PROCEDURE, PARTICIPATION, RIGHTS

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INTRODUCTION

It is common in civil procedure circles to criticize procedural rules on the ground that they burden a party's procedural "right," or to defend a reform on the ground that it better furthers procedural rights. The Due Process Clause is said to give each individual a right "to be heard," and "at a meaningful time and in a meaningful manner."[1] More specific rights flow from this general right, such as a right to reasonable notice and a right to participate.[2] And at times, the Supreme Court has invoked the due process right to a day in court to protect a relatively robust form of personal participation.[3]

Despite these general constitutional pronouncements, most details of civil procedure are sub-constitutional.[4] Still, arguments of right play an important role on the sub-constitutional level as well. For example, some critics object to

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[1] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (citation omitted).

[2] *See* Mullane v. Cent. Hanover Bank, 339 U.S. 306, 314 (1950) ("[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.").

[3] *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008); Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

[4] *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 579-80 (1984) (observing how thin constitutional protections are for civil procedure as compared to criminal procedure).

stricter pleading standards on the ground that strict standards impede the *right* of access to court by making it harder for plaintiffs to vindicate their legitimate claims.[5]

In this brief Essay, I would like to explore the concept of procedural rights more carefully. The question is whether it makes sense to speak of procedural rights in American civil litigation. I mean by a "right" the same thing Professor Dworkin means when he discusses political, legal, and human rights in Part V of *Justice for Hedgehogs*.[6] Roughly, a right limits, resists, or "trumps" arguments for acting inconsistently with the right based on furthering a collective social goal or a policy that makes everyone better off in the aggregate. An important example, and one that I shall refer to at times in this Essay, is the right to a personal day in court. This right guarantees relatively broad individual control over civil litigation and resists arguments for limiting control based on reducing the high social costs of litigation.[7]

Professor Dworkin mentions procedural rights at several points in Part V of *Justice for Hedgehogs*.[8] However, his most thorough defense of the idea is found in a wonderfully provocative essay, *Principle, Policy, Procedure*, first published in 1981 and republished in his 1985 book, *A Matter of Principle*.[9] I want to take the opportunity of this conference to discuss this earlier essay even though the idea of procedural rights is not a central focus of *Justice for Hedgehogs*. I have long admired *Principle, Policy, Procedure*, as I have most of Professor Dworkin's work. That essay is the best treatment of procedural rights I know and deserves more attention than it has received.

The answer to the question whether individuals have procedural rights matters in a deeply practical way. For example, one of the most powerful arguments against broad use of the class action and other innovative case aggregation devices rests on the supposed right of an absentee to participate personally in litigation that binds him.[10] The absence of such a right would make room for broader consideration of the social cost savings from

[5] *See, e.g.*, A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26-27 (2009); *see also* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 908-09 (2009) (exploring with care the rights-based arguments against stricter pleading).

[6] *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 208-09, on file with the Boston University Law Review).

[7] *See generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

[8] *See, e.g.*, DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 6 (manuscript at 234).

[9] RONALD DWORKIN, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72 (1985).

[10] *See, e.g.*, Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 576-98 (1993); *see also* Bone, *supra* note 7, at 236-56.

aggregative treatment and permit more expansive theories of adequate representation.[11]

The body of this Essay is divided into three parts. Part I applies Professor Dworkin's interpretive epistemology to explain why the best interpretation of American civil adjudication is likely to recognize procedural rights. Part I also describes a puzzling property that those procedural rights have to possess. Because they are rights, they must resist arguments for limiting procedure based on the high social costs of litigation, but to fit prevailing intuitions of procedural fairness, they must also yield to social cost arguments, at least to some significant degree.

Part II describes Dworkin's particular theory of procedural rights and explains how his theory addresses the problem of constructing rights that do and do not trump at the same time. Part II critically examines Dworkin's approach and identifies potential flaws.

Part III examines two competing theories of procedural rights and explains why they too are problematic. The Essay concludes by calling for more scholarship on procedural rights. There is much on the line. If there is no coherent account of procedural rights in civil adjudication, then radical procedural reforms justified on utilitarian grounds should receive much more favorable attention than they have so far.

Before proceeding, a caveat is in order. The question whether the best interpretive theory of civil procedure recognizes procedural rights, including participation rights, is extremely complex. I do not have the space to explore it with care, so the following discussion is more suggestive than it is rigorous.

I. THE PUZZLE OF PROCEDURAL RIGHTS

A. *The Existence of Procedural Rights*

In *Justice for Hedgehogs*, Professor Dworkin explains his interpretive epistemology and applies it to abstract questions of ethics and morality: what counts as living well, what moral duties best reconcile the principle of equal respect with the principle of ethical responsibility, and how best to understand political concepts like equality, liberty, and democracy. In this Essay, I apply Dworkin's interpretive method to a more concrete and institutionally-focused question: whether there are procedural rights in American civil litigation. As a thorough-going hedgehog, Professor Dworkin is committed to seeking principled coherence at all institutional levels, so it is perfectly appropriate to

[11] *See, e.g.*, William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 834-36 (2007) (explaining how proponents of broad collateral attack on class action settlements invoke the individual right to participate in a strong way). This does not mean, of course, that availability of the class action or other forms of aggregation would *necessarily* expand, although it is very likely that they would. It does mean that the debate would have to focus much more on a utilitarian trade-off of social costs and benefits.

apply his interpretive method at this more concrete institutional level as well. As Dworkin puts it in *Justice for Hedgehogs*, the goal is to seek to "order our convictions so that each supports the others in an overall network of value that we embrace authentically" and, in doing so, "to create an active integrity among [our abstract convictions]."[12]

There is no question that procedural rights in general and participation rights in particular figure prominently in current modes of justification for rules and practices. As recently as 2008, for example, the United States Supreme Court in *Taylor v. Sturgell* relied on individual participation, the so-called right to a personal day in court, to justify allowing a plaintiff to proceed with a suit identical to an earlier suit that a different plaintiff had already litigated and lost.[13] Applying preclusion to the second suit would clearly have produced substantial cost savings, yet the Court insisted on giving the second plaintiff a right to litigate and control his own suit.

It is possible that procedural rights have no place in the best interpretive theory of civil litigation. If so, then any arguments based on the existence of such rights would have to be treated as mistakes.[14] This conclusion is not out of the question. For example, the weight given to individual participation seems to vary with context and not in a clearly consistent way. Sometimes procedures provide broad individual control, and other times they tolerate substantial limits.[15] Any interpretive theory must account for these differences, and it is at least conceivable that the best theory could end up treating participation exclusively in utilitarian terms.[16]

Still, given the prevalence and importance of arguments of right in procedure, an interpretivist must take seriously the possibility that the best interpretive account of civil procedure includes at least some procedural rights. Indeed, it would be odd for a legal system based on substantive rights not to

[12] DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 6 (manuscript at 66).

[13] Taylor v. Sturgell, 128 S. Ct. 2161, 2178-80 (2008) (holding that the plaintiff's suit did not fit any of the recognized categories of nonparty preclusion and therefore was improperly claim precluded).

[14] For more on the idea of a mistake, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118-23 (1977).

[15] On the one hand, a strong version of the day in court right is used to justify narrow nonparty preclusion rules. *See Taylor*, 128 S. Ct. at 2171-73. On the other hand, the Federal Rules of Civil Procedure allow plaintiffs to construct complex lawsuits over the objection of defendants, even though complicated party structures greatly weaken individual control as a practical matter. Indeed, the larger the aggregation, the less individual control any given party can exercise, and in very large aggregations, the judge appoints a litigation committee, thereby converting an individual into a collective day in court. For more on this point, see Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 339-40 (2008).

[16] To be sure, broad individual participation and control can be justified on utilitarian grounds, given the strong incentives of those affected to investigate and present arguments, but a utilitarian theory would more readily justify limits when the social costs are high.

recognize procedural rights as well. Any system that creates substantive rights qua rights commits to guaranteeing each individual what she is entitled to under the substantive law, even if doing so is costly from a social point of view. It would be peculiar indeed if the same legal system were to tolerate a greater risk of outcome error – thus fudging on its substantive commitment – simply in order to serve the social goal of reducing aggregate costs.

This is certainly true for a Dworkinian theory of substantive law that assumes all legal rights act as trumps. But one need not be a Dworkinian to accept the point. The argument also holds for any theory of substantive law that views some legal rights as instruments to enforce moral rights. Since moral rights are supposed to trump arguments of social cost, the substantive legal rights that enforce moral rights should trump social cost arguments as well. So this sets up the same tension with a utilitarian approach to procedure.

To be sure, the juxtaposition of rights-based substantive entitlements and utilitarian-based procedure is not *logically* inconsistent; rights are still protected but just not as strongly. However, as Professor Dworkin notes in *Principle, Policy, Procedure*, there is a sense in which the juxtaposition is morally inconsistent. The utilitarian approach ignores the special moral value that makes the substantive right a *right*.[17]

B. *The Puzzle*

Thus, procedural rights, including participation rights, play an important role in contemporary modes of procedural justification, and they also seem to fit a legal system that presupposes substantive rights. But there is a puzzle. Within Professor Dworkin's theory or any other theory that adopts an outcome-based approach,[18] social costs must matter to the core definition of a procedural right and in particular to how much procedure the right guarantees. The puzzle is how to make room for arguments of social cost without stripping the right of its force as a right. The following discussion explains this puzzle.

Outcome-based theories assume that the primary purpose of adjudication is to produce outcomes that enforce the substantive law. Outcomes include all dispositive decisions made during the course of the litigation, final judgments after trial, and settlements.[19] All of these are results of adjudication that affect how the substantive law is enforced. This is not to say that procedure cannot

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[17] DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 93-94.

[18] Professor Dworkin is very clear about using an outcome-based approach. *See id*. at 101-03 (criticizing theories of procedural rights that rest on grounds other than outcome-based substantive injustice).

[19] I have explained elsewhere why settlements should be included. Not only do most lawsuits end in settlement (more than seventy percent of filed cases), but settlements serve the deterrence and compensation goals of the substantive law just as much as trial judgments do. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1981-85 (2007).

produce value in other ways, but it is to say that its primary value lies in the decisions, judgments, and settlements it generates.

Professor Dworkin follows most other commentators and most courts in evaluating outcomes by how closely they conform to the parties' substantive entitlements; in other words, by how accurate they are relative to the substantive law.[20] On this view, Outcome A is better than Outcome B if the risk of error associated with Outcome A is smaller than the risk of error associated with Outcome B. Procedure matters because it affects the magnitude of the error risk and thereby the quality of the outcomes that adjudication produces. It follows that procedural rights are a function of outcome accuracy; in other words, a function of the risk of error that a procedural system generates. The question is what form this function takes.

One possibility is to define the right as a right to some minimal set of procedures designed to assure optimal accuracy.[21] The problem with this approach is that there is no obvious set of procedures to choose. Before the 1970s, there was widespread agreement that trial-type adversary procedures were the best available for error-risk reduction. In 1970, for example, the Supreme Court celebrated personal participation, cross-examination, and other elements of adversarial process in holding that welfare recipients had a due process right to a trial-like evidentiary hearing before termination of welfare benefits.[22] However, just six years later, the Court expressed deep skepticism about the efficacy of evidentiary hearings,[23] and today we are acutely aware of the limitations of trial-like procedures, especially in the strategic environment of litigation.[24]

This leaves defining the right in terms of some normatively acceptable level of error risk. But this approach is problematic too. Obviously, parties cannot have a right to perfect accuracy since perfection is impossible. More precisely, if the right guaranteed perfect accuracy, every case would involve a rights violation, which hardly fits common intuitions of procedural fairness.[25] One

[20] *See* DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 92-98 (analyzing procedural rights in civil cases in terms of the accuracy of outcomes in enforcing substantive rights).

[21] One might argue that the minimal set consists of whatever procedures minimize the expected costs of error. But this approach defines the content of the right in terms of minimizing social costs, which strips the right of its power to resist utilitarian arguments.

[22] Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

[23] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[24] Witness the rise of the Alternative Dispute Resolution ("ADR") movement in the late 1970s and 1980s. *See* Bone, *supra* note 15, at 325-26.

[25] One might endorse such a right and then specify permissible infringements. *See, e.g.*, David McCarthy, *Rights, Explanations, and Risks*, 107 ETHICS 205 (1997) (using this approach to fit the morality of risk imposition into a theory of rights). But this strategy helps very little, for it just packs all the normative work into identifying which infringements are permissible.

might posit a right to reasonable accuracy, but this just begs the question of what is "reasonable."[26]

The right need not guarantee a fixed level of error risk. It might, for example, guarantee an equal or otherwise fair distribution of risk. No matter how it is defined, though, the procedural right must have a property that seems at odds with the idea of a right. If it is to fit prevailing intuitions of procedural fairness, the right must take account of the social cost of furnishing the procedures it guarantees. This is the puzzle of procedural rights: how is it possible for high social costs to limit the scope of a right without stripping the right of its ability to check arguments of high social cost?

To illustrate, suppose that a society would have to invest, on average, $100,000 per case to reduce the risk of error for some class of claims from 3% to 2%. Also suppose that the claims are for relatively small damages and that spending the $100,000 in this way would mean less money for repairing roads and improving schools. It is difficult to imagine that anyone would support making the investment. The cost of the procedure is simply not worth the benefit of a 1% error risk reduction, especially when the benefit involves only small damages per case. Furthermore, trading off the benefit to save the cost is not likely to evoke a sense of moral regret. It seems perfectly sensible to incur the marginal increase in error risk. In other words, our moral intuitions support the conclusion that parties have *no right* to the additional costly procedures.[27]

The general point is that few people, if any, would think that reducing the risk of error is always important enough to justify substantial social investments that could otherwise be used to improve roads, schools, public health, and the like. We do not treat risk this way, not even in our own lives. Many people are willing to gamble significant stakes when the chance of loss is small and the benefit substantial enough. Professor Dworkin recognizes the importance of this fact to an outcome-based theory of procedural rights.[28] Part II below discusses how he addresses it. For now, it is sufficient to note that any outcome-based theory must take account of procedure's social costs as well as its benefits, and that this makes it difficult to define procedural rights that can act as rights.[29]

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[26] The same problem exists for defining the right as a "right to a fair hearing," which merely begs the question of what is "fair."

[27] *Cf.* Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19, 24-25 (1998) (arguing that procedural rights reflect a balance of risk reduction and available resources, just as any substantive right against risk imposition does).

[28] *See* DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 86.

[29] For a more thorough discussion of this point, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 513-17 (2003). One might argue that only individual costs and benefits should matter. But it is not apparent why. As my example above showed, it makes sense to consider the cost to society of providing the procedure. And it is difficult to see why we should confine our attention on the benefit side to any particular litigant. Surely, it makes sense to count the benefits of error risk reduction to everyone.

The problem would not exist if rights were defined so narrowly that the procedures they guaranteed never created high enough costs to warrant serious concern. It is, however, difficult to imagine an outcome-based theory of adjudication that would support rights so narrow in scope. Indeed, a right of this kind could do no meaningful work as a right. It would give out just where it was needed to push back against utilitarian arguments.

Another way to take account of social costs is to frame the right as a prima facie right that can be overridden only if the social costs are very high. Many constitutional rights have this character; they can be qualified or overridden if the state interest is compelling enough. However, this approach does not work for procedural rights. The prima facie rights approach misses the way social costs limit a procedural right. For a prima facie right, the social costs are exogenous to the definition of the right; they operate from the outside to cut off the right before it reaches its full extension. For example, the right to speak without content censorship includes a core of protection for highly valued speech, defined independently of the compelling state interests that limit its reach.[30] By contrast, an outcome-based right to procedure has no cost-independent core of this kind. Instead, social costs are endogenous to the definition of the right itself. They operate internally and affect the level of error risk that the right supports and thus the procedures that the right guarantees.

II. DWORKIN'S SOLUTION TO THE PUZZLE

Professor Dworkin's solution to the puzzle involves framing procedural rights as rights to equal concern and respect in how error risk is distributed. He develops his theory in *Principle, Policy, Procedure*,[31] and also summarizes it in Part V of *Justice for Hedgehogs*.[32] I cannot do full justice to the richness and complexity of the argument in this brief Essay, but I will give a rough summary before offering a few critical observations.

Dworkin begins with the idea of moral harm.[33] An erroneous outcome can produce physical suffering, economic loss, and other types of "bare harm," but the type of harm that is critical for justifying procedural rights is what Dworkin calls "moral harm."[34] Moral harm is injustice that occurs whenever a court erroneously finds against a party's substantive right. According to Dworkin, this moral harm subsists in the injustice of the error itself and thus always arises whenever an error occurs no matter what substantive law is involved in the case.[35] While bare harm can be traded off in a utilitarian balance of costs

[30] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 365 (2003) (defining political speech as "the core of what the First Amendment is designed to protect").

[31] *See* DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 72-103.

[32] *See* DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 6 (manuscript at 234).

[33] DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 80-81.

[34] *Id.* at 80.

[35] *Id.*

and benefits, moral harm cannot. It is this property of moral harm that makes procedural rights qua rights possible.[36]

Since the risk of moral harm varies with the risk of outcome error, a procedural system distributes the former risk by distributing the latter. Moreover, not all outcome errors generate the same degree of moral harm. The moral harm of an error in a case about constitutional rights, for example, is more serious than the moral harm of an error in a tort case involving minor property damage. We know this not because of an independent judgment about the relative value of constitutional rights compared to ordinary property rights, but rather because the best interpretation of the United States legal system as a whole places a higher value on rectifying constitutional rights violations than awarding damages for minor property damage. In other words, the theory of moral harm that dictates the relative importance of different harms is embedded in the rules and practices of the legal system and is constructed by interpreting the features of that system treated as a coherent whole.[37]

Procedural rights in Dworkin's theory constrain acceptable error-risk distributions. Each party has a procedural right to a distribution that reflects equal concern and respect for the importance of the moral harm at risk. More precisely, each party has two rights: "a right to procedures justified by the correct assignment of importance to the moral harm the procedures risk, and a related right to a consistent evaluation of that harm in the procedures afforded them as compared with the procedures afforded others in different civil cases."[38] The first right applies against the state when the state makes procedural rules in a legislative capacity, and the second applies against a court when it makes procedure in an adjudicative capacity.[39] To define the content of the second right, one must first construct a theory that reflects the best interpretation of how the legal system actually assigns relative importance to different types of moral harm. Each party then has a procedural right to a consistent application of that theory.[40]

It is not clear whether a legislature or other rulemaking body is bound in Dworkin's theory by an obligation of moral consistency when it adopts general rules of civil procedure. Dworkin argues that legislatively promulgated rules must not discriminate unfairly by systematically skewing the error risk in an impermissible way and that they must not presume a clearly incorrect valuation for the moral harm at stake.[41] But it is not clear whether legislative rules must

[36] *Id.* at 81.

[37] *Id.* at 89, 95-96.

[38] *Id.* at 92-93.

[39] *Id.* at 93.

[40] As Dworkin puts it, "[the second right] is a right to the consistent application of that theory of moral harm that figures in the best justification of settled legal practice." *Id.*

[41] *See id.* at 87-89, 93.

also satisfy the consistency constraint imposed by the second right.[42] Fortunately, this point of confusion need not delay us. Many of the Federal Rules of Civil Procedure delegate broad discretion to the district judge. In effect, judges are empowered to create procedures specific to the circumstances of each particular case.[43] When judges make case-specific procedure, they act in an adjudicative capacity and for that reason are subject to the strictures of the second right. Therefore, the procedures they adopt must reflect a consistent application of the theory of moral harm embedded in the law as a whole.

The upshot is that procedures must distribute error risk in a way that respects the relative importance of the different moral harms at risk. For example, a plaintiff in a constitutional rights case should face a lower risk of error than a plaintiff in a minor property damage case, if, as seems quite plausible, the legal system as a whole treats the moral harm from failing to vindicate constitutional rights as more important than the moral harm from failing to compensate for minor property damage.

This approach to defining procedural rights is promising. There are strong reasons to think that outcome-based procedural rights, properly understood, will sound in distributive fairness.[44] As discussed above, it makes no sense to frame those rights in terms of particular procedures or a pre-defined level of error risk.[45] This leaves some kind of comparative right as the most promising option.

However, I am not entirely convinced by Professor Dworkin's account. The rest of this Section discusses three potential problems: problems with the idea that outcome error necessarily produces moral harm; problems with how to evaluate the importance of moral harm; and problems with how to apply procedural rights in a highly strategic litigation environment that features settlement.

[42] Dworkin notes that while the Due Process Clause requires that rules of criminal procedure respect "the historical theory of moral harm, embedded in traditions of criminal practice," no constitutional provision appears to subject rules of civil procedure to a similar requirement. *Id*. at 93. Dworkin, however, is not clear whether he means this observation to be simply a descriptive statement about the limits of constitutional law or also a normative statement about the proper application of procedural rights.

[43] *See* Bone, *supra* note 19, at 1967-69.

[44] At the same time, however, a fair distribution of error risk is not a strictly equal distribution, even in civil cases. Strict equality across cases and litigants simply does not fit the American system of civil adjudication, which sometimes adjusts the risk of error to take account of the importance of the substantive interests at stake.

[45] *See supra* notes 21-26 and accompanying text.

A. *Outcome Error Implies Moral Harm?*

Dworkin first introduces the idea of moral harm in connection with erroneous criminal convictions.[46] In that setting, the idea has intuitive appeal. But the intuition trades heavily, I believe, on the moral content of a criminal conviction, which is supposed to reflect a moral judgment and send a message of moral culpability. For this reason, it seems natural to think that an erroneous conviction would create moral harm. Judgments in civil cases are different. The purpose of imposing liability in a civil case is not to punish moral transgressions or convey a message of moral blame, at least not as centrally and as strongly as in a criminal case.[47]

It is true that any *deliberate* denial of a substantive right is a type of moral injustice. But it is unclear why an *innocent* mistake should produce a morally unjust outcome simply by virtue of its being a mistake. An innocent mistake might create an unjust result if the procedural system that produced it was unjust. In that case, however, the injustice of the mistake is a result of the injustice of the procedures – not the other way around. Also, an innocent mistake might have moral consequences if the underlying substantive law serves moral goals. In that case, it is not the mistake itself that creates the moral harm, but rather the fact that the substantive law has a moral purpose.

To illustrate, imagine an antitrust suit in which consumers sue for damages, alleging that the defendants entered into a price-fixing conspiracy. Few people view this type of suit as enforcing moral rights or duties. The suit is primarily, if not exclusively, about deterrence; the class action enlists private enforcement to protect market competition. Suppose our judge worries that the costs of discovery in such a large and complex case might spiral out of control. To avoid this result, she uses her discretion to limit the amount of discovery, and she justifies those limits on the ground that they further the underlying utilitarian goals of the antitrust laws. In particular, she argues that limiting discovery not only reduces litigation costs, but also makes it difficult for plaintiffs in frivolous suits to leverage the threat of burdensome discovery to obtain unjustified settlements. Settlements in frivolous suits impair the efficiency of the market and thus undermine the goals the antitrust laws are meant to further.

Suppose that the consumer plaintiffs in our hypothetical fail to discover a smoking gun memo, which they would have been more likely to uncover with broader access to discovery. As a result, they lose their suit when they should have won. Professor Dworkin, I take it, would have to conclude that moral harm has occurred based on the injustice of the erroneous outcome. But what makes the outcome unjust? To be sure, each consumer had a substantive legal right and we can assume that it would not be permissible to deliberately refuse

[46] DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 79-84.

[47] Punitive damages are an exception. Even a corrective justice theory, while it views civil liability in moral terms, is not about punishing moral transgressions or conveying messages of moral blame. It is about restoring the preexisting moral equilibrium.

enforcement on the ground that doing so would enhance social welfare. But our judge did not refuse enforcement. Quite the contrary; she made a good faith effort to assure effective enforcement. She was certainly aware that truncating discovery might increase the risk of error, but she justified her discovery limits as promoting the same utilitarian goals that the antitrust laws promote.

There might be moral harm from outcome error when the underlying substantive law is meant to redress or prevent morally wrongful conduct – at least if failure to vindicate a substantive moral wrong creates a morally worse state of affairs or a moral injustice to the party adversely affected. But not even this much is clear. The defendant might have committed a moral wrong, but that does not mean that the legal system's failure to provide a remedy for that wrong creates a second moral wrong. Nor does the error necessarily make the underlying moral wrong any more wrongful.

Furthermore, the idea that a moral harm occurs whenever an error occurs assumes that substantive legal rights can be distinguished from the procedures used to enforce them. But the substance-procedure distinction is notoriously problematic. Suppose a legislature creates a substantive legal right to compensation for lead paint injury. Suppose legislators worried about frivolous suits and potentially crippling liability and considered limiting the scope of the right to address these concerns, but in the end chose not to do so on the assumption that trial judges would use their case management discretion to limit litigation costs on a case-by-case basis. Has a moral harm occurred if the plaintiff is unable to sue successfully because of judicially-imposed procedural limits? The answer depends on the best interpretation of what the legislature did when it created the substantive right. One possible interpretation is that the legislature meant to adopt a substantive right conditioned on appropriate procedural implementation. If this interpretation is correct, then the right to compensation has an error risk already built in, so it is difficult to see how moral harm can occur when that risk materializes and a deserving plaintiff loses.[48]

B. *Evaluating the Importance of Moral Harm?*

Professor Dworkin evaluates the importance of moral harm indirectly by relying on what society is willing to invest to reduce the risk of its occurring; in other words, "by setting out the kinds of social gain that would or would not

[48] This argument is similar to the "bitter with the sweet" argument made famous in *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974). Professor Dworkin might respond that there is no problem anyway because the legislature in effect makes a judgment about procedure when it relies on trial judge case-management discretion and legislatures are not bound by an obligation of moral consistency when they make procedure. *See supra* notes 41-43 and accompanying text. Still, the legislature in my hypothetical does not in fact make any particular procedural rule; judges make the procedure in their adjudicative capacity.

justify running a particular risk of a particular sort of moral harm."[49] For example, one might measure the importance of moral harm from error in a constitutional rights case by examining how much the legal system is willing to invest to protect against the risk of constitutional rights violations in various settings, including the resources it is willing to expend, the opportunity costs it is willing to incur, and the competing policies it is prepared to sacrifice.

This method of evaluating moral harm is the way Dworkin incorporates social-cost-based limits into the definition of a procedural right. The idea is that procedure can be limited to save social costs as long as the resulting error risk distribution shows proper concern and respect for the importance of the moral harms at stake.[50] For example, if society generally is willing to incur only moderate costs to protect against the risk of ordinary property damage, then spending only a moderate amount on procedure shows appropriate concern and respect for the importance of the moral harm from error in an ordinary property damage case.

There are at least two potential problems with Dworkin's approach. First, it is not clear that society's willingness to invest has the moral significance Dworkin attributes to it. Whether it does should depend on *why* society invests what it does, and, in particular, whether it does so for moral reasons. For example, suppose a society values economic efficiency so highly that it is willing to spend a great deal to prevent market monopolization. It creates agencies to enforce anti-monopolization laws, gives competing firms and consumers legal rights to be free from monopolistic practices, and empowers courts to grant injunctions and compensate for economic losses. If moral values were at stake, these investment choices might signal the value our hypothetical society places on the moral harm from judicial error. But I fail to see how investment choices can signal anything about moral importance when, as in this example, the efficiency-based reasons for the choices have nothing to do with morality.

Second, Professor Dworkin's approach makes it difficult to allocate social resources toward preventing violations of substantive rights without also allocating comparable resources toward remedying violations after they occur. To illustrate, suppose a society decides that the best way to protect against violations of constitutional rights is to invest most of its scarce resources in prevention and relatively little in adjudicative procedures after violations have occurred. Suppose this same society makes the opposite investment choices for protecting property rights – it invests much more in enforcement than in prevention – and suppose that it also spends much less in total for property rights protection than for constitutional rights protection.

Professor Dworkin, I take it, would object to this arrangement. Our hypothetical society values the importance of vindicating constitutional rights more than the importance of vindicating property rights, as evidenced by the

[49] DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 95-96.

[50] *Id.* at 96.

greater total investment in the former than in the latter. Yet the society also provides thinner procedures, risking higher outcome error for constitutional rights cases than for property rights cases. This inconsistency seems to be the type that Professor Dworkin should find morally problematic, but I fail to see the problem.[51] That our hypothetical society chooses to invest more in prevention than in enforcement simply reflects a pragmatic judgment about how best to protect the substantive moral interests at stake; it does not reflect any shortage of respect and concern for the rights involved. Accordingly, I cannot see how the prevention-enforcement tradeoff presents any moral problem.[52]

C. *Operationalizing Procedural Rights?*

Even if moral harm makes sense and even if it is possible to evaluate its importance, there are still problems with operationalizing Dworkin's two procedural rights in the highly strategic environment of litigation. The main problem is the difficulty of predicting in advance the error risk a set of procedures is likely to generate. For example, one might expand discovery expecting that this change will reduce the error risk only to discover later that parties use the expanded discovery strategically to impose asymmetric litigation burdens that distort settlement outcomes.[53] As another example, one might expand plaintiffs' participation opportunities with the expectation that doing so will improve the presentation of evidence and argument, thereby reducing the risk of trial error. But the plaintiff might use these expanded

[51] It is possible there is no problem if the procedures are set by general rule and if Professor Dworkin exempts general legislative-type rulemaking from the moral consistency constraint. *See supra* notes 41-43 and accompanying text. However, the problem would still remain for judges exercising case-specific discretion to fashion procedures where the general rules give out.

[52] Professor Dworkin's approach might suffer from an even more serious problem. It is not clear what prevents his theory from sliding into utilitarianism. If procedural rights depend on the importance of moral harm and the importance of moral harm depends on the cost society is willing to incur to protect against that harm, then how is it that procedural rights guarantee anything different than what a utilitarian cost-minimization metric would require? Stated differently, if the relative importance of moral harms depends on a judgment about comparative social costs, why does it not follow that higher social costs justify more limited procedures? The answer to this question will determine whether Dworkin's procedural rights have any traction as rights.

[53] To be sure, parties consent to settlements, but consent is not enough to validate unjust settlement outcomes. Procedure frames the conditions for settlement bargaining and ultimately shapes the kinds of settlements parties are willing to accept. For example, plaintiffs might settle for amounts far less than their substantive entitlements if limited discovery makes it difficult for them to get needed information. Consent cannot justify the resulting errors when discovery limitations produce the error risks that pressure plaintiffs to settle. For a more detailed discussion of these issues, see Bone, *supra* note 19, at 1983-84.

opportunities strategically to distort the defendant's evidence and make spurious arguments, thereby increasing the risk of trial error instead.

Of course, problems of prediction plague any approach that focuses on error risk, but these problems are more serious for Dworkin's theory than they are for a utilitarian theory based on maximizing social welfare. The utilitarian can justify relying on very rough predictions with high variance if the cost of greater precision is substantial enough. Dworkin, however, cannot accept rough predictions quite so easily. Dworkin's procedural rights require a reasonably strong positive correlation between the distribution of error risk and the relative importance of moral harm. When this correlation fails because of strategic effects difficult to predict ex ante, the result is a morally unjust distribution. And the fact that the distribution is morally unjust (not simply socially undesirable) makes it difficult to rely on the high social costs of prediction as a good reason to accept it.

III. TWO ALTERNATIVE THEORIES

Professor Dworkin's theory of procedural rights is outcome-based and assumes that the function of adjudication – and thus of adjudicative outcomes – is to enforce the substantive law. In this Part, I briefly consider two alternative theories. The first also takes an outcome-based approach, but focuses on the lawmaking rather than the law-applying function of adjudication. The second alternative shifts from an outcome-based to a process-based theory. Both alternatives have serious shortcomings of their own.

A. *Outcome-Based – Lawmaking*

The paradigm of judicial lawmaking is, of course, common law adjudication, but constitutional and statutory adjudication embody lawmaking aspects as well.[54] The right to participate personally in litigation best illustrates the link between procedural rights and lawmaking: if personal participation in some form is likely to further a judge's ability to make good law, then individuals should have a right to participate in that form.[55]

[54] I am aware that distinguishing between law application and lawmaking oversimplifies greatly and raises a host of complex issues about the nature of common law adjudication. For example, Professor Dworkin himself is famous for an interpretive theory of adjudication that denies a sharp distinction along these lines. I mean here only to distinguish roughly between the value of adjudication in enforcing extant substantive law and the value of adjudication in developing good law for the future. I hope I can work with this distinction without engaging the complex jurisprudential issues too deeply.

[55] This argument justifies participation rights on rule-consequentialist grounds. If judges were able to make decisions about whether participation would further good lawmaking in specific cases, there would be no need for a right. Suppose, however, that judges are poorly equipped to make case-specific determinations about the marginal value of participation to good lawmaking, and suppose that judges left on their own would be more inclined to deny

Lon Fuller is famous for defending a robust participation right in just this instrumental way. He insisted that personal participation through proofs and reasoned argument is the essence of adjudication.[56] I have argued elsewhere that Fuller relied on a theory of adjudication that tied party participation in an adversarial setting to the development of good common law principles and sound purposive interpretations of statutes.[57]

According to Fuller, judges make good law by combining inductive and deductive reasoning in a way that resembles a process of reflective equilibrium. They reason inductively by hypothesizing principles and testing them against the facts, and they reason deductively by tracing out the logical implications of existing principles and shared premises.[58] Moreover, Fuller believed that this reasoning process worked well only when a judge was able to view a case from both a sympathetic and a detached perspective at the same time.[59] Sympathetic engagement was necessary to gain a deep familiarity with the case and the social practice that gave rise to it, and objective detachment was necessary to reflect on the implications of legal principle for that social practice.

For Fuller, these two perspectives – sympathetic engagement and objective detachment – were in tension with one another. The more engaged the judge is, the less detached she can be, and the more detached she is, the less engaged she can be. Over time, the institution of adjudication developed a mechanism for managing this tension: party participation through proofs and reasoned argument by lawyers in an adversary setting.[60] This form of adversarial presentation furthered the goal of sympathetic engagement by assuring that all the salient facts were placed before the judge in the most sympathetic light possible, and it advanced the goal of objective detachment by forcing the judge to maintain an impartial point of view. In sum, adjudication guaranteed a right to personal participation through proofs and reasoned argument in an adversarial setting because the participation right was essential to sound judicial reasoning and good lawmaking.

One does not have to accept Fuller's rather complex (and, I might add, not terribly rigorous) theory of adjudication to appreciate the possibility of linking procedural rights to optimal conditions for effective lawmaking. The problem,

participation than grant it in order to save time and avoid complicating a case. Adopting a rule that gave all persons seriously affected a right to participate would counteract this judicial tendency and might yield better results over the long run.

[56] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

[57] Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1303 (1995).

[58] *Id.* at 1305-06.

[59] *Id.* at 1306.

[60] *Id.* at 1306-08.

however, lies in identifying those optimal conditions. One might argue, for example, that adjudication involves moral reasoning about rights, and that moral reasoning works best when it takes place in a particular procedural setting. But what procedural setting is ideal for moral reasoning? Fuller argued that an adversarial setting featuring party participation through proofs and reasoned argument was ideal; however, there is no reason to believe that this is necessarily so. In fact, there is wide disagreement about how to do moral reasoning, and I know of no generally accepted theory of moral epistemology that singles out a particular method as ideal.[61]

B. *Process-Based – Dignity and Legitimacy*

Not all theories of procedural rights are outcome-based. Relying on a Kantian principle of respect for persons, for example, some scholars argue that a right to participate is required to respect the dignity of those who are bound or otherwise seriously affected by a decision.[62] Other scholars argue that participation is essential to the legitimacy of adjudication as a source of binding judgments, just as participation is essential to the legitimacy of legislation and other government action in a liberal democracy.[63] Both approaches claim to support a right to meaningful participation, which can be cashed out in terms of particular procedures.

There are, however, a number of problems with both the dignity and the legitimacy approaches. First, it is not clear what procedures a dignity-based participation right would guarantee. Why, for example, is individual dignity not adequately respected by giving parties a relatively minimal form of participation amounting to no more than an informal opportunity to tell one's story in one's own way?

Second, it is not clear what circumstances trigger dignity values strongly enough to call for individual participation in any form. Does it matter whether the stakes of the dispute have a close connection to personhood? Do corporations have dignity-based rights too? And so on.

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[61] *Cf.* Jeremy Waldron, *Participation: The Right of Rights*, 98 PROC. ARISTOTELIAN SOC'Y 307, 335-37 (1998) (making this point about political procedures for optimal rights definition).

[62] *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985). Psychological versions of this argument, such as the notion that due process protects against feelings of unjust treatment, cannot support the sort of rights we are seeking. If this argument is really about feelings rather than the injustice that feelings signal, it inevitably slides into some form of utilitarianism. The reason is easy to see. If feelings are what count, then there is no reason to prefer a feeling of just treatment to any other good feeling, such as the pleasure of eating ice cream. But that means that we must aggregate over everyone's feelings (preferences), which calls for a utilitarian approach. To escape this trap, one must explain why feelings of just treatment are more important than feelings about ice cream, but that just restates the problem we are trying to solve.

[63] *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275-77 (2004).

Third, anyone arguing for dignity or legitimacy as a basis for participation rights must be prepared to explain why dignity is not fully respected and legitimacy fully secured by an adjudication system that does its best to produce an outcome for each individual that conforms to the substantive law.[64] The state is not morally obligated to provide individualized participation whenever it renders a decision that affects a person profoundly. A legislature, for example, can pass a bill without giving each person who might be seriously affected a chance to participate directly and personally in the decision. To be sure, legislation is not the same as adjudication, and institutional differences matter for the type of rights people have. But that is my point. The form of participation required to respect dignity or assure legitimacy depends on the function of the institution making the decision. Since the *primary* function of adjudication is to produce quality outcomes, why does it not follow that dignity is satisfied and legitimacy secured by an outcome-based theory that guarantees participation whenever needed to ensure outcomes meeting quality standards?

CONCLUSION

My criticism of Professor Dworkin's theory and of the two alternative contenders should not be read as a wholesale rejection of procedural rights. It is instead a call for more serious scholarly attention to the topic. A great deal of practical importance turns on a careful account of procedural rights, and the task of defining those rights in a coherent way turns out to be much more difficult than it appears at first glance. Professor Dworkin said it well at the beginning of *Principle, Policy, Procedure*: "Nothing is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be."[65] I wholeheartedly agree.

[64] *See* Bone, *supra* note 7, at 279-85.

[65] DWORKIN, *Principle, Policy, Procedure*, *supra* note 9, at 72.