Super. Ct. 1991) (stating the judges must undertake "search for truth").

[144] Ray v. American Nat. Red Cross, 685 A.2d 411, 417 (D.C. 1996) (stating that purpose of jury instructions is to aid "search for truth").

[145] Walstad v. State, 818 P.2d 695, *699 (Alaska Ct. App. 1996) ("The general purpose of the Rules of Evidence is to facilitate the search for truth.").

[146] *Cf.* State v. Morales, 657 A.2d 585, 599 (Conn. 1995) (Borden, J., concurring) (stating that the right to counsel aids in the "search for truth"); President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 52-53 (1967) ("Limiting the right to counsel 'gravely endangers judicial search for truth."). *But cf.* United States v. Wade, 388 U.S. 256-68 (1967) (White, J., dissenting) (stating that "as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.").

[147] *See* United States v. Brown, 50 F.R.D. 110, *111 (D.D.C. 1970) (stating that "appeals, like trials, are a search for truth"); *cf.* Shiflett v. Com. of Va., 447 F.2d 50, 60 (3d Cir. 1971) (en banc) (Winter, C.J., dissenting) (stating that "at least one appeal is a necessary and desirable step in the search for truth").

[148] *See* United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979) (stating that statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."). The qualifying term "even" in the text is meant to convey the obvious fact that statutes of limitations operate to cut off claims that are meritorious, even when the particular factual record would demonstrate that there is no risk of inaccuracy as a result of the passage of time. Statutes of limitations, to the extent they are accuracy enhancing, aim at systemic accuracy. *See* Part IV.B.1.b), "Systemic Accuracy versus Case Accuracy," *infra*, p. 59. For a thorough analysis of the various justifications for statutes of limitations, see Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453 (1997).

[149] *See* Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569 (1994).

procedure doctrine, even though a residue of inaccuracy resists the system's best efforts.

But this hypothesis will not withstand serious scrutiny. This is because the procedural system is replete with rules that explicitly aim at the insulation of error from corrective action. One obvious example is appellate review. The clearly-erroneous and abuse-of-discretion standards insulate trial judge decisions that are in error from appellate review. Another example is the law of prior adjudication. The doctrines of claim and issue preclusion prevent relitigation of particular legal theories and whole causes of action, even when the prior litigation resulted in an inaccurate decision. This idea has been expressed by the courts on numerous occasions. For example:

> It has been said that res judicata makes black white and crooked straight. In some cases its application produces a demonstrably incorrect result. The principle that litigation must come to an end, however, is a very important one, and the fact that some decisions will be incorrect in a way that can later be demonstrated is a necessary price.[150]

The point is that the doctrines of claim and issue preclusion cannot be explained on the ground that they aim at accuracy of results. Although the current law of prior adjudication may sometimes have the effect of preserving a prior determination of an issue or claim that is correct from a subsequent reconsideration that would have resulted in error, a prior adjudication doctrine that truly aimed at accuracy would have a much different shape that existing doctrine: it might allow relitigation after a showing of clear and convincing evidence that the prior decision was incorrect, for example.

Thus, the conception of perfect procedural justice fails to meet the criterion of fit.[151] It cannot account for basic features of procedure doctrine. This utopian conception

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[150] Velasquez v. Franz, 123 N.J. 498, 538, 589 A.2d 143, 165 (1991) (Stein, J., dissenting). The most prominent expression of the idea is from the United States Supreme Court's decision in Jeter v. Hewitt, 63 U.S. (22 How.) 352 (1859):

> Under the system of that State, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the res judicata renders white that which is black, and straight that which is crooked. Facit excurvo rectum, ex albo nigrum. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy.

*Id.* at 363-64; *see also* Taxing District of Brownsville v. Loague, 129 U.S. 493, 504, 9 S.Ct. 327, 331 (1889).

[151] In text, I do not consider the possibility that the features of existing doctrine that cannot be explained by the accuracy model should be viewed as "mistakes," subject to eventual correction through common law adjudication. *See* Dworkin, *supra* note 93. The best way to approach this possibility is to compare the accuracy model with other available models, including the balancing model and the principles of procedural justice that I introduce in Part VI.A, "The Statement of the Principles," *infra* p. 111. When the alternatives are on the table the question will be, which theory best fits and justifies procedure doctrine as a whole. At this point, I offer

fails on the criterion of justification as well: given that civil procedure imposes real costs on litigants and society at large, it is difficult to argue that the smallest marginal gain in accuracy is worth the largest investment of resources. Justice has a price, and there is a point at which that price is not worth paying.[152] Moreover, we have every reason to believe that accuracy is subject to the law of diminishing returns. If we were to make perfect accuracy our highest commitment, we would find that as we got closer and closer to our goal, the cost of reducing the marginal rate of error would become higher and higher. We will reach a point where society would be required to invest enormous resources for the most infinitesimal gain in accuracy.

In sum, the accuracy model suffers from defects in both fit and justification. Doctrines like prior adjudication suggest that the existing system of procedure does not aim at accuracy alone, and the law of diminishing returns suggests that a system that aimed at accuracy alone could not be justified as striking a reasonable balance between competing claims on social resources.

*b) Systemic Accuracy versus Case Accuracy*

There is another difficulty with the accuracy model; the notion of accuracy is itself ambiguous or underdeterminate.[153] To begin the investigation of this point, note that the accuracy of a procedure can be viewed from two perspectives. From the *ex post* perspective, we can ask whether the result in a particular case is correct: call this kind of accuracy "case accuracy." From the *ex ante* perspective, we can ask whether a given procedure will produce more or less accurate results for all future cases: call this kind of accuracy "systemic accuracy." Do these two kinds of accuracy track each other, i.e. do procedures that maximize case accuracy also maximize systemic accuracy?[154]

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the more modest claim that at theory of procedure that would call for wholesale revision of prior adjudication doctrine is at least subject to a *prima facie* objection that it suffers from a substantial problem of fit.

[152] *See* Bone, *supra* note 136, at 599 ("Our current system tolerates procedural error even when expensive procedures might reduce it, and we do not believe that a moral wrong or a rights violation has occurred every time some procedure marginally increases the error risk. Furthermore, if a substantive right implied a right to a perfectly accurate outcome, parties would be entitled to demand that the community invest resources in procedure at a level that maximized accuracy regardless of cost. Any system that recognized such a right could easily find itself morally committed to a disastrous level of financing for adjudication.").

[153] On the notion of underdeterminacy, see Lawrence B. Solum, *supra* note 119.

[154] It might be argued that systemic accuracy and case accuracy are extensionally equivalent, e.g. that the procedure that maximizes case accuracy will always maximize system accuracy, for the reason suggested by the following argument. Begin with the procedural rule that maximizes systemic accuracy, and then consider the application of that rule to a particular case in which it is believed that a different rule would maximize case accuracy. There must be some feature of the particular case that accounts for the difference. But the rule that maximizes systemic accuracy can always be modified so as to create an exception for that kind of case. Because systemic accuracy is simply the sum of case accuracy for all future cases, a rule which incorporates the

This is a difficulty question, and the answer, as one might expect, is "it depends." There are some contexts in which the procedure that would result in accuracy, *ex post*, in the particular case would result in systematic, *ex ante*, inaccuracy. A clear example of the potential conflict between systemic and case accuracy is provided by the effects that statutes of limitations have on the accuracy of civil proceedings. On the one hand, statutes of limitations are defended on the ground that they are accuracy enhancing. For example, in *United States v. Kubrick*,[155] the United States Supreme court argued that statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[156] The use of the modal operator "may" is revealing. Statutes of limitations create incentives to bring claims within the limitations period, and the likely effect of this incentive is that early filing preserves the evidentiary record and thus increases the likelihood of accurate adjudication. But in any particular case in which the statute runs before the claim is filed, the result is that the claim is lost, even if it is meritorious and even if an examination of the record in that particular case would have revealed that evidentiary record was sufficiently preserved to insure a high likelihood of accurate adjudication. In other words, statutes of limitations purchase systemic accuracy at the price of a sacrifice of case accuracy.[157]

Another example is provided by the legal rules that deal with a party's destruction of evidence that is relevant to a civil proceeding. In *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*,[158] Justice (then Judge) Breyer explained the two

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exception will produce greater system accuracy that would a rule without the exception. Therefore, systemic accuracy requires the exception, and the supposed divergence between system accuracy and case accuracy disappears. This argument is a version of a familiar argument, first made by David Lyons, for the extensional equivalence of act and rule utilitarianism. *See* DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965). Whatever the merits of Lyons argument as applied to utilitarian moral theory, it does not establish the extensional equivalence of case accuracy and systemic accuracy, because it does not take into account the incentive effects that legal rules (as opposed to the ideal rules of rule utilitarianism) have on future behavior.

[155] 444 U.S. 111 (1979).

[156] *Id.* at 117.

[157] The substance of this point is recognized by Tyler Ochoa and Andrew Wistrich. *See* Ochoa & Wistrich, *supra* note 148, at 477-79; *see also* Charles C. Callahan, *Statutes of Limitations—Background*, 16 OHIO ST. L.J. 130, 134 (1955).

[158] 692 F.2d 214, 218 (1st Cir. 1982); *see also* Blinzler v. Marriott Intern., Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) ("When a document relevant to an issue in a case is destroyed, the trier of fact sometimes may infer that the party who obliterated it did so out of a realization that the contents were unfavorable. . . . Before such an inference may be drawn, there must be a sufficient foundational showing that the party who destroyed the document had notice both of the potential claim and of the document's potential relevance. . . . Even then, the adverse inference is permissive, not mandatory. If, for example, the fact-finder believes that the documents were destroyed accidentally or for an innocent reason, then the fact-finder is free to reject the

different purposes that underlie the spoliation inference, a judge made rule of evidence that permits a finder of fact to draw an inference against spoliator, i.e. a person who destroys evidence:

> The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. The fact of destruction satisfies the minimum requirement of relevance: it has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be. See Fed. R. Evid. 401. Precisely how the document might have aided the party's adversary, and what evidentiary shortfalls its destruction may be taken to redeem, will depend on the particular facts of each case, but the general evidentiary rationale for the inference is clear.
>
> The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk.[159]

What Justice Breyer calls the "evidentiary rationale" expresses an aim at accuracy in the individual case. Although the destruction of evidence may create uncertainty, the system can respond to that uncertainty by drawing those inferences that seem most likely under the circumstances. The "punitive" rationale is focused on systemic accuracy: by deterring future acts of destruction of evidence, the system aims to improve the long-run accuracy of the system as a whole. But the goals of case accuracy and systemic accuracy may conflict in any particular case. When evidence is negligently destroyed, for example, the careless failure to preserve evidence may not support any inference that the material that was destroyed was unfavorable to the party who destroyed it; hence, accuracy in the individual case would be undermined by imposing a penalty for the destruction. From the systemic point of view, however, imposing a penalty on the negligent destruction of evidence might create incentives to preserve such evidence that would improve the long-run accuracy of the system as a whole.

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inference."); Allen Pen v. Springfield Photo Mount Co., 653 F.2d 17, 23-24 (1st Cir.1981) (holding that without some evidence that documents have been destroyed "in bad faith" or "from the consciousness of a weak case," it is "ordinarily" improper to draw an adverse inference about the contents of the documents.).

[159] *Id.*

The question that arises for the accuracy model, then, at which sort of accuracy should procedural justice aim? This question is a specific example of a question that arises frequently in both the law and moral theory. In the law, we frequently draw a distinction between case-by-case balancing, in which factors are balanced (for example, by a trial judge) to decide a particular case, and systemic balancing, in which the factors are balanced (usually and authoritatively by an appellate judge) to create a general rule; the rule is then applied to decide particular cases.[160] In moral theory, we distinguish between two forms of utilitarianism, act-utilitarianism, which holds that an action is right if and only if that action will maximize utility as compared to the possible alternative actions, and rule-utilitarianism, which holds that an action is right, if and only if that action is in accord with a general rule that would maximize utility if the rule were generally obeyed.[161] The general distinction, between rules or systems, on the one hand, and acts or individual cases, on the other, is operating in the distinction that I have drawn between case accuracy and systemic accuracy.

In the context of formulating a conception of procedural justice in general and articulating the accuracy model of procedural fairness in particular, the tension between case accuracy and systemic accuracy poses a problem that must be resolved. At which sort of accuracy should we aim? If we aim at case accuracy, we achieve procedural justice in the case before us, but we will sacrifice accuracy in future proceedings. If we aim at systemic accuracy, we achieve a system that produces more accurate outcomes in the aggregate, but in particular cases we are required to decide against the party that is otherwise entitled to prevail: wholesale procedural justice is purchased at the price of retail procedural injustice.

How can this dilemma be resolved? One way out would be to appeal to a general moral theory for guidance. For example, we might appeal to a deontological view like Kant's for the proposition that one should never render an unjust decision at the expense of an innocent litigant in order to achieve system benefits: we might choose to pursue case accuracy, because case accuracy respects an important political right—the right to an accurate determination of one's legal rights. Or we might appeal to a consequentialist view, like utilitarianism, and opt for systemic accuracy on the ground that rules designed to produce system accuracy will produce the greatest good for the greatest number.[162] But, as I have already argued,[163] the appeal to general moral

[160] *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 948 (1987) (using the terms "definitional" and "ad hoc" balancing to refer to the distinction between rule-balancing and case-by-case balancing).

[161] *See* Dan W. Brock, *Utilitarianism* in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 824-25 (1995).

[162] The passage in text elides the important distinction between act and rule utilitarianism. The way that rule utilitarianism supports system accuracy over case accuracy is clear: to the extent that accuracy is a good consequence, rule utilitarianism counsels in favor of the general rule that will promote the greatest accuracy in the long run. An act utilitarian analysis is more complicated. One might argue that case accuracy is to be preferred on act utilitarian grounds, because the act utilitarian focuses on the consequences of each individual act, in this case the

theories to arbitrate between conceptions of procedural justice is inconsistent with the ideal of public reason. Our resolution of the tension between systematic and case accuracy will neither command widespread assent nor offer reasons that can be accepted by the citizenry at large as *legitimate* if it depends on the truth of a particular comprehensive moral doctrine.

The next question is whether we can resolve the question as to whether we should aim at case accuracy or systemic accuracy without relying on a comprehensive moral theory. Consider the following principle of political morality: each individual has a presumptive right to adjudication of her entitlements based on an individualized assessment of the merits of her own case. This principle of background morality expresses a presumptive right and not an unqualified legal entitlement. This principle of political morality does not need to rest on any particular moral or religious doctrine: the notion that each of us ought to be treated as an individual by the law finds strong support in the tradition of individual rights and liberties of our political culture.

This background right of political morality is not unqualified. For example, the system may establish general procedural roles that aim at systemic accuracy, so long as these rules satisfy the requirements of the rule of law, i.e., they are public and it is possible, through the exercise of reasonable care, to comply with them. So, I may be penalized for destroying evidence, to return to that example, if the rule against such destruction is announced in advance and if the rule allows me the defense that I have made reasonable good-faith efforts at compliance. In the case of a statute of limitations, it is fair to cut off my legal claim if I was given reasonable notice of the limitations period and the period was sufficient to enable me to bring my claim.

In light of this, consider the following three part hypothesis concerning the relationship between case accuracy and systemic accuracy: (1) where systemic accuracy and case accuracy are congruent, the system of procedure aims at both; (2) where systemic accuracy would impair case accuracy, the system usually aims at case accuracy; (3) systemic accuracy may be preferred over case accuracy, if systemic accuracy can be obtained through general and public rules, so long as it is possible for those affected to comply with the rules by reasonable good faith efforts.

Assuming then that we can offer a satisfactory account of the relationship between systemic accuracy and case accuracy, the accuracy model stands as follows. Accuracy is a plausible candidate as a component of an ideal of procedural justice, but it is not a plausible candidate for a complete account of procedural justice. The thesis that the system aims should and does aim at accuracy alone does not fit important aspects of the existing system of civil dispute resolution and does not offer a normatively attractive justification of that system. If taken alone, the accuracy model fails.

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decision of a particular case. In the context of a system of procedural rules, however, the act may be the promulgation of the rules, and hence the consequences to be summed would include the benefits of accuracy of all future cases affected by the rule.

[163] *See* Part II.B, *supra*, at 42.

*2. The Balancing Model*

The next hypothesis is that the current shape of procedure doctrine is best explained and justified by a conception of imperfect procedural justice. We assume that the substantive law provides an independent criterion for what constitutes a just or fair outcome. Acknowledging that perfection is impossible and that diminishing marginal returns imply that approaching perfection will become too costly at some point, the system aims at compromise, a balance between accuracy and its cost. Let us call this notion of imperfect procedural justice, "the balancing model." It is the nature of the compromise or balance struck between accuracy and other considerations that provides an ideal of imperfect procedural justice its content. Under what conditions will accuracy be sacrificed? How should the costs of procedural justice be distributed?

One answer to these questions is utilitarian. We could simply weigh the costs of procedure against the benefits and adopt the system of procedure that will maximize utility. Another approach to the questions would emphasize rights-based constraints on both the nature of the costs that may be imposed and on the distribution of those costs. Each of these two approaches is examined in turn.

*a) Consequentialist Balancing: The* Mathews v. Eldridge[164] *Balancing Test*

The consequentialist version of imperfect procedural justice finds substantial support in the decisions of the Supreme Court that interpret the Due Process Clauses of the United States Constitution. The most striking example is provided by the balancing test announced in *Mathews v. Eldridge*:[165]

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[166]

This approach is not confined to due process doctrine. It informs the Supreme Court's decisions in a number of doctrinal areas. [167] Consider, for example, the following

[164] 424 U.S. 319 (1976).

[165] For scholarly commentary on *Mathews v. Eldridge*, see Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[166] 424 U.S. at 334-35.

[167] *See, e.g.,* Bell v. Farmers Ins. Exch. 2004 WL 232371, *26 (Cal.App. 1 Dist.,2004) (appyling *Mathews* balancing test to determine whether use of statistical sampling techniques to

excerpt from a discussion of standards of appellate review, "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."[168] An explicit appeal is made to a balancing of the benefits of accuracy with its costs.

Beginning with the emphasis on balancing in doctrine, we could construct a utilitarian conception of imperfect procedural justice. This effort is complicated, however, because there are many forms of utilitarianism; for our purposes, we might consider ideal rule utilitarianism, in which an act is right if and only if it is conformity with the system of rules, which if universally followed would produce the best consequences.[169] Let us make a further simplifying assumption: that all of the relevant costs can be expressed as prices. The resultant approach will be roughly similar to some law and economics approaches.

Consider for example, Richard Posner's economic analysis of procedure. He writes, "The objective of a procedural system, viewed economically, is to minimize the sum of two costs. The first is the cost of erroneous judicial decisions."[170] The second type of cost is "the cost of operating the procedural system."[171] Operating costs are borne by the public, in the form of subsidies to the judicial system and by the parties in the form of court fees, attorneys' fees, and litigation costs.

Can a utilitarian conception of imperfect procedural justice fit and justify the general contours of existing procedure? Consider first the dimension of fit. On one hand, the utilitarian conception seems to fit contemporary procedural due process doctrine remarkably well. *Matthews v. Eldridge* and its progeny are all but explicit in their utilitarianism. On the other hand, a broader survey of the legal landscape reveals a number of problems.

The first problem of fit concerns the relationship between procedural and substantive justice. The theoretical framework within which we are operating postulates that the law is a seamless web.[172] Our account of procedural justice must fit within a larger theory that fits and justifies the law as a whole. The point is much mooted, but there are grave doubts about the viability of utilitarian theory to account

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assess damages in class action comports with due process); In re Travarius O. 799 N.E.2d 510, *515, 278 Ill.Dec. 792, **797 (Ill.App. 1 Dist.,2003) (analyzing "the possible deprivation of a parent's due process rights in termination and adoption proceedings by balancing the factors enunciated . . . in *Mathews*); Yorktown Medical Laboratory v. Perales, 948 F.2d 84 (2d Cir.1991) (applying *Mathews* balancing test to due process challenge to state's use of sampling in an audit of the laboratory's Medicaid payment claims).

[168] *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

[169] *See* Lyons, *supra* 154; J.J.C. SMART & BERNARD A. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

[170] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 549 (1992); *see also* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis,* 23 J. LEGAL STUDIES 307 (1994).

[171] *Id.*

[172] *See* DWORKIN, LAW'S EMPIRE, *supra* note 92.

for the shape of existing legal doctrine. Indeed, from Bentham on, utilitarians are noted at least as much for critique as for explanation. Large domains of law seem best explained by rights-based accounts, including rights to privacy as well as freedom of speech and religion.

The second problem of fit concerns the system's reluctance to take utility into account in a variety of situations. *Matthews v. Eldridge* is in a line of cases in which plaintiff's seek to extend traditional adversary procedures to administrative action, and in that context, a utilitarian approach predominates. The same approach does not seem to be followed when we turn our attention to the traditional pleading, discovery, and trial system. It is true that some rules can be explained on utilitarian grounds, prior adjudication doctrine and standards of appellate review may be examples. But what is the utilitarian case for the elaborate machinery of discovery, trial by jury, the rules of evidence, and so forth? And why do these procedures come (for the most part) as an indivisible package? Why not *Matthews v. Eldridge* in reverse, a doctrine that would eliminate procedures when it could be shown that their costs exceeded their benefits? These rhetorical questions are merely suggestive, and much utilitarian work has been done on the rules of evidence, the jury trial, and so forth. In this regard, it is important to remember that the expensive machinery of the traditional trial is used in only a tiny percentage of actual disputes, with negotiated settlement as the mode for resolution of the vast majority. But even conceding these points, the problems of fit seem overwhelming.

Despite the very broad statement of the holding in *Matthews*, the Supreme Court has not, in practice, applied the balancing test, even in all cases in which the issue is whether a hearing is required. A clear example is the Court's decision in *Richards v. Jefferson County*,[173] in which the Alabama's attempt to give claim preclusive effect to a prior judgment in which the parties to be bound did not have an opportunity to participate. Rather than balancing, the Court relied upon a categorical rule:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. . . . The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. . . . And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . ., so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."[174]

Indeed, *Richards v. Jefferson County* Court explicitly rejected the weighing of consequences:

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[173] 517 U.S. 793, 116 S.Ct. 1761 (1996).

[174] 116 S.Ct. at 1765 n. 4 (citations and internal quotation marks omitted).

> Respondents contend that, even if petitioners did not receive the kind of opportunity to make their case in court that due process would ordinarily ensure, the character of their action renders the usual constitutional protections inapplicable. They contend that invalidation of the occupation tax would have disastrous consequences on the county . . . .[175]

But the Court did not accept the invitation to engage in a balancing of interests:

> Of course, we are aware that governmental and private entities have substantial interests in the prompt and determinative resolution of challenges to important legislation. We do not agree with the Alabama Supreme Court, however, that, given the amount of money at stake, respondents were entitled to rely on the assumption that the [prior] action "authoritatively establish[ed]" the constitutionality of the tax. . . .A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party. That general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution.[176]

The important point is that the Court in *Richards* did not engage in *Matthews v. Eldridge* balancing; rather, it relied on a general rule that guarantees an opportunity to be heard, i.e. a right of participation.

Putting aside the dimension of fit, does the utilitarian version of the balancing model provide the best justification for the structure of existing procedure doctrine? This is a large question, to put it mildly. Certainly, utilitarian reasoning has played a role in thinking about the law.[177] Moreover, it seems overwhelmingly plausible to believe that consequences do count in legal justification. Even the most ardent adherents of rights-based approaches are unlikely to maintain that accuracy or participation must be purchased at any cost, and the magnitude of the costs imposed is itself relevant to questions of fairness. Thus, a utilitarian account captures at least part of the story.

But does the utilitarian version of the balancing model tell the whole story? Does utilitarianism provide the right kind of justification for the existing system of procedure? Consider the following argument for a negative answer to these questions. Recall the observation, made above, that ours is a pluralist society, in which there are a variety of competing comprehensive moral and religious doctrines. Although some features of utilitarianism, such as the insistence that consequences do count, are the subject of wide agreement, other features, most especially the utilitarian beliefs that only consequences count and that all values can be reduced to a single metric, are highly controversial. For this reason, utilitarian moral theory does not provide an

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[175] *Id.* at 1768.

[176] *Id.* at 1769.

[177] For a very explicit appeal to utilitarian norms, see Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NAT. TAX J. 407 (1995).

appropriate justification for our system of procedure. The right sort of justification must draw on public reasons, and in particular, on widely shared values that are implicit in our public political culture. The utilitarian notion that consequences count does provide a public reason, but the utilitarian premise that all rights ultimately depend on maximizing some nonmoral good, is not a justification of the appropriate sort.

*b) Deontological Constraints on Balancing: Consideration of Cost and Recognition of Procedural Rights*

Consider then an alternative to the consequentialist model of imperfect procedural justice. Is it possible to formulate a model of imperfect procedural justice that uses deontological notions, such as fairness and rights, to give a systematic account for the ways in which a system of procedure should aim for less-than-complete accuracy and for the distribution of the costs imposed by such a system? This conception of procedural justice would need to incorporate accounts of the fair distribution of procedural burdens and of the correction of procedural injustice.

Begin with the most obvious burden imposed by imperfect procedural justice, the risk of error. Does fairness have anything to say about the distribution of this risk? In the civil context, the baseline notion seems to be that the risks of error should be distributed equally. That is, neither plaintiffs nor defendants should enjoy an advantage in any particular category of cases. The clearest expression of this notion is found in the formulation of the burden of proof on most issues in civil litigation. The preponderance of the evidence standard seems designed to spread the risk of error evenly across potential litigants.[178] Why? Consider the alternatives. Suppose that in ordinary civil cases, the plaintiff were required to prevail "beyond reasonable doubt" or by "clear and convincing evidence." Such burdens would allocate the risk of error unevenly—resulting in a higher loss rate for plaintiffs with meritorious claims than for defendants entitled to prevail on the merits.

The risk of error is influenced by a large number of factors. The hypothesis is that the criteria of fit and justification are best satisfied by a fairness-based conception of

[178] Consider the following possibility, that the overall risk of error can be minimized by a procedure that distributes the risk asymmetrically. For example, imagine that the baseline rate of error in a particular context is .2 (and hence the accuracy rate is .8) with the risk distributed equally between potential plaintiffs and defendants (each bearing a .1 risk of an erroneous decision that goes against them and a .1 risk of an erroneous decision in their favor). Suppose further that a procedural change would reduce the overall risk to .15 (and hence the accuracy rate is .85), but that all of this risk would be borne by plaintiffs. If accuracy alone were considered, then the procedural change would be preferred (.85 > .8), but if equal distribution of the risk of error is of independent value, then the change might be ruled out on the ground that .15 risk or erroneous decisions that disadvantage plaintiffs accompanied by a .0 risk of erroneous decisions that disadvantage defendants is less fair than the symmetrical risk (.1 and .1) that was associated with the baseline error rate.

imperfect procedural justice, requiring an equal distribution of these risks across plaintiffs and defendants from the *ex ante* perspective. This hypothesis would be confirmed if it could be shown that existing doctrine avoids asymmetrical distributions of the risk of error, except in those cases in which there are countervailing considerations of fairness (or cost).[179] This claim needs to be qualified: some asymmetry may be unavoidable. The criterion of fit does not require that the doctrine fit the goal specified by the criteria of fairness in the conception of procedural fairness perfectly; if the current practice approximates the maximum degree of satisfaction of the criteria that is practically possible, then the conceptions can be said to fit current practice.

There is at least one way in which existing doctrine does not seem to spread the risk of error equally across the various classes of litigants. In an adversary system, the quality of representation may affect the risk of erroneous deprivation of substantive rights. Given that the quality of representation depends on the ability to pay, current civil procedure doctrine would seem to provide a systematic distribution of the risk of error in favor of those who have the greatest share of social resources. Equal distribution of the risk of error would seem to require the equalization of legal resources,[180] but current doctrine provides very little in the way of such equalization, especially in cases without a clear market value. This evidence does not suffice to settle the matter. It might turn out that inequality of legal resources is required by other considerations of fairness, e.g. by fundamental economic liberties. These important issues are outside the scope of this Article.

A fairness- or rights-based conception of imperfect procedural justice will have implications for the distribution of other costs that are imposed by the system of procedure. For example, liberal discovery may operate to increase accuracy, but it also imposes burdens on both litigants and third parties. A rights-based approach would attend to the question whether discovery would violate the preexisting moral or legal rights of the parties, for example, rights to privacy. Rather than balancing the costs of privacy invasions against the benefits in terms of increased accuracy, a rights-based conception might look to the question whether the privacy right has been waived, and if not, whether that right is more fundamental (or ranked higher in a lexical ordering) than the interests of the parties in accurate adjudication.

The adequacy of a fairness-based conception of imperfect procedural justice is more difficult to asses than is the adequacy of a utilitarian conception. Utilitarian accounts are relatively simple in structure, and although the assessment of

[179] Asymmetrical risks of error might also be justified where they were to the benefit of the party that bears the higher risk of error. Thus, in a variation of the example provided above, *supra* note 178, a change from a symmetrical risk of .1 for plaintiffs and .1 for defendants (total = .2) to an asymmetrical risk of .05 for plaintiffs and .0 for defendants (total =.05) on the ground that the risk of error disadvantaging plaintiffs is reduced ($.05 < .1$), even though it becomes unequal ($.0 \neq .05$).

[180] *See* Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF'S 303 (1988).

consequences may be difficult in practice, it may well be possible to devise test cases that will reveal the lack of fit between the utilitarian account and existing doctrine. This simplicity is lacking in the case of fairness-based conceptions. A great deal of argumentative work needs to be done in order to produce even the sketch of a fairness-based conception of imperfect procedural justice, and until that work is done, it simply isn't possible to determine whether existing doctrine fits the conception. There is another complication here, raised by the relationship between the criteria of fit and justification. If fit alone were the criteria, a rights-based conception could turn out to be empty and impossible to falsify. One could always gerrymander a conception of procedural rights, according to which, one has exactly those rights that existing doctrine embodies. The criterion of justification demands that the conception of procedural justice provide a coherent justification for the shape of existing doctrine. Thus, the criterion of justification rules out arbitrary, post-hoc procedural rights that are tailored to the shape of existing law. In Part VI, "Principles of Procedural JusticePrinciples of Procedural Justice," we will examine an articulated theory of procedural justice—albeit one that does not fit within the confines of the accuracy model.

*3. The Participation model*

Let us now consider a third and final family of conceptions of procedural justice. The participation model is based on the fundamental idea that procedural fairness requires that those affected by a decision have the option to participate in the process by which it is made.[181] The idea that procedural fairness requires participation is a familiar one. In *Marshall v. Jerrico, Inc.*,[182] Justice Marshall wrote that there are "two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process."[183]

The participation model is not well-defined, because it rests on uncertain and varying foundations: for this reason, we will investigate four interpretations of the model. The four interpretations are unified by the idea of pure procedural justice, that is, by the idea that the fairness of a procedure is a function, not of some independent criteria, but instead of the intrinsic features of the procedure itself. This entails that the outcome of the procedure is fair, whatever it is, provided that the requirements of the

[181] *See, e.g.*, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1489 (1991) ("Procedural fairness, however, is not subsumed completely by substantive justice. Procedural fairness means that a legitimate decisionmaking process promotes independent values of participation, deliberation, and consensus."); Michelman, *Formal and Associational Aims in Procedural Due Process*, DUE PROCESS: NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977).

[182] 446 U.S. 238 (1980).

[183] Id. at 242. Justice Marshall cited *Carey v. Piphus*, 435 U.S. 247 (1978).

procedure have been satisfied. The first interpretation, considered in Part IV.B.3.a), "The Gaming Interpretation," briefly explores the notion that litigation should be considered a fair game or contest that where the winner is entitled to prevail if she played by the rules and is entitled under the rules to win. The second, considered in Part IV.B.3.b), "The Dignity Interpretation," emphasizes dignity and autonomy as a function of the actual participation of litigants in procedures that affect them. The third, considered in Part IV.B.3.c), "The Satisfaction Interpretation," argues that participatory process is justified by the greater level of satisfaction it provides to litigants. The fourth, considered in Part IV.B.3.d), "The Discourse Theory Interpretation," appeals to an ideal communication situation as the criterion of what constitutes a just or correct outcome and then argues that civil procedure doctrine aims at approximating this ideal.

*a) The Gaming Interpretation*

At the outset, we should dispose of the least plausible interpretation of the participation model, which I shall call the gaming interpretation. The gaming expresses two related, but somewhat inconsistent ideas about procedural fairness: one is captured by the analogy between litigation and a game of chance, and the other is expressed by the metaphor of the level playing field. Each of these two ideas is explored in turn.

The first idea is that civil litigation is like a game of chance. Gambling contests are examples of pure procedural justice, so long as the rules are announced in advance and enforced, because gamblers and athletes agree to the procedure. No procedural unfairness can attach to one's having bet heavily on three aces if one loses to four twos. On this model, the side that wins a game of civil litigation game deserves its victory, so long as all of the rules were followed.

As one might suspect, this theory has been advanced by its opponents, notably Bentham[184] and should properly be viewed as a straw man or a *reductio* of the participation model. Jerome Frank provided a loose statement of this view:

> Wigmore (following up a suggestion made by Bentham) suggested that 'the common law, originating in a community of sports and games, was permeated by the instinct of sportsmanship' which led to a 'sporting theory of justice,' a theory of 'legalized gambling.' This theory, although it had some desirable effects, 'has contributed,' said Wigmore, 'to lower the system of administering justice and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance . . .' in which lawyers use evidence 'as one plays a

[184] Jeremy Bentham used the analogy to criticize the idea of pure procedural justice as "a maxim which one would suppose to have found its way from the gaming-table to the bench." 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 171 (Russell & Russell Inc. 1962) (1843), quoted in Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323 (1971).

> trump card, or draws to three aces, or holds back a good horse till the home-stretch.'[185]

The difficulty with the gaming interpretation of the participation model is that litigants do not choose to file or defend lawsuits in the same way that gamblers choose to join a poker game. If one's legal rights have been violated and the violator refuses voluntary alternative dispute resolution, then litigation is the only game in town. Even if it were fair to analogize the filing of a civil action to entering a sporting event, the requisite voluntary choice is missing in the case of civil defendants who can be compelled to play against their will at the risk of a binding default judgment being entered against them.

If I chose to play a game of poker and lose $10,000, that outcome can be said to be fair, so long as everyone who played abided by the rules. Poker players chose to play the game that is constituted by the rules of poker, and it would be very odd indeed if an experienced player who lost at poker were to complain that she had been cheated on the grounds that poker itself is unfair. But if I am forced to play a game of civil litigation and lose $10,000, then there is a further question: were the procedural rules fair? This question suggests another version of the gaming theory, captured by the metaphor of a "level playing field" frequently used in judicial opinions.[186]

What is meant by a level playing field? A sporting contest is unfair if the field is tilted, giving one side an unfair advantage. But the notion of unfair advantage must be cashed out. In a sporting contest, a level playing field is required so that the skill of the athletes will determine the outcome. But we do not believe that the skill of the lawyers should determine the outcome of civil litigation, although we acknowledge that in fact,

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[185] JEROME FRANK, COURTS ON TRIAL 91 (1949); *see also* Giles v. Maryland, 386 U.S. 66, 102 (1977) (Fortas, J., concurring)(arguing a trial is "not a sporting event"); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 2 (1990).

[186] U.S. v. O'Keefe, --- F.3d ----, 1997 WL 700484, *10 (5th Cir. Nov. 11, 1997) (discussing "level playing field between the prosecution and the defense"); United States v. Kai-Lo Hsu, No. 97-323-01, 1997 WL 679104, *4 (E.D. Pa. Oct. 27, 1997) ("While we find it unnecessary to identify an absolute constitutional right to a level playing field in these cases, we do find that if the prosecution is able to use complete and accurate Taxol technology documents to measure for the jury the dimensions of the secret involved, the defendants should be given the means to rebut it."); Saunders v. City of Philadelphia, NO. 97-3251, 1997 WL 400034, *6 (E.D.Pa. July 11, 1997) (stating "the public interest, we find, is best served where all parties have a level playing field, as set forth in the apposite rules of civil and criminal procedure."); Bilbo for Basnaw v. Shelter Ins. Co., 96-1476, 698 So.2d 691 (La. Ct. App., Jul. 30, 1997) ("The effect of the amendment [making summary judgment more freely available] is to level the playing field between the parties in two ways: first, the supporting evidence submitted by the parties should be scrutinized equally, and second, the overriding presumption in favor of trial on the merits is removed.").

lawyer skill may play a role. As a normative matter, an ideal of procedural justice that is fair to lawyer-contestants is completely unattractive.[187]

The gaming interpretation of the participation model is a nonstarter as a theory of procedural justice, precisely because it does not recognize the cogency of the very question it is supposed to address. Although the gaming interpretation cannot be considered a serious candidate, it does enable us to see what is at stake in our investigation of the participation model. We need an interpretation of what makes a process fair that can address fact that civil litigation is not a freely chosen activity.

*b) The Dignity Interpretation*

The second interpretation of the participation model connects the independent value of process with the dignity of those who are affected by legal proceedings.[188] One way of articulating this central notion is that everyone is entitled to their day in court. This right to participation is justified by a background right of political morality, i.e. the right of persons (or citizens) to be treated with dignity and respect. A procedure which ensures parties an opportunity to participate in the process of making decisions that affect them might be counted as a just procedure for this reason, independently of the correctness of the outcome that results from the procedures.

Robert Bone describes a closely related notion as follows: "The 'day in court' ideal in American adjudication is linked to a process-oriented view of adjudicative participation that values participation for its own sake, not just for its impact on outcome quality. Participation is important because it gives individuals a chance to make their own litigation choices."[189] A variety of values are invoked in connection

[187] Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

[188] The dignity argument is associated with its eloquent exposition by Jerry Mashaw. *See* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985); *see also* Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Owen Fiss, *The Allure of Individualism*, 78 Iowa L. Rev. 965, 978 (1993) (stating "participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual"); Toni M. Massaro, *The Dignity Value of Face-To-Face Confrontations* 40 U. FLA. L. REV. 863 (1988); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1391-93 (1991) (asserting that participation functions to enhance respect for the dignity of litigants and reasoned and accurate decisionmaking); Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L.REV. 111, 193 (1978) ("It is this value of individuality -- of respect for personal integrity and dignity -- that forms the core of inherent dignity. To ignore or deny its existence, or discard its importance in the procedural due process equation, is to invite a regime hostile to the role of the individual under the rule of law."). For a critique of the dignity theory, see Rutherford, *supra* note, 121, at 42-47.

[189] Bone, *supra* note 136, at 619; *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992); Robert G. Bone, *Personal and*

with the day-in-court ideal, including equality, individuality, and autonomy, but the most frequently invoked value is dignity, and I shall call the interpretation of the participation model that is grounded in the notion that participation is essential for dignity, the "dignity interpretation."

The best account of the dignitary value of participatory process has been developed by Jerry Mashaw. [190] Mashaw states the intuitive idea as follows:

> At an intuitive level, a dignity approach is appealing. We all feel that process matters to us irrespective of result. This intuition may be a delusion. We may be so accustomed to rationalizing demands for improvement in our personal prospects, in the purportedly neutral terms of process fairness, that we can no longer distinguish between outcome-oriented motives and process-oriented arguments.
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> * * *
>
> Yet there seems to be something to the intuition that process itself matters. We *do* distinguish between losing and being treated unfairly. And, however fuzzy our articulation of the process characteristics that yield a sense of unfairness, it is commonplace for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons.[191]

Mashaw argues that his dignitary theory of procedural due process provides both a necessary and sufficient account of the due process clauses.[192]

There is something to the notion that a right to participation in decision-making processes is valuable because it respects the dignity and autonomy of those who are affected by the outcome of those processes. Certainly it is not wrong to say that including those who are affected in the decision-making process is respectful of their status as equal citizens (or persons) and of their autonomy. It is plausible to see dignity as playing at least a supporting role in an account of procedural fairness.

But at this point the question is whether the dignity interpretation of the participation model offers an independent model or theory of procedural justice. And it is clear that it does not. First, participation alone is not sufficient to make for a just or fair procedure. All the participation in the world won't save a rump trial from a charge

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*Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990).

[190] *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985); JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L.REV. 28 (1976).

[191] Mashaw, DUE PROCESS IN THE ADMINISTRATIVE STATE, *supra* note 190, at 162-63.

[192] *See id.* at 169.

of injustice. At the very least, the role of accuracy in our understanding of procedural justice would need to be taken into account. Second, it is not clear that the value of dignity provides reasons that are sufficiently weighty to counter the other values that bear on procedural justice. By itself the value of dignity and respect is closely related to the values that are served by proper etiquette or good manners. Indignity or disrespect are not the sort of grave injuries that trump other values tout court, but the dignity interpretation of the participation model would require precisely dignity to have precisely that kind of force or weight. It does not suffice to say that dignity is a matter of right, because the concerns implicated by the accuracy model (i.e. the underlying substantive rights vindicated by the system of procedure) are also matters of right. And if we were to ask whether the substantive rights served by accuracy trump the right to be treated with dignity (or vice versa), it is difficult to make the case that the right to dignity ranks so high that it always trumps other the other rights that are implicated in procedural fairness. As a general theory of procedural justice, the dignity interpretation is a nonstarter.

*c) The Satisfaction Interpretation*

The dignity interpretation is rooted in a rights-based or fairness-centered conception of political morality, but the third interpretation of the participation model looks to a more utilitarian measure of the value of process. The satisfaction interpretation of the participation model uses participant satisfaction as the criteria for the evaluation of process. A process that provides participants an opportunity to tell their story and make litigation decisions may be more satisfactory to participants, even if the process is less accurate or more costly than alternatives which afford less opportunity for participation. Social psychologists have attempted to measure participant satisfaction levels and other perceptions of various procedures.[193]

[193] Social psychology has produced a large literature on procedural justice. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 24-25 (1990); Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCHOL. 296, 300 (1986); Pauline Houlden, Stephen LaTour, Laurens Walker, & John Thibaut, *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCH. 13 (1978); Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531 (1978); Stephen LaTour, Pauline Houlden, Laurens Walker, & John Thibaut, *Procedure: Transnational Perspectives and Preferences*, 86 YALE L. J. 258 (1976); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); E. Allan Lind & P. Christopher Earley, *Procedural Justice and Culture*, 27 INT'L J. PSYCHOLOGY 227, 227-40 (1992); E. Allan Lind & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXP. SOC. PSYCH. 19 (1985); E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort*

*Lawrence Solum*

For the purposes of discussion, let us assume that social psychologists were able to demonstrate that participation is satisfying to litigants and that the satisfaction which it produces is not substantially dependent on the accuracy and cost of the process. Would this social fact provide a good and sufficient reason for the participation model? Stating the issue somewhat differently, would the fact that participatory process produces high levels of satisfaction support a pure procedural justice theory of civil litigation?

Once again, the answer to these questions is obviously "no." To see this point clearly, let us assume, for the moment, a utilitarian framework for evaluation of these questions. We assume that participatory process has independent satisfaction value, *S*. But there are other values to be weighed in a utilitarian calculus. The benefits of accurate adjudication, *A*, and other external costs, *C*, and benefits, *B*, of the various alternatives must be summed. On utilitarian grounds, we should prefer the alternative with the highest utility score. For each alternative, *i*, the utility, is calculated as follows: $U_i = S_i + A_i + B_i - Ci$. But this is the balancing model, and not the participation model. In order for satisfaction interpretation of the participation model to succeed on utilitarian grounds, we would need to show that litigant satisfaction is the only consequence that counts (i.e. that $U_i = S_i$), but there is no basis for making such a

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*Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 967, 968 tbl. 2 (1990); Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes*, 18 LAW & HUM. BEHAV. 361 (1994); Austin Sarat, *Authority, Anxiety, and Procedural Justice: Moving from Scientific Detachment to Critical Engagement*, 27 LAW & SOC'Y REV. 647, 649 (1993) (citations omitted) (reviewing Tom Tyler, Why People Obey the Law (1990); Blair H. Sheppard, *Justice is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953, 956 (1985); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF.L.REV. 541 (1978); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 106 (1988); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 1987 NEGOTIATION J. 367, 372 (discussing disputants' preferences for ADR processes over traditional court procedures); Tom R. Tyler, Jonathan Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedure*, 33 AM. J. POL. SCI. 629, 640-41 (1989) (reporting data from interviews with 329 criminal defendants and concluding that perceptions of procedural fairness affected attitudes towards judicial authority and government more so than did outcomes and favorable sentences); 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); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular Supreme Court Decisions: A Reply to Gibson*, 25 L. & SOC'Y REV. 621 (1991); Laurens Walker, E. Allan Lind, & John Thibaut, *The Relationship between Procedural and Distributive Justice*, 65 VA.L.REV. 1401 (1979); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*," 23 LAW & SOCIETY REVIEW 469 (1989); J. Brockner and P. Siegel, *Understanding the Interaction Between Procedural and Distributive Justice* in TRUST IN ORGANIZATIONS 390 (Kramer and Tyler eds. 1996).

showing. Even if it could be demonstrated that litigants prefer participatory process, all things considered, even when they are made aware of the accuracy effects and other social costs and benefits, the would still not be sufficient, because civil proceedings have effects on persons who are not litigants, e.g. accurate adjudication may produce general deterrence, legal proceedings may be subsidized by public expenditures, and so forth. Thus, litigant satisfaction cannot be the sole determinate of the utility of the procedural system.

This simple utilitarian objection to the satisfaction interpretation is reinforced when fairness concerns are brought to bear on our evaluation of this variant of the participation model. Accuracy serves to insure that litigants prevail when they are entitled to do so, and inaccurate outcomes deny litigants their rights. Even if some litigants are more satisfied with a process that results in an erroneous outcome that disadvantages them (but allows them to participate), this does justify denying other litigants outcomes to which they have a right. This point could be overcome if it could be shown that all (or almost all) litigants would consent to an erroneous judgment against them in exchange for more participation, but it seems most unlikely that such a showing could be made.

It is important to remember that these arguments against the satisfaction interpretation of the participation model make a very narrow point—that satisfaction with process is not the whole story about procedural fairness. This narrow point does not entail the conclusion that litigant satisfaction is unimportant or that it should not be considered in the evaluation and comparison of specific procedures. The proper conclusion to draw is that the satisfaction interpretation of the participation model fails as a stand-alone theory of procedural justice.

*d) The Discourse Theory Interpretation*

Consider then, a fourth interpretation of the participation model. This interpretation argues for a deep, constitutive connection between participative process and correct outcomes. Because this interpretation is most fully expressed in the discourse theory offered by Jürgen Habermas, I shall call it the "discourse theory interpretation."

Existing procedures do more than simply provide for participation. Trials, for example, are conducted according to elaborate rules that insure that both sides have an equal opportunity to present their case, i.e. to make arguments, to put on and question witnesses, to introduce physical evidence, and so forth. Decisions are made by neutral third parties. These features suggest that the procedural system might be conceived on the model of the ideal communication situation as articulated by Jürgen Habermas. Habermas has advanced what might be called a discourse theory of truth.[194] On the

[194] *See* THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 291-310 (1978); *see also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans. 1984 & 1987) (two volumes). For an important recent secondary account, see Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) For a basic exposition

discourse theory, we parse a truth claim as a claim that the proposition asserted as true would be agreed upon under conditions of rational discourse, including the condition that all participants have an equal opportunity to engage in, advance, or refute arguments, question claims, and so forth.[195] The key notion is that "ultimately there can be no separation of the criteria for truth from the criteria for the argumentative settlement of truth claims."[196] As applied to the context of a civil action, the idea is that there is no criterion for a legally correct outcome other than the criteria for the settlement of a civil dispute through fair procedures.[197]

How does the ideal communication conception of pure procedural justice fare, when measured against the criteria of fit and justification? Initially, consider the question of fit. Certainly, there is much that can be said for the notion that the litigation system aims at the approximation of ideal discourse conditions. For example, rules about the equality of communicative opportunity are built into a variety of procedures, including discovery, trial, hearings, and so forth. There does seem to be a basic notion that in order for a procedure to be fair, each side must be an equal opportunity to present its case, question, rebut, and so forth.[198]

Other features of the ideal communication situation are modeled in existing procedure doctrine. For example, as articulated by Habermas, the ideal communication situation requires that the validity of norms be subject to challenge. One might see the appellate system and the practice of judicial review for constitutionality as providing an institutionalization of this requirement.

If we assume for now that the discourse theory interpretation of the participation model satisfies the criterion of fit, the next question is whether it satisfies the criterion of justification. Does the discourse theory offer the best justification for the general shape of the existing system of civil procedure? This question is complicated by the

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of Habermas's theory, see Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NORTHWESTERN U. L. REV. 54 (1988-89). Another important secondary source is Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791 (1996).

Thomas McCarthy's commentary is the best and most accurate introduction and guide to Habermas' thought. *See* McCarthy, *supra*. Lucid summaries of Habermas' more recent work are found in A. BRAND, THE FORCE OF REASON (1990); D. RASMUSSEN, READING HABERMAS (1989); S. WHITE, THE RECENT WORK OF JÜRGEN HABERMAS (1988). For a word on the problem of understanding Habermas's language, see M. PUSEY, JÜRGEN HABERMAS 11 (1986). For a study plan for approaching the corpus of his work in a systematic fashion, see id. at 124-25. For a brief introduction, see Bernstein, *Introduction*, in HABERMAS AND MODERNITY 1 (R. Bernstein ed. 1985).

[195] *See McCarthy*, *supra* note 194 at 306.

[196] *Id.* at 303.

[197] *Cf.* Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1164 (1987).

[198] The idea of equality of litigation opportunity is very similar to the notion of a level playing field. *See infra* note 186 and accompanying text.

breadth of discourse, which contains within itself, a general account of what constitutes an adequate justification. Consider then, a very brief summary of the central features of Habermas's theory.

Habermas's theory of communicative action borrows from speech act theory. Persons use language to act—to coordinate behavior through rational agreement. Promises, assertions, and orders are all examples of communicative actions. When one engages in a speech act, one implicitly raises validity claims—to comprehensibility, truth, sincerity, and right. When I ask you to close the window, I am explicitly making a claim (1) to truth, that there is a window and that it can be closed, (2) to sincerity, that my request is sincere (not a joke or irony or sarcasm), and (3) to right, that it is appropriate for me to make such a request of you. Engaging in the request pragmatically commits me to redeem any of these validity claims should you challenge the claim. Redemption occurs in rational discourse: we seek to reach an agreement or consensus on the challenged validity claim. Our search is rational in the sense that we seek agreement based on the force of the better argument and we rule out coercion or deception as the basis for agreement.

Habermas's theory can be understood as an attempt to develop a communicative conception of rationality. Such a communicative conception contrasts with a subjective (or Cartesian) view. According to the subjective conception, rationality is understood as a property of an individual's isolated deliberation. The communicative conception views rationality intersubjectively: rationality is a property of agreements among persons. Thus, the operative notion of agreement is the idea of a rational consensus, distinguished from the brute fact of bare agreement.

Habermas argues that a rational consensus is one that results purely from the force of the better arguments, and not from constraints on communication. The absence of such constraints can be elucidated in terms of the formal structure of the communicative situation. A communicative situation is structured without constraint only if it is open to all with the ability to communicate, it provides equal opportunity to engage in communication, and the participants are motivated solely by a cooperative search for truth or right. These conditions are met in the ideal communication situation,[199] which Habermas formerly labeled the "ideal speech situation."

The ideal communication situation can be defined more precisely by identifying three rules that formalize its conditions:

> (1) *Rule of Participation.* Each person who is capable of engaging in communication and action is allowed to participate.
> (2) *Rule of Equality of Communicative Opportunity.* Each participant is given equal opportunity to communicate with respect to the following:
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> a. Each participant is allowed to call into question any proposal;

[199] See T. McCarthy, *supra* note 194, at 306; JÜRGEN HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 194, at 25.

b. Each participant is allowed to introduce any proposal into the discourse; and

c. Each participant is allowed to express attitudes, sincere beliefs, wishes, and needs.

(3) *Rule against Compulsion.* No participant may be hindered by compulsion—whether arising from inside the discourse or outside of it—from making use of the rights secured under (1) and (2).[200]

As Thomas McCarthy put it, the ideal communication situation can serve "as a guide for the institutionalization of discourse and as a critical standard against which every actually achieved consensus can be measured."[201] To return to the Dworkinian criterion of justification, discourse theory maintains that an adequate justification is one that would be the subject of rational agreement under the conditions of the ideal communication situation. This is the point expressed by the following passage, which is laden with the theoretical vocabulary of Habermas's theory: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."[202]

Thus, the formal model of the ideal communication situation might provide a route to justification of the participation model. The argument could begin with the rule of participation. The rule of participation formalizes the notion that an agreement cannot count as rationally motivated if it can be demonstrated that it was only reached because someone who would have disagreed was excluded from the process of deliberation. In the context of litigation, the rule of participation would justify familiar principles of procedural due process, e.g. the right to notice and an opportunity to be heard.

The second step in the argument for the participation model from discourse theory would focus on the rule of equality of communicative opportunity. This uptake of this rule is that an agreement does not count as a rational consensus if it is reached under conditions where one participant or group of participants is not allowed to engage in the same quantity or quality of speech acts. Participants must have the same opportunities to initiate and perpetuate communication. In the context of procedure rules, the rule of equality of communicative opportunity is reflected in a wide variety of rules that provide equal opportunity to engage in discovery, the presentation of witnesses, cross examination, and so forth. Where local rules limit the number of interrogatories, the rule is not that the plaintiff shall have 30 and the defendant 10. If

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[200] This formulation is based on one suggested by Robert Alexy and adopted by Habermas. See J. Habermas, Moral Consciousness and Communicative Action, supra note 194, at 89; Alexy, Eine Theorie des praktishen Diskurses, in Normenbegrudung und Normendurchsetzung 40-41 (W. Oelmüller ed. 1978); R. Alexy, A Theory of Legal Argumentation 119-24, 193 (R. Adler & N. McCormack trans. 1989). The names given to the three rules are mine.

[201] T. MCCARTHY, supra note 194, at 309.

[202] HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 194, at 107; *see also* William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas*, 17 CARDOZO L. REV. 1147, 1149-51 (1996) (discussing Habermas's formulation).

the amount of time allowed the plaintiff to present his case is limited to one day, the defendant is likely to be allowed a roughly equal amount of time.[203]

Habermas himself has made the connection between discourse theory and rules of procedure:

> Rules of court procedure institutionalize judicial decision making in such a way that the judgment and its justification can be considered the outcome of an argumentation game governed by a special program. Once again, legal procedures intertwine with processes of argumentation, and in such a way that the court procedures instituting legal discourses must not interfere with the logic or argument internal to such discourses. Procedural law does not regulate normative-legal discourse as such but secures, in the temporal, social, and substantive dimensions, the institutional framework that *clears the way for* processes of communication governed by the logic of application discourses.[204]

Habermas then works through a number of specific examples, drawn from German criminal and civil procedure.[205]

In sum, a case can be made that an ideal-communication conception of pure procedural justice fits the existing contours of procedure doctrine. Indeed, some commentary on procedure is at least suggestive of a Habermasian view. Maguire and Vincent, writing in 1935, made the following pronouncement, "Courtroom truth is what a jury or judge finds after full and fair presentation of evidence."[206]

There are, however, a number of problems with the idea that process fairness is the sole criterion for courtroom truth. One problem arises from the structure of most of modern evidence doctrine. The rules of evidence seem to assume that there really is a fact of the matter, and that the admissibility and exclusion of evidence should aim at maximizing the likelihood that trials will result in fact-finding is accurate by the independent criteria of what really happened. The basic structure of evidence law, which is built around ideas of relevance and prejudice, is not structured around the notion that equal opportunity to present evidence guarantees the emergence of truth.

At a commonsense level, the ideal communication conception of fair process founder on a very practical objection. Although agreement that is reached under nonideal conditions, that is, under conditions where one side was not given an opportunity to present its side may be suspect, it does not follow that agreement reached under ideal conditions is any guarantee of truth. The reason is simple: inputs

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[203] If inequalities are allowed, it will be because they are justified by a more basic equality, e.g., that each side has been provided adequate time to present its case and that more time for one side would be redundant.

[204] *Id.* at 234-35.

[205] *See id.* at 235-37.

[206] Maguire & Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 Yale L. J. 226, 238 (1935).

count. That is, even the fairest trial, conducted under conditions that closely approximate those of the ideal communication situation, can yield an unjust outcome if crucial information was not considered.[207] Maguire and Vincent's formulation built this notion into the idea of courtroom truth: "Courtroom truth," they said, "is what a jury or judge finds after *full* and *fair* presentation of evidence."[208] The notion that *full* presentation of evidence is required for courtroom truth reflects the notion that inputs count. As the United States District Court for the District of Massachusetts put the point:

> Truth in the real world, that is, which, of necessity, may well differ from the "truth" announced by the jury's verdict. Although the ultimate aim of the judicial system is to ascertain the real truth, trial is nevertheless, in the scheme of things, an imperfect method, and the "truth" memorialized by the jury's verdict may not necessarily mirror actual truth.[209]

There is no guarantee of perfect accuracy, but system aims for accuracy and not simply equal opportunity to engage in the presentation of evidence, the questioning of witnesses, and so forth.

At this point, we can take stock of the participation model. We began with what is virtually a *reductio* of the process view, the gaming interpretation; because litigation is not a voluntary contest between litigants or lawyers, adherence to rules announced in advance is not sufficient for procedural fairness. The second interpretation, which emphasizes the dignity interest of litigants, at least gets off the ground, but dignity enhancing process is not sufficient for fairness in the face of skewed outcomes. The third interpretation, the satisfaction interpretation suffers from a similar defect; the subjective satisfactions of participation cannot confer legitimacy on a system with systematically distorted results. The final attempt to rescue a pure process view attempts to remedy this defect by positing a constitutive relationship between accuracy and fair process, but this view is inconsistent with the widely shared and firmly held convictions of common sense.

### *C. From the Three Models to a Theory of Procedural Justice*

What can we garner from out consideration of the three simple models of procedural fairness? Some conclusions are uncontroversial. We have very good reasons to believe that accuracy counts, even if the accuracy model does not tell the whole story about procedural justice. We also have good reasons to believe that any

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[207] For Habermas's view on the relationship between discourse theory and ideas about truth, see JÜRGEN HABERMAS, POSTMETAPHYSICAL THINKING, *supra* note 194, at 135-39; *see generally* RICHARD L. KIRKHAM, THEORIES OF TRUTH (1995) (offering an introductory account of contemporary philosophical thinking about truth).

[208] Maguire & Vincent, *supra* note 206, at 238 (emphasis added).

[209] Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 n.21 (D. Mass. 1991).

plausible account of procedural justice must account for the costs of procedure, although we may need to do further work to determine how the consequentialist and deontological interpretations of cost should be incorporated. These lessons will be reflected in the specification of the principles of procedural justice in the form of a principle requiring that accuracy be maximized, subject several provisos, including one aimed at striking a fair balance between accuracy and the costs of adjudication.[210]

The question that remains is whether the participation model makes any contribution to our understanding of procedural justice that is not already captured in the other two models. Our analysis of the participation model has, so far, been limited to the question whether it provides the whole story, and we have concluded that it does not. The question addressed in this part of the essay is whether process tells an essential and irreducible part of the story. Even if fair process is not the sole criterion for procedural fairness, it does not follow that the value of participation and equality of litigation opportunity is measured solely by the contribution made to accuracy and/or litigant satisfaction. Hence our next question must be: What is the value of participation?

## V. THE VALUE OF PARTICIPATION

What is the value of allowing litigants to participate in civil adjudications that may bind them? Most obviously, a procedure that provides for participation is likely to be more accurate than one that does not. In addition, litigants may feel more satisfied by adjudication that affords them the opportunity to tell their story in a meaningful way. But the focus of the Part of the essay is not on accuracy or satisfaction. Instead our focus will be on the connection between participation and legitimacy.

A good way to begin this inquiry is to recall what we have called the hard question of procedural justice: *How can we regard ourselves as obligated by legitimate authority to comply with a judgment that we believe (or even know) to be in error with respect to the substantive merits?* The answer to this question cannot be accuracy—the hard question arises only when litigants have a warranted belief that the outcome was ***not*** accurate.[211] Nor can the answer to this question be a subjective sense of

[210] *See infra* Part VI.A, "The Statement of the Principles." p. 111.

[211] It might be argued that legitimacy can be conferred on an erroneous outcome by a process that is accurate in the aggregate. Randy Barnett has advanced such a theory in the context of constitutional legitimacy. *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 9-86 (2004). Although Barnett's theory suggests the view critiqued in ths footnote, there is a crucial difference. Barnett's theory answers the question: what makes a constitution legitimate? He does not answer what we might call *the hard question of consitutional legitimacy*: How can I regard a constitutional outcome as unjust when I am injured by the outcome and it is fundamentally unjust?

Does systemic accuracy confer legitimacy on inaccurate outcomes? Consider a dissatisfied litigant who answers this question in the negative: she argues that if accuracy is the measure of legitimacy, then the erroneous outcome that injurs *her* is clearly illegitimate. The natural counter

satisfaction. Satisfaction that is merely subjective cannot confer normative legitimacy—although it may provide the legitimacy that is required for the important social goods of voluntary compliance and social stability. The full answer to the hard question of procedural justice must include a normative theory of procedural legitimacy. The Participatory Legitimacy Thesis—the central claim of this Part of the Article—provides such a normative theory. Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.

The central claim of this Part is set forth in Section A, "Participation Is Essential for Legitimacy," we investigate the claim that participation has a value that cannot be reduced to accuracy, because a core right of participation is essential for the legitimacy of adjudication. Next, in Section B, "Framing the Issue: Reduction or Dependence," we examine a framework for pinpointing the stakes in the debate over the value of process and participation. Then in Section C, "Dignity, Equality, and Autonomy," we survey three justifications that have been offered for the proposition that participation has a value that cannot be reduced to accuracy or cost. Finally in Section D, "Answers to Objections," we review a number of arguments that have been raised against the idea that process counts quite apart from considerations of accuracy and cost.

### *A. Participation Is Essential for Legitimacy*

This section lays out the case that a right of participation is essential for the legitimacy of a final and binding civil proceeding. The aim of this Section is to narrow our focus in two ways. First, the value of process that cannot be reduced to accuracy or cost is connected with participation. Second, the normative foundation of the irreducible value of participation must be found in the notion of legitimacy.

#### *1. A Statement of the Participatory Legitimacy Thesis*

Participation is essential for the normative legitimacy of adjudication processes[212]—that is the core idea, but the full statement of the Participatory Legitimacy Thesis is more complex:

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is to argue that she would have consented in advance to this procedure, because it gives her the best chance of systemic accuracy. To this argument, she might have two responses. First, she might argue that overall systemic accuracy does not guarantee maximum accuracy in particular case types. If her case is of a type for which the general, transsubstantive rules of procedure are less accurate than alternative rules, she could argue that she would not have consented. Second and independently, she may argue that if hypothetical consent is the criterion, that she would not consent on the basis of accuracy alone. In particular, she might argue that she would have demanded both reasonable rights of participation and a reasonable balance between procedural costs and benefits before she would have given her hypothetical consent.

[212] *Cf.* Bone, *supra* note 136, at 625 ("A strong participation right can be justified only by a normative theory of process value that grounds the value of participation in the conditions of adjudicative legitimacy, such as respect for a party's dignity or autonomy.").

> *Because a right of participation must be afforded to those to be bound by judicial proceedings in order for those proceedings to serve as a legitimate source of authority, the value of participation cannot be reduced to a function of the effect of participation on outcomes; nor can the value of participation be reduced to a subjective preference or feeling of satisfaction.*

The full statement adumbrates several important distinctions. First, legitimacy does not require actual participation, only an option or right is required, because participation may be voluntarily forsworn. Second, so far as legitimacy is concerned, it is the option to participate at a meaningful stage that is crucial: temporary decisions that are not binding may be unjust for other reasons, but they do not violate the fundamental requirement of legitimacy. Third, the Participatory Legitimacy Thesis makes a claim about the relationship between participatory legitimacy and outcomes: the value of participation cannot be *reduced* to the effect of participation on outcomes. With these distinctions in place, we can turn to the obvious question: What does it mean to say that the *legitimacy* of civil dispute resolution depends on affording those who are to be bound a right of participation?[213]

*2. The Analogy with Legislation*

We can approach the Participatory Legitimacy Thesis by first examining an analogous case, the case of legitimacy in the exercise of legislative power. For the exercise of legislative power to be legitimate, the legislation must be the outcome of a process that satisfies norms of democratic participation[214] (and perhaps other norms as well). These norms include the requirement that citizens have either the right to vote

[213] The connection between legitimacy and participation has recently been explored by Christopher Peters. *See* Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312 (1997). Many other commentators who have noted the connection between the legitimacy of adjudication and participation. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949) ("Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the lawmaking. They are bound by something they helped to make."); William N. Eskridge, Jr., *Metaprocedure*, 98 Yale L.J. 945, 951 (1989) (book review) ("One other value [to due process] might be to assure an individual participation in decisions affecting him or her, thereby enhancing the legitimacy of the ultimate decision."); John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 B.Y.U. L. Rev. 859, 874 (noting connection in context of Ninth Circuit's summary disposition procedures). *Cf.* Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 202-03 (1983) (noting connection between participation and legitimacy in context of criminal procedure).

[214] *See generally* Kenneth Ward, *The Allure and Danger of Community Values: A Criticism of Liberal Republican Constitutional Theory*, 24 Hastings Const. L.Q. 171, 188-89 (1996) (discussion connection between participation and democratic legitimacy in republican theory).

directly on legislative proposals or to vote for representatives to whom the citizens have delegated legislative authority.[215] The norms of democratic participation also include the requirement that citizens have a right to freedom of expression regarding legislative matters and the election of government officials.[216] If these norms are not satisfied, then the outcome of the legislative process is not regarded as legitimate.

The connection between participation and legitimacy is a strong one. First, legislation that is imposed by an unelected authority is illegitimate *even if* the particular laws that are passed are good ones, as measured by appropriate standards of political morality. Second, undemocratic legislation is illegitimate, *even if* the undemocratic process (benevolent dictatorship) reliably produces excellent laws. Third, undemocratic legislation is illegitimate, *even if* the legislation would have been approved by citizens had they been afforded an opportunity to do so. Rights of democratic participation are essential to the legitimacy of legislative processes.

It might be thought that legislative process demonstrates that process is unimportant, because there is no individual right to a hearing before a legislature passes a statute or an agency makes a rule, even if the statute or rule will have a substantial effect on one's interest.[217] But this argument is off the mark, at least if the target is the proposition is the proposition that participation in the process never matters to procedural fairness. For example, the right to an equal vote matters aside from outcomes. Edmund Burke's virtual representation theory[218] counts, in our political culture, as a paradigm case of bad political theory: we take the slogan, "No taxation without representation," as an expression of a fundamental political value of great importance. A right of participation in the form of an equal vote in the election of representatives is thought to be a prerequisite for the fairness or justice of the legislative process. The case of legislation illustrates the general proposition that a right of participation may be essential to legitimacy, quite apart from its effects on outcomes.

### *3. The Importance of Legitimacy*

Why is legitimacy important? Citizens are not obligated to regard illegitimate laws as authoritative and consequently they have no content-independent obligation of

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[215] *See* Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 792 (1992) ("Democratic government derives its legitimacy from the formal consent and ongoing participation of the governed, who are considered the ultimate source of political authority.").

[216] *Cf.* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882 (1963) (discussing relationship between democratic legitimacy and right of participation); *cf. also* John A. Powell, Worlds Apart: Reconciling Freedom of Speech and Equality, 85 Ky. L.J. 9, *45 (1997) (commenting on Emerson's position).

[217] *See supra* note V.D.6, "The Counter-example of Legislation."

[218] HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 174-76 (1967) ("Virtual representation exists where the substantive content and effect occur without election.").

political morality to obey such laws, except such obligation as is imposed by the correspondence of the laws with the independent requirements of political morality.[219] Given human nature and pluralism in matters of politics, religion, and morality, there will inevitably be disagreement about the justice or goodness of particular laws. The consequence of such disagreement under circumstances of illegitimacy is that citizens should frequently regard themselves as morally obligated or authorized to disobey particular laws. This does not necessarily entail general social disorder. The state may be able to coerce obedience to illegitimate laws—although depending on social circumstances, such coercion may require the repressive use of state power. But even if normative legitimacy is not required for social stability, it is nonetheless a very great social good. A society in which citizens can reasonably regard themselves as having a content-independent obligation to obey the law is better than a society in which the law begins with a presumption of illegitimacy.

As it is with legislation, so it goes with adjudication. The exercise of adjudicative power to bind an individual must be legitimate for the adjudication to be authoritative and hence to create content-independent obligations of political morality to obey judicial decrees and to respect the finality of judgments. This conclusion is strongly supported by our investigation of the nature of procedure in Part II, "Substance and Procedure." The upshot of that investigation was the entanglement thesis, including the idea that *procedure transforms general and abstract conduct rules into particular and concrete action guiding legal norms*. The requirement of legitimacy for substantive law reflects the action-guiding role of conduct rules. The entanglement thesis establishes that procedure performs a similar function—guiding action in particular and concrete factual contexts. More plainly, *adjudication is lawmaking*. The particularization that procedure provides is required for the law to do its work of guiding action, because of the three problems identified at the outset of our discussion: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality. Not only *does* procedure guide primary conduct, procedure *must* guide conduct for substance to guide action.

Moreover, in the case of adjudication, as in the case of legislation, we regard the legitimacy as a political good. The goodness of legitimacy flows from an intuitively appealing principle of political morality: *each citizen who is to be bound by an official proceeding for the resolution of a civil dispute should be able to regard the procedure as a legitimate source of binding authority creating a content independent obligation of political morality for the parties to the dispute.*[220] The notion that the procedures for the adjudication of civil disputes should be legitimate is not controversial. We hold to this notion for important reasons of principle and policy. As a pragmatic matter, it is

[219] Thus, one may have an obligation to obey an illegitimate law against murder, because the content of the law is itself required by political morality.

[220] Note the modal qualification: citizens should be *able* to regard adjudication as legitimate. There may be citizens who will not believe that adjudication is legitimate, even when all of the objective conditions for legitimacy have been met. This may result, for example, from the clouding of judgment that results from self interest.

important that citizens be able to regard procedures as legitimate so that we may secure their voluntary cooperation with the system of civil justice;[221] great social evils would attend a system that was required to resort to sanctions and incentives to secure the compliance of citizens who regarded the system as illegitimate and hence did not regard the system as a source of binding authority or moral obligation.[222] This argument of policy is complemented by one of principle: as a matter of political morality it would be unjust to coerce compliance with the judgments of a civil justice system which could not be regarded by reasonable citizens as legitimate.

As in the case of legislation, the legitimacy of adjudication depends on affording those who are to be bound a right to participate, either directly or through adequate representation.[223] As in the case of legislation, adjudication is not legitimate if the

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[221] This point is strongly associated with the work of Tom Tyler. *See, e.g.*, Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. Int'l L. & Pol. 219, 231 (1997) (stating "people defer to rules primarily because of their judgments about how those rules are made, rather than their evaluations of their content. Judgments about the fairness of decision-making authorities have been found to be more central to a rule's legitimacy, and to people's willingness to accept it, than are judgments of decision favorability. In other words, people are willing to defer to laws and legal authorities on procedural justice grounds."). For more work by Tyler and others on the connection between participation and perceptions of legitimacy, see *supra* note 193 (collecting sources); *see also* Raymond Paternoster, Robert Brame, Ronet Bachman, Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 165 (1997) (stating "being treated fairly by authorities, even while being sanctioned by them, influences both a person's view of the legitimacy of group authority and ultimately that person's obedience to group norms"); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 402-03 (2000) (stating "the use of procedures regarded as fair by all parties facilitates the maintenance of positive relations among group members, preserving the fabric of society, even in the face of the conflict of interest that exists in any group whose members have different preference structures and different beliefs concerning how the group should manage its affairs").

[222] Of course, psychological legitimacy would suffice for this purpose. So, for example, we might be able to achieve psychological legitimacy through the use of manipulation, coercion, or deception. But if we reject the use of these techniques on grounds of political morality, the alternative is that we offer a sound justification for the normative legitimacy of adjudication.

[223] *See* Peters, *supra* note 213, at 347 ("most judicial decisions are to a very great extent products not of the unilateral decree of a judge or panel of judges, but rather of a process of participation and debate among the parties to the case that greatly restricts the decisional options available to the court. In this sense, judicial decisions resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired."); Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 Def. Couns. J. 18, *24 (1996) (observing with respect to aggregative procedures in mass tort litigation, "The unease about the suggestion must be attributed to different concerns--the belief that the legitimacy of a democratic system and the dignity of those who make up society require the actual participation of the citizenry in the governing process. It is arguable that a similar dignitary legitimacy analysis dictates that a defendant have the opportunity to litigate each

norms of participation are violated, (a) even if the outcome of the particular adjudication would be considered right by independent norms of political morality, (b) even if the procedure was generally reliable, and (c) even if the outcome would have been the same had the required participation actually occurred.

Why is a right to participation required if citizens are to regard civil procedures as legitimate? To see the answer to this question clearly, we must return to the hard question of procedural legitimacy. When we seek to identify the conditions for the legitimacy of adjudication, we should assume the point of view of a citizen who is to be bound to a judgment that she has good reason to believe is in error and is adverse to her interests or wishes. For her, the question is, "Can I reasonably regard a procedure that did not afford me a right to participation (to observe and be heard) as a legitimate source of final binding authority that creates an obligation of political morality for me to comply with the outcome of the procedure?" If the answer to this question is "no," then we should affirm the Participatory Legitimacy Thesis.

Let us take up the point of view of a citizen who is to be finally bound by a decision she regards as erroneous. From her perspective, it is clear that being barred from participation undermines the legitimacy of civil adjudication. If I do not participate in a procedure that purports to bind me with finality, it is always open to me to object that the procedure was defective because an element of my case was not even considered by the tribunal through no fault of mine. For example, I may complain that salient facts were not presented or that a relevant legal principle was overlooked. I might argue that the tribunal did not hear my claim that the law applied was invalid on constitutional grounds, or I might contend that the tribunal failed to evaluate my contention that my case was an exceptional one in which equity required an adjustment of the legal rule. The right of participation is the right observe, to make arguments and present evidence, and to be informed of the reasons for a decisions. Without these participation rights, I cannot be assured that the proceeding considered my view of the law and facts.

On the other hand, if I have been given the right to participate in the proceeding and chosen not to make a potentially salient argument (e.g., to present evidence, make legal arguments, challenge the validity of the law, or argue for an equitable exception), then I may not reasonably complain that the proceeding was illegitimate on the ground my arguments were not considered by the tribunal, since I will be the author of the decision not to present them. By participating or waiving the right to participate, I become an[224] "author" of the proceeding; the choice of what arguments will be advanced on my behalf becomes my choice. As Christopher Peters has observed:

> [J]udicial decisions are to a very great extent products not of the unilateral decree of a judge or panel of judges, but rather of a process of participation and debate among the parties to the case that greatly restricts the decisional

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plaintiff's damages, even if one were to assume that the end result of such a process would be roughly equivalent to the result of a sampling procedure.").

[224] "An author" but not "the author"—judges, juries, and other litigants are also "authors" of a civil action and its outcomes.

> options available to the court. In this sense, judicial decisions resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired.[225]

One point deserves special mention before we proceed. A citizen who could be finally bound may wish to raise points that either cannot or likely will not have any affect of the outcome of the proceeding. An important example of this involves what we might call *principled dissent from legal norms*. Even if I have no viable legal argument against a legal norm that binds me, I may have an interest in making (or even attempting to make) arguments that the norm is illegitimate. In the United States, such arguments may don constitutional garb, because many arguments of political morality can be dressed in the clothes of equal protection, due process, or freedom of speech.[226] But such arguments need not be legal, and even if legal, may be raised as a matter of principle and *not* because they have a realistic possibility of success.[227] Some citizens may regard themselves as morally obligated to express their principled dissent from legally valid norms.[228]

This discussion allows us to clarify three aspects of the Participatory Legitimacy Thesis. First, a right or option to participate is required for final and binding adjudication to be legitimate—the claim is qualified by the terms "right or option," "final," and "binding." Second, the legitimacy which participation confers upon adjudication cannot be reduced to accuracy enhancing effects or to subjective preferences, feelings of satisfaction, or even to perceptions of legitimacy. Third, we have yet specified the institutional form of the minimum right of participation that is the subject of the Participatory Legitimacy Thesis.

#### *4. Three Thought Experiments*

So far, the case of the participatory legitimacy thesis has rested on abstract consideration of political philosophy. The abstract can be supplemented by the concrete—a pair of thought experiments designed to elicit first our intuitions and then our considered judgments about the relationship between procedure and legitimacy.

Before I go any further, I want to make two concessions about these thought experiments. The first concession is that my thought experiments may not succeed in

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[225] Peters, *supra* note 213, at 347.

[226] In addition to the constitutional arguments in text, more unconventional arguments may be made on the basis of the Ninth Amendment, U.S. CONST. amend 9, or privileges and immunities, U.S. CONST. amend 14.

[227] At this point, critics might argue that such arguments are aimed at success in the court of public opinion or in the courts of the relatively distant future. This may be the case, but it need not be so. A citizen might regard herself as obligated to register dissent, even if she believes that she has not likelihood of success.

[228] This point would assume a greater significance in a system that permitted jury nullification.

pumping from you the same intuitions they pump from me,[229] but I would ask you to bear in mind that reasonable people do share my intuitions. The second concession is that bare intuitions are not sufficient to make my case. Let my stipulate that the term "intuition" describes our initial, unreflective reaction to a thought experiment. Further stipulate, that such intuitions, if confirmed by reflection and deliberation, can be said to constitute "considered judgments." The purpose of the thought experiments is to provide a combination of intuition and supporting grounds that will yield good and sufficient reasons for us to reach considered judgments about procedural fairness.

*Exclusion from a Meeting.* Imagine that you are a faculty member excluded (without good cause) from a faculty meeting on a topic that concerns you, or a judge excluded from a meeting of your judicial council, or a lawyer excluded from a firm meeting, or a law review editor excluded from a meeting of the editorial board. Suppose further that you are fully satisfied with the outcome of the meeting and that the meeting did not impose excessive costs or otherwise violate any rights, except your right to participate. Indeed, as a matter of subjective preferences, we can imagine that you had quite a nice time during the period of your exclusion, a much better time than you would have had in a dreary meeting. Is your exclusion from the meeting unfair or unjust, despite the fact that you agree with outcome and that the balance of costs and benefits favored your exclusion? My considered judgment is that your exclusion renders the meeting illegitimate with the consequence that you are not required to regard its outcome as authoritative in the sense that its outcome is legitimate. Of course, if you agree with the outcome, you may choose to abide by it nonetheless.

*Star Chamber.* Suppose that we had a reliable procedure for producing accurate criminal verdicts that excluded the defendant and her counsel from the secret proceedings; the exclusion is complete, the defendant may not participate in any way, even through the submission of written arguments to the court (let us call the tribunal providing this perfectly accurate procedure "Star Chamber").[230] Would a defendant convicted through such a process have any ground for complaint? The objection cannot be that the process was unreliable; by hypothesis, Star Chamber is demonstrably reliable, and if convicted, the hypothetical defendant will know that she is, in fact, guilty. Nonetheless, many will share the intuition that secret proceedings from which the defendant is excluded are unfair despite their hypothesized accuracy; upon further reflection it seems likely that this intuition may well turn into a considered judgment.

The features of Star Chamber that seem objectionable are its secrecy (most especially the exclusion of the defendant) and the inability of the defendant to have a say, to raise objections, ask questions, and so forth. Suppose that we vary the hypothetical to isolate these features. Would Star Chamber be objectionable if the defendant had the right to observe the proceeding but not participate in any other way, either directly or through an agent or representative? By hypothesis, nothing she could

[229] On the role of thought experiments as intuition pumps, see DANIEL C. DENNETT, ELBOW ROOM 12 (1984).

[230] *See supra* note 1.

say could make the proceeding more accurate, although we may hypothesize that her participation might increase the likelihood of an erroneous decision. My considered judgment is that this procedure is still unfair to the defendant; indeed, in some ways, the requirement that she remain silent is more horrifying that the requirement that she remain outside the room. What about having a say without access? It is difficult to imagine a case in which the defendant is still excluded, but does have the right to have a say; having a meaningful say requires knowledge of the proceeding, at least to the extent necessary to identify what concerns are relevant to the decision-makers deliberation. The hypothetical variation of Star Chamber in which the defendant is allowed to submit a written or videotaped statement but not to know anything about the rest of the proceedings strikes me as unfair, although a slight (or perhaps substantial) improvement over the case in which she is both excluded and silenced.

*Guardian ad Litem.* Imagine now that you are being sued in an ordinary civil case. You are disputing a debt with a creditor. You are a competent adult; you have no disability that would render you unable to make your own decisions regarding the lawsuit. Nonetheless, the court denies your request to participate directly and instead appoints a *guardian ad litem* to act as your surrogate in the litigation. Your guardian is competent and makes good decisions. There is no reason to believe that the proceeding will be any less accurate because of the guardian's decisions on your behalf. Moreover, as far as your preferences are concerned, this is not a bad deal. You do not derive utility from the litigation process, and quite enjoy spending your time in other ways. Now suppose that you *lose*, and furthermore, that you know that a mistake has been made. My intuition is that under these circumstances, you would have good reason to deny the legitimacy of this proceeding. Your participation was feasible, and there was no compelling reason of cost or competency to deny you the right to participate.

The point of the three thought experiments is to suggest that our intuitions about particular and concrete cases cohere with the general and abstract considerations of political theory. Given this reflective equilibrium, we have good and sufficient reason to accept the Participatory Legitimacy Thesis.

### *B. Framing the Issue: Reduction or Dependence*

Discussion of the value of participation has generated unnecessary confusion because of a failure to distinguish two possible relationships between the value of process and participation on the one hand and the value of accuracy (or other costs and benefits that might be balanced) on the other. I shall call these two relationships "reduction" and "dependence." Before we proceed any deeper into the controversy over the value of process in general and the Participatory Legitimacy Thesis, this distinction must be clarified.

*Procedural Justice*

*1. Reductionist Programs*

One possible relationship between the value of process and other values, such as the value of accuracy, is captured by the idea of a reductionist program. For example, it might be argued that all of the value of participation in civil proceedings can be cashed out in terms of the contribution that participation makes to accuracy. The thesis that the value of participation can be reduced to the value of accuracy suggests that the reason we value participation is not that under normal circumstances, participation enhances accuracy. Phrased in terms of the three models, this reductionist strategy suggests that the idea of fairness identified by the participation model can be reduced to that specified by the accuracy model.

Another reductionist program suggests that the value of participation can be explained in terms of the satisfaction that participation provides to litigants. This reductionist program treats the value of participation as simply another social cost or benefit that can be weighed against others such costs, including the social costs of inaccurate adjudication and the social costs of participatory procedure. A more complex reductionist program would combine both the accuracy strategy and the cost strategy, the value of participation—this complex reductionist program would claim—can be reduced to the accuracy effects of participation plus any utility that would be derived from the satisfaction of subjective preferences for participation.

*2. Arguments for Dependence*

Reductionist strategies should be distinguished from another kind of claim about the relationship between the value of process and participation on the one hand and accuracy or cost on the other hand. It might be claimed that the value of participation is not independent of its effects on participation. Dependence does not entail reducibility, although reducibility does entail dependence. This point is vitally important, but it has not been obvious in debates over the value of participation.

Consider the implications of this distinction for the relationship between the Participatory Legitimacy Thesis and reductionist programs. The thesis that a right of participation is essential for the legitimacy of final, binding adjudication does *not* rest on the claim that the value of participation is independent of effects on outcomes or accuracy. But the Participatory Legitimacy Thesis *is* inconsistent with the proposition that the value of participation can be reduced to accuracy.

Why dependence? Final binding adjudication is not legitimate unless a minimum right of participation is afforded to those with a substantial interest in the controversy. If this claim is true, does it follow that the value of participation is independent of the effects of participation on outcome? The answer to this question is "no." This conclusion can be established through the following thought experiment: suppose you are offered a right to participate in a proceeding, but the proceeding is structured so that your input cannot have an effect on the outcome. Would this right of participation be sufficient to legitimate the proceeding? No. It is not *just* having a say that counts. Meaningful participation must be part of the process, and not a wheel that turns but

moves nothing else.[231] Meaningful participation requires that your input to the proceeding be considered, that what you say plays a role in the deliberative process of the decision-maker. In this sense, the value of participation is dependent upon possible effects on outcomes, and hence is in some sense dependent upon possible impacts on accuracy.[232] Thus, there is good and sufficient reason to believe that the legitimacy of a procedure is not independent of the procedures effect on outcomes. Put another way, the legitimacy of a procedure depends, at least in part, on its accuracy.

Does this form of dependence entail the further conclusion that the Participatory Legitimacy Thesis can be reduced to a claim about the relationship between participation and accuracy? The answer to this question is clearly no. The reduction of legitimacy to accuracy would require the truth of one of the following two propositions: (1) if legitimacy and accuracy are not a matter of degree, then it would have to be the case that accuracy is both a necessary and sufficient conditions for legitimacy, or (2) if legitimacy and accuracy are a matter of degree (scalar), then it would have to be the case that the degree of legitimacy of a procedure is an increasing function of the accuracy rate of the procedure. Neither of the two propositions follows logically from the fact that legitimacy depends on accuracy.[233]

So far, we have only dealt with dependence of legitimacy on the possibility that outcomes will be affected by participation. What about the claim that the value of participation can be reduced to a feeling of satisfaction or some other psychological effect of participation. This point may have some force as applied to the dignity theory of the value of participation,[234] but as applied to the Participatory Legitimacy Thesis this objection is far off the mark. The Participatory Legitimacy Thesis is a claim about the normative legitimacy of adjudicatory procedures and not primarily a claim about the psychological acceptability of such procedures. If psychological legitimacy were the only value at issue, then one might argue that its value could be reduced to specific costs and benefits, such as the psychological benefit to litigants of being satisfied with the resolution of their disputes or the social benefit of perceived legitimacy in promoting voluntary compliance with the law.

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[231] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶271 (3d ed. 1999) (stating "a wheel that can be turned though nothing else moves with it, is not part of the mechanism").

[232] *But see* Rosenfeld, *supra* note 194, at 794 ("In contrast, procedural justice as a means to vindicate the dignity of the accused is largely independent from, though it cannot squarely frustrate the application of, the above mentioned relevant substantive norms.").

[233] That is to say, that x depends on y does not entail either that x is the case if and only if y or that x is a increasing function of y. That is: $\neg\{D(x,y)\rightarrow[(x\leftrightarrow y)\ v\ (I(x,y)]\}$, where D is the dependence function and I is any increasing function.

[234] *See infra* Part V.D.1, "Reductionism One: The Reduction to Subjective Preference."

### *C. Dignity, Equality, and Autonomy*

The value of participation derives from the idea of legitimacy. Our focus on legitimacy contrasts with much of the prior literature which has suggested three rival explanations—based on dignity, equality, and autonomy—for the irreducible value of legitimacy. Each of these three rival explanations has a contribution to make, especially when considered in relationship to legitimacy. Considered in isolation, however, dignity, equality, and autonomy do not provide an adequate explanation of the value of participation.

We have already addressed dignity in the context of the participation model of procedural fairness.[235] At that point, our question was whether the notion that the role of a participatory process in respecting the dignity of litigants could be used as a model that would, by itself, explain and justify the civil procedure landscape; our answer was "no." Does dignity offers a sufficient explanation of the intuitions that participation has irreducible (but not necessarily independent) value that were elicited by our thought experiments. The answer to this question is "no." When participation is an entitlement (whether produced by law or by less formal social norms), then denying someone the right to participation is an insult to their dignity. If I am entitled to attend the meeting and you exclude me, then you have violated my entitlement and in so doing you have insulted me. On the other hand, if I am have no right to attend the meeting and you exclude me, dignity requires that I gracefully accept the exclusion—no insult to my dignity may be taken. The point is that dignity does not create the right to participate—it is a reflection of that right.

A second rival to legitimacy as the ground of a right to participation is the notion of equality.[236] Procedural justice has been even been defined as "the right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but

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[235] *See infra*, Part IV.B.3.b), "The Dignity Interpretation," p. 73.

[236] *See generally* Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVIRONMENTAL L. REP. 10681 tan 62 (2000) (quoting Rachlinski); William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jurgen Habermas*, 17 CARDOZO L. REV. 1147 (1996) (stating "inasmuch as a procedure expresses a recognition of one's equal status as a citizen regardless of how insightful one's judgment on a given issue, participation in the procedure can reinforce group solidarity, at least to some degree."); Massaro, *supra* note 188, at 902 ("Procedure therefore not only should promote rationality through unbiased and accurate decisionmaking, but also should show respect for persons by allowing equal, active participation in decisions affecting their interest."); Rutherford, *supra* note 121, at 74 ("The right to participate is meaningful only if a person can participate on an equal footing."); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 484 (1986) ("One value that might conceivably be fostered by procedural due process is the goal of equality."). Although various writers have seen connections between equality and the value of participation as a component of procedural justice, William Rubenstein's investigation of the role of equality in procedure omits this topic altoghether. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 Cardozo L. Rev. 1865 (2002).

to equal concern and respect in the political decision about how these goods and opportunities are to be distributed."[237] But equality alone cannot do the work of explaining a right to participation. Once rights of participation are defined, then equality comes into the picture. If others are afforded a right of participation but I am arbitrarily denied this right, then I have been treated unequally and have a right to complain—this is equality before the law, an important sense of the abstract idea of equality. Equality also plays a role in theories of distributive justice. It might be argued that an equal right to participate in litigation is a component part of distributional equality. But once again, equality comes to the scene after we have settled the prior question whether there is a right to participate in litigation. If no such right exists, then the norm of distributional equality is consistent with giving the right to none—as it would also be with giving the right to all. Equality simply does not do the necessary work.

The third rival to legitimacy is based on the notion of autonomy.[238] As Robert Bone has written, "According to [the Kantian process-based] theory, certain elements of civil process, such as individual participation and rational decision making, are implicit in what it means to respect human dignity and autonomy."[239] But if considered in isolation, the value of autonomy simply won't do the necessary work. On the one hand, the concept of autonomy is too general to provide a particular right to participation in adjudicative process. On the other hand, legal process necessarily involves limitations on autonomy rights. The sphere of civil litigation is not the private sphere where individual autonomy holds sway—quite the contrary, civil litigation is the public sphere where individual autonomy is necessarily qualified by the need for coordination of individual action.

But when the idea of autonomy is considered in relationship to legitimacy, then a role for autonomy (as well as dignity and equality) does become apparent. Legitimacy

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[237] Jeffrey Rachlinski, *Perceptions of Fairness in Environmental Regulation*, in STRATEGIES FOR ENVIRONMENTAL ENFORCEMENT 339, 347 (Barton H. Thompson Jr. ed., 1995).

[238] The association between procedural fairness and autonomy is a common theme in the literature. *See, e.g.,* Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. Haw. L. Rev. 647, 670 (1998) (stating "procedural fairness may be viewed in three component parts: litigant autonomy, dignity, and participation"); Jason Richards, Richards v. Jefferson County*: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 Santa Clara L. Rev. 691, 716 (1998) ("Central to litigant autonomy is participation. For the due process right to be meaningfully individual, a litigant must have the opportunity to tell his story, to try his case. Consistent with the traditional respect afforded the individual litigant, the opportunity to be heard must be more than the opportunity to intervene in another individual's suit."); Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. Davis L. Rev. 917, 954 (1995) (stating "participation of the parties is considered a key element of due process because of our belief in individual autonomy").

[239] Bone, *surpa* note 6, at 509; *see also*, Bone, *surpa* note 136, at 619-20 (assuming that "the intrinsic value of participation is historically tied to respect for individual autonomy").

itself is important because we respect the dignity of citizens as equal and autonomous. If we rejected the idea that citizens were autonomous and equal, then the value of legitimacy would not apply to them. Dignity, equality, and autonomy are fundamental political values. The idea that they connect in some way to the value of participation was sound. The error was to believe that any one of these values directly provides the value of participation—legitimacy plays that role.

### *D. Answers to Objections*

At this point, we have stated the Participatory Legitimacy Thesis, and clarified the relationship it bears to attempts to reduce the value of process to effects on outcomes. We can now proceed with an analysis of some of the arguments that have been made against the claim that participation has irreducible value.

#### *1. Reductionism One: The Reduction to Subjective Preference*

One powerful critique of the value of participation has been offered by David Rosenberg.[240] Rosenberg's argument, which is specific to the mass-tort context, is complex and subtle, but we can understand the core of his objection by attending to the following points. First, Rosenberg argues that in the mass-tort context, the primary purposes of the law are deterrence and compensation; deterrence does not require individual participation and may be better served without it[241]—at bottom, deterrence rests on accuracy and not on any independent process values. Second, Rosenberg contends that the value of participation is a "subjective taste for particularized process"[242] which litigants should be and are willing to trade for lower product prices.[243] These arguments rely on further premises, for which Rosenberg provides a variety of arguments. Importantly, Rosenberg argues that collectivization will result in more accurate outcomes by transferring resources from redundant case-by-case adjudication to collectivized proceedings.[244] Rosenberg also argues that collectivization is less costly than individual participation; collectivization and insurance will result in a higher *ex ante* welfare level for those who are injured.[245]

Accepting Rosenberg's factual premises and conclusions, his argument boils down to the following. Considering the policy goals of deterrence and compensation,

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[240] David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, *supra* note 4.

[241] *See id.* at 213, 237-248.

[242] *Id.* at 256 n.110.

[243] *See id.* at 213.

[244] *See id.* at 237. Rosenberg argues that determination of causation and liability issues involves high cost, that plaintiff's lawyers will underinvest in litigating these issues, and that as a result defense lawyers will have a systematic advantage.

[245] *See id.* at 245-48.

collectivization should be preferred over a right to participation because collectivization is both more accurate and less costly than the alternatives. Thus, both the accuracy and balancing models favor collectivization over an individualized right to participation. Moreover, because the value of participation can be reduced to the "subjective taste for particularized" process it follows that the value of participation can be fully achieved by allow those who wish to opt out of collectivization by paying the full cost of a particularized proceeding.[246] "Plaintiff's are never made better off by being vested with a property right—which absent the entitlement they would not and could not pay for—to an inefficient day in court, to personal control over their claims, and to other anti-collectivist procedures."[247]

Has Rosenberg made a convincing case against the irreducible value of process in general or the Participatory Legitimacy Thesis in particular? Despite the powerful arguments advanced, the answer is an obvious "no." Rosenberg's argument is question-begging, because it assumes the very conclusion for which Rosenberg is attempting to argue. The assumption that there is no right of political morality to individualized participation is smuggled into Rosenberg's argument in four moves. First, Rosenberg assumes that the purposes or functions of adjudication can be reduced to the purposes of functions of the substantive law being applied, i.e. that the function of tort adjudication is reducible to the function of substantive tort law. Second, Rosenberg assumes the validity of the balancing model by stating the functions or purposes of tort compensation as deterrence and compensation. Third, Rosenberg assumes that the value of participation can be reduced to a subjective preference which can be balanced against the costs and benefits of accurate adjudication and the costs of individual participation. Fourth, Rosenberg then shifts the burden asking why individuals should "desire the particularizing process for its own sake that is, unrelated to any instrumental reasons, such as providing cost-effective improvements in accounting or replacement value of compensation awards."[248]

None of these arguments are decisive, however, *if* the Participatory Legitimacy Thesis provides support for a background right of political morality to a minimum level of participation. It is as if Rosenberg had argued against a right to the freedom of speech by arguing that the purpose of the political system was to maximize utility, that the value of self-expression was reducible to a subjective preference to make noise, that democratic processes can maximize utility by collectivized lobbying, and that therefore, there is no possible explanation for the non-instrumental value of an individualized right to free speech. Yes, if all the premises were true, the conclusion would follow, but look at how much has been packed into the premises.

To the extent that Rosenberg has a positive argument against the irreducible value of process and participation, it rests on the assumption that the value of particularized procedures can be reduced to the subjective preferences of consumers for such

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[246] *See id.* at 256 n.110.

[247] *Id.* at 256-57.

[248] *Id.* at 256.

procedures. If this were true, then Rosenberg would have made a convincing case for the balancing model and against an independent role for a background right of political morality to a minimum level of participation. If Rosenberg's case for reducing the value of participation to subjective preference rests on the assumption that some version of utilitarian moral theory is true, then Rosenberg's argument should be rejected on the ground that it does not provide an appropriate public reason. Most citizens are not utilitarians, and the public at large would reasonably reject the premise that all values are subjective preferences whose intensity can and should be measured by willingness to pay (even corrected for wealth effects).

To the extent that Rosenberg does not rely on subjective-preference utilitarianism, then his argument boils down to a question, "what is the non-instrumental value of participation?" Rosenberg is certainly entitled to ask the question, but posing the question does not demonstrate that there is no answer.

*2. Reductionism Two: The Reduction to Accuracy Objection*

Louis Kaplow has raised another objection to the irreducible value of process;[249] as we shall see, Kaplow's objection is closely related to Rosenberg's. I shall call Kaplow's argument the "reduction to accuracy objection," and at the outset it is important to recall the distinction between reduction and dependence. It is not completely clear whether Kaplow intends to make the claim that the value of participation can be reduced to the effects of participation on accuracy or whether he is only arguing for the non-independence claim. I shall return to the significance of this distinction at the end of my consideration of Kaplow's argument.

Kaplow begins with the question whether what he calls "process value" is subsumed in the value of accuracy, raising the question in the following form:

> One suspects that claimants who object to not being heard are those who are, for example, denied benefits. If only losers complain, however, one should be suspicious that the complaint is motivated by a concern for the result, and thus an objection to a lack of process may implicitly be an instrumental argument. An entirely plausible reason to object to not being heard is that one may believe (perhaps feel certain) that the decision was adverse precisely because the decision-maker was deprived of information one had to offer. Thus, the decision may have been inaccurate. Alternatively, one may suspect that the decision-maker would be more favorable when the claimant appears personally, independent of any additional information made available, suggesting a favorable shift in the implicit burden of proof.[250]

[249] Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUDIES 307, 389 (1994).

[250] *Id.* at 390-91 (footnotes omitted).

In a footnote, Kaplow observes that "one does not often hear stories of individuals who win complaining that they did not get their day in court."[251] Although Kaplow may be wrong about this—the evidence suggests that there is a very strong preference for participation[252]—the real problem with his argument is that it elides the hard question of procedural legitimacy. The most important task for a theory of procedural justice is to offer those who suffer from inaccurate and binding decisions a reason to regard themselves as legitimately bound.

Kaplow argues that the hypothesis that process value is independent of accuracy can be tested:

> To test this, one must consider a hypothetical situation—one probably too far removed from the typical disappointed applicant's mind for him to take seriously—in which the applicant is heard but it is certain that the decision would be unaffected by the hearing. Would individuals value appearing if they knew in advance that they would be ignored or that they would be "heard" but that hearing them *could* have no effect whatever on the decision?[253]

Kaplow has devised a hypothetical that produces the intuition that process does not matter apart from outcome.[254] But has the hypothetical been structured so as to frame the issue correctly? Certainly a hearing in which one knows in advance that one will be ignored, is not a hearing in which one has a meaningful opportunity to participate. A meaningful right to be heard requires that the adjudicator not turn a deaf ear.[255] Likewise, if the adjudicator listens but the participation "could have no effect," then there is no meaningful right of participation. The modal operator "could" is crucial to Kaplow's argument, because it builds the hypothetical in such a way that it is impossible for the input to change the outcome,[256] and hence suggests that the input is not really part of the process at all.[257]

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[251] *Id.* at 390 n. 249.

[252] See *supra* note 193 (collecting social psychology literature on preference for participation).

[253] *Id.* at 391 (footnotes omitted and emphasis added).

[254] A set of hypotheticals that produce opposing intuitions is offered in Part IV.V.A.4, "Three Thought Experiments," *infra* at 90.

[255] There is an important distinction between turning a deaf ear and listening in circumstances where there is no reason to believe that there is any substantial likelihood that one's mind will be changed, but this distinction is lost if one measures the difference by the probability that listening will result in a different decision. One can have an open mind, and yet believe that is most unlikely that one's mind will be changed.

[256] *See* Wittgenstein, *supra* note 231.

[257] Kaplow's hypothetical can be more precisely formulated in possible worlds semantics, which cash out the notion of possibility in terms of relationships between the actual world and possible worlds. It may be important to pin down the precise sense of "could" that Kaplow means to invoke. We can do this by introducing the notion of accessibility relations between the actual world and other possible worlds. Something "could" happen in the logical sense if it does

Kaplow then goes on to explicate his thought experiment, but in a way that shifts our focus from the question as to whether there are any intrinsic process values to the quite different question as to whether the subjective preferences for process are sufficiently weighty to justify their costs:

> From one perspective, this is simply an empirical question that could be tested directly. There is indirect evidence relevant to how much people value such appearances for their own sake. One type of evidence noted previously is the high rate of settlement in most civil litigation. Another is the form of dispute resolution typically specified by contract, and these often are of a simple sort. Of particular relevance for *Mathews v. Eldridge*, individuals' private disability contracts presumably do not provide for personal appearances in formal hearings. Moreover, in such instances, individuals who agree to summary procedures forgo not only the benefits of greater personal involvement per se but also any positive effect such involvement may have on the accuracy of outcomes. Finally, it is important to recall . . . that individuals' incentives to promote their interests in claims proceedings, by personal appearance or otherwise, tend to be socially excessive. Thus, even if individuals, at the time disputes arose, did value further participation and were willing to pay for it, satisfying such preferences may be socially undesirable.[258]

None of the evidence that Kaplow adduces is sufficient to establish the conclusion that process has no irreducible value or that there is no background right of political morality to adequate equal participation.

Consider each argument in turn. First, "the high rate of settlement in most civil litigation" may be evidence against a subjective preference for participation, but it is simply irrelevant to the question whether the right to such participation is justified on grounds of political morality: no one is arguing for a duty to participate or a requirement that every case go to trial. Moreover, Kaplow's understanding of what is meant by participation is implausibly narrow. Kaplow asserts that "in a settlement, both sides forfeit the opportunity to appear personally and participate, implying that settlement destroys value for both parties if participation is indeed valuable to them,"[259]

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happen in at least one logically accessible possible world, and all possible worlds are logically accessible—a logically impossible world does not exist. Something "could" happen in the physical sense if it does happen in at least one nomologically accessible possible world, e.g. in at least one world that obeys the general laws of science. Historical accessibility is the relationship between the actual world and worlds that share the history of the actual world up to the present moment. One interpretation of Kaplow's remark is that he asking whether anyone would value a right of participation in proceeding P at time $T_1$ if they knew that in no nomologically and historically accessible possible world in which they participate and prevail in P. *See generally* Lewis, *supra* note 63, Kripke, *supra* note 62, Leibniz, *supra* note 61, Divers, *supra* note 60.

[258] *See* Kaplow, *supra* note 249, at 391-93 (footnotes omitted).

[259] *Id.* at 392 n. 254.

but, in the usual or typical case, one does have an opportunity to participate in settlement negotiations, either in person or through an agent. Indeed, it is difficult to imagine settlement process that completely eliminates party participation—perhaps a mediator could make a settlement proposal without consulting with the parties and each party would then have to accept or reject the settlement without comment. It is true that settlement involves a different form of participation than does an adversary hearing, but this hardly suffices to establish that there is no irreducible value to participation at all.[260]

Second, even if it were true that "individuals' private disability contracts presumably do not provide for personal appearances in formal hearings," such contracts are entered into voluntarily. Instances of the waiver of a right that is subject to waiver do not provide evidence that the right itself lacks a foundation in political morality. Moreover, one does have a right to an individualized hearing when one purchases private disability insurance:[261] that right is provided by the substantive law of contract and insurance creating a cause of action for the wrongful denial of benefits. The case in which such a right is not present would be one in which the insurance company required its insured to consent to entry of judgment against them in case of a dispute over the policy—a procedure that would be analogous to the cognovit note. There is no evidence that insurance contracts contain such provisions, and it is not clear that such contracts would comport with due process.

Third, as to the assertion that "individuals' incentives to promote their interests in claims proceedings, by personal appearance or otherwise, tend to be socially excessive," this argument assumes a utilitarian framework for the resolution of the question. If we assume utilitarianism first, we will be able to make a convincing case for a utilitarian version of the balancing model, but this argument would simply beg the question. The balancing model is, in a sense, already built into a utilitarian framework.

Kaplow expresses his argument somewhat differently when he poses the following hypothetical: "[O]ne could have two systems, known to produce identical outcomes, but in only one is the applicant heard. By charging differential fees, one could measure the value individuals associate with the procedure."[262] But this hypothetical assumes that the irreducible value of procedure must be of a sort that can be measured by

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[260] To avoid misunderstanding, we should note the difference between the adjudicatory and legislative contexts with respect to settlement. It is true that in a sense one waives one's right to participation in a formal process in the course of settlement, whereas normally one cannot waive one's right to vote in bargaining (among interest groups or among legislators). But this difference between the two contexts does not establish that there is no irreducible value to participation, because, as is pointed out in text, the waiver of the right to formal process does not waive the right to participate in determination of the outcome of adjudication.

[261] Kaplow is likely correct in assuming that there is not right to a formal hearing before one's claim is denied, but this is not decisive. The notion that there is an irreducible value to process and participation does not entail that this value is sufficient to justify a hearing before benefits are denied.

[262] Kaplow, *supra* note 249, at 391 n. 253.

willingness to pay—in other words, this argument is the subjective preference argument that has already been considered above. Moreover, the assumption that the two systems are "known to produce identical outcomes," is simply a variation of the hypothetical in which it is assumed that participation *cannot* affect the outcome.[263]

This leads to my final observation about Kaplow's argument. The modally restricted hypotheticals, in which participation cannot affect outcomes, may support the contention that the value of participation is not independent of effects on outcomes, but such hypotheticals do not a support a reduction of the value of participation to effects on outcomes. If we bear in bind the distinction introduced above, in Part V.B, "Framing the Issue: Reduction or Dependence,"[264] it becomes apparent that Kaplow's arguments, whatever its merits if directed against a claim of independent value for participation, does not engage the Participatory Legitimacy Thesis, which claims irreducible but not independent value.

### *3. Reductionism Three: The Reduction of Participation to Other Values*

Most arguments against the independent value of participation do not directly address the relationship between participation and legitimacy. There is, however, a brief discussion, also by Kaplow.[265] Kaplow's argument proceeds by the method of separation of cases. As I read it, Kaplow argues that there are four possible variations of the argument that participation is required for legitimacy: (1) participation provides legitimacy because it enhances accuracy;[266] (2) participation creates the appearance of legitimacy because it creates a perception of accuracy;[267] (3) participation provides legitimacy because it respects the dignity of litigants;[268] and (4) participation provides legitimacy because it prevents the abuse of power.[269]

Of course, the validity of Kaplow's argument depends on whether he has correctly identified the basis of the legitimacy argument. Kaplow is remarkably candid about his own doubts on this score. In the first footnote of this discussion he confesses: "This subsection does not explore what legitimacy means or why it might be valuable. Of

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[263] *See supra*, text accompanying note 253, at p. 100.

[264] *See supra*, Part IV.V.B, "Framing the Issue: Reduction or Dependence," p. 92.

[265] *See* Kaplow, *supra* note 3, at 395-96.

[266] Kaplow argues that in this case, legitimacy reduces to accuracy. *See id.* at 395.

[267] Kaplow's remarks on this case are underdeveloped: "If the procedures do not produce more accuracy, but citizens mistakenly think that they do, there arises a familiar problem in governance that there is no point in attempting to illuminate here. (As an analogy, one might ask whether the government should adopt a highway plan that results in more loss of life because most citizens mistakenly believe otherwise.)." *Id.* at 395 n. 263. Kaplow might argue that it would be wrong for government to decieve citizens—although given his welfarist framework, he could not rely on any deontological prohibition on deception.

[268] *Id.* at 395 & n. 264. Kaplow refers back to his own critique of the dignity argument. *Id.*

[269] *Id.*

course, given the resulting ambiguity of the subject, one is unavoidably more uncertain about the relevance of any analysis of it."[270] Without any analysis of what legitimacy is and why it is valuable, one wonders how Kaplow could possibly believe that he has produced any arguments against the thesis that participation is required for legitimacy.

Interpreting Kaplow charitably, we might construe his argument as the claim that the concept of legitimacy is itself so ambiguous that its value must reduce to something else. If this is Kaplow's actual claim, it is radically underdeveloped. What is ambiguous about legitimacy? If the problem is truly ambiguity, i.e. multiple possible meanings, why can't the ambiguity be resolved by choosing the best conception of legitimacy? Perhaps, Kaplow means instead that legitimacy is fatally vague, but once again he has no argument for that proposition either. Crucially, the Participatory Legitimacy Thesis is not reducible to any of Kaplow's four interpretations, and hence is not open to his objection.

*4. The Moral Harm Objection*

An objection to the independent value of participation from a deontological perspective has been developed by Ronald Dworkin. Dworkin considers the argument that process has what Lawrence Tribe calls "intrinsic value"[271] Tribe's argument was that what I have called a background right of political morality to participation is justified by the "idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one."[272] Dworkin counters, "The language about talking to people rather than dealing with them, and about treating them as people rather than as things, is of little help here, as it generally is in political theory. For it does not show why the undoubted harm of faceless decisions is not merely bare harm, and statements about what treatment treats as a person are at best conclusions of arguments and not premises."[273] This argument rests on Dworkin's distinction between two kinds of harm, which he calls "bare harm" and "moral harm."

Dworkin defines moral harm, as follows:

> [T]he violation of a right constitutes a special kind of harm, and people may suffer that harm even when the violation is accidental. We must distinguish, that is, between what we might call the bare harm a person suffers through punishment, whether that punishment is just or unjust—for example, the suffering or frustration or pain or dissatisfaction of desires that he suffers just because he loses his liberty or is beaten or killed—and the further injury that he might be said to suffer whenever his punishment is unjust, just in

[270] *Id.* at 395 n. 262.

[271] Tribe, *supra* note 133, at 503-04.

[272] *Id.*

[273] Dworkin, *Principle, Policy, Procedure* in A MATTER OF PRINCIPLE, *supra* note 92, at 102.

> virtue of that injustice. I shall call the latter the "injustice factor" in his punishment, or his "moral" harm.[274]

Moral harm does not depend on any psychological state; rather it "is an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care."[275]

Thus, Dworkin's argument is that the proponents of an irreducible value for process and participation have not given an explanation as to why exclusion (or other process flaws) gives rise to moral harm. Given his definition of moral harm, this amounts to an argument that no explanation has been given as to why the denial of a right of participation is unjust. Dworkin's argument then, at bottom, is like Rosenberg's, but with a deontological twist. It does not present a positive case against the thesis that process has irreducible value, but it does question the sufficiency of the arguments raised on behalf of that thesis. If it can be shown that a denial of participation is unjust, then that denial will give rise to moral harm, and Dworkin's objection will be answered. The Participatory Legitimacy Thesis is, in fact, an argument that shows that denial of a right to participation does inflict moral harm—understood in Dworkin's special technical sense.

### *5. The Objection from the Inseparability of Substance and Procedure*

Yet another argument against the participation model is suggested by an argument made by Larry Alexander, in a somewhat different context, the question whether there are independent rights to procedural due process. He argues that "because the procedure for applying a [substantive] rule [of law] can always be viewed as part of the substance of the [substantive] rule itself, a concern for procedure apart from substance verges on incoherence."[276] This argument rests on concealed premise that is false. The premise of the argument is: *The procedure for applying a substantive rule of law can always be viewed as part of the substance of the substantive rule itself.* Let's assume that this premise is true. From this premise Alexander draws the conclusion: *A concern for procedure apart from substance verges on incoherence.*

Alexander's argument is still incomplete. It assumes some like the following: *If X can always be viewed as part of Y, then the distinction between X and Y is incoherent.* But of course, this premise is false. Seahorses can be viewed as part of the ocean, but it is not the case that the distinction between seahorses and the ocean is incoherent. We have already established that the entanglement of substance and procedure does not entail that the distinction between these two concepts is incoherent. Indeed, the point of the thought experiment of acoustic separation between substance and procedure is

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[274] *Id.* at 80.

[275] *Id.*

[276] Larry Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 341-43 (1987).

can be stated in language similar to Alexander's: *The procedure for applying a substantive rule of law can always be viewed as distinct from the substance of the substantive rule itself*. Alexander's argument (if reconstructed) is logically valid but unsound because it rests on a false assumption.

Nonetheless, Alexander makes an important point. Sometimes substantive rules are adopted with specific procedures attached—some administrative schemes are of this sort. But our primary question is "what is a fair procedure," and the fact that procedures sometimes vary with substance does not moot that question. Indeed, Alexander's formulation of his point assumes that we can recognize the difference between a substantive rule and the procedures for applying it. Moreover, it is undeniably a fact that many procedures are transsubstantive[277] in many, if not all, contexts. Procedures frequently come in largely undivided clumps, for example the Federal Rules of Civil Procedure or the Administrative Procedures Act. Whatever the merits of Alexander's argument in the context in which he advanced it, the argument does not establish that the notion of an irreducible value to process based on a background right of political morality to participation is incoherent.

*6. The Counter-example of Legislation*

Yet another argument against the irreducible value of participation has been put forth by Robert Bone. Bone suggests that the argument for a right of participation grounded on respect for the dignity of litigants proves too much, because it would create a right, not present in law, to direct participation in the legislative process: "A

[277] *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Transsubstantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); The term "transsubstantive" was originates with the late Robert Cover in *For James Wm. Moore: Some Reflections on a Reading of The Rules*, 84 YALE L.J. 718 (1975). Of course, the question whether or not procedural rules ought to be transsubstantive is a live one. For a variety of viewpoints, see Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716 -17 (1988); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079-81 (1989); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 Fordham L. Rev. 989, *1028 (1995); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526 -27 (1986); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2175 -78 (1989); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's 'Tolstoy Problem*," 46 FLA. L. REV. 57, 78-84 (1994) (favoring nontranssubstantive discovery rules); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2042- 43, 2048 -51 (1989); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

state that sets the legal driving age at sixteen, for example, is not required on dignity grounds to give each person an individualized hearing before deciding that the person's age disqualifies her for a license."[278] Bone is right to observe that rights to participation do not have the same implications for legislation as they do for adjudication. Both legislation and dispute resolution implicate procedural justice, but the general idea of procedural fairness operates differently in the two contexts. When the context is the legislative process, a right to participation is expressed in the right to vote, the principle of one person, one vote, and the freedom of expression, including the right to petition the government for redress of grievances. These rights are rights to individual participation in the legislative process, but they take into account the impracticability of rights of direct participation by citizens on the floor of a legislative body. In different contexts, individual rights of participation assume different forms.

One way to see the error in Bone's argument is to examine its flip side. Suppose that the question was whether there is a group right to participate in the legislative process by democratic election of representatives. It might be objected that such a group right is absurd, because if such a right existed, then it would entail that democratic majorities have the right to participate in the decision of individual cases by the passage of ex *post facto* laws and bills of attainder. This argument is an enthymeme—it includes an unstated assumption that the form of a right to participation cannot vary with context. But this unstated premise is obviously false—participation in lawmaking can take a different form in adjudication and legislation. The same goes for Bone's argument. Once the missing premise is stated, it becomes clear that the argument, while valid, is unsound.

As we have already noted, the notion that there is an irreducible value to process is the subject of wide agreement once we move to the realm of democratic politics. One might argue that correct outcomes are all that really matters and the democratic process is valuable only insofar as it contributes to correct outcomes. But surely the more widely held view is that an undemocratic regime violates an important human right, even if it legislates as well as or even better than a democratic regime. The example of legislation establishes that the form participation may vary with the procedural context, but it does not establish that process has no value apart from outcomes.

### *7. The Argument that Representation Supercedes Participation*

Another objection to the idea that participation is essential for legitimacy is suggested by an argument made by Owen Fiss. The core idea is that *representation* supercedes *participation* as the basis for procedural legitimacy. Fiss's version of the argument addresses doctrine, but his argument can be transformed into an argument about procedural justice. Fiss claims,

[278] Bone, *supra* note 189, at 281.

*Lawrence Solum*

> [W]hat the Constitution guarantees is not a right of participation, but rather what I will call a "right of representation": not a day in court but the right to have one's interest adequately represented. The right of representation provides that no individual can be bound by an adjudication unless his or her interest is adequately represented in the proceeding.[279]

Importantly, Fiss formulates his claim in terms of the representation of interests and not of individuals:

> [T]he representation that I speak of is not a representation of individuals but a representation of interests. It is not that every person has a right to be represented in structural litigation, but only that every interest must be represented. If an individual's interest has been adequately represented then he or she has no further claim against the decree. The right of representation is a collective, rather than an individual right, because it belongs to a group of persons classed together by virtue of their shared interests.[280]

Corresponding to Fiss's argument about the due process clause, we can construct a parallel (Fissian) argument about procedural justice.[281] That is, we could argue that it is adequate representation of interests (and not participation) that confers legitimacy on adjudicative procedures.

The Fissian argument that representation supercedes participation has some obvious attractions. Much hangs on what counts as adequacy. For example, if adequacy is measured by contribution to accuracy, then the argument for supersession is simply a restatement of the argument that participation reduces to accuracy. If "adequacy" reduces in this way, the Fissian supersession objection is an old argument in a new bottle. We can, therefore, put this possibility to the side.

It might be argued, however, that representation (and not participation) creates legitimacy that is not reducible to accuracy. By way of analogy to the case of legislation, it could be argued that individuals do not have an individual right to participate in the legislative process itself;[282] representative democracies are legitimate so long as interests are adequately represented. Moreover, it might be argued that even in the case of traditional litigation, various types of litigants are represented by others. Thus, wards are represented by guardians, beneficiaries by trustees, and the mentally disabled by guardians ad litem. At first blush, it might seem that the Fissian objection

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[279] Owen Fiss, *The Allure of Individualism*, supra note 188, at 970-71 (1993).

[280] *Id.* at 972.

[281] Of course, the argument that I will present is not Fiss's own—although it is inspired by his argument. To the extent the argument has merit, Fiss deserves the credit, but if the argument fails, the fault is mine. If Fissian suggests too strong a connection between Fiss and the argument, "quasi-Fissian" could be substituted.

[282] *See supra* Part V.D.6, "The Counter-example of Legislation."

runs smack into the fact that in ordinary cases, there is an individual right of participation. Parties ordinarily represent themselves, and representation is the second-best substitute for participation. At this point, however, the Fissian objector would have a powerful counter: *the case in which individuals directly participate might be seen as a special case of adequate representation*. In some cases, an individual is simply the most efficient and accuracy-enhancing representative of her own interests. If this Fissian maneuver worked, then we would have undergone a classic duck-rabbit[283] shift in perspective. Before the shift, we saw participation as the norm and adequate representation as the exception. After the shift, we come to see that representation is the norm and participation is simply a special case.

But the Fissian duck-rabbit maneuver will not work. Participation is not plausibly seen as a special case of adequate representation. The Fissian conjuring trick is to redefine the object of adequate representation, "not a representation of individuals but a representation of interests."[284] Fiss may well be right that when group rights are at stake, then the relevant interests are the interests of groups, but in individual litigation, the interests at stake are the interests of individuals. But now the interests drop out. We are concerned about individual interests, because we are concerned about individuals. Interests themselves have no moral standing. Individuals represent themselves, not because they are the best or most efficient representatives of their own interests; individual represent themselves, because they are human persons, who act on their own behalf, define their own interests, and speak for themselves. If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck.

*8. The Contractarian Objection*

The contractarian objection is based on the idea of hypothetical consent. As explained by Robert Bone, the idea is:

> The ex ante argument supposes that a procedure is fair to a party if a rational person in the position of the party would have agreed to the procedure before the dispute arose. In deciding whether to agree, a rational person weighs the costs and benefits that he expects from the procedure.[285]

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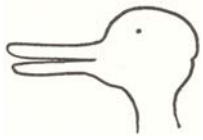
[283] The duck-rabbit is from Wittgenstein. *See* Wittgenstein, *supra* note 231, at 194.



The duck rabbit can be seen as a duck or as a rabbit. Most readers should be able to force a perspective shift at will.

[284] Fiss, *supra* note 279 at 972.

[285] Bone, *supra* note 6, at 496. Bruce Hay and David Rosenberg are strongly associated with this argument. See Bruce L. Hay, Procedural Justice--Ex Ante vs. Ex Post, *supra* note 7; Bruce

As applied to the value of participation, the idea is that a rational person would choose to forgo the option to participate if that option would neither be cost beneficial nor accuracy improving. Because Bone has provided a thorough and convincing treatment of the general form of the contractarian objection,[286] we can confine ourselves to a single point. Whether rational persons would bind themselves to process without participation will depend on the structuring of the initial choice situation. For example, if the choice situation is structured so that the interests of the rational persons are solely in economic payoffs, preference-satisfaction, or objective welfare, then they will be willing to forgo rights of participation that do not produce these payoffs. On the other hand, if rational persons are conceived as having an overriding interest in having reasons to consider themselves as legitimately bound by erroneous decisions, then they will choose to participation over accuracy and cost. In other words, the contractarian argument can easily become question begging. For this reason, the real work of contractarian accounts of procedural justice consists in the arguments that justify the set up of the initial choice situation.

*9. The Ineffability Objection or the Absence of an Explanation*

At this point, we are in a position to observe that several of the objections to the irreducible value of process share a common form. Although they are cast in the guise of affirmative reasons to believe that there is no irreducible value to process, they turn out, on close inspection, to rest on a burden-shifting move, i.e. on questions rather than arguments. In the absence of clear explanation as to why process should count aside from cost or outcomes, the claim is that there is something mysterious or ineffable about the claim that participation itself has intrinsic value. For example, Robert Bone asserts that "[t]he conventional understanding of American adjudication supposes that it is primarily a means to the end of producing outcomes that conform in some close way to the substantive law."[287] But if this is so, Bone argues, "then the demands of dignity should be satisfied in most situations by outcomes meeting the quality standards."[288] If we assume that accuracy alone is important, then "*it is difficult to see* what institutional value there could possibly be in guaranteeing participation beyond what is needed for"[289] accurate decisions.

The ineffability objection, in its various forms, founders when confronted with the Participatory Legitimacy Thesis. Legitimacy may be an abstract idea of political philosophy *but* it is not ineffable. Indeed, the idea that political processes should be legitimate is one of the most familiar and widely-accepted views in all of political

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Hay & David Rosenberg, The Individual Justice of Averaging, Olin Discussion Paper No. 285, available at http:// www.law.harvard.edu/programs/olin_center/.

[286] *See* Bone, *supra* note 6.

[287] Bone, *supra* note 189, at 281.

[288] *Id.* at 281-82.

[289] *Id.* at 282 (emphasis added).

theory. It is certainly no more controversial than the utilitarian assumption that only consequences count or the welfarist idea that subjective preferences are the sole criterion of goodness. Legitimacy is no more obscure than the deontological idea of autonomy. Quite the contrary, the idea of legitimacy, as a matter of practical politics, enjoys greater comprehension, acceptance, and argumentative potency than these rival notions. Indeed, the ability of ordinary folk to see the connection between legitimacy and participation is well confirmed by social science.[290] It is a strange irony of contemporary academic discourse that the straightforward and obvious value of participation has come to be seen as obscure. This irony is compounded when we realize that rival accounts of procedural justice rest on deeply controversial assumptions.

In sum, my assessment of the state of play is this: although there is a convincing argument that outcomes count, there is no convincing argument for reductionism. That is, none of the critics has given good and sufficient reason for the proposition that participation lacks independent value. Indeed, sensitive critics of the view that process counts, because some level of participation is required by a concern and respect for individual dignity, admit to lingering doubts about their own critiques.[291]

## VI. PRINCIPLES OF PROCEDURAL JUSTICE

Accuracy, cost, and participation must all play a role in a theory of procedural justice. But if such a theory is to be sufficiently specific to do actual work as a standard against which an actual system of procedure can be measured, then the relationship between accuracy, cost, and participation must be ordered and articulated. In this Part, we restate the conclusions we have reached so far in the form of two principles of procedural justice.

### *A. The Statement of the Principles*

Consider the following formulation for a set of principles which express a conception of civil procedural justice:

I. *The Participation Principle*: The arrangements for the resolution of civil disputes should be structured to provide each interested party with a right to meaningful participation, as specified by the following conditions and provisos:

   A. *The Interest Condition.* The right to participation should extend to all persons who will be the subject of final binding adjudication and to

[290] *See supra* note 193 (collecting social psychology literature).

[291] *See id.* at 287; *see also* Dworkin, *Principle, Policy, Procedure* in A MATTER OF PRINCIPLE, *supra* note 92, at 102-03.

all other persons with a substantial interest that as a practical matter would be finally determined.

B. *The Scope Condition.* The right of participation should include the following minimum:

1. *Notice*. The arrangements for civil dispute resolution shall include advance notice to the individuals specified in the interest condition

2. *Opportunity to Be Heard.* The arrangements for civil dispute resolution shall afford an equal and meaningful opportunity to present evidence and arguments that are relevant to the dispute.

C. *The Impracticability Proviso*. In the event that actual notice or an opportunity to be heard is impracticable, the absent interested individual shall be provided with an adequate legal representative and the proceeding shall be structured so as to give full and fair consideration to the interests of the absent individual. Represented persons should be afforded practicable opportunities to challenge the adequacy of representation.

D. *Fair Value of Procedural Justice Proviso.* Such arrangements shall insure the fair value of the basic liberties, including the right to reasonable attorneys' fees in suits for relief from violation of such liberties.

II. *The Accuracy Principle:* The arrangements for the resolution of civil disputes should be structured so as to maximize the likelihood of achieving the legally correct outcome in each proceeding, subject to the following provisos. A procedure may depart from the maximization of accuracy only for the following reasons:

A. *The Substantive Rights Proviso.* In order to insure that the process of adjudication does not unfairly infringe on the substantive rights guaranteed by the basic liberties, such as the rights of privacy and freedom of speech.

B. *Fair Distribution of the Risk of Inaccurate Adjudication Proviso*. In order to provide for a fair distribution of the risk of inaccurate adjudication.

C. *Systemic Accuracy Proviso.* In order to maximize systemic accuracy, so long as the procedures are announced in advance and create general rules with which parties can comply by making a reasonable good faith effort; procedures may also be arranged so as to maximize systemic accuracy where the arrangement will not result in inaccuracy in particular cases.

D. *Costs of Adjudication Proviso.* In order to insure that the systemic costs of adjudication are not excessive in relation to the interests at stake in proceeding or type of proceeding.

III. *Ordering of the Principles and Provisos*. These principals shall be satisfied in lexical order, such that satisfaction of the *Participation Principle* shall take priority over satisfaction of the *Accuracy Principle*. The *Provisos* to the *Accuracy Principle* are also ranked in lexical order; in cases of conflict, the first proviso shall take precedence over the rest, the second proviso shall take precedence over all but the first, and so forth.

Before proceeding further, we should observe that these principles require interpretation and exposition if they are to serve as the foundation for a fully developed conception of procedural justice.

### *B. The Principles in Relationship to the Three Models*

The principles bear a direct relationship with the considerations raised in connection with the three simple models of procedural justice discussed in Part IV.B, "Three Models of Procedural Justice." Each principle attempts to capture the core intuition or considered judgment that underlies one or more of the models, and the complex structuring of the principles attempts to remedy the deficiencies of each and the inconsistencies of all by providing a proper lexical ordering and enumeration of exceptions.

Consider first, the relationship between the accuracy model and the *Accuracy Principle*. That principle expresses the accuracy model and attempts to rectify the deficiencies of that model. Recall that the first deficiency was that the accuracy model suffers from a general problem of fit, because a variety of procedural rules do not aim at accuracy; for example, the rules of claim and issue preclusion prevent the relitigation of a claim or issue, even when it can be shown that the prior adjudication was clearly wrong. The *Accuracy Principle* acknowledges that accuracy may be balanced against costs in the *Costs of Adjudication* proviso.

A second deficiency of the accuracy model was that it failed to distinguish between systemic accuracy and case accuracy. The *Systemic Accuracy Proviso* resolves this ambiguity and attempts to strike a fair balance between systemic accuracy and accuracy in the particular case. On the one hand, the basic statement of the Accuracy Principle expresses the judgment that procedural justice aims to resolve the case that is being decided accurately; the baseline notion is that case accuracy takes priority over system

accuracy. Our notion of procedural justice requires the fair treatment of individuals, and making systemic accuracy the baseline would fail to take the differences between individuals seriously.

On the other hand, there are situations in which systemic accuracy can be promoted without treating the individual unfairly. Where a rule promoting systemic accuracy is announced in advance and parties can reasonably comply with the rule, imposing a case-accuracy distorting sanction is not unfair to those affected—the opportunity to comply places the responsibility for the distortion on the party who disobeyed the procedural rule.

The balancing model is expressed in two of the provisos to the *Accuracy Principle.* The Costs of Adjudication proviso reflects notion, expressed in the *Mathews v. Eldridge* balancing test, that the maximization of accuracy must be balanced against the costs of adjudication. The Violations of Substantive Rights proviso expresses the idea that so-called balancing should not be limited to the costs of adjudication, but should include considerations of fairness and respect for basic substantive rights. These provisos express the core intuitions of the balancing model.

The participation model as refined by our investigation of the value of participation is reflected in the *Participation Principle*. This principle recognizes that procedural legitimacy requires a basic right of notice and opportunity to be heard in all cases in which these basic rights of participation are practicable. The lexical ordering of the principles expresses both (a) the notion that a concern for accuracy does not trump the concerns for legitimacy that underwrite the requirements of notice and an opportunity to be heard, and (b) the notion that once these requirements are met, a fair procedure should aim at legally correct outcomes.

### *C. The Principles in Relationship to the Structure of Existing Doctrine*

The principles and their ordering rule do not map perfectly onto existing doctrine, and this should not be surprising. The structure of existing doctrine has been determined by a pattern of historical development, and much of contemporary procedure is frozen legal history. Nonetheless, the substance of the two principles is reflected in the general contours of the procedural law of the United States.

#### *1. The Participation Principle*

The central idea of the Participation Principle—that notice and an opportunity to be heard are essential to procedural fairness—is frequently found in judicial opinions:[292]

[292] *See* Kaggen v. I.R.S., 57 F.3d 163, 167 (2d Cir. 1995) (Jacobs, J., dissenting) (stating that "basic considerations of procedural fairness demand an opportunity to be heard"); Eash v. Riggins Trucking Inc., 757 F.2d 557, 579 (3d Cir. 1985) (en banc) (Sloviter, J., dissenting) (stating that "the principles of procedural fairness embedded in the Constitution . . require adversary proceedings including notice and an opportunity to be heard unless the events occurred within the view of the court"); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230,

"The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court."[293] And some tribunals have gone so far as to make explicit that this aspect of procedural fairness may not be balanced against other concerns.[294]

There is, however, a potential problem of fit, in this respect, between the Participation Principle and the Supreme Court's decision in *Mathews v. Eldridge*. It might be argued that *Mathews* adopts the balancing model, and hence that existing doctrine implicitly assumes that all rights of participation, even the minimal rights of basic notice and some opportunity to hard may be denied, if the balance of costs against the benefits of an increased likelihood of correct adjudication favors this result. It could be further argued that support for this theory is found in *Mullane v. Central Hanover Bank & Trust Co.*,[295] in which the Supreme Court allowed the rights of contingent beneficiaries to a trust to be adjudicated without any actual notice to them.[296]

As we have already seen, however, these arguments fail on closer inspection.[297] *Mathews* and *Mullane* are fully consistent with the Participation Principle. *Mathews* does not stand for the proposition that all participation can be denied, if the balance of costs and benefits would favor this result. Instead, Justice Powell's opinion for the Court states, "This Court consistently has held that some form of hearing is required

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1244 (3d Cir. 1975) ("One of the basic tenets of American jurisprudence is that procedural fairness requires that each party have notice of the issues involved and an opportunity to be heard at a meaningful time and in a meaningful manner."); In re Hourani, 180 B.R. 58, 67 (Bankr. S.D.N.Y. 1995) ("Notice is a central tenet of procedural fairness and assures justice and fair dealing by giving creditors an opportunity to present and contest the status of their claims."); Potvin v. Metropolitan Life Ins. Co., 63 Cal.Rptr.2d 202, *208 (Cal. Ct. App. 1997) (equating "procedural fairness" with "notice of the charges brought against the individual and an opportunity to respond to those charges"); Milenkovic v. Milenkovic, 416 N.E.2d 1140, 1148 (Ill. Ct. App. 1981) ("The essence of due process is procedural fairness, as embodied in the elements of notice and opportunity to be heard."); Nelson v. Jacobsen, 669 P.2d 1207, 1211 (Utah 1983) ("Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness.")

[293] Mason v. Eldred, 73 U.S. (6 Wall.) 231, 239 (1867).

[294] *See* Carothers v. Follette, 314 F.Supp. 1014, (S.D.N.Y. 1970) ("We cannot accept defendants' contention that the essential elements of fundamental procedural fairness-- advance notice of any serious charge and an opportunity to present evidence before a relatively objective tribunal-- must be dispensed with entirely because of the need for summary action or because the administrative problems would be too burdensome."); *accord* Lathrop v. Brewer, 340 F.Supp. 873, 880 (S.D. Iowa 1972); Meola v. Fitzpatrick, 322 F.Supp. 878, 885 (D. Mass. 1971).

[295] 339 U.S. 306 (1950).

[296] *Id.* at 317-18.

[297] *See* Part IV.B.2.a), "Consequentialist Balancing: The *Mathews v. Eldridge* Balancing Test."

before an individual is finally deprived of a property interest,"[298] and "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[299] As Justice Frankfurter put it in his concurring opinion in *Joint Anti-Fascist Comm. v. McGrath*,[300] "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'"[301] Similar language appears in Justice Jackson's opinion in *Mullane*.[302] Thus, the broad language of *Mathews* is consistent with the proposition that the Participation Principle, as expressed in the rights to notice and some opportunity to be heard, is lexically prior to the Accuracy Principle and its cost of adjudication proviso. More technically, in *Mathews* itself, application of the balancing test resulted in the denial of a right to a pretermination hearing,[303] but there is no suggestion in the opinion of the court that deprivation of benefits that constitute a property interest for the purposes of the due process clause could be accomplished with no hearing at all, without running afoul of the due process clause.

The interest condition triggers the right to notice and an opportunity to be heard. In particular these rights are triggered for "persons who will be the subject of final binding adjudication and to all other persons with a substantial interest that as a practical matter would be finally determined." This triggering condition is reflected in the rights of participation generally afforded by existing law. For example, Federal Rule of Civil Procedure 19 contemplates dismissing an action if a party who cannot be joined "might be prejudicial to the person or those already parties"[304] and favors joinder of an absent party if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest."[305] Similarly, Federal Rule of Civil Procedure 24 afford a right of intervention (which of course, just is a right of participation) "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the

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[298] 424 U.S. at 333.

[299] *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[300] 341 U.S., at 171-172, 71 S.Ct., at 649. (Frankfurter, *349 J., concurring).

[301] 424 U.S. at 328.

[302] 339 U.S. at 312 ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *id.* at 314 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[303] *Id.* at 340-41.

[304] FED. R. CIV. P. 19(b).

[305] FED. R. CIV. P. 19(a).

applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."[306]

The third specification of the Participation Principle requires the fair value of procedural justice: "Such arrangements shall insure the fair value of the basic liberties, including the right to reasonable attorneys' fees in suits for relief from violation of such liberties." This proviso is included to reflect the idea that the system of procedure should be structured so that that inequalities of litigation resources can operate so as to deprive individuals of the fair value of their basic liberties, such as the freedom of speech. This idea is reflected in current law by the provision of attorneys' fees for successful lawsuits challenging the violation of an individual's basic federal rights.[307] This is, of course, a large topic unto itself. For the purposes of this article, which focuses on procedural justice at a high level of generality, we can simply note that this proviso is added for reasons that would take our investigation far a field of our core concerns, and hence that a detailed investigation ought to be postponed until another occasion.

*2. The Accuracy Principle*

The second principle is the Accuracy Principle. This principle requires that civil procedures be structure "so as to maximize the chances of achieving the legally correct outcome in each proceeding" subject to four provisos. The question whether the existing system of civil procedure does maximize accuracy is a very large one—deserving of its own article or monograph. What is clear is that participants in the system—judges and those who draft rules of procedure—believe that the system is designed with accuracy as a primary goal. We have already examined the evidence for this proposition in our discussion of the accuracy model: the current system of procedure is understood as engaged in a search for truth.[308]

The first proviso allows for a departure from accuracy where an accuracy enhancing procedure would lead to the violation of another fundamental right. The first proviso to the Accuracy Principle allows for departures from accuracy that "insure that the process of adjudication does not unfairly infringe on the substantive rights guaranteed by the basic liberties, such as the rights of privacy and freedom of speech." This proviso is reflected in the structure of current doctrine in a variety of ways. Federal Rule of Civil Procedure 24(c) allows a trial court judge to limit discovery by entering a protective order;[309] one reason for granting such an order is to protect substantive rights, such as the right to privacy.[310] Similarly, various privileges (marital, priest-

[306] FED. R. CIV. P. 24(a).

[307] 28 U.S.C. §§ 1983, 1988.

[308] *See* Part IV.B.1, "The Accuracy Model;" *see also supra* note 138 & 139 (collecting sources identifying the search for truth as the goal of the system of adjudication).

[309] FED. R. CIV. P. 26(c).

[310] *See* Dominick C. Capozzola, Discovering Privacy, 26-NOV L.A. Law. at 28 (2003).

penitent) protect substantive rights when the search for truth collides with confidentiality.[311]

The second proviso to the Accuracy Principle allows departures from the goal of case accuracy that have purpose of providing for a fair distribution of the risk of inaccurate adjudication. In civil litigation, the goal of fair distribution of the risk of error is reflected in the preponderance of evidence standard for the burden of persuasion, and departures from the standard are justified on the ground that a shift would more fairly allocate the risk. Thus, the Supreme Court has justified departure from the preponderance standard in child custody cases on the ground that a fair distribution of the risk of error requires the departure.[312] Another example is provided by the requirement for clear and convincing evidence that a party signing a cognovit note expresses a waiver of the right to notice that is "voluntary, knowing, and intelligently made."[313] Here, inequality in the risk of error serves to protect the constitutional right to notice, which the Participation Principle suggests is a prerequisite for procedural fairness. In this case, the stakes are unequal (the monetary recovery on the cognovit note versus the protection of the fundamental dignity of the individual) and hence an unequal distribution of the risk of error is not inconsistent with fairness to the parties.

The third proviso allows departure from the goal of case accuracy in order to maximize systemic accuracy, if the procedures are announced in advance and create general rules with which parties can comply by making a reasonable good faith effort. We explored the tension between case accuracy and systemic accuracy in connection with the accuracy model.[314] The existing procedural landscape reflects the systemic accuracy proviso in myriad ways. Statutes of limitations and discovery sanctions, for

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[311] *See* Bruce P. Brown , Note, *Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications*, 17 Ga. L. Rev. 1009, 1028 (1983).

[312] *See* Santosky v. Kramer, 455 U.S. 745, 765-66 (1982) (2002) ("Even accepting the court's assumption we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.").

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[313] Overmyer, 405 U.S. 174, 185-86, 187, 92 S.Ct. at 782, 783 (1972) (assuming without deciding that the same standard of proof applies to waiver in the civil context as in criminal cases, and citing criminal cases); Leonard v. Clark, 12 F.3d 885, 889-90 (9th Cir.1993) (citing Overmyer, 405 U.S. at 187, 92 S.Ct. at 783; Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1394 (9th Cir.), cert. denied, 501 U.S. 1252, 111 S.Ct. 2892, 115 L.Ed.2d 1057 (1991)).

[314] *See supra* Part IV.B.1.b), "Systemic Accuracy versus Case Accuracy."

example, frequently lead to an inaccurate result in the particular case, but are justified at least in part on the basis of the contribution they make to systemic accuracy.[315]

The fourth proviso authorizes departure from the goal of accuracy to insure that the systemic costs of adjudication are not excessive in relation to the interests at stake in proceeding or type of proceeding. We have already discussed this proviso at length; it is reflected in procedural due process cases like *Mathews* and *Mullane*. These cases have enshrined the fourth proviso as a basic component of due process jurisprudence.

## VII. THE PROBLEM OF AGGREGATION

In this Part, we apply the Two Principles of Procedural Justice and the Participatory Legitimacy Thesis to the central problem of contemporary civil procedure in the United States—the problem of aggregation. Traditional procedure—especially the civil action and individual trial—has been challenged by the advent of the mass wrong—asbestos, tobacco, systemic misrepresentation, and so forth. In response, lawyers, judges, and legal scholars have advocated a variety of techniques for aggregation. These techniques have included expanded use of the class action and its close cousins, sampling and the theory of virtual representation. This Part addresses the question whether and how the technologies of aggregation can be squared with the Participation Principle.

### *A. Technologies of Aggregation*

Individual participation is costly, and so the system of procedure is under pressure to aggregate. The system has responded to these pressures with a variety of procedural innovations—technologies of aggregation. Three such techniques are (1) the class action, (2) the doctrine of virtual representation, and (3) sampling or aggregated trials.

The class action is the most familiar technology of aggregation.[316] Class actions aggregate by allowing an individual named party to act as a representative of a class. From our perspective, it is important to distinguish between two types of class actions.[317] In a mandatory class action, class members have no choice regarding their membership in the class, and hence may not preserve the right to individual

[315] *See* Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors Of Child Abuse*, 12 UCLA WOMEN'S L.J. 145, 166 (2003).

[316] *Cf.* John Bronsteen & Owen Fiss, *The Class Action Rule* 78 Notre Dame L. Rev. 1419, 1423 (2003) (discussing class action as aggregation device).

[317] Richard L. Marcus, *Slouching toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1602 (2003) (distinguishing opt out and mandatory class actions); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 153 (2003) ("The operation of the class action today as a rival to the conventional institutions of public lawmaking cries out for a normative account of the distinction drawn between mandatory and opt-out class actions, for the distinction defines the binding effect of class settlements.").

participation in any proceeding that will bind them.[318] In an opt-out class action, individual class members may elect out of the class, and hence to preserve the right of individual participation.[319] A civil action may not proceed as a class action until the class is certified; a judicial determination that the named party (or parties) is an adequate representative is a prerequisite for certification.[320]

The doctrine of virtual representation provides a second technology for aggregation.[321] One way of understanding virtual representation is as a class action without the formalities. The individual litigant in the first action acts as the representative of a party with similar interests in a subsequent action, but no class is certified and the representative relationship is only recognized after the fact when the doctrine is asserted in the subsequent action. Virtual representation is always mandatory. Because the first action does not proceed on a class basis, there can be no notification of absent parties that they have a right to opt out.

A third technology of aggregation is sometimes called "sampling" and also called "aggregate trial."[322] The idea is to take representative cases, try them, and then use the results as factual findings in cases that were not tried. The most famous example is *Cimino v. Raymark*,[323] an asbestos case tried during 1990 in Texas. *Cimino* involved 2,298 plaintiffs. In an initial phase, various "common issues" were resolved: these issues included which products contained asbestos, which products were dangerous, which defendants manufactured which products, and so forth.). The plaintiffs were then divided into five injury categories. From these five categories, 160 cases were randomly selected and presented to two separate juries. The results were then applied to the plaintiffs whose cases were not tried.[324] Without substantial changes in current

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[318] *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 716 (2003).

[319] *See id.*

[320] *See* FED. R. CIV. P. 23.

[321] *See* Howard M. Erichson, *Informal Aggregation: Procedural And Ethical Implications Of Coordination Among Counsel In Related Lawsuits*, 50 DUKE L.J. 381, 458 (2000) (discussing virtual representation as informal aggregation); *see generally* Bone, *supra* note 189; F. Carlisle Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 Ill. L. Rev. 580 (1936); Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion Of A Nonparty's Claim*, 68 Tul. L. Rev. 1303 (1994).

[322] *See* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in The Trial of Mass Torts* 44 Stan. L. Rev. 815 (1992). *See generally* Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 Law & Psychol. Rev. 43 (1998).

[323] 751 F. Supp. 649, 653, 664-65 (E.D. Tex. 1990) , aff'd in part and vacated in part, 151 F.3d 297 (5th Cir. 1998).

[324] *See* Bordens & Horowitz, *supra* note 322, at 45-46.

doctrine, sampling is voluntary, not mandatory[325]—although the use of mandatory sampling has been suggested.[326]

### *B. The Participation Problem*

Technologies of aggregation can create a problem of participation. Consider, for example, the following hypothetical.[327] Suppose that a mandatory class action as the solution to the problems created by a mass tort. We might imagine such a class action in response to a harmful substance ("the chemical") that affects hundreds of thousands of individuals—think of tobacco or asbestos. To simplify the example, suppose that exposure of those affected by the chemical is relatively uniform and the persons who were exposed are easy to identify. The plan for the class action is to proceed in two phases. In phase one, a trial will be held on various issues such as breach of the relevant standard of care and causation. In phase two, a quasi-administrative procedure will distribute the damage award, if any, to the members of the class. Let us further suppose that the named parties will get a hearing on class certification and the adequacy of representation, but that no collateral challenges to either certification or adequacy are permitted. Absent class members will be finally bound by the decision; the doctrine of claim preclusion or *res judicata* will apply. What this means is that class members will be bound by the decision, (a) whether it is correct or erroneous, (b) whether it is for the plaintiffs or the defendant, (c) whether the absent parties claim is substantially the same as that of the class members or not, and (d) whether representation was in fact adequate or not.

What opportunities for participation would this procedure afford? The answer to this question is "virtually none." In the hypothetical, a mandatory class actions would afford absent class members neither the right to opt out of the class and pursue their own individual lawsuits nor the right to be represented by counsel in the class proceeding. Class members might be permitted to participate in the class certification hearing by making an appearance or by letter, but once the certification decision is made, this right drops away. Class members would not be allowed to participate directly via a collateral challenge to the judgment (e.g. by filing another lawsuit) because of the doctrine of claim preclusion.

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[325] The Fifth Circuit held that the plan devised by the District Court in *Cimino* violated the defendant's right to a trial by jury, 151 F.3d at 302; the same argument would invalidate sampling imposed against the wishes of plaintiffs.

[326] *Cf.* R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 Wm. & Mary Bill Rts. J. 199, (1999) (raising question "whether mandatory statistical sampling violates a plaintiff's due process rights").

[327] Let us put to one side the question whether such a class action would be permitted by existing law. Under Rule 23, if the described class action were certified under Rule 23(b)(3), then opt-out and participation rights would be afforded under Rule 23(c)(2). If the class were certified under Rule 23(b)(1), then the participation in the class would be mandatory.

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Should we be concerned about the absence of a right to participate? Both the accuracy model and the balancing model suggests that the answer to this question could be "no." If we determine that the aggregate level of accuracy would be enhanced by a mandatory-class action as compared to individual trials, then the accuracy model gives us no reason to prefer a system of individualized trials. From the perspective of the balancing model, the case against individualized trials is likely to be even more compelling. Individualized participation is expensive as compared to a mandatory class action. The balancing model would allow rights of individual participation if they are cost justified, either by enhancing accuracy or because of a subjective taste for participation. Hypothetically, let us suppose that rights of individual participation would neither be accuracy enhancing nor cost justified.

If we accept the Participatory Legitimacy Thesis, however, then it is not clear that our hypothetical mandatory class action meets the requirements of procedural justice. The first principle of procedural justice, the Participation Principle states, "The arrangements for civil dispute resolution shall afford an equal opportunity to the affected individual to present evidence and arguments that are relevant to the legal rules and equitable considerations which should govern the dispute as a matter of substantive law." Given the hypothetical facts we have described, there is a *prima facie* case that the mandatory class action would violate the Participation Principle. Persons who will be finally bound are given no opportunity to participate.

However, the first principle of procedural justice does include an impracticability proviso: "In the event that actual notice or an opportunity to be heard is impracticable, the absent interested individual shall be provided with an adequate legal representative and the proceeding shall be structured so as to give full and fair consideration to the interests of the absent individual." The application of the impracticability proviso to any actual mass tort case will depend on the facts. It is certainly possible that affording equal rights of individual participation would be impracticable. Consider two scenarios. On one hand, if the effect of affording such rights was to consume the resources available for compensating plaintiffs, then the result would be self-defeating. On the other hand, if affording a right of participation is consistent with substantially just outcomes, then the case against such a right is much weaker. It is true that rights of participation may impose costs, but legitimacy is the kind of value that warrants the expenditure of significant resources.

Returning to the hypothetical, let us hypothesize that affording rights of participation is practicable. For example, we might assume that allow opt out rights, while adding costs without appreciable accuracy gains, would not produce costs that would neither bankrupt the defendant nor be wildly disproportionate to stakes involved. This hypothetical provides a test case for the two principles of procedural justice—as compared to the rival theories offered by the accuracy model and the participation model. The two principles would require that class members be afforded opportunities for participation that are practicable. Both the accuracy model and the balancing model would require that such right be denied.

In the context of this hypothetical, the Participatory Legitimacy Thesis provides reasons of political morality to affirm the two principles and reject its rivals. Does this result cohere with our intuitions and considered judgments about the hypothetical?

Readers must answer this question for themselves. My guess is that many readers will agree that participation is required for legitimacy under these circumstances. But I am also certain that readers strongly committed to consequentialist theories, such as welfarism or utilitarianism, would reject the conclusion that practicable participation is required as a matter of procedural justice for situations in which their costs exceed their benefits. We might ask these readers the following question: do you have any reason for denying the right to practicable participation that does not depend on some version of the controversial proposition that only consequences count? If not, then the argument may reach dialectical impasse at precisely this point.

### *C. Structuring Aggregation to Allow Participation Rights*

One of the lessons of the mandatory class action hypothetical is that rights of participation are not necessarily inconsistent with aggregation. Individualized litigation is not the only alternative to aggregation. There are a variety of modalities of participation that are consistent with technologies of aggregation. Briefly, these modalities include the following:

- Opt-out rights. We can allow absent class members to opt out and pursue individual litigation.
- Participation rights. We can offer class members to enter an appearance in a class action. The Participation Principle does not require that these participation rights be attached to a right to hold out (i.e. to veto settlement or other agreements between the class representatives and the other parties).
- Certification hearings. Even if a class members are not allowed to participate directly in the litigation, it may nonetheless be practicable to provide a right to participate in the class certification process, including, for example, the right (1) to argue for a more limited class definition, (2) to advocate the creation of subclasses, or (3) the right to argue against the adequacy of representation.
- Settlement hearings. If a class action settles, raising familiar questions about conflicts of interest between class counsel and class members, absent class members can be given rights of participation in settlement hearings.
- Issue hearings. The concept of allowing limited participation by class members in specific hearings need not be confined to certification and settlement. At crucial stages of the litigation, class members could be afforded the right to submit written briefs, make oral presentations, and even to present evidence.

The enumeration of exemplary modalities of participation helps dissolve a false dichotomy—the choice between individual litigation with maximal rights of individual participation and aggregation without any rights of individual participation at all. The

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Participatory Legitimacy Thesis requires meaningful participation, but it does not require individualized litigation. As Michael J. Saks and Peter David Blanck conclude, "When well done, the aggregated trial does not deny any of the instrumental values of due process, particularly from the viewpoint of defendants. Moreover, the value of procedural participation, central to legitimate judicial process, is not necessarily compromised in aggregated trials for either class members or defendants."[328]

*D. Aggregation If Participation Rights Are Impracticable*

There may be actual cases in which individual rights of participation in any meaningful form are impracticable. In these cases, the Principles of Procedural Justice permit participationless mandatory aggregation—as would the accuracy model and the participation model. It might be argued, however, that these special cases undermine the Participatory Legitimacy Thesis. We can express this argument in the form of a dilemma. The first horn of the dilemma is based on the premise that the Participatory Legitimacy Thesis implies that aggregation without participation is always illegitimate. If this premise is true—the argument continues—then the Participation Principle is incorrect and should be modified by deleting the Impracticability Proviso. The second horn of the dilemma is based on the opposite premise, i.e. that the participatory legitimacy thesis implies that aggregation with participation is sometimes legitimate. If this premise is true—the next step of the argument would go—then it undermines the participatory legitimacy thesis itself. If a binding decision can be legitimate without participation for reasons of practicability—so the argument maintains—then such decisions can also be justified by other practical considerations, such as accuracy and cost.

Although the dilemma expresses a real concern, it relies on false assumptions. The first horn of the dilemma assumes that aggregation without participation is always illegitimate, but this assumption is incorrect. Ought implies can. Normative legitimacy, like other normative concepts, does not demand the impossible or the impracticable. Moreover, legitimacy is not an "all or nothing" concept: procedures with full rights of participation may confer a greater degree of legitimacy than procedures with minimal participation. The second horn of the dilemma assumes that impracticability (as a ground for denying rights of participation) cannot be distinguished from accuracy and cost. This assumption is false. Impracticability as a reason for denying rights of participation is substantially different that marginal improvements in accuracy or cost.

When rights of participation are impracticable, there is, in theory, a choice for the design of a system of civil adjudication. One option is to require impracticable participation and hence to deny rights by making remedial procedures unavailable. This option is unattractive, both because it produces inaccurate outcomes and because the rights of participation it affords are illusory. The other option is to adopt

[328] Saks & Blanck, *supra* note, 322.

participationless procedures that provide the most accurate outcome available at a reasonable cost. The theory of procedural justice embodied in the Participation Principle requires the second option. When participation is impracticable, then accuracy and cost should shape procedural design.

## VIII. CONCLUSION

The real work of procedure is to guide conduct. It is sometimes said that the regulation of primary conduct is the work of the general and abstract norms of substantive law—clauses of the constitution, statutes, regulations, and common law rules of tort, property, and contract. But substance cannot effectively guide primary conduct without the aid of procedure. This is true because of three problems: (1) the problem of imperfect knowledge of law and fact, (2) the problem of incomplete specification of legal norms, and (3) the problem of partiality. The solution to these problems is particularization by a system of dispute resolution—in other words, a system of procedure. A theory of procedural justice is a theory about the fairness of the institutions that do the job of particularization.

A theory of procedural justice must answer to two problems. The easy problem of procedural justice is to produce accurate outcomes at a reasonable cost. Of course, what is easy in theory may be difficult in practice. A very high order of art and science may be required to design actual systems of civil adjudication that achieve accuracy at a reasonable cost while minimizing collateral violations of substantive rights. But the practical problems of procedural architecture should not obscure the obvious: procedural justice aims at accuracy and efficiency. In the abstract, these goals are shared by both the theorists and practitioners of procedural design.

The hard problem of procedural justice marks the point at which consensus about shared goals gives way to controversy. The hard problem of procedural justice goes deep. Procedural justice is necessarily imperfect, because perfect accuracy is unattainable and approaching the unattainable would be unjustifiably costly. The fact of irreducible procedural error is that even the best system of civil procedure that human ingenuity can design will make mistakes. This fact gives rise to the hard problem of procedural justice. How can litigants who will be finally bound by a mistaken judgment regard themselves as under an obligation to comply with the judgment? Framing the hard question of procedural justice suggests the key to the answer. The participatory legitimacy thesis makes clear what outcome reductionism obscures: because a right of participation must be afforded to those to be bound by judicial proceedings in order for those proceedings to serve as a legitimate source of authority, the value of participation cannot be reduced to a function of the effect of participation on outcomes; nor can the value of participation be reduced to a subjective preference or feeling of satisfaction.

Solving the hard problem of procedural justice clears the way to the formulation of principles of procedural justice. The Participation Principle requires that the arrangements for the resolution of civil disputes be structured to provide each interested party with a right to adequate participation. The Accuracy Principle requires that the

arrangements for the resolution of civil disputes should be structured so as to maximize the chances of achieving the legally correct outcome in each proceeding. Together, the two principles provide guidance where guidance is needed, both for the architects of procedural design and reform and for judges who apply general procedural rules to particular cases.

A theory of procedural justice is one thing; the practice of procedural design and application is another. We are tempted to sacrifice procedural fairness on the altar of substantive advantage. This temptation is strong and persistent—after all, much good can be done. Desirable outcomes can be reached; costs can be minimized. We can easily rationalize the sacrifice of procedural justice from a consequentialist perspective: the measurable marginal benefits of participationless procedure may exceed the marginal costs. In the end, however, these rationalizations ring hollow. Procedure without justice sacrifices legitimacy. Law without legitimacy can only guide action through force and fear. Procedure without participation may command obedience, but it cannot win principled allegiance. When we sacrifice procedural justice on the altar of substantive advantage, we risk a very great evil. But when we regard ourselves as bound by the principles of procedural justice, we produce a very great good—we give citizens a principled reason to respect the outcomes of civil process.