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Making Effective Rules: The Need for Procedure Theory

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MAKING EFFECTIVE RULES: THE NEED FOR PROCEDURE THEORY

ROBERT G. BONE*

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.[1]

I. Introduction

Today we celebrate the seventieth anniversary of the Federal Rules of Civil Procedure. Much has changed over seventy years, and this session provides an opportunity to examine some of those changes critically with an eye to exploring their implications for the future. In these remarks, I want to focus on one important dimension of Federal Rule reform: the role of procedural theory. By "theory," I mean normative theory: the policies, principles, and values used to justify procedural rules.

My general thesis is simple to state. Effective rulemaking depends at least as much on having a coherent normative theory of civil adjudication as it does on having an accurate empirical account of litigation practice. Many proceduralists today are quick to blame rulemaking failures on a poor empirical understanding of how rules actually operate in practice.[2] But this is only half the problem. Better empirics alone cannot produce better rules. We also need better theory. In particular, we need a more rigorous approach to such fundamental questions as the purposes civil adjudication should serve, the nature of procedural rights, the relevance of settlement to rule design, and the

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1. RONALD A. DWORKIN, A MATTER OF PRINCIPLE 72 (1985).

2. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 842 (1993); Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 103-13 (1997) (noting that the "natural tendency of the legal community is to demand solutions from empirical research and then to blame the research for failing to resolve the debates"); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 484-89 (1993).

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proper role of discretion in a rule-based system. In short, it is not possible to choose good Federal Rules without knowing what makes a Federal Rule good.

The Advisory Committee has an important role to play in building this normative framework. To succeed in this role, however, the Committee must move beyond its largely pragmatic mode of justification and its attraction to consensus-based rulemaking. Instead, it should adopt a more systematic approach, one that derives broad normative principles from core features of litigation practice and explicitly evaluates all the costs and benefits of a rule in light of those principles.

I recognize that this will not be an easy task. As the modern history of rulemaking demonstrates, procedural reform can provoke intense political controversy, and stakeholders all too often push aggressively for rules that serve their own private interest at the expense of the public interest. But this is precisely where the committee-based rulemaking process can help. The Advisory Committee is in a good position to take on this challenging task precisely because it is designed to be relatively independent of politics, sensitive to public input, and capable of considering the procedural system as a systemic whole.[3]

There is not enough space to develop all of these points in detail, and I have argued for many of them in other writing.[4] What I wish to do is briefly take stock of the state of rulemaking today and suggest how it might be improved. Part II begins with some history to provide background and context for the discussion that follows. Part III then focuses on three normative issues that I believe need more careful attention: (1) the relationship between procedure and substantive law; (2) the proper role of settlement, and (3) the nature of the participation right. Part IV concludes. In keeping with the occasion, my remarks will range broadly over the historical and normative terrain, sacrificing depth for breadth.

II. A Brief History of Procedural Reform

There have been three periods of intense reform activity over the past two centuries. The first period started in the late 1840s with the adoption of the New York Field Code and lasted well into the late nineteenth century as code procedure settled in and spread to other states. The second period started in

3. For a more rigorous development of this point, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999) [hereinafter Bone, *Making Process*].

4. I addressed a similar theme in my previously published essay, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155 (2006) [hereinafter Bone, *Securing the Normative Foundations*].

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the early 1900s and peaked with passage of the Rules Enabling Act[5] in 1934 and adoption of the Federal Rules of Civil Procedure in 1938. The third period started with talk of a federal court crisis in the 1970s and quickly expanded into a broad-based challenge to the vision of the original Federal Rule drafters in the 1980s and 1990s. This third period continues to this day.

There is an important difference between the two earlier periods and the one we live in now. Each of the earlier movements had a strong sense of shared mission. Interest in reform peaked in large part because changes in ideas and beliefs about law and procedure made the existing system seem irrational. Advocates of reform were confident they knew what was wrong and what should be done about it. Today, by contrast, there is no broad normative consensus to unite reformers. Although there is a widespread feeling that the system needs repair, there is no clear sense of how serious the problems really are, what to do about them, or even whether they can be solved at all.

Let us examine each of these three periods in more detail.

A. Field Code

The code reform movement was strongly influenced on the intellectual level by two nineteenth century developments: (1) the rise of legal formalism and its abstract classification of rights and remedies, and (2) Jacksonian-inspired enthusiasm for codification.[6] These developments invested the movement with a sense of common purpose and shared value.

Inspired by David Dudley Field in New York, code reformers criticized the common law forms of action as a hodgepodge of rights, remedies, and procedures.[7] They aimed to reorganize the law along more rational lines by eliminating the artificial division between law and equity and redesigning procedural rules to fit a more scientific understanding of the nature of rights

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5. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)).

6. The literature on late nineteenth century conceptualism is vast, as is the literature on nineteenth century codification movements. On conceptualism, see Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1112-15 (1986) (describing late nineteenth century conceptualism and collecting sources and examples); Duncan Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America 1850-1940*, 3 RES. L. & SOC. 3 (1980). For more on codification and the Field Code reforms in New York, see CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY IN ANTEBELLUM LEGAL REFORM 185-200 (1981).

7. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 18-26 (1989) [hereinafter Bone, *Mapping the Boundaries*]. For an in-depth description of David Dudley Field's contributions, see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

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and remedies. Procedure, as a branch of remedial law, had to be separated from the substantive law it enforced, and procedural rules had to be revised so courts could provide remedies that fit the logical structure of primary rights and duties.[8]

B. 1938 Federal Rules

By the turn of the twentieth century, critics were complaining that state legislatures had corrupted the original code vision by adding cumbersome technical rules that made no functional sense.[9] In 1906, Roscoe Pound took up the attack in his famous address to the American Bar Association (ABA), *The Causes of Popular Dissatisfaction with the Administration of Justice*.[10] Pound's sharp critique met with strong opposition at first, but soon gained powerful supporters and launched the more than two-decade ABA campaign that eventually produced the Rules Enabling Act and the Federal Rules of Civil Procedure.[11]

A number of factors helped sustain this lengthy reform campaign. On the practical level, mounting state court congestion dramatized the perceived deficiencies in common law and code procedure. In Massachusetts, for example, a rapidly growing population, an expanding economy, and increasing state regulation produced a sharp increase in the number of state court cases during the first decade of the twentieth century.[12] The resulting congestion intensified in the 1920s and 1930s when the number of automobile tort suits rose sharply.[13] Reformers blamed the backlog and delay on antiquated code

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8. I describe the normative vision that inspired code reforms in some detail in Bone, *Mapping the Boundaries*, *supra* note 7, at 9-26.

9. *See, e.g.*, *Report of the Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 415 (1896) (noting that the New York code had increased from 473 to over 3300 sections and that David Dudley Field, the original author of the code, "denounced the work as being all that a code should not be"); *see also* William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28, 30-31 (1908) (indicating that "the codes of procedure are generally much too elaborate" and that procedural reforms would help minimize the burden of judicial delays and litigation costs).

10. 29 A.B.A. REP. 395 (1906).

11. For what is still the most comprehensive account of the campaign for the Federal Rules, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043-98 (1982).

12. *See* A.J. DIMOND, THE SUPERIOR COURT OF MASSACHUSETTS: ITS ORIGIN AND DEVELOPMENT 93-99 (1960). For an in-depth account of these developments, see Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, at 393, 398-99, 402-07 (Russell Osgood ed., 1992).

13. DIMOND, *supra* note 12, at 120-21, 123-26; *see* FOURTH REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS, at 7, 13, *reprinted in* 14 MASS. L.Q. 1 (Dec. 1928). In

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and common law procedure, and they warned that the public would lose confidence in the court system unless procedural efficiency was greatly improved.[14]

While this congestion was mostly a state court problem, the elite lawyers involved in state procedural reform were also active in the ABA campaign on the federal level, and their critique applied to both systems. In addition, the Conformity Act assured that any defects in state procedure would infect federal procedure as well.[15]

Concerns about congestion and criticisms of procedural technicality were not simply empirical; they assumed widely shared norms that explained why congestion, cost, and delay were such serious problems and why procedural technicality was a major cause.[16] This normative vision was linked more generally to the early twentieth century attack on nineteenth century formalism and the rise of pragmatic instrumentalism.[17] New ideas and beliefs about law, developed first by progressive reformers and later by legal realists, inspired a functional approach that supplied the impetus for reform.[18]

Four elements of this vision are worth highlighting.[19] First, early twentieth century reformers believed that procedure should serve strictly as a means to the end of finding the facts and enforcing the substantive law accurately. This meant that all purely technical and formal aspects of code and common law procedure should be eliminated. The rules should be streamlined to serve substantive ends "without undue waste or friction or consumption of fuel."[20] Second, the instrumental nature of procedure meant that the design of a

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Massachusetts, the caseload crisis increased dramatically after the legislature enacted a compulsory automobile insurance statute, which effectively opened up a deep pocket for tort plaintiffs. Bone, *supra* note 12, at 403-04. The automobile litigation crisis was felt in many other states in addition to Massachusetts, and it even prompted proposals to create administrative solutions modeled on the then-recently-enacted workmen's compensation statutes. *See Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785 (1932).

14. *See, e.g.*, Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 393-95, 403 (1909).

15. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. Roughly, the Conformity Act required federal courts, except in equity and admiralty cases, to conform their procedures "as near as may be" to those procedures in the forum state courts "existing at the time in like causes." *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002, at 15-16 n.19 (2d ed. 1997) (describing the effect of the Conformity Act).

16. *See* Bone, *Mapping the Boundaries*, *supra* note 7, at 78-80.

17. *See id.* at 80-98.

18. *See id.*

19. All the elements mentioned in this paragraph are described more fully in my earlier work. *See id.* at 78-101.

20. Pound, *supra* note 14, at 394.

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procedural system was mainly a technical exercise in perfecting administrative machinery and thus best handled by technical experts. The values relevant to this task were not substantive in nature; they were practical values of sound administrative design, such as simplicity, flexibility, and efficiency understood narrowly as minimizing administrative cost.[21] Third, procedure's independence from substantive value implied that procedural rules could and should be general in nature and "trans-substantive," meaning that a single set of rules should apply to all civil cases despite varying substantive stakes. And fourth, since judges and lawyers were the technical experts in matters of procedural design, general rules should be made by court-appointed committees, not by legislatures, and any system of general rules should harness the technical expertise of trial judges by conferring broad discretion to adjust procedure to the circumstances of particular cases.

These beliefs, coupled with a commitment to adversarialism and trial process, produced the distinctive features of the Federal Rules. In keeping with the ideal of trans-substantivity, the Committee drafted a single set of Rules that applied to virtually all cases. In keeping with the goal of instrumental efficiency, the new system abolished formal code and common law rules, such as formal pleading rules and restrictions on party joinder. It replaced them with more flexible and simplified procedures aimed at deciding cases on the facts, such as simplified pleading, generous discovery, the novel procedure of summary judgment, and flexible party and claim joinder.[22] Further, in keeping with a belief in technical expertise, the new Rules delegated a great deal of decisionmaking power to the discretion of trial judges.

This is not to suggest that everyone agreed with all the normative elements of the reform agenda, either at the time of code reform or later at the time of Federal Rule reform. It is well known, for example, that many New York judges resisted the Field Code reforms early on, although this resistance weakened over time.[23] Moreover, the idea of reforming federal procedure along the lines of the Federal Rules had some powerful opponents in Congress—so powerful in fact that the Rules Enabling Act was delayed for

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21. The reformers' ideal of procedural "efficiency" resembled what proceduralists today call "judicial economy." It focused exclusively on reducing the costs of process without considering effects on error costs or broader concerns about global efficiency. As such, it bore little resemblance to the modern law-and-economics idea of efficiency as social cost minimization.

22. *See, e.g.*, FED. R. CIV. P. 8(a) (pleading); *id*. 26-37 (discovery); *id*. 56 (summary judgment); *id*. 18 (claim joinder); *id*. 20 (party joinder).

23. *See* Bone, *Mapping the Boundaries*, *supra* note 7, at 11 n.18.

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more than two decades.[24] The important point here is that most elite lawyers actively involved in reform shared a common vision on a general level even as they disagreed about specifics, and that the elements of this vision gradually infused the legal culture.

C. Modern Reform Efforts

In the late 1960s and early 1970s, the love affair with the Federal Rules began to sour, and many of the core beliefs of the Federal Rule drafters came under attack.[25] New forms of public interest litigation challenged the notion that procedure should be neutral to substantive value. Civil rights advocates, for example, called for adapting joinder, class action, and intervention rules to serve the substantive objectives of the civil rights laws.[26] So too, critics focused on the distributional consequences of procedural rules, including the impact of wealth on court access and the importance of litigation as a tool to empower disenfranchised groups.[27] In short, procedural design was no longer considered merely an engineering exercise for technical experts. It was a policy decision with substantive implications.

This critique of procedural neutrality combined with mounting concerns about case backlog and high litigation costs to feed criticism of the Federal Rules. Moreover, novel forms of complex, high-stakes litigation focused attention on the risk of costly strategic abuse in an adversarial system. By the end of the 1970s, these concerns had matured into cries of a crisis in the federal courts. Many critics blamed the adversary process itself and pushed for greater use of alternative dispute resolution (ADR).[28] Others blamed the flexibility and broad scope of the Federal Rules and pushed for stricter

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24. *See* Burbank, *supra* note 11.

25. For a more detailed account of these developments, see Bone, *Making Process*, *supra* note 3, at 900-02.

26. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 240-45 (1987) (discussing how the civil rights, consumer protection, and environmental movements applied pressure to modify the class action to enable the underlying litigation).

27. *See, e.g.*, Marc S. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-110, 140-44 (1974).

28. The so-called "Pound Conference" was convened in 1976 to discuss the growing litigation crisis in the federal courts, and an address at this conference by Professor Frank Sander is usually credited with giving birth to the ADR movement. *See* Frank A. E. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A. Leo Levin & Russell R. Wheeler, eds., 1979). Soon after the Pound Conference, U.S. Supreme Court Chief Justice Warren Burger took up the cause of ADR and criticized the adversarial process in public speeches. *See* Warren Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274 (1982).

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pleading, more limited discovery, harsher sanctions for frivolous filings, and more active trial judge involvement in settlement promotion.[29]

One particularly striking feature of all this reform activity is the absence of broad agreement on values and the lack of clear normative direction guiding reformers. In contrast to their nineteenth and early twentieth century counterparts, critics today sharply disagree about what, if anything, is wrong with the system and what should be done about it.[30] The consequences are profound. For one, the absence of generally shared norms places a premium on party consent as a way to validate outcomes, and this in turn contributes to an insufficiently critical enthusiasm for settlement and ADR.

A second consequence is more directly related to the theme of my remarks. Rather than resolving difficult and often divisive normative questions at the rulemaking stage, the Advisory Committee tends to draft general rules with vague standards that in effect leave the hard questions for trial judges to resolve in individual cases.[31] One reason for this strategy has to do with the continuing influence of a pragmatic style of reasoning that relies on an ad hoc and largely intuitive balancing of "process values" (such as efficiency, fairness, participation, legitimacy, and the like).[32] This type of reasoning tends

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29. *See, e.g.*, Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (criticizing broad discovery); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (discussing the debate over notice pleading and the movement toward stricter pleading). Rule 16, the pretrial conference rule, was amended in 1983 to include settlement as a specific topic for discussion, and Rule 11, the sanctioning rule, was amended that same year to enhance its deterrent effect.

30. Some examples of sharp disagreement over procedural issues include the battle over amendments to Rule 68 in the early 1980s, *see* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 12-19 (1985), the conflict over the 1983 amendments to Rule 11 and proposed amendments to the discovery rules, *see* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 851-55 (1991), and the ongoing controversy over the class action. *See generally* Charles Gardner Geyh, *Paradise Lost, Paradise Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187-88, 1227 (1996) (describing the politicization of the procedural rulemaking process).

31. *See, e.g.*, Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and the Common Law*, 63 NOTRE DAME L. REV. 693, 715, 718-19 (1988). Indeed, the Federal Rules today give trial judges broad discretion to manage lawsuits, encourage settlements, and oversee the pre-trial phase. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1589-90 (2003); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646-67. Many of the decisions trial judges make while exercising discretion involve difficult normative judgments.

32. *See* Bone, *Making Process*, *supra* note 3, at 913-14 (describing and criticizing the process values approach).

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to push toward case-specific, contextualized decisionmaking, just as it did for the Federal Rule drafters, but without the belief in expertise and value neutrality that justified the approach originally.

Another reason for delegating discretion has to do with the way this strategy copes with controversy at the rulemaking stage. Faced with sharply conflicting interests and no generally accepted normative standard to resolve the conflict, the Advisory Committee often seeks consensus among competing interest groups.[33] While consensus rulemaking has some advantages, it also has a serious problem. The need to reach consensus tends to push rulemakers toward highly general rules that leave most of the difficult normative questions to the discretion of trial judges in individual cases.[34]

Reliance on case-specific discretion might be a sensible strategy if proceduralists today still believed, as the original Federal Rule drafters did, that procedural design is a technical exercise largely devoid of substantive value and best performed by trial judges. That belief, however, was thoroughly discredited in the 1970s.[35] The normative issues are not purely technical; they directly implicate substantive values.

Not all of the Federal Rules suffer from these problems, of course, but many of the most significant rule amendments over the past twenty-five years do, including amendments to the pretrial conference rule (Rule 16), the discovery rules (Rule 26), and the class action rule (Rule 23). Also, I do not mean to suggest that case-specific discretion is never a good idea.[36] What I am suggesting is that the Committee, with help from the academic community, should tackle the controversial normative issues directly, do what it can to resolve them, and design an optimal set of procedural rules in light of the results.

III. Three Outstanding Normative Questions

A brief review of three important normative issues will illustrate the sort of inquiry that needs to be done. The first issue is fundamental, but surprisingly difficult. It involves specifying more rigorously the precise nature of the relationship between procedure and substantive law. The second issue, which has become particularly salient over the past twenty-five years, involves

33. Consensus has been a popular rulemaking approach over the past two decades. *See id.* at 916 n.150 & sources cited therein.

34. *See id.* at 917.

35. *See supra* notes 25-29 and accompanying text.

36. For a more thorough discussion of rule versus discretion in procedural rulemaking and the factors and options that the advisory committee should consider in striking an optimal balance, see Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007) [hereinafter Bone, *Who Decides?*].

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specifying the proper role of settlement in any system of civil adjudication. The third issue involves determining the proper way to value individual participation and the nature of the participation right. In considering these three issues, I shall focus mostly on the normative stakes and consider constitutional and other legal constraints only in passing.[37]

There is a possible objection, however, that should be addressed at the outset. One might wonder how the Advisory Committee is supposed to resolve controversial normative questions without an objective metric to accommodate competing views. This is, of course, the problem of value subjectivity that plagues much of modern law. I have two responses. First, I believe that it is possible to make considerable progress in resolving normative questions through reasoned deliberation. Second, as I have argued elsewhere, the Committee's task is similar to that of a common law judge fitting general principles to an attractive account of past precedent.[38] In particular, the Committee should develop principles that fit and justify the core features of litigation practice. This method is akin to Ronald Dworkin's interpretive approach or John Rawls's reflective equilibrium.[39]

Admittedly, this is a tall order, but it is also a feasible undertaking. The idea is not for the Committee to formulate a set of general principles for the entire procedural system all at once. The task is much more tractable. The Committee should proceed incrementally on a rule-by-rule basis and in a

37. I focus primarily on the normative aspects because I believe that a sound legal analysis requires a coherent normative account. Moreover, it is worth noting that the Advisory Committee can help guide the Court in its thinking about constitutional constraints. For example, the Committee might adopt a class action rule that reflects its best understanding of the Supreme Court's due process right to a day in court, but in the Note accompanying the Rule, explain why the Court's restrictive reading of the Due Process Clause is unjustified. This might support a productive dialogue between Committee and Court.

38. *See* Bone, *Making Process*, *supra* note 3, at 940-47.

39. *See* RONALD DWORKIN, LAW'S EMPIRE 49-113 (1986); JOHN RAWLS, A THEORY OF JUSTICE 20-22, 48-53 (1971). For examples of how this method might be applied to specific issues, see Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 545-50 (2003) [hereinafter Bone, *Agreeing to Fair Process*] (using this method to analyze subclassing issues made salient by *Amchem* and *Ortiz*); Bone, *Making Process*, *supra* note 3, at 943-47 (using this method to frame an analysis of the small claim class action); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 260-63, 264-79 (1992) [hereinafter Bone, *Rethinking*] (analyzing the implications for nonparty preclusion of an outcome-oriented participation theory within a rights-based theory of adjudication, and also deriving two principles for nonparty preclusion within a process-oriented participation theory); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 641-44 (1993) [hereinafter Bone, *Statistical Adjudication*] (deriving a principle of fair regard for other litigants and exploring its implications for aggregation and trial-by-sampling).

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manner analogous to the case-by-case method of the common law. Certainly, there are practical constraints to what a method like this can accomplish. The process of dealing with competing interests while aiming for well-justified rules requires some measure of compromise and pragmatic good sense. Still, one thing is clear: before compromising, the Committee needs to determine what is optimal in principle, for only then can the Committee know what price it is paying for compromise, how far to give in to practicality, and how to argue for a better result.

A. The Relationship Between Procedure and Substance

The first broad normative issue has to do with the proper relationship between procedure and substantive law. Procedure affects substantive outcomes, of course, and critics often emphasize this fact when they make a case for substantive law manipulation disguised as procedural choice.[40] However, I want to focus on a different aspect of the relationship, one that is more fundamental and more general. It has to do with justification. The central question is what role substantive law should play in *justifying* procedural rules. The 1938 Federal Rule drafters thought that substance had little, if any, role to play; in their view, most procedural rules could be justified by process values without referring to substance at all.[41] While this extreme position is no longer tenable, we have yet to figure out a coherent answer to the justification question for ourselves.

I cannot provide a complete answer in these brief remarks. What I can do is explain why the question matters and why it is so difficult. I do so by considering the problems faced by someone who insists on ignoring substantive policies when making procedural choices, a person I call "the legal rights proponent."

Let us begin with an uncontroversial proposition. I take it as given that whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law. There are, however, two different ways to evaluate outcome quality. One way, the "legal rights approach,"

40. *See, e.g.*, Pamela J. Stephens, *Manipulation of Procedural Rules in Pursuit of Substantive Goals: A Reconsideration of the Impermissible Collateral Attack Doctrine*, 24 ARIZ. ST. L. J. 1109 (1993).

41. I insert "most" because a few Federal Rules were originally tailored to the nature of substantive rights. The original class action rule, Rule 23, is an example. It made class certification depend on the formal nature of legal rights, such as whether the right was joint, common, secondary, or several. As I have explained elsewhere, this choice reflects the drafters' uncertainty about what made class adjudication fair to absent class members rather than reflecting a well-considered judgment about how an optimal class action rule should be written. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 287-90 (1990).

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focuses on how well the outcome fits the parties' legal rights. The other way, the "policy approach," focuses on how well the outcome fits the substantive policies that the parties' legal rights are meant to promote.[42]

It makes an important difference which approach one adopts. Suppose, for example, that the substantive law gives each injured party a legal right to full compensation. Suppose as well that the purpose of the legal right is to encourage efficient behavior minimizing social costs. Examples might include investor rights under SEC Rule 10b-5, rights created by the federal antitrust statutes, or even rights under negligence law, at least for those who subscribe to a deterrence theory of tort law. If one takes a legal rights approach, one would have a strong *prima facie* reason to be concerned whenever the procedural system generated an outcome that diverged from full compensation, since full compensation is what we are assuming the legal right guarantees. If one takes a policy approach, however, one would have reason to be concerned only insofar as the divergence from full compensation undermined the efficiency goals of the substantive law.[43]

For example, our policy proponent should have little difficulty justifying a procedure that clearly achieves the same level of deterrence at a significantly lower procedural cost (or perhaps even sacrifices a measure of deterrence if the cost savings are large enough)—even if that procedure also produces outcomes for many parties that fall substantially short of full compensation.[44] In a mass tort case, for example, a policy approach focused on achieving efficiency through optimal deterrence can support class action treatment even if some high damage plaintiffs systematically receive less than the full compensation that their legal rights guarantee.[45] More generally, stricter pleading, limited

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42. *See* Bone, *Agreeing to Fair Process*, *supra* note 39, at 511-13 (analyzing derivative theories of procedural fairness).

43. One might still give the legal right some deference since it represents the lawmaking authority's best effort to implement the efficiency goal, but one would not treat it as controlling in all cases. This point tracks the distinction between rule- and act-utilitarianism—with "legal right as defined" substituting for "rule." The rule-utilitarian applies a rule even when doing so achieves a suboptimal utilitarian result in particular cases, because she believes that the long-term social benefits of rule-following exceed the short-term costs of suboptimal results. The act-utilitarian, by contrast, applies the utilitarian calculus on a case-by-case basis. My policy proponent is act-utilitarian but with a qualification. She gives some weight to the legal right as defined because of the competency of the lawmaking authority that adopted it and because of doubts she has about her own ability to balance costs and benefits accurately in particular cases. However, where it is clear that cost savings are substantial enough, the policy proponent, like the act-utilitarian, can deviate from what the legal right prescribes and adopt the cost-saving procedure.

44. This is especially true if there is reason to believe that the authority adopting the legal right did not think about the costs of the procedures needed to enforce it.

45. *See, e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individualized Justice*

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discovery, broad summary judgment, class actions and the like should all be easier to justify with a policy approach than with a legal rights approach when the substantive law aims to achieve economic efficiency.[46]

It might seem obvious that rulemakers should employ the legal rights approach and not the policy approach. After all, courts are supposed to enforce the substantive legal right as articulated by the lawmaking authority rather than the policies underlying the right. When state law is involved, for example, it is the substantive legal right that the *Erie* doctrine commands federal courts to apply.[47] Moreover, when a federal statute is involved, it is the legal right created by the statute and not the statute's underlying policies that must be enforced.

On closer examination, however, the matter is not quite so simple. Consider the problem of allocating scarce process resources. What is a legal rights proponent supposed to do in a mass tort case when it is impossible to assure full compensation for everyone entitled to receive it? This can happen if high delay costs substantially reduce the real value of individual recovery or the defendant's assets are too limited to compensate everyone fully. Our legal rights proponent cannot simply ignore the problem and give each plaintiff a formal judgment for full compensation. This is not acceptable because the legal right must be understood as an entitlement to actual compensation, not merely to a formal judgment saying so. In other words, while the form of the

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by Collective Means, 62 IND. L.J. 561 (1987) (using what is in effect a policy approach to justify class actions in mass tort cases as better furthering tort law's deterrence and compensation goals).

46. The approach one adopts can also make a difference when the substantive law is meant to protect moral rights, promote distributive justice, or advance some other non-utilitarian value. If policy is what matters, then one should choose procedures that generate outcomes consistent with the moral theory that justifies the substantive law. These outcomes will often be the same as those the legal right mandates, but they might be different if the legal right reflects limitations not required by the moral theory itself. For example, suppose that a particular body of tort law is best understood as based on a *moral right* to compensation for ex ante risk rather than actual harm. Suppose, however, that the law itself creates a *legal right* to compensation for *actual harm*, but does so only because of practical difficulties proving the magnitude of ex ante risk in each individual case. Under these circumstances, someone taking a policy approach could justify procedures, such as aggregation and trial-by-sampling, that solve the practical problems and better serve the moral right by providing average recovery compensating for ex ante risk. *See, e.g.*, Bone, *Statistical Adjudication*, *supra* note 39, at 606-17 (developing this argument); *see also* Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481 (1992) (using what is in effect a policy approach to defend, on corrective justice grounds, average recovery and the aggregative procedures, including sampling, necessary to achieve it).

47. The Fifth Circuit emphasized this point, along with Seventh Amendment problems, in striking down the district court's sampling procedure in the *Cimino* case. Cimino v. Raymark Indus., 151 F.3d 297, 313-14 (5th Cir. 1998).

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legal right is satisfied by a judgment in the full amount, the substance defined by the underlying policies is not. And it is the substance that ought to control.

Thus, even a legal rights proponent has reason to worry when actual compensation falls short. But this is where matters get tricky. Should the legal rights proponent aim to satisfy in full the legal rights of as many as possible even if that means that a substantial number receive very little or nothing at all in real terms? Or should she instead try to provide a minimally adequate level of compensation to everyone even if that means that few injured parties get the full compensation their legal rights guarantee?

This is not the place to answer these questions. My point is simply that the answers require attention to the substantive policies underlying legal rights.[48] For example, using the class action and trial-by-sampling to give meaningful compensation to all injured parties sacrifices the legal rights of some for the benefit of others, but the result is arguably a superior way to implement the compensation-based policies that those legal rights were meant to serve.

There is a second problem facing our legal rights proponent that is even more vexing. She must consider substantive policies even in ordinary situations that pose no serious problem of process scarcity. To see why, we must examine the goals of procedure a bit more carefully.

Our procedural system is not prepared to enforce legal rights without regard to cost, nor does it make sense to do so even in principle. Because perfect accuracy is impossible, the goal must be to achieve optimal accuracy, or more precisely, an optimal level of error risk. What is optimal, moreover, must depend in some way on the costs of the procedures needed to reduce error. This suggests a balance between the costs of procedure on the one hand, and the benefits of error risk reduction on the other. The only sensible way to measure the benefit side of this balance is in terms of the error costs that the reduction in error risk saves. But—and here is the crucial point—the cost of error depends on the substantive values that errors impair.

Thus, there is an important sense in which the procedures used to enforce a legal right actually enforce the policies underlying the right. Procedure reduces expected error cost by reducing error risk, and the magnitude of error cost is measured in terms of the substantive policies at stake. So once again, the legal rights approach slides into a policy approach.

The necessity of considering the cost of process presents a third problem for the legal rights proponent. This problem is perhaps the most fundamental of

48. More precisely, choosing appropriate procedural responses to process scarcity requires a normative theory that explains when process scarcity justifies the use of procedures that systematically distort outcomes. Construction of such a theory is properly an undertaking for procedural law.

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all.[49] For a legal right to have authority independent of its underlying policies, courts must enforce the legal right according to its terms even when doing so is very costly. This is especially clear if the legal right is a Dworkinian-type right with the power to trump competing utilitarian arguments based on high social cost.[50] The existence of such a right necessarily implies the existence of procedural rights with a similar cost-trumping character. Otherwise, it would be possible to limit the substantive right to reduce social costs simply by limiting the procedures available to enforce it.

The puzzle is how to balance cost against benefit without stripping procedural rights of their character as "rights." If the procedure itself is the product of a social cost-benefit balance, then it is difficult to see how the procedural right can get any traction against utilitarian arguments for more limited procedure. One might argue that the parties have procedural "rights," but the content of those rights would be defined in utilitarian terms; in other words, the right would be just a right to those procedures that maximize social utility.

The point is not just that the divide between the legal rights and policy approaches is porous. The point is deeper and potentially more profound: the outcome-based procedural rights that the legal rights approach supports might not have the power to check utilitarian arguments for aggregation, broader preclusion, and other limitations on process opportunities. If this is true, then we might have to rethink our reluctance to adopt these limited procedures more broadly.

There is much more to say, but the simple idea is relatively easy to state: blind adherence to a legal rights approach cannot support well-justified procedural choices. My own view is that the main goal of a procedural system is to distribute the risk of error across different case-types and different parties, and any system must be judged by the kind of distribution it creates. Whether that distribution is evaluated by an efficiency or a distributive justice metric—and both have a role to play—the cost as well as the risk of error matters, and error cost is measured in terms of the substantive policies at stake.

This insight has at least two implications for federal rulemaking. First, we must bury, once and for all, the thoroughly misguided idea that trans-substantivity is an independent value or ideal for the Federal Rules.[51] The

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49. *See* Bone, *Agreeing to Fair Process*, *supra* note 39, at 513-16.

50. *See* Dworkin, *supra* note 1.

51. For the classic discussion and critique of trans-substantivity, see Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). The idea that one set of procedural rules should be designed, insofar as possible, to apply to all cases, no matter what the substantive stakes, continues to have a strong hold on rulemaking. Some fear that substance-specific rules violate the Rules Enabling Act, while others fear that

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Federal Rule drafters were committed to trans-substantive rules because they assumed that procedural rules could be justified without reference to substantive values. But this is just plain wrong. The fact that substantive policy is always a part of procedural justification means that trans-substantivity as an independent value or ideal makes no sense at all. This does not imply, of course, that all procedural rules should be substance-specific. What it means is that the optimal level of generality should be determined not by reference to some trans-substantive ideal, but by balancing the costs and benefits of general versus more specific rules.[52]

The second implication has to do with the Rules Enabling Act.[53] The Act's proviso—that no rule shall "abridge, enlarge or modify any substantive right"[54]—should be understood as a limitation on the acceptable form of justification for a Federal Rule, not as a limitation on the Rule's effects or entanglement with substantive law.[55] For example, there is no reason to worry about the validity of class action rules as long as the Committee justifies those rules by the way they contribute to a fair and efficient error risk distribution in light of error costs and process cost constraints.[56]

B. Settlement

The second issue that would benefit from more careful attention to normative theory has to do with the proper role of settlement in the design of procedural rules. The original Federal Rule drafters largely ignored settlement. For example, when a suggestion was made to include settlement in Rule 16, the original pretrial conference rule, the Committee rejected the proposal and chose to draft a rule directed exclusively at preparing cases for trial.[57] This position of ignoring settlement is untenable as a normative matter—and so is the current practice of federal judges embracing settlement

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tailoring procedural rules to substance will trigger intense political controversy and possibly paralyze the rulemaking process. *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074-81 (1989).

52. *See* Bone, *Who Decides?*, *supra* note 36, at 2002.

53. 28 U.S.C. § 2072 (2000).

54. *Id.* § 2072(b).

55. *See* Bone, *Making Process*, *supra* note 3, at 950-54.

56. It is worth mentioning that this is essentially the same interpretation of the Rules Enabling Act proviso that Professor Cover proposed more than thirty years ago. *See* Cover, *supra* note 51. I have demonstrated this at some length elsewhere. *See* Bone, *Securing the Normative Foundations*, *supra* note 4, at 1157-60.

57. *See* David Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980-81 (1989) (summarizing the 1938 committee's deliberations over Rule 16).

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uncritically. What is needed is a clearer understanding of why and how settlement effects should count in a procedural system.

This topic is extremely complex, but I will make three general points briefly.[58] First, settlements are just as important as trial judgments in evaluating a procedural system's effect on outcome quality. Second, it is impossible in general to optimize judgment quality and settlement quality at the same time; that is, procedural rules that optimize judgment quality can have adverse effects on settlement quality, and vice versa. Third, one must take into account the effects on settlements that are negotiated before as well as during litigation, as long as the pre-suit settlements are sufficiently related causally to the rule choice. The overall result of these three points is that rulemakers must balance settlement effects against judgment effects, and also consider the impact of their rule choices on settlement behavior outside as well as inside litigation.

It is easy to see why the first point—that settlement effects matter as much as judgment effects—must be true for substantive law that aims to achieve optimal deterrence. From the perspective of a rational party deciding how much to invest ex ante in precaution, investigation, and so on, a likely settlement in the event of litigation matters just as much as a likely trial verdict. The same point holds even if the substantive law serves a compensation goal. A settlement that provides less compensation than the legal right guarantees is just as troubling as a judgment deficient in the same way. Moreover, one cannot ignore settlement effects by relying on consent to justify problematic settlements. This is so because consent cannot validate an otherwise unjust settlement when the consent is the result of serious flaws in the procedural system (such as seriously asymmetric information or skewed litigation costs that disadvantage the consenting party). Settlements take place in the shadow of litigation, and a party who consents to an unjust settlement does not also consent to the flawed litigation procedures that bring it about.

The second point—that a procedural system cannot maximize judgment and settlement quality simultaneously—is more difficult to demonstrate rigorously. Yet the intuition is simple to describe. Adding settlement to an analysis that focuses exclusively on trial opens up new strategic opportunities that parties can exploit to gain a bargaining advantage. Thus, rules that work well for trial can produce additional costs when settlement is added to the mix, and vice versa.

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58. For a more careful discussion of the first two points, see Bone, *Who Decides?*, *supra* note 36, at 1981-85; Bone, *Securing the Normative Foundations*, *supra* note 4, at 1164-66. For some additional thoughts about the third, see Bone, *Securing the Normative Foundations*, *supra* note 4, at 1167-69.

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To take a timely example, consider pleading specificity. A rulemaker concerned only with judgments might choose a liberal notice pleading rule because meritorious suits have a better chance of reaching trial with notice pleading. Moreover, while liberal pleading might invite more frivolous suits, few of those suits should affect judgment quality because most will be dismissed or settled before trial. By contrast, a rulemaker who is as concerned about settlement quality as judgment quality would be more likely to favor a stricter pleading rule despite its adverse effect on meritorious suits if strict pleading deters frivolous suits and the unjustified settlements those suits bring about. It follows that no single pleading rule optimizes along judgment and settlement dimensions simultaneously. And this means that a rulemaker must trade off effects on settlement quality against effects on judgment quality and choose the rule that achieves an optimal balance between the two.

The third point—that the quality of pre-suit settlements should count just as much as the quality of in-suit settlements—is easy to explain. Rules that generate high litigation and delay costs can create pressure to settle before filing by reducing the expected value of suit.[59] If one ignores these effects, one might conclude that a procedural system was working well despite the fact that it induced pre-suit settlements systematically skewed in favor of one side. There might be practical reasons to ignore these settlements, especially if it is difficult to collect information about them, but there is no principled reason to do so as long as pre-suit settlement effects are causally linked to the rule choice.

These three points might seem a bit abstract, but they have important implications for procedural rulemaking. Four of those implications deserve specific mention. First, it will not do to return to a world in which federal rulemakers focus exclusively on trial and ignore settlement, as some seem to think should be done.[60] Second, it is equally unacceptable to focus exclusively on maximizing settlement *quantity* and ignore settlement *quality* in the belief that party consent can do the justificatory work. Third, because of the complexity of the judgment-settlement tradeoff, relying on trial judge

59. High litigation and delay costs can even generate a systematic and institutionalized practice of settlement. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

60. At least one federal judge has noted the beginnings of a "judicial backlash against making settlement the central goal of our federal court processes," and he quotes some federal judges who call for a return to focusing on trials. Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150 n.4 (D. Mass. 2006).

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discretion to manage the settlement process is not likely to produce optimal results.[61]

Fourth, the evaluation of a procedural rule is always a comparative analysis, and the baseline for comparison must include settlement effects outside as well as inside litigation. This means, for example, that the mass tort class action, with all its flaws, should be compared to lump-sum inventory settlements rather than to some idealized picture of individual litigation and individual trials.[62] There is reason to believe that without some large-scale aggregation device like the class action, lawyers would collect large inventories of mass tort clients and negotiate lump sum settlements en masse.[63] Class actions are plagued by agency problems, to be sure, but so are lump sum settlements, and the class action at least involves a modicum of judicial supervision.[64]

C. Participation and the Right to a Day in Court

For many proceduralists, outcome quality is not the only thing that matters in civil adjudication. In particular, there is a strong tradition of individual participation that many believe supports a participation right with intrinsic value unrelated to outcome quality. This "day in court" right famously stands as an obstacle to broader preclusion and class action rules defended on utilitarian grounds.[65] There are several different approaches to defining the participation right, but each has serious difficulties.

One popular approach, inspired by the procedural justice literature, defines the intrinsic value of participation by its tendency to make a party feel that she has been treated fairly by the process and the outcome.[66] The problem with

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61. For more on this third point, see Bone, *Who Decides?*, *supra* note 36, at 2011-15.

62. *See* Bone, *Securing the Normative Foundations*, *supra* note 4, at 1164-66; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 465-67 (2000) (noting that "[i]n informally aggregated litigation, settlement negotiations may occur with little control by the individual client" and recommending that the "downsides of formal aggregation . . . be viewed in light of the reality of informal aggregation, rather than in light of an imaginary picture of pure individual litigant autonomy").

63. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 527, 530-50, 571-72 (describing the dynamics of lump-sum settlement in non-class collective representation, including the conflicts of interest that arise in settlement distribution).

64. *See id.* at 523-25.

65. *See* Bone, *Rethinking*, *supra* note 39.

66. The procedural justice literature teaches that parties are more likely to feel they have been treated fairly by the process and the outcome if they are given a chance to participate personally. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 26-40, 61-83, 93-127 (1988) (discussing these empirical studies); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences*

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this approach is that psychological value cannot support a participation right capable of resisting utilitarian demands. Without some reason to count feeling good about adjudication more strongly than feeling good about anything else, the only choice is to count all feelings equally, and this quickly slides into some form of aggregate utilitarianism.[67]

A second popular approach takes the procedural justice findings in a slightly different direction. The argument here is that parties who do not have a chance to participate and feel unjustly treated as a result will lose faith in the legitimacy of the court system. I find this prediction highly implausible. Outcome quality already supports broad participation to ensure vigorous advocacy and reduce outcome error. It is hard to believe that the public would rise up against the court system if individualized participation were stripped back to what outcome quality alone justifies—especially if good reasons were given for the limitations.[68]

A third approach to defining the intrinsic value of participation is more promising, but it too has problems. One version holds that respect for individual dignity entails that each person be given a chance to participate in government decisions that have a major impact on her life.[69] Another version holds that participation is required by adjudicative legitimacy.[70] Whatever form the argument takes, it must deal with a number of difficult issues.

First, it must explain why dignity or legitimacy is not fully respected by an adjudication system that does its best to produce as accurate an outcome as practicable for each litigant.[71] 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 every single person who would be seriously affected a chance to participate directly and personally in the decision. What this means is that the participation right

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in the Civil Justice System, 24 LAW & SOC'Y REV. 953, 967-87 (1990) (analyzing the relationship between tort litigants' fairness judgments and various objective and subjective factors).

67. *See* Bone, *Agreeing to Fair Process*, *supra* note 39, at 505-07. A variant of this first approach takes the results of the procedural justice experiments as evidence of a widely shared moral belief that fairness requires participation. Moral conventionalists look to shared beliefs as the source of moral value, but even a conventionalist cannot be content with the sort of unfiltered intuitive reactions that procedural justice experiments elicit. Intuitions must be subjected to critical reflection before they count as well-considered beliefs.

68. For a more developed version of this critique, see Bone, *Rethinking*, *supra* note 39, at 233-35.

69. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158-253 (1985).

70. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

71. *See* Bone, *Rethinking*, *supra* note 39, at 279-85.

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must depend in some way on the function of the institution making the decision. But if this is so, and if the primary function of adjudication is to produce quality outcomes, then the question remains why dignity or legitimacy is not satisfied by participation at a level sufficient to ensure outcome quality.

Second, the dignity- or legitimacy-based argument must account for the fact that our litigation system does not deal with the participation right in a fully consistent way. On the one hand, an extremely strong version of the day-in-court right guaranteeing individual control is commonly invoked to support very narrow nonparty preclusion rules.[72] On the other hand, the Federal Rules grant plaintiffs broad power to join multiple defendants and also tolerate large numbers of plaintiffs joining together in a single lawsuit, even though complicated party structures greatly weaken individual control as a practical matter. It is true that joinder, unlike preclusion, binds only actual parties and not absentees.[73] But the larger the aggregation, the less control a party can exercise. Indeed, in very large aggregations, a court appoints a litigation committee, which in effect converts an individual into a collective day in court.[74]

Inconsistencies also surface when settlement is added to the mix. Judges pressure settlement in individual cases and do so without much concern about a party's day in court. Consent is often used to justify the result, but consent is a questionable source of legitimacy when procured through judicial pressure. A particularly dramatic example involves Multidistrict Litigation Act (MDL) practice.[75] An MDL judge will often lock transferred cases into the MDL forum in order to pressure settlements.[76] When this happens and the

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72. *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008); Richards v. Jefferson County, 517 U.S. 793 (1996); Tice v. Am. Airlines, Inc., 162 F.3d 966 (7th Cir. 1998). *See generally* Bone, *Rethinking*, *supra* note 39, at 218-31.

73. It is also true that the trial judge has considerable discretion to carve up a complicated party structure into more manageable litigating units. *See* FED. R. CIV. P. 20(b), 42(b). But it is significant that no party can assert a right to force an individual suit. The effect on participation is just one factor that the trial judge balances against the costs of multiple suits, effects on third parties, manageability, and other considerations. This discretionary balance in effect deprives the participation right of its power as an individual right entitled to priority over other factors.

74. *Cf.* Rosenberg, *supra* note 45, at 582 & n.86, 583 (arguing that the reality of little party control implies that the norm of litigant autonomy should receive little weight).

75. 28 U.S.C. § 1407 (2000).

76. The threat of long delays and high delay costs in the MDL forum often pressures plaintiffs to settle when they would prefer to have their cases transferred back to their home forums for trial. *See* DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150-55 (D. Mass. 2006) (commenting critically on this practice, and stressing in particular how it benefits defendants).

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MDL aggregation is very large, the personal control exerted by any individual plaintiff is weak, and the MDL judge's tactics undermine consent as a justification.

Thus, there is good reason to question the traditional day-in-court participation right. Moreover, any effort to reconceive that right must start with a general theory of individual participation in civil adjudication, a theory which should be developed by fitting principles in a coherent way to the core elements of litigation practice. Thus, it is clear that here, as elsewhere, we need better theory in order to make better rules.

IV. Conclusion

Much has changed in the past seventy years. The nature of litigation has changed dramatically. So too has the structure of the profession and with it the incentives of litigating lawyers. But perhaps the most far-reaching changes are normative. It is not surprising that the Federal Rules and the rulemaking process have attracted so much criticism today, since the most basic values supporting the original Federal Rule vision no longer have the force they once did.

Nevertheless, there is still a vitally important role for court rulemaking and its committee-based process. To perform this role adequately, the Advisory Committee must be prepared to develop more rigorous normative justifications for the rules it recommends. The task will be more challenging in some ways than what the Committee is accustomed to doing today. Yet I can see no other way for the Committee to sustain its legitimacy and properly discharge its central function—to construct an efficient and fair system of procedural rules for the federal courts.

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