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Procedural Justice

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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 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

1. *See* CORA LOUISE SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER (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 (Francis Hargrave ed., 1980) (1792) (stating that Star Chamber dates from the twelfth century reign of Henry II). For more information on the Court of Star Chamber, see 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).

2. *See* Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004); K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662 (2003); Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513 (2003).

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 decisionmaking 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. While procedural justice *is* concerned with the benefits of accuracy and the costs of adjudication, it is *not solely* concerned with those 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.

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 this

3. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307 (1994) [hereinafter Kaplow, *The Value of Accuracy in Adjudication*].

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

5. *See* Mathews v. Eldridge, 424 U.S. 319, 347–49 (1976) (using a balancing approach to resolve the question of whether the denial of an opportunity to be heard violates due process); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950) (using a balancing approach to resolve the question of whether due process requires notice of a proceeding).

6. *See* Robert G. 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, *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).

question is to take up the ex post perspective.[7] Imagine that a legal proceeding is complete and 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 are 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 procedural rights."[9] The implication of this conclusion 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,

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. Alice Kaswan provides a very clear example of this sort of argument:

> 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.

Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1046–47 (2003).

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

then the ideal procedure would discern the truth about the facts and apply the law to those facts with 100% accuracy. From the modest premise that outcomes matter, 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 100% 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 matter 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]

Procedural perfection is unattainable. No conceivable system of procedure can guarantee perfect accuracy. Approaching procedural perfection is unaffordable because a system that achieved the highest

10. Henry Friendly makes the point well:

> 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.

Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975).

11. The claim made in the text requires qualification. It might be argued that the costs of accuracy (and, for reasons that are established below, the value of participation, *see infra* Part V) 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*, *at* http://users.ox.ac.uk/~magd1534/JDG/cohen2.pdf (last visited Nov. 8, 2004). The assumption 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 of 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' fees, filing fees, and so forth.

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 a new trial, appeals, and, for some types of errors, collateral attacks) would 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. This view, however, is incomplete for many reasons, not the least of which 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 toward 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 law, (b) that the content of the law 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

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

problems would exist 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. How 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 their 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 the problems of imperfect knowledge, incomplete specification, and partiality, legal disputes will arise. Conversely, with perfect knowledge, complete specification, and impartiality, almost every dispute could settle.[13] From the ex post perspective, the role of procedure is to

13. The sentiment that every dispute could settle is an exaggeration. Settlement might be thwarted if the legal system provided incentives for delay, for example, if the defendant was not

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, and the judgment has become final. Legal proceedings communicate information about law and fact to parties and others. They also 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 the 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 end. Criminal defendants are coerced by force, not guided by legal norms specified by a procedure. We should not, however, 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, a coercive order does not issue. Rather, the judgment simply declares the parties' legal rights and obligations. Declaratory judgments can guide action without coercion, precisely because they provide information about law and fact that can overcome the

required to pay the plaintiff prejudgment 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).

15. *See* EDWIN 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 suffices to ensure obedience."). *See generally* Edwin Borchard, *The Declaratory Judgment—A Needed Procedural Reform, Part I*, 28 YALE L.J. 1 (1918) (tracing the historical development of declaratory judgments); Edwin Borchard, *The Declaratory Judgment—A Needed Procedural Reform, Part II*, 28 YALE L.J. 105 (1918) (analyzing declaratory actions and judgments from the time to "determine the scope of and limitations upon" them); Edwin M. Borchard, *Declaratory Judgments*, *in* LECTURES ON LEGAL TOPICS 243, 245 (Ass'n of the Bar of the City of N.Y. ed., 1928); Edson R. Sunderland, *The Courts as Authorized Legal Advisors of the People*, 54 AM. L. REV. 161 (1920); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69 (1917); Developments in the Law, *Declaratory Judgments—1941–1949*, 62 HARV. L. REV. 787 (1949).

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 procedural law.

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 may regard the judgment as authoritative and binding—that is, as providing good and sufficient reason to pay the judgment or obey the injunction. If adjudication fails and the losing party resists enforcement, further proceedings 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—for example, 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? We might begin with the assumption that the substantive rules of law are themselves legitimate. An accurate outcome would 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. This account of the legitimate authority of procedure is called the derivative theory of procedural legitimacy.

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

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 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, require rights of participation to establish legitimacy. This idea—which we shall call "the participatory legitimacy thesis"—will be explicated in due course.[17]

17. The participatory legitimacy thesis is developed and defended in Part V.

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. This theory 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.

The work of constructing a theory of procedural legitimacy 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 a 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, the participation model, assumes that the very idea of a correct outcome must be understood as a function of a 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 of whether a right of participation can be justified for reasons that are not reducible to either participation's effect on accuracy or its effect on the cost of adjudication. The most important result of Part V is the participatory legitimacy thesis, the idea that 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.

The central normative thrust of the procedural justice theory 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 any theory of procedural justice is not well defined. But as we all know, the substance and procedure problem is a tough nut to crack. The 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 can be approached from many directions. We might attempt to begin a priori with a 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 U.S. Supreme Court's decision in *Erie Railroad 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 should 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

18. Erie R.R. v. Tompkins, 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, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989) [hereinafter Freer, *Mid-Life Crisis*]; Richard D. Freer, *Some Thoughts on the State of* Erie *after* Gasperini, 76 TEX. L. REV. 1637 (1998) [hereinafter Freer, *Some Thoughts*]; 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).

from procedure. Every lawyer educated in American procedure knows that this task created an enduring 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 distinction 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 opinions and scholarship that address what procedure is in a wide variety of concrete contexts. Additionally, 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, lawyers, 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 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 federal general 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

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 the 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) (examining how principles and methodologies of conflict of law analysis can "prove useful in the *Erie* setting"). The *locus classicus* is Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

21. *Erie*, 304 U.S. at 78.

22. *Id*.

sentence in Justice Reed's concurring opinion: "The line between procedural and substantive law 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? 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 examples 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 is 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] Additionally, 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]

23. *Id*. at 92 (Reed, J., concurring).

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, *Mid-Life Crisis*, *supra* note 18, at 1102.

27. *Id.* at 1108–10.

28. Justice Stewart explained his method thus:

> 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.

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

29. Michael Moore calls this approach "the paradigm case theory," which he sees as one of the two "conventionalist theories of meaning." Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 295 (1985).

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

Furthermore, there are good reasons to doubt the efficacy of intuitionist formalism as a practical decision procedure. If *Erie* has any lesson, it is Justice Reed's observation about the line between substance and procedure being hazy, which has been vindicated by experience. No one familiar with the cases is likely to believe 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, our 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 (like 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 the case in

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 whether and why pleading rules are procedural in nature. One might produce a microtheory for each and every legal rule that our intuitions count 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, 110–12 (1945), but intuitive formalism suggests the opposite result—that limitations periods are procedural rather than substantive in nature.

which the Court itself first attempted to develop a deep answer to the question, *Guaranty Trust Co. v. York*.[32]

a. 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 applied to the plaintiff's claim. This would determine whether an action for breach of fiduciary duty would be time-barred; the former doomed the claim, while the latter allowed it to go forward.[33] Given Justice Reed's statement in *Erie*, one might think that this would turn on 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 keywords 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]

Justice 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*

32. *Id.* at 99.

33. *Id.* at 100–01. *See also id.* at 107 ("[T]his 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 (citation omitted).

> *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 was 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, 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 were presented by Chief Justice Warren 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.[37] Under Massachusetts law, in-hand service was required.[38] Is the choice between these rules outcome determinative? Chief Justice Warren answered thus:

> 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 the 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.[39]

Why does every procedural variation seem outcome determinative, post hoc, from the perspective of the termination of litigation? The assumption on which the reasoning of *Hanna* rests is that procedural rules are enforced

35. *Id.* at 109 (emphasis added).
36. Hanna v. Plumer, 380 U.S. 460 (1965).
37. *Id.* at 461.
38. *Id.* at 462.
39. *Id*. at 468–69 (emphasis added).

through outcome-affecting rulings.[40] 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 accordance 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, your 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 an ex post perspective of the termination of the litigation will not serve as the criterion for what counts as procedure. In that context, the proper formulation of the test would be whether a given 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.[41]

b. Outcome Determination: Ex Ante from Initiation

If *Hanna* 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 ask 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.[42]

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 determinative

40. 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 the claim preclusive (res judicata) effect is given only to judgments that are on the merits. *See* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 131.30 (3d ed. 1997).

41. 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.

42. *Hanna*, 380 U.S. at 469 (footnotes omitted).

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 balances the cost of precaution against the cost of 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 of 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.

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; and (4) it classifies forum-selection rules (for example, venue and jurisdictional rules) as substantive. Each of these points deserves comment.

a. 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 is to examine the text of the Rules Enabling Act,[43] the federal statute that authorizes the Supreme Court to

43. Rules Enabling Act, 28 U.S.C. § 2072 (2000).

create rules of procedure and evidence for the federal trial courts.[44] The Act provides that

> (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.[45]

Subsection (a) empowers the Supreme Court to create "general rules of practice and procedure" while subsection (b) prohibits the Court from making rules that "abridge, enlarge, or modify any substantive rights."[46] 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."[47] That is, it is possible for a procedural norm to alter a substantive right.

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 pled with particularity,[48] we could imagine a rule that requires a level of particularity that is, in practice, unattainable. For example, the Private Securities Litigation Reform Act of 1995[49] ("PSLRA") provides pleading rules for securities fraud actions[50]

44. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1168–69 (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).

45. 28 U.S.C. § 2072(a)–(b).

46. *Id.*

47. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 287. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

48. FED. R. CIV. P. 9(b).

49. Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

50. *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 Isaacson, *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); 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*,

that are far more difficult for plaintiffs to meet than the transsubstantive rules of pleading contained in the Federal Rules of Civil Procedure.[51] If the pleading burden is raised 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 Meir Dan-Cohen,[52] the point is that rules of procedure provide "decision rules" (directed at officials such as judges) that 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 are 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 become de facto rules of conduct.

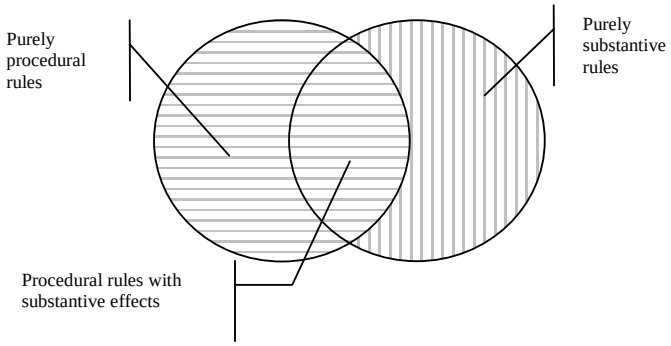
Before proceeding further, I should note that this criticism of the ex ante outcome-determination test is not aimed at the usefulness of the test for *Erie* purposes. Rather, my point is that this test cannot, by itself, provide the criterion by which we define substance and procedure. Why not? Because the ex ante outcome-determination test does not distinguish between the category of procedural rules with substantive effects and the category of purely substantive rules. This point is illustrated by Figure 1 below.

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); 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).

51. *See* FED. R. CIV. P. 8–9.

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

FIGURE 1. Substance and procedure



b. Accuracy Effects

There is a second reason for rejecting the ex ante outcome determination test: it 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 hypertechnical 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 skills and that it therefore 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 pretheoretical 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. The difference between the less accurate procedure and the more accurate procedure is not a difference of substantive law, however, simply because procedural improvements can make the system more accurate in a predictable way.

c. 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. In this situation, as a plaintiff I must choose between two procedural systems, an expensive system that will require me to expend more than the value of the claim to get relief and a cheap system that will permit me to pursue my claim to judgment without such an expenditure; from my point of view, then, 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 transform 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.

d. Forum Selection Rules

The fourth failure of ex ante outcome determination is very specific but nonetheless quite telling. Rules of jurisdiction and venue are paradigmatic 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 over a claim, it will be dismissed. Once again, the ex ante outcome-determination test fails to sort properly.

e. 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.[53]

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. Justice 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 those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[54]

The key phrase is "primary decisions respecting human conduct."[55] This test, although never endorsed explicitly by the Supreme Court, has been influential in the *Erie* context.[56]

The meaning of Justice 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.[57] By "inside the courtroom" we refer not only to 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 refer to the full range of human conduct from driving automobiles to selling real estate and entering into contracts. Of course, this primary conduct may take place inside a courtroom where torts may be committed, property sold, or contracts made. The topographic metaphor—inside and outside the courtroom—stands for a larger distinction.

53. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

54. *Id.*

55. *Id.*

56. For example, Judge 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 Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995). Posner does not cite Justice Harlan, but the connection is obvious, as has been noted by Freer. *See* Freer, *Some Thoughts*, *supra* note 18, at 1661. For a discussion of the influence of Justice 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) (using Justice Harlan's definition of substantive rules).

57. *See S.A. Healy Co.*, 60 F.3d at 310.

So, what distinction stands behind this metaphor? Serving process, drafting complaints, and taking depositions are just as much human conduct as speeding, buying a home, or entering into a personal services contract. Using Justice Harlan's distinction, what marks out the latter as primary decisions respecting human conduct?[58] The danger of circularity is apparent. We cannot use procedure or process, or substance or substantive, to mark the distinction because 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 and which are not. We know what lawsuits are, and we know under what conditions parties become parties to disputes. We also know when parties 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 usages that do not depend directly on the answer to the substance-procedure question. Once we are able to identify the contexts in which litigation occurs, we then are able to apply Justice Harlan's primary conduct test. A rule is procedural if its function is to regulate adjudication-related conduct. A rule 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 types of conduct. Rules that have both procedural and substantive functions may, nonetheless, have a function that dominates.[59]

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, I employed two perspectives—ex post (looking back from the end of litigation) and ex ante (looking forward from the point immediately prior to litigation). I can, however, move the ex ante perspective back in my 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 view a dispute ex ante from the point in time before

58. *See Hanna*, 380 U.S. at 475 (Harlan, J. concurring).

59. In this Article, I use the word "function" in a crucial role, and I have chosen that word rather than effect or purpose. We might define the line between substance and procedure by referring to the effects of legal rules. For example, tort law affects primary conduct and pleading rules affect litigation-related conduct. Or we might draw the same line by inquiring into the purpose of legal rules, for example, 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" in this context implies that rules themselves have a purpose or *telos*, and the ends of the rules are revealed in part by the effects that the rules have.

the accident occurred, before the contract negotiations began, and so forth. From that perspective, we can ask whether the legal rule in question would have altered the ways the parties to the dispute would have behaved before litigation commenced. From this perspective, we might define substantive rules as those that would alter predispute (primary) conduct.[60]

The *Restatement (Second) of Conflict of Laws* applies the ex ante perspective of a person deciding how to act before a dispute arises. In applying this perspective, it argues that a forum should apply 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.[61]

The *Restatement* paints with too broad a brush. In practice, rules of judicial administration directly affect the way litigants behave before disputes arise. Strict pleading rules may assure potential defendants that they can engage in certain conduct with the confidence that claims against them 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 versus procedure question has been theoretically cautious and mostly doctrinal—closely tied to the

60. The focus on predispute conduct emphasizes an important fact about the relationship between procedure and conduct that occurs postdispute but before the complaint is filed. During this period, the parties may interact in a variety of ways: a demand letter may be dispatched, a settlement offer may be 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 Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993–95 (1979) (discussing the interplay between substantive and procedural law in divorce litigation); 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) (discussing the interplay between substantive and procedural law in civil rights litigation).

61. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a (1971).

development of the *Erie* doctrine in the context of concrete cases with particular facts. But before proceeding further, we must grasp the abstract distinction between substance and procedure. Such a grasp is elusive precisely because of the entanglement of substance and procedure. By avoiding the complex particularity of the actual legal world, a thought experiment will allow us to see substance and procedure in a simplified legal environment. If the actual world of substance and procedure is a jungle, overgrown by intertwined strands of substance and procedure, we need a "desert landscape" so substance and procedure can stand in splendid isolation.[62]

This thought experiment posits a 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 posited world vivid and simple enough for an immediate intuitive grasp. The formal version aims to make this possible world precise and transparent.

1. The Informal Thought Experiment: The Cone of Silence

Imagine a world in which legal institutions (judicial, legislative, and executive officials) are "acoustically separated" from ordinary citizens.[63] As an aid to your imagination, you might picture a giant cone of silence covering the government complex, preventing any transfer of information from legal institutions to ordinary citizens with only a few exceptions.

What are the exceptions? First, a code of conduct regulating matters such as contract, criminal activity, property, and torts is promulgated by the legislature and allowed to pass through the cone to the outside world, where each citizen commits the code to memory. Second, information relevant to particular legal disputes, such as 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. Finally, judgments (orders to pay money damages, injunctions, and orders for incarceration) pass through the cone into the outside world.

62. *Cf.* Willard Van Orman Quine, *On What There Is*, *in* 2 REVIEW OF METAPHYSICS (1948), *reprinted in* WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW: LOGICO-PHILOSOPHICAL ESSAYS 1, 4 (2d revised ed. 1961) (using the "desert landscape" metaphor to contrast its pleasing aesthetic with an unattractive overpopulated universe).

63. *See* Dan-Cohen, *supra* note 52, at 630.

To those outside the cone of silence, the system of adjudication is a black box: information flows in and 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 citizens outside the cone are the rules of substance. Because of the acoustic separation between the institutions of adjudication and the outside world, the categories of substance and procedure are well defined and mutually exclusive.

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:

a. 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*.[64] Hart's distinction "discriminate[s] between two different though related types" of rules[65]:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do 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.[66]

Secondary rules, in Hart's sense, encompass the rules of contracts and trusts, which permit private individuals to create, modify, and extinguish primary obligations. The secondary rules encompass the rules that define the powers of legislatures and administrative agencies—powers to make general laws and rules that create, modify, or extinguish both primary obligations and secondary rules. Finally and *crucially*, secondary rules

64. H.L.A. HART, THE CONCEPT OF LAW 80–99 (2d ed. 1994).
65. *Id*. at 80.
66. *Id.* at 81.

allow adjudicators to determine the incidence and control the operation of other primary and secondary rules in particular cases.

b. Acoustic Separation Between Conduct Rules and Decision Rules

The second distinction that we need to formalize our thought experiment is the idea of acoustic separation between conduct and decision rules—that is, the cone of silence. Formulated in a more rigorous way the idea of acoustic separation specifies domains, between which information of a certain type does not flow. Dan-Cohen has explored 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." [67]

Dan-Cohen's formulation is evocative but not formally complete. Acoustic separation is insufficient, for the purposes of our experiment, because 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.

c. Possible Worlds

In the actual world, only limited acoustic separation exists between the officials who implement rules of decision and procedure, on the one hand, and the citizens whose actions are governed by rules of conduct, on the other. Our thought experiment requires that we posit a hypothetical situation or possible world[68]—to use the notion made famous by Gottfried Leibniz[69] and developed by the contemporary philosophers Saul Kripke[70]

67. Dan-Cohen, *supra* note 52, at 630.

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

69. *See* GOTTFRIED WILHELM FREIHERR VON LEIBNIZ, *The Theodicy*, *in* LEIBNIZ: SELECTIONS 509, 509–11 (Philip P. Weiner ed., 1951) (introducing the idea of possible worlds). Leibniz used the idea of a possible world to answer the argument against the existence of an omnipotent and beneficent God from the problem of evil. The argument is not proven, Leibniz maintained, until it is shown that the

and David Lewis.[71] The point of the thought experiment is neither that the actual world could become this possible world nor that this possible world is consistent with the laws of natural science and human psychology and sociology. 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 thought 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 key features, but abstracts from the complex details of actual legal systems. 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 that 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 attorneys' fees are borne by the State.

4. The Code is divided into four parts:

i. The Constitutional Code, which consists of secondary rules that confer power on the legislature to enact, modify, or terminate provisions of the Code.

ii. The Code of Conduct, which consists entirely of conduct rules that are addressed to citizens, including primary rules, such as criminal prohibitions, and secondary rules, such as contract law.

iii. The Code of Decision, which consists of decision rules addressed to legal officials, that attaches legal consequences to violations of the primary and secondary rules either contained in or authorized by the Code of Conduct.

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.

70. *See* SAUL A. KRIPKE, NAMING AND NECESSITY (rev. ed. 1980) (summarizing Kripke's philosophy of language and his mind-body problem theory).

71. *See* DAVID LEWIS, ON THE PLURALITY OF WORLDS (1986) (defending modal realism, which posits the existence of numerous alternate world universes).

vi. The Code of Adjudication, which consists of rules for conducting dispute resolution by the unified judiciary specified above. These rules include (a) conduct rules for the legal representatives of parties in civil and criminal actions and (b) decision rules for judges, which define the actions that judges must take in response to each possible action 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 specified above. It further specifies that all legal rules aiming at the regulation of conduct shall be included in the Code of Conduct and that the 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, that is, 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 that the Code permits, forbids, or requires, 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 except that 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 imagining 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 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 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.[72] 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.

72. The Code of Conduct is clearly substantive because 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 is 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 (discussing procedural functions of rules of decision).

Thus, 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. 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 the primary conduct of citizens by varying the rules of procedure. Moreover, procedural rules may have the unintended consequence of affecting conduct to the extent that they may produce inaccurate results that can be systematically predicted. In the actual world, substance and procedure are entangled.

Nonetheless, the thought experiment allows theorists to analyze the entanglement of the procedural and substantive dimensions of actual rules. 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 allows us to see clearly the entangled strands of substance and procedure.

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."[73] The rigor of the method does not imply that it provides a determinate answer for every case. When we look at the history of actual rules, their functions may be difficult to discern. This is an epistemological problem stemming 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 it does not undermine 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

73. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

about the world. When that knowledge is unavailable, characterizing a rule as procedural or substantive may be impossible. Furthermore, one may not be able to untangle the strands of substance and procedure. Nonetheless, even in these cases, the thought experiment provides a means of identifying the knowledge that would be decisive if it became available.

The thought experiment performs another important function by providing a mechanism for distinguishing form from 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, as in Table 1.

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 (for example, the Federal Rules of Civil Procedure) and codes of conduct (for example, the California Penal Code).

Finally, the purpose 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 demonstrate 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. As Justice Frankfurter articulated in the *York* case, "[n]either 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used."[74] The New Jersey Supreme Court has opined that "it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.'"[75] Scott Matheson argued that "[l]aw 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."[76] And finally, Judge Easterbrook once wrote that "[s]ubstance and process are intimately related. The procedures used 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."[77]

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 substantive function: these are rules 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 assumes that procedural rules regulate the sphere of adjudicative institutions. Similarly, the idealization of a pure rule of substance posits that the function of the

74. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

75. Busik v. Levine, 307 A.2d 571, 578 (N.J. 1973).

76. Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 223 (1987) (footnotes omitted).

77. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13.

substantive law is to regulate primary conduct—the whole 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. However, rules that are formally procedural may have a substantive function. There are two types of rules that we might call "substantive procedure." The first involves deliberate use of procedural forms to modify substantive decision rules. The second involves the action-guiding role of procedures that particularize general legal norms. Let us begin with type one, the simplest case of substantive procedure.

a. 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.[78]

A familiar example of a substantive rule cast in procedural form is the parol evidence rule, which excludes oral evidence of the content of a written contract. The parol 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 experiment of disentangling the substantive and procedural elements of the rule. Suppose that we thought the parol evidence rule truly was a rule of evidentiary procedure. In that case, the parol 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 parol evidence rule would fail to perform its substantive function. The actual parol evidence rule is addressed to contracting parties; the rule informs the parties that in the case of an integrated writing, oral modifications or

78. *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) (examining the interplay between procedural and substantive legal reform in the heightened federal pleading regime); 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) (discussing whether court use of procedural law to address judicially perceived limitations in the substantive law undermines public confidence in the legal process).

supplements do not have legal force. That is, the parol evidence rule is a secondary rule of substantive law (in Hart's sense of "secondary"). The parol 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 parol 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 parol evidence of oral supplements or modifications would be excluded by the general evidentiary rule of relevance.

Another important example of a rule with substantive function and procedural form is provided by the pleading provisions of the PSLRA[79] and its sibling, the Securities Litigation Uniform Standards Act.[80] The PSLRA modifies the transsubstantive rules of pleading provided by the Federal Rules of Civil Procedure 8(a)(2) and 9(b). [81] 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."[82] Rule 9(b) provides that allegations of fraud must be made with particularity.[83] The general pleading standard of Rule 8(a)(2) requires only a minimal level of factual detail.[84] Even Rule 9(b)'s requirement that fraud be pled with particularity has been interpreted to allow plaintiffs to allege fraud by specifying only the statement or conduct that was the basis of the

79. Securities Litigation Uniform Standards Act, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.). *See generally* Patricia J. Meyer, Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517 (1998) (analyzing various interpretations of procedural pleading standards for securities fraud and their substantive function); 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) (same).

80. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections 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 (1998) (discussing developments that led to the Act and analyzing its substantive effect on securities fraud law); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1 (1998) (discussing how the Act preempts state substantive law).

81. FED. R. CIV. P. 8(a)(2), 9(b). *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (discussing the survival of the heightened pleading requirements despite the trend toward liberal pleading standards); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

82. FED. R. CIV. P. 8(a)(2).

83. FED. R. CIV. P. 9(b).

84. *See, e.g.*, FED. R. CIV. P. Form 9 (providing only sketchy information in the model complaint for negligence).

allegation.[85] Not all false statements are fraudulent, however, and in the context of a securities fraud action, predictions of future business success may give rise to allegations of "fraud by hindsight" when a business experiences unanticipated turbulence. Defending securities fraud actions is expensive and the fact that the action is pending may create uncertainties that interfere 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—for example, the kinds of statements made on behalf of firms to potential investors. In addition, the Federal Rules of Civil Procedure establish tough standards for summary judgment[86] and directed verdicts.[87]

The PSLRA 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."[88] Commentators on the PSLRA have observed that this language seems designed for a substantive purpose. For example, Leslie M. Kelleher observes that

> [p]artisan 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.[89]

Kelleher concludes that

> [t]he 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 hazy line between substance and procedure has

85. *See* Denny v. Carey, 72 F.R.D. 574, 578, 580 (E.D. Pa. 1976) (reasoning that the particularity requirement of Rule 9(b) is satisfied if a plaintiff identifies the circumstances constituting fraud so that a defendant can adequately answer the plaintiff's allegations).

86. *See* FED. R. CIV. P. 56.

87. *See* FED. R. CIV. P. 50(a).

88. *See* 15 U.S.C. § 78u-4(b)(2) (2000).

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

> been blurred further, and we should expect to see even more instances of statutory procedural provisions.[90]

The PSLRA is just one of many examples of type one (functionally substantive rules cast in procedural form).[91] The essential structure of this type of entanglement of substance and procedure can be analyzed using the model of acoustic separation. The PSLRA uses procedural rules (that is, rules that would be found in the Code of Adjudication) to indirectly modify substantive decision rules (that is, 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 (the Code of Conduct).

b. 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, they are procedures that are action guiding. The standard picture of substance and procedure is that substantive rules of law function to guide primary conduct, conduct that occurs 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 the declaratory judgment.[92] Declaratory judgments have two critical features: (1) they take a general legal rule and apply it to a particular factual context, and (2) they 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 legislate for particular individuals (or entities) on particular occasions.

90. *Id.* at 61 (footnotes omitted).

91. *See* Parness et al., *supra* note 78, at 414–24 (listing federal securities claims, New Jersey and Georgia professional malpractice claims, medical malpractice claims, requests for punitive damages, childhood sexual abuse claims, and federal civil rights claims as examples of substantive rules cast in procedural form).

92. For a collection of sources on declaratory judgments, see *supra* note 15.

Declaratory judgments provide a 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 backward (ex ante). Sometimes a damage award only guides action to the extent that it requires an act of payment in satisfaction of the 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 and issue preclusion guide action by making judgments, findings, and rulings explicitly binding parties in contexts outside the four corners of a particular civil action.[93]

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.[94] The possible world of acoustic separation of substance and procedure allows us to appreciate the significance of procedure's particularization function. When we laid out the conditions of acoustic separation, we 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.

93. 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 conclusion of law in a prior adjudication becomes binding on the parties to that adjudication.

94. *See supra* Part I.A.

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 court rules that directly impact the litigation process. Type two involves the more general relationship between conduct rules and decision rules.

a. Procedural Substance: Type One—Formal Conduct Rules with Intentionally Procedural Functions

In the world of acoustic separation, 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 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.[95] 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.

b. 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[96] (the demurrer in some state systems or the 12(b)(6) motion in federal court[97]).

95. *See generally* JAMIE S. GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, DESTRUCTION OF EVIDENCE (2001); Stephen Marzen & Lawrence Solum, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L. J. 1085 (1987) (analyzing the destruction of evidence with proposals for a coherent judicial approach).

96. *See* FED. R. CIV. P. 50(a).

97. *See* FED. R. CIV. P. 12(b)(6).

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.

The summary judgment motion presents another context.[98] 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 does not. Operationally, summary judgment standards will require that affidavits, documents, or discovery responses containing certain types of facts be put before the court.[99] Once again, the substantive law is translated into standards for resolution of a procedural question.

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 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 and mechanisms that are formally procedural nonetheless perform substantive functions, for example, the PSLRA or declaratory judgments. Rules that are formally substantive perform procedural functions, for example, the spoliation tort or the substantive standards for demurrers and summary judgments. Table 2 summarizes the modalities of entanglement.

98. *See* FED. R. CIV. P. 56.
99. FED. R. CIV. P. 56(c).

TABLE 2. Modalities of entanglement

	Substantive Form Procedural Function	Procedural Form, Substantive Function
Type I (Intentional)	Formal Conduct Rules with Intentionally Procedural Functions (Example: spoliation tort)	Procedural Rules with Intentionally Substantive Functions (Example: PSLRA)
Type II (Particularized)	Particularized Decision Rules (Example: particularized standard for summary judgment)	Particularized Conduct Rules (Example: declaratory judgment)

In both the case of substantive procedure and 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 PSLRA 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, which 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 the particularization involved in Type II entanglement is a necessary feature of any system of adjudication. In the Introduction we explored 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 incomplete problem of imperfect knowledge of law and fact, (2) the problem of 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 it, 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."[100]

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 PSLRA could not achieve its goals in a world where those who issue securities are 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 because the acoustic separation between substance and procedure cannot be 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.[101] Substance was one thing, and procedure another—although the line between the two might be hazy.[102] The development of the *Erie* doctrine involves a series of attempts to operationalize this distinction—to render clear that which is hazy. The outcome-determination test (in both its original form and as reinterpreted in

100. Geoffrey Hazard, *The Effect of the Class Action Device upon the Substantive Law*, *in* CLASS ACTIONS: EXPERTS FROM A SYMPOSIUM BEFORE THE JUDICIAL CONFERENCE OF THE FIFTH JUDICIAL CIRCUIT, 58 F.R.D. 307, 307 (1973).

101. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 91–92 (1938) (Reed, J., concurring).

102. *See id*. at 92.

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 from procedure.[103] A more promising approach for this task was suggested by Justice Harlan's concurrence in *Hanna*; his concurrence was premised on the notion that substantive law regulates primary conduct and procedural law regulates the adjudicative process.[104] But Justice Harlan's suggestion runs into the problem of entanglement, which is exemplified by the PSLRA's intentional use of procedural forms to achieve substantive goals.[105] The thought experiment acoustically separating substance from procedure allows us to precisely characterize this entanglement by comparing actual legal rules to the form that they would take in the world of the thought experiment. 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 yields the conclusion that one source of entanglement—the need to particularize general rules of substance and procedure—is ineliminable, even in the thought experiment of acoustic separation.

The upshot of our investigation is not a deconstruction of the distinction between substance and procedure. Instead, the thought experiment yields a precise analytic tool for appreciating procedural forms and functions and 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 Article 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

103. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945); Hanna v. Plumer, 380 U.S. 460, 468–69 (1965).

104. *See Hanna*, 380 U.S. at 475 (Harlan, J.,- concurring).

105. *See, e.g.*, 15. U.S.C. § 78u-4(b)(1)–(2) (2000).

plausible relationship between this Article 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, implying 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 Part IV, "Views of Procedural Justice."

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 following 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. The theory of procedural justice I offer here is intended to fit and justify the existing procedural landscape. This approach is, of course, familiar from the work of Dworkin.[106]

Dworkin's own elaboration of his theory utilizes a heuristic device, an imaginary judge named Hercules. In an early essay, "Hard Cases," Dworkin posited that Hercules was confronted with a difficult case, in which the settled law did not provide a clear answer.[107] 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 fair procedure contained in the

106. *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 does not offer an interpretation of the Due Process Clause, but instead develops a theory of procedural justice.

107. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 106, at 105–30.

Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.[108] To decide this hard case, Hercules must construct a theory of procedural due process. We might imagine that his decisionmaking 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 language 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 a 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?"[109]

One caveat should be noted at once: I have presented Hercules' method as a linear two-step process, but this oversimplifies the theory for purposes of simplicity and clarity.[110] Let us pause for a moment and examine the relationship between the two criteria, fit and justification, for evaluating a theory of procedural justice. 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 basic features of civil procedure, such as the following: procedural due process doctrine, personal jurisdiction, the rules of pleading and joinder, the system of discovery, 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. 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 we have a system allocating power between the federal government and the states. There may be aspects of civil procedure that are mostly a

108. U.S. CONST. amends. V, XIV.

109. 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, such as textualism or originalism.

110. 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 106, at 231.

matter of convention.[111] 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, for example, whether there are to be pleadings beyond the answer or reply,[112] 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 decisions on the merits as opposed to procedural technicalities.[113]

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 conventions, or arbitrary within certain limits.

The second criterion is justification: what theory of procedural fairness offers the best justification—that is, the best argument of political morality—in support of our system of civil dispute resolution? This Article approaches the criterion of justification in two ways. First, we will assess proposed models of procedural justice using the familiar tools of moral and political argument. This first method 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 justification 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?[114]

The second dimension of the inquiry into justification is related to the first. Certainly our current practices and ideas about the reform of these practices will have much to tell us about the ideal case of a well-ordered society that is regulated by the best available conception of justice. But the two inquiries are not identical. It might be the case that core features of the

111. Here, I appeal to Aristotle's distinction between conventional and natural justice. *See* ARISTOTLE, *Ethica Nicomachea*, *in* THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH, 1094a1, 1130b31–1131a9 (W.D. Ross trans., Oxford Univ. Press photo. reprint 1949) (1915).

112. 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.

113. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 308–20 (1938) (discussing the shift from code to notice pleading and its merits).

114. For the purposes of the second approach, I shall work within a roughly Rawlsian paradigm. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993). For a summary of John Rawls's theoretical framework as I understand it, see Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549 (1994).

current procedural system would not be included in the ideal case; for example, it might be argued that the best conception of procedural justice would not include the adversary system.

I would like to make one concluding point about the jurisprudential framework within which this Article 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 Article, 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 this Article 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 Emmanuel Kant's, a consequentialist theory like Jeremy Bentham's utilitarianism, or a virtue-centered theory like Aristotle's. In turn, when Hercules constructs a theory of procedural fairness, he ultimately may 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. Essentially, if a legal theory rests on the deepest truths of moral theory, then it may be properly critiqued by cogent attacks on its 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, 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 make good and sufficient reasons available to them; the legitimacy of a democratic society requires this.[115] In other words, 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 provides such reasons cannot claim democratic legitimacy. Public reasons include common sense, the true and uncontroversial results of the sciences (broadly understood), and values embedded in our public legal and political culture that are available to our fellow citizens.[116] 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; that is, we ought to ask if they are public reasons.[117]

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

> (1) Content of Public Reason: Public reason is reason that 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.[118]

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

116. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 224–25.

117. *See id.*; Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1089–92 (1990) (discussing the requirement that judges rule on the basis of public reason); Lawrence B. Solum, *Inclusive Public Reason*, 75 PAC. PHIL. Q. 217 (1994); Lawrence B. Solum, *Law and Public Reason*, APA NEWSLETTERS, Spring 1996, at 54 (1996); Lawrence B. Solum, *Novel Public Reasons*, 29 LOY. L.A. L. REV. 1459 (1996); Solum, *supra* note 114 (discussing Rawls's theory of public reason).

118. RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 224–25.

> (2) Scope of Application: At a minimum, the ideal of public reason applies to deliberation and discussion concerning the basic structure of society and the "constitutional essentials."[119]
>
> (3) Persons Obligated: The duty of civility specified by the ideal creates obligations for (a) both citizens and public officials when they engage in public political debate, (b) citizens when they vote, and (c) public officials when they engage in official action—so long as the debate, vote, or action concerns the subjects specified in (2).[120]
>
> (4) Structure of the Obligation: The ideal requires citizens and public officials to include public reasons in public political debate, but nonpublic reasons may be included, provided that public reasons are offered in due course.[121] 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.[122]
>
> (5) Nature of the Obligation: The duty of civility implied by the ideal is an obligation of political morality, and the ideal does not justify legal restrictions on public political discourse.[123]

If Hercules complies with this ideal of public reason as a judge, he will be 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' theory of procedural fairness may not rely on the deep and controversial premises of particular comprehensive views. He may not rely on the truth of a religious doctrine, Kantianism, utilitarianism, or any other particular comprehensive view. Hercules's theory of procedural justice may, however, incorporate values and principles drawn from the public political culture. Importantly, the fact that a publicly available value or principle is part of or is 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.

My theoretical framework differs from Dworkin's theory to the extent that his view does not incorporate an ideal of public reason with content

119. *Id.* at 224, 227.
120. *See id.* at 217–18.
121. *See id.* at 217–18, 224–26.
122. *See id.* at 236, 252.
123. *Id.* at 217.

similar to that outlined above. Even if Hercules may voyage into the deep waters of ultimate value or ascend to the airy heights of abstract moral theory, this Article will remain on foot, relying for the most part on the familiar tools of legal theory and practical political argument. We 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 is rooted in legal pragmatism. It argues that highly abstract, large-scale theories, like a theory of procedural justice, ought to be eschewed in favor of mid-level or low-level principles. The second foundational objection is grounded in a radical critique of liberal legal theory. It states that 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 is based on concerns raised in critical race theory and feminist jurisprudence. It states 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 Article. Rather, my aim is 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. Foundational questions can be raised properly if they are cogent after we are successful in developing a theory of procedural justice. 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.[124] Some will adhere to a utilitarian theory of procedural justice, others to a theory 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

124. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 161–63 (1996).

seek instead agreement on more particular and concrete principles. Rather than a theory of procedural justice, we ought to be developing mid-level principles.[125] Utilitarians and deontologists may agree that our pleading system ought to provide adequate notice and avoid deciding 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.[126]

This objection must be taken seriously. In the case of procedural justice, the objection has an especially strong appeal because most discussions about procedure (and certainly most thinking by judges, lawyers, and legal scholars) have 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 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 and developing an adequate account of personal jurisdiction or of the *Erie* doctrine. The practice of proceduralists provides a good reason to believe doctrinal detail and mid-level principles provide a better target for theorists than general and abstract principles of procedural justice.

The practice of legal scholars is reflected in judicial opinion. The Supreme Court 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.'"[127] It is well to bear this statement 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. The likelihood that this latter exercise would be futile does not mean that the former task—the identification of general principles of procedural justice—is without promise.

125. A mid-level principle might, for example, address questions such as the following: Should finders of fact be lay persons or judges? Should there be a right of representation by counsel? And should there be an extensive right to pretrial discovery? Mid-level principles address questions that are relatively more particular and concrete than the questions addressed by the relatively general and abstract principles developed here. *See infra* Part VI.

126. SUNSTEIN, *supra* note 124, at 35 (defining this phrase as a situation in which people "accept the principle [but] need not agree on what it entails in particular cases").

127. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 483 (1982) (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974)).

At this point, my claim is simply that there is no way to settle, a priori, 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 tools for analysis. In other words, we ought to have a pragmatic attitude about the usefulness of abstraction and generality in legal thinking. Though pragmatic considerations sometimes counsel against highly abstract, large-scale theories, they do not 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. William James famously asked whether a theory has "cash value."[128] 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 Part III.B. There are strategies and resources available to a theory of procedural justice for coping with the problem of disagreement. It is unrealistic to hope that utilitarians and deontologists will agree across the board about anything, procedural justice included. But a theory of procedural justice need not 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 some version of deontology). In Rawlsian terms, we might seek an "overlapping consensus" between those who affirm the principles for a variety of reasons.[129] As Sunstein puts it, we can seek an "incompletely theorized agreement."[130] When we put the case for the theory, we shall avoid reliance on particular comprehensive doctrines (for example, on utilitarianism, Kantianism, virtue ethics, or particular religious views) and instead rely on public reasons, or those reasons that are widely available to the public at large.[131]

128. As James puts it, "Pragmatism . . . asks its usual question. 'Grant an idea or belief to be true,' it says, 'what concrete difference will its being true make in anyone'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, at 479, 573 (Bruce Kukclick ed., 1987).

129. RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 15.

130. *See* SUNSTEIN, *supra* note 124, at 35.

131. RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 223–24.

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. 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 civil disputes, the thesis states that there is no outcome of any procedural question that we can reasonably see as legally incorrect. More concretely, a Rule 12(b)(6) motion can be properly granted or denied with respect to any conceivable complaint. Any court can properly assert or reject personal 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 state a claim upon which relief can be granted.[132] Others clearly do not.[133] If there are easy cases in procedure, then the strong indeterminacy thesis is false in the procedural domain.[134]

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 a 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 in doctrine. Some cases or rules will not fit the best available theory of procedural justice. With respect to them, the theory will maintain that the decision should be overruled or the rule amended.[135] 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

132. The forms that accompany the Federal Rules of Civil Procedure provide paradigm cases of complaints that should not be dismissed on a motion under Rule 12(b)(6).

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

134. *See* Lawrence B. Solum, *Indeterminacy and Equity*, *in* RADICAL CRITIQUES OF THE LAW 44, 47–48 (Stephen M. Griffin & Robert C.L. Moffat eds., 1997) [hereinafter Solum, *Indeterminacy and Equity*] (giving an example and explanation of an "easy case" in which only one outcome is possible); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 471–72 (1987) [hereinafter Solum, *Indeterminacy Crisis*].

135. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 106, at 118–23.

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 validation 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 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 Perspectivalist Objection

Consider yet another foundational objection to the project of developing a theory of procedural justice. Perspectivalists will argue 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 women and people of color.[136] Surely there is some truth to this objection. The method for theory construction that I have proposed is biased or tilted because it takes existing doctrine as fixed and as the data for which the theory must account. Thus, the interpretive approach incorporates the possibility that existing procedure institutionalizes systematic unfairness.[137]

But the perspectivalist objection does not justify abstention from the project of theory building. First, articulating the notion of procedural

136. *See* Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85 (1994). *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."). *See generally* Lawrence B. Solum, *Virtues and Voices*, 66 CHI.-KENT L. REV. 111 (1990) (discussing the exclusion of the voices of persons of color, women, the poor, and homosexuals from political discourse).

137. 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 ensure that the voices of excluded groups are heard when the rights of individual members of such groups are at stake. *Cf.* Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 453–55 (1994) (suggesting that improved community participation procedures would make administrative agencies more responsive to poor and minority communities); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 350–54, 420–21 (1990) (exploring efficiency reforms of current court procedures that tend to reduce minority access to the courts and decrease advocacy of minority rights).

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.

We have completed our 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 the brief scope 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, we 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 sets out a general framework for thinking about procedural fairness and delineating the subject matter that the theory will cover. Current thinking about procedural fairness has been informed by three ideas laid out and critiqued in Section B. First, the "accuracy model" assumes that the aim of civil dispute resolution is correct application of the law to the facts. Second, the "balancing model" assumes that the aim of civil procedure is to strike a fair balance between the costs and benefits of adjudication. Last, the "participation model" assumes that the very idea of a correct outcome must be understood as a function of a process that guarantees fair and equal participation. Section C 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, I define the topic, relating procedural justice to the notions of corrective and distributive justice, and then lay out three possible views of procedural justice—perfect, imperfect, and pure. In Section 2, I distinguish 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 we shall call "distributive justice" and "corrective 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.[138] 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) apply the 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 the legislative processes by which social benefits and burdens are divided. In this Article, we am concerned with the procedures of corrective justice, and in particular, with the procedures of corrective civil justice—that is, 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.

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.[139] What makes this a fair procedure? One answer is that the criterion for what constitutes a fair outcome, equal slices for all, requires that the slicer pick last. The slicer-picks-last rule is fair because it guarantees accuracy in cutting equal slices. Or does it? A more reliable way to ensure perfectly equal slices would be to use a compass and principles of plane geometry. 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 fair is that it strikes a balance between the importance of the outcome and the cost of getting there; it gets us close to equal shares most of the time at a reasonable price. Thus, the slicer-picks-last rule might be considered fair because it does a good job of balancing. Or is there something even more to the idea that the slicer-picks-last rule is fair? Maybe we believe that the slicer gets a fair share 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

138. *See* ARISTOTLE, *supra* note 111, at 1131b25–1132b20.

139. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 114, at 85.

among the calorie conscious, a bigger slice).[140] The slicer-picks-last rule could be fair because of process independent 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*, Rawls distinguishes between three general 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,

> [t]wo 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.[141]

Rawls argues that the rule for slicing cakes is an example of perfect procedural justice. The person who slices picks last, thereby ensuring 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 that

> [i]mperfect 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

140. *See id*. 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_3, and so forth to 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 he or she believes is 1/n of the original, until all of the slices have been distributed. Using this procedure, the consumers receive slices that they believe are all 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. We might still believe, however, that C_n has received a fair share of the cake because C_n had an opportunity to trim each of these slices and chose not to do so. *See* JOHN ALLEN PAULOS, A MATHEMATICIAN READS THE NEWSPAPER 8 n.* (1995) (describing the procedure in a four-person cake-slicing game). I owe thanks to David Leonard for calling my attention to the *n*- person version of the familiar rule.

141. RAWLS, A THEORY OF JUSTICE, *supra* note 114, at 85.

> 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.[142]

Thus, imperfect procedural justice incorporates the notion of an independent criterion for accuracy but adds the notion of "other ends of the law," or considerations of cost that may be balanced against accuracy. Rawls's final kind of justice is "pure procedural justice":

> [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.[143]

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. Though there are not criteria for the correct outcome, there is an ideal (or actual) set of procedures.

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

2. The Limits of the Enterprise

This Article develops a theory of procedural justice, and before we proceed any further, I should say a few words about the limits of this enterprise. First, we shall limit our 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, including the burden of persuasion beyond a reasonable doubt, the special protections for criminal defendants provided (or formerly provided)

142. *Id.* at 85–86.

143. *Id.* at 86. Rawls notes that his gambling example requires further assumptions, including 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.*

by the privilege against self-incrimination in the Fifth Amendment, and the protections provided by the search and seizure provision of the Fourth Amendment.[144] 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.[145]

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 we 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 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 focuses on adjudication as the application of general rules to particular cases. Our investigation will focus on the civil action at the trial level. This focus elides an important aspect of the system of civil adjudication—the role of appellate courts in developing and modifying general and abstract rules themselves. This role is thematized by the way that the U.S. Supreme Court uses particular cases as a vehicle for announcing general rules of constitutional law. In cases like *Miranda v. Arizona*[146] and *New York Times Co. v. Sullivan*,[147] the Supreme Court acts in a legislative capacity, creating a constitutional code that supplements the actual text of the Constitution. A similar role is played by state courts in

144. 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) (discussing some distinctions between civil and criminal law in a broader analysis of the increasing use of civil remedies to punish criminal conduct); 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, 1878, 1887–90 (1992) (discussing the increasing overlap of civil and criminal law and the potential policy problems associated with this development); 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) (critiquing the distinction between criminal and civil law in the context of indirect contempts); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (discussing punitive civil sanctions and the procedures used to impose those sanctions).

145. At various points in the Article, I will offer remarks that point toward an account of the distinctiveness of criminal procedure. *See infra* Part IV.B.2(b).

146. Miranda v. Arizona, 384 U.S. 436 (1966).

147. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

cases governed by the common law. In cases like *Li v. Yellow Cab Co.*[148] or *MacPherson v. Buick Motor Co.*,[149] 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 my focus will be on the application of general rules to particular cases, for the most part we will simply set aside the special problems and issues raised by judicial lawmaking in civil litigation. The theory offered here is not a theory of the common lawmaking 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.[150] This does not mean that the theory of procedural justice cannot and should not be extended to these contexts; rather, these issues are simply put aside 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.[151]

B. THREE MODELS OF PROCEDURAL JUSTICE

In this section, we examine three simple conceptions or models[152] of procedural justice that are, at least partially, implicit in current legal practice.[153] Each model will be measured against the criteria of fit and

148. Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975).

149. MacPherson v. Buick Motor Co., 111 N.E. 1150 (N.Y. 1916).

150. 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, 30 (1979).

151. In addition to the limits discussed, 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. *See generally* Pinsker v. Pac. Coast Soc'y of Orthodontists, 526 P.2d 253, 260 (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 and that "the association's action must be both substantively rational and procedurally fair").

152. I use "concept" and "conception" to refer to the general idea of procedural justice as opposed to particular theories of procedural justice. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 106, at 103–04; W.B. Gallie, *Essentially Contested Concepts*, *in* 56 PROCEEDINGS OF THE ARISTOTLELIAN SOCIETY 167, 167 (1956).

153. 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, Laurence Tribe distinguishes between the "instrumental" and "intrinsic" values of due process. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) (distinguishing between the "instrumental" and "intrinsic" values of due process). *See also* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of*

justification. For each model we will question whether it accounts for the shape of current doctrine and whether it provides a normatively attractive grounding for that doctrine.

We can begin with the utopian hypothesis that the current doctrine is structured by an implicit conception of perfect procedural justice—or the accuracy model. This hypothesis is shown to be inadequate on grounds of fit. Although a concern for truth-seeking and accuracy does characterize some procedure doctrines, 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: does it pursue accuracy in particular cases or accuracy in the system as a whole?

The shortcomings of the accuracy model lead to a second hypothesis: 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 can 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. If process is the key, 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, namely, the exclusion of all considerations of accuracy and cost as the criteria for procedural fairness. That is, it purchases conceptual purity at the price of plausibility.

Process Scarcity, 46 VAND. L. REV. 561, 598 (1993) (distinguishing between outcome-oriented and process-oriented participation theories).

1. The Accuracy Model

The first model focuses exclusively on accuracy, or the correct application of the law to the facts.[154] 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.[155] Substantive law provides an independent criterion for the correct outcome. Robert Bone has called this the "rights-based" view.[156] The procedural system is designed to ensure 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."[157] One federal court opined that "the ultimate aim of the judicial system is to ascertain the real truth."[158] Thus, liberal pleading rules are designed to guard against erroneous resolutions on technical grounds.[159] Extensive discovery aims to provide the parties with all the relevant

154. *See* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 882 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.").

155. *See* D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 57–61 (1986). *See also* Susan Kneebone, *Natural Justice and Non-Citizens: A Matter of Integrity?*, 26 MELB. U. L. REV. 355, 374 (2002) (characterizing D.J. Galligan as maintaining that "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").

156. Bone defines rights-based views thus:

> 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 increased error cannot be justified simply by citing the aggregate benefits to all resulting from reduced litigation and delay costs.

Bone, *supra* note 153, at 598.

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

158. *See, e.g.*, Headley v. Chrysler Motor Corp., 141 F.R.D. 362, 366 n.21 (D. Mass. 1991).

159. *See, e.g.*, Mahler v. Drake, 43 F.R.D. 1, 3 & n.8 (D.S.C. 1967) (stating the Federal Rules may be construed liberally "in the search for truth as the ultimate justice").

evidence for their case.[160] Accuracy in fact-finding and in the application of law to fact is provided by elaborate trial procedures,[161] including cross examination,[162] neutral judges[163] and juries,[164] rules of evidence,[165] and representation by counsel.[166] A multilevel appellate system provides for the correction of errors made at the trial level.[167] Even statutes of limitations have been explained as a mechanism for enhanced accuracy.[168] 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.[169] That the system is not actually perfect does not mean that perfect procedural justice is not its aspiration; perfect procedural justice can be the animating

160. *See, e.g.*, Burke v. N.Y. City Police Dep't., 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., 220 A.2d 693, 697 (N.J. Super. Ct. 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.").

161. *See, e.g.*, 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 *ex rel.* Mendoza v. Allstate Ins. Co., 673 So. 2d 147, 147 (Fla. Dist. Ct. App. 1996) (per curiam) (stating that "trials . . . function as forums for the search of truth.").

162. *See, e.g.*, *In re* Grant, 936 P.2d 1360, 1364 (Kan. 1997) (Six, J., dissenting) ("As lawyers and judges, we acknowledge cross-examination as an aid in the search for truth.").

163. *See e.g.*, Commonwealth v. Santiago, 591 A.2d 1095, 1113 (Pa. Super. Ct. 1991) (stating that judges must undertake a "search for truth").

164. *See, e.g.*, Ray v. Am. Nat'l Red Cross, 696 A.2d 399, 405 (D.C. Cir. 1996) (stating that the purpose of jury instructions is to aid the jury in its "search for truth").

165. *See, e.g.*, Walstad v. State, 818 P.2d 695, 699 n.6 (Alaska Ct. App. 1991) ("The general purpose of the Rules of Evidence is to facilitate the search for truth.").

166. *See, e.g.*, 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 COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 52 (1967) ("Limiting the right to counsel 'gravely endangers the judicial search for truth.'"). *But see* United States v. Wade, 388 U.S. 218, 258 (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").

167. *See, e.g.*, Shiflett v. Virginia, 447 F.2d 50, 60 (4th Cir. 1971) (en banc) (Winter, J., dissenting) (stating that "at least one appeal is a necessary and desirable step in the search for truth"); United States v. Brown, 50 F.R.D. 110, 112 (D.D.C.) (stating that "appeals, like trials, are a search for truth"), *rev'd on other grounds*, 428 F.2d 1100 (D.C. Cir. 1970).

168. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) (stating that statutes of limitations "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"). For a thorough analysis of the various justifications for statutes of limitations, see generally Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997).

169. *See* Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 575–76, 582 (1994).

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

But this hypothesis will not withstand serious scrutiny 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,

> [i]t 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.[170]

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 protect a correct determination from subsequent reconsideration that can result in error, a prior adjudication doctrine that truly aimed at accuracy would have a much different shape than 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.[171] It cannot account for basic features of procedure doctrine.

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170. Velasquez v. Franz, 589 A.2d 143, 165 (N.J. 1991) (Stein, J., dissenting). The most prominent expression of the idea is from the U.S. Supreme Court's decision in *Jeter v. Hewitt*:

> 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.

Jeter v. Hewitt, 63 U.S. 352, 363–66 (1859). *See* Taxing Dist. of Brownsville v. Loague, 129 U.S. 493, 505 (1889).

171. In the text, I do not consider the possibility that the features of existing doctrine that do not fit the accuracy model should be viewed as "mistakes," which are subject to eventual correction through common law adjudication. *See* DWORKIN, *supra* note 106. 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. 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

This utopian conception 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.[172] 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 would reach a point where society would be required to invest enormous resources for an 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 aiming at accuracy alone cannot 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.[173] 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 was correct; call this "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 "systemic accuracy." Do these two kinds of accuracy track each other, that is, do

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the more modest claim that a theory of procedure that calls 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.

172. Bone articulates the problem thus:

> 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.

See Bone, *supra* note 153, at 599.

173. On the notion of underdeterminacy, see generally Lawrence B. Solum, *Indeterminacy Crisis*, *supra* note 134; Solum, *Indeterminacy and Equity*, *supra* note 134.

procedures that maximize case accuracy also maximize systemic accuracy?[174]

This is a difficult question, and the answer, as one might expect, is it depends. There are some contexts in which the procedure that would result in case accuracy ex post in the particular case would result in systemic, ex ante *in*accuracy. 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*,[175] the U.S. Supreme Court argued that statutes of limitations "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."[176] 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 the evidentiary record is sufficiently preserved to ensure a high likelihood of accurate adjudication. In other words, statutes of limitations purchase systemic accuracy at the price of case accuracy.[177]

174. It might be argued that the procedure that maximizes case accuracy will always maximize system accuracy. 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 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 that incorporates the exception will produce greater systemic accuracy than would a rule without the exception. Therefore, systemic accuracy requires the exception, and the supposed divergence between systemic 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's argument are 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.

175. United States v. Kubrick, 444 U.S. 111 (1979).

176. *Id.* at 117.

177. The substance of this point is recognized by Tyler Ochoa and Andrew Wistrich. *See* Ochoa & Wistrich, *supra* note 168, at 477–79. *See also* Charles C. Callahan, *Statutes of Limitations—Background*, 16 OHIO ST. L.J. 130, 134 (1955).

Another example is provided by the legal rules that deal with a party's destruction of evidence. In *Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*,[178] then-Judge Breyer explained the two different purposes that underlie the spoliation inference, a judge-made rule of evidence that permits a finder of fact to draw an inference against a spoliator, or 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. 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.[179]

What 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

178. Nation-Wide Check Corp. v. Forest Hills Distribs., Inc., 692 F.2d 214 (1st Cir. 1982).

179. *Id.* at 218 (internal citations omitted). The First Circuit also describes the spoliation inference this way:

> 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 factfinder believes that the documents were destroyed accidentally or for an innocent reason, then the fact-finder is free to reject the inference.

Blinzler v. Marriott Int'l., Inc., 81 F.3d 1148, 1158–59 (1st Cir. 1996). *See also* Allen Pen Co. 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).

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 it may not support an inference that the destroyed material was unfavorable to the party who destroyed it. Hence, accuracy in the individual case would be undermined by imposing a penalty for this destruction. From the systemic point of view, however, imposing a penalty on the negligent destruction of evidence might create incentives to be more careful in handling such evidence, improving the long-run accuracy of the system as a whole.

For which sort of accuracy should procedural justice aim? This type of question 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 to decide a particular case, and systemic balancing, in which the factors are balanced to create a general rule, which is then applied to decide particular cases.[180] 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.[181] 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 we have drawn between case accuracy and systemic accuracy.

In 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. If we aim at case accuracy, we achieve procedural justice in the case before us, but we may sacrifice accuracy in future proceedings. If we aim at systemic accuracy, we achieve a system that produces more accurate outcomes in the aggregate, but particular cases require a ruling 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

180. *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 systemic rule balancing and case-by-case balancing).

181. *See* Dan W. Brock, *Utilitarianism*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 824, 824 (Robert Audi ed., 1995).

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 systemic benefits. Instead, we might choose to pursue case accuracy because it 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 systemic accuracy will produce the greatest good for the greatest number.[182] But, as I have already argued,[183] the appeal to general moral theories to arbitrate between conceptions of procedural justice is inconsistent with the ideal of public reason. Our resolution of the tension between systemic and case accuracy will neither command widespread assent nor offer reasons that can be accepted as legitimate by the citizenry at large if it depends on the truth of a particular comprehensive moral doctrine.

The next question is whether we can choose between aiming 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 the individual's entitlements based on an assessment of the merits of his or her 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 the law should treat each of us as an individual 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, that is, so long as they are public and it is possible to comply with them through the exercise of reasonable care. So, I may be penalized for destroying evidence if the rule against it is announced in advance and if the rule allows me the defense that I have made reasonable good faith

182. The passage in the text elides the important distinction between act and rule utilitarianism. The way that rule utilitarianism supports systemic 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 analysis focuses on the consequences of each individual act, in this case the 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.

183. *See supra* Part III.B.

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; and (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. It is modified, though, so that accuracy is a plausible candidate as a component of an ideal of procedural justice, but it is not a candidate for a complete account of procedural justice. The thesis that the system aims 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.

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 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 between accuracy and cost that provides content to an ideal of imperfect procedural justice. 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 would emphasize rights-based constraints on both the nature of the costs that may be imposed and the distribution of these costs. Each of these two approaches is examined in turn.

a. Consequentialist Balancing: The *Mathews v. Eldridge*[184] 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 U.S. Constitution. The most striking example is provided by the balancing test announced in *Mathews v. Eldridge*:[185]

> [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.[186]

This approach is not confined to due process doctrine. It informs courts' decisions in a number of doctrinal areas.[187] Consider, for example, the following 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."[188] The Court made an explicit appeal to a balancing of the benefits of accuracy with its costs.

Beginning with this emphasis on balancing, 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 conforms with the system of rules, which, if universally followed, would produce the best consequences.[189] Let us make

184. Mathews v. Eldridge, 424 U.S. 319 (1976).

185. For scholarly commentary on *Mathews v. Eldridge*, see 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).

186. *Mathews*, 424 U.S. at 334–35.

187. *See, e.g.*, Yorktown Med. Lab. v. Perales, 948 F.2d 84, 90 (2d Cir. 1991) (applying the *Mathews* balancing test to a due process challenge to a state's use of sampling in an audit of a laboratory's Medicaid payment claims); Bell v. Farmer's Ins. Exch., 9 Cal. Rptr. 3d 544, 575 (Ct. App. 2004) (applying the *Mathews* balancing test to determine whether the use of statistical sampling techniques to assess class damages comports with due process); *In re* Travarius O., 799 N.E.2d 510, 515 (Ill. App. Ct. 2003) (analyzing "the possible deprivation of a parent's due process rights in termination and adoption proceedings by balancing the factors enunciated . . . in *Mathews*").

188. Anderson v. City of Bessemer, 470 U.S. 564, 574–75 (1985).

189. *See generally* LYONS, *supra* note 174 (discussing various forms of utilitarianism); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973) (same).

a further simplifying assumption: that all of the relevant costs can be expressed as prices. The resultant approach would 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 types of costs. The first is the cost of erroneous judicial decisions."[190] The second type of cost is "the cost of operating the procedural system."[191] 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. *Mathews 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 that we are operating within postulates that the law is a seamless web.[192] 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 for the shape of existing legal doctrine. Indeed, from Bentham on, utilitarians have been critiqued at least as much as they have been used to explain legal theory. 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. *Mathews* embodies a line of cases in which the plaintiff seeks to extend traditional adversary procedures to administrative action; 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

190. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 549 (4th ed. 1992). *See generally* Louis Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3 (analyzing the economic costs associated with legal reforms to increase accuracy in adjudication).

191. POSNER, *supra* note 190, at 549.

192. *See* DWORKIN, LAW'S EMPIRE, *supra* note 106, at 239–40, 264, 354, 379–91.

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 *Mathews* 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 resolving the vast majority. But even conceding these points, the problems of fit seem overwhelming.

Despite the very broad statement of the holding in *Mathews*, the Supreme Court has not applied the balancing test in practice, even in cases in which the issue is whether a hearing is required. A clear example is the Court's decision in *Richards v. Jefferson County*.[193] There the Alabama Supreme Court gave claim-preclusive effect to a prior judgment that the parties to be bound did not have an opportunity to participate. Rather than balancing, the Court relied on 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.[194]

Indeed, the Court in *Richards* explicitly rejected the weighing of consequences:

> 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 . . . .[195]

193. Richards v. Jefferson County, 517 U.S. 793 (1996).

194. *Id*. at 797 n.4 (citations and emphasis omitted).

195. *Id.* at 802–03.

The Court did not even 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.[196]

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, and thus, 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.[197] 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, especially the 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 appropriate justification for our system of procedure. The right

196. *Id.* at 804–05 (citation omitted).

197. For a very explicit appeal to utilitarian norms, see Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NAT'L TAX J. 497 (1995).

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 an appropriate justification.

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 systemic account for the ways in which a system of procedure should aim for less-than-complete accuracy and for the distribution of costs imposed by such a system? This conception of procedural justice would need to incorporate accounts of the fair distribution of procedural burdens and 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. 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 for most issues in civil litigation. The preponderance of the evidence standard seems designed to spread the risk of error evenly across potential litigants.[198] Why? Consider the alternatives. Suppose that in ordinary civil cases, the plaintiff were required to prevail beyond a 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.

198. Consider the 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 0.2 (and hence the accuracy rate is 0.8) with the risk distributed equally between potential plaintiffs and defendants (each bearing a 0.1 risk of an erroneous decision that goes against them and a 0.1 risk of an erroneous decision in their favor). Suppose further that a procedural change would reduce the overall risk to 0.15 (and hence the accuracy rate is 0.85), but that all of this risk would be borne by plaintiffs. If accuracy alone were considered, then the procedural change would be preferred ($0.85 > 0.8$), but if equal distribution of the risk of error is independently valuable, then the change might be ruled out on the ground that a 0.15 risk of erroneous decisions that disadvantage plaintiffs accompanied by a 0.0 risk of erroneous decisions that disadvantage defendants is less fair than the symmetrical risk that was associated with the baseline error rate.

The risk of error is influenced by many factors. Suppose that the criteria of fit and justification are best satisfied by a fairness-based conception of imperfect procedural justice, requiring an equal distribution of risks among 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.[199] 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 criterion of fairness in the conception of procedural fairness; if the current practice approximates the maximum degree of satisfaction of the criterion 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 among 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 systemic 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,[200] 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 like 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, such as the right to privacy. Rather than balancing the costs of privacy

199. Asymmetrical risks of error might also be justified where they benefit the party that bears the higher risk of error. Thus, in a variation of the example provided above, *supra* note 198, a change from a symmetrical risk of 0.1 for plaintiffs and 0.1 for defendants (total = 0.2) to an asymmetrical risk of 0.05 for plaintiffs and 0.0 for defendants (total = 0.05) is acceptable. This is because the risk of error disadvantaging plaintiffs is reduced ($0.05 < 0.1$) even though it becomes unequal ($0.0 \neq 0.05$).

200. *See* Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303, 304–06 (1988).

invasions against the benefits in terms of increased accuracy, a rights-based conception might look to 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 assess than is the adequacy of a utilitarian conception. Utilitarian accounts are relatively simple in structure, and although the assessment of 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; until that work is done, it simply is not 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 criterion, a rights-based conception could turn out to be empty and impossible to falsify. One could always gerrymander a conception of procedural rights so that it has exactly those rights embodied by existing doctrine. 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 conceptions that are tailored to the shape of existing law. In Part VI, we will examine an articulated theory of procedural justice—albeit one that does not fit within the confines of the balancing model.

3. The Participation Model

Let us now consider a third and final family of conceptions of procedural justice. The participation model holds that procedural fairness requires that those affected by a decision have the option to participate in the process by which the decision is made.[201] The idea that procedural fairness requires participation is a familiar one. In *Marshall v. Jerrico, Inc.*,[202] Justice Marshall wrote that there are "two central concerns of procedural due process, the prevention of unjustified or mistaken

201. *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."); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS 126 (J. Rolan Pennock et al. eds., 1977).

202. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process."[203]

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, the idea that the fairness of a procedure is a function, not of some independent criteria, but instead of the procedure's intrinsic features. This means that the outcome of the procedure is fair, whatever it is, provided that the requirements of the procedure have been satisfied. My discussion of the first interpretation, the "gaming interpretation," briefly explores the notion that litigation should be considered a fair game or contest in which the winners are entitled to prevail if they have played by the rules and are entitled under the rules to win. My discussion of the second, the "dignity interpretation," emphasizes dignity and autonomy as a function of the actual participation of litigants in procedures that affect them. My discussion of the third, the "satisfaction interpretation," argues that participatory process is justified by the greater level of satisfaction it provides to litigants. My discussion of the fourth, the "discourse theory interpretation," suggests an ideal communication situation as the criterion of 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, the gaming interpretation. This interpretation 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 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 deserves its victory, so long as all of the rules were followed.

This theory has been advanced by many, most notably by Bentham,[204] and criticized by others. The theory should properly be viewed as a straw

203. *Id*. at 242.

man or a *reductio* of the participation model. Jerome Frank provides a loose statement of the criticism on the gaming theory:

> 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 trump card, or draws to three aces, or holds back a good horse till the home-stretch . . . ."[205]

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 alternative. 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 choose 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 choose 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 he or 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.[206]

204. 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).

205. JEROME FRANK, COURTS ON TRIAL: MYTHS AND REALITY IN AMERICAN JUSTICE 91 (3d ed. 1973). *See also* Giles v. Maryland, 386 U.S. 66, 102 (1977) (Fortas, J., concurring) (arguing that a trial is "not a sporting event"); William J. Brennan, Jr., *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 (1990).

206. United States v. O'Keefe, 128 F.3d 885, 897 (5th Cir. 1997) (discussing a "level playing field between the prosecution and the defense"); United States v. Hsu, 982 F. Supp. 1022, 1025–26 (E.D. Pa. 1997); Saunders v. City of Philadelphia, No. 97-3251, 1997 WL 400034, at *6 (E.D. Pa. July 11, 1997)

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, legal skill may play a role. As a normative matter, an ideal of procedural justice that is fair to lawyer-contestants is completely unattractive.[207]

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 the 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.[208] 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, that is, the right of

(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 *ex rel.* Basnaw v. Shelter Ins. Co., 698 So. 2d 691, 693 (La. Ct. App. 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.").

207. *See* 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.").

208. The dignity argument is associated with its eloquent exposition by Jerry Mashaw. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158–253 (1985). *See also* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 978 (1993) (stating that "participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual"); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988); Richard B. 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 identity—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 . . . ."); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1391–93 (1991) (asserting that participation enhances respect for the dignity of litigants and reasoned and accurate decisionmaking). For a critique of the dignity theory, see Rutherford, *supra* note 136, at 42–47.

persons (or citizens) to be treated with dignity and respect. A procedure that 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 procedure.

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."[209] A variety of values are invoked in connection with the day-in-court ideal, including equality, individuality, and autonomy, but the most frequently invoked value is dignity. We 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. [210] Mashaw states the intuitive idea as follows:

> At an intuitive level, a dignitary 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 . . . .
>
> . . . 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.[211]

Mashaw argues that his dignitary theory of procedural due process provides both a necessary and sufficient account of the Due Process Clauses.[212]

209. Bone, *supra* note 153, at 619. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) [hereinafter Bone, *Personal and Impersonal Litigative Forms*]; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) [hereinafter Bone, *Day in Court*].

210. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); MASHAW, *supra* note 208; Mashaw, *supra* note 185.

211. MASHAW, *supra* note 208, at 162–63.

212. *Id.* at 169.

There is something to the notion that a right to participation in decisionmaking 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 decisionmaking process is respectful of their autonomy and status as equal citizens (or persons). 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. 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 will not save a sham trial from a charge 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 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 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 (that is, the underlying substantive rights vindicated by a 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, it is difficult to make the case that dignity ranks so high that it always trumps the other rights 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 stories and make litigation decisions may be most satisfactory to participants, even if the process is less accurate or more costly than alternatives that afford less opportunity for participation. Social psychologists have attempted to

measure participant satisfaction levels and other perceptions of various procedures.[213]

For the purposes of discussion, let us assume that social psychologists were able to demonstrate that participation is satisfying to litigants and that this satisfaction 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

213. Social psychology has produced a large literature on procedural justice. *See, e.g.*, 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 (1990) [hereinafter TYLER, OBEY THE LAW]; Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. PERSONALITY & SOC. PSYCHOL. 296, 300 (1986); Joel Brockner & Phyllis Siegel, *Understanding the Interaction Between Procedural and Distributive Justice*, *in* TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 390 (Roderick M. Kramer et al. eds., 1996); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC. REV. 469 (1989); 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. PSYCHOL. 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 & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXPERIMENTAL. SOC. PSYCHOL. 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 Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 967, 968 tbl. 2 (1990); E. Allan Lind & P. Christopher Earley, *Procedural Justice and Culture*, 27 INT'L J. PSYCHOL. 227, 227–40 (1992); E. Allan Lind, Ruth Kanfer, & P. Christopher Garley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (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 (1993) (reviewing TYLER, OBEY THE LAW, *supra*); Blair H. Sheppard, *Justice is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953, 956–57 (1985); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); 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 (1993); Tom R. Tyler, Jonathan D. 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 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 & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621 (1991); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987); 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); Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979).

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 evaluating 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: $U_i = S_i + A_i + B_i - C_i$. But this is the balancing model, not the participation model. In order for the 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 (that is, that $U_i = S_i$), but there is no basis for making such a showing. Even if it could be demonstrated that litigants prefer participatory process, even when they are made aware of the accuracy effects and other social costs and benefits, the satisfaction interpretation still would not be sufficient because civil proceedings have effects on persons who are not litigants. For example, accurate adjudication may produce general deterrence, legal proceedings may be subsidized by public expenditures, and so forth. Thus, litigant satisfaction cannot be the sole determinant 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. Accuracy serves to ensure 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 not 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 the process is not the whole story about procedural fairness. This narrow point does not force 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 participatory process and correct outcomes. Because this interpretation is most fully expressed in the discourse theory offered by Jürgen Habermas, we 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 ensure that both sides have an equal opportunity to present their cases. Decisions are made by neutral third parties. These features suggest that the procedural system might be conceived as the model of the ideal communication situation articulated by Habermas. He has advanced what might be called a discourse theory of truth.[214] On the discourse theory, we parse a truth claim as a claim that the proposition asserted as true would be agreed on 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.[215] The key notion is that "ultimately there can be no separation of the criteria for truth from the criteria for the

214. *See* THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 291–310 (1978). *See also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996); JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984) [hereinafter REASON AND THE RATIONALIZATION OF SOCIETY]; JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., 1987) [hereinafter LIFEWORLD AND SYSTEM]. For an important recent secondary account of Habermas's theory, see A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 751 (2003). For a basic exposition of Habermas's theory, see Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1989). 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's more recent work are found in ARIE BRAND, THE FORCE OF REASON: AN INTRODUCTION TO HABERMAS' *THEORY OF COMMUNICATIVE ACTION* (1990); DAVID M. RASMUSSEN, READING HABERMAS (1990); STEVEN K. WHITE, THE RECENT WORK OF JÜRGEN HABERMAS: REASON, JUSTICE, AND MODERNITY (1988). For a word on the problem of understanding Habermas's language, see MICHAEL 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 Richard J. Bernstein, *Introduction* to HABERMAS AND MODERNITY 1 (Richard J. Bernstein ed., 1985).

215. *See* MCCARTHY, *supra* note 214, at 306.

argumentative settlement of truth claims."[216] 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 criterion for the settlement of a civil dispute through fair procedures.[217]

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 have an equal opportunity to present its case, question, rebut, and so forth.[218]

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 breadth of discourse theory, 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

216. *Id.* at 303.

217. *Cf.* Solum & Marzen, *supra* note 95, at 1164–65.

218. The idea of equality of litigation opportunity is very similar to the notion of a level playing field. *See supra* notes 206–207 and accompanying text.

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 as 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, which Habermas formerly labeled the "ideal speech situation."[219]

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:

a. Each participant is allowed to call into question any proposal;

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

219. *See* REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 214, at 25; MCCARTHY, *supra* note 214, at 306.

> 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).[220]

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."[221] 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."[222]

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, for example, 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. The upshot 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 procedural rules,

220. This formulation is based on one suggested by Robert Alexy and adopted by Habermas. *See* JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 89 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990); Robert Alexy, *Eine Theorie des Praktischen Diskurses, in* NORMENBEGRÜNDUNG UND NORMENDURCHSETZUNG 22, 40–41 (Willi Oelmüller ed., 1978); Robert Alexy, A THEORY OF LEGAL ARGUMENTATION 119–24, 193 (Ruth Adler & Neil MacCormick trans., 1989). The names given to the three rules are mine.

221. MCCARTHY, *supra* note 214, at 309.

222. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 214, at 107. *See also* William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas*, 17 CARDOZO L. REV. 1147, 1150–51 (1996) (discussing Habermas's formulation).

the rule of equality of communicative opportunity is reflected in a wide variety of rules that provide equal opportunity for litigants 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 thirty and the defendant ten. If 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.[223]

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.[224]

Habermas then works through a number of specific examples drawn from German criminal and civil procedure.[225]

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. John MacArthur Maguire and Robert Vincent, writing in 1935, made the following pronouncement: "Courtroom truth is what a jury or the judge finds after full and fair presentation of evidence."[226]

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; thus, the admissibility and exclusion of evidence should aim at maximizing the likelihood that trials will result in fact-finding that is accurate according to

223. If inequalities are allowed, it will be because they are justified by a more basic equality. For example, when each side has been provided adequate time to present its case, more time for one side would be redundant.

224. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 214, at 234–35.

225. *Id.* at 235–37.

226. John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 238 (1935).

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 founders on a very practical objection. Although an agreement that is reached under nonideal conditions, in which one side was not given an opportunity to present its side, may be suspect, it does not follow that the agreement reached under ideal conditions is any guarantee of truth. The reason is simple: inputs count. 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.[227] Maguire and Vincent's formulation built this notion into the idea of courtroom truth: "Courtroom truth," they said, "is what a jury or the judge finds after *full* and *fair* presentation of evidence."[228] The notion that *full* presentation of evidence is required for courtroom truth reflects the notion that inputs count. As the U.S. District Court for the District of Massachusetts put the point,

> Truth in the real world . . . 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.[229]

There is no guarantee of perfect accuracy, but the system aims for accuracy and not simply an 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 the dignity-enhancing process is not sufficient for fairness in the face of skewed outcomes. The third interpretation, the satisfaction interpretation,

227. For Habermas's view of the relationship between discourse theory and ideas about truth, see JÜRGEN HABERMAS, POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 135–39 (William Mark Hohengarten trans., 1992). *See generally* RICHARD L. KIRKHAM, THEORIES OF TRUTH (1995) (offering an introductory account of contemporary philosophical thinking about truth).

228. Maguire & Vincent, *supra* note 226, at 238 (emphasis added).

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

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 our 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 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 principles of procedural justice,[230] requiring that accuracy be maximized subject to several provisos, including one aimed at striking a fair balance between accuracy and the costs of adjudication

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 whether it provides the whole story, and we have concluded that it does not. The question addressed in this part of the Article 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 litigant satisfaction. Hence, we must next examine 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

230. *See infra* Part VI.A.

focus of this part of the Article 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.[231] Nor can the answer to this question be a subjective sense of 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, which investigates 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, Section B examines a framework for pinpointing the stakes in the debate over the value of process and participation. Then, Section C surveys three justifications that have been offered for the proposition that participation has a value that cannot be

231. 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 this footnote, there is a crucial difference. Barnett's theory answers what makes a constitution legitimate. He does not answer what we might call the hard question of constitutional legitimacy: how can I regard a constitutional outcome as just 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: the litigant argues that if accuracy is the measure of legitimacy, then the erroneous outcome that injures the litigant is clearly illegitimate. The natural counter is to argue that the litigant would have consented in advance to this procedure because it gives the best chance of systemic accuracy. There are two responses to this argument. First, the litigant might argue that overall systemic accuracy does not guarantee maximum accuracy in particular case types. If the litigant's case is a type for which the general, transsubstantive rules of procedure are less accurate than alternative rules, the litigant could argue that he or she would not have consented. Second, and independently, the litigant may argue that if hypothetical consent is the criterion, then he or she would not consent on the basis of accuracy alone. In particular, he or she might have demanded both reasonable rights of participation and a reasonable balance between procedural costs and benefits before giving hypothetical consent.

reduced to accuracy or cost. Finally, Section D reviews a number of arguments that have been raised against the idea that process counts quite apart from considerations of accuracy and cost.

A. THE PARTICIPATION THAT 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 with two claims. 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[232]—that is the core idea, but the full statement of the participatory legitimacy thesis is more complex:

> 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 suggests 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

232. *Cf.* Bone, *supra* note 156, 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.").

dispute resolution depends on affording those who are to be bound a right of participation?[233]

2. The Analogy to 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[234] (and perhaps other norms as well). These norms include the requirement that citizens have either the right to vote directly on legislative proposals or to vote for representatives to whom the citizens have delegated legislative authority.[235] 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.[236] If these norms are not satisfied, the outcome of the legislative process is not regarded as legitimate.

The connection between participation and legislative 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

233. 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 commentators have noted the connection between the legitimacy of adjudication and participation. *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (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, 952 (1989) (book review) ("One other value [of 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 BYU L. REV. 859, 874 (noting the connection between legitimacy and participation in the context of the 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 the connection between participation and legitimacy in the context of criminal procedure).

234. *See, e.g.*, 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) (discussing the connection between participation and democratic legitimacy in republican theory).

235. *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.").

236. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882–84 (1963) (discussing the relationship between democratic legitimacy and the right of participation). *See also* John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 45 (1997) (commenting on Thomas Emerson's position).

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 the legislative process demonstrates that participation 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. But this argument is off the mark, at least if the target 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[237] is, in our political culture, a paradigmatic case of bad political theory. The slogan "No taxation without representation" is 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. Consequently, they have no content-independent obligation of political morality to obey such laws except the obligation imposed by the correspondence of the laws with the independent requirements of political morality.[238] 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 can 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

237. *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 174–76 (1967) ("Virtual representation exists where the substantive content and effect occur without election.").

238. 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.

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. 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 my 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 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.[239] 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 important that citizens be able to regard procedures as legitimate so that we may secure their voluntary cooperation with the

239. 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.

system of civil justice.[240] Great social evils would attend a system that resorted to sanctions and incentives to secure the compliance of citizens who regarded the system as illegitimate and did not regard the system as a source of binding authority or moral obligation.[241] 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 that 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.[242] As in the case of legislation, adjudication is not legitimate if the 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

240. This point is strongly associated with the work of Tom Tyler:

> [P]eople 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.

Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 231 (1997). For more work by Tyler and others on the connection between participation and perceptions of legitimacy, see *supra* note 213. *See also* Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 403 (2000) ("[T]he use of procedures regarded as fair by all parties facilitates the maintenance of positive relations among group members . . . even in the face of the conflict of interest that exists in any group whose members have different preference structures and different beliefs . . . ."); 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) ("[B]eing 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.").

241. 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.

242. Martin Redish observes this about 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 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.

Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18, 24 (1996).

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 by a judgment that he or she has good reason to believe is in error and is adverse to the citizen's interests or wishes. For this person, 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, which 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 this citizen. From this perspective, it is clear that being barred from participation undermines the legitimacy of civil adjudication. If I did not participate in a procedure that purports to bind me with finality, I may always 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 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 to observe, to make arguments, to present evidence, and to be informed of the reasons for a decision. 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 have chosen not to make a potentially salient argument (by presenting evidence, making legal arguments, challenging the validity of the law, or arguing for an equitable exception), then I may not reasonably complain that the proceeding was illegitimate because my arguments were not considered by the tribunal. By participating or waiving the right to participate, I become an "author"[243] of the proceeding; the choice of what arguments will be advanced on my behalf becomes my choice. As Christopher Peters has observed,

> 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,

243. An author, but not *the* author. Judges, juries, and other litigants are also authors of a civil action and its outcomes.

> judicial decisions resemble the decisions made by a democratic legislature after debate and a fair hearing at which all relevant views have been aired.[244]

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 effect on 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.[245] But such arguments need not be legal, and, even if legal, they may be raised as a matter of principle and not because they have a realistic possibility of success.[246] Some citizens may regard themselves as morally obligated to express their principled dissent from legally valid norms.[247]

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 that participation confers on adjudication cannot be reduced to accuracy enhancing effects, subjective preferences, feelings of satisfaction, or even perceptions of legitimacy. Third, we have not yet specified the institutional form of the minimal right of participation that is the subject of the participatory legitimacy thesis.

4. Three Thought Experiments

So far, the case for the participatory legitimacy thesis has rested on abstract consideration of political philosophy. The abstract can be supplemented by a few concrete thought experiments designed to elicit first

244. Peters, *supra* note 233, at 347.

245. In addition to the constitutional arguments in the text, more unconventional arguments may be made on the basis of the Ninth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment.

246. 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 himself or herself as obligated to register dissent, even if the citizen believes that he or she has no likelihood of success.

247. This point would assume a greater significance in a system that permitted jury nullification.

our intuitions and then our considered judgments about the relationship between procedure and legitimacy.

Before we 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 pumping from the reader the same intuitions that they pump from me,[248] but I would ask readers 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 me stipulate that the term "intuition" describes our initial, unreflective reaction to a thought experiment. Further, such intuitions, if confirmed by reflection and deliberation, can be said to constitute "considered judgments." The purpose of these 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.

a. 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, even though you agree with the outcome and 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. Of course, if you agree with the outcome, you may choose to abide by it nonetheless.

b. Star Chamber

Suppose we had a reliable procedure for producing accurate criminal verdicts that excluded the defendant and defense counsel from the secret proceedings. The exclusion is complete, and 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

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

procedure "Star Chamber").[249] 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 he or 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. On 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, to 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 the defendant would say could make the proceeding more accurate, although we may hypothesize that the defendant's 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 he or she remain silent is more horrifying than the requirement that the defendant 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 decisionmakers' 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 it is a slight (or perhaps substantial) improvement over the case in which the defendant is both excluded and silenced.

c. 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

249. *See* Riebli, *supra* note 1, at 810–11.

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 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 these 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. We 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.

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 we value participation because, 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 the fairness 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 other such

costs, including the social cost of inaccurate adjudication and 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 the 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.[250] Meaningful participation requires that your input to the proceeding be considered, that what you say plays a role in the deliberative process of the decisionmaker. In this sense, the value of participation is dependent on possible effects on outcomes, and, hence, is in some sense dependent on possible impacts on

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

accuracy. Thus, there is good and sufficient reason to believe that the legitimacy of a procedure is not independent of its effect on outcomes. Put another way, the legitimacy of a procedure depends, at least in part, on its accuracy.

Does this form of dependence implicate 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 condition 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.[251]

So far, we have dealt only with the 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,[252] 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.

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

251. That is, the fact that x depends on y does not mean either that x is the case if and only if y or that x is an increasing function of y.

252. *See infra* Part V.D.1.

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.[253] At that point, we asked whether the 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 offer a sufficient explanation of the intuitions elicited by our thought experiments, which implied that participation has irreducible (but not necessarily independent) value? The answer to this question is also no. When participation is an entitlement (whether produced by law or by less formal social norms), denying someone the right to participate is an insult to that person's 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 have no right to attend the meeting and you exclude me, dignity requires that I gracefully accept the exclusion and feel no insult to my dignity. 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.[254] Procedural justice has 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 to equal concern and respect in the political decisions about how these goods and opportunities are to be distributed."[255] But equality alone cannot do the work of explaining a right to participation. Once rights of participation are defined, equality comes into the picture. If

253. *See supra* Part IV.B.3.b.

254. *See* Massaro, *supra* note 208, 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."); 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."); Rehg, *supra* note 222, at 1147 ("[I]nasmuch 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."); Rutherford, *supra* note 136, at 74 ("The right to participate is meaningful only if a person can participate on an equal footing."). Although various scholars 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. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

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

others are afforded a right of participation, but I am arbitrarily denied this right, 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 of 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.[256] 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."[257] But if considered in isolation, the value of autonomy simply will not do the necessary work. On the one hand, the concept of autonomy is too general to provide a particular right to participation in the 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. To 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, a role for autonomy (as well as dignity and equality) becomes apparent. Legitimacy itself is important because we respect the dignity of citizens as equal and autonomous. If we rejected the idea that citizens are autonomous and equal, then the value of legitimacy would not apply to

256. The association between procedural fairness and autonomy is a common theme in the literature. *See, e.g.*, 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) ("[P]articipation of the parties is considered a key element of due process because of our belief in individual autonomy."); 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.'" (quoting Jack L. Johnson, Comment, *Due or Voodoo Process: Virtual Representation as a Justification for Preclusion of a Nonparty Claim*, 68 TUL. L. REV. 1303, 1323 (1994))); Elijah Yip & Eric K. Yamamoto, *Justice Ruth Bader Ginsburg's Jurisprudence of Process and Procedure*, 20 U. HAW. L. REV. 647, 670 (1998) ("[P]rocedural fairness may be viewed in three component parts: litigant autonomy, dignity, and participation.").

257. Bone, *supra* note 6, at 509. *See also* Bone, *supra* note 156, at 619–20 (assuming that "the intrinsic value of participation is historically tied to respect for individual autonomy").

them. Dignity, equality, and autonomy are fundamental political values. The idea that they connect in some way to the value of participation is sound. The error is 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.[258] 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.[259] 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,"[260] which litigants should be and are willing to trade for lower product prices.[261] 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.[262] 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.[263]

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

258. *See* Rosenberg, *supra* note 4, at 213, 237–48, 255–57.

259. *Id.* at 213, 237–48.

260. *Id.* at 255, 256 n.110.

261. *Id.* at 213.

262. *Id.* at 237. Rosenberg argues that the determination of causation and liability issues involves high costs, that plaintiffs' lawyers will underinvest in litigating these issues, and that as a result defense lawyers will have a systematic advantage. *Id.*

263. *See id.* at 245–48.

deterrence and compensation, 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 allowing those who desire to opt out of collectivization to pay the full cost of a particularized proceeding.[264] "Plaintiffs 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."[265]

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 he 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, he assumes that the purposes or functions of adjudication can be reduced to the purposes or functions of the substantive law being applied. For example, he assumes 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 that the functions or purposes of tort compensation are deterrence and compensation. Third, he 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, he 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."[266]

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 has argued against a right to the freedom of speech by arguing that the purpose of the political system is to maximize utility, that the value of self-

264. *Id.* at 256 n.110.
265. *Id.* at 256–57.
266. *Id.* at 256.

expression is 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 noninstrumental value of an individualized right to free speech. Yes, if all these premises were true, that conclusion would follow—but look at how much has been packed into these 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 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 to a minimum level of participation. If his case for reducing the value of participation to subjective preference rests on the assumption that some version of utilitarian moral theory is true, then his 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.

To the extent that Rosenberg does not rely on subjective-preference utilitarianism, his argument boils down to a question: what is the noninstrumental 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.[267] As we shall see, Kaplow's objection is closely related to Rosenberg's. We 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 nonindependence claim. We shall return to the significance of this distinction at the end of my consideration of his argument.

Kaplow begins by asking whether "process value" is subsumed by the value of accuracy, raising the question in the following form:

267. Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3, at 389.

> 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.[268]

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."[269] Although he may be wrong about this—the evidence suggests that there is a very strong preference for participation[270]—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?[271]

Kaplow's hypothetical produces an intuition that process does not matter apart from outcome.[272] But does the hypothetical 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

268. *Id.* at 390–91 (footnotes omitted).

269. *Id.* at 390 n.249.

270. See *supra* note 213 (collecting social psychology literature on a preference for participation).

271. Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3, at 391 (footnotes omitted and emphasis added).

272. A set of hypotheticals that produce opposing intuitions is offered in Part V.A.4.

ear.[273] 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,[274] and it suggests that the input is not really part of the process at all.[275]

Kaplow then goes on to explicate his thought experiment, but in a way that shifts our focus from whether there are any intrinsic process values to the quite different question of whether the subjective preference for process is sufficiently weighty to justify its 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 [personal] 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

273. There is an important distinction between turning a deaf ear and listening when there is little 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 it is most unlikely that one's mind will be changed.

274. *See* WITTGENSTEIN, *supra* note 250, at 271.

275. 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 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, that is, 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 is asking whether someone would value a right of participation in proceeding P at time T_1 if that person knew of no nomologically, historically accessible possible world in which he or she could participate and prevail in P. *See generally* DIVERS, *supra* note 68 (discussing the issues raised by the philosophical idea of possible worlds); KRIPKE, *supra* note 70 (same); LEIBNIZ, *supra* note 69 (same); LEWIS, *supra* note 71 (same).

> time disputes arose, did value further participation and were willing to pay for it, satisfying such preferences may be socially undesirable.[276]

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 whether the right to such participation is justified on grounds of political morality: no one has argued 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."[277] 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 a 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.[278]

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 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;[279]

276. *See* Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3, at 391–93 (footnotes omitted).

277. *Id.* at 392 n.254.

278. 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 the right to participation in a formal process in the course of settlement, whereas normally one cannot waive the 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 the text, the waiver of the right to formal process does not waive the right to participate in determination of the outcome of adjudication.

279. Kaplow is likely correct in assuming that there is no 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.

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 the insured 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, the assertion that "individuals' incentives to promote their interests in claims proceedings, by personal appearance or otherwise, tend to be socially excessive" 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 of whether the balancing model provides the best account of procedural justice. 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."[280] But this hypothetical assumes that the irreducible value of procedure must be measurable by 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.[281]

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 support a reduction of the value of participation on effects on outcomes. If we bear in mind the distinction introduced above, in Part V.B. It becomes apparent that Kaplow's arguments, whatever its merits as directed against a claim of independent value for participation, does not engage the participatory legitimacy thesis, which claims irreducible but not independent value.

280. Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3, at 391 n.253.

281. *See supra* text accompanying note 271.

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. Kaplow provides, however, a brief discussion of this relationship.[282] Kaplow's argument proceeds by the method of separation of cases. 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;[283] (2) participation creates the appearance of legitimacy because it creates a perception of accuracy;[284] (3) participation provides legitimacy because it respects the dignity of litigants;[285] and (4) participation provides legitimacy because it prevents the abuse of power.[286]

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 course, given the resulting ambiguity of the subject, one is unavoidably more uncertain about the relevance of any analysis of it."[287] Without any analysis of what legitimacy is and why it is valuable, one wonders how he 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 his actual claim, it is radically underdeveloped. What is ambiguous about legitimacy? If the problem is truly ambiguity, that is, multiple possible meanings, why can we not resolve the ambiguity by choosing the best conception of legitimacy? Perhaps Kaplow means instead that legitimacy is fatally vague, but, once

282. *See* Kaplow, *The Value of Accuracy in Adjudication*, *supra* note 3, at 395–96.

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

284. 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. He 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.

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

286. *Id.* at 395.

287. *Id.* at 395 n.262.

again, he has no argument for that proposition either. Crucially, the participatory legitimacy thesis is not reducible to any of his 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 Laurence Tribe calls "intrinsic value."[288] Tribe's argument was that 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."[289] Dworkin counters that

> [t]he language about talking to people rather than dealing with them, and about treating them as people rather than 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 a person as a person are at best conclusions of arguments, not premises."[290]

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 virtue of that injustice. I shall call the latter the "injustice factor" in his punishment, or his "moral" harm.[291]

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."[292]

288. TRIBE, *supra* note 153, at 503–04.
289. *Id.*
290. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 106, at 102.
291. *Id.* at 80.
292. *Id.*

Thus, Dworkin's argument is that the proponents of an irreducible value for process and participation have not explained why exclusion (or other process flaws) give 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 the 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 Larry Alexander. In a somewhat different context, he questions 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."[293] This argument rests on a concealed premise that is false. The premise of the argument is that 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 that a concern for procedure apart from substance verges on incoherence.

Alexander's argument is still incomplete. It assumes 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 mean that the distinction between these two concepts is incoherent. Indeed, the point of the thought experiment of acoustic separation between substance and procedure 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

293. Larry Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 325 (1987).

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—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[294] 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 state that sets the legal driving

294. *See* Geoffrey C. Hazard, Jr., *The Federal Rules Fifty Years Later: Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989). The term transsubstantive originated with the late Robert M. Cover in *For James Wm. Moore: Some Reflections on a Reading of The Rules*, 84 YALE L.J. 718 (1975). Of course, the question of whether 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 Body 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, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2042–43, 2048–51 (1989); 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); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

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."[295] 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. These 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 argued that such a group right is absurd, because if such a right existed, it would dictate 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 matter 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 of participation may vary with the procedural context, but it does not establish that process has no value apart from outcomes.

295. Bone, *Day in Court*, *supra* note 209, at 281.

7. The Argument That Representation Supercedes Participation

Another objection to the idea that participation is essential for legitimacy is suggested by Owen Fiss. His core idea is that representation supersedes 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 that

> what 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.[296]

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.[297]

Corresponding to Fiss's argument about the Due Process Clause, we can construct a parallel (Fissian) argument about procedural justice.[298] 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 supersedes 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.

296. Fiss, *supra* note 208, at 970–71.

297. *Id.* at 972.

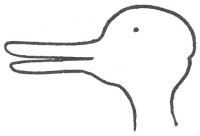
298. Of course, the argument that I will present is not Fiss's own—although it is inspired by his argument. To the extent that the argument has merit, Fiss deserves the credit, but if the argument fails, the fault is mine. If "Fissian" suggests too strong a connection between Fiss and the argument, "quasi-Fissian"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

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;[299] 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 persons with mental disabilities by guardians ad litem. At first blush, it might seem that the Fissian objection runs 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 his or her own interests. If this Fissian maneuver worked, then we would have undergone a classic duck-rabbit[300] 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."[301] Fiss may well be right that when group rights are at stake, 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; individuals represent themselves

299. *See supra* Part V.D.6.

300. The duck-rabbit is from Wittgenstein. *See* WITTGENSTEIN, *supra* note 250, 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.

301. Fiss, *supra* note 208, at 972.

because they are human persons, who act on their own behalves, 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 Bone, the idea is the following:

> 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.[302]

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 be neither cost beneficial nor accuracy improving. Because Bone has provided a thorough and convincing treatment of the general form of the contractarian objection,[303] 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 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 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

302. Bone, *supra* note 6, at 496. Bruce Hay and Rosenberg are strongly associated with this argument. *See* Hay, *supra* note 7; Bruce Hay & David Rosenberg, *The Individual Justice of Averaging* (John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper No. 285, 2000) *at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/285.pdf.

303. *See* Bone, *supra* note 6.

there is no irreducible value to process, they turn out, on close inspection, to rest on a burden-shifting move, that is, on questions rather than arguments. In the absence of a clear explanation of why process should count aside from cost or outcomes, many argue that there is something mysterious or ineffable about the claim that participation itself has intrinsic value. For example, 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."[304] But if this is so, Bone argues, "then the demands of dignity should be satisfied in most situations by outcomes meeting the quality standards."[305] 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"[306] 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 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.[307] 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, critics sensitive of the view that process counts because some level

304. Bone, *Day in Court*, *supra* note 209, at 281.
305. *Id.* at 281–82.
306. *Id.* at 282 (emphasis added).
307. *See supra* note 213 (collecting social psychology literature).

of participation is required by a concern and respect for individual dignity, admit to lingering doubts about their own critiques.[308]

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 a system of procedure can be measured, then the relationship between accuracy, cost, and participation must be ordered and articulated. In this part, I 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 that express a conception of civil procedural justice:

1. 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 all other persons with a substantial interest that, as a practical matter, will 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

308. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 106, at 102–03; Bone, *Personal and Impersonal Litigative Forms*, *supra* note 209, at 287.

the absent individual. Represented persons should be afforded practicable opportunities to challenge the adequacy of their representation.

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

2. The Accuracy Principle: The arrangements for the resolution of civil disputes should be structured 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 ensure 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 to maximize systemic accuracy where the arrangement will not result in inaccuracy in particular cases;

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

3. 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 by the three simple models of procedural justice discussed in Part IV.B. 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. The Accuracy 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 the notion, expressed in the *Mathews v. Eldridge* balancing test, that the maximization of accuracy must be balanced against the costs of adjudication.[309] 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 my 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 the 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 underwriting 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 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:[310] "The principle is as old as the law, and is of

309. Mathews v. Eldridge, 424 U.S. 319, 348 (1978).

310. Mason v. Eldred, 73 U.S. (6 Wall.) 231, 239 (1867). *See also* 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 Co., 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."); Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 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

universal justice, that no one shall be personally bound until he has had his day in court." Some courts have gone so far as to make explicit that this aspect of procedural fairness may not be balanced against other concerns.[311]

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* adopted the balancing model, and, hence, that existing doctrine implicitly assumes all rights of participation may be denied if the balance of costs and benefits favors this result. It could be further argued that support for this theory is found in *Mullane v. Central Hanover Bank & Trust Co.*,[312] in which the Supreme Court allowed the rights of contingent beneficiaries to a trust to be adjudicated without any actual notice to the beneficiaries.[313]

These arguments, however, fail on closer inspection.[314] *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 favors this result. Instead, Justice Powell's opinion for the Court states, "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest,"[315] and "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[316] Furthermore, "the essence of due process is the requirement

meaningful time and in a meaningful manner."); *In re* Hourani, 180 B.R. 58, 68 (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. Metro. Life Ins. Co., 63 Cal. Rptr. 2d 202, 208 (Ct. App.) (equating "procedural fairness" with "notice of the charges brought against the individual and an opportunity to respond to those charges"), *superseded*, 941 P.2d 1121 (Cal. 1997); Milenkovic v. Milenkovic, 416 N.E.2d 1140, 1148 (Ill. App. Ct. 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.").

311. One district court stated the importance of procedural fairness this way:

> 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.

Carothers v. Follette, 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970) (citations omitted). *Accord* Lathrop v. Brewer, 340 F. Supp. 873, 880 (S.D. Iowa 1972); Meola v. Fitzpatrick, 322 F. Supp. 878, 885 (D. Mass. 1971).

312. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

313. *Id.* at 317–18.

314. *See supra* Part IV.B.2.a.

315. Mathews v. Eldridge, 424 U.S. at 319, 333 (1978).

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

that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'"[317] Similar language appears in Justice Jackson's opinion in *Mullane*.[318] 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,[319] but the opinion does not suggest that no violation of the Due Process Clause lies where a deprivation of benefits that constitute a property interest is accomplished with no hearing.

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 the absence of a party who cannot be joined "might be prejudicial to the person or those already parties."[320] It also 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 . . . as a practical matter impair or impede the person's ability to protect that interest."[321] Similarly, Rule 24 affords a right of intervention (which, of course, is just 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

317. *Id*. at 348–49 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 1951) (Frankfurther, J., concurring).

318. *Mullane*, 339 U.S. at 313 ("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.").

319. *Mathews*, 424 U.S. at 340–41.

320. FED. R. CIV. P. 19(b).

321. FED. R. CIV. P. 19(a).

> or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[322]

The Participation Principle also requires the fair value of procedural justice in a proviso: the arrangements for resolution of civil disputes shall ensure 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 demonstrates that the system of procedure should be structured so that inequalities of litigation resources cannot operate to deprive individuals of the fair value of their basic liberties, such as the freedom of speech. Current law reflects this idea through the provision of attorneys' fees for successful lawsuits challenging the violation of an individual's basic federal rights.[323] 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 afield 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, which requires that civil procedures be structured so as to maximize the chances of achieving the legally correct outcome in each proceeding and is subject to four provisos. 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.[324]

The first proviso to the Accuracy Principle permits a departure from accuracy where an accuracy enhancing procedure would lead to the violation of another fundamental right. This proviso allows for departures from accuracy that ensure that the process of adjudication does not unfairly infringe on the substantive rights guaranteed by 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 26(c) allows a trial court judge to limit discovery by entering a protective order;[325] one reason for granting such an order is to protect

322. FED. R. CIV. P. 24(a).

323. 42 U.S.C. §§ 1983, 1988 (2000).

324. *See supra* Part IV.B. *See also supra* notes 158–159 (collecting sources identifying the search for truth as the goal of the system of adjudication).

325. FED. R. CIV. P. 26(c).

substantive rights, such as the right to privacy.[326] Similarly, various privileges protect substantive rights when the search for truth collides with confidentiality.[327]

The second proviso to the Accuracy Principle allows departures from the goal of case accuracy that have the 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 the 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.[328] Another example is the requirement for clear and convincing evidence that a party signing a cognovit note expressed a waiver of the right to notice that was "voluntary, knowing, and intelligently made."[329] Here, inequality in the risk of error protects 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

326. *Cf.* Dominick C. Capozzola, *Discovering Privacy*, L.A. LAW., Nov. 2003, at 28 (arguing that discovery orders should be narrowly tailored to protect legitimate privacy rights and interests).

327. *See, e.g.*, Bruce P. Brown, Note, *Free Press, Privacy, and Privilege: Protection of Researcher-Subject Communications*, 17 GA. L. REV. 1009, 1028–29 (1983).

328. Specifically, the Supreme Court justified the departure in this manner:

> 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.

Santosky v. Kramer, 455 U.S. 745, 765–66 (1982) (citation and footnote omitted).

329. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185–86, 187 (1972) (assuming that the same standard of proof applies to waiver in the civil context as in criminal cases, and citing criminal cases). *See* Leonard v. Clark, 12 F.3d 885, 889–90 (9th Cir. 1993) (citing *Overmyer*, 405 U.S. at 187; Davies v. Grossmont Union High Sch. Dist., 930 F.2d 1390, 1394–95 (9th Cir. 1991)).

accuracy and systemic accuracy in connection with the accuracy model.[330] The existing procedural landscape reflects the systemic accuracy proviso in myriad ways. Statutes of limitations and discovery sanctions, for 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.[331]

The fourth proviso authorizes departure from the goal of accuracy to ensure that the systemic costs of adjudication are not excessive in relation to the interests at stake in a 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 torts, tobacco torts, 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, the theory of virtual representation and sampling. This part addresses 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.

330. *See supra* Part IV.B.1.b.

331. *Cf.* 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, 166–67 (2003) (discussing policy considerations of statutes of limitations and discovery rules to "ensure the accuracy and fairness of the judicial process").

The class action is the most familiar technology of aggregation.[332] 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. [333] 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 participation in any proceeding that will bind them.[334] In an opt-out class action, individual class members may elect out of the class to preserve the right of individual participation.[335] 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.[336]

The doctrine of virtual representation provides a second technology for aggregation.[337] 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" or "aggregate trial."[338] The idea is to take representative cases, try them, and then use the results as factual findings in cases that were not tried. The

332. *See* FED. R. CIV. P. 23. *See generally* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003) (discussing the class action as an aggregation device).

333. *See* 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.").

334. *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 716 (2003).

335. *See id.*

336. *See* FED. R. CIV. P. 23(a).

337. *See* Bone, *Personal and Impersonal Litigative Forms*, *supra* note 209; 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); F. Carlisle Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580 (1936); Johnson, *supra* note 256.

338. *See* 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); 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).

most famous example is *Cimino v. Raymark Industries, Inc.*,[339] 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 the 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.[340] Without substantial changes in current doctrine, sampling is voluntary, not mandatory[341]—although the use of mandatory sampling has been suggested.[342]

B. THE PARTICIPATION PROBLEM

Technologies of aggregation can create a problem of participation. Consider, for example, the following hypothetical.[343] Suppose that a mandatory class action is 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

339. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653, 664–65 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998).

340. *See* Bordens & Horowitz, *supra* note 338, at 45–46.

341. The Fifth Circuit held that the plan devised by the District Court in *Cimino* violated the defendant's right to a trial by jury. *Cimino*, 151 F.3d at 320–21. The same argument would invalidate sampling imposed against the wishes of plaintiffs.

342. *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, 215 (1999) (raising the question "whether mandatory statistical sampling violates a plaintiff's due process rights").

343. Let us put to the side 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.

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' claims are substantially the same as that of the class members, and (d) whether representation was, in fact, adequate.

What opportunities for participation would this procedure afford? The answer to this question is virtually none. In the hypothetical, a mandatory class action 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 (for example, by filing another lawsuit) because of the doctrine of claim preclusion.

Should we be concerned about the absence of a right to participate? Both the accuracy model and the balancing model suggest 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 be neither 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 that civil dispute resolution shall afford an equal opportunity to affected individuals to present evidence and arguments that are relevant to legal rules and equitable considerations that 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 allowing opt-out rights, while adding costs without appreciable accuracy gains, would not produce costs that would bankrupt the defendant or be wildly disproportionate to the stakes involved. This hypothetical provides a test case for the two principles of procedural justice—the Participation Principle and the Accuracy Principle—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 a 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, will reject the conclusion that practicable participation is required as a matter of procedural justice for situations in which its costs exceed its benefits. I 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 a 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 allow 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 (that is, to veto settlement or other agreements between the class representatives and other parties).
- Certification hearings. Even if 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) 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 participatory legitimacy thesis requires meaningful participation, but it does not require individualized litigation. As Michael Saks and Peter 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."[344]

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 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, 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. 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, but procedures with minimal participation still confer some legitimacy. 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 also 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

344. Saks & Blanck, *supra* note 338, at 830.

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 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 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 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 for 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 be structured 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 and 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.