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Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness

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Abstract:

This article examines the concept of procedural fairness as a limit or constraint on decisions aimed at maximizing aggregate welfare, and focuses in particular on one type of fairness argument that has received some attention in recent procedure scholarship, an argument that I call the "ex ante argument" because it is based on the notion of hypothetical ex ante agreement or choice. The ex ante argument holds that a procedure is fair if all parties would have agreed to the procedure had they been able to contract for it in advance of (i.e., "ex ante") their dispute. The ex ante argument, if valid, has remarkably broad policy implications. It is capable of justifying a number of controversial procedures that are often challenged on fairness grounds. For example, one might defend the fairness of a mandatory damages class action by arguing that the defendant and all the class members would have agreed to the procedure in advance of the dispute, at a time when they did not know whether their future cases would be strong or weak.

The article first surveys the existing process-based (dignitary) and outcome-based theories of procedural fairness and identifies shortcomings with each. This analysis sets the stage for the rest of the discussion by explaining why it is so difficult to articulate a coherent theory of procedural fairness and why, at least at first glance, the ex ante argument seems so promising. The article then critically examines the ex ante argument. First, it explains the essential link to contractarian moral theory. Second, it distinguishes between two different versions of contractarianism - egoistic and ideal. Third, it shows why neither version of contractarianism can furnish a satisfactory basis for the ex ante argument.

As for egoistic contractarianism, it is incapable of supplying the requisite moral force needed to justify imposing a hypothetical agreement on parties who have never actually agreed. This means that the ex ante argument must rest on some form of ideal contractarianism, which imagines parties bargaining through representative agents for principles or rules behind a Rawlsian-type "veil of ignorance." But there are serious problems with ideal contractarianism. The parameters of the ideal bargaining situation are difficult to specify in a sensible way for procedure. The bargaining game, as properly specified, is likely to be extremely difficult to solve, if soluble at all. And there are good reasons to believe that agents in an ideal bargaining situation would not unanimously choose hypothetical ex ante agreement as a principle of fairness; nor would they necessarily choose the specific procedural rules that proponents of the ex ante argument seek to defend.

The article concludes by recommending an alternative approach to evaluating the fairness of procedures. This alternative relies on a constructivist methodology, which develops general

principles of procedural fairness from existing practice through a process of reflective equilibrium. The discussion then illustrates the constructivist approach by applying it to the question of when fairness requires the subclassing of mass tort class actions.

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