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Adjudicating Uncertain Facts – The Case for Procedural Legitimacy

Judger des Faits Incertains – Le Cas de la Légitimité Procédurale

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Abstract: This paper is a commentary on the legitimacy of judicial fact-finding in civil litigation. Judges are called on to make authoritative factual findings in conditions of evidentiary uncertainty and the decision-making process cannot guarantee the accuracy of those outcomes. Given the inevitable risk of error, on what basis is the authority of judicial fact-finding legitimate? My exploration into this question leads me to set out a notion of *procedural* legitimacy that bridges two unavoidable aspects of adjudication: evidentiary gaps leading to factual uncertainty/indeterminacy and the need for justifiably authoritative dispute resolution. I show how the notion of procedural legitimacy enables a recognition that the civil litigation system, while inevitably imperfect, is nonetheless legitimate. The nuances of this claim are demonstrated by situating the procedural legitimacy theory within debates about the instrumental and non-instrumental values

of litigation procedures, drawing on the work of Robert Bone and Ronald Dworkin, among others. The notion that procedural propriety in civil litigation systems is key to maintaining legitimate judicial outcomes gestures towards the important role that legal players have in ensuring adjudicative legitimacy. As such, this paper serves as a call on all legal actors, whether practitioners, policy-makers, academics or adjudicators, to reflect deeply on their role in ensuring that cases are decided with procedural integrity because the legitimacy of Canadian civil litigation depends on it.

Key words: Civil adjudication. Civil litigation. Fact-finding. Procedural legitimacy. Procedural theory

Key words (French): Jugement Civil. Litige civil. Établissement des fait. Légitimité Procédurale. Théorie procédurale

INTRODUCTION

The foremost question for resolving most civil legal disputes is 'what happened?' Almost invariably, the events that led to the quarrel are uncertain, and ascertaining 'what happened?' requires speculation. Still, the dispute must be resolved, and that resolution is authoritative. My aim in this paper is to comment on why, and on what basis, judicial outcomes are justifiably authoritative, given the uncertain nature of fact-finding. In academic contexts, adjudicative legitimacy is usually considered from the perspective of whether a judge appropriately defined the applicable law, but as trial judges and lawyers would easily attest, so often, it is not the law at issue – it is the facts. This paper centralizes the judicial task of fact-finding and approaches adjudicative legitimacy from that important, yet under-explored starting point. My analysis results in recognizing the vital role of procedural propriety in ensuring legitimate judicial decisions of fact.[1] Below, I expound that position and demonstrate the importance of recognizing it. An implicit theme that runs through the argument and analysis presented throughout this paper is the invaluable role of lawyers and judges in maintaining the legitimacy of the civil litigation system, as it is these key players who are in the privileged position of being able to maintain and uphold procedural integrity.

In Part One, I start by posing a descriptive question – what constitutes valid fact-finding? My consideration of that question highlights the tension between the need for

1. I note at the outset that my concern in this paper is to demonstrate that procedural propriety is one among other necessary conditions of legitimate adjudication. Other necessary conditions may include the propriety of the substantive laws, and the substantive propriety of procedural rules as well. For instance, a procedural rule that prejudices one gender or race would clearly not lead to acceptable adjudicative outcomes in Canadian society. But my goal in this paper is not to comment on the appropriateness of particular procedural rules. My purpose is to highlight the importance of procedural propriety as a crucial element of legitimate adjudication, and demonstrate the significance of that claim in its own right.

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authoritative, effective dispute resolution and the inevitability of factual uncertainty or indeterminacy in adjudication. This discussion yields my basic observation that accurate fact-finding is not a necessary pre-requisite for valid judicial fact-finding, and conversely, that procedural propriety is.

It is important to clarify at the outset that the terms 'valid' and 'legitimate' are used often in this paper, and they are distinct, though related. The term 'legally valid,' in my conception, denotes only the descriptive conclusion that when procedural integrity is maintained an outcome is valid in law. Legal validity does not imply that an outcome is necessarily just or good or desirable – it means only that it constitutes law. Having legal validity does, however, come with an important implication: when an outcome is legally valid, it is authoritative in the sense that it is broadly acquiesced as final, binding, and even coercively enforceable. I contend that since law must be authoritative in that way in order to be meaningful at all, it must also be justified. That is, there must be a justification for the fact that having legal validity means a societal norm is permitted to be authoritative and enforceable in the community. That justifying reason is what I refer to here as 'legitimacy.' When a legal outcome is legitimate, therefore, it has some sort of justifiability.

Since it is legal validity itself that brings authoritative implications, I reason that whatever gives rise to legal validity must *also* underpin the justifiability of that outcome's authority. Accordingly, if legal validity makes judicial outcomes (and the underlying factual determinations) authoritative, and procedural propriety grounds the legal validity of the factual findings, then procedural propriety must be a necessary characteristic of their legitimacy as well. This is the line of reasoning that leads to the conclusion that the framework for legitimate judicial fact-finding must have a fundamentally procedural character. Part One of this paper concludes, therefore, with two observations: First, that valid adjudicative fact-finding *requires* legitimacy, and second, that such legitimacy depends on the *processes* of resolving factual disputes – how was the evidence admitted, how was it evaluated, was the standard of proof appropriately employed, and so on.

Next, I discuss my agreement and disagreement with various ideas about the harms that result from factual inaccuracies, and the role that procedure plays in rectifying those harms. Through that discussion, I indicate the normative value of procedural legitimacy in fact-finding: what are the limits of procedural legitimacy, and what must it achieve in order to ensure acceptable civil adjudication.

PART 1. UNDERSTANDING ADJUDICATIVE FACT-FINDING

A. Introducing the Fact-Finding Tension

Almost any successful legal action depends on establishing the relevant facts as defined by the governing legal principles. One of the primary tasks of the courts is to

determine whether the facts that would give rise to a cause of action are established. The value of accurate determination of the relevant factual circumstances is obvious. But the adjudicative process cannot guarantee accuracy in fact-finding - it is impossible to infallibly know what happened and what will happen.[2]

Evidentiary gaps and factual uncertainty have a number of causes. First, there is the practical issue that adjudicative claims arise out of events of the past, so determining what happened cannot simply be observed. Rather, it has to be inferred based on whatever fragments of evidence are available and presented to the court. The available evidence may be scarce to begin with, there may be a lack of competent witnesses in injury claims and evidence may deteriorate over time.[3] Moreover, since adjudication requires relative efficiency to maintain its utility, waiting for additional evidence to become available may not be feasible.

Along with these practical issues, some legal principles prevent judicial access to relevant evidence in several ways. First, adversarial dispute resolution entitles parties to present evidence of their choice and binds decision-makers to make decisions on the basis of the evidence presented. The adjudicator is generally not at liberty to collect their own relevant information.[4] This does not invariably contribute to the risk of inaccuracy, but it demonstrates that commitment to the adversarial process can outweigh the commitment to accuracy. Similarly, legal admissibility rules also restrict what might otherwise be relevant evidence in order to protect some other legal principle. For instance, evidence subject to legal privilege is not admissible, even

2. Jerome Frank captures this thought succinctly in his chapter title "Facts and Guesses," in *Courts on Trial – Myth and Reality in American Justice* (New Jersey: Princeton University Press, 1973). Later, he comments that, "Guessing legal rights, before litigation occurs, is, then, guessing what judges or juries will guess were the facts, and that is by no means easy. Legal rights and duties are, then, often guessy, if-y" in *Courts on Trial* at 27.
3. In Walter Bloom and Harry Kalven Public Law Perspectives on a Private Law Problem – Auto Compensation Plans," (1964) 31(4) U Chicago L Rev 641 at 647, the authors note that some people have questioned the very viability of tort law for adjudicating injury claims arising out of motor vehicle accidents on the basis that evidentiary problems culminate such that the "actual trial involves an imperfect and ambiguous historical reconstruction of the event, making a mockery of the effort to apply so subtle a normative criterion to the conduct involved." Larry Laudan has made the same point in the context of criminal proceedings. Discussing the causes of evidentiary gaps in criminal trials, Laudan notes, "[the crime] is now in the past. What survive are traces of remnants of the crime. These include memories of the participants and eyewitnesses and physical evidence of the crime…. The police will come to find some, but rarely all, of these traces." Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge, New York: Cambridge University Press, 2006) at 16.
4. Michael Bayles makes this observation in "Principles for Legal Procedure," (1986) 5(1) Law & Phil 33 at 37: "Courts have limited investigative powers. At best, they can investigate matters relating to the specific case before them. They do not have the power to conduct a general investigation into, for example, business practices in an industry. In the common-law system, the burden of amassing and presenting evidence rests with the parties" [Bayles, "Principles for Legal Procedure"].

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if the privileged evidence would reduce the factual uncertainty.[5] Moreover, some legal principles reflect a commitment to an efficacious dispute resolution system by prioritizing the finality of outcomes, even in instances where factual uncertainties exist. Rules around the introduction of fresh evidence on appeals are an example. Where a party wishes to introduce new evidence during an appeal of an action,[6]

> the onus is on the moving party to show that all the circumstances 'justify making an exception to the fundamental rule that final judgments are exactly that, final.' (Reference removed). In particular, the moving party must show that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings.

These comments illustrate the principle that once a fair trial has occurred, the outcome is legitimately final, and ought to be respected as such. While there may be justifiable reasons to re-open legal actions and even factual determinations, the efficacy of the adjudicative process would be significantly compromised if it was not the norm to accept judicial outcomes, including the underpinning factual findings, as final, even though the evidence presented to the court cannot be guaranteed to be complete.

In short, adjudication occurs in conditions of inevitable factual uncertainty, and that condition must be balanced against the need for an effective dispute resolution system. An accurate appraisal of the facts is necessary in order to ensure that the resolution of disputes accords with substantive legal principles. As Robert Summers puts it, "without findings of fact that generally accord with truth, the underlying policy goals or norms of the law could not be served."[7] The importance of accuracy in fact-finding is undeniable, yet accuracy is impossible to guarantee. Even so, for the administration of law to be meaningful, the adjudicative system must provide legally valid outcomes that constitute final, authoritative resolutions to legal disputes. On

5. For a discussion of the evidentiary principles of privilege, see David Paciocco and Lee Stuesser, *The Law of Evidence* Revised 5ed, (Toronto: Irwin Law Inc., 2008) at 7 and for a discussion focusing on procedural aspects of privilege principles, see Janet Walker and Lorne Sossin, *Civil Litigation*, (Toronto: Irwin Law Inc., 2010) at chapter 9.

6. *Mehedi v 2057161 Ontario Inc* 2015 ONCA 670 (CanLii) at 13. *In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), [2001] 2 SCR 983, the Supreme Court accepted (at para 20 and 64), the test set out in *Scott v Cook*, [1970] 2 OR 769, for presentation of fresh evidence on appeal: First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence have been obtained before trial by the exercise of reasonable diligence?

7. Robert Summers, "Formal Legal Truth and Substantive Truth in Fact-Finding – Their Justified Divergence in Some Particular Cases" (1999) 18 Law & Phil 497 at 498 [Summers, "Formal Legal Truth"]. Alex Stein makes similar remark in *Foundations of Evidence Law* (Oxford, New York: Oxford University Press, 2005) at 2: "accuracy in fact-finding is a logical pre-requisite to proper administration of the controlling substantive law"; and at 10: "Accuracy in fact-finding…is a straightforward understandable objective of the law. Getting the facts right is a prerequisite to proper determination of the litigated entitlements and liabilities."

what basis, then, are adjudicative factual determinations legally valid? The first step to answering that question is to discern how the tension between factual uncertainty and the need for final and binding resolution of disputes is handled.

B. Valid Fact-Finding: Resolving the Fact-Finding Tension through Process

The tension between the need for a resolution to a legal dispute and the reality that factual accuracy cannot be guaranteed is reconciled by enabling facts to be found on a 'less than certain' standard of proof.[8] In civil cases, facts are proven on the balance of probabilities.[9] If it is more likely than not that the defendant's negligence caused the plaintiff's injury, for instance, then causation is taken to be a legal certainty – it is established as a 'legal fact.'[10] In this way, factual uncertainty morphs into legal certainty – relevant factual conditions are legally established, and the governing law is applied to those facts, resulting in a certain legal outcome – one that is authoritative and enforceable.[11]

Legal fact-finding, therefore, contemplates the chance that an event found as a legal 'fact' may not be a fact in reality. Still, the applicable legal rules will be applied on the basis that the legal facts are true. [12] This creates the potential for situations where,

8. I note that standards of proof are also mechanisms of error distribution. A balance of probabilities standard ensures that the risk of erroneous outcome is equally distributed between the parties; the criminal 'beyond reasonable doubt' standard ensures that the accused faces a far lesser risk of an erroneous outcome. For my purpose above, this aspect of the standard of proof has less relevance. Above, I have highlighted that the standards of proof set the degree of certainty which is required to establish legal proof.
9. My argument here does not require a discussion of why the balance of probabilities standard of proof is acceptable. The crucial point is that fact-finding occurs on some standard of proof that is less than certainty. As a result, there is inevitable potential for legally valid, yet inaccurate outcomes. My argument depends only on the existence of a risk of inaccuracy implicit in adjudicative fact-finding. How much risk is tolerable is an important question, but that discussion is not required for the development of the argument at this stage.
10. I use the term 'legal facts' to denote facts that are established for the purpose of making a legal determination, whether or not the facts are actually true.
11. Of course, judicial outcomes can be appealed, but that does not diminish the authoritative nature of adjudicative outcomes. This is especially true in the fact-finding context, because appellate courts afford the highest degree of deference to the trial judge's fact-finding. This was most recently reaffirmed in *Benhaim v St-Germain*, 2016 SCC 48 at paras 36-39. Another stark testament to the recognition of the authoritative status of a valid judicial outcome is that civil trial decisions remain, by default, enforceable even pending appeal. See for example: R. 90.41 of *The Nova Scotia Civil Procedure Rules* and Rule 63 of the Ontario *Rules of Court*, which expressly hold that filing an appeal does not automate a stay of proceedings of the trial decision being appealed. Rule 14.48 of the *Alberta Rules of Court* and Rule 9 of the *British Columbia Rules of Court,* similarly hold that a court order would be required in order to stay the enforcement of a trial decision pending an appeal.
12. See Summers, "Formal Legal Truth," *supra* note 12, for an explanation of the potential instances where "truth" and "formal truth" (which distinction I refer to as "facts" versus "legal facts") diverge by the very design of the legal system, and the rationales for that divergence. In this paper,

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for example, a plaintiff is negligently injured, but the available evidence is insufficient to meet the standard of proof for a requisite factual element, so despite the violation of the plaintiff's legal rights, the defendant will not be liable to compensate her. Or, evidence may suggest that a defendant's negligence was more likely than not the cause of a plaintiff's harm, so liability is established, but there remains a significant risk that the defendant's negligence was not, in fact, the cause of the harm at all. In civil cases, through our system of fact-finding on a balance of probabilities standard of proof, we tolerate up to a 50% risk of such factually erroneous outcomes.

The implication that can be drawn from our method of fact-finding is that the validity of factual determinations is not contingent on their accuracy. Rather, we accept the validity of a determination of fact when it results from appropriate adherence to adjudicative procedures. Despite their potential incongruence with factual reality, the hypothetical outcomes noted above are acceptable because of their procedural propriety. That is, when parties present evidence in accordance with adversarial procedures including admissibility rules, and when the trier of fact relies on properly admitted evidence and weighs that evidence against the requisite standard of proof, the factual finding, along with the ultimate legal outcome, is acceptable, even if we do not know whether it is accurate, and sometimes, even if we know it is inaccurate.

Conversely, a legal outcome would be considered invalid in the event that the process of fact-finding is compromised. If, for instance, a lawyer presents inadmissible evidence and a trial judge relies on it, or misconstrues the applicable standard of proof, the resultant factual determination is, of course, not valid. That is true even if the factual finding is ultimately accurate. To give a simple example, if a judge erroneously applies the criminal 'beyond reasonable doubt' standard of proof in a civil claim for compensation for a negligently inflicted injury, the factual finding she arrives at may be accurate, but the outcome cannot be considered valid due to the procedural error of applying the wrong standard of proof.

So far, two observations regarding the legal validity of a judicial determination of fact have been presented. First, that fact-finding is valid on the basis of procedural propriety, and second, the converse, that a factual finding may be invalid on the basis of procedural impropriety. That is, outcomes that bear a risk of inaccuracy can be acceptable on the basis that fact-finding procedures were adhered to. And a factual finding can be unacceptable on the basis that the procedures of fact-finding were not adhered to, even if that factual determination is accurate. The crux of these observations is that the validity of judicial fact-finding does not depend on the ultimate accuracy of each determination; it depends on its procedural propriety.

Summers concludes that "…the concept of 'formal' legal truth, in those cases in which it diverges from substantive truth, is not necessarily something to be disparaged at all," paving the road to my inquiry into the requisite features that make 'formal legal truth' legitimate.

The conclusion that legal validity depends on the proper application of legal procedures is a descriptive one, but there are important normative implications contained within it. This is because when judicial outcomes are legally valid, they are authoritative in the sense that litigants and the society more generally acquiesce in the outcomes as non-optional, and permissibly enforceable. [13] If they did not, adjudicative outcomes would have no utility. Being authoritative in this way, I contend, judicial outcomes, including their factual determinations, require justification, which serves as a reason *why* legally valid outcomes are permissibly authoritative and *why* litigants, lawyers, and community members can agree to that. I refer to that justificatory reason as legitimacy.[14]

I reason that since legal validity implicates legal authority, and since legal authority must be justified, or, legitimate, then whatever gives rise to legal validity must *simultaneously* give rise to legitimacy as well. [15] On that basis, I hold that not only is the validity of judicial fact-finding grounded in procedural propriety, but that its legitimacy is too.

One upshot of this conclusion is that just as factually inaccurate outcomes can be legally valid, they can also be legitimate because neither their validity nor their legitimacy depends on their accuracy. Concluding that a factually inaccurate outcome is nonetheless legitimate (and therefore justifiably enforceable) would seem uncomfortable because it seems unjust. However, a generalized commitment

13. As Joseph Raz provides, "[l]aw is a structure of authority, and central to its functioning is the interplay between legislators and other authorities on one side, and the courts, which are entrusted with delivering authoritative interpretations of its norms, on the other side. Judicial interpretations are authoritative in being binding on the litigants, whether they are correct or not," in Joseph Raz, "Interpretation: Pluralism and Innovation," in Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009) at 320 [Raz, *Between Authority and Interpretation*]. I note that holding that judicial outcomes are authoritative does not mean that every individual in a society will always accept the authority of every, or even any judicial outcome. But to the extent that, as a society, we accept the validity of the Canadian political system and its outcomes, so we also generally-speaking, accept that judicial outcomes are authoritative. I also note that the concept of authority and its relation to law and legal legitimacy can be complex. Here, I rely only on the uncontroversial descriptive reality that when a rule, including a judicial outcome, is found to have legal validity, that outcome is final and binding on the litigants.
14. This understanding of legitimacy resonates with Jurgen Habermas's approach when he contends that legal norms must "*deserve* legal obedience. Such legitimacy," he holds, "should allow a law-abiding behavior that, based on respect for the law, involves more than sheer compliance." (Emphasis in the original.) Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, Mass: MIT Press, 1996) at 198 [Habermas, *Between Facts and Norms*].
15. Compare this with Dan Priel, "The Place of Legitimacy in Legal Theory" (2011) 57 McGill LJ 1 at 6 who suggests that while normativity and legitimacy are related, they address two different issues: "the question of normativity asks, 'how are legal obligations possible?' whereas the political question of legitimacy asks 'what political conditions need to be in place for law to bind those subject to it?'" In my conception, these questions are inseparable, as I argue further below, drawing especially on the legal theories of Lon Fuller and Jurgen Habermas.

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that factual inaccuracy can delegitimize an adjudicative outcome and revoke the acceptability of its authority is unsustainable. If subsequent awareness of factual error could delegitimize a legal outcome resulting in a revocation of the justifiability of its authority, then there would be no basis for considering judicial dispute resolution authoritative at all, because there is almost invariably a risk of factual error. When analyzing the value of the civil litigation process, it is important not to minimize or ignore its inevitable frailties. In my view, perfection (in the sense of eradicating the risk of inaccuracy) is unattainable, but legitimacy is not. This recognition clears the way for the claim that both the validity and the legitimacy of adjudicative outcomes must be sourced in the virtues of the process that gave rise to that outcome. But the uneasiness that naturally accompanies inaccurate, yet legitimate judicial outcomes must be addressed soundly. Below, I respond to questions about the injustice that may be associated with factual inaccuracies from the perspective of process-based legitimacy.

I start with Robert Bone's proposal in "Procedure, Participation, Rights" [16] There, he suggests that the answer to the adjudicative tension caused by factual uncertainty can be found through a re-conceptualization of 'injustice' in relation to inaccurate factual determinations. His response is premised on a comingling of substantive rights and procedural rights.[17] He suggests that the processes of administration and enforcement of laws deliberately limit the substantive rights that the laws provide for. In the torts context, for instance, while a plaintiff has a substantive right to compensation for negligently inflicted injury, that right is contingent on the procedures of adjudicating the plaintiff's claim. That process of adjudication includes a risk of factual error. This line of reasoning prompts the following comments from Bone, illustrating how the interpretation of the interplay between substance and procedure can affect the existence of a harm: [18]

> 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.

Accordingly, Bone advises that when an outcome is either deliberately factually erroneous, or is a result of procedural impropriety, it may be appropriate to consider

16. Bone, "Procedure, Participation, Rights," *supra* note 1.
17. *Ibid* at 1022.
18. *Ibid*. Note that the phrase "moral harm" that Bone employs here is borrowed from Dworkin, and is synonymous with the term "injustice factor," as I discuss further below.

the outcome to be an injustice, but where there is an innocent factual error, in the sense that all the appropriate procedures were adhered to but a factually erroneous outcome was rendered, there is no obvious injustice. [19]

Because Bone treats substantive rights and the processes of making factual determinations to resolving disputes about those rights as inextricable, he can deny the injustice that occurs when a person who is entitled to a certain legal outcome in principle is refused that outcome due to factual error. For me, this denial constitutes an avoidance of the uncomfortable reality that an adjudicative result that denies a particular outcome when it is deserved in principle *does* bear an injustice, in the sense that a litigant's legal right was not vindicated, even if there was no error in the process of adjudication, so the outcome is legally valid. As Ho puts it, "the person against whom a verdict is wrongly given is the victim of an injustice; it misses an essential force of her grievance to dismiss her plight as a mere misfortune."[20] And as Dworkin holds, that injustice factor exists whether or not it ever comes to light that a factual error occurred, and even if the error was wholly innocent.[21] In this respect, I agree with Ho and Dworkin: factual errors do result in a certain type of injustice - when injustice is understood as the failure to uphold a legal right.[22] And, importantly**,** it is the inevitability of that possibility that gives rise to the normative work accomplished by a procedural legitimacy framework.

Bone's idea of conceptually comingling substantive rights with the procedural rules of adjudication, which contemplate the risk of inaccuracy, de-problematizes factual uncertainty. It implies, in my understanding, that procedural correctness is synonymous with justice (provided that the procedures themselves are acceptable) because it denies the injustice that occurs when a factual error results from correct

19. Bone, "Procedure, Participation, Rights," *supra* note 1 at 1021-2.
20. Ho, *Philosophy of Evidence Law, supra* note 87 at 65.
21. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 81.
22. This is not to say that factual inaccuracy is the only way that an adjudicative outcome can be rendered unjust, and even outcomes where the factual determinations were perfectly accurate may nonetheless be unjust. For instance, if a judge misapprehends the law, and thereby applies the wrong legal principle to an accurate set of facts, that outcome can be said to be unjust. Injustice can also occur when, for instance, a judge accurately determines that a fugitive slave is legally property of some owner and decides, in accordance with the law, that the slave must be returned to the owner. Here, one may argue that factual inaccuracy may have generated a more just result. But it is not the factual inaccuracy that would generate a more just response; the more just response would be generated because the factual inaccuracy would cause an unjust law to go unapplied. Injustice can occur as a result of unjust legal principles, even absent factual inaccuracy. But given the centrality of the legitimacy of factual determinations in this project, my focus is on the type of injustice that occurs through factual inaccuracy, not the injustices that occur due to unjust substantive laws or judicial misapprehension of the laws. Those circumstances do lead to improper adjudicative outcomes, even if the underlying fact-finding was accurate. Addressing those types of outcomes, and the injustice associated with them, is not central to the procedural legitimacy framework for legitimate fact-finding that I am developing.

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adherence to the relevant procedural rules. Bone's approach parallels my purpose of demonstrating the significance of procedural propriety to some extent, but it is not the view I am presenting because it masks the true normative work that procedural propriety accomplishes.

Procedural integrity, in my proposal, grounds adjudicative *legitimacy,* which is the normative basis for the authority of judicial outcomes. This concept of legitimacy must not be confused with a guarantee of justice; rather, the normative work that it achieves is maintaining the integrity of a fallible judicial system that must tolerate a gap between perfect justice (which requires, among other things, factual accuracy) and legitimate adjudicative outcomes (which cannot depend on factual accuracy). We have little choice but to accept that a plaintiff who is entitled to win her claim in principle may not win at trial due to factual error. We may consider that an injustice. Nonetheless, that adjudicative outcome must still be legitimate in order for its authority to be defensible. As Lawrence Solum explains:

> When we know the outcome to be unjust, the justice of the outcome cannot be the source of its legitimacy. This conceptual point has a crucial corollary: only just procedures can confer legitimate authority on incorrect outcomes.[23]

To Solum's point, I add the qualifier that whether we 'know the outcome to be unjust,' is not significant because it is possible that we will never know whether a legal fact is true or not. That is, some relevant facts are inevitably uncertain, and some are simply indeterminate. For instance, where there is a difficulty in establishing causation of an injury due to medical or scientific evidentiary uncertainty, it may never be possible to know for sure whether the defendant's error really did cause the plaintiff's injury, or if some other medical condition caused it. By accepting probabilistic fact-finding, we embrace indeterminacy and the associated risk of inaccuracy and logical consistency requires that we must also be ready to accept the materialization of that risk, whether we know it has materialized or not. It is the *potential* for factually inaccurate outcomes that are nonetheless valid and legitimate that leads to the claim that the legitimacy of adjudicative factual determinations cannot depend on factual accuracy, and are, rather, contingent on procedural merits.

Accordingly, legitimacy bears a hefty normative weight: it gives us the reason that we can assert that a litigant should accept the authority of a valid law, even if she believes or even knows it to be producing a factually erroneous outcome. And the burden of maintaining legitimate adjudication, in light of factual uncertainty, must be borne by procedural propriety.

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23. Lawrence Solum, "Procedural Justice," *supra* note __ at 190. And elsewhere, he states: "The exercise of adjudicative power to bind an individual must be legitimate for the adjudication to be authoritative and, hence, to create content-independent obligations of political morality, to obey judicial decrees, and to respect the finality of judgments." (Solum, "Procedural Justice" at 278).

This leads, of course, to a number of questions. Most broadly, 'on what basis can the fact-finding procedures play their legitimizing role?' Surely, it cannot be the case that just any procedures will do. A flip of a coin, for instance, or an otherwise arbitrary fact-finding procedure, could not capture the rich normative foundations that one must demand of procedural legitimacy. Responses can be grouped into two categories: instrumental approaches and non-instrumental approaches.[24] Instrumental approaches are those viewpoints that perceive adjudicative procedures as a means to achieve particular ends. When such approaches are adopted, efforts to provide principles of procedure are oriented towards the effective achievement of some outcome. In the fact-finding context, the accuracy of the outcome is the central concern. Non-instrumental viewpoints are held by those that perceive adjudication as a process of dispute resolution and for whom adjudicative procedures have (or should have) some inherent or intrinsic value that is independent of the outcome itself. I turn now to situating the idea of procedural legitimacy being developed here among the pertinent aspects of various instrumental and non-instrumental viewpoints in relation to fact-finding.

PART 2. SITUATING AMONG INSTRUMENTAL AND NON-INSTRUMENTAL APPROACHES

Those who hold instrumental viewpoints of adjudication, and particularly adjudicative fact-finding, centralize the relationship between procedures and outcome accuracy. Acknowledging that accuracy cannot be guaranteed, instrumentalists attempt to determine which procedures justifiably manage the risk of inaccuracy by weighing the cost of errors associated with inaccuracy (like the harms associated with a false conviction or a false acquittal in the criminal context, or an inaccurate finding of liability, or inaccurate dismissal of a claim in a civil suit) with the costs of achieving better accuracy, generally assuming that higher accuracy comes at a higher cost.[25]

24. These categories are referred to differently by different people. For example, Michael Bayles uses the "instrumental" and "non-instrumental" terminology that I adopt here in "Principles for Legal Procedure," *supra* note 8; Robert Bone opts for "outcome-oriented" and "process-oriented" in "Rethinking the "Day in Court" Ideal and Non-party Preclusion" (1992) 67 NYUL Rev 193; Richard B Saphire uses "substantive" and "inherent" in "Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection," (1978) 127 U Pa L Rev 111. Adopting the instrumental and non-instrumental categorization has enabled the most conceptual clarity for me, so I have adopted it here.

25. As Louis Kaplow notes in "The Value of Accuracy in Adjudication" (1994) 23 J Legal Stud 307 at 307, it is usually assumed that higher accuracy comes with higher economic cost, and that assumption seems sound [Kaplow, "Value of Accuracy"]. See Also Richard Posner, "An Economic Approach to the Law of Evidence" (1999) 51(6) Stan L Rev 1477; Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," (1973) 2 J Legal Stud 399; Richard A. Posner, Economic Analysis of Law, 2nd ed. (Boston: Little, Brown and Co., 1977), p. 429; Gordon Tullock, *Trials on Trial* (New York: Columbia University Press, 1980) at 5-6.

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Posner's economic analysis of law, for instance, refers to this type of analysis as the balance between "the cost of erroneous judicial decisions" and "the cost of operating the procedural system."[26] Capturing the central tenet of such cost-balancing based analyses, Kaplow holds that[27]

> [A]ccuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil, criminal and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal cost.

Accordingly, evaluation of adjudicative fact-finding procedures occurs on the basis of whether rules that increase legal costs for the sake of accuracy, and vice versa, are desirable by determining the various harms associated with inaccuracy and comparing it to the costs that come with decreasing the risk of such inaccuracy, making them fundamentally utilitarian models. To give a simplified example, an economic analysis of adjudication may hold that the harm associated with a wrongful conviction is greater than the harm associated with an inaccurate civil claim. This difference in harm would justify the more onerous criminal standard of proof beyond a reasonable doubt compared with the less onerous balance of probabilities standard of proof in the civil context.

Ronald Dworkin has provided one of the most intricate and compelling explanations of why such utilitarian models cannot tell the full story of managing factual accuracy. He explains that these models do not duly account for individual rights protected by substantive law, and offers a theory of managing factual uncertainty that provides two procedural rights that correspond to the rights set out by the substantive law. Still, his approach remains fundamentally instrumental, and is, in my view, an exemplar of instrumental approaches.[28] Setting out his approach enables me to highlight the lessons that it can contribute to the version of procedural legitimacy that I ultimately propose, as well as the points of divergence between my approach and those that are exclusively instrumental.

In *Principle, Policy, Procedure*,[29] Dworkin considers whether a society that provides its subjects with certain rights can be considered 'morally consistent' if it administers those rights through a process that compromises accuracy for the sake of the societal benefit of less costly legal procedures. For instance, if we have substantive rights to not

26. Richard Posner, Economic Analysis of Law 8th ed. (New York: Aspen Publishers, 2011) at 757.
27. Kaplow, "Value of Accuracy," *supra* note 103 at 307-308.
28. Michael Bayles refers to Dworkin's approach as "'multi-value instrumentalism', that is, an approach that evaluates procedures by seeking to maximize several values" in "Principles for Procedure, " *supra* note 8 at 45.
29. Ronald Dworkin, "Policy, Principle, Procedure" in *A Matter of Principle* (Massachusetts: Harvard University Press, 1985).

be convicted of a crime if innocent, should we also have a right to the most accurate procedures available to determine our innocence? Similarly, in the civil context, tort law provides us with a legal entitlement to be compensated if we suffer a negligently inflicted injury, so should we also have corresponding procedural rights to an accurate determination of whether we suffered an injury and the extent of its damage?[30] In taking up these questions, Dworkin analyzes whether a utilitarian cost-benefit analysis can adequately respond to the dilemma posed by the practical inability of guaranteeing factual accuracy in the adjudicative process. Dworkin starts by introducing what he calls the "cost-efficient society" as follows: [31]

> This society…designs criminal procedures, including rules of evidence, by measuring the estimated suffering of those who would be mistakenly convicted if a particular rule were chosen, but would be acquitted if a higher standard of accuracy were established, against the benefits to others that will follow from choosing that rule instead of a higher standard.

In one respect, Dworkin explains, there is some consistency between the substantive right to not be convicted if innocent and the criminal procedure rules, because although factual errors are permissible, factual errors would not be acceptable if they are deliberate. That is, a person who is known to be innocent cannot be convicted.[32] This society, Dworkin explains, "accepts the risk of innocent mistakes about guilt or innocence in order to save public funds for other uses, but will not permit deliberate lies for the same purpose."[33] But this, for Dworkin, is not enough.

Dworkin's account for why it is not enough begins with a clarification of the nature of the harm that occurs when a factually inaccurate adjudicative outcome is rendered. He explains the impact of inaccuracy by introducing the concept of the "injustice factor" or "moral harm." The injustice factor arises wherever a substantive right, like the right to be free from conviction if innocent or the right to compensation for a negligently inflicted injury, is not vindicated due to factual error:[34]

> Someone who is held in tort for damage caused by negligently driving, when in fact he was not behind the wheel, or someone who is unable to pursue a genuine claim for damage to reputation because she is unable to discover the name of the person who slandered her…has suffered an injustice…

30. Stated in a criminal law context, Dworkin asks, "Does if flow, from the fact that each citizen has a right not to be convicted if innocent, that he has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?" Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 72.
31. *Ibid* at 79.
32. *Ibid*.
33. *Ibid* at 80.
34. *Ibid* at 92. This is consistent with my comments above.

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This harm arises whether the inaccurate outcome was an innocent mistake or deliberate (though there is greater harm when deliberate inaccuracy occurs).[35] It is an objective harm: it makes no difference whether anyone, including the victim of the injustice factor, knows about it, accepts it, or has any concern whatsoever for it.[36] It exists in addition to the bare harm that comes with an inaccurate outcome – frustration, irritation, even anger or outrage.[37] Dworkin explains that because of its objective quality, the injustice factor cannot be accounted for in a utilitarian cost-benefit analysis because a utilitarian analysis can only capture a manifest harm that is subjectively experienced. [38]

For Dworkin, the existence of the injustice factor grounds the requirement for procedural rights to accuracy. Being rights, these procedural guarantees would trump collective concerns, taking them outside a purely utilitarian justification scheme. That is, certain procedural rights cannot be compromised on the basis of weighing the societal cost of more stringent fact-finding procedures, like less efficient adjudication, against the injustice suffered in the event of inaccuracy. This is because the injustice caused by inaccuracy may not be "suffered" at all, but it exists nonetheless.[39]

Although Dworkin argues that some procedural rights of accuracy in complement to substantive rights are a necessary aspect of an acceptable adjudicative system, he does not advocate the overly onerous guarantee of the most accurate possible adjudicative procedures. A society that absolutely prioritizes adjudicative accuracy, Dworkin explains, would be unable to "devote public funds to amenities like improvements to the highway system, for example, so long as any further expense on the criminal process could improve its accuracy. "Our own society," Dworkin notes, "does not observe that stricture, and most people would think it too severe.[40]

In furtherance of finding a middle ground between no right to accuracy, and an absolute right to accuracy, Dworkin calls for adherence to two principles of "fair play" that correspond to his general commitment to ensuring a legal system that maintains integrity through assurance of equal concern and respect for legal subjects.[41] These

35. *Ibid*.
36. *Ibid* at 80: "[The 'injustice factor'] is an objective notion which assumes that someone suffers a special injury when treated unjustly, whether he knows or cares about it, but does not suffer that injury when he is not treated unjustly, even though he believes he is and does care."
37. *Ibid.*
38. For Dworkin's more detailed explanation of this point, see generally *Ibid* at 81-84. At 81, Dworkin demonstrates why a society that fixes its adjudicative fact-finding procedures through a utilitarian calculus makes no place for the injustice factor, which exists even when "no one knows or suspects it, and even when – perhaps especially when – very few people very much care."
39. *Ibid*.
40. *Ibid* at 84.
41. *Ibid*: "I propose the following two principles of fair play in government. First, any political decision must treat all citizens as equals, that is, as equally entitled to concern and respect…. Second, if a

two principles of fair play manifest in Dworkin's proposal as two procedural rights that involve ensuring a coherent scheme for the distribution of the risk of factual errors, and consistent adherence to that scheme.[42]

First, everyone has a right to be subjected to only those procedures that assign the correct level of importance to the injustice factor that may occur as a result of those procedures.[43] Dworkin refers to this as a "background and a legislative right," in the sense that the drafters of the rules of adjudicative procedure must set rules that correctly identify the potential of the injustice factor and its harm.[44] The 'correctness' of such a procedural rule depends on whether it accords with the general scheme of risk tolerance in a society. This procedural right calls for a legal system to maintain an internal integrity in terms of its theory of risk distribution. Consider, for example, a procedural rule that calls for a balance of probabilities standard of proof when adjudicating negligently inflicted injuries. If a court or legislator then introduced a procedural rule that reduced the standard of proof to a *de minimis* standard if the claim is against a doctor, then a defendant doctor may argue that such a rule violates her first procedural right, because it does not cohere with the broader risk allocation scheme within the society which is more protective of the medical profession.

Second, Dworkin suggests that people are entitled "to procedures consistent with the community's own evaluation of moral harm embedded in the law as a whole."[45] This is a right of equal and consistent treatment. "It holds the community to a consistent enforcement of its theory of moral harm, but does not demand that it replace the theory with a different one...." [46] Dworkin explains this as a "legal right. It holds, that is, against courts in their adjudicative capacity."[47] This is the application aspect of Dworkin's rights.[48] When a litigant asserts this right, she does not question

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political decision is taken and announced that respects equality as demanded by the first principle, then a later enforcement of that decision is not a fresh political decision that must also be equal in its impact in that way. The second principle appeals to the fairness of abiding by open commitments fair when adopted – the fairness, for example, of abiding by the result of a coin toss when both parties reasonably agreed to the toss."

42. The two rights that Dworkin provides are paralleled in his broader theory of integrity: "We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that the law be seen as coherent in that way, so far as possible." Dworkin, *Law's Empire*, *supra* note 44 at 176.
43. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 89 in the criminal context, and at 93 for the application in the civil context.
44. *Ibid* at 93: "Everyone has the right that the legislature fix civil procedures that correctly assess the risk and importance of moral harm, and this right holds against the courts when these institutions act in an explicitly legislative manner...."
45. *Ibid* at 89.
46. *Ibid* at 90.
47. *Ibid* at 93.
48. *Ibid* at 93: "It is a legal right to the consistent application of that theory of moral harm that figures in the best justification of settled legal practice."

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the substance of the procedural rules, but she demands a consistent application of them. She could assert this right when, for instance, her expert evidence is improperly deemed inadmissible, or if the trier of fact fails to properly assess the reliability of expert evidence, or when the wrong standard of proof is applied. In such cases, the litigant does not claim that the admissibility rules or the standards of proof are improper; rather, she demands that she be subjected to those procedural rules consistently as an equal member of society.

These rights, Dworkin concludes, "provide a middle ground between the denial of all procedural rights and the acceptance of a grand right to supreme accuracy."[49] I find the concept of the injustice factor associated with factual inaccuracy - even when that inaccuracy is innocent - helpful and accurate. And the move to introduce procedural rights on the basis of the inability to guarantee factual accuracy is in keeping with my theme of highlighting the significance of procedural propriety. In addition, through the idea that adherence to procedural rights enables and maintains equal concern and respect for litigants, Dworkin's theory provides at least some grounding for the idea that procedural integrity can provide legitimacy to the authority of factual determinations that arise through a fact-finding system that accepts some risk of inaccuracy.

But there are unaddressed tensions in Dworkin's proposal that stem, I suggest, from his fundamentally instrumental approach to adjudication. Since his central focus is the potential inaccuracy of the ultimate factual determination, the procedural rights that he advocates are exclusively oriented towards the fair management of the risk of that inaccuracy. In my view, this approach fails to assign enough normative value to adjudicative procedures in their own right, independent of any relationship to outcome accuracy. While Dworkin's procedural rights provide helpful guidance and can play a crucial role in the procedural legitimacy proposal, they cannot suffice on their own to ground the legitimacy of adjudicative fact-finding. That is, Dworkin's procedural rights may be necessary conditions of legitimate judicial fact-finding procedures, but they are under-inclusive.

The problem with Dworkin's proposal becomes evident when one tries to reconcile the tension between the rights provided by the substantive law (like the right to be compensated if negligently injured) and procedural rights. The procedural rights he articulates are necessarily somewhere between "the extravagant and nihilistic" [50] – a society cannot reasonably assure its citizens of a right to the most accurate possible fact-finding procedures and still maintain expeditious or cost-effective dispute resolution.[51] Accordingly, Dworkin's procedural rights guarantee fair distribution of the risk of

49. *Ibid*. Dworkin explains his aim in "Principle, Policy, and Procedure" as seeing "whether a middle ground can be found between the impractical idea of maximum accuracy and the submersive denial of all procedural rights" at 77.

50. Dworkin, "Principle, Policy, and Procedure," *supra* note 59 at 78.

51. *Ibid* at 78.

factual error that duly recognizes the harm that accompanies inaccuracy.[52] Being risk distribution rights, these procedural guarantees contemplate the potential for factual inaccuracy. Should that risk manifest, the injustice factor would exist, because that moral harm arises even in instances of innocent errors. Therefore, in my reading, the injustice factor associated with factual inaccuracy can occur even if the procedural rights that Dworkin advocates are fully respected.

Dworkin seems to be suggesting that adherence to the procedural rights would justify a system that must accommodate potential injustice arising from inaccuracy. Presumably, the procedural rights can bear that justificatory role because they ensure that litigants are treated equally and non-arbitrarily in conditions of inevitable uncertainty. If this is a correct reading, then Dworkin's argument is that the acceptability of judicial fact-finding depends on the maintenance of procedural rights, since even outcomes that bear a potential injustice of factual error can be accepted on the basis of adherence to the procedural rights. The logical extension of this argument is that it is not the vindication of the substantive right that gives legitimacy to the outcome – rather, that legitimacy comes from the vindication of the procedural rights. That means that the legitimacy of *accurate* judicial factual decisions must *also* depend on the observance of procedural rights.

Suppose, for instance, that a judge applies the criminal standard of proof in a civil case and finds against the plaintiff. The outcome that she renders is factually accurate, but clearly, the procedural rights have been violated. Presumably, this outcome is unacceptable in Dworkin's proposal because of the procedural rights violation, even though the outcome is accurate. Holding otherwise would be to hold that if an outcome is factually accurate, a violation of procedural rights becomes irrelevant, and factual accuracy could be pursued at the expense of the procedural rights, on the basis that the ends justify the means.

Accordingly, in order for a procedural theory of legitimate fact-finding to be workable, procedural guarantees must ground the acceptability of *all* factual determinations, whether those determinations are ultimately accurate or inaccurate. As such, a procedural theory for legitimate factual determinations must be able to accomplish two things: it must provide a reason to accept factually inaccurate outcomes (which Dworkin's rights arguably can do); but it must also give us a clear, principled reason to reject factually accurate outcomes where a procedural compromise has occurred. The procedural rights that Dworkin articulates, while helpful, cannot fully accommodate the second requirement. That is because his procedural rights provide

52. Dworkin provides an intricate conceptual argument for why a right to the most accurate possible procedures is not required for an acceptable adjudicative system beyond the practical problem of the impact of such a commitment on societal resources. His comments in that respect are not significant for my critique here, because here I depend only on the uncontroversial fact that Dworkin does not, of course, advocate for the most accurate possible procedures.

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for the assurance of consistent and coherent treatment only in terms of managing the risk of outcome inaccuracy. This restricts the extent of their promise of providing equal concern and respect, as illustrated in the following two examples.

Suppose it is decided that Canadians who are visible minorities will not be permitted to present their own evidence in civil actions, and instead all evidence will be selected and presented on their behalf, as competently as possible, by white representatives. All judicial fact-finding will occur based on the evidence put forth by the white representatives. In such a system, both of Dworkin's procedural rights could be satisfied because the applicable principles in relation to fact-finding and risk of error may be perfectly coherent and applied consistently. Yet it is unacceptable to claim that a fact-finding process that prevents visible minority individuals from participating fully in decision-making can be legitimate.[53] That is true even if there is no difference in the chances of obtaining an accurate outcome between a system that permits everyone to participate and one that does not. In other words, we would not have a good enough reason to expect any minority person to accept the legitimacy of a judicial outcome when the outcome arises through a process that excludes their participation, whether the outcome is factually accurate or not, and even if Dworkin's procedural rights are honoured.

Now suppose that a society decides that in instances where evidence indicates that there is a 50-50 chance that a fact is true or not true, it will break the tie through a coin toss. For example, imagine that a patient suffers some medical detriment after being treated negligently by a doctor, but that medical consequence was just as likely to happen even absent the doctor's negligence. In that claim, there is a 50-50 chance that the doctor's conduct caused the injury. Under current Canadian rules of tort litigation, we would conclude that the plaintiff has not satisfied her burden of proof, so the claim must be dismissed. But suppose that in a hypothetical society, such 50-50 situations are broken by a coin-toss. If the coin falls on its head, the plaintiff wins the case, and if it falls on its tail, the defendant wins. That coin-toss process simply distributes the risk of inaccuracy equally between two parties, and it can be applied consistently wherever there are 50-50 situations. It could satisfy Dworkin's procedural rights. Yet there is something deeply problematic about a coin-toss deciding a legal right, because it is arbitrary decision-making, even though it arguably has no impact on the chances of getting the outcome right in the 50-50 cases.

The procedures in both examples seem to maintain the important requirement that litigants should be treated equally and coherently within the system of management of inaccuracy that exists in a given society, but they fail to truly treat litigants with equal concern and respect. This is more obvious in the first example because removing a class of legal subjects from a decision-making process that will result in an authoritative

53. Compare to Owen Fiss, "The Allure of Individualism," (1993) 78 Iowa L Rev 965, where he argues that having a full representation of ones interests could satisfy a demand for participation in a adjudicative procedure.

outcome is clearly outrageous. In the second example, although the litigants are treated equally, it seems more accurate to say they are treated with equal *dis*respect because they are bound to a decision that results from an arbitrary fact-finding process. The key point is that even if Dworkin's coherence and consistency requirements are respected, and even if the ultimate outcome produced is accurate, such processes are not equipped to provide for legitimate decision-making.

Since the procedural rights that Dworkin advocates are exclusively concerned with the fair management of the risk of inaccuracy, they fail to account for other intrinsic values of the process of arriving at a factual conclusion, irrespective of the impact of the procedures on outcome accuracy. And those intrinsic procedural values are important because as I have noted above, the process must legitimize all judicial fact-finding, even accurate fact-finding. In order to discharge this normative burden, the fact-finding procedures must embody values that are independent of outcome accuracy, in addition to the fair management of potential inaccuracy, as Dworkin's proposal provides. Robert Summers has stated the point precisely as follows:[54]

> good result efficacy is not the only kind of value a process can have *as a process*.… [A] process may also be good insofar as it implements or serves "process values" such as participatory governance and humanness. These forms of goodness are attributable to what occurs, or does not occur, in the course of a process. They are thus process--oriented, rather than results-oriented.

This conclusion prompts a turn to non-instrumental approaches to judicial decision-making, and particularly fact-finding. Evident in the above two examples, for me, processes that disallow participation, and that are in some way irrational or arbitrary, are unacceptable because they fail to display due respect for legal subjects. Grounding process values in notions of dignity and respect for the agency of litigants is well known. Jerry Mashaw is usually credited with advancing an influential dignitary theory of law.[55] Others have pointed to numerous values that ought to be considered valuable aspects of procedures. Bayles, for instances, points to a number of principles suggesting that processes should maintain values of peacefulness, voluntariness, meaningful participation, fairness through equal treatment, the intelligibility of procedures, timeliness, and finality.[56] Others have focused on autonomy, and have

54. Robert Summers, "Evaluating and Improving Legal Process – A Plea for 'Process Values' in *The Jurisprudence of Law's Form and Substance (Collected Essays in Law)* (Brookfield, Vermont: Ashgate Publishing Ltd, 2000) at 115-116.

55. See Jerry Mashaw, "The Quest for a Dignitary Theory" (1981) 61 B U L Rev at 902-904. See Waldron, "Rule of Law," *supra* note 60 for comments on the theme of dignity that permeates the value implicit in rule of law. See also Jeremy Waldron, "How Law Protects Dignity" (2012) 71 Cambridge L J 200.

56. Bayles, "Principles for Procedure," *supra* note 8 at 53-56. See also Robert Summers, "A Plea for 'Process Values'" in *The Jurisprudence of Law's Form and Substance (Collected Essays in Law)* (Brookfield, Vermont: Ashgate Publishing Ltd, 2000).

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often concluded that participation, in some form, is a key feature of acceptable legal procedures, grounded in those values.[57] Participation rights have also been lauded from the perspective of their role in positively influencing a litigant's subjective satisfaction with the outcome, even when unfavourable.[58] Lawrence Solum has concluded that while the need for participation cannot be reduced to any one particular value like dignity or autonomy, participation is a requisite feature of legitimate adjudicative decision-making.

Jurgen Habermas has notably linked the need for participation to rational decision-making. In his theory, a law is rationally acceptable when it is a product of a rational discourse process. Rational discourse requires the equal and free exchange of information and reasons and a commitment on the part of participants that the force of reason alone will motivate the outcome. When those features are present in the decision-making process, the emergent law can be said to be rationally acceptable, irrespective of its ultimate substantive content. This demand for rationality would not be satisfied in a coin-toss procedure or other such arbitrary procedure, nor would it be satisfied absent meaningful participation.[59]

The differences between instrumental and non-instrumental approaches to adjudication map directly onto the tension inherent in adjudicative fact-finding that was presented at the beginning of the paper: part of the purpose of the adjudicative process must be to arrive at the "truth" in the sense of ascertaining what facts occurred that ultimately gave rise to the legal claim. If a fact-finding procedure was more often wrong than right, then claiming its legitimacy would be difficult. Instrumental

57. For example, Robert Bone, "Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity" 46 Vad L Rev 561 at 619 notes: "ideal in American adjudication is linked to a process-oriented view of adjudicative participation that values participation for its own sake. Participation is important because it gives individuals a chance to make their own litigation choices"; Martin H. Redish & Nathan D. Larsen, "Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process," (2007) 95 Cal L Rev 1573 at 1578 make note of "a foundational belief in the value of allowing individuals to make fundamental choices about the judicial protection of their own legally authorized rights."

58. Tom Tyler's work in this respect is a well known. See for instance, Tom Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, (1992) 46 SMU L Rec 433; Tom Tyler, "What is Procedural Justice?: criteria used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 Law & Soc'y Rev 103, 106; see also Stephen LaTour, "Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication" (1978) 36 J Personality & Soc Psychol 1531. See also Frank Michelman, "Formal and Associational Aims in Procedural Due Process" (1977) 17 Due Process: NOMOS 127 for (non-empirical) comment that the intrinsic value of participation may be, in part, the psychological value that it affords to the individual.

59. It is worth mentioning here that participation is also sometimes argued from an instrumental standpoint. In such points of view, participation is necessary because it improves outcome accuracy. For instance, Lawrence Tribe describes this view as, "the purpose of procedures is less to assure *participation* than to *use* participation to assure *accuracy*." Lawrence Tribe, American Constitutional Law 2nd ed, (1988) emphasis in the original.

approaches rightly emphasize that fact-finding processes must be oriented towards achieving a truthful outcome. This orientation towards correctness of outcome is the key feature of David Estlund's development of a theory of "epistemic proceduralism" in the analogous context of democratic decision-making. Making the point that epistemic correctness matters to legitimacy by reference to jury-trials, Estlund remarks:[60]

> The jury trial would not have this moral force [i.e. the legitimate authority] if it did not have its considerable epistemic virtues. The elaborate process of evidence, testimony, cross-examination, adversarial equality, and collective deliberation by a jury all contribute to the ability – certainly very imperfect – of trials to convict people only if they are guilty, and not to set too many criminals free. If it did not have this tendency, if it somehow randomly decided who goes punished and who goes free, it is hard to see why vigilantes or jailers should pay it much heed. So its epistemic value is a crucial part of the story. Owing partly to its epistemic value, its decisions are (within limits) morally binding even when they are incorrect.

I agree with the sentiments in the above quotation: epistemic value is crucial, but it is important to emphasize that it only tells part of the story. Along with having a fact-finding role, adjudication, including adjudication of factual disagreements, is also rightly understood as a process of resolving disputes efficiently and fairly.[61] Non-instrumental approaches remind us that the process of resolving disputes must be principled, irrespective of the ultimate outcome. Both of these aspects of adjudication must maintain relevance within a theory of legitimate fact-finding. For instance, a process wherein a trial judge has no demonstrable interest in truly ascertaining facts and decides facts through an arbitrary coin-toss cannot be redeemed by even the most robust participation rights. Simultaneously, without a commitment to principled dispute resolution, even the search for truth can become unfair and illegitimate.

Accordingly, the procedural legitimacy model that I would endorse is situated in between the models of procedural justice that John Rawls famously describes as "imperfect procedural justice" and "pure procedural justice."[62] Imperfect procedural

60. Estlund, *Democratic Authority, supra* note 55 at 8. Estlund's more general thesis is that "Democratic procedures are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions. It is not an infallible procedure, and there might be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires." As I note above, the epistemic qualities of fact-finding procedures are crucial. But those epistemic features must be supplement with other non-instrumental procedural features in a robust theory of legitimate fact-finding. That is because, such a theory must be able to provide a framework to assess when epistemic values can be compromised in pursuit of other values, and to what extent.
61. As Michael Bayles puts it, "Two general purposes are inherent in the above concept of adjudication - resolving disputes and finding the "truth."" Bayles, "Principles for Procedure," *supra* note 8 at 39.
62. John Rawls, *Theory of Justice* Revised Edition (Harvard University Press, 1977, 1999) at 73-78.

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justice holds that there is a procedure-independent criterion for justice, and the procedure cannot guarantee that outcome. In the context of fact-finding, that model would hold that factual accuracy is the relevant procedure-independent criterion. A pure procedural model holds that there is no procedure-independent criterion to assess outcomes, and that procedure guarantees correct outcomes.[63]

I suggest that acknowledging the importance of factual accuracy is crucial, but factual accuracy is not an appropriate criterion to assess the legitimacy of the outcomes of judicial procedures *because* factual accuracy cannot be guaranteed. A workable procedural model should be considered imperfect in the sense that factual accuracy cannot be guaranteed, while also being a substantiated version of pure procedural justice which requires that the significance of factual accuracy, along with other important values, be reflected in the procedures of fact-finding in order to achieve legitimate outcomes. As Habermas puts it (albeit in the context of majority rule in the democratic process), legitimacy is derived from an "'imperfect,' but 'pure' procedural rationality."[64]

In sum, Dworkin's theory (an exemplar of instrumental approaches) provides an important starting point for understanding a basis on which outcomes that bear a risk of factual inaccuracy may nonetheless merit their authority by calling for a principled method of managing the risk of factual error through consistent and coherent treatment of litigants. Still, there are gaps in his approach that could lead to unfair dispute resolution. Non-instrumental approaches that insist that procedures have inherent virtues that must be maintained can help to fill those gaps. A theory that combines both approaches would be best suited to provide a justifying framework for authoritative judicial determinations of fact, whether those factual determinations are accurate or inaccurate. Such a theory would enable answers to the following questions:

(1) Why, and on what basis, can the authority of factual findings be legitimate despite being (or potentially being) inaccurate?

And

(2) Why, and on what basis, should accurate outcomes be considered illegitimate due to procedural compromises?

A theory of procedural legitimacy must be able to answer *both* of these questions in order to be able to provide a framework that can be used to assess the propriety of fact-finding procedures, including assessing when, and to what extent, epistemic

63. *Ibid*.

64. Jurgen Habermas, "Reply to Symposium Participants Benjamin N Cardozo School of Law" (1995-1996) 17 Cardozo L Rev 1477 at 1494-1495. For more on Habermas and Rawls, see James Cledhill, "Procedure in Substance and Substance in Procedure: Reframing the Rawls-Habermas Debate" in Finlayson, J. G. and Freyenhagen, F., eds, *Habermas and Rawls: Disputing the Political* (New York: Routeledge, 2011).

concerns can be compromised in pursuit of other values.[65] A fulsome framework of procedural legitimacy for judicial fact-finding depends on determining which values should be represented in fact-finding processes and to propose principles that can guide questions about how those values should relate to one another and how they can manifest in fact-finding rules.

FINAL COMMENT

The important work of further substantiating the procedural legitimacy framework is invoked by this paper, but not taken up fully here. Here, the purpose is to demonstrate the normative significance of procedural propriety is when it comes to maintaining legitimate civil adjudication. It highlights that while lawyers are certainly right to advocate powerfully with a view to achieving outcomes that are desirable for their clients, their commitment to maintaining procedural integrity must be paramount.

My inquiry into adjudicative legitimacy begins from the premise that judicial fact-finding will always occur based on probability and will always bear the risk of inaccuracy. Leaving aside the question of the propriety of the substantive legal norms themselves, the inquiry into reconciling the inevitability of factual uncertainty and the need for authoritative dispute resolution has enabled the conclusion that procedural propriety is a necessary condition for adjudicative legitimacy. The analysis here calls on all legal actors – practitioners, policy-makers, academics, and adjudicators – to think deeply about their own roles in ensuring that all cases are decided with procedural integrity. The legitimacy of any civil litigation system would depend on it.

65. As I noted in Part One, the legal system has rules that clearly prioritize values besides outcome accuracy.

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