TO MY LAW AND PHILOSOPHY COLLOQUIUM READERS:

The two chapters attached are from a book I'm writing, tentatively entitled "Justifying Procedural Reform," to be published by Cambridge University Press. The book draws from and expands on my previous work in civil procedure. My target readers are not just those with a legal or philosophy background. My hope is to reach a broader audience, including people involved in policymaking. Accordingly, there are parts of the exposition that you might find quite basic and other parts that could be stated in a more technical or sophisticated way. Also, some of my arguments are designed to respond to critical points I expect civil procedure scholars to make. (Even so, I worry that some of the discussion might assume too much legal knowledge or too much technical background.)

In the Introduction, which I do not include here, I describe the current state of procedure discourse among scholars and those interested in reform as highly polarized and politicized (all too common in many areas today). This is a serious problem because sound procedure is essential to the proper enforcement of substantive law and thus to the ability of society to promote justice and efficiency through law:

> "Diametrically opposed views like these can be useful starting points for discussion, but only when followed up with meaningful engagement and a good faith effort to find common ground. And that is exactly what is missing today. There are notable exceptions, of course, but in general few litigation stakeholders seem willing to engage in constructive dialogue lest doing so will empower their opponents and weaken their own positions."

I argue that the key to a more fruitful and constructive debate is to engage the normative issues rigorously and in a way that connects the theoretical analysis to litigation practice (i.e., a kind of reflective equilibrium): "The idea is to fit the *well-settled* features of civil litigation in a normatively attractive way." I describe and defend this methodology in Chapter 2, which I'm not sharing with you. I also include the following lest readers think I'm excessively Pollyanish:

> "It is important to add a word of clarification at this point lest the reader misunderstand the scope of what I claim. I do not claim that the nature of procedure discourse will change immediately or that contending parties will stop playing politics and immediately turn to reasoned argument. Change comes gradually and follows a complex path. My point is that changing what is accepted as proper grounds for persuasive argument can, over the long run, change how people think about and debate procedural issues, with salutary consequences for procedural reform. In any case, my goal is to develop an attractive mode of justification that itself is well-justified and that makes possible a convergence of reasonable views. This is an important step forward but there is no guarantee that people will take it."

Here's a table of contents for the book as a whole:

I'm particularly interested in your comments on Chapter 4, especially its discussion of procedural rights. This has been the most difficult chapter for me to write, and I'm still uncertain about quite a few of my points.

I apologize for the length of Chapters 3 and 4. Together they comprise 84 double-space pages. I know this is a longer manuscript than is usually presented at the colloquium. If you don't have time to read it all, just read Chapter 4 (which is 30 pages). If you have more time but not enough to do it all, you might read the following sections (a total of 55 pages):

- In Chapter 3, read pages 3-4 (introduction); 7-10 (civil adjudication's purpose); 11-14 (procedure's purpose); 18-23 (relationship between procedure and substantive law); 28-41 (balancing), and 41-45 (the legal rights view).

- In Chapter 4, read pages 57-74 (introduction and a chunk of the procedural rights discussion), and 79-85 (the litigation and inequality section).

I appreciate your interest and look forward to our discussion.

Best,
Bob

CHAPTER THREE:
PROCEDURE AND SUBSTANCE

What is the purpose of a procedural system and what is procedure's relationship to substantive law? There are many possible answers to this question. Ask a judge and she is likely to say that a procedural system furnishes the tools needed to find the facts and the relevant substantive law, manage the litigation effectively, and ultimately decide the case. Ask a legislator and she is likely to focus on the way properly designed procedural rules help the substantive law achieve its policy goals, or more cynically, subvert disfavored substantive law covertly. A lawyer's answer is likely to track the lawyer's perspective. Procedural rules define the strategic moves in a litigation game, the goal of which is to maximize the client's (and often the lawyer's) payoff. And for some who seek to use litigation to dramatize a case or cause, procedure sets the stage and substantive law supplies the narrative framework.

These answers all share a common feature. They describe what procedure is and does from the perspective of the one answering the question. As such, they say nothing about what a procedural system *should* do or what the relationship between procedure and substantive law *should* be. The aim of this chapter is to provide answers to these normative questions. Those answers do not depend on the point of view of the person answering. They depend on the best account of our civil litigation system and procedure's role in it.

In Chapter One, we saw that the nineteenth century Field Code reformers envisioned procedure as strictly instrumental to enforcing a separate and distinct substantive law. The early twentieth century reformers accepted this general formulation, but their pragmatism led them to a

different view of optimal procedure, a view expressed concretely in the Federal Rules of Civil Procedure. The Legal Process jurisprudence of the 1950s and 1960s tweaked the underlying theory a bit but kept its core intact. For the Legal Process generation, as for the early twentieth century reformers, designing optimal procedure was a substance-neutral task best done by technical experts. Legal Process came under siege in the late 1960s and early 1970s. The results have been healthy in many ways, but they have also exacerbated the politics of procedure and undermined the legitimacy of the traditional court rulemaking process. The challenge is to tame the politics while still retaining the core insight of the critics, that procedure is intimately bound up with substantive law.

Meeting this challenge requires a deep dive into the nature and purpose of procedure and its relationship to substantive law. The payoff is worth the effort. A great deal turns on a clear understanding of procedure's purpose. It makes a difference, for example, to the ability of courts to employ novel procedures to adjudicate related cases and provide compensation to injured parties in a fair and efficient way. It also makes a difference to the effectiveness of private litigation as a mechanism to deter systemic wrongdoing. And it makes a difference to the United States Supreme Court's power to adopt sensible procedural rules to govern proceedings in the lower federal courts.

The Purpose of Civil Adjudication

Civil procedure is nested within the broader institution of civil adjudication: it consists of the rules and practices that shape the way courts adjudicate civil cases. Thus, it is important to be clear about the primary purpose of civil adjudication before we examine the purpose of procedure.

As with all complex institutions, civil adjudication has many dimensions and produces many different benefits. It is a method for resolving disputes that otherwise might devolve into private violence. In its lawmaking guise, it generates new legal norms and defines existing norms with more particularity. It furnishes a venue for reasoned deliberation and civic participation.[1] It is an instrument for social change.[2] For many, it is an important democratic and democratizing institution, a forum open to the public where individuals can stand up against powerful actors and be treated as equals.[3] For others, it is a valuable investigative tool, a way for private parties to expose corporate secrets through formal discovery and alert the public to dangerous products and environmental hazards.[4]

Civil adjudication can and does produce all these benefits—and more. However, the fact that an institution does something socially beneficial does not mean that the institution exists to produce that benefit. This is a point often overlooked. People all too frequently focus on a benefit and then jump immediately to treating it as a purpose. This is a mistake. Some benefits are purposes, but many are not. In an institutionally differentiated system, such as the U.S. system of governance, different institutions perform different functions. There is plenty of overlap, but there are also distinctive functions for each institution, and those functions define the primary purpose of the institution.

---

[1] ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 5-6, 18-19, 84 (Oxford 2017). We saw in Chapter One that civic republicanism in the first half of the nineteenth century celebrated adversarial process with oral argument as promoting civic participation and educating the public in republican values.

[2] Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1088-89 (1984): "Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."

[3] See Resnik, Andrew Hammond, *The Democratic Turn in Procedural Scholarship* (for Yale symposium)

[4] See Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020); Lahav, *In Praise of Litigation*, at 56-83.

What then is the purpose of civil adjudication? What core function is civil adjudication supposed to perform? We are not interested in answering these questions in the abstract. There is no fundamental essence of civil adjudication that defines its universal nature. Our focus is on the U.S. system of civil adjudication and we look for an answer that fits that system in a normatively attractive way. Some people might answer that the purpose of civil adjudication is to do justice. This is true on a general level. But there are many institutions that share the same goal of building a just society. Civil adjudication has a particular function within this larger justice-seeking framework, and that function is to interpret and apply the substantive law to the facts of specific cases. Thus, the answer to our question is that the primary purpose of civil adjudication as it is practiced in the U.S. is to enforce the substantive law, or more precisely to *resolve cases according to the substantive law*. Adjudication's other benefits flow from this central purpose. They are the consequences of courts resolving cases in the manner they do.

To be clear, I do not mean that substantive law enforcement is an extremely important benefit of civil adjudication, although it plainly is. My claim is that substantive law enforcement is the core purpose of civil adjudication, the principal reason why the institution exists. To see the importance of distinguishing benefit from purpose, suppose that courts are very bad at determining liability; say, they make mistakes 70% of the time, both by finding liability when they should not and failing to find liability when they should. Moreover, these errors frequently involve poor interpretation and application of legal rules. If substantive law enforcement is adjudication's primary purpose, this extremely high error risk would be a strong reason to get rid of the institution; one can do better by flipping a coin. On the other hand, if substantive law enforcement is just one benefit among many, it might make sense to retain the institution despite

its abysmal track record if the other benefits are substantial enough. To be sure, no sensible person is likely to recommend doing this. But that is precisely my point.

Nor do I mean to suggest that judges, as an empirical matter, are always engaged in resolving cases according to the substantive law. Recent empirical work on state civil courts, for example, shows that there are vast numbers of lawsuits dealing with debt collection, eviction, foreclosure, and custody disputes that do not fit the ideal I have described here. For example, Daniel Wilf-Townsend's study of debt-collection cases reveals a pattern of low-monetary-value, high-volume litigation brought by sophisticated corporate plaintiffs against individual debtors who are often impoverished and almost always lack legal representation. This "assembly-line litigation," as Wilf-Townsend calls it, is usually resolved by default judgment without any serious consideration of the facts or the substantive law.[5] Colleen Shanahan and her co-authors describe eviction, debt, and family-related cases in state court that force judges into roles as social service providers rather than adjudicators.[6]

However, none of these developments call into question the central purpose of civil adjudication. Quite the contrary. They are notable for how they force judges into actions and roles that are not properly adjudicative. Indeed, these forms of litigation raise serious questions of equal treatment and rights protection, which I shall take up in Chapter Four. Those who write about this litigation assume that the purpose of civil adjudication is to resolve cases according to the substantive law when they criticize state courts for deviating too much from what

---

[5] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1723 (2022). See also Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1582-84 (2018).

[6] Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471 (2022).

adjudication should be doing.[7] Even those who favor judges taking a more problem-solving approach recognize that what they are proposing diverges markedly from what courts traditionally do.

That adjudication is supposed to decide cases according to the substantive law might seem a rather obvious and uncontroversial proposition, and it certainly should be. But it's a proposition that needs emphasis in this age of settlement. At least since the 1970s, federal judges have become deeply involved in encouraging and even promoting case settlement. In fact, it is quite common for judges to extol the virtues of settlement over trial.[8] Chapter Five discusses this development and critically evaluates it. The point I want to make here is that enthusiasm for settlement promotion has the effect of downplaying the importance of resolving cases *according to the substantive law*. The temptation is to accept a result that commands the agreement of all the parties and at the same time reduces litigation costs and clears a case from the court's docket. And this temptation is strong even if the result deviates significantly from what the substantive

---

[7] See Wilf-Townsend, *Assembly-Line Plaintiffs*, at 1756 ("The core problem of assembly-line litigation is that mass filings of low-value claims are going uninspected, creating bad incentives for plaintiffs and resulting in the underenforcement of substantive and procedural protections for the consumers who find themselves defendants in these suits. Solutions that are targeted toward this problem must find a way to promote accurate adjudication and the enforcement of consumer protections while also being cognizant of the problem of negative value defenses and the mass nature of the claims involved"); Shanahan et al., *Institutional Mismatch*, at 1523-28 ("Courts are not designed for social provision, yet they are attempting to do so with a range of consequences. . . At a minimum, courts are carrying a burden that is not part of their design as institutions.")

[8] For a particularly clear statement, see *In re* Warner Commc'n Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial...There is little doubt that the law favors settlements.") For an account of the current infatuation with settlement, see Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 Emory L. J. 1491, 1509-12 (2016). This trend traces back to the late 1960s and early 1970s. In 1971, for example, Judge Fred Cassibry felt comfortable giving the following advice to newly appointed federal district judges: "My goal is to settle all my cases . . . Most of the time when I try a case I consider that I have somehow failed . . . The judge must not only explore settlement but must actively pursue it with all the vigor at his command." Fred J. Cassibry, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 271 (1971). For background on the history of judicial education programs focusing on settlement, see Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RES. 129, 133-35 (2015); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

law requires. But when substantive law enforcement is the focus, as it should be, the fact that a case settles is not enough; it matters how closely the settlement fits the substantive law. And there are good reasons to question this fit for settlements, as we shall see in Chapter Five.

In fact, it should be obvious that civil adjudication cannot be just about settling disputes. There are lots of ways to do that and many of them are less costly and, quite frankly, more effective than civil adjudication. Indeed, if trial courts were simply in the business of settling disputes, it is not clear why judges should pay attention to substantive law at all.[9]

In common law countries like the United States, courts not only enforce substantive law; they make substantive law. But making law, as important as it is, is not a distinct goal. Courts do not make law the same way legislatures do, by declaring legal rules that operate prospectively. Instead, judicial lawmaking is wrapped up in the process of resolving a case according to the substantive law. When a judge decides a negligence case, for example, she must determine the negligence law that applies to the case. The body of negligence law is not codified in some canonical form. The judge has to "find" the law and she does so by interpreting case law precedent. This interpretive process can result in modifying or extending existing law when the judge adapts the rules and principles in previous cases to fit new facts. This is what we mean by a judge making law.

The same is true for constitutional decisions, even though the Constitution itself provides some textual direction. And it is also true for decisions based on the interpretation of statutes,

---

[9] One can see this clearly if one contrasts adjudication with arbitration. Both processes decide cases. But in arbitration, parties can agree to give the arbitrator power to disregard the law and decide based on the arbitrator's view of the equities. See Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 514-18 (2005) (discussing the arbitrator's power to depart from formal legal rules and do equity in the individual case by relying on such things as "commercial understanding, good business practice and notions of honorable behavior"). In adjudication, however, the judge has an obligation to apply the law and the parties cannot change that obligation by agreement.

although the range of interpretive freedom is usually much more limited in these cases. For now, the important point is that case decision and law creation are inextricably intertwined; the latter is part and parcel of the former.[10]

Some commentators argue that courts are especially important because they model the application of reasoned deliberation to social problems.[11] I agree that reasoned deliberation is a very salient—even critical—feature of civil adjudication, and I explain why in Chapter Eight. However, this does not mean that the purpose of civil adjudication is to model reasoned argument. We do not give judges legal problems so they can apply reason to solve them and inspire the rest of us to do the same. Reasoned deliberation enters the picture because it is how courts go about resolving cases according to the substantive law. If a court's reasoned deliberation done well is inspirational, all the better.

Our statement of adjudication's purpose must be qualified in an important way. The process of civil adjudication must honor principles of procedural fairness even when doing so yields a suboptimal enforcement of the substantive law. For example, many courts and commentators assume that individuals have a right to their own personal day in court. If such a right exists, honoring it can end up producing delays and costs that interfere with a court's ability to resolve cases according to the substantive law. But if parties have a moral—not just a legal—

---

[10] One leading civil procedure scholar, Professor Owen Fiss, argued in an important series of articles published in the late 1970s and 1980s, that adjudication's primary purpose is to give concrete meaning to public values. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). I agree with Fiss that many decisions, especially those in constitutional cases, work out the more concrete implications of public values in the context of case-specific facts. However, I disagree that this is the primary purpose of adjudication. Judges do not aim to give meaning to public values; they aim to decide cases given their best understanding of what the law requires. That understanding requires interpretation of relevant legal norms and it is through this process of interpretation that public values are given concrete meaning.

[11] Lahav, *In Praise of Litigation*, at viii-x. It might be particularly important to have an institution committed to reasoned argument during periods, like the one we are living in now, when reason and fact are under assault.

right to their own personal day in court, then it would be morally wrong to deny it despite the high costs. I discuss procedural fairness in Chapter Four.

Thus, the primary purpose of civil adjudication is to resolve cases according to the substantive law, subject to the constraint that any system of adjudication must honor procedural rights and other fairness constraints. Procedural rules and norms furnish the tools courts use to pursue this objective; that is, to elicit facts, identify relevant law, and apply law to fact. As we shall see, a great deal follows from this relatively obvious proposition.

The Purpose of Civil Procedure

Since the purpose of civil adjudication is to resolve cases according to the substantive law, and since the point of having a procedural system is to furnish the tools needed for adjudication to accomplish this purpose, it follows that a procedural system should be judged in large part by how well its outcomes—including decisions of legal issues, determinations of motions, and final judgments—conform to what the substantive law requires on the facts of each case. In other words, a procedural system should be judged by the accuracy of the outcomes it produces.

A skeptical reader might object at this point that it makes no sense to speak of "accuracy" when reasonable people frequently disagree about what the law means, what the facts are, and how the law applies to the facts. She might also object that even if accuracy is a meaningful concept in this context, it is not possible to determine whether an outcome is accurate.[12] The

[12] For an example of a scholar noting both objections, see Jay Tidmarsh, *Resolving Cases "on the Merits"*, 87 DENVER U. L. REV. 407, 409 n.7 (2010). These objections are sometimes conflated. For example, a person might argue that the fact that we cannot tell whether a case outcome is accurate means that there is no such thing as an accurate outcome. This is a mistake; it fails to distinguish the metaphysical objection from the epistemological objection.

first objection is metaphysical; it claims that accurate outcomes do not exist. The second objection is epistemological; it claims that one cannot know whether a given outcome is accurate. It's worth examining each objection in turn.

The metaphysical objection need not detain us for long. Accuracy is a meaningful concept even if people disagree about whether a particular outcome is accurate. The fact that they disagree means that they agree that there is something to disagree about, and that something is accuracy. It is tempting to think that accuracy requires a *uniquely correct* outcome for each case. It does not. All it requires is that *incorrect* outcomes exist, or put differently, that the set of correct outcomes, however defined, is bounded. Even if there is more than one acceptable decision of a legal issue, it is possible to endorse the concept of outcome accuracy so long as there is such a thing as an unacceptable (and hence inaccurate) decision.[13] More generally, if the set of valid outcomes (however validity is defined) is bounded, an accurate outcome can be defined as an outcome that belongs to the valid set and an inaccurate outcome as an outcome that does not.

I recognize that this conception of accuracy raises some philosophical and jurisprudential issues. But we need not delve into that complexity here because American adjudicative practice clearly assumes that accuracy is a meaningful concept.[14] Judges devote considerable time to researching the substantive law so they can apply it accurately; appellate courts reverse for legal

---

[13] Professor Tidmarsh argues that the legal system's conception of factual accuracy presupposes a correspondence theory of truth and the fact that there are other theories, such as a coherence theory, complicates the idea of outcome accuracy. Tidmarsh, *Resolving Cases "on the Merits*", at 409 n. 7. To be sure, there are different theories of truth, but that does not mean that there is no such thing as true and false factual propositions and accurate and inaccurate outcomes. We do not need to defend a particular theory of truth to make sense of outcome accuracy, although if I were to do so, I would argue that the best theory fitting adjudicative practice is a correspondence theory for fact propositions and a coherence theory for legal propositions.

[14] It is commonplace to characterize the purpose of the civil litigation system in terms of finding the truth. *E.g.*, Carroll v. Jacques Admiralty Law Firm, 110 F.3d 290, 294 (5th Cir. 1997); Headley v. Chrysler Motor Corp., 141 F.R.D. 362 n. 21 (D. Mass. 1991); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 244, 311 (2004).

error or for clearly erroneous factual determinations, and scholars routinely criticize judicial decisions as wrongly decided. These are such deeply entrenched aspects of American civil adjudication that they must be accounted for in any interpretation of the practice, and the only way to account for them is to recognize that some decisions are accurate, and some are not. To be sure, if it were obvious that outcome accuracy clearly made no sense, we would have to conclude that these practices are mistaken. But it is not at all obvious. Indeed, if it were, we would have to wonder why judges work so hard to get the law and facts right, why appellate courts review for error, and why scholars bother to criticize judges for getting the law wrong.

Nor is our account imperiled by the epistemological objection. For one thing, there are some cases where it is clear what the correct outcome is. If there is direct evidence that clearly supports all the necessary facts (the proverbial "smoking gun") and no contrary evidence, it should be possible for someone with reasonable skill in the law to determine the outcome correctly (recall that there can be more than one correct outcome). But, of course, these conditions are rarely satisfied. In most cases, the evidence supports only probabilistic inferences of the relevant facts and it is not clear that all the evidence has been uncovered. Still, we can assess the probabilities that the different possible outcomes are correct. These probability estimates depend on the available information, of course, and therefore change as the litigation progresses and more information is uncovered. Still, even at the end of the case, we cannot know for sure that the actual outcome is in fact accurate. The best we can do is assign a probability, although that probability should be much higher at the end of the case than at the beginning.

In fact, the American system of litigation assumes that the likelihood of outcome accuracy can be determined. Critics of strict pleading, for example, assume as much when they

complain that a strict pleading rule increases the risk of outcome errors by screening meritorious suits. Supporters of broad discovery make the same assumption when they argue that limited discovery increases the error risk by hampering fact finding. So too, the practice of appellate review depends on the feasibility of determining decisional error. All of this is perfectly sensible, as any lawyer will admit. In short, what matters is the statistical likelihood that outcomes are accurate, and assessments of statistical likelihood are entirely feasible.[15]

Therefore, the problem is not that there is no sensible conception of outcome accuracy or that we cannot evaluate it. The problem is that it is impossible to achieve perfectly accurate outcomes. There is always a chance of a mistake; a court might find the wrong facts, identify the wrong substantive law, or apply law to fact incorrectly. This is where procedure steps in. *The primary purpose of a well-functioning procedural system is to manage the risk of outcome error in an optimal way*. This statement of procedure's purpose is not intended as a universal proposition about the essential nature of procedure. It is intended as the best account of the way procedure works in American civil litigation.

---

[15] Professor Tidmarsh insists that "it is impossible to talk about an accurate outcome independent of the procedural rules that determine the outcome" because "the procedures used to determine the facts influence the determination." Tidmarsh, *Resolving Cases "on the Merits"*, at 409 n. 7. See also *id*. at 411 ("In theory, we might talk about a 'right' or 'accurate' or 'rational' answer on the substantive merits that is independent of the process used; in the real world, however, substance and procedure are inextricably intertwined and cannot be disaggregated."). This argument is a non sequitur. Tidmarsh is correct, of course, that procedure affects outcome; that is, after all, the reason why it's so important to choose procedures well. But it does not follow that it is impossible to "talk about an accurate outcome independent of the procedural rules that determine the outcome"—even in the "real world." To be sure, we often infer a procedure's effect on outcome accuracy from features of the process itself. For example, under appropriate conditions, we can infer from the statistical properties of a coin flip that deciding cases by flipping a fair coin will produce an error risk of 50%. But that doesn't mean that there is no such thing as an accurate outcome independent of the coin flip. Quite the contrary. There must be an independent metric of accuracy for us to conclude that the error risk is 50%. What Professor Tidmarsh likely means is that we cannot tell whether a specific result of the coin flip is erroneous. Even if that's true—and its truth is empirically contingent—we don't need to know whether a specific outcome is accurate to have a meaningful conception of outcome accuracy. All we need to know is the statistical risk of error, and we know that it's 0.5 (50%) in the case of a coin flip.

By the "risk of error," I mean an average risk. More precisely the risk of error is the average probability of an erroneous outcome over all the cases to which the procedures in question apply.[16] If the procedures are meant only to apply to a specific case, then the error risk is the average risk for cases with the same identical features as that case. If the procedural rules are designed for a larger set of cases, such as for all contract cases, then the relevant error risk is the average probability of error for all the cases belonging to the set. And if the procedural rules are designed for all cases that could possibly be filed, then the relevant error risk is the probability of error averaged over all cases.

My formulation of procedure's purpose might seem a bit underwhelming. Why not frame it in a more positive and aspirational way—as aiming to produce perfectly accurate outcomes—and then rely on social costs and other factors to justify falling short of the ideal? One advantage of this alternative formulation, one might argue, is that it keeps the ideal clearly in mind. However, it makes no sense to choose an unattainable goal, one that no procedural system could ever achieve. We do not think that procedures are always deficient in some way that requires justification simply because they are incapable of producing perfectly accurate outcomes. In fact, as we shall see, the ideal goal of a procedural system is *not* perfect accuracy. Increasing error in some areas might be justified to reduce error in others. The key to an optimal procedural system is how the error risk is distributed, a point we shall develop at some length later in this chapter.

[16] This average can be estimated from what we know about the general type of cases. Economists call this an expected error risk.

Of course, there is more work to do in fleshing out what it means to distribute the risk of error in an optimal way. In particular, we need to define what counts as "optimal." But it is worth pausing for a moment to take a closer look at this important point.

I refer to "managing," not "reducing," the risk of error because the goal is not simply to reduce error risks. The goal is to strike an optimal balance between the benefits of error risk reduction and the costs. Moreover, procedures often increase some errors even as they reduce others, a point we shall explore a bit later. Thus, procedure's relationship to error risk, while fundamental, is more complicated than merely reducing it.

One might object that procedure is about justice and that its purpose is best framed as assuring reasonably just outcomes. This is a perfectly fine way to state procedure's purpose—with the important caveat that the justice of an outcome is determined by what the substantive law deems to be just. Understood this way, assuring reasonably just outcomes is encompassed by the idea of managing the risk of error: managing error risk is the same thing as doing one's best to assure that the substantive law is applied optimally, which is the same thing as doing one's best to assure that outcomes are reasonably just by substantive law standards.

Perhaps fair procedures determine the justice of outcomes in cases where the substantive law gives out and the judge must decide purely on policy grounds.[17] People disagree about whether substantive law ever gives out in such an extreme way.[18] But even if it does, it's not clear what fair procedures have to do with the substantive justice of the outcome. A judge

---

[17] One might argue that fair procedure is *evidence* that an outcome is just, but that is very different than the constitutive relationship referred to here. An evidentiary connection presupposes that the justice of an outcome is determined not by the fairness of the procedure, but by some independent standard of justice, and that fair procedure correlates strongly enough with just outcomes, as so determined, to be a useful signal that an outcome is just.

[18] See H.L.A. Hart's positivist theory of law supposes it does sometimes, while Ronald Dworkin's interpretive theory supposes it never does H.L.A. HART, THE CONCEPT OF LAW (3rd ed. Oxford 2012); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard 1977).

presumably decides such a case by applying the principles and policies that she believes are appropriate and the justice of the outcome depends on the justness of those principles and policies.[19]

My statement of procedure's purpose might strike some as too technocratic and antiseptic to capture the full richness, vitality, and importance of litigation and civil adjudication. After all, procedures in United States courts have underwritten hugely impactful lawsuits and made possible judicial decisions with profound social and political consequences. One need only point to the *Brown v. Board of Education* litigation that resulted in an iconic case for our times, as well as the courageous decisions of federal judges implementing *Brown* during the civil rights era. One might also point to the litigation in the Pentagon Papers case that produced the Supreme Court's bold First Amendment decision that helped end the Vietnam War. And the litigation in *Roe v. Wade* that produced a Supreme Court decision transforming women's lives and sparking deep social divisions. In all these examples, procedure shaped the litigation stage that made possible momentous decisions with huge consequences for social and political life.

Certainly these cases, and others like them, stand as inspiring examples of what an independent judiciary can do in times of crisis and important reminders of the courage and personal sacrifice it sometimes takes for judges, lawyers, and parties to ensure that the law is upheld and justice is done. But even the most famous and impactful court decisions result from the sincere efforts of judges to apply their best understanding of the substantive law to the facts. To be sure, the constitutional law involved in these cases did not come prepackaged. Each judge had to interpret open-ended constitutional provisions, and their interpretations were often

---

[19] Thus, civil adjudication is an example of what John Rawls called "imperfect procedural justice" rather than an example of "pure procedural justice." See JOHN RAWLS, A THEORY OF JUSTICE (1971).

controversial. But in every case, the judge made a genuine effort to determine what the law required, and the procedural system furnished the tools for doing so as accurately as practicable. Thus, adjudication is not a different thing in these cases than it is, for example, in a run-of-the-mill contract case. The procedures might be different, and the outcomes certainly have a different salience, but they all involve the same function of applying substantive law to facts.

In fact, as we shall see, characterizing procedure's purpose in the way I do, far from stripping procedure of its humanity and turning it into a technocratic subject, actually ties procedure closely to what really matters to people in the real world. Managing the risk of error requires judges to connect procedure directly to substantive values and goals. The rest of this chapter describes in some detail.

We return then to our central question: what counts as an "optimal way" to manage error risk? It's useful to separate the discussion of this question into two parts: (1) the parameters of optimal error risk management, which I discuss in the rest of this chapter, and (2) the principles of procedural fairness that constrain achievement of the optimality goal, which I discuss in the next chapter. One might object that the optimality of a procedural system involves both, that a system is optimal only when it manages error risk in a way that also satisfies fairness principles. This is true, of course, but it makes sense to discuss the goal before considering the constraints. In any case, separating these two dimensions makes the exposition clearer.

The Procedure-Substance Relationship

To answer the question what counts as an optimal way to manage error risk, we must first have a clear understanding of the relationship between procedure and substantive law. Most everyone acquainted with the litigation system recognizes the relatively obvious, though

important, point that procedure affects outcome and thus the effective enforcement of the substantive law. But the relationship between procedure and substantive law is much deeper and more complex than this. Once we clarify that relationship, we can construct a normative framework for evaluating procedural rules.

In the previous section, we saw that the primary purpose of procedure is to manage the risk of outcome error optimally. But why do we care about reducing errors? The answer is not that there is some intrinsic value in having fewer errors. Only the most compulsive among us would value error reduction for its own sake. Errors are worth preventing only when they produce bad results, and avoiding these results is the reason to prevent the error and to reduce the error risk. In the rest of this book, I shall use the term "harm" in an expansive way to include all kinds of bad results, including those that are bad for moral reasons as well as those that are bad because they involve physical, psychological, and other kinds of tangible loss. The reason I do so is simple convenience.[20]

That errors are worth preventing only when they cause harm may seem too obvious to mention. But the point has important implications for procedure. It means that evaluating a system of procedure requires attention not only to the likelihood of error, but also to the seriousness of the harms that errors create. For a fixed level of harm, an error is more serious when it is more likely to occur, and for a fixed likelihood of occurrence, an error is more serious when the harm it creates is more serious.[21]

---

[20] I'm aware that some might object to my use of the harm concept to refer to results condemned on moral grounds. After all, an error might perpetuate or create a violation of a moral right, but not harm anyone in the conventional sense. We might think of such a violation as creating intrinsic harm, but there are problems with doing that as well. But none of this matter to my use of the term. Any other word would do just as well.

[21] This idea can be formulated mathematically. Let P be the risk of error and let H be the harm from error. The objective is not to reduce P alone, but rather to reduce P × H. This product is called "expected error cost" or expected error-related harm. This formulation works best when H is ordinary harm, but it can still be useful as a

It follows that we should do more to prevent errors that create more serious harms. But how does one determine the seriousness of error-related harm? The answer is to focus on the purposes, utilitarian or moral, that the substantive law is meant to further. When a court makes mistakes in applying the substantive law, the substantive law's purposes are imperfectly realized, and the shortfall creates harms. We often think of these harms as setbacks to interests that the substantive law is mean to promote or protect. These substantive interests have social value and the seriousness of error-related harm depends on that value. For example, suppose the purpose of the substantive law is to promote the social interest in deterring people from engaging in some form of socially undesirable behavior. The value of that interest depends on the importance of deterring the behavior in question. Or suppose the purpose of the substantive law is to further an injured party's interest in receiving compensation. The compensation interest can have utilitarian or moral value depending on why the substantive law promotes the interest. As another example, the purpose of the First Amendment is to protect an individual's interest in freedom of speech, and that interest can have social value either as a moral right or as a means of furthering a well-functioning democracy, or both.

That evaluating a procedural system requires attention to the seriousness of the harms that outcome error creates is fundamental to understanding the connection between procedure and substantive law. Procedure reduces the risk of outcome error; reducing the risk of outcome error is valuable because it improves enforcement of the substantive law; and improving enforcement of the substantive law is valuable because it promotes the law's purposes and thus protects the substantive interests that those purposes aim to further. This relationship can be

---

heuristic even when H has a moral valence. For a more detailed discussion of expected error cost in litigation, see ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 20-29 (2003).

diagrammed as follows (vertical arrows indicate more or better when they point up and less or worse when they point down):

It follows that we should invest more in procedure when the substantive interests protected by the substantive law are valued more highly. This is the key normative relationship between substantive law and procedure. The substantive law defines the value that should be assigned to the substantive interests at stake, which in turn determine the type and magnitude of the harm from outcome error.[22]

Let us pause for a moment to recognize how important this insight is. There has been much discussion in recent years about the so-called principle of "trans-substantive" procedure.[23] According to this principle, the same procedural rules should apply to all (or most) cases regardless of the substantive law at stake—whether the case is a simple tort suit, an important civil rights suit, or a complicated securities fraud suit.[24] This principle makes absolutely no

---

[22] The substantive law can also influence choice of procedure by affecting the risk of error. For example, a substantive claim that involves very complicated factual issues might generate a higher error risk than a claim with simple issues.

[23] For an overview of the history and current state of the trans-substantivity principle, see David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371 (2010). For a critical analysis, see Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009). Scholars credit Professor Robert Cover for coining the term "trans-substantive." Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 (1975). Today, some argue for trans-substantivity on the ground that substance-specific rules might be beyond the power of the court rulemaking process to adopt or that tailoring procedural rules to substance will trigger intense political controversy and possibly paralyze the rulemaking process. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedur*e, 137 U. PA. L. REV. 2067, 2074-81 (1989).

[24] The Federal Rules of Civil Procedure are the canonical example of trans-substantive rules. It is true that the Federal Rules apply to all cases within their scope regardless of the substantive law, but they also delegate broad

sense given that procedure depends on the social value of substantive interests.[25] If that value varies, optimal procedure might vary as well.[26] This does not mean that each body of substantive law necessarily should have its own set of procedures. Different substantive law interests might have the same social value and be suited to the same procedures. Also, one must consider the administrative costs of designing different procedures for different types of cases and classifying cases into their proper categories. What it does mean is that there is no justification for privileging trans-substantivity as a matter of principle. Substance-specific procedure should always be an option.

The previous discussion assumed that some substantive interests are valued differently than others. This is not obvious at first glance. Maybe all substantive interests are equally important from a social perspective, or maybe it's just too difficult to draw distinctions among them as a practical matter. Neither of these possibilities, however, fits the way our legal system treats substantive interests. For example, some interests, especially those that are constitutionally protected, have paramount importance and are valued more highly than interests that do not rise to a constitutional level.[27] Of course, a party who suffers harm to a lesser interest might feel the sting just as much as a party whose constitutional right has been violated, but that

---

discretion to trial judges to adapt the general rules to the facts of specific cases—to, in effect, make substance-specific procedure.

[25] As we saw in Chapter One, it made sense in the early twentieth century when the prevailing view assumed that procedural design involved applying substance-neutral process values.

[26] For more on this point, see Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B. U. L. REV. 1155, 1160-63 (2006).

[27] For examples, see Santosky v. Kramer, 455 U.S. 745, 765-66 (1982) (holding that the burden of proof in a parental rights termination proceeding should be clear and convincing evidence rather than a preponderance because the interest of parents in preserving the natural family is highly valued and the interests of the child, while important, are not as severely affect by error: "a standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity"); New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that in a libel suit brought by a public figure against a newspaper, the plaintiff can recover only by proving actual malice and strongly suggesting that actual malice must be alleged by the plaintiff and proved by the plaintiff by clear and convincing evidence, because of the importance of the constitutional right to freedom of the press and freedom of expression.)

does not mean that the two interests are valued the same from a social point of view. We are willing to spend more on procedure for a constitutional rights case because constitutional rights protect more highly valued interests, making the harm from error more serious.[28] So too, compensating for major personal injury is more important than compensating for minor property damage—so an error in the former is more serious than an error in the latter. And if the substantive law aims to deter socially undesirable conduct, the seriousness of the harm from error varies with the importance the law places on deterring the conduct in question.[29]

All these distinctions reflect judgments about relative value, and these judgments are interpretive. Assigning value to substantive interests requires interpreting the substantive law and the reasons why that law was adopted. People can disagree about such matters, but that does not mean any interpretation is as good as any other. An interpretation must fit the substantive law as best as the interpreter understands it. When more value is assigned to constitutionally protected interests, for example, the decision to do so is not arbitrary or purely subjective. It is the result of an interpretive judgment based on how constitutionally protected interests are treated by the legal system as a whole. People might disagree, but there is something they disagree about and thus a basis for criticizing one another's conclusions.

Process Costs

Thus, procedural design should take account of the risk of outcome error and the seriousness of error-related harm measured in terms of the social importance of the substantive

---

[28] Indeed, in many states, small claims for economic loss are handled informally though small claims court. This does not mean that the way we handle these claims in state court today is well-justified. In Chapter Four, I examine the problem of state court's handling high volume, small claims.

[29] For an example of an approach to allocation of scarce legal resources based on substantive law interests having different social values, see WILMOT-SMITH, EQUAL JUSTICE, at 195-96.

interests at stake. There is a third factor that must be considered: the social costs of a procedural system. There are two types of social cost. "Error cost" is the harm associated with erroneous outcomes. "Process cost" is the cost of litigating and deciding motions, handling objections, promulgating and complying with discovery requests, and so on. The next section takes a close look at error cost. This section focuses on process cost.

The magnitude of process costs depends on three factors: the frequency with which a procedure is used, the cost of the procedure when it is used, and the effect of the procedure on other aspects of the litigation. To illustrate, consider the impact of a stricter pleading rule on process costs. One might predict that stricter pleading will increase the number of dismissal motions since it makes dismissal more likely. However, it also deters meritless suits and encourages more factual specificity in meritorious suits, which leaves fewer cases vulnerable to dismissal. These two countervailing effects can produce an increase, decrease, or no change at all in the frequency of dismissal motions depending on how they balance out.

The second factor, the cost of the procedure when it is used, is easier to predict in our hypothetical. The process cost of litigating and deciding a motion to dismiss if one is filed should increase with a stricter pleading rule because there is more to litigate about.

As for the third factor, if stricter pleading screens more suits, then it saves the process costs of litigating the suits it screens out, including the costs of discovery, summary judgment, and all the rest. Of course, the suits that are screened might be meritorious, in which case the process cost savings come at the cost of more errors, a point we shall explore in the following two sections. The important point for now is that the overall process cost effects of changing from liberal to stricter pleading depend on how these three factors combine.

It is worth mentioning one more point. The analysis to this stage has assumed that process cost is always a negative feature and should be reduced whenever feasible, all other things equal. However, it can also generate benefits. A rational actor contemplating whether to violate the law considers not only the expected liability consequences of her actions, but also the anticipated process costs of defending a lawsuit should one be filed.[30] Those costs add to the losses from litigation and make it more costly for our prospective defendant to take the unlawful action. Anticipating these higher costs, the actor will be less likely to violate the law. In this way, process costs can generate deterrence benefits.

This refinement is important for a careful treatment of deterrence, but we won't worry about it for the rest of the book. We are interested in how to evaluate procedure in general and adding this additional complexity does not affect the general analysis significantly.

Error Costs

Process costs are not the only costs that matter to a procedural analysis. Error costs matter, too. When I refer to "cost" in this context, I mean more than economic cost. As I use the term here, the cost of an error includes any kind of harm that results from an erroneous outcome, whether that harm is valued in economic, psychological, or moral terms. The magnitude of expected error costs depends on two factors: the frequency (or risk) of errors, and the cost (economic or moral) of an error when it occurs.[31] We have assumed so far that adding more procedure reduces the risk of error and thus expected error costs. But this is not necessarily true.

---

[30] For more on this point, see Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1194-95 (2013).

[31] I refer here to "expected error costs," which is a technical term. One can understand the exposition in this chapter without knowing anything about the technical meaning of the term. For those with an interest, however, the "expected cost" of some event is the cost generated by the event if it occurs discounted by (i.e., multiplied by) the probability that it will occur. In effect, it is the average cost generated by events of that type.

A new procedure can increase one type of error at the same time as reducing another type, thereby adding and reducing error costs at the same time.

To illustrate, let us return to our pleading example. As Chapter Two explained, procedural systems differ in the amount of factual detail they require in a complaint. The most liberal pleading rules require only that the plaintiff describe in a general way what the dispute is about. Stricter pleading rules require more factual specifics. Advocates of stricter pleading argue that meritless litigation is a serious problem and that requiring greater factual detail in complaints will deter it.[32] Many people dispute whether there is a serious meritless suit problem, but let's assume there is.[33] The reason meritless filings are problematic is not because of high process costs. When a suit lacks merit, the plaintiff is very likely to settle early if the suit is not dismissed, so not much litigation is likely to take place. Meritless suits are a problem because of high error costs due to bad settlements. When a meritless suit settles, the meritless plaintiff recovers when the substantive law says she should not, so the settlement counts as an error. And to the extent stricter pleading deters meritless filings, it reduces the risk of these errors.

However, a stricter pleading rule also creates new errors by screening meritorious suits. Some discrimination claims, for example, impose liability only if the defendant intended to

---

[32] I should be clear about what I mean by "meritorious" and "meritless" suits. A suit is "meritorious" if and only if the defendant is liable as an objective matter under an accurate and complete account of the facts and the substantive law that the plaintiff alleges. A lawsuit is "meritless" if and only if the defendant is not liable as an objective matter under the true facts and law. The same definitions apply to defenses: a meritorious defense is one that is objectively valid, and a meritless defense is one that is not. Thus, a meritorious suit or defense is not necessarily strong; it can be strong or weak in varying degrees depending on the quality of the evidence, the nature of the proceeding, and other factors. Moreover, a meritless suit or defense is not necessarily frivolous. It is frivolous if there is some reason to blame the party for filing it. For example, a meritless suit is frivolous if the plaintiff filed it knowing it was meritless or under circumstances where she should reasonably have known it was meritless. However, if the plaintiff had no reasonable way to know that the suit was meritless before filing, she cannot be faulted for filing it so the suit is not frivolous. Yet the procedural system should still aim to eliminate meritless suits insofar as reasonable, whether they are knowingly filed or not.

[33] See literature on meritless suits—Croley has a good summary.

discriminate. It can be very difficult for a plaintiff to obtain evidence of defendant's intent before filing a lawsuit.[34] After filing, she can force production of documents, take depositions, and use the other powerful tools of discovery, but before filing, she is on her own.[35] When plaintiffs face this kind of information access problem, they might not be able to find the facts necessary to plead with sufficient specificity, in which case a stricter pleading rule can end up scuttling a meritorious suit. This is an outcome error: a plaintiff who should win and obtain a remedy is not able to do so because she lacks the necessary information to satisfy the rule.[36]

Thus, there are two types of error: Type 1 error or "false positives" (in our example, these are meritless filings that make it past the pleading stage) and Type 2 error or "false negatives" (in our example, these are meritorious suits either dismissed or not filed because of the likelihood of dismissal). A stricter pleading rule reduces one type—false positives (Type 1 error)—but increases the other type—false negatives (Type 2 error). A decision whether to adopt a stricter pleading rule should take account of effects on both types of error.[37]

---

[34] The case of *Ashcroft v. Iqbal*, one of two major Supreme Court pleading decisions adopting plausibility pleading, is a good example. There the plaintiff relied on a discrimination theory that required an allegation of intent to discriminate, and the Court found that he had not done so with sufficient factual specificity. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[35] This is true for many procedural systems, including the federal system governed by the Federal Rules of Civil Procedure, but there are exceptions. Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J. L. REFORM 217 (2007) (discussing pre-suit discovery tools available in some state courts).

[36] If the prospect of dismissal causes an injured party with a meritorious claim not to file suit, the result is an error attributable to stricter pleading. In such a case, the injured party receives nothing when she should receive something and the defendant escapes liability when he shouldn't. This point generalizes. For example, when litigation costs are so high that meritorious plaintiffs cannot afford to file suit (or expect a recovery less than the costs of obtaining it and thus choose not to sue), the result is a system error. In this respect, I disagree with those commentators who distinguish access to court from the accuracy of outcomes. See, e.g., STEVEN P. CROLEY, CIVIL JUSTICE RECONSIDERED: TOWARD A LESS COSTLY, MORE ACCESSIBLE LITIGATION SYSTEM 51-53 (NYU. 2017). Obstacles to access are troubling because of the outcome errors they produce, and those errors are no different conceptually than any other outcome errors.

[37] For a more detailed discussion, see BONE, ECONOMICS OF CIVIL PROCEDURE (2003), at 125-157.

Balancing Benefits and Costs

So far, we have identified three variables critical to evaluating procedural reform: (1) the effect of the reform on false positive error costs; (2) its effect on false negative error costs, and (3) its effect on process costs. How should we combine these three factors to make a decision about the proposed reform? The usual answer is to "balance" them. But the "balancing" metaphor is not very helpful on its own. It begs the question of how to do the balancing.

A classical utilitarian has a relatively straightforward answer to this question. For the utilitarian, the metaphor of weighing scales fits quite well. To do a utilitarian balance, one places the additional social benefit in the aggregate that the procedural reform generates on one side of the scales and the additional social cost on the other, and then one determines whether the former outweighs the latter.[38] It is, of course, much more difficult to apply this balance than to describe it. One must choose a metric for measuring benefits and costs in a commensurable way, obtain the empirical information necessary to measure all the positive and negative effects, and have some way to convert these effects into a common metric.[39] However, empirical and conceptual problems haunt all balancing methods, so one should not demand too much from utilitarianism. Although there are many well-rehearsed criticisms of utilitarianism, the fact is that it is an established method of analyzing social issues.[40]

---

[38] The utilitarian approach I describe here, and the one that is commonly used including in law-and-economics, is known as classical utilitarianism. Classical utilitarianism simply adds up all the positive and negative effects. For a technical discussion of classical utilitarianism and other social welfare functions, see DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 156-164 (1990).

[39] In hedonistic utilitarianism, for example, the common metric is pleasure and pain (which is assumed to be commensurable across human beings). Law-and-economics uses a different metric, one that focuses on preference satisfaction, and a Kaldor-Hicks efficiency criterion (with a marginal analysis) where utilities are measured in terms of willingness to pay. For more, see R. BONE, ECONOMICS OF CIVIL PROCEDURE (2001), at 113-24.

[40] One of the most well-known criticisms of the economic version of utilitarianism that relies on individual utilities grounded in preference satisfaction has to do with the difficulty—some would say impossibility—of comparing utility effects across different persons (so-called interpersonal comparison of utility) when preferences are purely

Utilitarian balancing, however, is not the only type of balancing. There is also moral balancing. A moral balance strikes an accommodation between competing moral demands often by seeking a compromise that gives each appropriate weight. For example, if the competing demands involve moral rights with equal weight, a balance will honor each right equally and fall short of fully protecting each to an equal extent. This balance might also happen to maximize aggregate utility, but that is not its goal or how it's struck. And utility maximization is not at all guaranteed.

To see how utilitarian and moral balancing apply to procedure, suppose that the existing procedural rules allow very limited discovery, only two depositions and narrow document production, and that rulemakers are considering a proposal to expand discovery in civil rights suits. The current system does a good job of keeping litigation costs in check and reducing unjustified settlements by making it difficult for meritless plaintiffs to threaten defendants with burdensome discovery. However, it makes it difficult for plaintiffs with meritorious suits to obtain the evidence they need to prove their claims. This information access problem is particularly serious in race discrimination suits that require proof of the defendant's intent to discriminate. With broader discovery, more meritorious plaintiffs will be able to prove liability. But, of course, more meritless plaintiffs will be able to strongarm unjustified settlements.

These two effects must be balanced, and the result depends on whether the balance is utilitarian or moral. Our rulemakers could easily reject the proposal if they employ a utilitarian balance. To see why, suppose that state officials in our hypothetical world rarely discriminate on racial grounds. As a result, only a small fraction of civil rights suits alleging racial

---

subjective. There are many responses that seek to show the problem is exaggerated or at least can be managed in many circumstances. Cite.

discrimination are meritorious; most are meritless. It follows that switching to broad discovery will reduce the number of unvindicated civil rights suits by only a small amount (because there are very few meritorious suits to begin with). However, switching to broad discovery is likely to increase the number of unjustified settlements by a substantial amount (because there are many more meritless suits to begin with).[41]

The costs of error matter, too. The cost of unvindicated civil rights violations (false negative errors) includes weaker deterrence and emotional, economic, reputational and other harms to the victim and others. Notably, a utilitarian does not assign any cost to the moral wrong of racial discrimination itself, only to its welfare effects. The cost of unjustified settlements (false positive errors) includes reputation harms and emotional distress for state officials, less state revenue available for useful social programs, chilling effects on other officials fearful of being targets of meritless suits, and so on. Totaling up all the gains and losses can easily produce more additional social cost than social benefit (even without considering the increase in process costs).[42]

---

[41] To illustrate with numbers, suppose state officials discriminate only 10% of the time, so on average only 10 of every 100 lawsuits are meritorious and 90 are meritless. Suppose that switching to broad discovery reduces the false negative error risk (meritorious suits that lose or are not filed) from 50% to 20%. With only 10 meritorious suits, a 50% error risk under limited discovery means only 5 errors and 20% error risk under broad discovery means only 2 errors, so the switch to broad discovery avoids three false negative errors (out of every 100 suits). Now suppose that only 20% of meritless suits settle unjustifiably under limited discovery, but 40% do so under broad discovery. Given that there are 90 meritless suits, a 20% false positive error risk under limited discovery means 18 errors (unjustified settlements) and a 40% risk under broad discovery means 36 errors, so the switch to broad discovery adds eighteen more false positive errors (out of every 100 suits). Thus, switching to broad discovery generates *six times* as many false positive errors as it reduces false negative errors. Since these numbers are for every 100 suits, we can easily state the conclusions in the form of probabilities – broad discovery reduces the risk of false negative error by 3% and increases the risk of false positive error by 18%. Thus, the proposed reform produces six times as many false positives as it reduces false negatives (18% ÷ 3% = 6).

[42] In our footnote 41 hypothetical, switching to broad discovery adds six times as many false positives as it reduces false negatives. This means that the proposal to switch should be rejected unless the cost of denying recovery to a deserving victim of discrimination (a false negative) is more than six times the cost of an unjustified settlement (a false positive). In fact, the ratio must be even greater than six, since process costs are virtually certain to rise with broader discovery requests and more litigation over discovery disputes.

The point, of course, is not that broad discovery *should* be rejected on utilitarian grounds. That depends on such things as the propensity of state officials to discriminate according to race, the tendency of plaintiffs to file meritless suits, and the incentives of meritless plaintiffs to abuse broad discovery. The empirical assumptions in our hypothetical were chosen simply to illustrate the point, and they might not survive empirical scrutiny. My point is only that broad discovery *could* be rejected on utilitarian grounds even when it substantially improves the enforcement of civil rights law in meritorious cases.

But there is something seriously wrong with this analysis. Most people agree that the right to be free from racial discrimination is a moral right and that victims of racial discrimination suffer a serious moral wrong. When a moral right or obligation is at stake, the proper balance is not utilitarian; it's moral. For example, when a moral right is balanced against high social costs, the moral right takes priority. When a moral right is balanced against a competing moral right, however, the two rights must be accommodated, and the accommodation depends on the relative moral weight of the rights involved. I shall call this kind of balancing "rights-based balancing."

We must tread carefully here. The rights-based balancing required when substantive moral rights or interests are involved is relevant to the shape of the substantive law. This does not necessarily mean, however, that these substantive moral rights and interests are also relevant to the shape of the procedural rules used to adjudicate that substantive law. In our hypothetical, for example, the moral right against racial discrimination requires those making and interpreting substantive legal rights to use rights-based balancing rather than utilitarian balancing. But that's the substantive law. Is the same thing true for procedures? One thing is clear: the presence of a substantive moral right or interest must limit reliance on utilitarian justifications for procedure at

least to some extent. Otherwise, it would be possible indirectly to limit the substantive moral right on utilitarian grounds by limiting the procedures available to enforce it.

Still, the presence of a substantive moral right or interest exerts a weaker constraint for procedure than it does for substantive law. The reason has to do with the different ways that substantive law and procedure affect the moral right. Directly limiting the substantive law frees the state to interfere with an individual's rights-protected activities. However, limiting the procedures available to enforce the substantive law just increases the probability that a state actor will escape liability for violating the right.

One can see this difference clearly in the context of litigation. A lawsuit is always a gamble and increasing the error risk merely alters the terms of the gamble. If increasing the error risk by a small amount would free substantial social resources for other valuable uses, most people, I believe, would agree to accept the somewhat higher risk even when the substantive law at stake protects a moral right or morally valuable interest. And they would do so without thinking that the resulting system was morally troubling at all. People trade risk for reward all the time.

Moreover, this intuition comports well with litigation practice. Reducing the social costs of litigation has always been an important impetus for procedural reform. [43] And today, there are many procedural rules that take account of the social costs of process directly. For example, a federal trial judge has the power to compel plaintiffs to adjudicate their constitutional claims in a single proceeding through consolidation or via a class action, all in order to promote judicial

[43] The social costs of litigation have figured prominently in every reform movement in the United States since the Field Code reforms of the mid-nineteenth century.

economy by reducing duplicative litigation costs.[44] And a plaintiff's suit can be transferred to a different federal court to be joined with a related suit already pending there in order, among other things, to save litigation costs.[45] Indeed, if the system were committed to providing procedures that minimize error risks regardless of costs, there would be no obvious end to the procedures that a party with a moral right could demand.[46]

Thus, substantive moral rights and interests exert weaker constraints on procedure than on substantive law. But what are those constraints? First, the presence of substantive moral rights or interests shifts the focus from the aggregate effects on error risk to the effect on individual litigants. Recall that in our discrimination hypothetical, we assumed that state officials rarely discriminate, which meant that there were very few meritorious civil rights suits. Because of this, there was little benefit in broadening discovery *even if* the error risk facing a meritorious civil rights plaintiff was very high under a limited discovery regime.[47] When substantive moral rights or interests are at stake, however, it doesn't matter how many meritorious suits there are; what matters is the false negative error risk in each individual suit. For example, suppose that only 10% of the cases filed are meritorious (because discrimination is very rare) and that meritorious plaintiffs are unable to vindicate their discrimination claims 50% of the time. The overall error risk is 5% (i.e., 50% × 10%), which is the risk critical to a

---

[44] For consolidation, see Fed. R. Civ. P. 40(a). For the class action, see Fed. R. Civ. P. 23.

[45] 28 U.S.C. § 1404(a). Other examples include the Supreme Court's shift to plausibility pleading justified in part by the need to reduce high discovery costs, the1983 amendments to Federal Rule of Civil Procedure Rule 26 that authorized the judge to impose limits on discovery when the discovery is unduly burdensome or expensive, and the most recent version of Rule 26(b)(1) that allows limits when the costs of additional discovery exceed the benefits. All these procedural rules apply to civil rights suits as well as breach of contract actions.

[46] It's always possible to reduce the error risk by allowing parties to relitigate the same case multiple times and then giving everyone the most commonly recurring outcome. This follows from the Condorcet Jury Theorem. But our litigation system allows only the same parties to litigate a case only once, and does so primarily to avoid the social costs of repetitive litigation. For a discussion of the Condorcet Jury Theorem, see Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261, 264-65 (1983).

[47] Recall that in footnote 41's numerical example, the false negative error risk was 50%, in other words, only one half of the meritorious civil rights plaintiffs succeed in proving their claims.

utilitarian analysis. However, when a moral right or interest is at stake, what matters is the 50% error risk that each meritorious plaintiff faces because that's the impact of the procedure on an individual rightholder.

The second, and more important, constraint is distributive. What seems so striking about limited discovery is that it hurts civil rights plaintiffs seeking to vindicate moral rights violations but helps defendants without any moral rights or interests at stake. In other words, it generates a higher false negative error risk than false positive error risk. This is not an irrational or indefensible choice. As we saw, it can be justified on utilitarian grounds, but the utilitarian justification is not available when moral rights are at stake. From a rights-based perspective, this error risk distribution is exactly the reverse of what one would expect if the moral right had been given appropriate weight. A meritorious civil rights plaintiff seeking to vindicate a moral right or interest should be treated more, not less, favorably than a defendant without any moral rights or interests at stake. This follows from the nature of rights-based balancing: moral rights take priority over ordinary interests that have no moral weight.

Still, whether this difference is problematic depends ultimately on the reasons for it. Our hypothetical distribution seems so out of whack because we cannot imagine a justification for the skewed error risk that properly credits the fact that civil rights plaintiffs are vindicating morally grounded legal rights. It might be different if the defendant had a legal defense based on a moral right. In that case, there would be a rights conflict and the best accommodation might impose a higher error risk on plaintiffs than on defendants depending on the relative moral weight of the conflicting rights at stake. But that is not our hypothetical.

There is another way to see this point. All parties have a background moral right to equal concern and respect.[48] This does not mean that the error risk must be the same for all parties in all cases, but it does mean that the distribution of error risk should be justified in a way that gives appropriate weight to the relative importance of the substantive interests at stake. Shortchanging civil rights plaintiffs seeking vindication of moral rights or interests while benefiting those with only economic or other nonmoral interests at stake does not credit the importance of moral rights and interests. As a result, it fails to give those with moral stakes the concern and respect they are due.

It is quite common for procedure scholars to assume that error risks should be presumptively equal across the party line—the same for plaintiffs as for defendants—with deviations from equality requiring special justification.[49] This is incorrect. What must be equal across the party line is the concern and respect accorded to each party, and equal concern and respect requires attention to the substantive interests at stake as well as the relative error risks. To be sure, in some, perhaps many, suits, the substantive interests on each side will have equal weight, in which case it makes sense to equalize the error risk. As we have seen, however, there are cases in which the relative weight of the substantive interests are significantly different.

This analysis also applies to the distribution of error risk across different types of cases. In general, the error risk should be lower for parties with moral rights or interests at stake than for parties in lawsuits that do not involve moral stakes. For example, in the absence of an adequate justification, the error risk should ordinarily be lower for plaintiffs in civil rights suits

---

[48] Ronald Dworkin focused on the right to equal concern and respect in his important essay on procedure. See Ronald Dworkin, *Principle, Policy, Procedure*, in A MATTER OF PRINCIPLE 72 (1985).

[49] For an example, see Solum, *Procedural Justice*, at 257, 312.

than for plaintiffs in ordinary contract suits involving only economic harm.[50] In other words, both intra-suit and inter-suit comparisons matter.

So far, we have focused on the push and pull of moral rights and interests. But what about the process costs of litigation? I argued above that a rights-based balance makes room for these costs as reasons to limit procedure. The key is to spread the marginal increase in error risk resulting from the procedural limitations across multiple cases in a way that preserves the comparative risks. Since the rights-based constraint is comparative, the absolute magnitude of risk can increase so long as relative magnitudes remain the same.

To illustrate, suppose that for some reason civil rights cases are unusually costly to litigate. Perhaps the complexity of the legal and factual issues as well as the need for extensive discovery leads to lengthy litigation delays and high litigation costs. One way to address this problem is to limit discovery in civil rights cases, but this burdens civil rights plaintiffs disproportionately and distorts an otherwise proper error risk distribution. An alternative is to compensate for the high costs of litigating civil rights suits by saving litigation costs with procedural adjustments in other cases. The goal is to make sufficient adjustments across the board to reap the desired cost savings while maintaining relative error risks and an error risk distribution that conforms to rights-based constraints.[51]

---

[50] One might argue that contract suits also involve a moral right, the right to have promises fulfilled. That is not the standard view of contract law in the United States, but even if it were, it's still reasonable to suppose that the American legal system assigns keeping a contractual promise considerably less moral weight than honoring a right to freedom of speech. As one indication of this, the latter has been elevated to constitutional status while the former has not, at least not since the early twentieth century.

[51] It might also be possible to justify the distribution if the litigation cost savings mostly benefitted the plaintiff. In that case, the increase in false negative error risk might be offset by the savings the plaintiff enjoys in being able to litigate a civil rights case at much less cost.

This might seem rather technical, but the idea is fairly simple. And it is also intuitively appealing. Given the social importance of civil rights litigation, it makes intuitive sense to make other cases, where the substantive interests are less highly valued, take much of the burden. One might object to parties in non-civil-rights cases bearing the burden of reducing the high litigation costs generated by civil rights cases when the former did nothing to create the problem. However, no one has an entitlement to any specific level of error risk. As long as the error risk is distributed in a way that respects the relative importance of substantive interests, those parties have no ground to object.

There is an additional point that deserves mention. To operationalize the balancing framework, we must be able to determine whether the substantive law is meant to protect moral rights or interests valued in moral terms. This is done by finding the best interpretation of the substantive law. Sometimes that interpretation will be relatively clear. For example, the Equal Protection Clause of the United States Constitution is clearly meant to protect a moral right against discrimination, and this is also true for Title VII of the Civil Rights Act targeting employment discrimination and Title II targeting discrimination in public accommodations.[52] Much of the time, however, interpretation is much less clear. There is sharp disagreement, for example, about the proper characterization of the goals of negligence law; some commentators focus on deterrence while others stress corrective justice.[53] Yet it is important to remember two things: first, the point is to discern the purposes of the law as it exists and not as one would like it to be, and second, moral rights protection need only be a substantial goal not the only goal. To

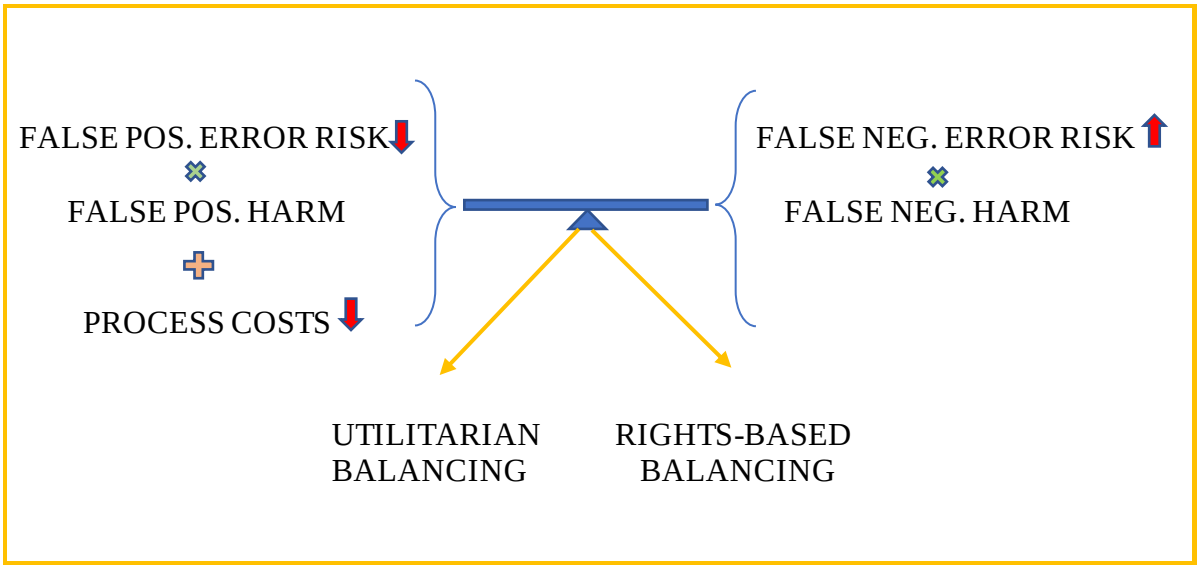
[52] Cites.

[53] Economists argue that the goal of negligence law is to incentivize socially efficient precautions, while corrective justice theorists argue that it is to repair disruptions in a pre-existing moral equilibrium.

be sure, reasonable minds might disagree about the best interpretation of the substantive law. But that is no different than any other interpretive exercise in the law.

It is important to emphasize that none of this is meant to be precise or mathematical. In an ideal world of complete information and perfect rationality, we might be able to determine error risks precisely. But ours is not an ideal world. Predicting the impact of a procedural reform on error risk is fraught with uncertainty. Not only are the empirics limited, but so is our ability to foresee the effects of strategic interaction. Rough predictions are possible, but not precise ones. And determining the relative value of substantive interests is, of course, a matter of judgment. In the end, the best one can do is nudge the error risk in a desired direction to achieve rough proportionality. What is required is not precision, but a good faith effort to justify procedural choices in the best way possible given informational, cognitive, and other limitations. This applies to advocates for reform not just to those who make the rules. While there is bound to be disagreement about how to achieve a fair error risk distribution and reduce costs, there is reason for everyone acting in good faith to be open to all reasonable views given that everyone shares the same goal: to design procedures for civil litigation that implement the best normative account of the American litigation system.

We now have all the pieces in place: process costs, two types of error cost, and utilitarian versus rights-based balancing. The following diagram pulls all these elements together in the context of evaluating a procedural reform, such as limiting discovery, that reduces false positive errors and process costs but increases false negative errors. We could use a different example where process costs increase and the effect on error risk is reversed. But the overall framework would be the same. The vertical arrows indicate the direction of change; ✖ means combine (if this were a mathematical equation, it would mean multiply), and ✚ means "add to":



In this diagram, the increase or decrease in error risk is combined with the harm produced by each type of error to yield the magnitude of error-related harm. Moreover, the harms from error are evaluated in terms of the nature and importance of the interests protected by the substantive law and therefore are likely to be different for the two different types of error. As for process costs, we have seen that a procedural reform can increase or reduce process costs or have no net effect at all. Indeed, while limiting discovery is likely to reduce process costs, as indicated on the left-hand side, it could also increase those costs if it encouraged parties to switch to more costly methods to obtain the information they need.

The balancing is utilitarian or rights-based depending on the nature of the substantive interests affected by error. If those interests do not have a moral character, that is, if they involve only ordinary harms like economic loss, then the appropriate mode of balancing is utilitarian, and the goal should be to choose procedures that maximize aggregate social benefits net of social costs. On the other hand, if one or both types of error adversely affect substantive interests valued in moral terms, such as interests protected by moral rights, the balance should be rights-

based. A rights-based balance demands an error risk distribution across all cases and litigants that gives due regard to the special constraints on procedural choice that a moral right or interest imposes. In general, this means distributing the risk of error in proportion to the relative importance of the substantive rights or interests at stake: the error risk should be lower for substantive interests with moral value than for substantive interests with no moral value, and it should be lower for moral rights and interests that are valued more highly.

Procedure as a System

When striking this balance, it is important to bear in mind that procedural rules work as an integrated system. They operate in tandem to reduce error risks, avoid error-related harms, and limit process costs. It follows that if multiple rules serve the same function, those rules should be coordinated to prevent mutual interference and excessive cost. And the primary responsibility for coordinating different rules lies with the rulemakers rather than with judges in individual cases.

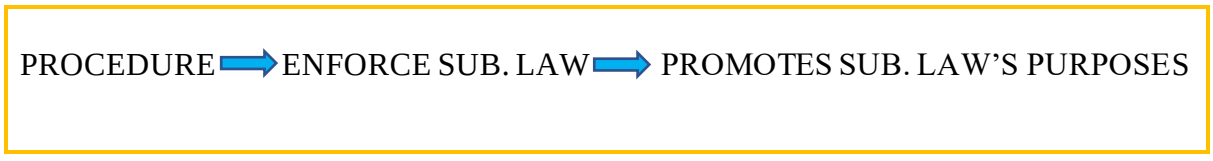
For example, strict pleading rules, penalty rules, and summary judgment rules all screen meritless suits. Strict pleading does it by requiring that the plaintiff have sufficiently detailed factual support for her claim before she files. Penalties do it by sanctioning frivolous filings. Summary judgment does it by demanding that the plaintiff show admissible evidence that can be used to prove her legal claims at trial. Each of these rules operates in a different way and has its own mix of benefits and costs. To determine an optimal approach to screening meritless suits, therefore, one must consider all these rules together. It might be that a liberal pleading rule coupled with a strict penalty rule and a broad summary judgment rule will produce the optimal balance of benefits and costs. Or maybe a strict penalty rule coupled with a liberal pleading rule

and a narrow summary judgment rule is optimal. A judge is not well positioned to make these evaluations in the context of an individual case. [54]

Procedural design requires attention to global effects in another way. Not only is it important to consider how the rules interact. As we have seen, it is also important to consider how the procedural system distributes the risk of error across different cases and litigants. A party asserting a constitutional right that protects a moral right or interest, for example, should enjoy a lower error risk than, say, a party asserting an interest in recovering for minor property damage. Only rulemakers with a view of the system as a whole are capable of making these distributional decisions.

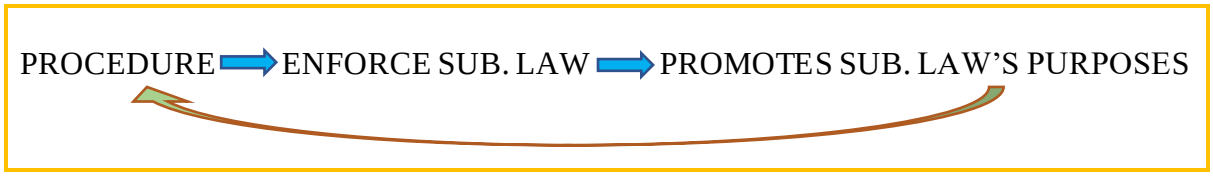
The Legal Rights View

We have assumed to this point that procedure should enforce substantive law as that substantive law is defined. This assumption may seem self-evident, even axiomatic. Substantive law is made by properly authorized lawmaking authorities to serve the purposes that the lawmaker deems important and in the way the lawmaker thinks is best. The job of a procedural system is to enforce that law as the lawmaker has defined it, not to further the law's purpose directly. We can summarize this view in the following simple diagram:



[54] For example, judges usually know very little about a case at the beginning when case-specific procedures would have to be determined, and they are bound to have difficulty predicting the interactive effects of different procedural elements. For a discussion, see Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1990-96 (2007).

This simple picture isn't quite right. The procedures used to adjudicate a substantive law claim must take account of the social value of the interests that it is the purpose of the substantive law to protect. And doing this requires attention to the values and policies that the substantive law was meant to further. Thus, we should alter the simple diagram to add a connection between substantive law purpose and procedure in the following way:



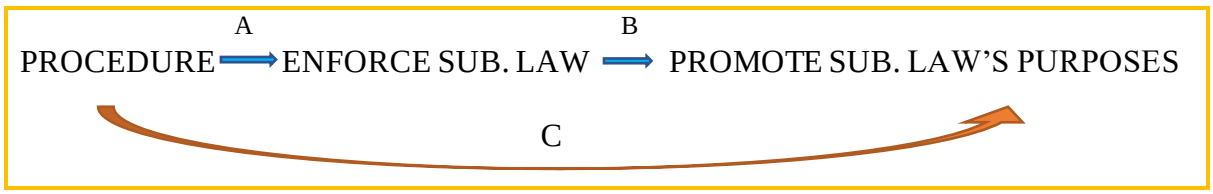
Still, while this is an important gloss, it does not change the basic idea that procedure should enforce the substantive law as defined and not directly promote the substantive law's purposes or directly protect the underlying substantive interests. Errors are still defined as deviations from substantive law entitlements.

But there is still a problem with this modified picture. Simply put, insisting that procedure always enforce substantive legal rights and never promote the substantive law's purposes directly can result in not enforcing the substantive law at all. Asbestos litigation is a good example. During the asbestos litigation crisis of the 1990s, there were so many asbestos suits that individually litigating them all would have created huge delays for thousands of injured plaintiffs and diminished their actual recovery significantly.[55] Judges experimented with different solutions, one of which, case sampling, is discussed in the next section. These solutions

[55] For a description of the asbestos litigation crisis and its effects, see REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 41 (March 1991); Ortiz v. Fibreboard Corp., 527 U.S. 865, 866–68 (1999) (Breyer, J., dissenting); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 632–33 (1997) (Breyer, J., concurring in part and dissenting in part).

delivered meaningful recovery to plaintiffs who would have otherwise netted virtually nothing after taking delay and litigation costs into account. However, they also produced outcomes that deviated systematically from the substantive law as defined.

This created a Catch-22. The innovative procedures that courts developed were better at protecting the substantive interests at stake, but only by sacrificing strict fidelity to the substantive law as defined. The alternative, individual litigation, made possible strict fidelity to the substantive law as defined, but only by systematically shortchanging substantive interests and underenforcing the values and policies that the substantive law was meant to promote. Thus, courts had to choose between enforcing the substantive law as defined or adequately promoting the substantive law's purposes. One can diagram the choice as follows:



Enforcing the substantive law as defined (path A) normally promotes the substantive law's purposes (path B). However, sometimes path A or path B fails, in which case the court must decide whether to follow path C. For example, A might fail because the procedural system is too costly for injured parties to bring suit. Or B might fail because, as in the asbestos example, serious delays in litigation due to huge case backlogs undermine the substantive law's deterrence and compensation goals. In these situations, there might be some novel procedure, like case sampling, that follows path C and thus promotes the substantive law's purpose and protects the substantive interests at stake more effectively, but only by producing outcomes that systematically deviate from the substantive law as defined.

The question is whether courts can ever follow path C instead of sticking with path A. In other words, do judges have the power to craft novel procedures to address litigation problems that impede path A or path B? Some proceduralists answer no and many others implicitly assume that the answer is no without thinking hard about it. I shall refer to this position as the "legal rights view" and its advocates as "legal rights proponents," because it insists that procedure must be limited to enforcing legal rights as defined even when doing so shortchanges the purposes the substantive law was meant to serve. [56]

A clarification is in order. The substantive law is seldom crystal clear. The definition of legal rights is usually a matter of finding the best interpretation, and the best interpretation might take account of the law's purposes and the values and policies that inform those purposes—in the way a purposive interpretation of a statute does. But once a judge interprets the law and settles on her best account of the substantive entitlements that the law creates, the legal rights view demands that a court enforce those entitlements strictly even if doing so undermines the purposes that the substantive law was meant to promote.[57]

---

[56] For a particularly clear statement of the legal rights view, see Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 650 (2010). For a general discussion, see Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 329-34 (2008). For examples of courts and commentators applying the legal rights view, see Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (condemning the use of sampling to adjudicate small backpay claims on the ground that it alters defendant's legal rights under Title VII); Cimino v. Raymark Industries, Inc., 151 F.3d 297, 311–19 (5th Cir. 1998) (relying on the Erie Doctrine to bar the use of sampling to adjudicate state-created claims on the assumption that federal courts must enforce state substantive rights as defined); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 158 (2003) (arguing for a preexistence principle that holds that a class settlement cannot alter the preexisting substantive rights of class members, and noting that "[t]he power to alter rights in a manner that individuals may not avoid generally rests with democratic institutions, not class counsel and courts by way of a judgment approving a class settlement").

[57] This account assumes that there are limits to legitimate interpretation and that the best interpretation of the relevant law sometimes leaves a gap between what the law prescribes and what the lawmaker wanted to achieve. This is obvious for a restrictive interpretive approach like textualism or originalism, and some legal rights proponents favor those interpretive methodologies. But the assumption also holds true for more liberal methodologies. In any case, it is widely accepted.

The legal rights view assumes a clear differentiation of tasks between lawmakers and courts. Lawmakers make the law, and courts apply the law that lawmakers make. When courts change statutory law, for example, they alter the way democratically accountable legislators chose to promote their desired purposes. It might be that some other version of the statute would better serve those purposes, but it is not for the judge to implement the improvement. In a democracy, that power lies with the legislature.[58]

The relationship between procedure and substantive law, however, is much more complex than the legal rights view supposes. To be sure, a judge should not alter the elements of a statutory claim simply because she believes a different statute would better serve the statutory purposes. But in the cases that interest us, the judge has a very different reason for departing from the statute: she seeks to address problems with the procedural system that create a normatively unacceptable level of error risk for some and an unfair error risk distribution across the board.[59] Viewed in this way, a procedural innovation like sampling represents an effort to further procedure's purpose when that purpose fails because of defects in the procedural system.

An Example: The Use of Sampling to Adjudicate Mass Tort Cases

[FEEL FREE TO SKIP THIS DISCUSSION OF SAMPLING IF YOU DON'T HAVE TIME TO READ IT.]

---

[58] The legal rights view also applies to constitutional law and common law, but explaining how is more difficult because of the more active role courts play in making and interpreting constitutional and common law.

[59] There are cases that fall in between judicial alteration of a statute and judicial adoption of novel procedures. For example, courts sometimes adopt evidentiary presumptions that facilitate the use of established procedures that more effectively enforce the substantive law. For example, the Supreme Court adopted the fraud-on-the-market theory to create a presumption of reliance that enabled class action litigation, which in turn enhanced the effective enforcement of securities fraud claims. Basic Inc. v. Levinson, 485 U.S. 224 (1988). And many states recognize presumptions of reliance to facilitate consumer fraud class actions. One might argue that these are examples of judges deviating from substantive law as defined in order to better promote the substantive law's purposes and the values and policies those purposes further.

To see the problem with the legal rights view more clearly, let us take a close look at one of the most controversial procedural innovations of the last few decades: the use of sampling to adjudicate mass tort and other large case aggregations. We shall focus on asbestos litigation, but the analysis applies more generally to all large-scale litigation.

First some background. In 1990, near the peak of the asbestos litigation crisis, when asbestos cases inundated the federal courts, Judge Robert Parker, a federal district judge in the Eastern District of Texas, faced the daunting task of adjudicating thousands of pending asbestos cases.[60] He described the situation in stark terms: "If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing. Transaction costs would be astronomical."[61] The challenge, as he saw it, was to find "a fair and cost-effective means of trying large numbers of asbestos cases."

Judge Parker met the challenge by using a sampling procedure. We need not dwell on the specific details of his approach. The essential features are quite simple. He divided the total population of cases into five disease categories, sampled cases from each category, held jury trials in the sampled cases, and gave each of the remaining cases in the population the average of the sample case verdicts for its disease category.

The defendants appealed and the Fifth Circuit Court of Appeals reversed. The Fifth Circuit recognized the unprecedented scale of the asbestos litigation crisis and the huge backlog, delay, and cost problems confronting the federal courts. Nevertheless, the Court held that Judge Parker had no power to use sampling to address these problems because, among other things,

---

[60] Cimino v. Raymark Industries, Inc., 751 F. Supp. 649 (E.D. Tex. 1990).
[61] *Id.* at 652.

sampling altered substantive legal rights as defined.[62] The doctrinal technicalities are not important for our purposes.[63] The key defect, as the Fifth Circuit saw it, was that sampling produced average outcomes when most plaintiffs had substantive law entitlements to more or less than the average.

Other courts have followed the Fifth Circuit's lead in rejecting sampling.[64] They cite a number of different doctrinal grounds, but most of them in one way or another implicate the legal rights view.[65] From a legal rights perspective, the problem with sampling is that it generates outcomes that systematically and predictably deviate from substantive law entitlements. The mere risk of a deviation alone is not a problem. Any outcome error does that.[66] But ordinary errors are random; sampling's deviations are inevitable, the systematic and predictable consequence of giving everyone an average recovery. Those who have strong cases entitled to a recovery greater than the average receive less than they are due, and those with weak cases receive more.[67]

---

[62] Cimino v. Raymark Industries, Inc., 151 F.3d 297 (5th Cir. 1998).

[63] Technically, the Fifth Circuit held that sampling altered state tort law in violation of the Erie Doctrine.

[64] And in *Wal-Mart Stores v. Dukes*, the United States Supreme Court dealt sampling a major blow, pejoratively referring to it as "Trial by Formula." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011). But see *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (opening a narrow window for the use of sampling). See Robert G. Bone, Tyson Foods *and the Future of Statistical Adjudication*, 95 N. C. L. REV. 607 (2017).

[65] The Fifth Circuit in *Cimino* relied on the Erie Doctrine, and the *Wal-Mart* Court relied on the Rules Enabling Act. But both focused on the fact that sampling alters the rights granted by the substantive law. It is worth noting, however, that not all objections to sampling have this character. For example, the Fifth Circuit also relied on the Seventh Amendment jury trial right and some courts invoke the Due Process right to a personal day in court. I discuss the day-in-court right in Chapter Four.

[66] In fact, it is virtually certain that in a large enough population of cases, at least one plaintiff will lose when she should have won. To illustrate, suppose there are 100 plaintiffs with very strong cases, all of whom should win. Suppose sampling gives all of them less than their substantive entitlements. Assume all 100 plaintiffs litigate individually and that the risk of an erroneous verdict in defendant's favor is 10%. The probability that at least one plaintiff will lose her individual suit and receive zero damages is $1 - (0.9)^{100}$ which is more than 0.9999, or almost 100%.

[67] For an in-depth analysis of statistical adjudication with a special focus on sampling, see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993); Robert G. Bone, *A Normative Evaluation of Actuarial Litigation*, 18 CONN. INS. L.J. 227 (2011).

For a legal rights proponent, this means that sampling alters the substantive law as defined and therefore courts cannot use it without the approval of the lawmaking authority. It does not matter how effective sampling is as a solution to a serious litigation problem; it is beyond the power of courts to adopt on their own.[68] And this objection is not limited to sampling. Legal rights proponents also complain that class actions and other aggregation devices generate outcomes that deviate from substantive law entitlements.[69]

This line of argument has superficial appeal, but the matter is not so simple. The problem is that fidelity to the legal rights view also produces outcomes that deviate systematically and predictably from substantive law entitlements. Specifically, it leaves plaintiffs whose cases are tried late in the litigation queue with a recovery that falls far short of their substantive entitlements in real terms and far short of the amount recovered by identically situated plaintiffs whose cases are tried earlier in the queue. This systematically skewed distribution of error risk is exactly what a procedural system is meant to prevent. And sampling prevents it.

Let us unpack this argument. At the outset, it is important to bear in mind that our judge does not use sampling *because* she believes the substantive law should provide only average recovery.[70] After all, the judge applies the substantive law to each of the sampled cases. She uses sampling because the volume of cases exceeds the capacity of the court system to render fair and efficient results through individual litigation. A large volume of cases delays litigation

---

[68] As the Fifth Circuit summed it up in *Cimino*, "federal courts must . . . maintain 'the separation of powers between the judicial and legislative branches. The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more.'" *Cimino*, 151 F.3d at 321 (quoting from *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990)).

[69] For a discussion of the use of cy pres in class actions that addresses the legal rights objection, see Robert G. Bone, *In Defense of the Cy-Pres-Only Class Action*, 24 LEWIS & CLARK L. REV. 571 (2020).

[70] Some scholars argue that negligence law should provide average compensation for how much the defendant's conduct increased the risk of injury. But that is not what our judge is trying to do. For a discussion, see Bone, *Statistical Adjudication*, at 605-15.

for those later in the queue, and the more cases, the longer the delays. While delay can be costly for corporate defendants, it is much more costly for plaintiffs. For one thing, delay reduces the real value of a damages award due to discounting.[71] Assuming a compound interest rate of 5%, a damage award of $500,000 received five years from now is worth only $391,763 today.[72] In addition, a plaintiff's injuries often worsen as she waits for her suit to be tried, at least when insurance is very limited or nonexistent and personal resources fall far short of what is required to cover her medical needs. And plaintiff's personal and family situation can easily deteriorate without funds to maintain a comfortable life.

All these delay costs reduce a deserving plaintiff's real recovery below her substantive entitlement. We might not worry about small discrepancies. A litigation system is hardly perfect even when it functions well. But the discrepancies can be very substantial when the volume of cases is huge and the backlogs severe. Indeed, with a large enough volume of cases, the delays can be so lengthy that the net recovery for plaintiffs late in the litigation queue is zero, or even negative, in real terms. Moreover, these reductions are not distributed evenly; plaintiffs later in the queue are treated worse, and in many cases much worse, than plaintiffs earlier in the queue.

It is important to bear in mind that these adverse effects are not the fault of plaintiffs. They depend on the order of the litigation queue, which is usually determined by factors largely out of a plaintiff's control. To be sure, a plaintiff might unreasonably procrastinate in filing suit,

---

[71] Discounting to present value reflects the fact that money received a year from now is not worth the same as money received now. The reason is that a dollar received now can be invested to yield more than a dollar in one year's time. Assuming interest is compounded annually, the formula for discounting is: $PV = w/(1+r)^n$, where PV is the present value of an amount w received n years in the future and r is the rate of return.

[72] Most states award prejudgment interest to compensate for this time discount, but the amount of prejudgment interest varies and is frequently insufficient to compensate fully. [Check on this.]

but more often a plaintiff's decision to file late is the result of random factors, such as when the plaintiff's injury materializes, what she reasonably can know and when, and how difficult it is for her to obtain counsel.

To be sure, the legal rights view does not mandate individual litigation; it only mandates that outcomes match substantive entitlements. However, this requirement pushes toward individual litigation because any form of collective litigation has an averaging effect. Not surprisingly then, legal rights proponents assume that individual litigation is the ideal baseline.[73]

In short, the legal rights view betrays its own principle when it pushes large numbers of related cases into individual litigation. This much is enough to show that the legal rights objection to sampling cannot do the work its proponents claim for it. But this still leaves the question whether sampling is superior to individual litigation when delay costs are very high. The answer is almost certainly yes and this answer applies whether one adopts a utilitarian or a rights-based perspective. It's worth seeing why.

Sampling is clearly superior to individual litigation within a utilitarian theory that focuses on deterrence. Prospective wrongdoers are deterred by the *total* liability they expect, and a properly designed sampling procedure produces roughly the same total as individual litigation (even though it distributes the total differently).[74] Moreover, sampling reduces litigation and

---

[73] It will not do to argue that the *formal* judgment matches substantive law entitlements (within the bounds of ordinary error) regardless of how long the suit is delayed. For one thing, delay can adversely affect a formal judgment if evidence becomes stale or witnesses die or are otherwise unavailable because of the passage of time. More importantly, the notion that the formal judgment is all that matters does not fit American civil litigation. Judgments that seriously undercompensate or fall far short of deterring wrongful conduct are obviously problematic and recognized as so by lawyers and judges. And courts care specifically about lengthy delay precisely because of its impact on recovery. The old aphorism "justice delayed is just denied" captures the sentiment perfectly.

[74] The reason has to do with a statistical property of sampling. For a sufficiently large random sample, the sample average closely approximates the average over the entire population of cases. It follows that if we give all cases the sample average, the sum of the average amounts over all the cases will be virtually the same as the sum of individually litigated damage awards. More precisely, the sample average is a very good estimate of expected

delay costs by limiting trial expenditures to the sample cases and speeding up the resolution of all cases. Thus, sampling yields the same deterrence benefits as individual litigation and at significantly lower cost. That makes it superior on utilitarian grounds.

It's more difficult to see why sampling is superior within a rights-based theory. If plaintiffs have a moral right to full compensation, how can a sampling procedure that delivers average compensation be superior? The first step in answering this question is to recall that individual litigation also fails to provide full compensation due to lengthy delays and high litigation costs. It might be tempting at this point to simply declare a tie: sampling and individual litigation are equally objectionable on moral grounds so there is no way to choose between the two. But it also matters how the shortfalls are distributed.

As we have seen, individual litigation leaves those with suits later in the litigation queue at the mercy of high delay costs. If the order of the litigation queue were morally significant, a later position in the queue might justify a lower recovery, but litigation order depends on random factors, most of which are not morally significant. This means that plaintiffs are similarly situated from a moral perspective regardless of where their cases are queued up. Yet a system based on individual litigation treats them differently. It assigns a higher error risk to later cases that involve the same moral harm, and it does so when it is feasible to reduce the discrepancy substantially by using a sampling procedure.

---

liability and rational actors adjust their conduct with an eye to expected liability. To illustrate, consider our asbestos hypothetical. Recall that the sample average was $300,000. Multiplying that number by the total number of cases (1000) produces total damages of $300 million. Compare this figure to the total if each case were tried individually. This would yield 500 verdicts of $500,000 each and 500 verdicts of $100,000 each. The total of all those individual verdicts is $500 \times 500{,}000 + 500 \times 100{,}000$, which equals $300 million, which is the same as the sampling total.

By contrast, a properly designed sampling procedure spreads the risk of error more evenly.[75] To be sure, those with stronger than average cases receive less than their substantive entitlements. However, since no one knows for sure who has the strong and who has the weak cases, all plaintiffs are similarly situated with respect to case strength. It is true that the difference between entitlement and outcome is certain to occur for many plaintiffs, and one might argue that certain errors are more serious than stochastic errors. But individual litigation also produces errors with certainty. The delay created by individual litigation inevitably reduces the recovery for plaintiffs later in the litigation queue below their substantive entitlements.

Of course, the harm from error also matters. We have been assuming, as is typical of mass torts like asbestos, that all plaintiffs rely on the same substantive tort law and all target the same wrongdoing. To be sure, they suffer injuries of different severity. But this factor should not affect the moral weight assigned to the substantive law interest, since moral weight depends on a more general assessment of the interest at stake.[76] And if type or severity of injury does affect moral weight, we can take account of this factor to some extent by sampling separately from subgroups sorted by injury type. It follows that since all plaintiffs in the population are comparably situated, or at least all plaintiffs within each subgroup, the error risk distribution should treat them comparably. And that's exactly what a sampling procedure does, or at least what it does more effectively than individual litigation.

---

[75] A sampling procedure is not limited to a simple average over the sample verdicts. There are more sophisticated techniques that generate results that more closely match the specific characteristics of each case. For example, the judge can use a stratified sample, as Judge Parker did in *Cimino*, or she can get an even closer match by using regression. However, these techniques are more costly and take more time than simple averaging, and these additional costs must be balanced against the benefits of more individually tailored outcomes. See Bone, *Statistical Adjudication*, at 584-87.

[76] Severity of injury would be relevant if the substantive law favored those with more serious over those with less serious injuries all other things equal, but that is not usually the case. We might still justify prioritizing the seriously injured on utilitarian or general distributive justice grounds, but those justifications are unrelated to the substantive law at stake and independent of error risk considerations in a rights-based theory.

It is true that sampling cannot even out the error risk distribution for *all* comparably situated plaintiffs. Judge Parker in *Cimino*, for example, was able to use sampling for the roughly two thousand cases in the class, but that still left a huge number of cases to be adjudicated at a later time and in a different court. The litigation system can only do so much to gather related cases into a single proceeding. Still, even with these practical constraints, sampling produces an error risk distribution that is superior to individual litigation. Not only does sampling even out the error risk distribution for cases in a single aggregation, it speeds up adjudication and thus reduces delay for later cases aggregated elsewhere. If aggregation of mass tort cases is maximized insofar as feasible and sampling is used routinely, the result should be a substantial reduction in delay costs across the board compared to individual litigation and thus a superior error risk distribution on fairness grounds.

So far, we have assumed that all individually litigated cases go to trial. That is what produces the high delay costs. It was reasonable for Judge Parker to make this assumption because asbestos defendants at the time made a strategic decision to wear down plaintiffs by aggressively litigating every case. But the assumption doesn't hold true in general. Most cases settle. This is important because settlement reduces delay costs. Even those plaintiffs late in the litigation queue can receive a timely recovery.

However, settlement takes place in the shadow of trial. When parties negotiate a settlement, they compare the settlement amount to what they expect from trial. This means that the amount of the settlement will reflect the delay costs of a trial, and as a result, plaintiffs later

in the litigation queue will settle for less than those earlier in the queue.[77] This produces an error risk distribution that parallels the distribution created by trials.[78]

Still, a critic might object that sampling fits settled features of litigation practice very poorly. Given my methodology, I must take an objection of this sort seriously. There are two responses. First, the error risk distribution principle in fact fits settled features of litigation practice very well, as this chapter has demonstrated, and it is this principle that supports sampling as a solution to serious error risk distortions caused by individual litigation. Second, sampling is no stranger to civil procedure. For one thing, procedure like substantive law is replete with general rules, and all general rules are based on assumptions about what is typical for the type of case being regulated, which in turn depends on an average over some sample of past and present cases.[79] Moreover, when parties settle, they value their cases by reference to outcomes in a sample of similar cases, so the result is an average recovery based on the sample.

---

[77] The analysis is a bit more complicated because delay costs are a function of how many cases go to trial. Suppose P-1000 is a plaintiff whose case will be tried late and suppose that in a world where all cases are tried, she would suffer severe delay costs. If P-1000 anticipates that all or most of P-1 through P-999 will settle early, then P-1000 will expect little in the way of delay cost and thus might be willing to go to trial rather than settle. However, this is true for all P. If each expects all the others to settle, each will demand a settlement amount based on the expectation that trial will yield a recovery undiminished by delay costs. But then D's best response is not to settle for this higher amount.

[78] However, the fact that the parties agree to settlements raises the possibility of consent validating the skewed distribution. But this is too much for consent to bear. Later plaintiffs are willing to consent to the lower settlement amounts only because they anticipate receiving comparably low amounts from trial. Stated differently, since trial casts a shadow over settlement, the consent to settlement is tainted by the normatively flawed trial distribution. I explain this point in greater detail in Chapter Five.

[79] *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the difference between rules and standards). Consider a simple example. Suppose lawmakers adopt a law that prohibits drivers from exceeding fifty miles per hour on a stretch of highway. This law is based, among other things, on predictions about the risk of accidents at different speeds. Those predictions, in turn, must average over a sample of driving experience. It follows that when a judge finds a defendant liable for driving sixty miles per hour, the judge engages in a kind of statistical adjudication. Driving sixty miles per hour might have been perfectly safe given the weather, traffic, and road conditions that the defendant faced at the time. But the defendant's liability depends not on his own driving conditions, but instead on the average case that the rule was designed to target, which itself is based on a sample of driving experience. To be sure, whether the defendant exceeded fifty miles per hour is a case-specific determination, but whether the defendant's speed was unsafe is not. This is, after all, how general rules work.

Finally, in reaching a verdict, jurors draw inferences based on their assumptions about average behavior derived from a sample of their past experience.[80]

In sum, the objection to sampling advanced by those who support the legal rights view, while it has superficial appeal, is far too simplistic. It misunderstands what a procedural system is supposed to do. It assumes that procedure's purpose is limited to strictly enforcing the substantive law as defined. But this assumption is wrong. When, as in the asbestos mass tort example, excessive delay or high litigation costs frustrate effective enforcement of the substantive law, courts have a responsibility to address the problem. And sometimes this requires innovative procedures like sampling. Put simply, courts act well within their legitimate authority when they adjust procedures to correct a procedural obstacle to fair and efficient adjudication.

Utilitarian and Rights Theories Revisited

We saw that there are two different ways to strike the balance of error costs and process costs. One is utilitarian. It seeks to maximize social welfare by balancing costs and benefits at the margin. The other is rights-based. It seeks to accommodate moral rights. In general, a utilitarian balance gives more weight to the costs of additional procedure and justifies tighter limits on procedure than a rights-based balance.

---

[80] This is true no matter what view of jury decision-making one holds. *See generally* Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547 (2013) (describing two alternative conceptions of evidence and proof—probabilistic versus explanatory). The conditional probabilities central to Bayesian theory are based on average expectations over a juror's slice of real-world experience. *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 108 (2007). And a more holistic approach of "inference to the best explanation" involves assessing the "relative plausibility of the competing hypotheses advanced by the parties" by comparing those hypotheses to a juror's own stories, scripts, and scenarios, which in turn composites of a juror's experience drawing from an informal sample of reality. *Id.* at 136; see Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 629 (1994).

I suggested that the choice of balancing method should match our best interpretation of the purposes served by the substantive law. If the purpose of the substantive law is to promote aggregate social welfare, a utilitarian balance makes sense. If the purpose is to give legal protection to moral rights or interests, a rights-based balance makes sense.

This seems sensible enough. However, Ronald Dworkin developed a theory of civil adjudication based on the idea that adjudication *always* enforces claims of right regardless of the purposes the substantive law was meant to serve.[81]

[I OMIT MY DISCUSSION OF DWORKIN.]

However, the best account of American civil adjudication is neither a pure rights theory, such as the one advanced by Dworkin, nor a pure utilitarian theory. The best account is a hybrid theory. Only a hybrid theory can adequately fit all the settled features of American civil adjudication.

---

[81] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

CHAPTER FOUR:
PROCEDURAL FAIRNESS

We saw in Chapter Three that procedure is tied much more closely to substantive law than commonly supposed. The connection is not just instrumental; it is in an important sense constitutive. The values underlying the substantive law determine the seriousness of the harms from error, which in turn determines the benefits of reducing error risk through procedural reform. This chapter examines the other half of the analysis. Are there principles of fairness that must be respected even if doing so means settling for procedures that fall short of an otherwise optimal error and process cost balance? Do parties, for example, have a moral right to participate in litigation even if their participation increases litigation costs and reduces outcome quality?

We have already seen one fairness constraint. A fair procedural system assures that each litigant faces an error risk consistent with a fair distribution of error risk overall, and a fair distribution assigns lower error risks to cases where moral rights and interests are at stake and still lower risks to cases involving more highly valued rights and interests. This constraint, however, is tied to substantive law: the source of moral principle comes from the moral nature of the rights and interests protected by substantive law combined with the moral right to equal concern and respect. In this chapter, we are interested in whether there are any freestanding moral principles existing independently of the substantive law and applying across the board to all cases regardless of the legal rights involved.

The chapter focuses on two promising aspects of procedural fairness: procedural rights and procedural equality. Most of the discussion is devoted to rights because many of the

fairness-based arguments for and against procedural reforms these days invoke what can only be understood as moral rights sounding in procedure. It is also important to discuss equality-based principles because equality plays a crucial role in criticizing lack of court access, failures of legal representation, and other problems with the litigation system.

Procedural Rights

By procedural rights, I mean *moral* rights to procedure. There are, of course, many legal rights to procedures of various sorts, but legal rights cannot do the work critics of procedural reform need rights to do. Legal rights have no traction against utilitarian justifications for procedures that minimize social costs. Only moral rights can do that. If a party has a *moral* right to a jury trial, for example, that party can demand that a jury decide her case even if the social costs greatly exceed the benefits. Without moral procedural rights, it would be much easier to justify strict pleading, strict discovery limits, expansive use of the class action, case sampling, and other controversial procedures on cost-benefit grounds.

It is also important to distinguish moral rights from rights-like claims justified on rule-utilitarian grounds. For a rule-utilitarian, rights are the result of rules strictly enforced.[82] The idea is that following general rules can maximize social utility over the long run when there are obstacles, such as bounded rationality and limited information, that frustrate correct utility-maximizing decisions in individual cases. In the litigation setting, for example, strict application of well-designed procedural rules not only reduces process costs, but also reduces error costs if judges are poor cost-benefit balancers in individual cases. The important point for our purposes

[82] The classic distinction is between act-utilitarianism and rule-utilitarianism. An act-utilitarian seeks the utility-maximizing decision for each individual case based on the facts of that case. A rule-utilitarian maximizes utility indirectly by applying general rules themselves justified on utilitarian grounds. For an account of the difference between act-utilitarianism and rule-utilitarianism, see

is that when rules are strictly applied, parties can insist on what the rule guarantees even in cases where an exception would be superior for the individual case at hand. In this way, the rule behaves like a right; it excludes utilitarian reasons for diverging from what the rule mandates.

The problem with a rule-utilitarian account of rights, at least for our purposes, is that it cannot support rights-based criticisms *of the rule itself*.[83] Simply put, it makes no sense to object to a procedural rule for violating a right when the rule itself creates the right. To illustrate, suppose rulemakers adopt a rule that allows five depositions in contract cases. The right to five depositions created by strict application of the rule is only effective against judges who apply the rule and not against the rulemakers who adopted it. These rulemakers are perfectly free to adopt a different rule that reduces the number of depositions to four. Only a moral right is capable of constraining those who make rules as well as those who apply them.[84]

Two additional clarifications are in order. First, the moral rights that concern us are institutional rights, not background rights. The distinction between background rights and institutional rights is useful even though it blurs at the margins. By background rights, I mean moral rights that individuals possess in all institutions. An example of a background right is the moral right not to be subject to torture. This right applies to courts, administrative agencies, legislative bodies, and other arms of government, and its proscription against torture operates in essentially the same way in all these institutions. In adjudication, for instance, it prevents a court

---

[83] There are other philosophical objections to rule-utilitarian rights. See Lyons, etc. For example, a rule-utilitarian has trouble explaining why a utilitarian judge should be forced to apply a rule that produces a bad result in a particular case when the judge is known to be very good at balancing social costs and benefits in individual cases. It also has difficulty accounting for how rules change.

[84] Of course, one might move up to one level higher and suppose that the legislature adopts a rule that allows at least five depositions and justifies that rule on rule-utilitarian grounds. If our procedural rulemakers must follow legislative commands, they would not be able to impose a limit of four. But in that case, the legislature's rule would not bind the legislature itself, which would still have power to change it. We can iterate this process, always finding someone who is not bound by the rule and thus able to change it.

from authorizing torture to force disclosure of information. A less extreme example is a moral right of privacy, which, when applied to adjudication, can limit what information parties are able to obtain from their adversaries.

Unlike a background right, an institutional right, as I use the term here, is a right that applies only to a specific institution (or set of institutions).[85] Consider the right to a "personal day in court" guaranteed by the Due Process Clause of the United States Constitution.[86] If this is a moral right (not just a legal right), it is an institutional moral right. It is given meaning and content by the institution of civil litigation to which it applies. An institutional moral right is often derived, at least in part, from a background moral right. The day-in-court right, for instance, is often linked to the background right to be treated with dignity and respect, as we shall see later in this chapter. One could simply refer to the background right, but doing so misses the important way that adjudication expresses the background right more concretely as an institutional right. When litigants complain about a violation of their rights, they are likely to appeal to an institutional right rather than the background right with which it is linked.

Second, our focus here is primarily on rights that give persons grounds to insist that the state provide procedures that the right guarantees. As such, the morality at work is political morality, moral principles that govern the relationship between individual and state. Interpersonal morality is also relevant to civil litigation. For example, each party has a moral

---

[85] The term "institutional right" is sometimes used with a different meaning, to refer to a right created by or for an institution. For example, philosophers sometimes draw a distinction between "pre-institutional" rights and "institutional" rights. See, for example, Christopher Heath Wellman, *Procedural Rights*, 20 LEGAL THEORY 286 (2014). In this usage, a moral right is pre-institutional while a legal right is institutional (since it is created by a legal institution). In my usage, however, both institutional and background rights are moral rights (and thus "pre-institutional" in the other sense). This is just a semantic point.

[86] *See, e.g.*, Richards v. Jefferson Cty., 517 U.S. 793, 797-98 & n.4 (1996); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

right that other parties deploy procedures only with good reason and not to harass or cause harm intentionally, and I have argued elsewhere that parties to litigation are bound by a principle of fair play that sometimes calls for collective rather than individual litigation.[87] However, our primary focus in this chapter is on political morality.

To sum up, we are concerned with whether litigants have freestanding institutional moral rights to procedure that constrain both rulemakers and judges from relying on utilitarian justifications to limit what the right guarantees. We shall examine this question from outcome-based and process-based perspectives. An outcome-based perspective grounds procedural rights in what is necessary to assure quality outcomes. A process-based perspective grounds procedural rights in the intrinsic value of litigation process itself independent of outcome quality. Thus, honoring a process-based right can produce outcomes that are predictably worse than they otherwise would be. The challenge for outcome-based rights is how to define an outcome standard capable of supporting a utility-constraining right. The challenge for process-based rights is how to square a right that ignores outcome quality with an institution that is focused on producing quality outcomes.

Later in the chapter we also briefly examine a contractarian approach to justifying principles of procedural fairness. The contractarian approach justifies principles of fairness on the ground that persons subject to those principles would have agreed to them in a hypothetical bargaining situation. The major challenge for contractarianism, as we shall see, is how to construct a bargaining situation that can produce agreement on morally attractive principles for

---

[87] Robert G. Bone, *Statistical Adjudication: Rights, Justice and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993). I realize that I'm being sloppy about the distinction between rights and duties and I'm also skipping over the tricky question of what level of generality to define rights. Much ink (and digital bits) has been spilled parsing the architecture of rights and duties. Fortunately, we do not need to delve into this complexity here.

civil litigation that everyone in the real world has reason to accept—or at least reason not to reject. But that's for later. In this section I focus on outcome-based and process-based theories.

Outcome-Based Rights?

Outcome-based procedural rights can take two possible forms. They can guarantee specific procedures such as a right to discovery or a right to a jury trial, or they can guarantee a system of procedures that generates outcomes meeting some moral standard. Let's examine each possibility in turn.

A Right to Specific Procedures?

It is easy to see the problem with outcome-based moral rights to specific procedures. For a party to have a moral right to a specific procedure, the procedure must somehow be essential to assuring quality outcomes independent of the other procedures the system includes. But there is no specific procedure that meets this condition. Procedures operate as a system, and it is always possible that altering a given procedure while adjusting others will produce better outcomes.[88]

To illustrate this point concretely, suppose that a procedural system offers no formal discovery. Parties must rely exclusively on their own investigations to obtain the information they need to litigate their claims. This is not a far-fetched hypothetical. Before the adoption of the Federal Rules of Civil Procedure in 1938, discovery was extremely limited, and parties had to rely mostly on their own investigations. A procedural system that denies formal discovery can be justified on utilitarian grounds if the savings in litigation and false positive error costs exceed

[88] Wellman relies on a similar point in his argument against the existence of a pre-institutional moral right not to be subject to double jeopardy. Wellman, *Procedural Rights*, at 289-90.

the increase in false negative error costs.[89] But any such justification would be ruled out if parties had a moral right to discovery.

One problem with a moral right to discovery is finding some nonarbitrary way to define the level of discovery guaranteed by the right without appealing to a cost-benefit balance.[90] One might be tempted to define the right as a right to "reasonable" discovery, where what is reasonable depends on the circumstances of the case. But this definition simply shifts all the difficult normative questions to determining what is "reasonable." It will not work to define reasonable as the amount of discovery that a party "needs" because it is impossible to tell what parties need in advance of their conducting the discovery they seek.[91] One might try to define reasonable in terms of the discovery parties ordinarily conduct in the general type of case, but that requires some basis for investing customary practice with moral force.

There is an even more serious problem with a moral right of this kind. Any specification of what the right guarantees depends on how the procedural system works as an integrated whole. For example, if the burden of proof is lax, parties might not need as much information to prove their case, or if summary judgment is difficult to obtain, limited access to discovery might

---

[89] A system without formal discovery is likely to have lower litigation and delay costs. Moreover, if litigation costs are lower, there should be fewer opportunities for plaintiffs in frivolous suits to use discovery threats to leverage unjustified settlements, which reduces false positive error costs. On the other hand, some, perhaps many, deserving plaintiffs will be unable to secure the evidence necessary to prove their cases and some innocent defendants might be held liable because they lack the information necessary to mount a proper defense. If the savings in litigation, delay, and false positive error costs exceed the increase in false negative error costs created by informational deficits, a utilitarian might well endorse a no-discovery rule.

[90] Is the moral right a right to a single deposition lasting one hour; a single deposition lasting two hours; two depositions? While a choice can be made on utilitarian grounds by balancing marginal benefits against marginal costs, it is hard to see any nonarbitrary way to make it on moral grounds.

[91] A party could always claim that more discovery is needed because there could be more evidence to uncover, and a judge, ignorant of what evidence might exist, would have trouble evaluating the claim. In fact, it's not possible to tell, even after trial, whether the amount of discovery allowed meets a standard of need. If a plaintiff loses in the end, it doesn't mean that she lost because of an inability to obtain necessary information; she might just have had a losing case. And if a plaintiff wins in the end, it doesn't mean that all necessary information was made available; the defendant might have been unable to obtain the information necessary to prove its defense.

not create as high a risk of pretrial dismissal. We might handle this problem by positing a right to whatever discovery is necessary to ensure a fair opportunity to prove one's case. Putting to one side the challenge of defining a "fair opportunity," what is important about this formulation is that it alters the nature of the right. The right is no longer a right to discovery; it is instead a right to a fair opportunity to prove one's case. And a fair opportunity does not turn on any specific procedure; it turns on the entire system of procedures operating as an integrated whole.

Thus, we started by hypothesizing a moral right to formal discovery and we ended with a moral right to a procedural system that provides a fair opportunity to prove one's case. Discovery is just one component of that system. There is a more general point here. An outcome-based right to a specific procedure makes sense only if that procedure for some reason is essential to the moral quality of the outcome. But it is difficult to imagine that any specific procedure could be essential in this way. Parties might have *process-based* rights to specific procedures—a topic we take up later in this chapter—but an *outcome-based* right of this sort is inconsistent with how a system of procedures works.

A Right to a Procedural System

It follows from the previous discussion that an outcome-based procedural right is properly characterized as a right to a *procedural system* that meets certain moral standards. We have seen one such right already—the right to an error risk in one's own case that is consistent with a fair overall error-risk distribution. While this right applies to all cases, it is not a freestanding right of the sort we seek because what it prescribes for a case depends on the substantive law at stake in that case. However, stating the right in this way suggests the possibility of two other rights that are freestanding.

Since the right to a fair error risk distribution is comparative, it can be satisfied even if all parties face extremely high error risks. It follows that if an extremely high error risk is troubling on moral grounds, we need something more than the right to a fair error risk distribution to deal with it. This suggests that each party might have a moral right not to be subject to an error risk above some maximum (in other words, a right to a minimally accurate outcome).

However, there are serious obstacles to recognizing such a right. One problem is choosing the maximum. There is no moral reason to choose one number over another, say, 40% rather than 45%.[92] Moreover, because error risks are interdependent across the party line, it is possible that satisfying one party's right to a maximum requires violating the opposing party's identical right. When we reduce the error risk a plaintiff must bear, we often increase the error risk the defendant must bear. For example, compared to stricter pleading, liberal notice pleading reduces false negative error risks but at the same time increases false positive error risks. This means that, in theory at least, keeping one type of error risk under a maximum ceiling can require pushing the other type of error risk above that same ceiling. [93]

Another question is whether the right to a fair error risk distribution captures all our moral intuitions about outcome-based fairness constraints. Consider the following hypothetical. Suppose that some set of procedural rules includes a special rule, let's call it the Lottery Rule, that applies when case congestion is extremely serious. The Lottery Rule allows courts to deny

---

[92] One might argue for an error risk ceiling of 50% on the ground that a 50% error risk is equivalent to deciding a case by flipping a coin and deciding a case by a coin flip does not show proper respect for the parties as substantive rightholders. This argument, however, is based on a false premise. Cases are not decided by flipping a coin; they are decided by evaluating the evidence and applying the substantive law no matter how poorly this is done.

[93] In addition, a high error risk might result from a legislature's reasonable efforts to allocate scarce social resources among multiple social projects with equally strong moral claims to funding, such as schools and hospitals as well as the court system. The question is whether a moral right to a maximal error risk is sufficiently strong to trump these legislative decisions like these. I am skeptical that it is. Along this line, it is worth noting that the federal courts have been extremely reluctant to recognize constitutional rights to more funding for the court system. Cites.

formal discovery to parties in ten percent of pending cases chosen by lottery. Since discovery is often time consuming, the Lottery Rule reduces the time to adjudicate the cases chosen by lottery, which gives judges more time to decide more cases.

Of course, the Lottery Rule alters the error risk distribution. But is there any moral ground to object to it? If the procedural rules in place guaranteed discovery in all cases without a Lottery Rule exception, parties might be able to object to a judge unilaterally implementing the lottery on the ground that it violates the parties' moral right to have properly promulgated rules applied evenly. But this objection is not available in my hypothetical because the procedural rules themselves authorize the Lottery Rule.

A party would have a moral basis for objecting to the Lottery Rule if it distorted the error risk distribution in such a way as to violate that party's moral right to an error risk consistent with a fair distribution. After all, if antitrust, environmental, and products liability suits with complex issues are chosen by the lottery, they are likely to experience a much larger increase in error risk than simpler types of cases not so dependent on discovery. And the Lottery Rule can also skew the error risk distribution between plaintiffs and defendants. For example, in many civil rights cases, the defendant has much more information than the plaintiff, so the plaintiff needs discovery more than the defendant does and therefore suffers more when discovery is barred. All these effects might end up distorting the error risks in ways that violate a party's right to a fair distribution.

However, it does not seem to me that this exhausts all the moral concerns with the Rule. Imagine that in addition to the Lottery Rule, there are special procedural rules that apply when a

lottery is used and those special rules adjust other elements of the system to offset the lottery's error risk distortions. My intuition is that the Lottery Rule is still morally troubling. But why?

The lottery, while treating everyone equally in a statistical sense, singles out parties in some cases for (procedurally) harsh treatment while leaving others in identical cases untouched. This strikes me as the core of the problem. The Lottery Rule imposes burdens on some to benefit others when it is possible to share the burdens more equitably. Specifically, the Rule violates a fair-share principle that, in this setting, gives each party a right not to bear burdens greater than the burdens they would have to bear if all parties who benefit assumed their fair shares. But if such a principle applies in our hypothetical—and it seems plausible to me that it does—the moral right that it supports is a background right, not an institutional right. Like a right to be free from torture or a right of privacy, it applies to all institutions and in roughly the same way. This is fine, of course, but it is not the sort of right we are looking for. We are interested in moral rights that are specific to adjudicative procedure.

In sum, it's difficult to justify a freestanding, outcome-based, institutional procedural right that is independent of the substantive law. This means that we must look elsewhere, and process-based rights seem more promising.

Process-Based Rights?

Process-based rights are not concerned with outcomes; they are concerned with how individuals are treated within the litigation system. The most well-known and clearly articulated process-based rights theory in the procedure literature relies on a background right to respect for

individual dignity, usually linked to a Kantian ideal.[94] According to this theory, certain elements of civil process, such as individual participation, are required as a matter of right because the treatment they guarantee is essential to what it means for the state to respect the dignity of parties as morally autonomous individuals.

There is good reason to be skeptical of process-based procedural rights. That litigants have a background right to be treated with dignity and respect does not necessarily imply that they have institutional moral rights that are process-based. After all, civil adjudication is primarily about producing good outcomes. Yet a process-based right, by definition, demands certain treatment even if providing that treatment leads to worse outcomes. Given this, one might wonder why adjudication does not do enough to respect the dignity of litigants by producing outcomes that are as accurate as practicable within outcome-based constraints.

Legal philosophers disagree about whether there are process-based moral rights to procedure. Some scholars, such as Larry Alexander and Christopher Heath Wellman, have argued against their existence, or as in the case of Ronald Dworkin, expressed grave doubts.[95] Others, such as David Enoch and N.P. Adams, are less skeptical, though they concede the question is a difficult one.[96]

---

[94] The most extensive and well-known treatment of dignitary procedural rights is Jerry L. Mashaw, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985). Other examples include Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 10-7, at 666 (2d ed. 1988); Robert S. Summers, *Evaluating and Improving Legal Processes - A Plea for "Process Values"*, 60 CORNELL L. REV. 1, 2-4 (1974). For a critical review of these theories, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 264-79 (1992).

[95] Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19 (1998); Wellman, *Procedural Rights* (2014); Ronald Dworkin, *Principle, Policy, Procedure*, in A MATTER OF PRINCIPLE 72 (1985). See also Larry Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 325-26, 341-43 (1987) ("Because the procedure for applying a rule can always be viewed as part of the substance of the rule itself, a concern for procedure apart from substance verges on incoherence.")

[96] David Enoch, *In Defense of Procedural Rights (Or Anyway, Procedural Duties): A Response to Wellman*, 24 LEGAL THEORY 40 (2018); N.P. Adams, *Grounding Procedural Rights*, 25 LEGAL THEORY 3 (2019).

To see why it's so challenging to defend process-based rights, it is useful to examine some of the specific rights that proponents and critics of procedural reform rely on to defend their positions. One procedural right that figures prominently on both sides of the debates is the right of parties to participate in litigation that affects them. Respect for this right is often thought to be a fundamental requirement of any fair system of procedure. Another right, frequently invoked by critics of aggregation, is the right to control one's own litigation, or as it is commonly called the right to a personal "day in court." A third right that figures prominently in criticisms of restrictive trends in procedure such as stricter pleading is the right to court access (or more generally "access to justice"). Not everyone expressly frames participation, control, and access as moral rights, but they assume these elements function as rights when they enlist them to counter procedural reforms that are strongly justified on utilitarian grounds.

A Right to Participate

The principle of litigant participation is deeply entrenched in U.S. litigation on both the federal and state levels. The United States Supreme Court has affirmed its central importance, repeatedly emphasizing that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[97] Indeed, it is difficult to imagine an effective litigation system that does not allow party participation at least to some extent. The alternative would be to rely exclusively on judicial staff to investigate, initiate, and prosecute, but that alternative places a huge burden on public officials and taxes a limited public treasury.

[97] E.g. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). See also Richards v. Jefferson County, 517 U.S. 793, 797 n.4 (1996) ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.").

Relying on those affected by litigation to bring suit has the potential advantage of selecting for the more salient cases and harnessing self-interest to incentivize investigation of facts and law.

None of this implies, however, that participation is a *moral right*. Nor does it say anything about what kind of participation the right guarantees. One popular argument for a participation right relies on empirical studies drawn from the "procedural justice" literature.[98] Most of these studies involve experiments that purport to show that individuals are more likely to be satisfied with an adverse outcome and believe that the process was fair and legitimate when they are given a chance to participate personally and "tell their story" to the decisionmaker.[99] The problem with this argument, however, is that empirical results like these are incapable of providing a moral foundation for a participation right.[100]

Psychological states have no normative value in themselves. They have normative value only if some normative theory gives them value. The obvious choice for valorizing feelings about process and outcomes is a utilitarian theory, but a utilitarian theory cannot support a moral

---

[98] There is a tendency in the procedure literature to equate perceptions of fairness with actual fairness and to rely on the procedural justice literature to draw inferences about the necessity of participation to just procedures. For examples of this type of reasoning, see Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 838-39 (1992) (equating participation value with litigant satisfaction to defend aggregation and sampling against objections that it sacrifices individual participation); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998) (arguing for party satisfaction as a fairness component in mediation statutes); Martin A. Frey, *Alternative Dispute Resolution in the Twenty-First Century: Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727 (2001) (using litigant perceptions of fairness to determine whether a dispute resolution method provides a just process); Minutes of the Civil Rules Advisory Committee, May 1-2, 1997, available at 1997 WL 1056241 (report of Policy and Agenda Committee) (stating that "the ideal rule change is one that is purely procedural, that "creates peace,' and is satisfactory to all sides of a dispute").

[99] Some of the important work in this field includes: E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 26-40, 61-83, 93-127 (1988) (discussing these empirical studies); John Thibaut & Laurens Walker, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) (applying social-psychological methods to legal decision-making so as to define procedural justice); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 967-87 (1990) (analyzing the relationship between tort litigants' fairness judgments and various objective and subjective factors).

[100] This does not make them unimportant. A party's beliefs about the legitimacy of the outcome can affect the party's willingness to comply with an adverse result, which in turn affects the costs and benefits of enforcement. So too, it matters how people feel about the court system in general, which can affect institutional efficacy.

right to participate. Indeed, a utilitarian theory does not give any special weight to feelings or preferences about procedure; it counts all feelings and preferences equally.[101] To be sure, a moral conventionalist might credit widely shared beliefs, but the beliefs that matter to conventionalism are not the same as those the procedural justice literature harvests.[102] For a moral conventionalist, being fair to someone is not a matter of that person believing she has been treated fairly; being fair to someone involves treating the person in the way principles of fairness require. Generally held beliefs about fairness are important to a moral conventionalist but only if they are well-considered beliefs, not the raw beliefs that subjects report in response to an empiricist's questions.

In perhaps the most extensive philosophical treatment of litigant participation in the legal literature, Lawrence Solum argues that procedural fairness accords lexical priority to participation over outcome accuracy and cost reduction.[103] Solum defends his thesis by arguing that participation is essential to the normative legitimacy of adjudication. He claims that a person has no obligation to comply with a judgment she has good reason to believe is erroneous *unless* the adjudicative process that generated the judgment is legitimate, and to be legitimate, an adjudicative process must allow participation by the person affected.[104] And he justifies this claim on grounds of political morality, as consistent with our well-considered moral intuitions, and as a good fit with actual litigation practice and norms.

---

[101] More generally, for a theory to be about procedural fairness, it must give some reason to assign procedure a special weight in the social calculus, a weight capable of giving priority to procedure over other social goods. A psychological theory is incapable of providing such a reason.

[102] A moral conventionalist believes that morality is a matter of social convention, that it consists of those principles that society in general accepts as moral. See THE ENCYCLOPEDIA OF PHILOSOPHY 103-04, 361-65 (Donald M. Borchert ed., Supp. 1996).

[103] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 305-06 (2004).

[104] *Id*. at 277-281.

There is no question that normative legitimacy is important, and we shall return to that topic in Chapter Eight. The question here is whether individual participation, as valuable as it is, is essential to legitimacy. Suppose a powerful computer knows everything about the physical world, the biological world, human psychology, and so on. Suppose this computer can decide cases with perfect accuracy based on very few facts and that the only way to allow individual participation of any meaningful sort is to alter the computer program in a way that reduces decisional accuracy. People who lose their cases might well insist that they would have won if they had been able to participate, but this claim, even if true, has no force since a win on their part would necessarily be erroneous. Is this computer-based adjudication legitimate? It might not be, a topic I shall explore in Chapter Eight, but if so, the reason is not because of lack of participation.

Solum, however, focuses more realistically on processes that produce errors, and argues that error-prone adjudication is legitimate only when those affected have a chance to participate.[105] If error is the source of the legitimacy problem, however, why is participation the solution? Why, for example, isn't it enough that an adverse decision believed to be erroneous was generated by a set of procedures designed to distribute the risk of error fairly, respect background rights, and treat all parties with equal concern and respect? To be sure, a person might object that she could have presented evidence and legal arguments that would have changed the result.[106] But this does not support a moral right to participate in the original

---

[105] *Id*. at 190 ("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?").

[106] Solum makes this argument. *Id*. at 280 (noting that the party without a chance to participate "may always object that the procedure was defective because an element of [her] case was not even considered by the tribunal through no fault of her own.").

lawsuit. At most, it might justify allowing the person to relitigate if the new evidence and arguments are very likely to produce a different—and more accurate—outcome.

Solum uses three hypotheticals, which he refers to as "thought experiments," to tap our intuitions about participation and motivate our considered judgment.[107] He constructs these hypotheticals in a way that forces the reader to focus on participation itself, apart from any effect the participation might have on outcome quality. Solum believes that in all these cases his reader's intuition will condemn the proceedings as unfair and illegitimate. What is telling about each hypothetical, however, is that Solum gives no reason why the individual is denied participation. This omission is critical because it makes the denial seem arbitrary. In the real world, by contrast, the choice of litigation procedures is always supported by reasons.

For example, in one hypothetical, Solum imagines a faculty member who is excluded from a faculty meeting but is perfectly happy that she didn't have to attend. Solum's intuition is that the faculty member's exclusion from the meeting makes it illegitimate and as a result the excluded faculty member has no obligation to "regard the outcome as authoritative."[108] But my intuition is different. It seems to me that this conclusion depends on the reasons why the faculty member was excluded. Suppose the faculty is huge, too large to assemble everyone together. In view of this, the Dean convenes a subset of faculty to make a decision. She includes as many faculty as practicable and ensures that all points of view are represented, and she uses a random lottery to choose whom to exclude. Under these circumstances, I have no moral objection to excluding some faculty members even if the decision adversely affects those excluded. The

---

107 *Id* at 281-84.
108 *Id*. at 282.

difference between my hypothetical and Solum's is that the decision to exclude faculty members is justified on reasonable grounds.

There is little point, however, in pushing these arguments any further. Even if participation is not a moral right, it certainly has moral value, especially in a liberal democracy committed to respecting human agency. From an instrumental perspective, moreover, some form of participation seems practically desirable for any procedural system to function effectively. And the existence of a participation *right* fits both Supreme Court pronouncements about due process and established features of litigation practice.

The important question is what kind of participation the right guarantees. At one extreme, the right might merely guarantee an opportunity to provide input even if the input is only in writing. At the other extreme, the right might guarantee an opportunity to make all the important strategic decisions in one's own litigation. There are intermediate points along this spectrum. For example, the right might guarantee an opportunity to tell one's story to the decisionmaker either personally or through others. Or it might guarantee an opportunity to introduce evidence, call and cross-examine witnesses, and so forth. Solum argues for an intermediate point: a "meaningful opportunity to present evidence and arguments that are relevant to the dispute."[109]

A Right to Control

The United States Supreme Court recognizes a right that falls at an extreme point of this participation spectrum. On numerous occasions, the Court has held that parties have a due process right to their own personal "day in court," a right that the Court claims is embedded in

---

[109] *Id*. at 285, 305.

"our deep-rooted historic tradition."[110] Moreover, the personal day in court is very broad. It includes the opportunity to make all important strategic choices in litigation, including the choice whether to appeal an adverse judgment.[111]

This day-in-court right has rather dramatic consequences for litigation. Because of it, everyone has a right to relitigate issues that have already been litigated and decided in earlier suits. For example, each of thousands of plaintiffs who have claims against a pharmaceutical company for injuries from the same drug can relitigate identical issues common to all the claims, such as general causation, even when those issues have already been litigated and decided adversely in earlier suits.[112] This repeated litigation over thousands of individual suits generates huge social costs. Still, the Court insists, each plaintiff must have a chance to litigate the same issues in her own way.

There are outcome-based reasons to give parties a substantial degree of control over their own lawsuits. Litigant control can improve outcome accuracy by enlisting strong party incentives to invest in a lawsuit, investigate the facts thoroughly, and advocate vigorously. However, when there are thousands of individual suits, as in mass tort cases, the social costs of giving each plaintiff her own day in court can easily overwhelm the benefits. [113] Thus, from a utilitarian perspective, guaranteeing each person an opportunity to control her own litigation

---

[110] Taylor v. Sturgell. See also Richards v. Jefferson County; Martin v. Wilks, Bristol Myers,

[111] This is clear from the cases deciding whether a nonparty can be bound to a judgment on the ground that she controlled the litigation as though she were a party. For the nonparty to be bound on this basis, she must have had an opportunity to control all the important litigation decisions, including whether to appeal. *See* Wright, Miller & Cooper.

[112] Taylor v. Sturgell.

[113] Bone, *Right to a Day in Court* (1992).

cannot be justified. It might make sense to litigate issues more than once, but not thousands of times.[114]

The same is true for a rights-based approach anchored to outcome quality. As we have seen, parties have a right to a level of error risk in their cases that is consistent with a fair distribution across all cases and litigants. There is no reason to believe that the way to achieve a fair distribution is by giving everyone broad control over their own litigation. In fact, giving litigants greater control invites more adversarial litigation, which is likely to add to the time it takes to process cases thereby delaying pending litigation. These delay costs systematically disadvantage later filed suits and distort the error risk distribution.

This leaves the possibility of a process-based right. Perhaps the right to a personal day in court is required on the same Kantian grounds that supposedly justify a participation right, namely, that litigant control is required to respect the dignity of litigants as morally autonomous individuals. But this justification fails as well. Respect for dignity, as a background right, makes different demands in different institutional settings depending on the institution's function and purpose. For example, no citizen has a moral right to speak directly to assembled legislators while a bill is being debated or a right to attend a legislative session in person.[115] There are certainly requirements of publicity that constrain how legislators conduct their discussions and debates, but those requirements are justified consequentially, as a means to assure democratic accountability, rather than as a requirement of individual dignity. This makes sense given the purpose of the legislative process: to produce policy decisions that reflect the preferences of the

---

[114] The social value of a few re-litigations follows from application of the Condorcet Jury Theorem, with some adjustments to account for deviations from the theorem's assumptions. For the Condorcet Jury Theorem, see Bernard Grofman et al., *Thirteen Theorems in Search of the Truth*, 15 THEORY & DECISION 261, 264-65 (1983).

[115] People are allowed to attend, of course, but only to the extent that the gallery can accommodate them. Moreover, citizens can testify before legislative committees, but they do not have a moral right to do so.

majority. Citizens participate by voting for legislators who represent their interests, and voting provides a form of participation that fits the collective goals of the legislative process. I do not mean to suggest that there is no moral value to more direct participation in the legislative process in a liberal democracy, just that there is no moral right to do so.

We can apply a similar line of argument to civil adjudication. The primary purpose of civil adjudication is to produce outcomes that enforce the substantive law. Given this, it is not at all clear why individual litigants should have a moral right to exercise control over their own litigation above and beyond what makes for sufficiently good outcomes. Put differently, it is not clear why a procedural system does not respect the dignity of litigants by distributing the risk of outcome error in a way that treats everyone with equal concern and respect. At least, those who insist that dignity requires more have the burden to explain why.

There is another problem with grounding the day-in-court right in a process-based dignitary theory. Control is not essential to dignity. Even if respect for dignity requires personal participation, it does not require party control over strategic litigation choices, such as, for example, how many depositions to take or whether to move for summary judgment.[116]

In short, there is no secure theoretical justification for a broad right to a day in court. Some measure of litigant control is justified on utilitarian grounds, but neither distributive fairness nor individual dignity supports a moral right. But this is not the end of our inquiry. We must also check how well this theoretical insight fits settled features of litigation practice. If the

---

[116] Even the procedural justice literature does not point to the need for control; its findings suggest that what individuals really care about is having a chance to tell their own story to the decisionmaker. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101-06 (1988).

fit turns out to be poor, we must revisit and rethink our theoretical arguments. That's what our methodology demands. We move back and forth between theory and practice until we reach a reflective equilibrium.

[I'VE DELETED THE SECTION SHOWING THAT A BROAD DAY IN COURT RIGHT DOES NOT FIT MANY SETTLED FEATURES OF LITIGATION PRACTICE]

To sum up, there is no basis for a moral right to broad personal control over litigation. Neither outcome-based nor process-based theories support it. Nor does it fit settled features of American litigation practice. This does not mean that there is no moral right to participate, but it does mean that the right, if it exists, does not guarantee broad litigant control.

A Right of Court Access

Ever since the Supreme Court decided to adopt a stricter pleading standard, many critics have argued that strict pleading impermissibly restricts access to court.[117] These critics do not expressly invoke a moral "right" of court access. But they assume that the value of court access is capable of trumping strong utilitarian reasons for screening cases. For example, they tend to juxtapose the value of access against the value of efficiency and complain that courts are restricting access to reduce costs.[118] This argument points to an assumption that court access is a moral right, one capable of excluding utilitarian reasons for limiting access.

[I'VE DELETED MY DISCUSSION OF THE ACCESS RIGHT]

---

[117] For just one of many examples, see A. Benjamin Spencer, The Restrictive Ethos in Civil Procedure, 78 GEO. Wash. L. REV. 353 (2010).

[118] A right of access is different than a right to participate in or control litigation. Denying access necessarily denies participation but denying participation does not necessarily deny access. In a class action, for example, absent class members have access to court through their class representatives, but they do not participate personally.

In sum, even if a moral right to court access exists on process-based grounds—and its existence must be squared with the fact that the Constitution offers very thin protection—the right is not broad enough to support objections to rules like strict pleading. If plaintiffs have process-based rights to court access for meritorious suits, defendants have process-based rights to be free of meritless suits. When these rights are balanced, the result can support stricter pleading rules and other procedural reforms designed to handle meritless litigation (assuming, of course, that the empirical evidence supports the reforms).

Litigation and Inequality

Another important dimension of fairness is equality. A claim of equality is conceptually distinct from a claim of right. Suppose X and Y are brother and sister. X receives an ice cream cone from his parents, but Y does not. Y might object on equality grounds that she should also get an ice cream cone if X gets one. Notice that neither X nor Y has a right to an ice cream cone. X's and Y's parents are perfectly free to give nothing at all. Y's objection is not that her right has been violated, but rather that she was treated unequally relative to her brother X. Y might frame her claim as a "right" to be treated equally, but that doesn't change the nature of the claim; it is still a claim based on equality.

We have already seen that equal concern and respect requires an error risk distribution that tracks the relative moral weight of the substantive interests at stake. Furthermore, we assumed that equality was built into a process-based right to participate based on respect for dignity, since everyone has equal dignity worthy of respect. The question for us is whether equality makes any other demands on a procedural system.

It is quite common to invoke the principle that like cases should be treated alike. This can be understood in two distinct ways. One way focuses on procedure: cases that are alike

should have procedures that are alike. There is, however, no such principle. It is the risk of outcome error that must be the same across similar cases, not the procedures. To be sure, the easiest way to equalize error risk is to provide the same procedure (assuming everything else is the same). But it would also be perfectly fine to use different procedures so long as they generated the same error risk. This also helps us better understand what makes cases similar. The critical feature is the importance of the underlying substantive interest at stake.

This point has an important corollary. When cases are not alike in relevant respects, procedures need not be alike.[119] In fact, procedures might have to be different in order to distribute the error risk fairly across different cases, as we saw in Chapter Three. This means that there is no value in trans-substantive procedure as a matter of fairness. Quite the contrary. A fair distribution of error risk often requires different procedures for different types of cases in order to generate an error risk pattern that fits the substantive differences between the different cases.

The second and more common way to understand the like-treatment principle focuses on substantive outcomes. This version of the principle holds that outcomes should be the same in cases that are the same, and therefore procedures should be designed to produce outcomes that conform to this principle.[120] But this statement of the principle is also incorrect. Suppose Case A and Case B are identical in terms of the relevant facts and the legal claims alleged. Suppose that the plaintiff wins in Case A, but the plaintiff's win is an error. Does the like-treatment

---

[119] William Rubenstein argues that equality of procedural rules—"rule equality" as he calls it, which includes trans-substantive rules—is a desirable form of procedural equality because it promotes efficiency, fairness, and legitimacy. William Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1884-86 (2002). However, rule equality across different cases is contrary to a fair error risk distribution and not efficient if it distorts the socially optimal enforcement of substantive law.

[120] Rubinstein refers to this form of procedural equality as "outcome equality." As he puts it, "cases with relatively similar facts ought to reach relatively similar outcomes." Rubenstein, *The Concept of Equality*, at 1893. He then concludes that consistent outcomes are required by fairness.

principle require that we always replicate the error in Case B and in all the other identical cases? The answer must be no. To be sure, there are cases in which a judge should follow a previous decision even when she is convinced the decision is erroneous. For example, strong reliance interests can outweigh the value of error correction, or equal treatment might be implicated in a particularly strong way. But there is no requirement that the judge always follow an earlier decision just to reach a like outcome in like cases. A judge has the power to ignore a precedent that she believes was incorrectly decided.[121]

Thus, identical cases should receive identical outcomes when those outcomes are correct but not when they are incorrect, unless the pragmatic and fairness benefits of following the earlier decision are particularly strong. However, ordinarily we can't know for sure whether a specific outcome is correct or incorrect. All we can do is estimate the probability the outcome is correct. Given this, the most that the like-treatment principle can demand is an identical error risk in identical cases. But this is just what the fair error-risk-distribution principle requires.

Equality also demands that lawsuit adversaries be treated equally. William Rubenstein calls this "equipage equality" and argues that it is valuable because it creates a level playing field and thus helps produce more accurate and acceptable outcomes.[122] Frederick Wilmot-Smith agrees in his book *Equal Justice*, arguing that a fair procedure requires adversaries with equal legal resources.[123]

---

[121] For statements of this principle, see *Ammons v. State*, 315 Ga. 149, 156 (2022); *Carpenter v. Daar*, 346 Conn. 80, 112 (2023) ("When a prior decision is seen so clearly as error that its enforcement [is] for that very reason doomed ... the court should seriously consider whether the goals of stare decisis are outweighed, rather than dictated, by the prudential and pragmatic considerations that inform the doctrine to enforce a clearly erroneous decision").

[122] Equipage equality includes equal capacity to bring suit and litigate, equal opportunities to present a case, and equal regard from an impartial arbiter. Rubenstein, *The Concept of Equality*, at 1873-74.

[123] Wilmot-Smith posits a principle of equal justice that requires any unequal distribution of outcome-error-related burdens to be justified as the result of a fair procedure. He also argues that a fair procedure requires, among other things, rough equality in access to legal resources across the party line, including access to equally competent lawyers, so that one party cannot dominate the other. FREDERICK WILMOT-SMITH, EQUAL JUSTICE 74 (Harvard 2019).

It is important, however, to distinguish between thin and thick versions of this equality principle.[124] The thin version focuses exclusively on available procedural opportunities and brackets concerns about inequality in the real world. It assumes, in effect, that all litigants have sufficient economic resources to hire good lawyers and finance vigorous litigation. The challenge for procedural equality, on this view, is to design procedures that distribute the error risk fairly between adversary parties on the assumption all the parties have equal access to economic and social resources. This is the way we've been treating the question of error risk distribution so far.

To illustrate, consider an ordinary contract suit where the substantive interests at stake on both sides have the same value. Given the parity of substantive interests, there should be rough equality of error risk across the party line. To achieve this, procedures should be designed with the goal of making the false negative and false positive error risks as close to equal as reasonably feasible, such as by adjusting the pleading burden, the scope of discovery, and the like.[125]

The thick version of inter-party equality does not assume parties have equally competent lawyers and equal capacities to litigate vigorously. Quite the contrary. It worries about background inequalities that create litigating disparities. This is what Rubenstein means by equipage equality, and it is what Wilmot-Smith claims procedural fairness requires.

It is not self-evident that the thick version is the correct one to use when designing a procedural system. Many areas of the law do not adjust for background inequality. For example, tort damage awards for economic loss take the plaintiff as she is and thus award less to

---

[124] One might call these two versions "formal" and "substantive," but I dislike those labels. The term "formal equality" often carries a negative connotation that the thin version of inter-party equality does not deserve.

[125] Even use of the class action to enable enforcement of claims too small to justify individual suits fits the thin version of equality. The obstacle to individual litigation is not that plaintiffs lack resources to invest in the suit; rather it is that investing in the suit is not rational given the expected recovery. Even Elon Musk, one of the richest people in the world, would not file an individual suit when the litigation costs exceed the expected benefit.

poorer, nonwhite, and female plaintiffs because of the systematic differences in wage and work-life expectancy compared to wealthy white males.[126] This is not a necessary feature of the system. Damages could be calculated, for example, based on a person of average means and income without regard to race or gender.[127] But this is not what tort law does. In defense of the current approach, one might argue that the job of redressing social and economic inequality should be left to those institutions suited to the task, such as legislatures which can implement redistributive policies, executive agencies that are empowered to prevent discrimination and administer social welfare programs, the tax system that can redistribute wealth, and so on. On this view, tort law should stay in its own lane and take account of background inequality only insofar as doing so furthers its compensation and deterrence goals.[128]

Whether tort law should take greater account of background inequality is a matter of debate today.[129] But the question is not up for debate in civil procedure. The thick version of inter-party equality is a better fit. The reason is simple. The adversary system works well only if the parties on both sides have roughly equal litigating power. If one side has more, that side is more likely to win even when it should lose. In other words, disparity in litigating power skews

---

[126] For a discussion of how economic damages are measured, see Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages*, 96 NOTRE DAME L. REV. 1479, 1485-87 (2021) ("The use of . . . gender- and race-based tables reifies and perpetuates structural inequities").

[127] For an example of a reform proposal along these lines, see Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L. J. 661, 724-26 (2017).

[128] The compensation goal is to remedy the actual loss the particular plaintiff suffers. For this reason, it is sensible to tailor compensation to the plaintiff's individual circumstances. Deterrence is also served by tailoring damages to the circumstances of each individual plaintiff; doing so forces defendants to pay for the cost of their wrongdoing, which creates optimal deterrence (although average damages would do the same thing). For arguments that compensation and deterrence are better served by awarding average damages to all plaintiff regardless of race and gender, see by Avraham & Yuracko, *Torts and Discrimination*, at 671-78.

[129] For criticism of the current approach, see Sharkey, *Valuing Black and Female Lives*, at 1485-87, and Avraham & Yuracko, *Torts and Discrimination*, at 671-78.

the error risk in favor of the more powerful party and does so in a way that is unrelated to the value of the substantive interests at stake.[130]

The litigation system today makes some effort to redress the adverse effects of background inequality. [I DELETE MY DESCRIPTION OF THESE MEASURES – E.G., CONTINGENCY FEES, FEE-SHIFTING, AND PRO BONO REPRESENTATION. THE BOTTOM LINE IS THAT ALL OF THESE HAVE LIMITS AND DO NOT NEARLY TAKE CARE OF ALL THE PROBLEMS.] The upshot is that substantial disparities in litigating power due to background inequalities still infect large chunks of litigation.

No procedural system can ignore these power asymmetries when they lead to skewed error risks. Yet a procedural system is incapable of addressing the root causes of the problem—the gross disparity of wealth and power in society. It can only address some of the symptoms of this problem. The legislature has the power to deal with root causes, but to date Congress and state legislatures have not done nearly enough to redress social and economic inequality. Nor have they done much to fund legal services in civil cases, provide meaningful assistance to unrepresented parties, increase the number of judges available to handle high volume litigation, or otherwise correct for the defects that produce litigating disparities. This legislative inaction creates a serious challenge for those who make procedural rules and for judges who apply them to individual cases because all these actors have a moral obligation to ensure a fair distribution of error risk.[131]

---

[130] Wilmot-Smith argues that it is unfair for a different reason. Because the state requires parties to redress grievances by going to court rather than resorting to self-help, the state has an obligation to provide a judicial setting that treats parties with equal respect. Forcing a party to litigate in an environment of domination due to wealth disparity falls short of this moral requirement. Wilmot-Smith, EQUAL JUSTICE. While promising, Wilmot-Smith's argument needs an account of when unequal litigating power becomes "domination" that infringes equal respect.

[131] I don't mean to suggest that legislative inaction is due only to lack of political will, although that is certainly a factor. A legislature must allocate scarce social resources among potential recipients, many of whom have moral claims to adequate funding, and might reasonably choose to appropriate more funds for schools and state hospitals

The remainder of this section focuses on a concrete example: debt collection litigation in state courts. This is a particularly dramatic example for three reasons. First, third party debt collection firms as well as first party creditors file hundreds of thousands of cases each year, so many in fact that state court judges cannot adjudicate them properly. Second, these cases are routinely filed by debt collection firms and other repeat players against economically impoverished individuals who are unable to afford lawyers and who rarely even appear in court. Third, state judges, overwhelmed by the number of these cases, deal with them in a highly routinized manner frequently entering default judgments without investigating the merits. The problems are so acute that one of the most prestigious legal organizations in the United States, the American Law Institute, has taken on the task of developing principles for addressing high-volume, low-dollar-value-but-high-personal-stakes cases that "shape the lives of millions of Americans particularly women and people of color."[132]

[I DELETED MY DISCUSSION OF DEBT COLLECTION LITIGATION]

Contractarian Principles of Fairness

[I DELETED MY DISUSSION OF CONTRACTARIANISM]

---

than for courts. However, it does have an obligation to justify the choices it makes on grounds that respect the competing moral claims.

[132] American Law Institute, *Principles of the Law, High-Volume Civil Adjudication*, https://www.ali.org/projects/show/high-volume-civil-adjudication. This project will focus on eviction proceedings and child custody disputes in addition to debt collection litigation. Eviction proceedings are also numerous and often pit much more powerful landlords against resource-constrained tenants who have difficulty hiring lawyers, and child custody cases can pit powerful state agencies against individuals with limited resources and no legal representation.